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Registration of Bank-Financed Properties: A Tool Against Real Estate Fraud

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Abstract

Real estate fraud in India has now come in the following two forms: first, selling an immovable property on which a mortgage/security interest is already subsisting, without informing the prospective purchaser about the existence of the same and second, selling the same property to multiple purchasers who are unaware of the sale. Informational opacity is a breeding ground for both wrongs, as prospective buyers and competing lenders may not be able to determine whether the property is already encumbered. This paper proposes that strong, open registration of bank financed property is a front line defence against such fraud, because it transforms private financing arrangements into constructive public notice. The study examines the interplay of the Transfer of Property Act, 1882, the Registration Act, 1908 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in conjunction with the Central Registry (CERSAI) framework, and examines how the doctrines of disclosure, priority and notice are working to protect the bona fide purchasers and the lending institutions. It explains how the judiciary has developed a doctrine of the publicity, certainty and protection from fraud and forgery of registration and examines the relative priority of charges, the effect of non-registration and the equitable mortgage. The paper describes some existing challenges that hinder the protective effect of registration, such as non-registrability of mortgages via mere submission of the title deed, poor inter-agency coordination, and incomplete and presumptive land registers. It concludes that compulsory, integrated digitally searchable, registration of all bank-financed property interests coupled with compulsory encumbrance verification at the time of sale is crucial for transparent, fraud-free property transactions in India.

Keywords: *Real Estate Fraud, Mortgage, Bank-Financed Property, Property Registration, Multiple Sale, Property Law, Banking Law*

1. Introduction

The real estate sector in India has become one of the major contributions to national economic growth. With around 7.3% of the country's gross domestic product and a market size reaching one trillion US dollars by 2030, the sector remains among the largest employment generators and net inflow attractors to both local and foreign investment in the economy.[1] For example, housing demand has experienced a strong rightward shift over the past several years, with property sales pulling up in many major cities and an expanding middle class rushing into property for the first time.[2] There has been an unparalleled level of real estate transactions, with Rs lakh-crore worth of immovable assets changing hands every year, as urbanisation and higher household incomes have propelled the rise of nuclear families. The complexities of documentary and title verification that each transaction requires are only magnified as the size and speed of transactions grow. Central to this expansion is the paramount role of bank finance. A significant and increasing share of real estate transactions is financed by mortgage lending and other mortgages on the very asset being purchased or collateralized against other immovable assets of the borrower. With every such transaction, a collateral security interest arises in favour of the lending institution which co-exists with, and burdens, the borrower's ownership rights. What makes the arrangement a mortgage as opposed to an absolute sale is that the mortgagor retains title and often possession of property, while the mortgagee has only a mere interest by way of security. The gap between ostensible ownership and the specter of charge is central to the problem this paper analyzes, creating a circumstance in which property appears to outsiders to be unencumbered when it is actually encumbered for the bank.

However, this growth has been accompanied by a corresponding increase in property fraud. Two forms are especially damaging. The first is where a mortgaged or bank-financed property is sold without disclosure of the subsisting charge, by which an unscrupulous owner of the land wittingly retaining ostensible title and possession to it conveys title to a purchaser absolutely unaware of the conflicting interest asserted by way of security in favour of the bank. The second form is to sell the same property multiple times to multiple different buyers, each of whom pays consideration under the belief that he or she is obtaining a clear and marketable title.[3] The Supreme Court has acknowledged that transfer by disordered and informal methods give very serious trouble to bona fide purchasers and promote a mafia in land or even the criminalisation of land dealings.[4] The continued prevalence of such fraud, even as the value of these transactions grows exponentially, illustrates that property laws have not kept up with the practices of criminals looking to capitalize on the misalignment between perceived and real ownership.

The research problem this paper investigates is whether and in what way, registration of bank-financed properties can serve as a deterrent against real estate fraud? This is a question that carries a lot of importance. Such fraud causes serious harm to innocent consumers, who often spend their entire life savings only to learn that their title has been wiped out by a bank's existing lien, and financial institutions who have had their collateral damaged, priority challenged and recovery delayed by lengthy litigation.[5] More than just individual losses, this type of fraud diminishes the aggregate trust in property transactions, raises risk premium on lending and threatens the integrity of financial systems related to real estate. Thus, the transmission of private security agreements into constructive public notice via registration must inform the design of a fraud resistant transactional architecture. The study has three objectives: (1) To analyse the nature and drivers of real estate fraud involving mortgaged and bank-financed property; (2) To scrutinize the legal framework pertaining to such property with a focus on Transfer of Property Act, 1882, Registration Act, 1908, Securitisation and Reconstruction of Financial Assets and Enforcement Of Security Interest Act,2002 along with Central Registry mechanism; (3) To assess registration as preventive tool and suggest reforms. The methodology employed is doctrinal and analytical, based on primary legislation, authoritative judicial pronouncements of the Supreme Court and High Courts, institutional practice, and secondary scholarship and empirical industry data. The study is constrained to mortgage and bank finance in immovable property transactions in India. It does not cover secured transactions over movable property, except to the extent that such material is tangentially relevant and contemporary foreign systems will not be examined in detail except as an example of potential reforms.

2. Real Estate Fraud and Multiple Sale of Properties in India

2.1 Concept and nature of real estate fraud.

Real estate fraud refers to any unfair or deceptive practice where a person shall knowingly provide evidence of deceit that results in acquired access to money property, e.g. title of property through providing false information, suppression or counterfeiting of title. It is very much covetous of the high value and documentary complication of immovable property: where title chains are lengthy, records fragmented, verification difficult, potential for iniquity burgeons. Whereas, in the case of movable goods possession is usually all that is needed to indicate ownership, immovable property depends upon a chain of documents, most which an ordinary purchaser would be ill equipped to verify. The Supreme Court noted that the lack of orderly registration leaves genuine buyers with no guarantee of good and marketable title, and helps criminalise land deals observing that informal transfers are a conduit for stamp duty evasion, black money generation and the functioning of the land mafia.[6] In this conjecture, fraud is not an outlier but a rational adaptation to structural lack of transparency.

2.2 Sale of mortgaged properties without disclosure.

One of the most frequent and damaging forms of fraud is whereby property with an existing easement charge is sold without disclosure.[7] Mortgage The term "mortgage" has been defined under Section 58(a) of the Transfer of Property Act, 1882 as a transfer of interest in specific immovable property for securing the payment of money borrowed or an engagement which may give rise to a pecuniary liability. The Act recognizes five types of mortgage, simple mortgage; the mortgage by conditional sale; the usufructuary mortgage; the English mortgage and the deposit of title deeds popularly known as an equitable mortgage.[8] Where in each case, the mortgagor remains as owner and mortgagee receives an interest by way of a security. Since the mortgagor is still in apparent possession and appears to hold ostensible title, a dishonest owner can sell the land to a purchaser who is completely unaware that a bank already has security over it. So too is the equitable mortgage which arises simply by deposit of title deeds with intent to create security, vulnerable to concealment, because it can be created without any registered instrument and leave no public spoor.[9] And as a result, when the borrower later defaults and the lender begins to redeem its interest that innocent purchaser concludes, sometimes for the first time, that this apparently free clear asset is subject to sale in order to pay off the debt.

2.3 Multiple sales of the same property to different purchasers.

Just as bad is selling the same property to multiple buyers. This is where the perpetrator completes subsequent contracts or transactions to the advantage of numerous purchasers, receiving benefit from all but concealing the earlier transactions. The main rule is contained in Section 48 of the Transfer of Property Act which states that where a person professes to create by transfer at different times, rights in or over the same immovable property, and such rights cannot all exist or be exercised fully at the same time together, each right created later shall be subject to the earlier ones unless it has been provided otherwise a special provision binding on earlier transferees.[10] As a result, the first transferee usually wins and later buyers are left only with worthless documents and an action against a recalcitrant fraudster only in damages or criminal proceedings. This very nature of informal conveyancing which resulted in defective or overlapping titles, was the reason why the Supreme Court had struck down these so-called transactions of an "SA/GPA/will" as a mode of conveying title, with some emphasis on the proposition that immovable property can be properly and legally transferred only by a deed registered for that purpose, and an agreement to sale together with power of attorney & will cannot transfer title or create any interest whatsoever in respect of immoveable property.[11] The Court opined that registration gives safety, security and publicity to transactions regarding immovable property such that the risk of fraud, forgery are taken care of.

2.4 Impact on bona fide purchasers and financial institutions.

These frauds hit two classes the hardest. Bona fide purchasers without notice lose their money and their home, often after burning through every last cent at the well-documented mortgage-lenders' crisco fry.[12] Having impaired security, priority disputes, and drawn-out litigation regarding the recovery of lost funds transgresses financial institutions. In the case of competing claims, the lender has to prove the date and valid notice of its charge too, often through litigations that can take span years; to compound matters. It is well known that a corporate insolvency resolution process takes much more than what was originally mandated by statute with averages landing upwards of seven hundred days in India raising capital costs and feeding higher borrowing costs for honest customers.[13] The overall effect is to shift the cost of fraud away from a wrongdoer and onto innocent parties and society as a whole.

2.5 Common causes of fraudulent property transactions.

Such fraudulent transactions mostly happen due to structural reasons than incidental. The first reason is that the land-records system of India gives presumptive title, which shows records of possession and revenue liability but does not conclusively indicate ownership in which a registered entry does not eliminate competing claims. Second, the historical nature of unregistered or informally-recognised transfers in their attempt to avoid stamp duty, registration charges and capital gains tax means that many of these imperfect titles remain a tempting prey for scammers.[14] Third, the coordination among sub-registrar offices, revenue authorities and lenders is poor an interest registered in one system might not be visible to those checking another. These existing mortgages therefore may not be easily discoverable by prospective purchasers owing to the limited public searchability and in particular given that equitable mortgages can be created merely by deposit of title deeds with a bank, in circumstances where an ordinary purchaser would have no means of identifying a subsisting charge from material available in the public domain.[15] Each of these gaps drives greater the asymmetry of information which lies at the heart of property fraud.

3. Legal Framework Governing Mortgaged and Bank-Financed Properties

3.1 Transfer of Property Act, 1882.

Substantive law regarding mortgages is codified into the Transfer of Property Act, 1882 with respect to their forms and incidents and rights and obligations are governed between mortgagor & mortgagee under various chapters contained in this act.[16] It declares in Section 59 that, except in the case of a mortgage by deposit of title deeds, no mortgage securing one hundred rupees or more can be created save by an instrument executed by the mortgagor and attested by at least two witnesses; such mortgage may only be created and delivery of the property made, where such principal sum is fewer than one-hundred rupees.[17] The Act also incorporates the doctrine of notice in section 3, which provides that a person with actual knowledge of any fact is deemed to have notice of such fact and also any fact that would have been revealed by an inquiry or inspection into the title and per the statutory explanation includes the contents of a duly registered document.[18] It forms a central part in the determination of whether the purchase is bona fide, because a transferee who should have known of an earlier encumbrance cannot be said to have acquired without notice. Lastly, Section 54 of the Act states that a contract for sale of an immovable property does not, per se, create any interest in or charge on such property and therefore an agreement to sell only gives Personal Right and not Proprietary Right.[19]

3.2 Registration Act, 1908.

The provisions relating to registration are governed by the Registration Act, 1908. All non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, any right, title or interest whether vested or contingent of the value of one hundred rupees and upwards, with respect to immovable property are compulsorily registrable under Section 17.[20] A failure to register such an instrument gives rise to undesirable corollary effects since section 49 provides that it may not affect any immovable property contained therein nor may be received as evidence of any transaction affecting that property, other than for limited collateral purposes permitted by law.[21] The Act is one that provides for orderly, disciplined and public dealings in immovable property, as judicially approved, and protects from fraud and forgery of transfer documents.[22] The function of registration, therefore, it cures the enhancing legal effect of the instrument and simultaneously renders the transaction public for scrutiny.

3.3 SARFAESI Act, 2002.

By contrast, the framework under The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 relies heavily on a shift in balance decisively towards lender protection & transparency. It grants secured creditors the ability to enforce such interests outside court or tribunal by serving notice and taking possession or management of land or added components upon default.[23] It provides for a Central Registry of transactions of securitisation, asset reconstruction and creation of security interests with records searchable by any person.[24] The Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2016 introduced a new Chapter IV-A consisting of Sections 26B to 26E in the principal Act which came into force from January, 2020. Such provisions have made registration of security interests with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI) a condition precedent to exercising enforcement rights under Section 26D. While Section 26E has given priority as against subsequent security interest holders and dues owed by the Central or State Government to registered secured creditors.[25]

3.4 Relevant provisions of banking law and mortgage regulation.

In addition to enforcement, the SARFAESI regime mandates the registration of details of all security interests with the Central Registry, which maintains searchable records accessible by any lender or other person wishing to deal in relation to that property. The intention behind this arrangement was specifically to avoid the double lending against the security of one property and also a fraudulent sale of property without declaring that there is already an existing secured interest over it.[26] One lingering regulatory gap, however, is that a fair mortgage created from only the deposit of title deeds can be valid without registration with the sub-registrar because an implication of the law calls a contract of mortgage into existence when one deposits deeds, and so no instrument per se is needed, even such a memorandum simply recording the deposit itself is not compulsorily registrable.[27] This allows the right of an approach to information given it falls outside conveyance under a public commercial register and in doing so trump later dealings, in that there can endure a category of bank protection.

3.5 Rights and liabilities of borrowers, banks and purchasers.

The parties' stances create a three-cornered balance of rights and obligations. The property subject to the charge is retained by the borrower and remains personally liable for the debt, permitting immediate enforcement and sale on default. The bank has an interest by way of security, which upon proper creation and registration, is not only enforceable but enjoys priority in rank based on the order of its creation and registration. The purchaser, lastly, takes his estate subject to any equitable interest of which the registration or reasonable inquiry gives him notice and will only be protected as a bona fide purchaser for value without notice of a prior charge. It is the careful calibration of these positions playing with both axes of priority and notice that allows policy to channel loss among rival claimants systematically.

3.6 Judicial approach to disputes involving mortgaged properties.

The courts have always taken the line of setting records straight for the registered claimant and provided the favour to be notified chrage holders first. The right of a first charge-holder to realise its mortgage is a valuable proprietary right which cannot lightly be destroyed, held the Supreme Court in *ICICI Bank Ltd. v. SIDCO Leathers Ltd*., (2009) 6 SCC 426 upholding that the order of priority among secured creditors as laid down in Section 48 of the Transfer of Property Act continues unless specifically over-ridden by statute.[28] The Bombay High Court, while interpreting the post-2016 SARFAESI regime has held that for all practical purposes, registration of a security interest with CERSAI acts as constructive public notice of the charge, and holds that priority (ranking) among competing registered charges is determined according to their order of registration; no such registration means that a secured creditor will not be able to take recourse to the enforcement mechanism at all.[29] The courts have similarly clarified in the context of equitable mortgage disputes that deposit of title deeds with purpose to create a charge is enough to secure creation of a valid mortgage, which dispels any doubts on protection offered by lenders holding security.[30]

4. Registration of Bank-Financed Properties as a Fraud Prevention Mechanism

4.1 Need for public disclosure of mortgages.

Fraud in property is perpetuated by secrecy, registration beats secrecy by converting a private security device into a public record. At its logical nucleus lies the doctrine of notice. To the extent a mortgage is registered and publicly searchable, an ordinary purchaser or competing lender who chooses to exercise reasonable diligence remains chargedor constructive notice of the encumbrance, and cannot later obtain protection as an innocent third party without notice.[31] In one sweep, disclosure eliminates the information asymmetry that facilitates both the undisclosed sale of leased property and the multiplicity of transfer of a single piece of collateral, since neither fraud can persist against a purchaser who is presumed to know or who in fact learns about both interest. Public transparency transforms the register from a fact-finding tool into a deterrent measure too.

4.2 Existing registration practices and limitations.

The current registration practice falls short, often uncoordinated and uneven. As for conveyances and much of the mortgage, they are registered with the sub-registrar under the Registration Act while bank security interests are independently recorded at CERSAI under a SARFAESI framework; in practice, having two systems is not entirely integrated in operation plainspeak, equitable mortgages by deposit of title deeds may take place outside the ambit of a sub-registrar's register altogether.[32] This means, for example, that a buyer examining one register may not realize that an interest recorded or lawfully unrecorded against another remains. Indeed, the very existence of so many separate registers, each more or less limited in their scope and searchability functions to frustrate registration in a systematic way for remote circumstances can be relevant only if one is aware of that specific record which produces a misleading assurance that title exists without encumbrance. It is where registration fails not in principle, but in incomplete coverage and disconnected repositories.

4.3 Benefits of compulsory registration of bank-financed properties.

Compulsory and comprehensive registration of bank-financed property yields several distinct benefits. In the most fundamental sense, it protects buyers that when potential purchasers prepare to buy something or any kind of consideration. They have a single definitive point where even diligent investigation will produce some certainty (rather than suspicion). And, second, it protects lenders by ensuring that they are first in line and that registration establishes priority between competing creditors.[33] Third, it sends a warning to frauds: the very fact of registration publicly charges them, and any concealed second dealing can be easily detected by any searcher. Fourth, it lowers litigation by providing courts with real-time testimony of the existence and timing of competing interests eliminating a key source of dockets over which recovery now rests.

4.4 Protection of purchasers and lending institutions.

The CERSAI database was conceived specifically for this purpose, as by registering with the Central Registry lenders allow anyone interested in a given property to check whether the said property is already mortgaged typically before a loan is sanctioned afresh or a sale takes place.[34] In the case of lending institutions, registration transforms an otherwise insecure security into an enforceable, ranked-interests regime, under the post-2016 framework, registration is not just a best practice but a statutory-prerequisite to SARFAESI enforcement and priority among subsequent or official claims.[35] The mechanism therefore pits honest buyers and prudent lenders against the mutual enemy the concealing fraudster.

4.5 Comparative practices and emerging reforms.

This direction is also confirmed by the path of reform. By conditioning enforcement on registration with CERSAI and creating a hierarchy of registered banks along the way, post-2016 SARFAESI has changed bank security from voluntary to effectively mandatory.[36] Registration Bill, 2025 (as proposed), The draft aims to digitise property and land records, more transparency in registration process with e-registration by e-signature based on Aadhaar on paperless mode for both resident and non-resident buyers, reduce fraud.[37] Together with the Real Estate (Regulation and Development) Act, 2016 under which more than one hundred thousand projects have by now registered.[38] Enhancing developer accountability and buyer awareness such measures point squarely to an integrated, search-able and credible public record, at the core of a modern architecture for preventing fraud.

5. Challenges and Reform Measures

5.1 Practical and legal challenges in implementation.

The biggest legal problem lies with the continued non-registrability of equitable mortgages formed by mere delivery of title deeds. As these mortgages can be created without any use of registered security and may be available for recording, if at all, only in an unregistrable memorandum with no real practical effect, a large class of bank mortgage securities continues to remain invisible to the common searcher. In practice, the coexistence of different state stamp and registration regimes, different fee structures and inconstant enforcement makes any national average attempt difficult to implement uniformly, whilst the sheer number of historical transactions is not easily induceable into conformity.

5.2 Issues relating to land records and digital databases.

Indian land-records gives presumptive, not conclusive title, and suffers from lack of complete digitisation across states and incompleteness and outdatedness backlogs of unmutated transfers historically.[39] Even where interest has been validly registered, there may be no single authoritative search tracing it reliably because revenue records, registration registers and central security-interests registries are individually maintained on different platforms with distinctly different identifiers and standards. Lack of unique identifier that can be governed identity across systems tied to property is a very common source of error & hiding.

5.3 Coordination between banks and registration authorities.

Coordination between registration authorities and revenue departments, as also between lending institutions is too poor. CERSAI database and the records maintained by the sub-registrar or entries in the revenue mutation are not currently able to talk to each other seamlessly, the interest recorded in one repository may not be visible to a party consulting any other.[40] Lacking institutional mechanisms for cross-verification, the registers operate as silos rather than a unified ledger, and registration provides correspondingly less protection.

5.4 Strengthening transparency in property transactions.

Whoever owns a property should have full right to encumber it, but transparency could be greatly enhanced if sale deeds cannot be accepted for registration unless they are checked against the central security-interest registry and not buried in the mounds of non-existent bank charges. That link up would eliminate the loophole by which a sale of mortgaged property is currently hidden, and it would otherwise also make the multiple sale of one house virtually traceable at the second transaction.

5.5 Legislative and policy recommendations.

As a solution, this exemption for the deposit of title deeds should be repealed by legislation so that all bank-generated security interests are mandatorily and centrally recorded in the publicly searchable register, even where they include equitable mortgages.[41] Registration, revenue and central-registry systems can be integrated into a unified online digital platform that is real-time and publicly accessible which would progress the ideals of the Registration Bill, 2025 ans take the country closer to a system of conclusive titling. Complementary measures a solo identifier for each property, compulsory encumbrance certificates attached to the national registry and stricter penal provisions in case of concealment would convert registration from a mere formality into an effective bulwark.

6. Conclusion

In this study, it has been demonstrated that the two most harmful types of real estate fraud in India, selling an already mortgaged property while it is in the possession of the buyer, and two or more similar loans being advanced against a single property share a common common denominator. That is the lack of ability of the purchasing party and competing party/lenders to determine the existing interest in the property. The condition is addressed head-on through the signing up of bank-financed properties. However, the overall legal regime in the country, including the Transfer of Property Act along with the Registration Act and SARFAESI Act, provides a strong framework, and the SARFAESI amendments, which make the registration of banks a pre-condition for enforcement and a deciding factor for priority, is a positive development towards compulsory and effective disclosure of bank security in the country in 2016. Equitable mortgages cannot be registered, land records are incomplete and presumed, and the systems for land registration, revenue and central-registry are not interoperable, which provides opportunities for fraud. So, the verdict is that India has all the legal tools it takes to have a fraud free property transaction system but it has not been consolidated into a single, authoritative and searchable public record. To fill in these gaps, and to make registration not just a formality but the final protection against hidden and multiple transactions, all bank-financed property interests must be compulsory registered, and a point-of-sale verification of encumbrance must be required. Such a system would vindicate the concept, reiterated by the judiciary, that the purpose of registration is to provide safety, security and publicity and to prevent fraud and forgery and would at last make property dealing in India transparent and free from fraud.

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