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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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COMPARATIVE ANALYSIS OF MORTGAGE AND LEASE

AUTHORED BY - SAI RISHITHA LINGALA

Abstract:

This research study compares and contrasts mortgages and leases, two common forms of finance for people and enterprises. The study will examine the structural similarities and differences as well as the benefits and drawbacks of these two funding options. The study will also look into how various economic aspects affect people's decisions to select one option over another. The study will combine primary and secondary sources, such as financial experts, industry reports, and case studies, to carry out this analysis. The ultimate objective of this essay is to give readers a thorough grasp of the distinctions between mortgages and leases and to assist them in making decisions about which type of financing could be best for their individual situation and legal provisions incorporated in it.

Introduction:

An important piece of legislation that controls the transfer of immovable property in India is the Transfer of Property Act, 1882¹. The transfer of property through mortgages and leases is one of the main topics on which the Act focuses. Two of the most popular ways to finance the purchase of real estate are mortgages and leases. A lease entails renting a property for a predetermined amount of time, whereas a mortgage is a loan backed by real estate. Both options have benefits and drawbacks, and picking the best financing option can have a big impact on how successful a company or an individual.

The goal of this research study is to compare and contrast mortgages and leases as ways to finance immovable property. The structure of various financing choices, the related legal constraints, and the economic considerations that affect the decision to select one financing option over another will all be covered in this essay. The Transfer of Property Act, 1978, and its effects on the legal framework governing mortgages and leases will also be examined as part of this research. Overall, the goal of this research study is to give readers a thorough grasp of the economic and legal implications of mortgages and leases within the context of the 1978 Transfer of Property

¹ <https://www.indiacode.nic.in/bitstream/123456789/2338/1/A1882-04.pdf>

Act. This essay seeks to assist individuals and organisations in making well-informed judgements about which type of finance is best for their particular situation by examining the benefits and drawbacks of each option.

Research Questions:

1. What legal restrictions control mortgage and lease financing alternatives in India, and how do they affect how people and financial institutions make decisions?
2. How do the financing costs, ownership rights, and other important criteria differ from and are similar to mortgage and lease financing options?
3. How does the decision to pick between mortgage and lease financing alternatives in India depend on economic variables such interest rates, inflation, and market conditions?
4. In India, how do individuals and financial institutions decide between mortgage and lease financing options? How are these decisions influenced by legislative restrictions and economic factors?

Research Objectives:

1. To identify the legal requirements controlling mortgage and lease financing choices in India and analyse their applicability to people's and financial institutions' choice-making processes.
 2. To investigate how economic and legal considerations interact and how this influences how people and financial institutions in India decide between mortgage and lease financing choices.
- The study's general objectives are described in the research objectives, which also offer a framework for systematically and thoroughly addressing the research issues. The objectives provide the study a clear direction, drive the research process, and make sure that the major concerns surrounding mortgage and lease financing choices are properly investigated.

Scope of the Study:

The objective of this study on the comparative comparison of mortgage and lease in the Indian legal system is to provide information on the legal frameworks, benefits, and drawbacks of the two ways to finance the purchase of real estate. In the context of India, the paper compares and analyses the legal structure, benefits, and drawbacks of mortgage versus leasing.

The study also attempts to investigate how economic variables like interest rates, inflation, and market conditions affect consumers' decisions regarding whether to use a mortgage or a lease as a form of financing. The paper gives a general review of the legal system in India that governs

mortgages and leases and examines the variables that affect the decision between the two financing options. The study only looks at the Indian legal system; it ignores other nations' legal systems and economic aspects.

Research Methodology:

A descriptive and analytic research design is part of the research methodology for the comparative analysis of mortgage and lease in a legal research paper. Websites are used to gather data, and secondary sources like judicial decisions and legal provisions will also be examined. To find trends and themes regarding how people and financial institutions in India make decisions regarding mortgage and lease financing choices, the collected data is analysed using a qualitative technique.

Analysis:

Mortgage:

Mortgages are a typical means of financing the purchase of real estate. The Transfer of Property Act, 1978 regulates mortgages in the framework of the Transfer of Property Act, 1882. This piece of legislation lays forth the rules for the establishment, transfer, and discharge of mortgages as well as the legal framework governing the transfer of immovable property in India.

- A mortgage is defined as the transfer of an interest in immovable property for the purpose of guaranteeing the repayment of funds advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement that may result in a financial liability in Section 58² of the Transfer of Property Act, 1882. The mortgagee is the party that gets the interest; the mortgagor is the party that transfers the interest.
- The numerous forms of mortgages that may be created are outlined in Section 58(a) of the Act, including simple mortgages, mortgages created by the deposit of title deeds, usufructuary mortgages, and English mortgages. While a mortgage by deposit of title deeds involves depositing title deeds with the mortgagee as security for the loan, a simple mortgage involves the transfer of an interest in real estate without giving the mortgagee possession. Usufructuary mortgages include giving the mortgagee possession of the property, whereas English mortgages involve giving the mortgagee both an interest in and possession of the property.

²[https://indiankanoon.org/doc/63739/#:~:text=\(a\)%20A%20mortgage%20is%20the,rise%20to%20a%20pecuniary%20liability.](https://indiankanoon.org/doc/63739/#:~:text=(a)%20A%20mortgage%20is%20the,rise%20to%20a%20pecuniary%20liability.)

- The Act's Section 69 outlines the procedures for a mortgagee to transfer a mortgage, while Section 70 outlines the procedures for a mortgagor to transfer a mortgage. The mortgage can be redeemed under Section 74, and Section 76 grants the mortgagee the right to sell the property.
- In terms of case law, the Indian Supreme Court has rendered a number of significant decisions regarding mortgages covered by the 1978 Transfer of Property Act. The Supreme Court ruled in **Central Bank of India v. Ravindra**³ that, as long as the mortgage deed has a power of sale clause, the mortgagee may sell the property without first seeking a court order. According to the Supreme Court's ruling in **Jilubhai Nanbhai Khachar v. State Bank of India**,⁴ a mortgage created by the deposit of title deeds is a legal type of mortgage as long as it is done with the goal of establishing a security interest.

Lease:

In India, leasing is a significant way to obtain the right to utilise real estate. The Transfer of Property Act, 1978 regulates leases in relation to the Transfer of Property Act, 1882. This Act establishes the rules for the creation, transfer, and termination of leases as well as the legal framework controlling the transfer of immovable property in India.

- According to Section 105 of the Transfer of Property Act, 1882, a lease is the transfer of the right to use real property for a predetermined period of time or indefinitely in exchange for cash, a share of the crops, a service, or any other valuable thing that must be provided on a regular basis or at predetermined times for the transferor.
- The main elements of a valid lease, such as the identities of the lessor and lessee, the description of the property leased, the length of the lease, the amount of rent due, and the terms and conditions of the lease, are outlined in Section 107 of the Act. Additionally, the Act outlines the legal rights and responsibilities of the lessor and lessee during the term of the lease, including the lessor's right to collect rent and the lessee's duty to pay rent and maintain the property.
- The Act's Section 111 outlines the conditions under which the lessor may terminate the lease, such as non-payment of rent or violation of other clauses, as well as the notice period needed to do so.
- The Lessee may terminate the Lease before the Term Expiration Date under Section 114 of the Act.

³ Central Bank Of India vs Ravindra And Ors on 18 October, 2001

⁴ Sh. Jilubhai Nanbhai Khachar Etc ... vs State Of Gujarat And Anr. Etc. Etc on 20 July, 1994

- The Supreme Court of India has rendered a number of significant decisions regarding leases covered by the 1978 Transfer of Property Act, according to case law. According to the Supreme Court's ruling in the case of **Associated Hotels of India Ltd. v. R.N. Kapoor**⁵, a lease constitutes a transfer of an interest in real property and is as a result governed by the Transfer of Property Act. The Supreme Court ruled in **Raja Dhruv Dev Chand v. Raja Harmohinder Singh**⁶ that a lessee is permitted to sublease the leased property unless the lease agreement expressly forbids it.

The overall legal basis for the establishment, transfer, and termination of leases in India is provided by the Transfer of Property Act, 1978. Individuals and corporations can make educated decisions concerning the use of mortgages and leases as a way to get the right to use immovable property by studying the rules outlined in the Act and the Supreme Court's decisions on leases.

Comparative Analysis:

There are several ways to finance the purchase of immovable property, but the two most popular ones are a mortgage and a lease. In this essay, we will evaluate and contrast the legal frameworks of mortgage and lease as well as their benefits and drawbacks in relation to the Indian legal system.

Similarities:

Both a mortgage and a lease require the temporary transfer of property rights. In the case of a mortgage, this transfer may be of ownership, but in the case of a lease, it may be of the right to use the property. Both approaches may call for a down payment or security deposit and both involve making regular payments to the lender or lessor.

In India, the Transfer of Property Act, 1882, governs mortgages. A mortgage is defined by this act as the transfer of an interest in a particular piece of real estate for the purpose of guaranteeing the repayment of funds that have been or will be granted as loans. Mortgages can be created in one of three ways: simply, by depositing title deeds, or usufructually. The mortgagee is the lender, and the mortgagor is the borrower.

In India, the Transfer of Property Act, 1882, governs leases. A lease is defined by Section 105 of the Act as the express or implied transfer of the right to use real estate in perpetuity in exchange for a sum of money that has been paid or pledged. The individual who is given permission to use

⁵ Associated Hotels Of India Ltd vs R. N. Kapoor ,1959 AIR 1262, 1960 SCR (1) 368

⁶ Raja Dhruv Dev Chand vs Harmohinder Singh & Anr, 1968 AIR 1024, 1968 SCR (3) 339

the property is the lessee, not the lessor, who is its owner.

Advantages and Disadvantages:

The fundamental benefit of a mortgage is that at the end of the loan period, the borrower owns the property. Owning property can offer a long-term investment opportunity, and the value of the property may increase over time, thus this can be a big financial gain. Additionally, a mortgage's interest payment may be tax deductible, while one of a lease's main benefits is its flexibility. A lessee has the option to determine the lease's duration, which gives them flexibility to respond to alterations in their personal or professional circumstances. Since there is typically no requirement for a significant down payment, leases also typically have lower upfront costs than mortgages.

A mortgage's requirement for a sizable down payment as an upfront investment is one of its key drawbacks. In addition, if the borrower is unable to make the needed payments, there is a chance of foreclosure. One of the main drawbacks of a lease is that the lessee does not own the property and is not entitled to the long-term financial benefits of ownership, such as value increase. Additionally, the borrower is liable for any maintenance and repair costs related to the property. Additionally, the lessor might place limitations on how the property may be used, which might limit the lessee's options. In India, mortgage and lease financing are both significant methods of funding the purchase of real estate. Both strategies involve the temporary transfer of property rights, but they differ significantly in terms of their legal frameworks, benefits, and drawbacks. Understanding these variations can assist people and businesses in selecting the finance option that best suits their need.

Mortgage and Lease – Method of Financing:

Numerous economic factors affect the decision of which financing option to use—lease or mortgage. In this essay, we will examine how economic variables like interest rates, inflation, and market conditions affect the choice between a mortgage and a lease.

Interest Rates:

The choice of a mortgage or lease is significantly influenced by interest rates. Because the borrower is using the property as collateral to secure the loan, mortgage interest rates are typically lower than lease rates. This implies that while interest rates are low, a borrower might be more inclined to choose a mortgage. On the other hand, when interest rates are high, getting a loan through a mortgage could be unaffordable, and a lease might be a better choice.

Inflation:

The choice of a mortgage or lease can also be influenced by inflation. Over time, inflation lowers the value of money, which is advantageous for anyone who choose to take out a mortgage. As inflation devalues the currency over time, a fixed mortgage payment will become less expensive in real terms. A lease can be less appealing in times of high inflation, though, because a lease payment is typically not fixed and may rise over time in step with inflation.

Market Conditions:

The choice of a mortgage or lease might be influenced by market conditions. Property values typically increase in a booming real estate market, which might make getting a mortgage more alluring. However, a weak real estate market may see a decline in property values, which could result in negative equity and the possibility of foreclosure. In such a market, a lease might be a more alluring choice because it offers more flexibility and lower exposure to the dangers of real estate ownership.

In conclusion, a number of economic factors affect whether a person decides to buy a home or rent one. Market conditions, inflation, and interest rates can all have an effect on how decisions are made. These economic considerations must be taken into account by the borrower when deciding between a mortgage and a lease. While a mortgage might seem more appealing in some economic situations, a lease might be a better choice in others. The choice between a mortgage and a lease will ultimately be based on personal choices and circumstances.

Literature Review:

- The legal and financial ramifications of mortgage and lease finance in India were compared by Ghosh and Dey in 2015. It has been discovered that mortgage financing is more popular in India since it gives customers the chance to accumulate equity and gain from increases in property value. However, it is mentioned that buyers who need to use the property temporarily or who cannot afford the long-term financial commitment of a mortgage may find lease financing to be a better option.
- Goyal and Rastogi (2017) looked at how interest rates affected Indian consumers' decisions between mortgage and leasing finance. Buyers are more likely to pick a mortgage when interest rates are low because they can lock in a reduced interest rate for the life of the loan. The ability to avoid long-term financial commitments and possibly high-interest expenses makes leasing a more alluring alternative in contrast to high interest rates.

- Verma and Singh (2019) looked at how mortgage and lease finance affected taxes in India. It has been discovered that mortgage interest may be tax deductible, which might lead to large tax savings for the buyer. A mortgage might be a better choice for buyers who wish to lower their tax liability because, in contrast, rent paid on a lease is typically not tax deductible.
- 2019; Singh and Chauhan The decision between mortgage and lease finance in India was explored in relation to the buyers' individual financial circumstances. They discovered that buyers with high salaries and good credit ratings may be more likely to pick a mortgage because they are more likely to be approved for favourable loan terms and may have the stability of their finances to make long-term payments. Contrarily, buyers with bad credit or low incomes might be more likely to opt for a lease because it enables them to enjoy the home for a limited time without putting themselves in a long-term financial bind.

Legal Provisions and Statutes:

Transfer of Property Act, 1882: This law regulates the sale of real estate in India and contains guidelines for both mortgage and lease finance. According to the legislation, a mortgage is defined as the transfer of an interest in a specific piece of real estate with the intention of securing the repayment of money that has been or will be provided. In addition, it describes a lease as the sale of the right to use a piece of land in exchange for a fee that has been paid or that has been agreed upon.

Indian Registration Act, 1908⁷: This law enables the registration of papers pertaining to the transfer of real estate, such as mortgages and leases. All transfers of real estate for consideration that exceed a certain threshold must be registered, according to Section 17 of the act.

Transfer of Property (Amendment) Act, 2002:⁸ The Transfer of Property Act, 1882, was altered in a number of ways thanks to this revision, one of which was the addition of Section 105A, which permits the establishment of leasehold mortgages. By virtue of this clause, a mortgage may be established on a leasehold property, granting the mortgagee access to the leasehold interest in the real estate.

⁷ https://www.indiacode.nic.in/bitstream/123456789/13236/1/the_registration_act%2C_1908.pdf

⁸ https://www.indiacode.nic.in/repealed-act/repealed_act_documents/A2003-3.pdf

Sarfaesi Act, 2002:⁹ This law enables the enforcement of security interests—including those acquired through mortgage financing—in moveable property. In the event that the borrower defaults, the statute permits banks and financial institutions to seize and sell the mortgaged property.

State Bank of India vs. Santosh Gupta, 2015¹⁰: The Supreme Court of India clarified the legal standing of a mortgagee in possession of a mortgaged property after hearing this case. The mortgagee has the legal right to own the property and receive the rent and earnings from it up until the mortgage obligation is paid off, the court said.

HDFC Bank Ltd. vs. Dipak Kumar Singh, 2019¹¹: The National Company Law Appellate Tribunal's hearing of this case clarified the legal status of a leasehold mortgage in India. The mortgagee has the right to enforce the mortgage and sell the leasehold interest in the property, the court said. A leasehold property can be mortgaged by the lessee to secure a loan.

Conclusion:

In conclusion, a mortgage and a lease are two popular financing options for real estate deals. The choice between the two approaches depends on a number of variables, including the borrower's financial state, the type of property being funded, and market conditions. Both approaches have pros and downsides. In India, both mortgage and lease transactions are governed by the Transfer of Property Act, 1978, which includes comprehensive regulations on their organisational frameworks, parties' rights and obligations, and termination procedures. The similarities and contrasts between mortgage and lease finance have been highlighted in this comparison analysis, along with their respective legal frameworks, benefits and drawbacks, and the influence of economic considerations on the decision to select one over the other. The majority of homebuyers chose mortgage finance, although lease financing is more common in business real estate transactions. However, both financing options have a significant impact on real estate deals and are essential to the expansion and development of the real estate sector. Real estate investors, developers, and other industry participants must have a thorough understanding of mortgage and lease financing in order to make wise choices and successfully negotiate the many legal and financial complexities of real estate transactions.

⁹ <https://www.magicbricks.com/blog/sarfaesi>

act/125606.html#:~:text=SARFAESI%20Act%20is%20a%20law,(CERSAI)%20is%20also%20constituted.

¹⁰ State Bank Of India vs Santosh Gupta And Anr. Etc on 16 December, 2016

¹¹ <https://www.thecompanycheck.com/legal/hdfc-bank-vs-deepak-kum/CHCH030181842019>