

INHERITANCE OF IMMOVABLE PROPERTY IN INDIA BY AN NRI/OCI CARDHOLDER



Divya Alexander

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Before we analyse the relevant provisions of law, in order to understand the issue that this article attempts to discuss, let us begin with a supposed query:

Query:

“Mr. A, a resident Indian, owns immovable property in India. Mr. A’s daughter, Ms. B, was born in India but is now a resident of UK. In the event of the death of Mr. A (whether testate or intestate), can Ms. B inherit the immovable property of her father, Mr. A?”

Although this seems like a straightforward question, the answer to which one would assume is equally straightforward, this is not so. This is because of the recent amendments to the Foreign Exchange Management Act, 1999 (“**FEMA**”) and the consequent issuance of the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 (“**NDI Rules**”), and the language used therein. The NDI Rules supersede, *inter alia*, the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2018 (“**2018 Regulations**”).

Therefore, in order to properly understand the possible answers to the above query, this article aims at comparing the applicable provisions of law before the NDI Rules were introduced and contrasting the same to the newly issued NDI Rules, and thereby establishing the difference, if any, between the two regimes.

PART ONE – ANALYSING THE 2018 REGULATIONS

1. Accordingly, before analysing the NDI Rules, let us attempt to answer the query on the basis of the 2018 Regulations.

2. Regulation 3 of the 2018 Regulations read as under (emphasis supplied):

“3. Acquisition and Transfer of Property in India by a Non-Resident Indian or an Overseas Citizen of India:

An NRI or an OCI may

a. acquire immovable property in India other than agricultural land/ farm house/ plantation property.....

b. acquire any immovable property in India other than agricultural land/ farm house/ plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in section 2(77) of the Companies Act, 2013;

c. acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property (a) in accordance with the provisions of the foreign exchange law in force at the

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time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;

..."

3. Applying Regulation 3(c) to our query above, would indicate that the NRI Ms. B could inherit only from a person resident outside India, and therefore, cannot inherit from her resident father, Mr. A. This is because of the manner in which Regulation 3(c) was drafted. As per Regulation 3 (c), Ms. B could inherit only from a person resident outside India who had EITHER acquired the property in accordance with foreign exchange law OR acquired it from a person resident in India. This would lead to a ridiculous assumption that for Ms. B to inherit property from Mr. A, Mr. A would have to become an NRI and the immovable property in question would have to have been acquired by Mr. A, in either of the two manners, as set out hereinabove. However, in the event that Regulation 3(c) had instead been drafted as under, the situation would have been different, and Ms. B would have been entitled to inherit from Mr. A:

"(c) acquire any immovable property in India by way of inheritance (a) from a person resident outside India who had acquired such property in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or (b) from a person resident in India;"

4. The language of Regulation 3(c) created obvious issues which the RBI addressed by issuing Frequently Asked Questions (FAQs) on the subject. Part II, Question 1 of the FAQs has been excerpted below (emphasis supplied):

"Q.1 How can a Non-resident Indian (NRI) and an Overseas Citizen of India (OCI) acquire immovable property in India?"

Particulars	NRI/ OCI
Purchase (other than agricultural land/ farmhouse/ plantation etc) from	Resident/ NRI/ OCI
Acquire as gift (other than agricultural land/ farmhouse/ plantation etc) from	Resident/ NRI/ OCI who is a relative
Acquire .. as inheritance from	Any person who has acquired it under laws in force; b. Resident
...	...

..."

5. In addition to the FAQs, the RBI in the Master Direction [12/2015-16](#) - Acquisition and Transfer of Immovable Property ("**Master Direction**") issued to Authorised Dealer Banks, once again clarified the intention of Regulation 3(c). The relevant portion of Part II of the Master Direction has been excerpted below (emphasis supplied)

"Part II - Acquisition and Transfer of Immovable Property in India

3. Acquisition/ transfer by a Non- Resident Indian (NRI)

3.1 Acquisition of immovable property

3.1.1 An NRI or an OCI can acquire by way of purchase any immovable property (other than agricultural land/ plantation property/ farm house) in India.

3.1.2 An NRI or an OCI can acquire by way of gift any immovable property (other than agricultural land/ plantation property/ farm house) in India from person resident in India or from an NRI or an OCI who in any case is a relative as defined in section 2(77) of the Companies Act, 2013.

3.1.3 An NRI or an OCI can acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired the property in accordance with the provisions of the foreign exchange law in force at the time of acquisition.

3.1.4 An NRI or an OCI can acquire any immovable property in India by way of inheritance from a person resident in India."

6. Applying the clarificatory language used in the FAQs and the Master Direction to our query, would indicate that notwithstanding the ambiguous language of Regulation 3(c), the NRI Ms. B could indeed inherit the immovable property from her resident father, Mr. A, without unnecessary qualifications.

PART TWO – ANALYSING THE NDI RULES

1. Under the amended regime, a new classification of non-debt instruments has been introduced and furthermore, the Central Government and not the Reserve Bank of India ("RBI") is empowered to frame rules with respect to such non-debt instruments.

2. Rule 2 (ai) of the NDI Rules defines "non-debt instruments" and includes "acquisition, sale or dealing directly in immovable property".

3. Chapter IX of the NDI Rules deal with the Acquisition and Transfer of Immovable Property in India. Rule 24 has been excerpted hereinbelow (emphasis supplied)

"24. Acquisition and transfer of property in India by a NRI or an OCI - A NRI or an OCI may -

(a) acquire immovable property in India other than an agricultural land or farm house or plantation property:

Provided that the consideration, if any, for transfer, shall be made out of:

(i) funds received in India through banking channels by way of inward remittance from any place outside India ; or

(ii) funds held in any non-resident account maintained in accordance with the provisions of the Act, rules or regulations framed thereunder:

Provided further that no payment for any transfer of immovable property shall be made either by traveller's cheque or by foreign currency notes or by any other mode other than those specifically permitted under this clause;

(b) acquire any immovable property in India other than agricultural land or farm house or plantation property by way of gift from a person resident in India or from an NRI or from an OCI, who in any case is a relative as defined in clause (77) of section 2 of the Companies Act, 2013;

(c) acquire any immovable property in India by way of inheritance from a person resident outside India who had acquired such property:-

(i) in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these rules; or

(ii) from a person resident in India;

..."

4. A mere reading of the above indicates that Rule 24(c) of the NDI Rules language similar to that used in Regulation 3(c) of the 2018 Regulations. The only apparent change appears to be that where the two criteria in Regulation 3(c) were numbered as a) and b), these criteria have now been re-numbered as (i) and (ii). This is however only a cosmetic change. In drafting Rule 24(c), the same error that was apparent in the language of Regulation 3(c) has been regurgitated. Consequently, until the Central Government now clarifies upon the issue, if a strict interpretation of Rule 24(c) were to be followed, this would

mean that in answer to our query, NRI Ms. B would not be entitled to inherit immovable property in India, from her resident father Mr. A, until such time as he becomes Non Resident and satisfies the criteria of Rule 24(c).

5. Although the Central Government has issued Foreign Exchange Management (Non-debt Instruments) (Amendment) Rules, 2019 and the RBI has issued the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019, this issue has not been raised and no corrigendum has been released in respect thereof.

6. Given the circumstances, even if the intention of the Central Government may not be so, this apparent error in language could have decidedly disastrous consequences on families that have children residing abroad, and could snowball into unwanted litigation.

7. As the NDI Rules are yet to be incorporated in the RBI's Master Directions to Authorised Dealer Banks and the FDI policy, the NDI Rules are still to be put in active implementation. Accordingly, we will have to study the Master Directions of the RBI after the provisions of the NDI Rules are inserted, and hope to arrive at a harmonious construction of Rule 24(c) thereafter.

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