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Title : The Conundrum and the Solution



This article is based on a presentation by Ameet Hariani, Founder and Managing Partner, Hariani & Co., at the Confederation of Indian Industry (CII) Webinar on Land Law Reforms, held on 24 September 2020.

Title means legal ownership over a property. Having proper title gives a property owner the right to use, deal with and dispose of property. In short, title makes land productive. But international studies have shown that only around 15% of land has adequate title.^[1] This means that trillions of dollars worth of land is not as productive as it could be and many property owners are insecure in their ownership. This is especially complicated in India because proving property title in India depends on many different documents and permissions.

Potential Issues with Title

There are multiple issues that can come up in India with respect to a property owner's title over their land. These issues include lease restrictions, acquisition proceedings, conditions with respect to the special nature of the land (e.g., land developed as part of slum rehabilitation projects), government restrictions with respect to land transfer, succession disputes, encroachments, litigation proceedings, mortgages, insufficient documentation, zoning, income tax claims, tenancy, Hindu Undivided Families claims, etc. The list is endless.

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No Guarantee of Title in India

Government guarantee of title

The Indian government does not guarantee title to any property. There is no conclusive record with the government that indicates who owns or has the right to use any piece of land.

Revenue records are not title documents

Revenue records, such as property register cards, 'khata' entries, 7/12 extracts etc. do not amount to title documents. The Supreme Court has repeatedly said, as late as 2019,[\[2\]](#) that revenue records only show presumptive title and only give the holder the right to pay land revenue. The Supreme Court has taken this position recognising that the land revenue records in India are unreliable, that there are gaps in administrative procedure and that there is a lack of standardisation in the records.

Title deeds

Property in India is transferred through the use of a "title deed" (property transfer deed). However, this does not ensure that this will establish or guarantee title to property. Another person may assert that they have legal title over the same property, either claiming there has been some problem with a past transfer of legal title or that they have an equitable right over all or part of the property (the right of tenancy or other rights to benefit from the enjoyment of the property).

Property due diligence

Therefore, before undertaking any property transaction in India, most parties undertake a legal property due diligence with respect to the property title. This involves lawyers reviewing the title deed and historical title deeds for the property (these can stretch back over several decades), conducting searches of various land records, issuing public advertisements with respect to the land and following a lengthy process to ascertain whether the transferor of a property has the right to transfer legal title. The lawyers then issue a "title certificate" with respect to the property. Title certificates by lawyers are not binding and only reflect the lawyers' professional opinion. The title certification process is cumbersome and is also only as good as the actual lawyers investigating the title.

Title insurance

The Real Estate (Regulation and Development) Act, 2016 (the RERA) has introduced private title insurance in India, requiring that it be obtained in certain specific circumstances.^[3] However, crucially, private title insurance does not guarantee title – insurers only agree to indemnify property owners if their title is defective. The insurance does not rectify or perfect defective title.

The inefficient system of title deeds, title due diligence and title certificates needs an overhaul. This could effectively be done by creating a central registry of property in India.

The Solution

The inefficient system of title deeds, title due diligence and title certificates needs an overhaul. This could effectively be done by creating a central registry of property in India. This registry would include details of every piece of property, including a map of each property's boundaries, as well as details of all rights over the property – with a unique “Aadhaar”-like number for each property. Every owner of a property could then be given a single short document certifying their title to that property and with it, a map demarcating the limits of the property. This title would be guaranteed by the government.

Property in India is governed by individual states so the registry would need to be divided along state lines. To make the registry system work, each state government would need to:

- (1) accurately digitise all property records;
- (2) conduct an extensive survey of property within their state, including by using drone photography;
- (3) educate citizens, organisations, banks and NBFCs about the new system and provide for a sufficiently long transition period;
- (4) allow people to file claims for issue of a final record of title of a particular property in their name with the central electronic registry – convert their title deeds coupled with a title certificate and an insurance policy into a government certified title – follow the dematerialization model.

(5) Encourage the insurance companies to introduce a new insurance policy aimed at this conversion. This will transfer risk of claims from the government to the insurance companies, and reduce government cost.

(6) The registry should consider using block chain technology to ensure that any changes are accurately recorded;

(7) amend existing property laws in keeping with the new system.

To be successful, the system of title guarantee would need to follow three principles: (1) the mirror principle (the title registry must accurately reflect current ownership of the land); (2) the curtain principle (there is no need to check past title once the government title guarantee is in place); and (3) the assurance principle (the title guarantee shows indefeasible title, shows valid ownership and is guaranteed by the government).

Conclusion

Experience from other countries that have adopted a government title guarantee system suggest that such a title guarantee system can be extremely effective, although it can take some time to implement. Both Rajasthan and Maharashtra have already taken steps towards moving to a title guarantee system. Although moving to a title guarantee system might seem like a monumental task for a large country like India, India has in fact been successful in handling a similar transition – from physical to electronic “demat” shares – over the past 25 years. A title guarantee system can be implemented in a similar smooth way, allowing the value of Indian property to be properly leveraged and easing property ownership for countless people.

[1] "The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else" by Hernando de Soto Polar, Peruvian economist

[2] Bhimabai Kambekar v. Arthur Import & Export Co. AIR 2019 SC 719

[3] See the Hariani & Co. Legal Update from September 2018 – Title Insurance and the Real Estate Market here: <https://bit.ly/3l2BNaj>

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