CHAPTER-II
WORKING OF HOUSING FINANCE COMPANIES

A. HOUSING FINANCE
Owning a house is one of our most valuable possessions, one of our biggest investments in terms of finance, and also one of our biggest joys. Ensuring that your dream house turns into a reality, requires much more effort than merely shelling out funds for investments and making a trip to a property broker. One need to gather information and understand the implications involved in housing transactions, the processes for obtaining housing finance and the various other aspects to become a satisfied master of own house. Starting from scratch one need to familiarize himself with the ‘buying’ jargon involved in housing and housing finance in India, evaluate reasons of buying, plan funds, decide on the right house, before making the final purchase deal. One need to be on top of each aspect so that search to buy the perfect house ends on a happy note. This chapter takes the prospective home seeker beyond the ‘text-book’ approach for buying a home. It offers a useful and practical mix of resources, guidelines, documentation, checklists and interactive tools that help to purchase dream house quickly and smoothly.

Before begin the search for dream house, one need to know if buying is the right choice in the available budget, preference, and situation. One can use the buy vs. rent calculator\(^1\) to decide whether one should buy a property or rent one. This would also helps to decide if buying a house is a better option than renting one, and what impact does market mood have on housing buying decision. The rent vs. buy calculator lets calculate the difference between renting a property and buying a home. The broad features will be viz. (i) rent assumptions, monthly rent payment, additional monthly fees, monthly renter’s insurance premium, annual rate increases, (ii) purchase assumptions, purchase price of home, annual appreciation rate, amount of loan, annual interest rate, number of years, annual homeowner’s insurance premium, annual property taxes, annual maintenance cost, (iii) other assumptions, number of years for the comparison, marginal tax bracket, refore tax return on savings and assumed annual inflation rate.

\(^1\) [www.homes.yahoo.com/cqcalculative/business/buy-rentcalculator/html](http://www.homes.yahoo.com/cqcalculative/business/buy-rentcalculator/html)
Buying a house that is the envy of others may tempting any one, but it may not turn out to be a wise decision in the long run. Learn how one can differentiate needs from wants. One can use home affordability calculator\(^2\) to ease his housing buying decision. In this chapter information on the negative impact of overbuying and how one can save himself from this tempting trap is also covered. Price in this connection, if a total debt-to-income ratio of no more than 36 percent is taken and assumed a housing payment-to-income ratio of 28% for a conservative estimate and 33 percent for the aggressive one considered. Before buying, however, one should also factor in other savings needs. A mortgage term of 30 years has been assumed, annual property tax of Rs.3,500 and homeowners insurance of Rs. 481. However, home insurance is to be borne by the borrower if the downpayment is less than 20 percent of the purchase price. One may plug in his own numbers for better results.

Looking for the right house is like hunting for a needle in the haystack. Practical aspects such as locality, size of the house required, leasehold vs. freehold property, costs involved in buying a house, etc., should be taken into account. When buying a plot of land as property one need to consider whether one should buy a constructed property or should construct. One can use the area conversion calculator to address issues related to the size of the house one wish to purchase. This covers all aspects to consider while zeroing in on a home for self and family.\(^3\)

Finance is the most important aspect of house buying. Before one decide to take the plunge into investing in dream house, one need to know how he will pay for it. If one planning to purchase a house against the sale of another property or going to avail housing finance to buy dream house this Section guides him through the tedious task of taking stock of funds so that the money is available at the right time for purchase of property as well as for other sundry expenses associated with buying a house.

Getting a loan for house is as important a decision as buying a house. Since buyer will be responsible for paying the home loan he need to be aware of the different types of banks and companies providing housing finance, risk factors involved, tax benefits of taking a loan, etc. He also need to understand who will sanction his loan and the process of getting home loan sanctioned. Other important aspects such as whose name

\(^2\) cgi.money.cnn.com/tools/houseafford/houseafford.htm
\(^3\) www.metric-conversions.org/area-conversion.htm
should he avail the loan in and the importance of guarantor should also be considered. This familiarizes everything buyer must know about housing loans in India.

Loan providers in India are governed by the rules and regulations of Reserve Bank of India and the National Housing Bank. But, keep in mind that lenders offer home loans at terms that are profitable to them. They will plan the details of buyer’s loan and will be responsible for the calculations involved, he also need to familiarize himself with the process. Here are a few simple, interactive calculators that will make housing finance transactions a smooth sailing for home buyer and home loan seeker.

Home loans will remain on the back of buyer’s mind even while he is enjoying the luxury of owning a home. He need to make well-informed service decisions, understand prepayment and its effects, and plan for an increase in the rate of interest. One can use loan planner calculator to estimate loan eligibility, serviceable loan; payment terms, monthly outgo, and effective outgo. One also can go through this chapter to learn some smart ways that will help him to get the housing loan off head quickly.4

Constructing house can be quite a challenge, especially if one is doing it for the first time. The basic questions need to address before commencing construction are how and from where to get a cost estimate, what is the role of architects, builders and engineers? Once decisions regarding cost of construction and whom to hire have been made, one need to become informed about the key stages of constructing a house, the necessary approvals and permissions that need to be obtained from different authorities in India and the importance of a completion certificate. This section also deals with the key essentials of construction so that building dream house is a pleasant journey.

If any one planning to mortgage his property the question arises as to why he is planning to mortgage? How he can mortgage his property in India? There is a facility of a loan namely, ‘Reverse Mortgage’, a new concept introduced by the National Housing Bank for the senior citizens of India.

Insure home or not? Which home insurance option is the best in India? How to get the best insurance deal?

4www.thecalculatorsite.com > finance calculators
B. When applying for a Home Loan

Virtually every young family in India aspires to own a home. Home Loan is a great way to part finance the dream home that one always wanted to own. Here are the top six factors to keep in mind before applying for a home loan:

1. Get own credit report
   Apply online at http://www.cibil.com/accesscredit.htm and follow the instruction given there to get a copy of own credit report. Check credit report thoroughly to spot errors. If need be, use advisory services on CIBIL Report to get any errors corrected. Remember any errors in credit report can reduce chances of getting a good home loan offer.

2. Finalize property first before finalize home loan lender.
   Lenders reserve their best rates for immediate disbursement customers and hence customers who have finalized property get the best possible home loan offers. Also if they have any issues with property it will get highlighted before one incur too much effort and costs. Some lenders may not be comfortable with the borrower buying a plot and self constructing on it. Some lenders will not fund under construction property unless the developer is pre-approved with them. A lot of lenders can have issues if the property one is buying is more than 15-20 years old.

3. Be prepared to lose out on the processing fee.
   Most companies charge a non refundable processing fee which will not be refunded even if one decide not to use the loan sanction. The lenders incur costs for sanctioning loan and hence in most cases this is non refundable. If anybody is promising that the processing fee cheque will not be put in without prior approval or that the processing fee will be refunded if prospective borrower do not accept the sanction the chances are that he is lying. But, now a days most of the lenders charge processing fees once prospective borrower accept the sanction through the offer letter issued by the lender.

4. Fixed rates are rarely fixed
   Understand the interest rates chargeable. The fixed costs quoted are normally fixed only for a period of 12 to 60 months and can be revised thereafter. Understand the

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5http://www.apnapaisa.com
6www.cibil.com
rates chargeable in detailed home loan comparison table and then decide. It is better to know the market rate/trend.

5. **Make a provision for higher down payment**
Lenders carry out an independent valuation of the property being bought and they will fund around 80-85% of the valuation amount as determined by their valuers. These independent valuers normally are conservative and value the property (especially property bought on resale) much lower than what one might actually be paying for it. While one can ask for a second valuation (at cost) he should be prepared to shell out the difference between the actual price being paid and the valuation made by the lender over and above the 15-20% down payment required.

6. **Let Family inherit home not home loan**
Make sure to review insurance requirement when one take on a home loan. If he is underinsured make sure he buy a term policy (it is anyway cheaper than a so called loan cover policy) for the entire amount of loan so that the family can pay off the loan in the event of the borrower’s death during the loan tenure. Also consider buying a critical illness rider that will pay off the loan in the event of the borrower suffering from critical illnesses such as kidney failure, paralytic stroke, cancer, etc.

It is advisable not to sign blank application forms or documents and keep a copy of all documents submitted to the lender for future reference. Any promise made by the Direct Selling Agent (DSA) of the lending institution or even an official of the lender has no value unless it is in writing or at least on email. So if one is basing decision on any such promise make sure to get it in record in some form.

C. **What is Home Loan?**
Home loan is a loan product where the lender provides funding for purchase or construction of a house. The housing loan may be availed either for buying a new house or resale residential house. One can also avail a housing loan product, for the purpose of buying a plot of land and carrying out construction on the same, which is called composite loan.

Home loans in India are provided by the lenders up to maximum of 80% to 85% (90% for loan amount mostly below Rs 20 lakhs) of the agreement value of a house. In

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7 [www.dhfl.com](http://www.dhfl.com)
case of home loan for resale flats, most lenders get the property valued independently and they will provide the housing loan based on their value rather than the cost mentioned in the purchase agreement. Frequently, the valuation as determined by the lender’s valuer for the purpose of home loan is significantly lower than the actual cost and hence the requirement of the borrowers for down payment for the loan goes up. Also note that lenders do not consider other charges like Stamp Duty, Registration Charges, etc. while considering the home loan amount eligibility.

Home loans are repaid through monthly installments spread over up to 20 years. Some of the lenders provide housing loans even for a tenure extending up to 25 - 30 years. The maximum tenure of any loan and home loan specifically is also restricted by the borrower’s age at the end of the tenure so as to ensure that the loan gets fully paid by or before the retirement age or within 5 years from the date of retirement taking account of the position for repayment of loan depending upon case to case basis.

Home loan in India can primarily be classified into two categories on the basis of interest rates i.e. fixed rate and floating rate of interest. There are very few lenders in India who offer pure fixed rates where the rate of interest remains constant for the entire tenure of the home loan, while most lenders have a reset clause of 3-5 years. In floating home loan type, the rate of interest on such loans is subject to change whenever there are changes in the repo rates announced by RBI or any changes in base rate of the bank. Borrower should opt for fixed rate of interest only if s/he is certain that the rate of interest is the lowest in the interest cycle.

The home loans in India are provided by banks and housing finance companies. In turn Reserve Bank of India and National Housing Bank regulate these activities respectively, which issues Directions and Guidelines governing home loans in India from time to time. In recent times, some lenders have come up with innovative home loan products like dual rate of interest where the interest rate on such loans remains fixed for initial 1-5 years and thereafter it automatically moves to a normal floating rate of interest. Here one should be aware that loan taken under dual rate, which starts as a fixed type of interest in the initial stages are treated as fixed rate home loan for the purpose of levy of penalty for prepayment of loans. In case where you prepay your housing loan the lender cannot levy any penalty for prepayment of such loan.
where the loan is taken under floating rate of interest as per the guidelines issued by RBI and National Housing Bank (NHB) respectively for bank’s and housing finance companies.

The purpose of a housing finance system is to provide the funds which home-buyers need to purchase their homes. This is a simple objective, and the number of ways in which it can be achieved is limited. Notwithstanding this basic simplicity, in a number of countries, largely as a result of government action, very complicated housing finance systems have been developed. However, the essential feature of Indian system, that is, the ability to channel the funds of investors to those purchasing their homes, must remain.8

“Housing is a basic need that provides a place of ‘home’ to the individual and is a valuable collateral that can enable her/him to access credit from the financial market”. 9 Housing is a basic human need. Besides providing economic and social security, house is also an “asset” that can act as collateral for other borrowings to support and supplement other means of income generation and poverty alleviation.

It has significant leveraging effect for the individual as well as the entire economy. Affordability is a challenge in all emerging economics. Providing housing loans on affordable terms requires long term funding support and innovative products. An individual desirous to have a residential house may plan either purchase a ready built house or purchase a plot and construct house. To avail the housing loan he/she has following options:

   a. To approach any banking institution or/and
   b. Also to approach a housing finance company.

There are about 57 housing finance companies registered with the National Housing Bank10. These HFCs are also regulated and supervised by the National housing Bank. It is better to avail housing loan from these lenders as in case of any problem or complaint any customer can approach to National Housing Bank for redressal of his grievances.

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8 Home page of International Union for Housing Finance website www.iuhf.com
9 National Housing Bank, New Delhi, Trend and progress of Housing in India , 2011, p.33.
10 www.nhb.org
1. Can Fin Homes Limited
2. Cent Bank Home Finance Limited
3. First Blue Home Finance Ltd.
4. Dewan Housing Finance corporation Ltd.
5. DHFL Vysya Housing Finance Ltd.
6. GIC Housing Finance Ltd.
7. GRUH Finance Ltd.
8. HDFC Ltd.
9. HUDCO Ltd.
10. ICICI Home Finance Company Ltd.
11. Ind Bank Housing Ltd
12. LIC Housing Finance Ltd.
13. Manipal Housing Finance Syndicate Ltd.
14. National Trust Housing Finance Ltd.
15. PNB Housing Finance Ltd.
16. REPCO Home Finance Ltd.
17. Sundaram BNP Paribas Home Finance Ltd.
18. Vishwakriya Housing Finance Ltd.
19. Indo Pacific Housing Finance Limited
20. GE Money Housing Finance Limited.
21. HBN Housing Finance Ltd.
22. Indiabulls Housing Finance Limited
23. India Home Loans Limited
24. Kerala Housing Finance Ltd.
25. Religare Housing Development Corporation Limited
26. Mahindra Rural Housing Finance Ltd
27. MAS Rural Housing and Mortgage Finance Ltd.
28. Micro Housing Finance Corporation Ltd.
29. Orange City Housing Finance Limited.
30. Rose Valley Housing Development Finance Corporation Limited
31. Sahara Housingfina Corporation Ltd.
32. India Shelter Finance Corporation Limited
33. SRG Housing Finance Ltd.
34. Swagat Housing Finance Company Ltd.
35. Vastu Housing Finance Corporation Ltd.
36. Reliance Home Finance Limited
37. India Infoline Housing Finance Limited (IIHFL).
38. Tata capital housing Finance Limited.
40. Akme Star Housing Finance Limited.
41. Panthoibi Housing Finance Company Limited.
42. North East Region Housing Finance Company Ltd.
43. Edelweiss Housing Finance Limited.
44. Habitat Housing Finance Limited
45. Aptus Value Housing Finance India Limited.
46. Home First Finance Company India Private Limited.
47. Aadhar Housing Finance Private Limited.
48. Equitas Housing Finance Private Limited
49. Shubham Housing Development Finance Company
50. Muthoot Housing Finance Company Limited.
51. Shriram Housing Finance Limited
52. A u Housing Finance Private Limited
53. Milestone Home Finance Company Private Limited
54. New Habitat Housing Finance and Development Ltd.
55. Habitat Micro Build India Housing Finance Company Private Limited
56. USB Housing Finance Corporation Limited
57. DMI Housing Finance Private Limited

D. Home Loan

1. EMI Calculator

If one is planning to buy a home in near future and confused how much he will need to pay for home loan every month to the bank or have finalized the property and want
to know how much EMI he will have to pay to the lender. The EMI calculator\(^\text{11}\) for home loans will help him to calculate the EMI to service the loan. This EMI is payable to the lender every month towards the repayment of home loans. EMI will depend upon the interest rate which the bank charges for giving a loan, the tenure of the loan and the loan amount. One can also play around with the tenure and the interest rates and see how one can reduce the EMI or the tenure of loan. The EMI calculator will enable to plan better by giving a clear picture of EMI payments. But before that it is better to know what is EMI.

2. What is EMI?

Equated Monthly Installment, i.e., EMI in short is the amount payable every month to the bank or any other financial institution until the loan amount is fully paid off. It consists of the interest on loan as well as part of the principal amount to be repaid. The sum of principal amount and interest is divided by the tenure, i.e., number of months, in which the loan has to be repaid. This amount has to be repaid monthly. The interest component of the EMI would be larger in the initial months and gradually reduce when compared to the principal amount. The exact percentage allocated towards payment of the principal depends on the interest rate. Though total monthly principal and interest payment won’t change, the proportion will change with time. With each successive payment, prospective borrower will pay more toward the principal and less in interest.

Here’s the formula to calculate EMI

\[
EMI = P \cdot r \cdot \frac{(1 + r)^n}{(1 + r)^n - 1}
\]

Where \( E \) is EMI

\( P \) is Principal Loan Amount

\( r \) is rate of interest calculated on monthly basis. (i.e., \( r = \) Rate of Annual interest/12/100. If rate of interest is 10.5% per annum, then \( r = 10.5/12/100 = 0.00875 \)),

\( n \) is loan term / tenure / duration in number of months

For example, if one borrow ₹10,00,000 from the bank/hfc at 10.5% annual interest for a period of 10 years (i.e., 120 months), then EMI = ₹10,00,000 * 0.00875 * (1 +

\(^{11}\) www.unionbankofindia.co.in/EMICal.aspx
0.00875\(^{120}\) / \([(1 + 0.00875)^{120} - 1]\) = ₹13,493. i.e., will have to pay ₹13,493 for 120 months to repay the entire loan amount. The total amount payable will be ₹13,493 * 120 = ₹16,19,220 that includes ₹6,19,220 as interest toward the loan.

Computing EMI for different combinations of principal loan amount, interest rate (offered by various financial institutions) and loan term using the above EMI formula by hand is time consuming, complex and prone to errors. EMI calculator automates this calculation and gives the result in a split of second along with visual charts displaying payment schedule and the break-up of total payment.

**Tranche Based EMI repayment option?**

To help customers save pre-EMI interest, HFCs have introduced a special facility of Tranche Based EMI. For under-construction properties, customers can choose the installments they wish to pay till the time the property is ready for possession. Anything paid over and above the interest by the customer goes towards principal repayment. The customer benefits by starting EMI and hence repays the loan faster.

**3. How to use EMI calculator?**

EMI calculator is easy to use, intuitive to understand and is quick to perform. One can calculate home loan or car loan or personal loan EMI with this calculator. If one is planning to avail any kind of loan, use EMI calculator to determine EMI payments against the principal loan amount and the interest on the loan and judge how affordable a loan can be. One has to enter the following information in the EMI calculator:

i. Principal loan amount one wish to avail (rupees)

ii. Loan term (months or years)

iii. Rate of interest (percentage)

Use the slider to adjust the values in the EMI calculator form. If one need to enter more precise values, he can type the values directly in the relevant boxes. As soon as the values are changed using the slider (or hit the ‘tab’ key after entering the values directly in the input fields), EMI calculator will re-calculate monthly payment (EMI) amount. Along with EMI payment amount, it also give other useful data including:

i. Total interest payable

ii. Total amount with interest
A pie chart depicting the break-up of total payment (i.e., total principal vs. total interest payable) is also displayed. It displays the percentage of total interest versus principal amount in the sum total of all payments made against the loan. The payment schedule table revealing payments made every year for the entire loan duration is displayed along with a chart showing interest and principal components paid each year. A portion of each payment is for the interest while the remaining amount is applied towards the principal balance. During initial loan period, a large portion of each payment is devoted to interest. With passage of time, larger portions pay down the principal. The payment schedule also shows the intermediate outstanding balance for each year which will be carried over to the next year.

When one enter the loan amount, interest rate and loan tenure, the EMI calculator will show EMI amount that one would have to pay every month to bank / HFC, the total interest payable and the total amount (Principal + Interest). Note that here EMI is calculated taking the interest rate as fixed for the whole tenure.

Then how to calculate EMI for floating rate of interest? Calculating EMI assuming rate of interest will constantly increase or decrease would be faulty and impractical. Also, if one could predict direction and time of interest rate changes, one can become a millionaire in a very short time if he is having  money to invest.

4. Floating Rate EMI Calculation

It is better that one should calculate floating / variable rate EMI by taking into consideration two opposite scenarios, i.e., optimistic (deflationary) and pessimistic (inflationary) scenario. Loan amount and loan tenure, two components required to calculate the EMI are under ontrol; i.e., one is going to decide how much loan he has to borrow and how long his loan tenure should be. But interest rate is decided by the bank/hfc which in turn depends on the bank rate fixed by Reserve Bank of India or the market trend. As a borrower, one should consider the two extreme possibilities of increase and decrease in the rate of interest and calculate how much would be EMI under these two conditions. Such calculation will enable prospective borrower to decide how much EMI is affordable., how much loan should be borrowed and how long should be loan tenure.
Optimistic (deflationary) scenario: Assume that the rate of interest comes down by 1% – 3% from the present rate. Consider this situation and calculate EMI. In this situation, EMI will come down or you may opt to shorten the loan tenure. Ex: If one avail home loan to purchase a house as an investment, then optimistic scenario enables you to compare this with other investment opportunities.

Pessimistic (inflationary) scenario: In the same way, assume that the rate of interest is hiked by 1% – 3%. Is it possible to continue to pay the EMI without much struggle? Even a 2% increase in rate of interest can result in significant rise in your monthly payment for the entire loan tenure.

Such calculation helps to plan for such future possibilities. When one decides to take a loan, you are making a financial commitment for next few months, years or decades. So consider the best as well as worst cases. And be ready for both. In short, hope for the best but be prepared for the worst.

Apart from the information provided above, one should also consider various factors that could impact EMI, loan tenure & tax benefits and understand the pros and cons of fixed vs. floating rates of interest to determine how much EMI he can really afford. One can also read the news and current affairs related to EMI, interest rates and loans.

E. How to choose home loan lender?

1. Buying a Home – Buying a home is dream for everyone but most of us are not able to achieve the dream due to many reasons. The escalating real estate prices have made buying a property a dream for most of us. It may happen that prospective home buyer may have been thinking for quite some time to buy a property but his bank balance does not allow him to do so. If that is the case, he may go ahead and take home loans that he can pay over a period of time and also own dream home. The foremost thing to be kept in mind is that one should never finalize a lender on the basis of interest rates. Most of us choose home loan lender on the basis of interest rates, cheapest the best. But actually, there are various other things that should be kept in mind while finalizing home loans.

2. Check home loan eligibility with various banks - Various banks/lending institutions have their own methods and standards for calculating eligibility. One
should do some shopping to check which institutions is offering higher loan eligibility. Adding up his spouse income may also be a good option to increase loan eligibility.

3. **Fixed or Floating interest rate**- A fixed interest rate means that one will have to pay same EMI over a period of time (it may be fixed for entire tenure or it may be reset at fixed interval). Floating interest rates may change at any given point of time, which may result in increase or decrease in either EMI or his tenure.

4. **Processing fees** - This fee is charged by the lender for processing the loan and is not refundable. In case one decide not to take the loan, then the entire amount that have been paid towards processing fees is lost. This generally varies in the range of 0.5 to 1% of the total loan amount. Also payment of processing fees doesn’t means that loan is passed. It may happen that one may pay the processing fees but still loan is not sanctioned due to various other reasons. Thus before paying the processing fees, one should bargain on the same and get it confirmed from the lender in writing.

5. **Prepayment fees**- Prepayment fees come into picture in case one wants to prepay his home loan from various sources. It may be from his personal savings or if he is planning to switch the loan to a different lender. Few of the lenders offer no prepayment charges in case the prepayment is done from own sources. But in case the person is shifting the loan to a different lender then most of the banks ask to pay a fee in the range of 1% to 2% of the outstanding loan amount.

All the charges should always be taken down in written from the lenders and the written document should be preserved in case the bank/hfc asks the person to pay up some different amount after sometime. Once one is satisfied with the above clauses and the interest rate offered by the particular lender, he should go ahead and buy dream home. Along with that it is always said that one can get the best home loan deal only after the property is finalized. So before start with loan hunting, it is better to finalize the property.

F. **Home Loan Customers**

1. **New customers**

In case one is planning to buy a dream home for very long and he is unable to do that because of the rising prices everywhere, here are some tips. One can take a loan that
will help him to buy dream home. All he has to do is to save enough money to make the down payment of home that is 20% of the home value. The remaining 80% of the home price can be taken as a loan from a bank/any other lending institution or a housing finance company depending upon how much loan he is eligible for. The lender will decide how much loan he is eligible for depending upon his income and various other parameters. These home loans can be repaid to the lender every month as equated monthly installments or more popularly known as EMI over the entire tenure of the loan. A part of this EMI goes towards repaying the principal component of the loan and the other part goes towards paying the interest. The EMI is calculated on a reducing balance basis. A reducing balance home loan means that in the initial days of the loan, the interest component of the EMI is high as the loan amount is high. But gradually, when the principal amount starts becoming lesser and lesser as you keep on paying it through EMI, the interest component of the EMI goes down and the principal component increases.

Also, while one is going to take a home he need to decide, the type of interest rate he want to pay to the bank/lender. The lender will offer with an option of a fixed rate or a floating rate. Home loans with fixed interest rate mean that the interest rate is fixed for the entire tenure of the loan. But these days, most of these fixed interest rates come with a reset clause where the lender has an option to change the interest rate after a fixed period of time generally in a range of 3 to 5 years. There are also a few lenders that give a fixed interest rate for the entire term of the loan.

The other type of home loans is with floating interest rate where, the rates will depend on the base rate of the bank. As and when the bank/hfc will change their base rate, the interest rate will change for the customers. The change can either be in terms of EMI or tenure. For example, if the bank/hfc increases their base rate, the EMI will increase if the customer chooses the option to increase the EMI. Or in case the bank decides to decrease their base rate then the EMI will reduce for the customer. Generally the floating interest rates are cheaper compared to the fixed rates. Looking at the home loan interest rate scenario, one has to decide an appropriate time to buy the home you were always looking to buy. The interest rates are generally on a rising trend thus in
In case one can manage to get a home loan as early as possible, he can expect to get a better interest compared to what will get a few months down the line.

2. Existing customers

In case one has already bought a property and paying a very high interest rate, then he should consider shifting existing loan from existing home loan lender to a new home loan lender. This will decrease the monthly EMI he is paying towards loan and will save money. He should consider shifting from the old BPLR system where the interest rate changes according to BPLR\textsuperscript{12} to the new base rate system. The base rate system is more transparent than the BPLR system. Thus the effort one put behind converting old home from the BPLR to the base rate system will be worth devoting. Also he should act now as the interest rates are increasing and he may miss the bus in case he wait for any longer.

3. Eligibility

Home loan eligibility depends upon various factors. A few of them are listed below:

i. Income- Income determines the amount of loan customer is eligible for.
   Lending institution generally keep the EMI to income ratio at 0.45 to 0.50.

ii. Tenure of the loan – If the longer tenure is opted for, loan eligibility is more.

iii. Interest rate offered - If interest rates are on a lower side, then the loan eligibility will be higher and vice versa.

iv. Existing loans - In case one is having any existing loans, then the loan eligibility amount will come down to keep the EMI to income ratio around 0.50.

The lender will consider all these factors along with credit history to determine how much loan will be eligible for.

Almost anyone and everyone with a wish to buy a property and means to repay the loan can get a home loan. Every bank/hfc or lender has a set of criteria that one need to meet before he can avail the loan. He need to have a stable source of income and have attained 21 years of age to be able to apply for the loan.

\textsuperscript{12} www.rbi.org.in (BPLR- Bank’s Prime Lending Rate).
**Home Loan: Eligibility Criteria: Basics**

Several factors besides income will have an impact on the home loan amount eligibility. Club incomes of relatives to get home loan to buy dream house.

The cost of the property one is planning to buy has a direct impact on his loan eligibility. Majority of the public sector banking institutions do not charge processing fees and administrative fees etc., whereas housing finance companies (HFCs) charge processing fees and also administrative fees ranging from 1% to 2.5% on the loan amount to be sanctioned. HFCs alongwith the application form ask the prospective borrower to deposit cash or cheque of the amount equivalent to the processing and administrative fees. Now a days many of the housing finance institutions have appointed their business agents and opened many branches for home loans. These business agents do not charge any additional fees from the home loan seeker but availing commission from the financing institutions only. In case of not availing the sanctioned loan, customer has to forget the processing fee. Administrative fee is charged generally just before disbursement of loan amount.

**4. Loan Application Form**

The application for seeking housing loan contains following information about the prospective borrower/co-borrower

INDIVIDUAL HOME LOAN APPLICATION FORM

NAME:
Father’s/
Husband’s Name:
Mother’s Name:
Date of Birth: Sex: Male Female Marital Status: Single Married Others
Category: SC/ST OBC Others Status: Resident Non-Resident PIO

PERSONAL & EMPLOYMENT DETAILS OF THE APPLICANT :
Permanent Residential Address
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Present Residential Address
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Qualification: Occupation: Service Self-employed/Business Professional
Name of the Employer: .................................................................
Address of the Employer:
...................................................................................................
...................................................................................................
Tel: .............................................................................................
Designation: ................................................................................
Year of Retirement: .....................................................................
No. of years in the present employment: ...................................
Previous employer: .................................................................
No. of years in Job/
Profession/Business: .................................................................

Present Accommodation: Own Rented Staff Qtrs. Company Provided Family
Preferred Mailing Address: Residence Office Permanent Address New Property

No. of dependents: No. of Children:
Names of all legal heirs (Children’s name is to be written. If studying, please write school/college):
Name Relationship with applicant Age School/College Income p.m. (if any)
Tel: ...........................................................................................Mobile: .............................................................
E-mail: ..............................................................

PERSONAL & EMPLOYMENT DETAILS OF THE CO-APPLICANT:
NAME:
Father’s/
Husband’s Name:
Mother’s Name:
Date of Birth: Sex: Male Female Marital Status: Single Married Others
Relationship with applicant: Status: Resident Non-Resident PIO
Permanent Residential Address
Tel/Mobile ................................ Email: .................................

Present Residential Address
...................................................................................................
...................................................................................................
...................................................................................................
Tel/Mobile ................................ Email: .................................

Qualification: Occupation: Service Self-employed/Business Professional
Name of the Employer : ............................................................
Address of the Employer:
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...................................................................................................
Tel/Mobile ................................ Email: .................................

Designation : .............................................................................
Age of Retirement: .................................................................
No. of years in the present employment: .................................
Previous employer: .................................................................
No. of years in Job/
Profession/Business: .................................................................

Present Accommodation : Own Rented Staff Qtrs. Company Provided Family
Preferred Mailing Address : Residence Office Permanent Address New Property

No. of dependents: No. of Children:

Names of all legal heirs (To be filled only if CO-APPLICANT is other than SPOUSE):
Name Relationship with applicant Age Income p.m. (if any)

BANK DETAILS OF THE APPLICANT :
Primary Bank A/c. (Salary credited)
Name of the Bank Address of the Branch Type of A/c. A/c. Number Date of opening of A/c.
Secondary Bank A/c. (any other Bank A/c. other than salary account)
Name of the Bank Address of the Branch Type of A/c. A/c. Number Date of opening of A/c.(Please attach minimum 12 months bank statement for both the above accounts)

Details of Credit/Debit Card A/c.
Name of the Card Issuing Bank Card No. Type of Card Limit

BANK DETAILS OF THE CO-APPLICANT :
Primary Bank A/c. (Salary credited)
Name of the Bank Address of the Branch Type of A/c. A/c. Number Date of opening of A/c.
Secondary Bank A/c. (any other Bank A/c. other than salary account)
Name of the Bank Address of the Branch Type of A/c. A/c. Number Date of opening of A/c.
Details of Credit/Debit Card A/c.
Name of the Card Issuing Bank Card No. Type of Card Limit

PROPERTY AND LOAN DETAILS:
Purpose of loan:
Construction of house
Flat under construction
Purchase of ready built house/flat
Repair/Renovation
Extension of house
Purchase of site
Composite loan
Balance transfer/Take over
Present status of property:
Ready
Proposed
Under construction
Site development
Not selected
(only for pre-approval)
Location of property:
Metropolitan/Urban/Semi-urban/Rural
Ownership of property:
Sole/Joint
Property type:
Free hold GPA/Lease hold (write unexpired term)
Present owner:
Dimension (Area of land): Built up Area: Age incase of ready built:
(Only for house & site purchase)
Address of the property to be financed
with Survey No. & Site No.
Address of the Builder & Telephone Number:
(in case of the flat purchase)
Nearest landmark:
Estimated requirement of funds (Rs.) Estimated sources of funds (Rs.)
Cost of Land :
Construction cost :
Cost of registration :
Additional works :
Other costs (incl. Tax & deposits, if any) :
Parking/open space :
Total Estimation :
Savings :
Disposal of investments :
Prov. Fund (Refundable/Non-Ref.) :
Employers housing loan :
Others :
Loan amount required :
Premium under Canfin Loan Shield :
Total Source of Funds :
Amount already spent on construction or advance/booking: Source:
(Receipt for the same to be attached in case of flat/house/site purchase)
FINANCIAL POSITION: (To be filled compulsorily where ever applicable)
ASSETS: (Please write value in Rupees)
<table>
<thead>
<tr>
<th>Particulars</th>
<th>Applicant</th>
<th>Co-applicant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Savings (FD, NSC, PPF, Shares etc.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property (Land/house)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Balance in PF account</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance policies (mention sum assured &amp; premium p.a.)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 wheeler / 4 wheeler</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other assets</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(Please specify)

FINANCIAL POSITION: (To be filled compulsorily where ever applicable)
LIABILITIES: (Please write value in Rupees)
<table>
<thead>
<tr>
<th>Particulars</th>
<th>Applicant</th>
<th>Co-applicant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal loan* (Employer/Credit Card/Private Lender)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PPF loan</td>
<td></td>
<td></td>
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<tr>
<td>Credit society</td>
<td></td>
<td></td>
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<tr>
<td>Employers housing loan</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2 wheeler / 4 wheeler loans</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Any other liabilities (Please specify)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Please mention the monthly installment details and the loan outstanding.
Would you be interested in opting for Life Insurance Cover under Canfin Loan Shield Scheme? Yes No
Please mention your choice of scheme. Fixed Rate Variable Rate

Document submitted for identification (Attested copy of any one):
PAN Card Election commission’s ID Card
Passport /Driving License /Ration Card No……..

At the last the following declaration has to be signed by the applicant
I/We declare that all the particulars and information given in this application form are true, correct and that they shall form the basis of any loan (company name) may decide to sanction to me/us. I/We have no insolvency proceedings/legal proceedings/disciplinary action against me/us nor have I/We even been adjudicated insolvent. I/We further confirm that I/We have read the brochure and understood the
contents. I/We also understand that the processing fees are not refundable. I/We agree that (company name) may take up such references and make such enquiries in respect of this application, as it may deem necessary. I/We undertake to inform (company name) regarding any change in my/our occupation/employment. I/We further agree that my/our loan shall be governed by the rules of (company name) which may be in force from time to time.

Date: (Signature of the Applicant)

5. Scrutiny of the application

Scrutiny is being done prima facie from the particulars furnished in the application form. In the present scenario of competition in the housing finance market for the individual housing loan guarantor is not required instead co-applicant is necessary. Mostly spouse has been included as a co-borrower with the applicant. Salaried and well established individuals are being given preference over all the borrowers. Second preference mostly to self employed but income tax payee individuals and third to other income generating individuals.

The focus is targeted on the quality of the house or dwelling unit to be financed. Copies of the documents are perused and verified from the legal angle. The overall liability of the applicant is seen and repayment capacity is judged from the income expenditure statement and salary statement, wherever necessary. Most important is assessment of the repayment capacity and the entitlement of quantum of loan. If the project cost is more and the housing loan eligibility is less in such a case generally applicant will have to invest his own contribution first and then utilize the loan amount as per requirement.

A crucial process before request for a home loan is actually sanctioned by any Bank/HFC is the credit appraisal process, which is a three-fold securitization process that decides loan eligibility. This is also undertaken to determine loan repayment capability and with increasing loan applications, banks/hfc can definitely run into credit risk when doling out lakhs of rupees to borrowers. Hence, evaluation of home loan applicants becomes critical.
6. Aspects borrower must understand\textsuperscript{14}

i. When to apply for a loan?

The moment one decide to buy a home, he can put in application for a Home Loan. One can also apply for a Home Loan even before the property has been finalized. The loan amount would be sanctioned or approved, based on repayment capability.

ii. What are the loan tenure options?

Home loan up to 20 years, provided the term does not extend beyond 65 years of age or the retirement age, whichever is earlier.

iii. How is the interest charged/calculated?

Interest is calculated on monthly rest.

iv. Who can be the co-applicants for the loan?

Spouse, any of blood relative (immediate family members)

Also co-owner has to be necessarily co-applicant in the loan.

v. What are the securities/collaterals need to provide?

Immovable property owned by the applicants. The applicant’s title to the property should be clear, marketable and free from any encumbrances. The security created on property shall be first and exclusive. Such security will be created by deposit of original title documents of the said property.

vi. What are the stages involved while taking a loan?

Application submission – One has to submit a completely filled in application with all the necessary documents.

Sanction – Then an approval for a specific loan amount based on requirement, repayment capability and the value of the property is conveyed to the prospective borrower.

Disbursement – Disbursement is done on the basis of nature of transaction. For resale, disbursal instrument is made favoring the seller, For Balance transfer cases it will be favoring existing financer, for self construction cases it will be on the basis of stage of construction favoring the borrower. It will be in favoring of the builder for builder direct allotment cases.

\textsuperscript{14} http://financial.indiabulls.com/homeloans website
vii. What are the various kind of loans extended?
   a. Loan for home purchase
   b. Loan for Residential plot and self construction
   c. Loan for Home extension/Improvement
   d. Balance Transfer from other banks
   e. Loan for builders properties
   f. Loan Against Property

viii. What is a Monthly Reducing Balance?
An Equated Monthly Installment (EMI) has 2 components: interest and principal. When the interest is calculated on monthly rests, the principal on which the interest is charged goes down every month. This results in significant savings for the customer over the tenure of the loan. HFCs works on Monthly Rests basis.

ix. What is an amortization schedule?
An amortization schedule is a table giving the reduction of loan amount by monthly installments. The amortization schedule gives the break-up of every EMI towards repayment interest and outstanding principal of loan.

x. Can one get IT certificates in the name of both the applicant and co-applicant separately?
As per Income Tax rules, only one certificate can be issued for a Home Loan hence one certificate will be issued in the name of both the applicant and co applicant.

xi. When is the IT certificate issued?
Borrower can request for a provisional IT certificate that can be issued any time during the course of the year.

xii. What kind of Tax Benefit does an individual get while applying for a Home Loan?
Many of the people have taken home loans / mortgages to buy house. One of the most important motivators for availing a housing loan is the income-tax benefit that it provides. If anybody have availed a home loan, he can claim tax benefits on both the principal and interest components of the home loan as per the Income Tax Act. These benefits are in the form of deductions available to assesses who have taken a loan to either buy a house or build one. This can reduce tax liability.
xiii. How to apply for the loan?
By calling on to bank/hfc on telephone/mobile/ toll free number. Drop in an email at customer service loan or given SMS or visit the nearest Branch/Home Loan Branch of lending institution.

xiv. What are the types of rate of interests offered?
Fixed and Floating rate of Interest.

xv. What is an EMI?
Repayment of the loan in Equated Monthly Installments (EMIs) comprising principal and interest. Repayment by way of EMI commences from the month following the month in which loan is fully disbursed.

xvi. What is pre-EMI?
Pre EMI is the Interest paid on the home loan amount availed in part and before the start of the actual EMI. This generally occurs in Self Construction or Construction Stage Linked Disbursals. The EMI doesn’t get started till the loan is disbursed in full and hence interest is charged on partially disbursed loan amount only which is Pre EMI. Pre-Emi contains only interest portion for the amount disbursed by the lending institution. In this connection, credit (financial), technical and legal scrutiny is undertaken by the financing institution from the following aspects:-

Most of the housing finance companies offer home loan with the best in-class features and most competitive pricing to the widest range of borrowers seeking to buy their dream home. While every home loan is a very personalized need of the borrower and lender makes the best effort to understand the requirement and provide him with the most customized home loan, some of the salient features are presented below:

xvii. Maximum loan
80% of the cost of the property (including the cost of the land) and based on the repayment capacity of the customer for loans beyond 20 lacs. Offer upto 85% of the cost of the property if the loan requirement is upto 20 lacs.

xviii. Applicant and Co- Applicant to the loan
Home Loans can be applied for either individually or jointly. Proposed owners of the property, will have to be co-applicants. However, the co-applicants need not be co-owners.

15 www.jagoinvestor.com/forum/sbi-pre-emi-calculation
xix. Adjustable Interest Rate Home Loan

Loan under Adjustable Interest Rate is linked to benchmark rates of the housing finance company. The rate on your loan may be revised from the following month, if there is a change in the benchmark rate of IHFL. However, the EMI on the home loan disbursed will not change. If the interest rate increases, the interest component in an EMI will increase and the principal component will reduce resulting in an extension of term of the loan, and vice versa when the interest rate decreases.

xx. Interest Rate: Market research reveal mostly the following rate of interests prevailing in the Country:

<table>
<thead>
<tr>
<th>Applicable Rates (Monthly Rest Basis)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Variable rates%</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Floating</td>
</tr>
<tr>
<td>Upto and including Rs 25 lacs</td>
</tr>
<tr>
<td>Rs 25.01 lacs to Rs 75 lacs</td>
</tr>
<tr>
<td>Rs 75.01 lacs to Rs 150 lacs</td>
</tr>
<tr>
<td>Over Rs 150 lacs</td>
</tr>
</tbody>
</table>

The above rates are always subject to change even without prior notice. In case of purchase of ready built house or a house/flat to be purchased from the builder/developer which is under construction normally the price should not escalate. The cost of the house/flat on which it was offered to the customer should not increase in any condition whatever it may be. In case of Delhi Development Authority & Anr. v. Joint Action Committee (Allotters of SFS and Ors) it was decided that in case of housing shenes by the Development Authority, allotment letter stipulating norms for fixing price, payment schedule of installments and interest chargeable for default etc. can not be amended.

16 AIR 2008 SC 1343.
In another case of Kanpur Development Authority v. Smt. Sheela Devi and Ors. 17 A scheme of allotment of houses was framed by Development Authority. Escalation of price-clause in brochure limited escalation by 10%-price stipulated to be fixed on date of construction of house. Development Authority escalated price four and half times. Houses though ready were not allotted for years by authority. It was held that delay on the part of authority was not justified and escalation of price beyond 10% and on basis of cost at time of allotment was not justified. It was also held that price of house or flat can not exceed the limit so fixed.

The customers are mostly finding difficulty in getting the home loan from any lender if they are holding the will of the property in their name. Generally, lenders find ‘Will” being disputed document which is not supported with any other documentary or other evidence. In case of Laxamanan v. T. Padmini 18 it was held that in the light of section 63 of the Indian Succession Act, 1925, the burden of proof that the will was properly executed lies on the propounder.

G. Appraisal

1. Technical Appraisal
   Apart from the financial appraisal, the technical appraisal is also an integral part of the credit appraisal process. Here the validity for approvals for construction from local government bodies is verified. Compliance with building laws, like restrictions on the number of floors or height of the building, is also verified and the property to be financed is valuated and its condition is checked. Technical appraisal judges if the property to be financed is viable at all.

2. Legal Appraisal
   Finally, legal appraisal of the property takes place. It requires the borrower to submit sale deeds, khata certificates, encumbrance certificate and other property related papers. Then these papers are handed on to lawyers who verify if the borrower is the absolute owner of the property that needs to be financed. Subsequently, validation of succession of title from earlier owners to the present one is done.

17 AIR 2004 SC 400.
18 AIR 2009 SC 951.
In the case of *Chako & Anr. v. Mahadevan*\(^9\) it was observed that deed was executed when transferor was suffering from alcoholic psychosis. Fact of the mental illness was proved by medical certificate. Deed in question also showing that valuable land was sold at a very paltry amount. It was held that sale being by person who was not of sound mind is liable to be set aside.

Legal appraisal involves ensuring availability of the documents, the relevant parent documents linking the chain of transaction, vetting encumbrance certificate etc., and ascertaining the marketability of the title. The appraiser checks the ownership, property details, minority, consideration, mortgage and proof of discharge of mortgage. On perusal of the documents, if the legal appraiser comes to the conclusion that the title is defective, then the entire set of document is returned to the applicant. Documents will be returned only in that case where it is not possible to clear the documents submitted for creation of mortgage. After perusal of documents, if there are further requirements, the same is detailed in the loan appraisal report and such documents are required to be submitted by the applicant.

**Revenue records**- Though normally revenue records are not insisted, on a case to case basis, the following records might be required by the legal appraiser for the purpose of detail scrutiny of information.

**Death certificate**- To be obtained from the concerned Birth and Death Registrar.

**Legal Heir ship certificate**-To be obtained from the Tehsildar of the Revenue Department to check and correlate the old and new survey numbers.

**Registry Extract**- If there is discrepancy between the survey number stated in one deed and another subsequent deed or record. ‘A ‘ Registry extract is obtained from the Survey Department.

**Patta /Sale deed**- When the title of possession is doubtful and the legal appraiser come to the conclusion that some more supporting records are required to establish the validity of the customer, he might ask for the above records, which has to be obtained from the concerned Tehsildar. Patta/sale deed/extract might incidentally show the ownership pattern. The possession of the property can be ascertained by obtaining the extract from the concerned Revenue Officer only.

\(^9\) *AIR 2007 SC 2967.*
Encumbrance Certificate- The above named certificate is obtained to verify the subsistence of any earlier mortgage, etc., on the property offered as security. This certificate disclosed all the registered transactions that have taken place with respect to a particular property over a period of time. The encumbrance certificate will have to be submitted for 15 years. It is so since the mortgage thus created will be in subsistence for 13 years. The same has to be obtained from the Sub—Registrar within whose jurisdiction the property is situated.

Partition Deed- Under deed of partition, the property acquired or devolved upon jointly are divided into pieces for the convenient and individual enjoyment of the co-owners. Normally, the original partition deed will be with the eldest member and extra copy (duly numbered) will be with other members. The custody of the original deed can be ascertained by the recital in the deed itself. If the original deed has not been handed over to a customer and is entitled to only an extra copy then the customer can submit the same with an indemnity letter signed by the custodian of the original and the customer to the effect that the property offered as security has not been mortgaged elsewhere. In the indemnity letter they should agree for production of original before disbursement and at any other subsequent occasion for inspection. If the documents are found in order the legal appraiser clears a case by giving a legal appraisal report.

3. Financial (Credit) Appraisal

An important part of credit appraisal is financial appraisal, where the applicant’s financial position is reviewed. Past repayment records including defaulting, late payments, delinquencies and bankruptcies, earnings potential including spouse’s, any outstanding debt, assets, liabilities and stability of employment income comes under close scrutiny.

Financial stability of the borrower and the co-borrower is an important factor not only for credit appraisal but also for increasing your creditworthiness. A housing finance company or bank sets a fixed upper limit for the amount of money that can be sanctioned for a particular type of loan. Depending on the creditworthiness of a customer, the amount of money sanctioned to him can be increased to a certain degree.
Age is another factor that can also impact how much will be sanctioned and speaks about your repayment capacity. Those earning high salaries and carrying a professional degree with a bright growth potential can definitely strike a great bargain. Age also matters when the tenure is quite long.

HFC assess the customer’s repayment capacity based on income, age, qualifications, number of dependants, spouse’s income, assets, liabilities, stability and continuity of occupation, and savings history.

In short, credit appraisal is a three-fold securitization process that includes financial, technical and legal appraisal of the property. Credit appraisal is sometimes done by the housing finance company itself or outsourced to other firms for a fee. As a part of the credit appraisal process, the applicant may be required to visit the bank branch for a credit interview. If you are found to be financially sound with a good credit history and property financially viable and legally clear of hassles, then there could be no hiccups in obtaining a sanction of loan application.

4. Mortgage

The Transfer of property Act, 1882 (TPA) deals with the definition and types of mortgages. The law relating to mortgage is codified in India by Section 58 of the above Act. The following elements are essential to create a mortgage of property:

- Transfer of an interest- Specific immovable property.
- For the purpose of securing payment or money advanced or to be advanced, an existing or future debt or performance of an engagement which may give rise to a pecuniary liability.
- A banker or a financial institution when obtains a mortgage by way of security, intends to create a charge on the specific immovable property to secure the loan. The immovable property includes land, benefit to arise out of land, building, structure and any thing which is permanently attached to the earth, but does not include standing timber, growing crop or grass.\(^2\) A financial institution must have first charge by way of hypothecation of goods/book debts, movable plant and machinery etc., towards

\(^2\) Transfer of Property Act 1882, sec.3; General Clauses Act 1897, sec.2(26).
prime security and obtains mortgage by way of collateral security. The Transfer of Property Act, 1982 deals with six kinds of mortgages.\textsuperscript{21} A financial institution prefers security of mortgage by way of deposit of title deeds which is popularly known as equitable mortgage. In India, mortgage by deposit of title deeds is a legal mortgage and there is nothing to look for an equitable relief. Intention to create mortgage is equal to mortgage created. The mortgage by deposit of title deeds could be created by a borrower in the notified towns, viz. Kolkata, Chennai, Mumbai or any other town notified, from time to time, by the State Governments. It can be created by delivering the creditor or his agent, documents of title relating to immovable property with an intention to create a security thereon. It will be observed that the presence of the mortgagor with title deeds before the creditor or his agent is absolutely essential for delivering the title deeds with an intention to create security for the loan. The Act nowhere prescribes any procedure and form and, therefore oral evidence has to be led to establish creation of such mortgage. The legal practitioners in India, therefore, developed a method of creating record of such transaction by making entry in the register maintained by the creditor. However, it should be noted that it is purely an internal record maintained by the creditor and the mortgagor can not sign such entry. Inadvertently, if the mortgagor signs the entry, then it will be treated as a bond and will attract ad-valorem stamp duty under the State Stamps Laws. Earlier no stamp duty was prescribed by the States. However, from 1958 onwards, some states like Maharashtra, Gujarat have prescribed stamp duty on the memorandum evidencing deposit of title deeds. However, the same is with a ceiling fixed on stamp duty.

When mortgage by deposit of title deed is created by a limited company, the creditor takes care to register charge with the Registrar of Companies within 30 days of creation of the charge. The creditor writes to Revenue/Municipal Authority informing about the charge created by the borrower (Mortgagor) and insist upon the borrower producing an extract of such record maintained by the Authority, duly noting the charge. Where the property belongs to an individual or partnership firm the creditor similarly informs the Revenue/Municipal Authorities about the creation of the charge.

\textsuperscript{21} Transfer of Property Act 1982 sec.58.
by such borrower/firm. Where a Limited Company is mortgaging property, proper care is taken to obtain a copy of the resolution passed by the Board empowering its directors to mortgage the property by deposit of title deeds. It is also necessary that the borrower obtains previous permission from the Income Tax Authority for creation of mortgage by deposit of title deeds under Section 281(1) (ii) of the Income Tax Act. If such permission is not obtained then the charge created by the borrower, pending assessment proceedings, shall be void as against any claim in respect of tax payable by the assessee (borrower) to the Income Tax Department.

Where a mortgage of property belonging to a third person is sought to secure the loan, the creditor obtains guarantee from third person and in consideration of such guarantee, the mortgage is created by deposit of title deeds.

A mortgagee is the transfer of interest in a property to secure payment of money advanced. The transferor is called a mortgagor. The transferee is called a mortgage. The principal money and interest secured are, called as mortgage money. The instrument by which this transfer is effected is called mortgage deed. The provisions related to mortgage of property are contained in the Transfer of Property Act.

A mortgage can be of various types. These include simple mortgage, mortgage by conditional ‘sale, usufructuary mortgage, English mortgage, mortgage by deposit of title deeds and anomalous mortgage.

An equity of redemption is immovable property, and so is the mortgagee’s interest in the immovable property mortgaged. There are many conflicting decisions as to whether a mortgage debt is immovable property, but since mortgage debt has been excluded from the definition of an actionable claim by Act 2 of 1900, it seems that a mortgage debt is for all intents and purposes, immovable property, though for the purpose of attachment it is treated as movable property. A full Bench of Rangoon High Court has said that a mortgage, being transfer of an interest is immovable

24 Paresh Nath v Nabogopal (1902) ILR 29 Cal1.
25 Sakuddin v Sonullah (1917) 22 Cal WN 641.
26 Taruadi v Bal Kashi (1904) ILR 26 Bom 305.
property, is immovable property, and that a suit to enforce a mortgage is a suit for land under the Letters Patent of the Chartered High Courts.  

**English Mortgage** - It is a type of mortgage where the mortgagor binds himself to repay the mortgaged money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a provision that he will retransfer the property to the mortgagor upon payment of the mortgage money as agreed. This is also called registered mortgage.  

This is the safest form of mortgage for a bank. No documents of the property are required to create this kind of a mortgage. The borrower just needs to enter into a mortgage deed with the bank which needs to be stamped and registered in order to make it enforceable. However, this is an expensive way to create a mortgage as charges have to be borne by the borrower for stamping and registration. Further, the mortgagor binds himself to repay the money at a certain date and transfers property absolutely to the mortgagee subject to the condition that he will re-transfer it to the mortgagor on payment of the mortgaged money. A mortgagee has a right to sue for the mortgage money in these cases:

- a. Where the mortgagor binds himself to repay.
- b. Where the mortgaged property is wholly or partially destroyed or the security is rendered insufficient. The mortgagee must have given the mortgagor a reasonable opportunity to provide further security to render the security sufficient - and the mortgagor has failed to do so.
- c. Where the mortgagee is deprived of his security due to a wrongful act or default of the mortgagor.
- d. If a suit is brought, the Court may stay the suit and all proceedings until the mortgagee has exhausted all his available remedies against the mortgaged property, unless the mortgagee abandons his security and retransfers the mortgaged property.

Section 67 of the Act gives the mortgagee the right to foreclosure or sale. As per this provision, in case the mortgage money has become due to the mortgagee, before a de-

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27 *Vermnct Chettyar v ARARRM Chettyar Firm* (1934) ILR 12 Rang 370.
29 The Transfer of Property Act, 1882, section 67.
cree has been made for the redemption of the mortgaged property, the mortgagee has a right to obtain a decree from the Court that the mortgagor be absolutely debarred of his right to redeem the property, or a decree that the property be sold. This suit to obtain a decree that the mortgagor be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

For enforcing the mortgage security, the creditor has to file a mortgage suit. The limitation is twelve years from the date of mortgage when the mortgage money becomes due. When the Court passes a decree in a mortgaged suit, the creditor can initiate execution proceedings against the mortgaged property and sell the property for realization of the decrital amount. Where the mortgaged property consists of Government Land on lease the creditor insists on a letter of consent from the lessor and execution of tripartite agreement between the borrower, the lessor and the creditor before mortgage is created. Otherwise it created difficulties in transferring the title in favor of the prospective purchaser in a Court action. It should, however, be remembered that to bind the mortgagor or his personal covenant to repay the loan, the creditor has to keep the limitation alive by obtaining debit balance confirmations periodically. If the remedy is barred against the mortgage, the creditor can not obtain personal decree against the mortgagor and will have to rely on the decree against the mortgaged property for recovery of his dues.

5. Security to be provided

The security for the loan is a first mortgage of the property to be financed, normally by way of deposit of title deeds and/or such other collateral security as may be necessary.

Interim security may be additionally required, if the property is under construction. Collateral or interim security could be assignment to the HFC/bank of life insurance policies, the surrender value of which is at least equal to the loan amount, guarantees from sound and solvent guarantors, pledge of shares and such other investments that are acceptable to the bank/hfc.

The customer and the lender has to ensure that the title to the property is clear, marketable and free from encumbrance. To elaborate, there should not be any existing mortgage, loan or litigation, which is likely to affect the title to the property adversely.
6. Agreement for Sale to be registered
In many States in India, the Agreement for Sale between the builder and purchaser is required by law to be registered. It is, therefore, in the interest of the customer to lodge the Agreement for registration within four months of the date of the Agreement at the office of the Sub-Registrar appointed by the State Government, under the Indian Registration Act, 1908. Similarly, execution of sale deed should not delinked from the payment of consideration. In case of Saradamani Kandappan v. Rajalakshmi & Ors it was decided that in terms of Section 55 of the Contract Act in a case of Contract of sale of immovable property, the time fixed for schedule of payment has to be observed.

7. Higher loan through existing loan account
One could go in for a Home Conversion Loan with lender whereby existing loan could be transferred to the new property with an increase in loan amount subject to one’s current loan eligibility. This would save from the hassle of prepaying the first loan, also saving from prepayment and processing charges to the extent of the loan converted.

KYC (Know Your Customer) & Money Laundering Prevention
Bank/HFC is required to obtain documentary evidences of the identity of the customer which is mandatory in terms of the guidelines issued by the National Housing Bank (NHB), a regulator of the housing finance companies. These guidelines are as under:

H. Know Your Customer’ Guidelines
The objective of ‘Know Your Customer (KYC) Guidelines’ is to prevent housing finance companies (HFCs) from being used, intentionally or unintentionally, by criminal elements for money laundering activities. KYC procedures also enable HFCs to know/understand their customers and their financial dealings better which in turn help them manage their risks prudently. HFCs should frame their KYC policies incorporating the following four key elements:

i. Customer Acceptance Policy;
ii. Customer Identification Procedures;

30 AIR 2011 SC 3234.
31 www.nhb.org
iii. Monitoring of Transactions; and
iv. Risk management.

For the purpose of KYC policy, a ‘Customer’ may be defined as:

a. a person or entity that maintains an account and/or has a business relationship with the HFC;
b. one on whose behalf the account is maintained (i.e. the beneficial owner);
c. beneficiaries of transactions conducted by professional intermediaries, such as Stock Brokers, Chartered Accountants, Solicitors, etc. as permitted under the law, and
d. any person or entity connected with a financial transaction which can pose significant reputational or other risks to the HFC, say, a wire transfer or issue of a high value demand draft as a single transaction.

2. Customer Acceptance Policy

i. HFCs should develop a clear Customer Acceptance Policy laying down explicit criteria for acceptance of customers. The Customer Acceptance Policy must ensure that explicit guidelines are in place on the following aspects of customer relationship in the HFC:-

a. No account is opened in anonymous or fictitious/benami name(s);
b. Parameters of risk perception are clearly defined in terms of the location of customer and his clients and mode of payments, volume of turnover, social and financial status, etc. to enable categorization of customers into low, medium and high risk (HFCs may choose any suitable nomenclature, viz. level I, level II, level III etc.); customers requiring very high level of monitoring, e.g. Politically Exposed Persons (PEPs), may, if considered necessary, be categorised even higher;
c. Documentation requirements and other information to be collected in respect of different categories of customers depending on perceived risk and keeping in mind the requirements of Prevention of Money Laundering Act, 2002 (Central Act No. 15 of 2003) (hereinafter referred to as PMLA), rules framed thereunder and guidelines issued from time to time;
d. Not to open an account or close an existing account where the HFC is unable to apply appropriate customer due diligence measures, i.e. HFC is unable to verify the identity and/or obtain documents required as per the risk categorisation due to non-co-operation of the customer or non-reliability of the data/information furnished to the HFC. It may, however, be necessary to have suitable built-in safeguards to avoid harassment of the customer. For example, decision to close an account may be taken at a reasonably high level after giving due notice to the customer explaining the reasons for such a decision;

e. Circumstances, in which a customer is permitted to act on behalf of another person/entity, should be clearly spelt out in conformity with the established law and practices, as there could be occasions when an account is operated by a mandate holder or where an account may be opened by an intermediary in a fiduciary capacity; and

f. Necessary checks before opening a new account so as to ensure that the identity of the customer does not match with any person with known criminal background or with banned entities such as individual terrorists or terrorist organizations, etc.

ii. HFCs may prepare a profile for each new customer based on risk categorization. The customer profile may contain information relating to the customer’s identity, social/financial status, nature of business activity, information about his clients’ business and their location, etc. The nature and extent of due diligence will depend on the risk perceived by the HFC. However, while preparing customer profile the HFCs should take care to seek only such information from the customer which is relevant to the risk category and is not intrusive, and is in conformity with the guidelines issued in this regard. Any other information from the customer should be sought separately with his/her consent and after opening the account. The customer profile will be a confidential document and details contained therein shall not be divulged for cross selling or any other purposes.

For the purpose of risk categorization, individuals (other than High Net Worth) and entities whose identities and sources of wealth can be easily identified and transactions in whose accounts by and large conform to the known profile, may be
categorized as low risk. Illustrative examples of low risk customers could be salaried employees whose salary structures are well defined, people belonging to lower economic strata of the society whose accounts show small balances and low turnover, Government departments & Government owned companies, regulators and statutory bodies, etc. In such cases, the policy may require that only the basic requirements of verifying the identity and location of the customer are to be met.

Customers that are likely to pose a higher than average risk to the HFC may be categorized as medium or high risk depending on customer’s background, nature and location of activity, country of origin, sources of funds and his client profile, etc. HFCs may apply enhanced due diligence measures based on the risk assessment, thereby requiring intensive ‘due diligence’ for higher risk customers, especially those for whom the sources of funds are not clear. Examples of customers requiring higher due diligence may include

a. non-resident customers,
b. high net worth individuals,
c. trusts, charities, NGOs and organizations receiving donations,
d. companies having close family shareholding or beneficial ownership,
e. firms with ‘sleeping partners’,
f. politically exposed persons (PEPs) of foreign origin,
g. non-face to face customers, and
h. those with dubious reputation as per public information available, etc.

As regards the accounts of PEPs it is advised that in the event of an existing customer or the beneficial owner of an existing account subsequently becoming a PEP, HFC should obtain senior management approval in such cases to continue the business relationship with such person, and also undertake enhanced monitoring.

It is important to bear in mind that the adoption of Customer Acceptance Policy and its implementation should not become too restrictive and must not result in denial of HFC’s services to general public, especially to those, who are financially or socially disadvantaged.
3. Customer Identification Procedure

Rule 9 of the Prevention of Money-Laundering (Maintenance of Records of the Nature and Value of Transactions, The Procedure and Manner of Maintaining and Time for Furnishing information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules, 2005 (hereinafter referred to as PML Rules), requires every HFC at the time of commencement of an account-based relationship, identify its clients, verify their identity and obtain information on the purpose and intended nature of the business relationship, and in all other cases, verify identity while carrying out transaction of an amount equal to or exceeding rupees fifty thousand, whether conducted as a single transaction or several transactions that appear to be connected, or any international money transfer operations.

In terms of proviso to rule 9 of the PML Rules, the relaxation, in verifying the identity of the client within a reasonable time after opening the account/execution of the transaction, stands withdrawn. Rule 9 also provides that every HFC shall identify the beneficial owner and take all reasonable steps to verify his identity. The said Rule also require HFCs to exercise ongoing due diligence with respect to the business relationship with every client and closely examine the transactions in order to ensure that they are consistent with their knowledge of the customer, his business and risk profile. Therefore, the Customer Identification Policy approved by the Board of an HFC should clearly spell out the Identification Procedure to be carried out at different stages, i.e. while establishing a relationship; carrying out a financial transaction or when the HFC has a doubt about the authenticity/veracity or the adequacy of the previously obtained customer identification data.

Customer identification means identifying the customer and verifying his/her identity by using reliable, independent source documents, data or information. HFCs need to obtain sufficient information necessary to establish, to their satisfaction, the identity of each new customer, whether regular or occasional and the purpose of the intended nature of relationship. Rule 9 of the PML Rules provides for the documents/information to be obtained for identifying various types of customers i.e. individuals, companies, partnership firms, trusts, unincorporated association or a body of
individuals and juridical persons. HFCs are advised to take note of the provisions of the above rule and ensure compliance. HFCs should frame their own internal guidelines based on their experience of dealing with such persons/entities, normal prudence and the legal requirements. Each HFC is required to formulate and implement a Client Identification Programme to determine the true identity of its clients keeping the above in view.

4. Customer Identification Requirements

Indicative Guidelines

Trust/Nominee or Fiduciary Accounts

There exists the possibility that trust/nominee or fiduciary accounts can be used to circumvent the customer identification procedures. HFCs should determine whether the customer is acting on behalf of another person as trustee/nominee or any other intermediary. If so, HFCs may insist on receipt of satisfactory evidence of the identity of the intermediaries and of the persons on whose behalf they are acting, as also obtain details of the nature of the trust or other arrangements in place. While opening an account for a trust, HFCs should take reasonable precautions to verify the identity of the trustees and the settlors of trust (including any person settling assets into the trust), grantors, protectors, beneficiaries and signatories. Beneficiaries should be identified when they are defined. In the case of a ‘foundation’, steps should be taken to verify the founder managers/directors and the beneficiaries, if defined. If the HFC decides to accept such accounts in terms of the Customer Acceptance Policy, the HFC should take reasonable measures to identify the beneficial owner(s) and verify his/her/their identity in a manner so that it is satisfied that it knows who the beneficial owner(s) is/are.

Accounts of Companies and Firms

HFCs need to be vigilant against business entities being used by individuals as a ‘front’ for maintaining accounts with HFCs. HFC should verify the legal status of the legal person/entity through proper and relevant documents. HFC should verify that any person purporting to act on behalf of the legal/juridical person/entity is so authorized and identify and verify the identity of that person. HFCs should examine the control structure of the entity, determine the source of funds and identify the natural persons who have a controlling interest and who comprise the management.
These requirements may be moderated according to the risk perception, e.g. in the case of a public company it will not be necessary to identify all the shareholders.

**Client Accounts Opened by Professional Intermediaries**

When the HFC has knowledge or reason to believe that the client account opened by a professional intermediary is on behalf of a single client, that client must be identified. HFCs may hold ‘pooled’ accounts managed by professional intermediaries on behalf of entities like mutual funds, pension funds or other types of funds. Where the HFCs rely on the ‘customer due diligence’ (CDD) done by an intermediary, they should satisfy themselves that the intermediary is regulated and supervised and has adequate systems in place to comply with the KYC requirements. It should be understood that the ultimate responsibility for knowing the customer lies with the HFC.

**Accounts of Politically Exposed Persons (PEPs) Resident outside India**

Politically exposed persons are individuals who are or have been entrusted with prominent public functions in a foreign country, e.g. Heads of States or of Governments, senior politicians, senior government/judicial/military officers, senior executives of state-owned corporations, important political party officials, etc. HFCs should gather sufficient information on any person/customer of this category intending to establish a relationship and check all the information available on the person in the public domain. HFCs should verify the identity of the person and seek information about the sources of funds before accepting the PEP as a customer. The decision to open an account for PEP should be taken at a senior level which should be clearly spelt out in Customer Acceptance Policy. HFCs should also subject such accounts to enhanced monitoring on an ongoing basis. The above norms may also be applied to the accounts of the family members or close relatives of PEPs.

**Accounts of non-face-to-face customers**

In the case of non-face-to-face customers, apart from applying the usual customer identification procedures, there must be specific and adequate procedures to mitigate the higher risk involved. Certification of all the documents presented may be insisted upon and, if necessary, additional documents may be called for. In the case of cross-border customers, there is the additional difficulty of matching the customer with the documentation and the HFC may have to rely on third party certification/introduction.
In such cases, it must be ensured that the third party is a regulated and supervised entity and has adequate KYC systems in place.

**Rural Housing**

Some of the banks/hfcs are also financing for housing in rural areas. Broadly the features are as under:32

- a. Home loans in rural areas for construction:
- b. Construction of Houses on plot owned by borrower
- c. Addition of more rooms or floors to existing house
- d. Renovation & Improvement of existing house
- e. Purchase of a new house

**Features for Agriculturist**

If a farmer/planter/horticulturist/dairy farmer etc. having own land looking to have own home, the banks provide:

- a. Specially Designed Housing Loans for Agriculturists.
- b. Loan eligibility on the basis of land owned and the crops being cultivated.
- c. Housing Loan in residential area of own village
- d. Loans for buying house or flat in city of choice and many more.

**I. Documentation:**

Documents required: generally the following documents are required for availing home loan for salaried, self employed professionals and self employed businessmen:

<table>
<thead>
<tr>
<th><strong>Salaried Customers</strong></th>
<th><strong>Self Employed Professionals</strong></th>
<th><strong>Self Employed Businessman</strong></th>
</tr>
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<tbody>
<tr>
<td>Application form with photograph</td>
<td>Application form with photograph</td>
<td>Application form with photograph</td>
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<tr>
<td>Identity and Residence Proof</td>
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<td>Identity and Residence Proof</td>
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<tr>
<td>Form 16</td>
<td>Last 3 years Income Tax returns (self and business)</td>
<td>Business profile</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Last 6 months bank statements</th>
<th>Last 3 years Profit /Loss and Balance Sheet</th>
<th>Last 3 years Income Tax returns (self and business)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Processing fee cheque</td>
<td>Last 6 months bank statements</td>
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</tr>
<tr>
<td></td>
<td>Processing fee cheque</td>
<td>Processing fee cheque</td>
</tr>
</tbody>
</table>

Some of the banks /hfc specficy more detailed documents with eligibility and purpose norms as under:

**Following documents are required for instant loan approval**

**For salaried people:**
- a. Duly certified latest salary slip
- b. Employment certificate
- c. Latest copy of Form-16
- d. Proof of additional Income, if any.
- e. Consent letter from employer to deduct the monthly installment.

**For Self-employed / professional / businessmen:**
- a. Copy of last 3 years Tax Returns
- b. Copy of last 3 years Balance sheet and profit & loss statement, duly certified by a Chartered Accountant.
- c. Proof of business premises
- d. Copy of shop & establishment license
- e. Copy of certificate of practice

**Common Doouments:**
- a. Copy of age proof
- b. Copy of address proof
- c. Identification documents
- d. Copy of Bank pass-book / statement of accounts for the
- e. Last 6 months

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33 Website of Cent Bank Home Finance Ltd. Mumbai
Property Documents:

a. Allotment letters of the society
b. Copy of the approved drawings
c. Copy of the sale agreement
d. Cost estimate from the architect
e. Legal search report

It is fundamental that all the operations and transactions of a bank are duly supported by proper documents. The relationships between the banker and his customer are contractual and need to be supported by evidence of various types. For this purpose, besides the printed rules and regulations for various schemes of service such as Current Account, Fixed Deposits, it is the usual practice of banks to obtain the consent of customers and other dealing with the bank, on special forms. One of the important and major functions of banking business is lending money to constituents either with or without security. It is, therefore, also essential that a proper and legally enforceable record is maintained by the bank for the purpose of recovery of the loans so advanced.

1. What is a Document?

Document is a very wide term and is to be understood in the context in which the term is used and according to the definition that has been ascribed to it under various legislations. A document shall include any matter written, expressed or described upon, any substance by means of letters, figures or marks or by more than one of those means which is intended to be used for the purpose of recording that matter”. 34

It can be generally said that documents include any decipherable information which is set out in lasting form; document includes any device in which sounds or other data or visual images are embodied so as to be capable of being reproduced therefrom. Document has also been described as a device by means of which information is recorded or stored.

All deeds are documents but not all documents are deeds. A deed is a particular kind of document and must –

34 The General Clauses Act, 1897, Section 3(18).
a. effect a transference of interest, right or property,
b. or create an obligation binding on some person or persons,
c. or confirm some act whereby interest, right or property has been transferred or passed.

A deed or document in the present context of commercial transaction is therefore the substratum of commercial law and its field of applicable extends to the laws of contract, laws of sale of goods, partnership, negotiable instruments, letters of credit, insurance, contracts of carriage, arbitration, stamp, registration and various other fields in which a merchant, trader or businessman continuously deals.

2. Need for Documentation

The need for documentation can be said to be twofold. One is the requirement of law, the other is for the purpose of maintaining a permanent record evidencing the fact of the transactions.

By virtue of the provisions of certain statutes, some specified operations/transactions are required to be effected by means of proper documents. In other words they must be in writing, followed by certain other legal requirements. For instance, sale of tangible immovable properties of value of Rs. 100/- and upwards can be made only by an instrument in writing which requires also to be duly registered.\(^{35}\) Similarly, a lease of immovable property from year to year requires to be registered.\(^{36}\) A mortgage other than a mortgage by deposit title deeds, where the principal money secured is one hundred rupees or upwards, can be effected only by means of a registered instrument.\(^{37}\) Under the Negotiable Instruments Act, also, various instruments have been specifically provided which are required to be in writing.

As aforesaid, the other object of documentation is to maintain a permanent record of a dealing or a transaction entered into by and between the parties to such documents. In view of the non-permanent existence of the persons entering into a transaction, it is necessary that a record by means of a document is kept which would hold the legal heirs or successors of such persons to give effect to or act on the strength of such a document. Further, a document affords a good piece of proof of the transaction contained therein.

\(^{35}\) The Registration Act, 1908, section 54.
\(^{36}\) The Registration Act, 1908, section 17.
\(^{37}\) The Transfer of Property Act 1882, section 59.
Particularly in the case of banks where, as already mentioned, lending is one of the major functions, it is absolutely essential that a properly documented record is maintained, which will evidence the transactions of lending made by the bank, to ensure due repayment of the loan by the borrower and, in the event of non-payment by the borrower, to entitle the bank to take legal steps for recovery of the loan. In the absence of a document capable of being legally enforced, the bank would find it hard to prove and establish before a court that the amount was lent and that the same remains unpaid and also to enforce its claim for recovery of the amount lent.

Even otherwise, a document is necessary for the purpose of creating a valid and effective security in favour of the bank for any loan or advance made by it to a constituent. As mentioned above, certain forms of securities can be validly created only under duly executed documents, such as mortgages of immovable properties other than the mortgage by deposit of title deeds, lease for a period exceeding one year and sale of immovable properties.

A document has also a negative value in the sense that the statements made therein bind the parties executing it and prevents either from avoiding its own statement. This is known as estoppels by deed or document and is based upon the principle that either of the parties to the document having acted upon it or performed its obligation can prevent the other party from unilaterally withdrawing there from.

3. Types of Documents ordinarily in use and dealt with by Banks/HFCs

The following are some of the types of documents that are ordinarily dealt with by the banks:

a. Negotiable Instruments – Cheques, Bank Drafts, Bills of Exchange, Promissory notes
b. Documents of title to goods – Railway Receipts, Bills of Lading, Lorry Receipts, are house receipts.

c. Letters of Credit, Trust Receipts.
e. Ledgers and Registers regularly maintained in the ordinary course of business.

The following are some of the forms/ agreements generally used in banks:
1. Account opening form.
2. Letter of Authority for operation of the account.
3. Specimen signature card.
4. Term and conditions governing the deposit accounts.
5. Promissory Note.
7. Agreement of Pledge- of stocks, shares and other securities.
8. Agreement of Hypothecation of goods/ plant, machinery and movable assets, book debts, etc.
11. Lease Deeds.
12. Packing Credit Agreements.
13. Letter of Credit/ applications.
15. Letter of lien and assignment.
16. Agreement for discounting/ purchase of bills.
17. Guarantee agreements.

Preparation of a document would naturally depend on the nature of the transaction and the purpose for which it is intended to be used. Documents that are required to be obtained pursuant to a provision of law should contain the principal ingredients as are stipulated under the relevant law so as to make such documents legal and valid. The other terms and conditions that are to be generally embodied in a document would depend on the nature of the transaction that is covered by the document. It may be a simple document by way of a letter or a Promissory Note which may fully cover the loan advanced or it may be Deed of Mortgage or a Debenture Bond. The transaction may be evidenced by one document or a series of documents.

A document normally contains the following essential ingredients:

a. Date, month and year of execution.
b. The names and description of the parties thereto.
c. Non-operative elements which are considered as recitals or narration to indicate what has led up to the necessity or desirability of executing the deed or document (recitals do not control the operative part of the deed where the operative part is clear).

d. The operative part of the document consists of ‘premises’ which is that portion of the operative part that narrates the consideration of the document.

e. Grant and the covenants for title implied there from, the purpose of which is to make effective the transaction of interest or property from the grantor to the grantee.

f. Parcels, that is to say, that part of the document which prescribes the general property or interest sought to be granted and the exceptions or reservation if any, in favour of the grantor. It also deals with the outstanding rights.

g. Express covenants which indicate the permission or stipulations which are very common in leases and all kinds of commercial agreements, charter parties and engagement for personal service contracts.

It is proposed to consider here some of the important credit arrangements that are generally granted by banks with particular reference to the various security documents that should be obtained in respect thereof.

(a) **Term Loan Agreements**

Term loans are granted against the security of mortgage of land, buildings and other fixed assets and also against hypothecation of plant, machinery and assets of a movable nature.

Unlike in the case of Cash credit Hypothecation arrangements where the advance is repayable on demand, term loans are repayable in installments. Therefore, strictly viewed, a Demand Promissory Note is not necessary in the case of term loans. However, the practice varies from bank to bank, though no prejudice is caused even if a demand Promissory Note is obtained.

The term loan hypothecation agreement should contain most of the clauses of the cash credit hypothecation arrangement and, in addition, an acceleration clause, by virtue of which in the event of any default by the borrower in payment of the installment or by breach of any other terms and conditions of the agreement, not withstanding that the
loan is repayable in installments, the bank would become entitled to recall the loan for repayment on demand and enforce the security and exercise the various rights and powers conferred under the agreement.

In respect of the term loans granted to joint stock companies, as stated above, the charges created in favour of the bank is required to be registered with the Registrar of Companies within the stipulated period.

(b) Mortgages

Generally, banks and housing finance companies take mortgages by deposit of title deeds (Equitable Mortgage. It may be by way of primary security or additional security. It is necessary that before a mortgage is created, the bank/hfc arranges through its solicitors/ lawyers to have the mortgagor title to the property proposed to be mortgaged properly investigated by taking out a search in the various land registry office, and satisfies itself that the mortgagor has a good and marketable title to the property.

**Mortgage by Deposit of Title deeds**

The main requisites of a mortgage by deposit of title deeds are (1) Debt, (2) Deposit of title deeds in a notified town, (3) intention that the title deeds deposited would be a security for the debt. To secure a debt due to the bank, the borrower/ owner of the property calls on the bank in the town, specified in the Transfer of Property Act or which has been duly notified by the Central/State Government for the purpose and hands over and deposits with the Branch Manager, official of the bank the title deeds relating to the immovable properties proposed to be mortgaged with an intention that the title deeds deposited shall be held as a security by the bank/mortgagee for the debt due.  

There is no stamp duty payable on this type of mortgage nor is it required to be registered. (Some States have now imposed stamp duty on mortgage by deposit of title deeds by requiring the parties to pay stamp duty on any note writing or document relating to transaction of such mortgage.) it is not proposed to go into details here as to what is a title deed which is capable of being deposited for the purpose of creating an Equitable Mortgage. Since this is a mortgage created by mere deposit of title deeds by the mortgagor with the bank, no document being signed or executed it

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38 The Transfer of Property Act 1882, section 58.
should be ensured that such a mortgage is properly created and recorded in such a manner that it would not attract the provisions of the Stamps Act. The proper procedure would be that on the agreed day, the owner of the property intended to be mortgaged visits the bank at notified town and hands over to and deposits with the Branch Manager/ official of the branch the title deeds of the property and the Branch Manager/ official of the branch accepts them and makes a suitable noting in the security register which is maintained by the branch in the ordinary course of business( such nothing is also known as Memorandum of Oral Assent) wherein it is, inter alia, recorded that the named person (owner) visited the bank and handed over the title deeds (with full particulars given) with the named official of the bank with an intention to create security thereon for due repayment by the borrower of the amount borrowed under the specified loan arrangement approved by the bank. It may also state that the mortgagor declared that he has absolute title to the property which is free from any charge or encumbrances, and that it would remain so till the bank’s dues are repaid in full. Such a nothing/ oral Asset should be stated and signed only by the Branch Manager/ official, also recording that the same was read over and consented to by the owner/mortgagor.

The owner/mortgagor would not sign thereon. One important aspect that should be noted is that this type of noting/oral assent would be the record that can be used as evidence to prove the mortgage and hence it should be ensured that the record can be proved as that is maintained in the ordinary course of business.

In some banks there is a practice that, after the mortgage is created as above, the mortgagor confirms it by a letter addressed to the Bank a day later, confirming that he had visited the bank in the previous day and deposited the title deeds relating to the property mentioned therein with the bank, with an intention to create security thereon for repayment of the specified loan. Such a letter, if not properly worded, recording only a past event, may be open to be interpreted as a document attracting the provisions of the Stamp Act and the Registration Act and thereby expositing to risk of the mortgage being held as not provided.
The deposit of title deeds should be made by the owner/s of the property. If the person depositing the title deeds is acting on the strength of a power of attorney, the power of attorney should be carefully scrutinized to verify whether the Attorney has the requisite power. In the case of joint stock companies, deposit of title deeds can be made by the director/s of the company who has/have been duly authorized under a resolution of the Board of Directors of the company for the purpose.

A mortgage by deposit of title deeds is created to cover land, buildings, and other fixed assets, both present and future. In the case of term loans granted against the security of land building and other plant and machinery, the bank should obtain besides the mortgage by deposit of title deeds covering such assets, an agreement of hypothecation covering plant, machinery and other equipment of movable nature.

It would be a sound practice to obtain from the mortgagor, before the mortgage is created a suitable declaration, duly affirmed before a competent authority declaring, inter alia, that he has a good and marketable title to the property proposed to be mortgaged.

As usual, where the joint-stock company is the mortgager, the charge by way of mortgage requires to be registered with the Registrar of Companies. Since there is no document under which such a mortgage is created, it should be mentioned in forms No. 8/14 to be filed with the Registrar of Companies that no document has been executed.

It is also possible to have a mortgage by deposit of title deeds registered with the Sub-Registrar, and according to the present provision of the Stamp Act, the stamp duty payable is lower than that payable on an English Mortgage. This will have all the advantages of a registered document; in particular, it serves as a notice to the public. However, it should be made certain that the document contains only clauses stating the deposit of the title deeds with the bank before the execution of the document, with an intention to create thereon a security by way of equitable mortgage for the due repayment of the specified financial arrangement. It should not contain any other clauses which are normally found in an English Mortgage, as otherwise it may be constructed as an English Mortgage liable for repayment of higher stamp duty.

39 indiankanoon.org/search
It is not necessary that mortgage by deposit of title deeds should be created only at the place where the property is situated. It is valid to have such a mortgage created at any other place, provided it is a notified town for the purpose.

(c) Guarantees

The function of contract of guarantee is to enable a person to get a loan, goods on credit or an appointment. Some person comes forward and tells the lender, or supplier or the employer that he (the person in need) may be trusted in case of any default. For example, in the case of *Birkmyr v. Darnell*⁴⁰ the Court said:

‘If two comes to a shop and one buys, and the other to give him credi, promises the seller, ‘If he does not pay you, I will’.

This type of collateral undertaking to be liable for the default of another is called a ‘contract of guarantee.’ In English law a guarantee is defined as a promise to answer the debt, default or miscarriage of another.⁴¹ It is a collateral engagement to be liable for the debt of another in case of default. The person in respect of whose default guarantee is given is called the ‘principal debtor’ and the person to whom the guarantee is given is called creditor.⁴² The complete features of ‘guarantee’ is defined in The Indian Contract Act, 1872.⁴³ The purpose of a guarantee being secure the payment of a debt, the existence of recoverable debt is necessary.⁴⁴ It is of the essence of a guarantee that there should be some one liable as a principal debtor and the surety undertakes to be liable on his default.⁴⁵ If there is no principal debt, there can be no valid guarantee.⁴⁶ The contract of guarantee is a tripartite agreement which contemplates the principal debtor, the creditor and the surety.⁴⁷ A contract of guarantee is not a contract *uberrmae fides* or one of absolute good faith.⁴⁸ Thus where a banker received a guarantee with knowledge of circumstances seriously affecting the credit of the customer, it was held that there was no duty to disclose this fact to the

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⁴⁰(1704) 91 ER 27 : 1 Salk 27.
⁴¹S.4, Statute of Frauds 1677, 29 Car, II, C.3.
⁴³The Indian Contract Act, 1872, s.126 to s.147.
⁴⁴Mountstephen v. Lakeman, 1871 LR7 QB 196, 202 Ex, affirmed, LR7 HL 17.
⁴⁵Harburg India Rubber Comb Co. v. Marti, (1902) 1 KB 778 CA.
⁴⁶A guarantee for debt already barred by time, held void. Manju & Mahadeo v. Shivappa (1918) 42 Bom 444.
⁴⁷Swan v. Bank of Scotland decided in 1836 by House of Lords.
guarantor.\textsuperscript{49} Guarantee obtained by misrepresentation is invalid.\textsuperscript{50} Guarantee obtained by concealment is also invalid.\textsuperscript{51}

Banks/HFCs have occasion to issue guarantees of varied types on behalf of their constituents. Mostly they are bid Bond Guarantees in lieu of tender deposit/earnest money deposit or performance guarantees in lieu of security deposits towards the due performance of a contract. It is obvious that the bank should be fully aware of the nature and extent of the obligation it is undertaking under the guarantee. It is, therefore necessity that the tender contract between the contractor on whose behalf the guarantee is issued and the beneficiary under the guarantee is properly examined with a view to ascertaining the nature and extent of obligation that the bank would be undertaking, as guarantees are generally linked to the tender contracts. No parts of the guarantee can be taken in isolation. The Guarantee should contain clear and unequivocal clauses setting out the bank’s liability. The main features to be clearly spelt out in a proper guarantee are the nature of the obligation undertaken, the extent of the pecuniary liability and the duration of the validity period of the guarantee. It should also specify the period within which the beneficiary is required to legally enforce any claim under the guarantees against the bank, failing which the bank would stand discharged and absolved from the liabilities under the guarantee. Depending on the nature of the guarantee, it should clearly spell out whether the bank is undertaking to merely indemnify the loss or damage incurred by the beneficiary or whether the bank unequivocally undertakes to pay any claim under the guarantee, irrespective of the nature of the extent of loss incurred by the contractor may have against the beneficiary. This position has to be particularly taken due note of as, on a number of occasions, the bank would be in a predicament as the contractor and also the beneficiary would be having claims and counter-claims, the bank being uncertain as to the stand it has to take.

In cases where the terms of the Tender or Sale Agreement provide for the renderer to furnish a performance guarantee on the tender being accepted, the liability of the bank under the Bid Bond Guarantee issued at the time of submission of the tender cannot

\textsuperscript{49} \textit{National Provincial Bank of England v. Glanusk} (1913) 3 KB 335.
\textsuperscript{50} The Indian Contract Act 1872, section 142.
\textsuperscript{51} The Indian Contract Act 1872, section 143.
be deemed to have terminated as soon as the contract is awarded/tender accepted. This, however, depends on the terms of the tender, Sale Agreement and other conditions. If, however, the bank does not want to bind itself at the stage of issuing Bid Bond Guarantee to excite a Performance Guarantee in the event if the tender being accepted, a clear terms to that effect should be incorporated in the Bid Bond Guarantee itself. Further, it is also open to the bank to incorporate a specific clause in the Bid Bond Guarantee to the effect that the bank’s liability under such irrespective of whether a Performance Guarantee is procured or not by the renderer for the beneficiary, so that the Bank’s liability under the Bid Bond Guarantee can be said to have come to an end once a decision is taken on the tender - either by acceptance or rejection.

In respect of the guarantee issued/agreed to be issued, the bank should take a suitable counter-guarantee from the contractor on whose behalf the guarantee is issued. A copy of the guarantee issued/to be issued by the bank unrestricted and unequivocal power on the bank to satisfy any claim that may be made on it by the beneficiary without being liable to make any reference to the contractor, not being bound to inquire into the propriety, correctness or the legality of any such claim made on the bank and that the contractor shall be bound by any payment that the bank make in satisfaction of such claim by the beneficiary. Further, the bank/hfc should have the right to debit any of the accounts maintain by contractor with the bank for the purpose of satisfying the claim of the beneficiary. The counter-guarantee should also have a clause that the counter-guarantee shall remain valid and in force till the guarantee executed by the bank is returned to the bank duly discharged by the beneficiary or till a certificate to that effect is received by the bank from the beneficiary.

There are occasions when, as security for the guarantee issued, in addition to the counter-guarantee of the contractor, an indemnity policy of an insurance company obtained. The terms of such an indemnity policy would depend on the terms of the bank guarantee. In particular, inter alia, the Insurance company should bind itself to pay to the bank immediately on receipt of a demand by the bank, the amount of the claim that beneficiary has made on the bank without being entitled to question as to whether the bank is liable or not to satisfy the claim from the beneficiary. Further, the
indemnity policy should have a validity period extending over at least six months after the expiry of the bank guarantee, including the period provided for enforcement of claims. This would leave enough time for the bank to enforce, if necessary, action under the indemnity policy.

There have been instances where guarantors, though of high standing have failed to honor the bank’s claim as soon as these arose and sometimes recourse to law was necessary. No matter who is the guarantor, whether a Public Authority, or a Public Corporation or an individual, the working of the guarantee must be such as to make all terms and conditions specific and no loopholes should be left which will permit interpretation to the detriment of the bank’s interests or as would involve the bank in legal procedures and delays.

Particularly, in the case of medium and long-term loans, it is considered advisable that after the loan arrangement is sanctioned a loan agreement - otherwise referred to as Heads of agreement - is entered into by and between the borrower and the bank setting out therein in detail all the terms and conditions that would govern the credit arrangement approved by the bank. Such an agreement would contain the nature of the arrangement, the various obligations to be fulfilled by the borrower before being obligation to be fulfilled during the currency of the credit arrangement, terms of repayment, interest, negative covenants, securities to be created and other conditions. Such an agreement would be helpful in regulating and controlling the arrangement and also to ascertain the stage at which the rights and powers available to the bank could be exercised since the security to be created thereafter would be contemporaneous with such an agreement and any breach of the terms and conditions of the agreement would be constructed as an event giving a cause of action for the bank to exercise its powers and enforce the securities.

It is necessary in all agreements of the type mentioned above, as also in other security agreements that discretion is vested with the bank, particularly to vary the rate of interest to be charged by the bank on the advance, as also the percentages of margin to be maintained by the borrower, as otherwise it may be contended that the bank can not unilaterally vary these terms when it may find it expedient to do so.
Where a joint stock company is the borrower, the bank/hfc will first examine the Memorandum and Articles of Association of the company to ascertain the borrowing powers of the company. Subject thereto, before borrowing in accordance with provisions in the Company Law, the board of directors of the company is required to pass a resolution at its meeting delegating the requisite power/authority to borrow to any committee of directors, the managing directors, the manger or any other principal officer of the company as the board may deem fit.

The board of directors of a company is prohibited from borrowing except with the consent of the company in a general meeting, where the moneys borrowed by the company (apart from the temporary loans obtained from the company’s bankers in the ordinary course of business) will exceed the aggregate of its paid-up capital and free reserves, that is to say, reserves not set apart for any specific purpose. The expression ‘temporary loans’ has been explained to mean loans repayable on demand or within six months from the date of the loan such as short-terms loans, cash credit arrangements and discounting of bills arrangement. These types of arrangements are not to be included for computing the aggregated borrowing by the company.

In the case of English Mortgages, where under power is confirmed on the bank to take of the undertaking or the company, in accordance with section 293 (1)(a) of the Companies Act, 1956, the consent of the company in a general meeting should be obtained for execution of such mortgage by the company as otherwise such power may prove to be ineffective and not capable of being exercised.

d. Manner of Execution of Documents

In determining the validity of a contract, the capacity of the parties therein may have to be determined. Again, it is essential that the parties to it must have consented or agrees the same thing in the same sense. Any want of consent would result in the negation of the contract; and, therefore a mistake, fraud, coercion, and duress must be absent in the execution of any document to prevent it from being rendered invalid.

It is fundamental that the executant of a document should possess the necessary powers and is legally competent to execute such a document whereunder there may be many obligation binding himself/and/or the person, firm/trust on whose behalf he may

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52 The Companies Act 1956, section 292.
53 The Companies Act 1956, section 293 (1)(d).
be executing the document. Lack of competence on the part of the executants to execute a particular type of document may vitiate the document itself.

For instance, in the case of a joint-stock company should be pursuant to the authority delegated by the company’s board of directors either by a resolution or a power of attorney and it should also be in accordance with the company’s Articles of Association. Further, care needs to be taken regarding affixing the common seal of the company. Similarly, in the case of a Hindu undivided family, execution should be by the Karta of the family and it would be advisable to have the documents executed by all the adult members of the family also. If there are any minors, then by their respective guardians. In the case of partnership firms, while any act done or performed by one of the partners would bind the firm, a prudent practice that banks have generally been following is to get the documents executed by all the partners of the firm both in their capacity as partners of the firm as also in their respective personal capacity. When a trust is executing a document the Deed of Trust would need to be scrutinized to ascertain as to who are the persons empowers to execute the documents so as to be binding on the trust. It should be ensured that the documents are executed in the presence of the banks’s official/s as far as possible.

There may be cases when documents are executed in ‘escrow’. A document is executed in ‘escrow’ when it is made conditional and is handed over to a party to the contract to hold it till the happening of a contingency. When the parties are at distance and the execution takes place at a different place and mutual obligations exist, the procedure of executing the document in ‘escrow’ is adopted.

While completing the execution of documents, care should also be taken to avoid any alterations or erasures in the document as the same may have an effect upon the validity of the documents. If there are any such alterations or erasures, the same must be properly initialed on the sides to prevent the plea of any material alteration being set up against the bank at a later date.  

f. Attestation

Under law, certain types of documents like a mortgage deed\textsuperscript{54} are required to be attested. Absence of attestation in the prescribed manner where attestation is

\footnote{The Transfer of Property Act1882, section59.}
mandatory may render such documents inadmissible in evidence before a court. The Transfer of Property Act\textsuperscript{55} prescribes that the attestation should be by at least two persons. To attest is to bear witness to a fact. Attestation need not be in any particular form, a mere signature is sufficient but the signature must be made in the presence of the executants. Attestation must follow execution and not precede it. The purpose of attestation is that there should be supporting testimony by a person other than the executant himself as to the execution of a document. Attestation signifies that the document was signed by the executants and that the attester witnessed the same. The object is protection against fraud and undue influence. If a document not required to be attested is attested, it would not be rendered invalid, though it may entail payment of a higher stamp duty, as under the Stamp Act different provisions apply to instruments attested and instruments not attested.

g. Execution of Documents by Illiterate Persons

The law does not make any distinction, as for as the execution of documents is concerned, between literate and illiterate persons. All the requirements of a proper and valid execution of a document are the same. While in the case of literate person, expression of his consent to the contents of a document is indicated by putting his signature on the document, in the case of an illiterate person who does not know how to write, expression of his consent to the contents of a document is indicated by affixing the impression of his left hand thumb. Below such thumb impression it should be noted that the same is the left hand thumb impression of the person signing the document. With a view to eliminating any scope for any controversy that maybe raised at a later stage by or on behalf of the executant who has put his thumb impression that he was not aware of the contents and by way of abundant caution, it is advisable to insist that affixing of the thumb impression is done before an independent authority such as judicial magistrate or a notary public or a person holding a public office or a respectable person known to the bank. In such a case, care should also be taken that the attesting or identifying person also explains the contents of the document to the executant in the language that the executants is capable of understanding and a certificate to that effect is also separately made by such

\textsuperscript{55} The Transfer of Property Act 1882, section 3.
identifying or attesting person. Such a certificate made by the identifying or attesting person should be as of the same date on which the document is executed and should be carefully preserved along with the security documents.

In some cases, it is also the practice of banks/hfcs to have the left thumb impression of an illiterate person witnessed by two respectable witnesses who are known to the bank. Their addresses and other particulars are noted so that, in the event of any reference becoming necessary, it will be possible to contact them easily.

**h. Stamping of Documents**

One of the important aspects of a valid and legal document is that the document has to be properly stamped as required under the Indian Stamp Act, 1899. Though the Indian Stamp Act is a central legislation, each State is empowered to vary the stamp duty leviable on certain types of documents. However, the stamp duty payable on documents such as promissory note, bill of exchanges and receipt is governed by the Indian Stamp Act and the States are not competent to vary the same. The law requires certain documents such as promissory notes, bills of exchange to be compulsorily stamped with the appropriate stamp duty at the time of execution, and non-compliance would render them inadmissible in evidence before a court; in other words, they become invalid and unenforceable. In the case of certain types of documents which are by inadvertence insufficiently stamped, the Stamp Act provides for payment of the appropriate stamp duty subsequently, which may include payment of a penalty after applying to the collector of stamps.

There are two methods of stamping documents: one is by affixing adhesive stamps of the requisite value on the document and the other is by having the document prepared on non-judicial stamp paper.

The legal requirement is that the document should bear the stamp duty of the requisite value as applicable at the place of execution of the document. If the document is executed at two different places and the stamp duty payable at the first place of execution, is lower then the difference should be paid within the period stipulated for the purpose under the Stamp Act in force at the second place. The same principle would apply in the case of documents executed outside the country but meant for acting upon the enforcement within the country.
It is considered advisable to get special documents duly adjudicated by the Stamp authorities according to the provisions of the Stamp Act so that the proper stamp duty could be paid on them to avoid the risk of the documents being impounded.

i. Registration of Documents

The law requires certain types of documents to be compulsorily registered with the prescribed authority like the Registrar of Assurances, \(^56\) inter alia, requires the documents which purport or create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property, to be compulsorily registered. The documents generally dealt with by banks that fall in the category are leases, mortgages and release deeds. Such documents, if not registered, may be inadmissible in evidence before a court of law and would have no legal effect, though they may be in order in all other respects, and they may be made use of for any other purpose for which registration is not necessary. For example, an unregistered mortgage document cannot be used for providing the mortgage, but can be used for providing a simple personal debt.

While the above-stated types of documents are compulsorily registrable, registration of certain other documents is optional and non-registration of such documents would not render such documents invalid. The documents requiring registration should be presented for registration within four months of their execution \(^57\).

The main object and purpose of registration is that it serves as notice to the public. Where under law any transaction relating to immovable property is required to be and has been effected by a registered instrument, any person acquiring such property or any part thereof or share or interest in such property shall be deemed to have notice of such instrument. It is for this reason that banks, while acquiring a property on ownership or on lease or when immovable properties are taken as security, always insist on investigation of the title of the vendor/lesser/mortgagor of the property, including taking searches from the office of the Sub-Registrar, Land and Revenue and other authorities.

\(^56\) The Indian Registration Act 1908, section 17.

\(^57\) The Indian Registration Act 1908, section 23.
In the case of documents executed by and on behalf of joint stock companies where-under a charge, inter alia, by way of hypothecation or mortgage is created over the company’s assets, including book debts, the company is required to register such charge with the Registrar of Companies within 30 days from the date of creation of such charge. Charges not so registered would not be binding on the liquidator if the company goes into liquidation. Though, under the Companies Act, the obligation is on the part of the company, since non-registration of the charge with the Registrar of companies would adversely affect the lending bank, it is necessary that the bank should ensure that the required formalities are completed by the company in this regard, such as filing the prescribed form with the Registrar of companies within the stipulated period and its follow up. A registered document only can be brought under perview of the legal framework a registered document can be produced as evidence.\textsuperscript{58}

\textbf{j. Modification and Renewal of Documents and Limitation}

When a complete set of documents has been obtained at the time the credit arrangement is first granted, particularly in the case of cash credit and term loan arrangements, as and when the extent of such credit arrangement is subsequently increased or when there is a variation of any material term of the arrangement, it is not necessary to again obtain a set of documents for the revised extent of the arrangement and to treat the previous set of documents cancelled. This is mainly to avoid any break in continuity and to prevent the possibility of other creditors’ claims intervening. An agreement by way of modification of the earlier agreement should be obtained setting out in effective terms the enhancement of the extent of credit arrangement and/or of the variation of the terms thereof, as the case maybe. There may be occasions when a charge created in favour of the bank by way of mortgage by deposit of title deeds or an English Mortgage would have to be extended to cover some additional finance granted and/or to secure some other credit arrangement/s granted and/or to be granted to the borrower/mortgagor. Such extension of charge on the mortgaged property can be effected by having a Deed of Further Charge in the case of an English Mortgage. In the case of mortgage by deposit of title deeds, a further mortgage should be created for which the mortgagor calls on the bank and

\textsuperscript{58} Mool Singh \textit{v.} Pokardas, AIR 1959 Raj 15.
consents to the bank continuing to hold the title deeds already deposited with it not only as a security for the advance for which the title deeds were earlier deposited, but also as a security for the further finance and/or the other credit arrangement/s granted and/or to be granted which have now been secured.

In the case of mortgage/hypothecation documents, charges created under such modification agreements should be registered with the Registrar of Companies. There is an increase in the extent of a credit arrangement, besides such modification agreement, a promissory note for the differential amounts also should be taken in addition to other usual documents.

The period of validity of a document would depend on its nature and its terms and conditions subject, however, to the provisions of the Indian Limitation Act, 1963. With a view to ensuring that the security documents obtained by the bank remain valid and enforceable and the bank’s claim on the strength thereof does not get time barred, it is absolutely essential that the documents are got suitably renewed by the executant within the prescribed period of limitation as applicable in the particular case. The period of limitation commences to run from the date of the cause of action. The date of the cause of action varies from document to document. In the case of loan documents, ordinarily, the cause of action arises when a default is committed. For example, in the case of a Demand Promissory Note where-under the amount is payable on demand, the period of limitation is three years and this three-year period commences from the date of the promissory note itself. In an arrangement where the loan is repayable in installments, the cause of action arises from the due date for payment of each installment.

The practice that has been found to be correct and advisable to be followed in this connection is to preserve the first original set of documents executed by the borrower and to get the debt due there-under the securities held thereof renewed by the executant/s by obtaining an acknowledgement of debt and security duly signed by all the borrowers/ co-obligants/guarantors within a period of three years. Under this practice, it would be necessary to preserve the first set of documents as also acknowledgment/s of debt and security obtained subsequently, for any legal action to be taken by the bank. It is obvious that such acknowledgements of debt and security
are taken within the limitation period of three years so that the debt is kept continuously alive with proper and legal links. Further, in such acknowledgements, in addition to the first set of documents, the particulars of the modification supplemental documents, further acknowledgments of debts and security, if any, obtained subsequently should also be mentioned.

It would not be a safe practice, unless proper precautions are taken, to treat the existing documents as cancelled and to obtain fresh documents as and when any credit arrangement is renewed. Such a practice involves some risks particularly in the case of joint-stock companies where the bank’s charge is registered with the Registrar of companies. Care should be taken to ensure that the bank does not lose priority as a consequence of treating the previous set of documents as cancelled, by properly ensuring that in the intervening period, the company has not created any charge in favour of any other creditor.

k. Interpretation of Documents

Rules of interpretation of documents are also material. Normally, the meaning of the document or a particular part of it is to be sought for in the document itself. Ordinarily, the parties should use apt words to express their intention, but often they do not. The cardinal rule again is that clear and unambiguous words prevail in evidence, but if the words used are not clear, any further evidence will prevail. The plain ordinary meaning of the words used is to be adopted in construing a document. The subject-matter may, however show that plain words used in connection with usage of trade or profession have special technical meaning. If the plain ordinary meaning of the words leads to some absurdity or inconsistency, the ordinary meaning may have to be modified in order to avoid such absurdity or to render different parts of the document consistent. The deed or document has to be construed as a whole. This means collecting general intention from the instrument as a whole and inferring that intention from the general framework of the document. However, very frequently, there are more than one document relevant to the transaction and these have to be read together.
I. Preservation of Documents

There is no universal rule relating to the period for which documents should be preserved. The law on the subject governs the preservation of certain types of records. However, as a matter of practice, banks generally preserve most of the records for a period of 8 years so as to be in line with the requirements under the Income Tax Act. The preservation of a document would thus mainly depend on the requirement of the statutory provisions, if any, and on the circumstances under which the document has come into being. Documents such as books of account, registers, etc. of joint-stock companies are required to be preserved in accordance with requirement under Companies Act.

In this context, one other aspect also would need to be borne in mind, namely, the claims that may arise against the bank. In order to defend any such claim against the bank, it is necessary that the banks preserve the documents at least till the expiry of one year to provide as a sort of cushioning period, over and above the period of limitation prescribed for enforcement of any such claim against the bank. This again would vary from case to case, depending on the nature of the document and also the claimant, whether Government or other than Government.

m. Proof of documents

The provisions of the Indian Evidence Act, 1872 should be borne in mind while getting a document executed. Unless the document fulfils all the legal requirements as to its stamping, execution and registration, it would not be admissible in evidence before a court of law.

Proving a document is nothing but proving its contents. Before the Bank can get the required relief in a court on the strength of any document, the bank would have to establish mainly:

a. that the document has been signed by the party by whom it is alleged to have been signed,

b. that the party while signing such a document knew the contents thereof and that he consented to such contents,

c. that due consideration has been received by the party signing the document.

59 The Destruction of Records Act, 1917.
60 Sec. 209 of the Companies Act, 1956.
The contents of a document can be proved either by primary evidence or by secondary evidence. Primary evidence means the document itself produced for inspection of the court. Secondary evidence\(^{61}\) means and includes certified copies; copies made from original by mechanical process, copies made from or compare with original, counterparts of the documents, oral accounts of the contents by the person who has himself seen it. Documents must be proved by primary evidence except in certain cases as specified in the Evidence Act\(^{62}\) In the case of documents required to be attested, it is necessary that at least one attesting witness is examined for the purpose of proving its execution.\(^{63}\)

**n. Vernacular Documents**

With the present changed pattern of banking which has been spreading and is likely to spread further to the rural parts of the Country, it is desirable that, as far as possible, document be obtained in the vernacular language. The practice all along has been to obtain documents in English. With the accent on making banking more popular in rural areas, there is a real and urgent need for introduction of vernacular documents so that the executants really knows the contents of the document he is signing. Some progress has already been made in this direction by banks and effective steps should be taken to accelerate it.

**o. Standardization of Documents**

As mentioned earlier, a substantial number of the forms/documents that are generally in use have been standardized by the banks for obvious reasons. In those instances where the arrangement is of an unusual nature the documents should be got prepared so as to meet the particular need and cover the special type of transaction.

However, there still remains the work of standardization of documents so as to be accessible and applicable to all banks. While the basic nature of the credit arrangements granted by the various banks is the same, each bank has its own forms and documents. It is desirable that uniformity is brought about in this respect so that all banks could obtain the same type of standardized documents.

\(^{61}\) The Evidence Act 1872, section 95.  
\(^{62}\) The Evidence Act 1872, section 55.  
p. Mortgages

In an ancient system of law, a mortgage was really a pledge. The property was forfeited on default of payment. The transaction was either by delivery of possession, or by conditional conveyance. In Roman law, the earlier type of security was the ‘finducia’, a conditional conveyance under which the property whatever its value, was forfeited in case of non-payment. In the case of transfer by way of mortgage, a discharge by a mortgagor of an encumbrance, or of a prior mortgage, enures for the benefit of the mortgagor. When mortgage of a chak is acquired the mokarari interest that interest is an accession to the security and passes with it to the purchaser at a sale in execution of a decree on the mortgage.

The Transfer of Property Act, 1882, defines ‘Mortgage’ as the transfer of an interest in specific immoveable property for the purpose of securing:

a. the payment of money advanced or to be advanced by way of loan,

b. an existing or future debt, or

c. the performance of an engagement which may give rise to pecuniary liability.

The ‘Transferor’ is called the ‘Mortgagor’ the ‘Principal money and interest’ of which payment is secured for the time being, are called the ‘Mortgage money’ and ‘instrument’ (if any) by which the transfer is effected is called ‘Mortgage Deed’.

“Specific” property means that the property must be capable of identification by description i.e. with regard to location, area, boundaries, etc. ‘Immoveable’ property includes land, benefits to arise out of land, thing permanently attached to the earth (e.g. fixed machinery, buildings etc) or permanently fastened to anything attached to the earth e.g. doors, windows).

Immoveable property does not include standing timber, growing crops or grass. Machinery which is not permanently attached to the earth and which can be shifted from one place to another is not considered immoveable property but considered moveable property.

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64 Shyama v. Ananda, (1880) 3 Cal WN 323.
66 The Transfer of Property Act 1882, section 58 (a).
67 The General Clauses Act, 1897 section 3 (2).
68 The Transfer of Property Act, 1882, section 3.
(1) Simple Mortgage
   a. Possession of the mortgaged property is not delivered to the mortgagee.
   b. There is no transfer of ownership also.\(^{69}\)
   c. The mortgagor binds himself personally to pay the mortgage money.
   d. There is an agreement-express or implied-that if the mortgage-money is not paid by the mortgagor, the mortgagee can recover the amount by causing the property to be sold through intervention of the court.

Remedies
   a. Apply to the court for power of sale (judicial only).
   b. Sue on the personal convenant in as much as the simple mortgagor binds himself to pay.

(2) Mortgage by Conditional Sale
   a. Mortgagor completes a deed of ostensible sale of the immovable property.
   b. There must be a condition embodied in the document which affects or purports to effect the sale that on default on a certain date, the ostensible sale, shall become absolute; or the sale shall become void; or the buyer shall transfer the property to the seller.\(^{70}\)
   c. There is no personal convenant by the mortgagor because there is no personal Convenant for payment. The bankers are reluctant to favour this type of mortgagee.

Remedy
The only right the mortgagee acquires is to close the transaction in case of default in repayment. The right can be enforced, not privately, but only by a suit for foreclosure. The mortgagee does not have a right to sell the property or cause it to be sold. The mortgagee can have the ownership over the mortgaged property not merely when the mortgagor defaults but only when he gets an absolute decree of foreclosure in his favour.

\(^{70}\) Srinivasa v. Radhakrishnam, (1915) 38 Mad 667 22 IC 54.
(3) Usufractuary Mortgage

a. Either there is a delivery of possession to the mortgagee or the mortgagor binds himself expressly or by an implication, to deliver the possession of the mortgaged property.
b. The mortgagee can retain the possession till the repayment of debt.
c. The mortgagee has a right to receive all the income such as rents, profits, etc. out of the property and appropriate the same in lieu of interest or principal amount etc.
d. The mortgagor is not personally liable unless there is a distinct agreement to that effect.

Remedy

a. The only remedy is to retain possession of the property till the debt is paid off and to appropriate the rents and profits thereof till then.
b. If the mortgagee is not put in possession or should he be deprived of possession or lose possession, he may sue to obtain possession and also profits.

(4) English Mortgage

a. There should be a personal convenant to pay i.e. the mortgagor should bind himself to repay the mortgage money on a certain date.
b. The property should be absolutely transferred to the mortgagee. (It is out and out conveyance followed by delivery of possession but subject to proviso for redemption).  
c. Such absolute transfer should be made subject to the provision that the mortgagee will reconvey the property to the mortgagor upon payment by him on the fixed date. (The mortgagor retains equity of redemption even when absolutely conveying the property to the mortgagor).
d. Banks generally incorporate a clause in mortgage-deed for appointment of ‘receiver’ to take charge of the mortgaged property and to collect the rent, issues & profits etc.

(5) Mortgage by deposit of Title-deeds or Equitable Mortgage

This is derived from the English Law an equitable mortgage. It is the well established rule of equity that mere deposit of a document of title without writing or without word of mouth, will create in equity a chance upon the property referred to. The term ‘equitable mortgage’ is not appropriate in India, for the law of India knows nothing of the distinction between legal and equitable estates.\(^{72}\)

a. It can be created in the presidency towns like Bombay, Madras, Calcutta and any other town which the “State Govt. concerned” may, by notification in the official gazette, specify in this behalf.

b. It is effected merely by delivering to creditor (or his agent) documents of title to immovable property. The original title-deeds must be deposited.\(^{73}\)

c. Equitable mortgage can be created even in the case of a barred debt.

d. Even written acknowledgement is also not necessary.

e. It must be made with the intention of securing a debt or advance made or to cover even future advances.

The law provides that the provisions which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.\(^{74}\)

(5-A) Registered Equitable Mortgage

A mortgage by deposit of title deeds does not require any writing,\(^{75}\) and being an oral transaction it is not affected by the law of registration. But it is used for the deposit to be accompanied by a memorandum in writing.\(^{76}\) When the title-deeds are deposited along with a memorandum of deposit and that memo is registered with the Registrar of Assurances, the type of mortgage so created is called Registered Equitable Mortgage. The mortgagor generally binds himself to create Registered Mortgage when called upon to do so.

(6) Anomalous Mortgage

When a mortgage does not pertain to any of the above types it is called Anomalous Mortgage. But it is necessary that all the requirements of the Transfer of Property Act

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\(^{72}\) Webb v. Macpherson, (1904) ILR 31 Cal 57 30 IA 238 p.245.


\(^{74}\) Transfer of Property Act 1882, section 96.

\(^{75}\) Shaw v Foster, (1872) LR 5 5 HL 32.

\(^{76}\) Miller v. Madho Das, 23 IA 106.
for creating a valid charge of mortgage, are duly met. A document styled as a possessory mortgage was held to be in effect anomalous mortgage, the mortgagee having been given the right to realise the mortgage money by bringing the right, title, and interest of the mortgage to sale.\textsuperscript{77}

In practice, two kinds of anomalous mortgage are noticed:

1. A combination of simple and usufructuary mortgage; and
2. A usufructuary mortgage accompanied by conditional sale. This type of mortgage is not generally accepted by banks.

q. IMPORTANT POINTS TO NOTE FOR ALL TYPES OF MORTGAGE

(a) Right to Redeem or Equity of Redemption

The mortagor’s right of redemption and the mortgagee’s right of foreclosure or sale are co-extensive. When the mortagor’s right to redeem accrues, the mortgagee has a right to enforce his security.\textsuperscript{78} Redemption means paying off the mortgage money and getting back the mortgaged property. It takes place when the mortgagor discharges his liabilities under the mortgage and thus becomes entitled to have his property reverted in him free of charge. This right has to be executed by the mortgager within the limitation period which starts from the day the mortgage money become due. Any clause in the mortgage deed which denied or restricts this right of redemption is treated as clog on equity of redemption and is void.\textsuperscript{79}

(b) Right to Foreclosure

As the mortgagor has the right to redeem, a corresponding: right of foreclosure is given to mortgagee. Where the mortgagor fails to redeem the mortgage by repaying the mortgage money within the period allowed to him, the mortgagee gets the right to institute a suit for a decree that the mortgagor be absolutely debarred from exercising his right to redeem the property. Foreclosure means and implies the loss of the right of redemption by the mortgagor.

(c) Scrutiny of the Title-deeds

The bank/hfc should fully satisfy itself about the following:

\textsuperscript{77} Hathika & others \textit{v.} Puthiyapurayil Padmanabhan, AIR 1994 Ker p.144.
\textsuperscript{78} Sakharam \textit{v.} Vithu, (1866) 2 Bom HC 225.
\textsuperscript{79} The Transfer of Property Act 1882, section 60.
1. Identify the owners of the proposed mortgage of property.

2. That the owner(s) have absolute, clear, free and marketable title to the property and are fully competent to mortgage the said property.

3. That the chain of title is complete in all respects. Where the title-deeds does not show a well connected title ending with that of the borrower he should be asked to explain the missing link or give satisfactory explanation of the absence of such details in the deeds.

4. That the property can be mortgaged.

5. That the title-deeds are clear and marketable and fit for accepting the same as security even by way of equitable mortgage.

6. That the property is free from all encumbrances, charges, liens, attachments, mortgage etc.

7. That the borrower’s title to the property is a good title and that there would be reasonable and decent probability of litigation for enforcing security against the borrower in case of need.

(d) Type of Tenure-Freehold or Leasehold Property

If the property is leasehold, the bank/hfc should study the original lease-deed to find out whether onerous clauses such as necessity of obtaining the lessor’s consent before mortgaging.

Requirement for creating mortgages

The intention that the title deed shall be security for the debt is the essence of the transaction. In Heng Moh v. Urn Saw Yeann the managing partner admitted that he had received title deeds from other partner in the capacity of a manager, and the Privy Council held that the delivery of the deeds was a mere partnership transaction, and did not give the managing partner the rights of the equitable mortgage. 80

It should also be enquired that the lease continues to subsist. This can be done by obtaining from the borrower the latest ground rent receipt. In case the lease deed provides the consent to be obtained from lessor, such consent should be obtained prior to creation of mortgage. The terms and conditions of such permission should be

80 (1923) ILR 1 Rang 545, 75b IC 287, AIR 1923 Mad 1.
complied with. If tenants and other persons are in occupation of the property, enquiries should be made from the lessor as to the nature and extent of their interest in the property.

(e) Municipal Rates and Tax Receipts: Govt. dues and Revenue Records
A receipt for the payment of house-tax should be asked for in case of building situated within Municipal limits. Remember that if municipal taxes are not paid, Municipal Authorities have a preferential charge on the property. The borrower should also be asked to produce the latest receipt regarding the land revenues and or any other Govt. dues paid by him.

In case of agricultural land the borrower should be asked to produce certified copies of the latest revenue records. Latest House Tax/Property tax/Lease Money Receipt should be obtained every year and kept on record.

(f) Income Tax Clearance
As per the provisions of the Income Tax Act, 1961 for the purpose of registration of mortgage deed, a tax clearance certificate is required in cases where bank advances a loan of more than Rs. 50,000/- on the security of land or other immoveable property deed is executed for more than Rs. 50,000/- whether property is to be charged as principal or collateral security, a tax clearance certificate is necessary for the purpose of registration and the constituent should be asked to obtain the same. This Section 230-A does not apply to those case which involve registration of documents in which the Govt. is a Transferor.

(g) Valuation Reports
An estimate of the value of the property is usually arrived at by one or more of the following methods:

1. Taking Architect’s or Engineer’s certificate if the property consists of building. In the case of machinery embedded in the earth, the services of special surveyors may have to be requisitioned.
2. Personally inspecting the property.
3. Making enquiries through brokers/agents, neighbours and market or surroundings or business premises.

4. Scrutinizing the valuation certificate issued by a local authority for taxation purpose.

5. Calculation based on net-yield by way of rent. A building occupied by tenants (who are protected by law) will fetch lower price than a vacant building, in case of forced sale.

Some banks/hfcs have nominated values for the purpose of valuation of property. The report in that case should be obtained from them. The valuation can even be done by the valuer in the current panel of income tax/wealth tax department.

In case of plot of land valuation should be obtained from a renowned estate broker. In case of building under construction, the valuation should be done by an approved valuer at different stages of construction for the purpose of insurance and for arriving at the advance value. Insurance cover should be increased corresponding to the progress of construction of the building. In the case of lands situated in the rural areas the valuation should be arrived on the following basis.

   a. At eight times the net post development income from the land.
   b. Comparison with recent sales of similar lands in the neighbourhood.
   c. Valuation certificates given by the village officer.
   d. Enquiries from parties having good knowledge of local land values.

In any case, the bank should make a report quoting interalia the sources/criterion for arriving at his valuation. A copy of this report should be kept with the loan documents.

(h) Permission under Urban Land (Ceiling & Regulation) Act, 1976

This Act received the assent of the President on 17.2.1976 and came into force in various states and union territories. According to the Act, mortgage (equitable or regular) cannot be created in favour of the bank by any person (borrower of whatever constitution, i.e. individual proprietorship, partnership, joint stock companies, H.U.F. etc.) of any urban or urbanisable land with a building to which this act applies, except with the previous permission in writing of a competent authority under the act. If the permission is not refused within 60 days, the permission will be deemed to have been given. This act provides for imposition of a ceiling on vacant land in notified urban agglomerations, for the acquisition of excess vacant land.
After 17.2.1976 if any person has transferred any vacant land even by registered documents and for valuable consideration, he has to prove that the sale was bonafide and the transaction was not a benami.

Every person possessing vacant land in excess of ceiling limits has to furnish necessary statement to the competent authority. All lands held by a person in different capacities and character such as partnership firm, beneficiary of a trust, as a member of H.U.F., or Co-op. Societies etc. shall be clubbed together. The State Govt. can acquire the excess land at reasonable price but it would not exceed Rs. 10/- per sq. metre or Rs. 2 lakhs in all, whichever is less. The Govt. may allot such land to others either for residential purpose or industry.

The Public Trusts, Financial Institution, Banks, Co-op. Societies, Govt. companies etc. possessing even excess land are exempted.

(i) Legal Opinion-cum-Search Reports
Title deeds of the property should be got examined by the bank’s legal advisor on panel in order to ascertain the title of the property and to confirm that the property is fit for regular mortgage/ equitable mortgages at the proposed place. The legal opinion must contain details of the title deeds inspected and should also state whether any permission to mortgage the property is required in terms of the relevant lease deed/sale deed/conveyance deed etc. apart from permission to mortgage under Urban Land (Ceiling & Regulation) Act, 1976, specifying the authorities form whom such permission(s) is are required. Permission will be deemed to have been granted if not refused within 60 days.

In view of the statutory requirement that most of the documents affecting immovable property are required to be registered compulsorily and maintained at the Registered Office for inspection. 82 Before undertaking a search it is extremely important to ascertain the proper Sub-Registrar’s office within whose jurisdiction the property is situated. Inspection of Book No. 1 and Index No. 11 must always be taken.

A search should be got made by the bank’s legal advisor in the registration records for the last 12 years to find out whether there is any previous encumbrance on the

82 The Registration Act 1908, section 51 & 55.
property. The search fee receipt evidencing the making of the search must be obtained from the Legal Advisor and kept on bank’s record along with the search report. The bank should also ensure that all the relevant points covered in the forwarding letter are specifically covered in the legal-opinion-cum-search report. The report should be obtained in duplicate for loan correspondence file and another copy for loan documents file.

The report should be studied by the bank official thoroughly and it should be ensured that bank’s interest is not jeopardised. Points regarding any compliance should be complied with before the creation of mortgage. Likewise, any permission, consent required under any Act should be obtained before creation of the mortgage.

At the time of allowing renewal / enhancement of facilities, a fresh search in the records of the Sub-Registrar/Registrar of Assurances should be made by the bank’s Legal Advisor on panel to verify that no change/encumbrance has been created on the property since the date of the last search report. Relative search fee paid receipt and search report should be kept on record.

(j) Consents

When an equitable or legal mortgage is created, the banker should ensure that the borrower has obtained the requisite consent of the Govt. or other authorities required under law or any contract. Following are few instances where such consent is required to a mortgage:

1. Lease-hold property: If consent of the lessor is a condition precedent to the creation of the mortgage as per lease-deed, it should be obtained.

2. Indian Electricity Act, 2003 : In the case of the company which is governed by provisions of this Act, the previous consent of the State Govt. under section 9(2) of the Act should be obtained for assignment of the license of the Electricity Company of transfer of its undertaking or part therefore, inter-alia by way of a mortgage.

3. Mining rights and mines: The rules framed by the State Govt. (in whose territory the mine is situated) for the section of the mortgage of the mining rights and mines should be scrutinised and followed. In most cases, sanction of the State Govt. is required.
4. A mortgage of a ship, (registered in India) can be made only in the prescribed form under the Merchant Shipping Act, 1903 and in no other form; it is not possible to make a hypothecation of the ship. As per the provisions of the Merchant Shipping Act, 1958\(^{83}\), the sanction of the Govt. of India, Ministry of Transport is necessary before a ship registered in India is mortgaged. The mortgage should be registered with the Registrar of Companies and also with the appropriate Registrar of Shipping with whom the ship is registered. Copies of the sanction of the Govt. of India to create a mortgage are required to be furnished to the Director General of approval of Shipping and Port Registry of the place where the ship is registered.

5. Advances guaranteed by Central or State Govt.: Enquiry should be made whether the borrower has given any undertaking and to alienate the assets belonging to him without the prior approval of the Govt. If so, the approval of Govt. should be obtained prior to creation of the mortgage in bank’s favour.

(k) Insurance

All buildings, their fittings and fixtures and other immoveable properties mortgaged to the bank should always be kept fully insured against the prescribed risks such as fire, riots, strikes, floods etc. Policies must be in the joint names of the mortgagor and the bank as mortgagee with the usual bank clause. The due date of the policy must be properly diarized.

(l) Inspection

Properties mortgaged to the bank/hfc should be periodically inspected and inspection reports kept on record.

(m) Registration

An instrument requires compulsory registration must be presented for registration before an officer competent to register documents (Section 1) of the Indian Registration Act. The real purpose is to secure every person dealing with property against fraud and to maintain a public register.

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\(^{83}\) Merchant Shipping Act 1958, Section 42(1).
As per the provisions of the Transfer of property Act,\textsuperscript{84} where the principal money secured is one hundred rupees or more, a mortgage other than a mortgage by deposit of title deeds (equitable mortgage) can be effected only by a registered deed duly attested by at least two witnesses. The documents should be presented for registration within four months\textsuperscript{85}. If the documents could not be presented for registration owing to urgent necessity or unavoidable accident, another four months are allowed by way of grace but then the document can be registered only on payment of a fine up to the limit of ten times the amount of the proper registration fee.\textsuperscript{86} Documents executed outside India are allowed four months time from date of their arrival in India.\textsuperscript{87}

(n) Attestation

Attestation of a document after its execution is compulsory in case of mortgage. A mortgage deed must be attested at least by two witnesses.

(o) Stamp Duty

The mortgage deed attracts ad-valorem stamp duty. Costs and charges are allowable deductions for the purpose of Income Tax. In case of agricultural advances, co-op. credit societies obtain declaratory charge if the agriculturist does not have title deeds. However, co-operative credit societies including Land Development Banks are exempted from the payment of stamp—duty and registration charges.

(p) Limitation

In case of mortgage the limitation period is 12 years. If the bank wants to enforce the personal covenant against the mortgagor, i.e. to make the mortgagor personally liable, the suit will have to be filed within 3 years of the advance. Limitation period can be validly extended by a letter of acknowledgement of debt and security or by part payment.

J. SECOND AND SUBSEQUENT MORTGAGES

A mortgagor after giving a first mortgage can thereafter create legally a second mortgage or even subsequent mortgages on the property. In this case the second

\textsuperscript{84} Section 59 of the Transfer of Property Act, 1882.
\textsuperscript{85} The Indian Registration Act 1908, section 23.
\textsuperscript{86} Section 25, \textit{Ibid.}.
\textsuperscript{87} Section 26, \textit{Ibid.}. 
mortgagee will rank in priority after first, the third after the second etc. Bankers are not inclined to accept second or subsequent mortgage because the title-deeds do not come in the banker’s possession.

However, if a second mortgage is taken as a security, the banker should give notice to the first mortgage and obtain his acknowledgement and confirmation of the amount due to him. In case of a running account the outstanding balance can go up even after the creation of second or subsequent mortgage and the priority will be postponed to that effect.

For example, K.C. Desai has mortgaged his flat at Borivli to Dena Bank to secure a cash credit limit of Rs. 1,00,000/- while the debit balance was Rs. 50,000/-. New Bank of India having prior notice of mortgage has also advanced Rs. 75,000/- against the security of the same property and gives a notice to Dena Bank. K.C. Desai, afterwards utilizes the full limit of Rs. 1,00,000/- by further drawing upto on cash credit a/c with Dena Bank. The entire drawing upto Rs. 1,00,000/- will receive priority even though Rs. 50,000/- were drawn subsequent to the notice received from New Bank of India. It sometimes so happens that the bankor who has advanced on second mortgage may elect to take over the first mortgage (by paying off the due to the first mortgagee) in order to deal with security effectively.

**SUB-MORTGAGE**

The interest of the mortgagor and of the mortgagee may each be subject of assignment either absolutely or by way of security. The mortgagor may assign his equity absolutely to a purchaser, or he may make a second mortgage of his equity of redemption. The mortgagee may also assign his interest absolutely to a purchaser, or may make a sub-mortgage of his mortgagees’s interest. The Transfer of Property Act does not, however, deal with sub-mortgages. A sub-mortgage does not stand in a higher position than the mortgagee. He is bound by the state of accounts between the mortgagor and mortgagee.\(^{88}\) An assignment of the mortgagee’s interest either absolutely, or by way of sub-mortgage is a transfer of immovable property, and requires registration.\(^{89}\) A sub-mortgage being mortgage requires attestation.\(^{90}\)

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\(^{88}\) *Bhagwati Prasad v. Dullah Singh*, AIR 1939 All 719.

\(^{89}\) *Perumal v. Perumal*, (1921) ALR 44 Mad 196.

mortgage is the mortgage of mortgage. A mortgagee may offer to a bank as security the mortgage in his favour (i.e. his right as mortgagee and not mortgaged property). The bank should in such cases, give a notice to the mortgagor in writing to acknowledge and confirm the amount due to him. The bank should also ask the mortgagor to make repayment (part or full) to him (sub-mortgagee) and not to the original mortgagee. It must, however, be noted that the banker’s recourse to the security is subject to the terms and conditions of the original mortgage deed executed. Bankers are reluctant to accept sub-mortgage except when they find that no better security is available and cover is required for a week advance already made. The banker should ensure following five covenants while getting the charge of mortgage:

The mortgagor has right, interest and title to the property and possesses unequivocal power to transfer the same.

i. Either the mortgagor himself will defend or enable the mortgagee to defend.

ii. Where the property mortgaged is on lease basis, the rent payable under lease has been paid, conditions contained in the lease are complied with. The mortgagor will indemnify the mortgagee against all claims sustained by reason of non-payment of the rent, non-performance of the conditions or contracts.

iii. The mortgagor in case of second encumbrance will pay interest due and accruing due from time to time. He will also discharge the principal money due on prior encumbrance.

iv. The mortgagor will also undertake so long as the possession of mortgaged property is not with the mortgagee (Bank), to pay all the public charges accruing due.

Importance of equitable mortgage

This type of mortgage is most popular among the bankers/hfcs and also among the clients. The reasons are very simple:

i. Lot of stamp duty saved.

ii. Registration not required with the Registrar of Assurances.

iii. Credit of the mortgagor does not suffer because except the banker nobody will know the transaction.
iv. No witness is required.

v. Easy to create—only deposit of title deeds with intention to create a charge is required.

The banker can claim only equitable charge, it has no right of foreclosure, rents and profits.

Difference between Equitable Mortgage & Other Mortgages

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<tr>
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<th>Equitable</th>
<th>Other Mortgages</th>
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<tr>
<td>No deed is required.</td>
<td>Mortgage deed is required.</td>
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<tr>
<td>Registration not necessary.</td>
<td>Registration compulsory.</td>
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<tr>
<td>Generally, stamp duty is not required. Only negligible stamp duty in some States.</td>
<td>Stamp duty is payable.</td>
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<tr>
<td>Deposit of original title deeds is absolutely necessary.</td>
<td>Fresh deed has to be executed as an evidence of mortgage.</td>
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Registration

Legally speaking registration of equitable mortgage is not necessary because it is created by deposit and not by writing\(^91\) and being an oral transaction it is not affected by the law of registration. But it is usual for the deposit to be accompanied by a memorandum in writing.\(^92\) If this writing is the contract of mortgage so that it creates the mortgage it must be registered and oral evidence to contradict it is not admissible.\(^93\) However, if a banker desires, he can register the same. The memorandum of deposit of title-deeds can be registered with the office of Sub-Registrar or Registrar of Assurances. The memorandum inter-alia states the amount as it covers all advances granted or to be granted and that the mortgagor agrees to execute a registered mortgage when required by the bank. It is to be borne in mind that if the memorandum is the soul of deposit or it contains the terms and conditions which are the main essence of the transaction, registration will be absolutely required. But if the memorandum is only a forwarding memo, no registration is necessary.

\(^91\) Shaw v. Foster, (1872) LR 5 HL 32.
\(^92\) Miller v. Madho Das, 23 IA 106.
\(^93\) Pranjivandas Mehta v. Chan Ma Phee, (1916) ILR 43 Cal 895.
Stamp Duty
Where the title-deeds are deposited in equitable mortgage and the memorandum indicates the purpose thereof, the instrument is not an agreement for mortgage and hence does not require stamp-duty.\textsuperscript{94} In some states it attracts little stamp duty but it is negligible as compared to the duties payable on simple mortgage.

REQUISITES OF EQUITABLE MORTGAGE

1. A debt: It may be existing or future. It may also cover the general balance on a running account.

2. Deposit: Delivery of title deeds is a must. Delivery may be actual or constructive. In case the title deeds are already in possession of the banker and more funds are required by the borrower, he may give mere oral consent to treat the documents in possession also for further lending, it would constitute a constructive delivery.

3. Intention: Equity looks at the intention rather than a form. A letter of intention is invariably taken before or after the creation of mortgage indicating his willingness/intention for such mortgage. Mere possession of title deeds by banker does not ipso-facto prove that he has a charge over the property as mortgagee. Since the intention is the essence of the transaction. The existence of such intention must be proved.

What are the title deeds and what are not?
A title-deed to be valid must be properly drafted, signed, stamped and registered in a manner prescribed by the relevant provisions of law.

Notified Towns
The delivery can be made in Bombay, Madras, Calcutta and other notified towns as specified by state Govts. from time to time. Even Taluka headquarters are also included, State Govts. are empowered under Section 58 (f) of the Transfer of Property Act, 1882, to specify by notification in the official gazette where equitable mortgage can be created. The deposit of the title deeds must be made in the notified towns. As long as the memorandum merely confirms an equitable mortgage already created in a

notified town, the registration of the memorandum even outside the notified towns, will be valid.\textsuperscript{95}

The property intended to be mortgaged may be situated at any place in India. It is not necessary that it must be situated in notified towns. In Case of branches situated at place other than ‘notified towns’ the title deeds must be deposited at any of the bank’s branches/Area/Regional/Zonal office or at Head Office. It would be advantageous to the bank and the borrower if such a branch or office is nearer to the branch where borrower’s account is maintained. All the required documents excepting memorandum of deposit of title deeds should be got executed at the Branch where advance is being sanctioned. This Brach will inform the branch/office of the bank of the notified stations of the following.

1. The details of title deeds to be accepted;
2. The details of the owner(s) of the property who will sign the memorandum and will deposit the title deeds.
3. Specimen signature(s) duly verified of the owner(s).

The branch/office of the notified station where the title deeds are deposited should obtain memorandum of title deeds and title deeds from the owner(s) of the property. The details of the title deeds should be kept in safe custody. True copies or photocopies of this document and title deeds along with a certificate that required title-deeds have been deposited, should be sent to a branch where the loan is sanctioned.

**Procedure**

The documents of title to immoveable property must be deposited by the owner or his duly authorised agent or even the agent of the creditor banker. If all the joint owners or partners of a firm cannot attend the office branch in person, one or more of them can be authorised for this purpose.

It is not required that the debtor himself must in person produce the documents and deposit the same in any of the notified towns. Even if the documents are forwarded through the agent of the creditor banker for the ultimate deposit in the notified town, the deposit will be deemed to have been made on the town intended.\textsuperscript{96}

\textsuperscript{95} State Bank of Mysore v. SM Distilleries Pvt & Others, AIR 1993 Kant 359 p.365.

\textsuperscript{96} K.G. Nathan v. Maruthi Rao, AIR 1975 Mad 70 SC; AIR 1965 SC 430.
In case of Limited company any one of its directors or officers, specially authorised by a resolution of the Board of Directors, must attend and deposit the title-deeds. The letter of authority (certified copy) of resolution should be kept on record.

All the title-deeds specified in the legal opinion-cum-search report should be deposited with the bank. The property must have been certified as un-encumbered and fit for equitable mortgage. The formalities, if any, prescribed by the legal adviser in his report must be duly complied with. No receipt should be passed by the bank for the title deeds deposited but if subsequently the mortgagees ask for confirmation of deposit of title-deeds, banks may confirm the same

**Entries**

The concerned bank/hfc officer must make an entry in the specified form or register and witnessed by one or two officers. The practice slightly varies from bank to bank. Among other things the most important aspect to be borne in mind is that the depositor will make it aptly clear that the title-deeds are deposited with the intention to create equitable mortgage (which is described in the entry). This record is admissible in the court of law in case of eventuality. Moreover it is not necessary in law to deposit the entire bunch of title-deeds. It is enough if material documents are deposited. The material title deeds consist of original documents sale-deeds/sale certificates lease deeds. It should be remembered that agreement for sale or for lease are not title-deeds. copies of the sale deeds are also not title deeds. In one case\(^{97}\) it was held that in order to create an equitable mortgage, it is necessary that the documents deposited should show a good title in the depositor. It would suffice if the deeds are material evidence of title and are shown to have been deposited with an intention to create a charge.

**SOME IMPORTANT POINTS**

(a) **Priority**

According to sec. 48 of the Indian Registration Act, 1908 a mortgage by deposit of title-deeds operates against a subsequent legal registered mortgage. The prior mortgage takes precedence over subsequent mortgage. If the subsequent mortgagee wants to invoke Sec. 78 of the act, he must plead and prove the gross neglect on the

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\(^{97}\) *Usha Rice Mills Co. Ltd. v. United Bank of India, 82 CWN 92, 1978.*
part of the prior mortgagee whereby he was induced to advance money on the security of the mortgaged property. The onus of proof is on the subsequent mortgagee not only to set up the plea but should establish the gross neglect.  

(b) Land in cantonment Area
Equitable mortgage of property constructed on such land is not a good security. Only legal mortgage should be created.

(c) Limited Company
The charge should be registered within 30 days with Registrar of Companies under Section 125 of Companies Act, 1956.

(d) Conversion into Legal Mortgage
If an equitable mortgage is being converted into legal mortgage, a further search at the office of Sub Registrar/Registrar of Assurances and in the case of Limited Company also at the office of Registrar of Companies should be carried out.

(e) Pendency of Suits
During the in any Court having authority within the limits of India (excluding the State of Jammu and Kashmir) in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose. For the purposes of this section 52 of the Transfer of Property Act, 1882, the pendency of a suit or proceeding is deemed to be commenced from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof.  

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99 Transfer of Property Act 1882, section 52.
Flat in Co-operative Society

In a co-operative housing society, a member does not own anything. All properties are purchased by the co-operative society from the contribution of members. The property is owned by the society and a member has the authority to use only particular portion in the building. No doubt, a certificate is issued to a member but it is not a document of title to immovable property and hence no equitable mortgage can be created by deposit of such certificates. Since the interest of the member cannot be specified, there is no specific property which can be mortgaged.

Second Equitable Mortgage

According to one school of thought, the right of the mortgagor to possess the title-deeds is lost by deposit with the creditor. He is left with only remedy of redemption and can get back the title-deeds by discharging the mortgage-debt. There is also no possibility of fulfilling the essential ingredients of custody and deposit of title-deeds by the debtor while creating a second equitable mortgage.

Another school of thought

They subscribe the view point that there can be a second equitable mortgage by application of constructive recovery of the title-deeds as laid down by the Supreme Court.\(^\text{100}\)

There is an element of uncertainty and hence the bankers will have to take a calculate risk, while accepting second equitable mortgage with the prior mortgage acting as an agent while the first mortgage is still subsisting. In practice, however, bankers do agree on a second mortgage by deposit of title-deeds and accept it as security for their advance on pan pash terms. No documents or title deeds etc. should be permitted to be handed over to the constituent or mortgagor till the advance is adjusted in full.

Release

When the advance is repaid in full, the deeds should be returned to the depositor against his acknowledgement in the Title Deeds Register. If notice of the second mortgage has been received, the written consent of the second mortgagee should be obtained for their release. If the property is mortgaged by a limited company, a memorandum of satisfaction of charge should also be filed with the Registrar of

\(^{100}\text{K.I. Nathan v. Marutl Rao, AIR 1965 SC 430.}\)
Companies. Before the release of deeds, it should be ensured that security of title deeds is no more needed by the bank for any other debts or obligation of constituents as a mortgagor principal debtor or guarantor etc.

**Equitable Mortgage of Property-Inter Branch Transfer of Accounts**

Banks are aware that equitable mortgage of immovable property is created by deposit of title deeds of the property (with an intention to create a security thereon) at the branches/offices in the “Notified Towns” only. It is therefore, necessary that the title deeds, deposited at the particular branch/office of the bank (in the NOTIFIED TOWN) for the purpose of creation of equitable mortgage, continue to be kept at the said branch; office till the loan/advances is adjusted in full.

Therefore, if at the request of the constituent or otherwise, any borrowed account secured by equitable mortgage of property is transferred to any other branch of the bank, the equitable mortgage, created in bank’s favour, should not be disturbed and the title deeds etc., should continue to be kept at the branch/office where these were originally deposited by the owners of the property.

The above procedure should be adopted for all loans and advances where equitable mortgage of immovable property constitutes main or collateral security, including facilities sanctioned to members of the bank’s staff Housing Loan Scheme.

**Equitable Mortgage of Immoveable Property and Hypothecation of Movable Property**

An equitable mortgage can be created only in respect of immovable properties, such as land and building and fixed machinery imbedded into the ground. These fixed assets cannot in law, be hypothecated. Hypothecation charge can be created only in respect of moveable assets (such as goods or commodities). Moveable assets cannot, in law be equitably mortgaged. It is very difficult in practice to distinguish between immovable machinery and moveable machinery. It is therefore, considered necessary that in any advance against land, buildings, fixed machinery, plant and fixtures imbedded in the ground should be equitable mortgaged and moveable machinery and plant should be hypothecated.

It may, however something happen that (a) the land or building does not belong to the constituent or (b) although that land and buildings belongs to the constituent, they are
not intended to be charged to the bank, but only the machinery installed is to be charged. In such cases, it is necessary to have a regular mortgage of all the machinery and plant, both immoveable and moveable. Mere hypothecation of the moveable machinery could cause difficulties later on as to what is moveable and what is not moveable machinery.

The detail of machinery required to be mortgaged must be mentioned in the memorandum of deposit. Original invoices of such machinery should form part of little deeds which must be deposited with the bank and also sanctioned in the memorandum of deposit along with the title deeds of the property.

**Power of Attorney (POA): Buy or not buy?**

It is a document under which one person known as “Principal” or “Donor” grants an authority to another person, known as “Agent”, “Attorney” or “Donee,” to do or undertake the acts, deeds and things specified in the document, on behalf of the Principal or Donor. It is called as “Mukhtaar Nama” in Urdu. With respect to property transactions under a Power of Attorney, the seller (donor) of the property gives the buyer (donee) the possession of the property and the power to deal with the property as he/she (the buyer) may deem fit. In some areas like the National Capital Region of Delhi, many property transactions were done on the basis of power of attorney, in cases where otherwise property cannot be sold due to certain restrictions.

**Rules & Guidelines Associated with POA**

The rules and guidelines related to POA are described under various provisions of the Indian Evidence Act, 1872; Indian Contract Act, 1872; Power of Attorney Act, 1882; Indian Stamp Act, 1899; and Registration Act, 1908. These are summarized as follows:

a. The Power of Attorney can be specific or very general. You can authorize just one task or, you can give your agent the power to do everything you can do for yourself.

b. The duration of Power of Attorney may continue to be in force until the expiry date mentioned in the document or it is revoked or by death of either party. A registered power of attorney can be cancelled by a cancellation deed. Applicable stamp duty required to be paid while doing so.
c. A Power of Attorney need not be registered except in case of sale of leasehold immovable property. However, some states have recently enacted amendments to rules stipulating registration of POA for registration of transactions involving sale or lease of immovable property. As per Registration Act, if a Power of Attorney assigns power to present documents for registration then it must be executed before and authenticated by the Registrar or the Sub-Registrar. If the Registration Act is not in force at the place where the executant resides, then an authentication by a Magistrate is necessary.

d. If a Power of Attorney is registered outside India, a notary public, court judge, magistrate of that country, or Indian consulate or a representative of central government must authenticate it.

e. It is the duty of the agent, the Power of Attorney holder, to act honestly and faithfully on behalf of his principal. He is legally bound to perform and work according to the wishes of the principal.

f. Registration of Power of Attorney provides authentication to the Deed of Power of Attorney. In India, where the Registration Act, 1908 is in force, the Power of Attorney must be authenticated by a Sub Registrar only, when a person signs the document and his attorney presents/admits execution. Power of Attorney has to be attested by two or more adult independent witnesses who are of sound mind. If a Power of Attorney has been registered outside India, it is required to be stamped by the Collector within 3 months from date of its receipt in India.

g. It is also an important document required by the Banks/HFIs for processing home loans, especially in case of NRIs. Since they are not based in India, the HFIs need a representative in India ‘in lieu of the NRI’ to deal with.

h. The courts have held that if a sale deed is signed by the power of attorney holder on behalf of the owner and presented for registration, the power of attorney need not be authenticated by way of registration. However, as stated earlier some states have amended the rules stipulating registration of POA for registration of sale or lease transaction for immovable property. If the sale deed has been signed by the owner and presented for registration by the power of attorney holder, then the power of attorney should be registered.
Advantages/Disadvantages

What constitutes ownership is a legal subject and has been the subject matter of much litigation in courts. With the introduction of Section (iiib) of the Income Tax Act, the power of attorney holder is the deemed owner of the property and eligible for the tax benefits. The power of attorney may give the power to the buyer to further provide such power of attorneys to other people (for other buyers in the future). Most banks / HFCs do not encourage such transactions, since the ownership itself is not transparent in such a transaction. Such transactions are normally entered into to save on charges payable to the development authorities as well as stamp duty and registration charges. Home loans to buy such properties may be available from a restricted list of home loan lenders, who may also charge higher interest rates. Buying property becomes more complicated if it is being done through a chain of power of attorneys. In Delhi, for instance, most Delhi Development Authority flats were earlier sold with a condition that 50 per cent of the difference between the first purchase price and the re-sale price had to be given back to the government. To get around that, power of attorney sales became common in the city. But power of attorney sales need to be taken up with extreme care. An irrevocable power of attorney must be accompanied by a will, which names the buyer as the person who will inherit the property. That seems simple enough. But it gets complicated if the property is sold several times. Each person selling the property must also hand over an irrevocable power of attorney, along with the will of the original and subsequent owners as well as his own. So if you end up purchasing a property that has trail of several Power of Attorneys, you will also receive a large number of will.

What needs to be done?

It is advisable to stay away from a property involving a long chain of power of attorneys. The heirs of any of the previous owners can challenge the wills, creating problems for the present owner. On the other hand, if it’s the first or the second power of attorney, then you can track the trail to ensure that there will be no complications in future. However, it’s best to consult a lawyer in such a case. Also, you must insist on furnishing the original title deed and other documents evidencing allotment of property in the favour of original seller and payments for the same.
Registration of Sale Agreement

Any property that is sold, bought or rented, under certain circumstances, requires to be registered inclusive of:

a. A valuable sale or purchase of immovable property.

b. If a property is rented for a period of more than 11 months, then the agreement needs to be registered.

When an agreement is made for a valuable sale and purchase of an immovable property it is called a Sale Agreement. This is an agreement that strictly defines the conditions governing the sale of an immovable property wherein the parties have finalized the terms of sale and purchase. When the parties involved in the transaction of an immovable property comply with the clause of sale and purchase of the said property then they enter a Sale Deed.

The Sale Agreement/Deed is an instrument executed between two parties and the two parties are defined on the first page of the Agreement/Deed. The two parties include the current owners of the land and the persons who are buying the land. Click on the below link to view sample sale/lease deeds.

1. Purchase of property from a Co-operative Society
2. Sale of an independent house
3. Sale of freehold property
4. Sale of leasehold property
5. Sale of mortgaged house

The Sale Agreement/Deed is registered with the Registrar as specified by the Registration Act, 1908. Stamp Duty is also levied by the State Government for registration of a Sale Agreement/Deed and it varies for each State. Generally, a nominal Stamp Duty is payable for registration of a Sale Agreement which may be fixed. Stamp Duty payable on the Registration of a Sale Deed, on the other hand, is usually a percentage on the value of the said property. The procedure for registration of Sale Agreement/Deed also varies from state to state but a general procedure is given below.

General Procedure for Registration of Sale Agreement/Deed

a. Steps.

b. Procedure for registering a sale deed.
c. Check for encumbrances at the office of Sub-registrar of Assurance.

d. Conduct a search of the property in the Registry and the Revenue Office, not noting the location details of the property and the time period to be checked.

While investigating the title it should be verified that:

i. Legal ownership document is in the name of the owner, issued by the Revenue Record Department under the seal of the Tahsildar,

ii. On the date of purchase the title of the owner for the preceding 30 years (preferably) shows no mortgage or other encumbrance as still existing on the date of purchase,

iii. Property is transferable and heritable,

iv. Transferor is competent and/or authorized to transfer the property,

v. Transferee is qualified to be a transferee,

vi. Object or consideration for the transfer is lawful,

vii. Transfer has been made and completed in the manner prescribed by law,

viii. Property being sold is free of restrictions for sale under the Urban Land (Ceiling & Regulation) Act, 1976 and a Clearance Certificate for the property has been issued by the U.L.C. (Urban Land Ceiling) Authorities.

ix. All papers with regard to payment of taxes, electricity bills and water bills need to be checked.

**Preparation of the final Sale Deed by the purchaser’s lawyer**

a. The lawyer prepares the final Sale Agreement/Deed and then engrosses the document on green paper leaving the date and place blank. This document is then submitted for stamping.

b. Payment of Stamp Duty on the final Sale Agreement/Deed

c. Deposit the stamp fees at the district headquarters. A receipt is issued and the first page of the printed Sale Agreement/Deed marked with the stamp duty received. This printed Sale Agreement/Deed with stamp duty details will then be executed. Some States and UTs such as Maharashtra and Delhi have introduced e-payments for paying stamp duty. E-payments can be made at the designated bank/institution.
d. Execution of the final sale deed in the presence of witnesses

e. The Sale Agreement/Deed is signed by both parties in presence of the number of witnesses authorized to be present. The document is then executed.

f. Submit document to the local office of the Sub Registrar of Assurances

g. The Sale Agreement/Deed should be typed/printed and then submitted with the Office of Sub Registrar for registration. Once the document is registered, a distinct document number is assigned to that document. The record of registration of that document is kept in the office of Sub Registrar of Assurance.

h. The due registration fees is to be deposited and the documents to be submitted to the Sub-Registrar in accordance to the Registration Act.

i. Apply to the Urban Local Body to the title of the property.

j. After receipt of the registered title deed, the purchaser applies to the Municipal Authority seeking mutation of the title of the property in its favour. The authorised signatory may have to submit the duly signed application along with the affidavit, indemnity bond, and a certified/notarised copy of the registered title deed.

After the assessment of the request for mutation, the Municipal Authority decides the value for levying tax on property and then issues a letter of mutation in favour of the purchaser.

**Development and Collaboration Agreement**

**Development Agreement**

A Development Agreement in common parlance denotes an agreement between two entities to develop land for a specific purpose. It is an agreement to develop a parcel of land for personal or commercial use. The Development Agreement can be between:

Owner and Developer: An owner of a piece of land (an individual or a company) can enter into an agreement with a developer to construct residential or commercial premises on land owned by the former, with the developer getting a right to sell the whole or part of the building to be built. The consideration payable to the owner in this case may be in the form of a lump sum (to be paid upfront or in instalments) or
alternatively in the form of a share in the property to be built or a combination of payment plus part of the property to be built.

**Sample of a Development Agreement between owner and developer.** Development Agreements are resorted to mainly in cases where the developer does not want to block huge funds in acquiring land for executing a project. They are also preferred when the owner of the land does not want to sell whole of the property and wants to retain part of the property for his own use after development. Development Agreements are also common when the owner wants to enjoy part of the profits expected from the sale proceeds of project rather than being satisfied with enjoying the profits to be derived from a simple sale of his land. Development Agreements also lead to tax gains through deferment of income tax payable.

Government and Developer: Quality infrastructure is a pre-requisite for the economy to achieve a higher growth on a sustained basis. In order to achieve this, the Planning Commission of India has estimated that the total investment in infrastructure has to increase from 4.5 per cent to around 7.5 per cent of the G.D.P. in the 11th Five Year Plan (2007-2011). Hence, the requirements are enormous and are not likely to be met from the public sector alone. Recourse to private sector is, therefore, essential for sustaining the growth momentum. Thus, Public Private Partnership (PPPs) agreements are being encouraged as the preferred mode for execution and operation of infrastructure projects.

The Government of India has taken measures to create enabling framework for PPPs by addressing issues relating to policy and regulatory environment. Progressively, more sectors have been opened to private and foreign investment, levy of user charges is being promoted, regulatory institutions are being set up and strengthened, fiscal incentives are given to infrastructure projects, standardised contractual documents including the Model Concession Agreement are being notified, and approval mechanism for PPPs in the Central sector has been streamlined through setting up of PPP Appraisal Committee (PPPAC).

The PPP projects may be proposed by the Central Ministries, State Governments or Statutory Authorities (like Municipal Authorities and Councils) which own the underlying assets. The PPP project should be from one of the following sectors: roads
and bridges, railways, seaports, airports, inland waterways, power, urban transport, water supply, sewerage, solid waste management and other physical infrastructure in urban areas, and infrastructure projects in Special Economic Zones. For example, if a state highway has to be developed by the State Government, it can issue a notice and invite tenders from developers for construction of the highway. The developer who is awarded the tender will enter into a Development Agreement with the State Government. The agreement could be on BOT (Build, Operate and Transfer) basis or BOLT\textsuperscript{101} basis. Under these arrangements, the developer gets to receive annuity from the government over a period of time in consideration of developing the necessary infrastructure (e.g. road) and maintaining/operating the same over a period of time. Alternatively, the developer gets paid only through collecting toll from the users at the agreed rates over a specified number of years. The later model is resorted to for easing the resource constraints faced by the governments. At times this model is slightly varied, entitling the developer to receive the annuity as well as collect a toll from the users at an agreed rate for a specified period. This varied model is resorted to in cases where the project cost is high and there are uncertainties about the likely revenue accruals through toll collection in view of uncertainties in the expected number of users of the proposed project. There are also very sound projects where the developers pay the government specified amount of annuities over an agreed period through collection of tolls for a specified number of years after completing the project. The revenue stream expected in such projects is so high that a developer gets adequately compensated through extra amount of toll collected over and above the annuity payable to the government. On the other hand, the government not only gets to complete an infrastructure project without incurring capital cost, but also gets paid for such projects.

Sample Agreement between Developer and Government

Collaborative Agreement

Agreements made between two or more entities to develop, sponsor, maintain, manage, etc., a project are often referred to as Collaborative Agreements. Collaborative Agreements are formed with the objective of achieving a common goal

\textsuperscript{101} Build, Operate, Lease and Transfer.
wherein all entities involved in the collaboration make a profit. Shared decision making and accountability to each other are some of the aspects of Collaborative Agreements. A good example of such projects are ones wherein reputed developers have teamed up with foreign entities renowned for their town planning/design skills to develop large projects so as to market their projects in a competitive market at remunerative rates.

These agreements can be between:

1. Two or three companies/entities, for e.g. one having large orders which if executed alone would stretch its existing resources/business model, another throwing in its spare resources for execution of the order and another bringing in its design and technical capabilities.
2. Landowner and developer.
3. Foreign company and an Indian company.
4. Such collaborative arrangements are also common these days so as to bid for very large projects by coming together of one or two financial institutions and one or two engineering companies efficient in managing large contracts to form a consortium.

Collaborative Agreements address payment procedures and administrative issues. The key features of a Collaborative Agreement is the variable that addresses all eventualities and circumstances, provides comprehensive provisions such as proprietary rights and license agreements, etc., as per the needs of the collaborative entities. Division of revenue/profit is also agreed upon in these agreements. Dispute resolution mechanism is also duly covered in these agreements.

Registration of Agreements

1. Development Agreements or Agreements to Sell can be registered with the appropriate authorities of the State Government under the Registration Act, 1908. Benefit of entry into Book-1 maintained at the Registrar’s office can be availed. Such entry will ensure that there is a public notice of these documents and their contents. Encumbrance certificates, if any, can be obtained on the immovable property as there will be entries recording the execution of these documents.
2. General Power of Attorney (GPA) given by the owner to the developer can also be registered and there will be a public notice on the GPAs. The total cost of stamp duty and registration fee payable on these documents will depend on the kind of powers given to the PA holder to deal with the property concerned. It should also be noted that the stamp duty payable on a Development Agreement is very high in case it is observed that sweeping powers are given to the developer to deal with the property under the guise of Development Agreement.

3. Any disputes arising between the developer and individual/company/Government are covered by the Indian Contract Act which is a Central Act and is applicable throughout India. It has to be borne in mind that Banks and Housing Finance companies normally decline to finance houses bought by individuals in buildings developed under developmental rights and on land held by PA holders till the time the owners have been fully paid off. Similarly, developers will find it hard to obtain bank finance for their projects to be executed on land covered by such Development Agreements.

**Development Agreement vis-a-vis construction contract**

Development Agreements, broadly speaking, are agreements between the owners of land/building and the developers to construct/reconstruct large building complexes. The agreements are of the nature of joint venture between the two in which the owner contributes his share by way of the development rights existing on the land, and allows the developers to load Transfer of Development Rights (TDR) as Floor Space Index (FSI) by procuring Development Rights Certificate (DRCs), and use the same as per regulations. Apart from procuring DRCs, the developers also contribute by way of cost to be incurred in construction and construction-related activities, manage the construction work and carry out all activities necessary and incidental to such work. The two collaborators to the agreement are generally compensated by a sharing arrangement in which the product i.e., the constructed space is distributed between the two.

The arrangement is a variant of the contract agreement in as much as the person undertaking the actual construction work is compensated not in terms of fixed agreed
monetary consideration but in terms of allotment of some FSI which he is entitled to construct on his own, hold it as his own, and dispose it in manner suited to him, subject to the terms and conditions stipulated in the Development Agreement. It is similar to the contract arrangement in so far as it relates to constructed area to be handed over to the owner except for the difference that the consideration is received by the developer not in money but in term of constructed area and/or use of some percentage of TDR entitlement which can be loaded on the property of the owner. The arrangement can also be distinguished from a joint venture agreement in so far as the two parties join together not to earn profit arising therefrom but to share the fruits in terms of the space constructed as a result of such activities. There is no profit worked out from the venture as such. The two parties arrive at their respective profit on the basis of their consideration and the benefit derived as a result of the agreement. Another distinguishing feature of Development Agreement is the fact that the property viz. the land/building continues to remain the property of the owner in the property card. What is given to the developer is the right of development to exploit the percentage of development potential of the area to be kept by him as free sale area which he is entitled to dispose of and make profit therefrom. This is clearly stated by the Bombay High Court in *Chaturbhuj Dwarkanath Kapadia Vs. CIT* when it observed that, “the object of entering into a Development Agreement is to enable a professional builder/contractor to make profits by completing the building and selling the flats as a profit. The aim of these professionals is only to make profits by completing the buildings and therefore, no interest in the land stands created in their favour under such agreements”. Such agreements are only a mode for remunerating the builder for his services of constructing the building as stated in *Gurinder Developers v. Kurla Konkan Niwas Co-operative Housing Society*. 

**Repayment**

The borrower has to repay the loan amount with full interest failing which the lender is having option to take legal action in the Court of law besides initiating action under SERFACIE Act where there are provisions to favor lender for full recovery of due amount through an easy process. Banks and financial institutions which are

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102 260 ITR 491.
designated as approved agencies under financial institution category appoint recovery officers under the Act. The lender gets the house/flat auctioned for recovery of its dues.

In one of the case\textsuperscript{104} it was decided that State Financial Corporation has every right to sell property of defaulting unit limited to property mortgaged.

**Closure of loan account**

Once the repayment is fully made the account gets automatically closed. However, it is better for the borrower to get a no dues certificate from the lender against the full and final payment.

**Return of the documents**

Once the loan account is closed the documents are automatically released by the lender. However, the borrower has to submit an application to get back the loan documents in original. In addition to the same borrower must ask a discharge certificate from the lender to get the charged removed from the Registrar Office, if any created by the lender on the borrower’s property.

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\textsuperscript{104} M/s Omni Textiles Anr. v. State of U.P. & Ors, AIR 2008 SC 2177.