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THE SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITIES INTEREST ACT, 2002

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Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

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Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

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Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
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CHAPTER 1: INTRODUCTION

The banking sector in the India plays an important role in the growth of an economy. Through its intermediary activities, the banking sector fosters the production, distribution, exchange and consumption processes in the economic system. It stimulates the flow of funds in the economy and fuels economic growth. The efficiency of the banking system, thus determines the pace of development of the economy. Similar to any other business enterprise, the efficiency of a bank is evaluated based on profitability and quality of assets it possesses. But unlike other commercial ventures, Indian banking has social commitments integrated into its operations. The banking system in India has had to achieve the goals of equitable income distribution, balanced regional economic growth and the reduction and elimination of private sector monopolies in trade and industry.

The financial sector has been one of the key handlers in India's efforts to

achieve success in rapidly developing its economy. Since our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This ensures the slow pace of recovery of defaulting loans and escalating levels of nonperforming assets of banks and financial institutions.

Narasimham Committee I and II and Andhyarujina Committee was constituted by the Central Government for the purpose of examining banking sector reforms having considered the need for changes in the legal system in respect of these areas. Amongst the other committees, these Committees have made suggestions to form new legislation for securitization and empowering banks and financial institutions to gain possession of the securities and to sell them without any intervention of the court here.

The SARFAESI Act was passed on December 17, 2002, in order to lay down processes to help Indian lenders recover their dues quickly. The SARFAESI Act essentially empowers banks and other financial institutions to directly auction residential or commercial properties that have been pledged with them to recover loans from borrowers. Before this Act took effect, financial institutions had to take recourse to civil suits in the courts to recover their dues, which is a lengthy and time-consuming process.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

As per the SARFAESI Act, if a borrower defaults on a loan financed by a bank against collateral, then the bank gets sweeping powers to recover its dues from the borrower. After giving a notice period of 60 days, the lender can take possession of the pledged assets of the borrower, take over the management of such assets, appoint any person to manage them or ask debtors of the borrower to pay their dues too, with respect to the asset. This recovery procedure saves banks and financial institutions a lot of time which otherwise would be long drawn out due to the intervention of courts.

One of the major drawbacks of the Act is that it is not applicable to unsecured creditors. This and other drawbacks in the recovery mechanisms were plugged in the Insolvency and Bankruptcy Code, 2016. ARCs or Asset Reconstruction Companies which buy out distressed assets are the other alternative that banks use to offload doubtful debt to ensure more focused and efficient resolution.

1.1 : Scheme of the Act

The Securitization Act contains 41 sections in 6 Chapters and a Schedule.

Chapter 1 contains 2 Sections dealing with the applicability of the Securitization Act and definitions of various terms.

Chapter 2 contains 10 Sections providing for regulation of securitization and reconstruction of financial assets of banks and financial institutions, setting up

of securitization and reconstruction companies and matters related thereto.

Chapter 3 contains 9 Sections providing for the enforcement of security interest and allied and incidental matters.

Chapter 4 contains 7 Sections providing for the establishment of a Central Registry, registration of securitization, reconstruction and security interest transactions and matters related thereto.

Chapter 5 contains 4 Sections providing for offences, penalties and punishments.

Chapter 6 contains 10 Sections providing for routine legal issues.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

CHAPTER 2 : SALIENT FEATURES OF THE SARFAESI ACT

The secured creditor has two rights under the Act. It can either transfer the Security Interest to ARCs or enforce the provisions of the Act on its own, without the intervention of the court. As per **Section 35**, the provisions of this Act override all other laws for the time being in force notwithstanding anything inconsistent therewith contained therein. Further, as per **Section 37**, the provisions of this Act or the rules made thereunder are in addition to and not in derogation of the Companies Act, 1956, Securities Contract (Regulation) Act, 1956, the SEBI Act, 1992 (15 of 1992) and Recovery of Debts due to Banks and Financial Institutions, Act, 1993 (51 of 1993) or any other law for the time being in force.

1. The Secured Creditor may require the borrower to give notice in writing to discharge his liabilities within 60 days from the date of the notice, if the borrower fails than the Secured Creditor can exercise all or any of the following rights under Sub-section 13 (4) to recover his Secured Debt.

   a) Take possession of Secured Assets of the borrower, including, by the way of lease, assignment or sale for realizing the Secured Assets.

   b) Take over the management of the Secured Assets of the Borrower.

   c) To manage the secured Assets the secured creditors also appoint any person as Manager.

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d) Required any person who acquired the secured Assets whose money is due and payable to borrower and who to pay the same to the Secured Creditor, as is sufficient to repay the secured debt.

2. No Secured Creditor will be entitled to any or all of the above-said rights conferred on him under Section 13 (4) of the Act, if the financial Assets have been jointly financed by more than two secured creditors.
3. If the full amount of the secured creditors is not fully satisfied by the sale proceeds of the Secured Assets than the Secured Creditor can file an application with the Debt Recovery Tribunal or a competent Court of Law for recovery of the balance amount from the Borrower.
4. Secured Creditors can proceed against the guarantors or sell the pledged Assets without first taking any of the measures specified in clause (a) to (d) of Sub-Section 13 (4) in relation to the Secured Assets, under the Act.
5. By publishing a Notice in newspaper in English and any other Indian language of the area, in which principal office of the borrower is situated the secured creditors can take over the management and appoint Directors where the Borrower is a company or Administrator of the business.
6. The Borrower cannot alienate the Secured Assets in question when the notice preparatory to repossession is received.
7. Banks can package and sell loans via Securitization. Loans can be traded

among banks in the form of bonds or shares.

8. In the following transactions the Act is not applicable.

a) Any Security Interest created in the Agricultural Land.
b) Any Debt where the amount due is less than 20% of the Principal amount and Interest thereon.
c) Any Security Interest for securing repayment of any financial asset not exceeding Rs. 1 Lakh.
d) Pledge of Movable assets within the meaning of Section 172 of Indian Contract Act 1872.
e) Any conditional sale, hire purchase or lease or any other contract in which no Security Interest has been created.

9. If the banks take the possession of assets than the right to appeal is also given to the borrowers. The aggrieved borrower can file appeal under **Section 17** before the DRT within 45 days from the date of initiation of steps, though 75% of the amount stated in the notice or such lower amount as DRT may direct, is required to be deposited with the DRT concerned. Similar right of appeal before DRAT within 30 days is given under **Section 18** to any person aggrieved by the order of the DRT. Thus, the Act restricts frivolous or dilatory appeals. The Act ousts the jurisdiction of the Civil Courts and mandates that no Injunction shall be granted in respect of any exercise of rights conferred by or under this Act.

CHAPTER 3 : APPLICABILITY OF THE SARFAESI ACT

The Act deals with the following :-

1. Registration and regulation of Asset Reconstruction Companies (ARCs) by the Reserve Bank of India.
2. Facilitating securitization of financial assets of banks and financial institutions with or without the benefit of underlying securities.
3. Promotion of seamless transferability of financial assets by the ARC to acquire financial assets of banks and financial institutions through the issuance of debentures or bonds or any other security as a debenture.
4. Entrusting the Asset Reconstruction Companies to raise funds by issue of security receipts to qualified buyers.
5. Facilitating the reconstruction of financial assets which are acquired while exercising powers of enforcement of securities or change of management or other powers which are proposed to be conferred on the banks and financial institutions.
6. Presentation of any securitization company or asset reconstruction company registered with the Reserve Bank of India as a public financial institution.

7. Defining 'security interest' to be any type of security including mortgage and change on immovable properties given for due repayment of any financial assistance given by any bank or financial institution.
8. Classification of the borrower's account as a non-performing asset in accordance with the directions given or under guidelines issued by the Reserve Bank of India from time to time.
9. The officers authorized will exercise the rights of a secured creditor in this behalf in accordance with the rules made by the Central Government.
10. An appeal against the action of any bank or financial institution to the concerned Debts Recovery Tribunal and a second appeal to the Appellate Debts Recovery Tribunal.
11. The Central Government may set up or cause to be set up a Central Registry for the purpose of registration of transactions relating to securitization, asset reconstruction and creation of the security interest.
12. Application of the proposed legislation initially to banks and financial institutions and empowerment of the Central Government to extend the application of the proposed legislation to non-banking financial companies and other entities.

13. Non-application of the proposed legislation to security interests in agricultural lands, loans less than rupees one lakh and cases where 80% of the loans, is repaid by the borrower.

3.1 : Exceptions to the Act

3.1.1 : The SARFAESI Act is not applicable to

a) Regional Rural Banks;

b) Nationalized Banks;

c) Co-operative Banks;

d) State Bank of India and their Associate Banks;

3.1.2 : This Act will not apply in the following cases

a) A lien on any goods, money or security given by or under the Indian Contract Act or the Sale of Goods Act or any other Law for the time being in force;

b) A pledge of movables;

c) Creation of any security in any aircraft and any vessel;

d) Any conditional sale, hire purchase or lease or any other contract in which no security interest has been created;

e) Any security interest for securing repayment of any financial asset, not exceeding Rs. 1,00,000/- (Rupees One lakh only);

f) Any security interest created in agricultural land;

g) Any case in which the amount due is less than 20% of the principal amount

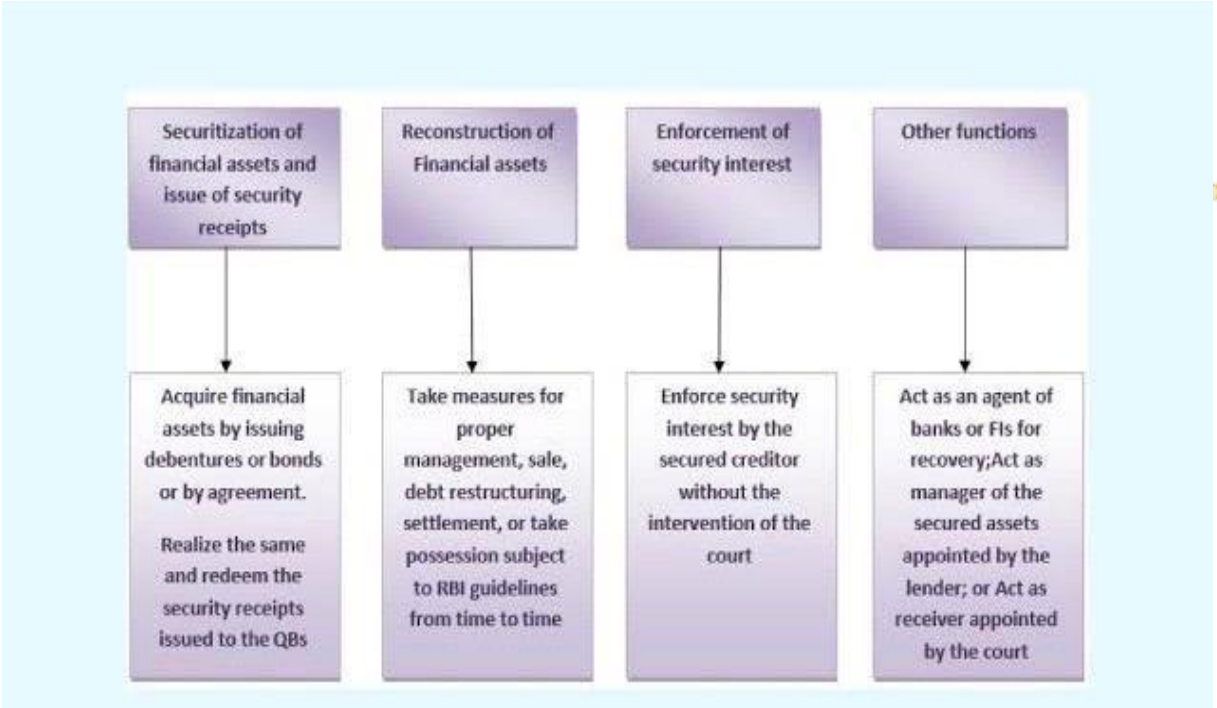
h) Any rights of an un-paid seller and any property not liable to attachment or sale as per the Civil Procedure Code.

Other than freeing up the blocked assets of banks, securitization can transform banking in other ways as well. The growth in credit off take of banks has been the highest in the last 55 years. But at the same time the incremental credit deposit ratio for the past one-year has been greater than one. What this means in simple terms is that for every Rs. 100 worth of deposit coming into the system more than Rs. 100 is being disbursed as credit. The growth of credit off take though has not been matched with a growth in deposits. Banks essentially have been selling their investments in government securities. By selling their investments and giving out that money as loans, the banks have been able to cater to the credit boom. This form of funding credit growth cannot continue forever, primarily because banks have to maintain an investment to the tune of 25 per cent of the net bank deposits in Statutory Liquidity Ratio (SLR) Instruments (government and semi government securities).The fact that they have been selling government paper to fund credit off take means that their investment in government paper has been declining. Once the banks reach this level of 25 per cent, they cannot sell any more government securities to generate

liquidity. And given the pace of credit off take, some banks could reach this level very fast. So banks, in order to keep giving credit, need to ensure that more deposits keep coming in. One way is obviously to increase interest rates. Another way is Securitization. Banks can securitize the loans they have given out and use the money brought in by this to give out more credit. A.K. Purwar, in a recent interview to a business daily remarked that bank might securitize some of its loans to generate funds to keep supporting the high credit off take instead of raising interest rates. Not only this, securitization also helps banks to sell off their bad loans to Asset Reconstruction Companies (ARCs). ARCs, which are typically publicly/government owned, act as debt aggregators and are engaged in acquiring bad loans from the banks at a discounted price, thereby helping banks to focus on core activities. On acquiring bad loans ARCs restructure them and sell them to other investors as PTCs, thereby freeing the banking system to focus on normal banking activities. A recent survey by the Economist magazine on International Banking, says that securitization is the way to go for Indian banking. As per the survey, "What may be more important for the economy is to provide access for the 92% of Indian businesses that do not use bank finance. That represents an enormous potential market for both local and foreign banks, but the present structure of the banking system is not suitable for reaching these businesses.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

CHAPTER 4: ROLE OF SARFAESI ACT



4.1 **:** *Procedural Nature of the SARFAESI Act*

The Act is procedural in nature and provides the procedure for providing the remedy of enforcement of security in secured assets without going to the court, directly through the secured creditor.

4.2 **:** *Retrospective Nature of Provisions of SARFAESI Act*

The provisions of the SARFAESI Act are retrospective in nature. The Act intends to cover up all the transactions of loan already entered into the subject to the provisions within the period of limitation and the defaults in making

repayment and the debts already classified as non-performing assets and such future contingencies too.

4.3: Constitutional Validity of the SARFAESI Act

The Hon'ble Supreme Court of India has upheld the validity of the SARFAESI Act, 2002. In one of the case, there was default on the part of the borrower in repaying his debt in full and the bank sent the notice for 60 days to the defaulter as required under the SARFAESI Act. After the measures have been taken under section 13 (4) have been resorted to then the mechanism provided under Section 17 of the Act is for the borrower to approach Debt Recovery Tribunal (DRT). The Constitutional validity of the Act and its provision was upheld except Section 17(2) of Act, which was declared Ultra vires Article 14 of Constitution.

4.4 : The action under SARFAESI Act during the pendency of Civil Suit

During the pendency of the bank's civil suit, the bank can resort to simultaneous action under Section 13(4) of the Act.

4.5 :Writ Jurisdiction

The remedy of appeal is available under the Act against actions relating to recoveries of dues of banks and financial institutions. Hence, it is not necessary to resort to writ jurisdiction under Article 226 of the Constitution. Section 13(4)(d) gives power to a creditor to require the borrower to pay to the secured

creditor a sum of money sufficient to discharge the secured debt such notice is given under Section 13(2). The action to be taken is contemplated under Section 13(4)(d) of the Act. The order passed by the DRT directing bank to proceed under the section during the pendency of the petition was upheld.

4.6 ***:*** *Can Co-operative Banks take action under SARFAESI Act ?*

The provisions of this Act enabling co-operative banks to take resort to the Act cannot be challenged on the ground that members of co-operative banks are governed by the provisions of the bye-laws which inter-alia, provide for filing of suits before the Nominee, which cannot be nullified by the provisions of the present Act. The validity of Securitisation Act so far as inclusion of co-operative banks is concerned cannot be challenged on the ground that since provisions for recovery by a co-operative bank is already made under Gujarat Co-operative Societies Act and therefore remedy under any other law is excluded.

CHAPTER 5 : SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT (SICA), 1985 & RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS (RDDBFI) ACT , 1993

The Government, in order to solve the problem of Sick Companies, brought The Sick Industrial Companies (Special Provisions) Act, 1985 which instead of solving the problems of sick industries rather aggravated the problem of Non-Performing Assets. In and around September 1990, more than 15 Lakh cases were filed by public sector banks and 304 cases by Financial Institutions (F.I.) found pending in various courts for recovery of loans. A whooping sum of Rs. 6,013 Crores was found due. The Government, in order to meet the crisis, formed a committee under the Chairmanship of Mr. Narsimhamand which suggested the establishment of Debt Recovery Tribunals, hence the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 came up. Results achieved by the formation of Debt Recovery Tribunals and Appellate Tribunals under the Act can be said as moderately encouraging.

5.1 : Sick Industrial Companies (Special Provisions) Act (SICA), 1985

The Sick Industrial Companies (Special Provisions) Act, 1985 defined the concept of the 'sick company' and a 'potential sick company'. The provisions

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

under the Act defined the company as sick when there was a complete net worth erosion. The Act defined the 'sick industrial company' under Section 3(1)(o) as "an industrial company (being a company registered for not less than five years) which has at the end of financial year accumulated losses equal to or exceeding its entire net worth."

[Explanation – For the removal of doubts, it is hereby declared that an industrial company existing immediately before the commencement of the Sick Industrial Companies (Special Provisions) Act, 1993 registered for not less than five years and having at the end of any financial year accumulated losses equal to or exceeding its entire net worth, shall be deemed to be a sick industrial company]

The quasi-judicial bodies under the SICA were the 'Board' for Industrial and Financial Reconstruction and the 'Appellate Authority' for Industrial and Financial Reconstruction are defined under Section 3(a) and 3(b) of The Sick Industrial Companies (Special provisions) Act, 1985. Section 15 of the SICA provided for 'Reference to the Board' for Industrial and Financial Reconstruction, had the company become a sick industrial company within sixty days from the date of finalization of the duly audited accounts of the company. The SICA failed due to its backward approach in dealing with the bankruptcy issues. There was a balance sheet approach to detect a sick unit rather than the

prospective cash flow approach. It took a fairly long time for the net worth to erode, and the grave liquidity issues were never addressed.

5.2 : Recovery of Debts Due to Banks and Financial Institutions (RDDBI) Act, 1993

It is noticeable that prior to the enactment of Recovery of Debts Due to Banks Act, the normal remedy for recovery of debts due to Banks and Financial Institutions was to institute a suit in Civil Court which was tried and decided in accordance with the procedure laid down in Civil Procedure Code 1908. The decree passed by the Civil Courts was also executed in accordance with the procedure contained under Order XXI of Civil Procedure Code. The procedure of suit was a long and a cumbersome process. Often it took years and decades to recover the amount. The position was that a civil suit took five years to fifteen years for adjudication of liability or for getting a judgment. After such a long period spent in adjudication of liability there was considerable difficulty at the time of execution for recovery of loan amount or for sale of goods/property.

There are large numbers of Non-Performing Assets on Balance Sheets of majority banks and these assets are non-recoverable in some cases. The Non - Performing Assets were treated as Bad Debts. Recovery of these debts by banks through normal court procedure is a Herculean task and takes long years.

The Government in order to remove these difficulties and give Banks /Financial Institution an edge on the Debtors, passed "Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI Act, 1993). The Act was amended in 1995, 2000, 2003 and 2013. The Act was again amended in year, 2016.The Act was renamed as **"Recovery of Debts Due to Banks and Financial Institutions and Bankruptcy Act, 1993"**.

The main purpose of the Act is to establish Tribunals for expeditious adjudication and recovery of debts due to Banks and Financial Institutions. The main features of Recovery of Debts Due to Banks and Financial Institutions Act 2016 Act are as follows :

1) The Financial Leasing and Conditional Sale (like Hire purchase) transactions and transactions in intangible assets are brought within the definition of property and security interest.
2) Debenture Trustees and Assets Reconstruction Companies brought within definition of "Financial Institutions" and "Secured Creditors".
3) DRT Act amended to cover liabilities over debt securities and security interest.
4) Appeal against order of DRT before DRAT with 50% pre-deposit against 75% earlier.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
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5) Presiding Officer of DRT Act proposed to function also as Adjudicating Authority under Insolvency and Bankruptcy Code, 2016.
6) Chairperson of DRAT will also function as Appellate Authority under Insolvency Code.

Under this Act, the Tiwari Committee constituted with the objective of solving the problem of recovery by the Banks and the Financial Institutions, proposed establishment of the specialized Tribunals, called the Debt Recovery Tribunals and the Debt Recovery Appellate Tribunals who would assist in unlocking the huge amount of public money and to move towards proper utilization of the funds for the development of the country.

The provisions of this Act did not apply to those Banks and Financial Institutions where the amount due is less than Ten lakh rupees. Under **Section 2(g)** of the RDDBFI Act, 1993 'Debt' has been defined as, *"any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise*

or under a mortgage and subsisting and legally recoverable on the date of the application."

The RDDBFI Act, 1993 under **Section 19(19)** also gave power to the Tribunals to issue certificate of recovery against the company registered under the Companies Act, 1956, to the recovery officers specially designated under this Act. The various modes of recovery as governed by **Section 25** of the Act include :-

1) Attachment and sale of the movable and immovable property
2) Arrest of the defendant
3) Appointing a receiver for managing the properties of the defendant

5.3 : Difference Between RDDBI and SARFAESI Act :-

Sr. No.	Recovery of Debts Due to Banks and Financial Institutions Act	Securitization and Reconstruction of Finance Assets and Enforcement of Securities Interest Act
1.	It is an adjudicating Act	It is executor in nature
2.	It is there to establish Tribunals for expeditious adjudication	It is an act to regulate securitization and reconstruction of financial

	and recovery of debts due to banks and financial institutions	assets and enforcement of security interest.
3.	It is for all types of creditors whether or not they are secured or unsecured	Only secured creditors can refer to SARFAESI
4.	It covers secured as well as unsecured dues	It takes into account only secured assets and secures interest of secured creditors only

In the matter between ***ARCIL V/s Kumar Metallurgical Corporation Limited (IV (2005) BC 117, 2006 134 CompCas 438 NULL)*** before the Debt Recovery Appellate Tribunal, Chennai, the Appellate Tribunal held that,

> *"there is no question of applicability of doctrine of election as the RDDB&FI Act covers secured as well as unsecured dues, while the SARFAESI Act takes into account only secured assets and secures interest of secured creditors only."*

It is not doubtful that the intention behind enacting both the Acts is complimentary to each other, but they operate in different spheres. The RDDB&FI Act is for expeditious adjudication at the hands of Tribunals, while

the SARFAESI Act bypasses intervention of the courts for expeditious recovery of dues of banks and financial institutions, which is public money of which they are custodian. The Appellate Tribunal further held that Section 37 (application of other laws not barred) makes it clear that the provisions of the SARFAESI Act are in addition to the provisions of the RDDB&FI Act, 1993.

Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act, 1993 provides for the establishment of Tribunals for expeditious adjudication and recovery of debts due to Banks and Financial Institutions and for matters connected therewith or incidental thereto. The Debts Recovery Tribunals (DRTs) and Debts Recovery Appellate Tribunals (DRATs) were established under the Recovery of Debts Due to Banks and Financial Institutions Act (RDDBFI Act), 1993 with the specific objective of providing expeditious adjudication and recovery of debts due to Banks and Financial Institution.

CHAPTER 6 : DEBT RECOVERY TRIBUNAL (DRT)

The DRT Act, 1993 was enacted with an object to provide for expeditious adjudication and recovery of debts due to Banks and Financial Institutions through DRT. However, the Debt Recovery Tribunals constituted under the provisions of DRT Act, 1993 was not so successful in recovering the bad debts due to banks and financial institutions as the recovery procedures in DRT entangled in time consuming legal procedures and further banks did not have the required powers and skill to enforce the securities without approaching the Courts.

The backlogs and delays in adjudication of the cases before the Debt Recovery Tribunals have prompted the Central Government to examine the need for changes in the legal system. The Committees constituted by the Central Government such as Narasimham Committee and Andhyarujina Committee have suggested enactment of a new legislation for empowering banks to take possession of the securities and sell them without the intervention of the court. Acting on these suggestions, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was enacted by the Central Government.

Research by: *Adv. Pankti Dedhia, Associate*
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The rules pertaining to Security Enforcement, Debt Recovery Tribunal (Procedure) Rules, 1993, The Debt Recovery Appellate Tribunal (Procedure) Rules, 1994 have been amended to that effect to DRT (Procedure) Rules, 2016 and DRT Appellate Tribunal (Procedure) Rules, 2016, respectively.

The Debt Recovery Tribunal and Debt Recovery Appellate Tribunal have no administrative feature as there is no administrative member in those Tribunals. These aspects of the constitution of these Tribunals making them different from other Tribunals may be connected with the nature of cases which the Tribunals deal with. The appointment will be for five years only (from the date he enters upon his office) or until he attains the age of sixty two years. DRT has also been given the power to adjudicate the applications filed by the Borrower/Mortgagor against the action of the Secured Creditor initiated under the Securitization Act.

6.1 ***:*** *Powers of Debt Recovery Tribunal*

Powers of DRT are as follows :-

a) Summoning and enforcing the attendance of any person and examining him on oath;

b) Requiring the discovery and production of documents;

c) Receiving evidence on affidavits;

d) Issuing commissions for the examination of witnesses or documents;

e) Reviewing its decisions;

f) Dismissing an application for default or deciding it ex-parte;

g) Make interim order by way of injunction, stay or attachment against the defendant to debar from transferring, alienating or otherwise dealing with the property or asset without permission of Tribunal;

h) Direct the defendants to provide security sufficient to satisfy the debt;

6.2 ***:*** *Applications to be made to Debt Recovery Tribunal under the Securitization Act:*

Any person, aggrieved by any of the measures referred to in **Sub-Section (4) of Section 13** taken by the secured creditor may make an application under **Section 17** of the Act to the Debts Recovery Tribunal, within forty-five days from the date on which such measures had been taken.

Procedure prescribed under the DRT Act is to be adopted by the DRT for disposal of such applications filed under **Section 17** of the Act.

6.3 ***:*** *Appeal against the Order of Debt Recovery Tribunal under the said Securities Act*

Any person aggrieved on account of order passed by DRT may file an appeal before DRAT.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

The DRAT does not entertain the appeal unless the Appellant deposits with the Appellant Authority, 50% of the amount or such other lesser amount as directed by DRAT.

6.4 ***:*** *Overriding Effect*

Provisions of the DRT Act have overriding effect over any other law for the time being enforced except:

a) IFCI Act

b) State Financial Corporation Act

c) Unit Trust of India Act

d) Financial Reconstruction Bank of India Act

e) Sick Industrial Companies (Special Provisions) Act

f) Small Industries Development Bank of India Act

g) The Industrial Reconstruction Bank of India Act, 1984

CHAPTER 7 : PROVISIONS OF THE ACT

The Securitization Act contains provisions to provide for the following:

1) Registration and regulation of securitisation companies or reconstruction companies by the Reserve Bank of India (RBI)
2) Facilitating securitisation of financial assets of banks
3) Easy transferability of financial assets by the Securitization Company or Reconstruction Company to acquire financial assets of banks and FI's by the issue of debentures/bonds or any other securities in the nature of a debenture
4) Empowering securitization companies/reconstruction companies to raise funds by the issue of security receipts to qualified institutional buyers
5) Declaration of any ARCs registered with the RBI as a public financial institution for the purpose of section 4A of the Companies Act, 1956
6) Defining "security interest" as any type of security including mortgage and charge on immovable properties given for due repayment of any financial assistance given by any bank or Financial Institution
7) Empowering banks and financial institutions to take possession of securities given by the borrowers for financial assistance and sell or lease the same or take over management in the event of default, i.e. given classification of the Borrowers account as NPA in accordance under the guidelines issues by the

Reserve Bank of Inida from time to time.

The major feature of SARFEASI Act is that it promotes the setting up of Asset Reconstruction and Asset Securitization Companies to deal with Non-Performing Assets accumulated with the banks and financial institutions. The Act provides three methods for recovery of Non-Performing Assets, they are as follows:

a) Securitization

b) Asset Reconstruction

c) Enforcement of Security without the intervention of the Court

The Act brings three important powers into asset management of financial banks and institutions – securitization of assets, reconstruction of assets and powers for enforcement of security interests (means asset security interests) which are explained as follows :

7.1 **:** *Securitization*

Section 2(1)(z) of the SARFAESI Act, 2002 states that 'Securitization' means acquisition of financial assets by any securitization company or reconstruction company from any originator, whether by raising of funds by such securitization company or reconstruction company from qualified institutional buyers by issue of security receipts reciprocating undivided interest in such financial assets or

otherwise. In simple words, securitization means :-

a) It is an innovation in the financial market which covers the process of converting the contractual debt into tangible securities and selling them to end investors after properly packaging and underwriting the same.

b) It is a process where an owner of receivables (the originator or seller) sells off its receivables to a third party (the purchaser or SPV i.e., special purpose vehicle), in return for a purchase price payable immediately on sale.

c) Securitization in its widest sense implies every such process which converts a financial relation into a transaction.

7.1.1 ***:*** *Advantages of Securitization*

(I) For Banks and Financial Institution :-

a) Asset liability management

b) Reduced cost of capital and exemption from capital adequacy requirement

c) Increased liquidity

d) Achieving expertise and specialization

e) Revenue from special purpose vehicle

(II) For Borrowers or Investors :-

a) Use of securities for specific risk-hedging purposes

b) Investment liquidity

c) Greater safety and yields

d) Third party monitoring

Securitization is the process of pooling and repackaging of financial assets (like loans given) into marketable securities that can be sold to investors. In the context of bad asset management, securitization is the process of conversion of existing less liquid assets (loans) into marketable securities. The securitization company takes custody of the underlying mortgaged assets of the loan taker. It can initiate the following steps:

a) Acquisition of financial assets from any originator (bank), and

b) Raising of funds from qualified institutional buyers by issue of security receipts (for raising money) for acquiring the financial assets or

c) Raising of funds in any prescribed manner, and

d) Acquisition of financial asset may be coupled with taking custody of the mortgaged land, building etc.

7.2 : <u>ASSET RECONSTRUCTION</u>

Section 2(1)(b) of the SARFAESI Act, 2002 states 'Asset Reconstruction means acquisition by any securitisation company or reconstruction company of any right or interest of any bank or financial institutions in

any financial assistance for the purpose of realisation of such finance assistance.

Asset reconstruction is the activity of converting a bad or non-performing asset into performing asset. The process of asset reconstruction involves several steps including purchasing of bad asset by a dedicated Asset Reconstruction Company (ARC) including the underlying hypothecated asset, financing of the bad asset conversion into good asset using bonds, debentures, securities and cash, realization of returns from the hypothecated assets etc. The loans given by the Banks are classified into Performing and Non-Performing Assets on the following basis :

7.2.1 : Performing Assets

It is also known as standard assets are the assets which do not disclose any problem and which do not carry more than the normal risk attached to the business. Performing asset is one which generates income for the bank. It is an asset where the interest and or principal are not overdue beyond 180 days (modified to 90 days w.e.f. March 2004) at the end of the financial year.

7.2.2 : Non-Performing Assets

In terms of Section 2(1)(o) of SARFAESI Act, "Non-Performing Asset" means an asset or account of a borrower, which has been classified by a bank of financial institution as sub- standard [doubtful] or lost asset :-

a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classification issued by such authority or body;

b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank. In this study, "non-performing asset" means the asset or account of a borrower classified by a bank in accordance with the directions or guidelines of Reserve Bank of India

An amount is to be treated as non-performing asset when it ceases to generate income for the Bank. An asset may be treated as Non-Performing Asset (NPA), if interest and /or instalment of Principal remain overdue for a period exceeding 180 days (modified to 90 days w.e.f. March 04) and Banks and FI's should not take into their Income account, the interest accrued on such NPAs, unless it is actually received/recovered. NPAs are further classified into:

a) *Substandard Assets :* Loans which are non-performing for a period not exceeding two years, where the current net-worth of the borrower or the current market value of the security, against which the loan is taken, is not enough to ensure full recovery of the debt.

b) *Doubtful Assets:* Loans which have remained nonperforming for a period exceeding two years and which are not classified as loss assets by for the management or the internal/external auditor appointed by RBI.

c) *Loss Assets:* Assets where loss has been identified by the internal/external auditor of the bank or the RBI, but the amount has not been written-off wholly or partly. These assets are considered unrecoverable and are of little value to the lending institution.

(I) General Causes for Non-Performing Assets

(i) In priority sector advances :-

a) Directed and pre-approved natures of loans sanctioned under sponsored programmers

b) Mis-utilisation of loans and subsidies

c) Diversion of funds

d) Absence of security

e) Lack of effective follow-up (post-sanction supervision& control)

f) Absence of bankruptcy and foreclosure laws

g) Decrepit legal system

h) Cost ineffective legal recovery measures

i) Difficulty in the execution of decrees obtained

j) Lack of marketing support

(ii) In Non-Priority Sector Advances:

a) Improper and inadequate credit appraisal

b) Demand recession.

c) Frequent changes in Governments policies.

d) Industrial sickness and labour problems.

e) Antiquated legal & judicial system.

f) Lack of legal reforms (Bankruptcy Foreclosure laws).

g) Diversion of funds.

h) Willful default.

i) Technology obsolescence.

j) Incompetence-Management failures.

k) Fear psychosis among Banks & lack of effective follow-up(policing of assets by Banks)

l) Political compulsion and corruption.

There are different types of recovery process for Non-Performing Assets. They are as follows :

(i) One Time Settlement Schemes

(ii) Lok Adalats.

(iii) Debt Recovery Tribunal (DRTs)

(iv) SARFAESI Act 2002

(v) Assets Reconstruction Companies (ARC)

(vi) Corporate Debt Restructuring (CDR)

(vii) Information about the defaulters of loan by RBI

(viii) Credit Information Bureau

Among the above various ways to recover measures, the most effective ways practiced for recovering NPAs from defaulters are SARFAESI ACT 2002, DRT, Lok Adalats and Corporate Debt Restructuring.

LOK ADALAT:

Lok Adalat has been developed in India by Legal Services Authorities Act, 1987. It is also called as "People's court". Lok Adalat is a non-adversarial system, whereby mock courts (called Lok Adalats) are held

by the State Authority, District Authority, Supreme Court Legal Services Committee, High Court Local Services Committee, or Taluk Legal Services Committee. The first Lok Adalat was held in Gujarat on March 14, 1982. Lok Adalats help the banks to settle loans by way of compromising between bankers and defaulters of the bad loans through Lok Adalats. Debt Recovery Tribunals have been authorized to form the Lok Adalats to decide on cases of NPAs of Rs. 10 Lakhs and more. The systems seemed to be more effective for recovery of loans by immediate judgment on the cases referred. Lok Adalats have been useful for mostly recovery on smaller loans.

CORPORATE DEBT RECOVERY CELL / RESTRUCTURING:

The Corporate Debt Restructuring System evolved and detailed guidelines issued by Reserve bank of India on August 23, 2001 for implementation by financial institutions and banks. The Corporate Debt Restructuring (CDR) Mechanism is a voluntary non-statutory system based on Debtor-Creditor Agreement (DCA) and Inter-Creditor Agreement (ICA). The CDR Mechanism covers only multiple banking accounts, Syndication/consortium accounts, where all banks and institutions together have an outstanding aggregate exposure of Rs.100

million / 10 lakhs and above. It covers all categories of assets in the books of member-creditors classified in terms of RBI's prudential asset classification standards. Even cases filed in Debt Recovery Tribunals/ Bureau of Industrial and Financial Reconstruction/and other suit-filed cases are eligible for restructuring under CDR. The cases of restructuring of standard and sub-standard class of assets are covered in Category-I, while cases of doubtful assets are covered under Category-II.

Sr. No.	Amount to be recovered	Procedure for filing
1.	Amount not exceeding more than Rs. 1,00,000/-	i. Filing simple suit for recovery before City Court ii. Filing of summary suit under Order XXXVII of CPC, 1908 iii. Filing suit for foreclosure of mortgage iv. Arbitration proceedings if arbitration agreement exists
2.	Amount exceeding more than Rs. 1,00,000/-	In case the "Security Interest" has been created in specific movable / immovable property provisions of

		the Securitization Act may be invoked to repossess the mortgaged property, without intervention of the court, and sell the same, provided the court has been classified as NPA
3.	Amount exceeding more than Rs. 10,00,000/-	Original application is to be filed before the DRT for recovery of dues. Bank can simultaneously initiate proceedings under Securitization Act as well. Civil Court / Arbitrator will not have jurisdiction to entertain such claim.

Reconstruction, is to be done with the RBI regulations and the SARFAESI Act gives the following components for reconstruction of assets :-

a) taking over or changing the management of the business of the borrower,

b) the sale or lease of a part or whole of the business of the borrower,

c) rescheduling of payment of debts payable by the borrower,

d) enforcement of security interest in accordance with the provisions of this Act,

e) settlement of dues payable by the borrower,

f) Taking possession of secured assets in accordance with the provisions of this Act.

7.3 **:** *Security Interest*

Section 2(1)(zf) of the SARFAESI Act, 2002 states 'Security Interest' means right, title and interest in any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in **Section 31**.

The Banks and Financial Institutions grant loans to borrowers or investors by keeping some asset as security which is equivalent to the loan amount. Thereby, if there is any subsequent default being made by the borrower then such loan amount can be recovered easily by enforcing such security interest. This enforcement of security interest has been dealt under **Section 13** of the SARFAESI Act, 2002.

7.3.1 : Enforcement of Security Interests without the Intervention of the Court

The Act empowers the lender (banker), when the borrower defaults, to issue notice to the defaulting borrower and guarantor, calling to repay the debt within 60 days from the date of the notice. If the borrower fails to comply with the notice, the bank or the financial institution may enforce security interests (means interest of the bank/creditor) by following the provisions of the Act:

a) Take possession of the security,

b) Take possession of the security,

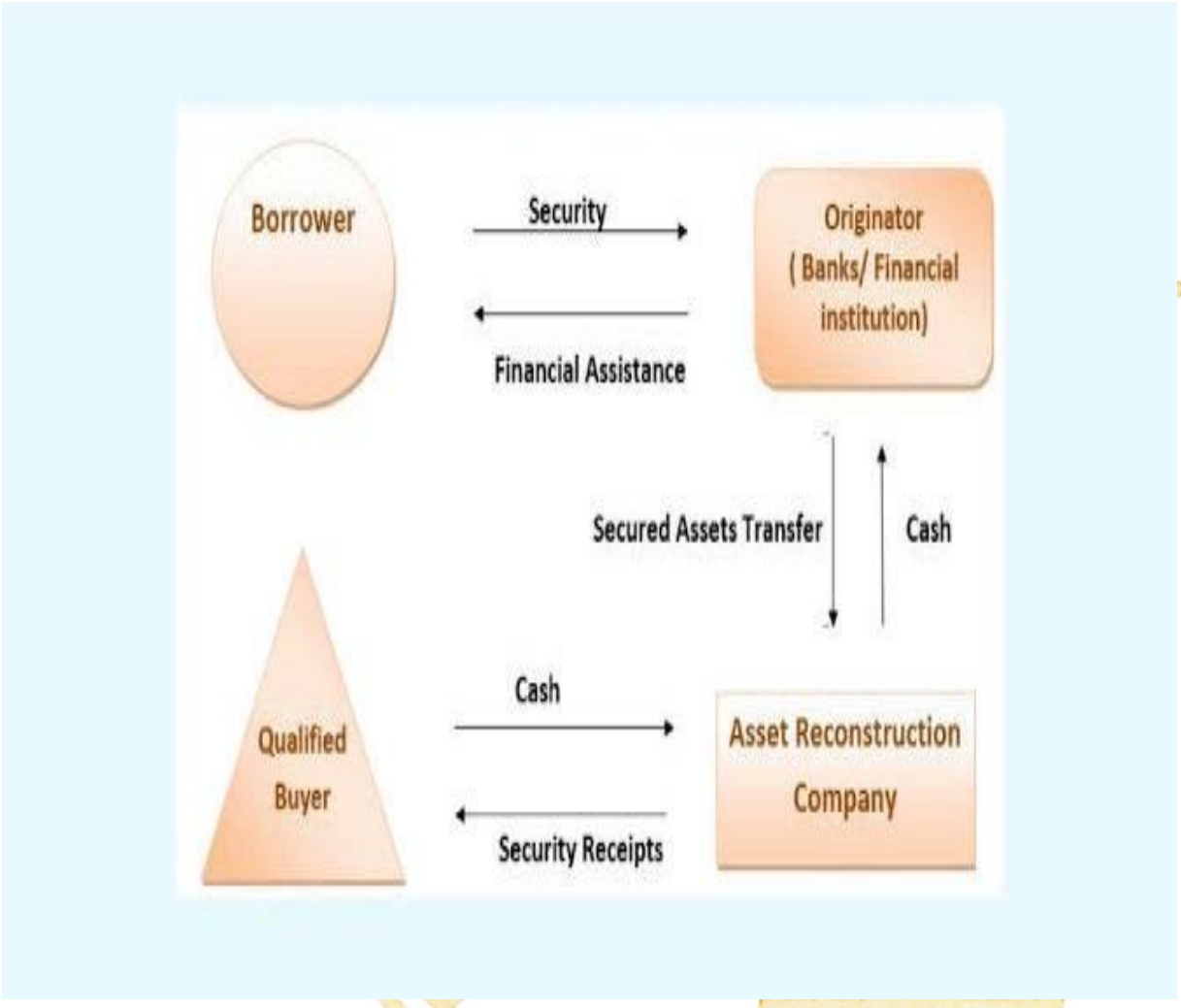
c) Appoint Manager to manage the security,

d) Ask any debtors of the borrower to pay any sum due to the borrower.

If there are more than one secured creditors, the decision about the enforcement of SARFEASI provisions will be applicable only if 75% of them are agreeing.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

CHAPTER 8 : PROCEDURE UNDER SECURITIZATION ACT



Sr. No.	ACTION	DURATION
1.	Notice for Possession	**60 Days**
2.	Reply by Bank to borrower's representation or objection from date of receipt of such representation or objection	**15 Days**

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

3.	Borrower can approach DRT against Possession Notice from date of acknowledgement	**45 Days**
4.	Appeal to DRAT against decision of DRT	**30 Days**
5.	Notice before sale of the Immovable secured Asset	**30 Days**
6.	Period of balance payment of 75% amount by the buyer of he secured assets	

8.1 **:** *Demand Notice*

a) If the borrower defaults in repayment, the service of demand notice as referred to in sub-section (2) of **Section 13** of the Act shall be made containing details and amounts of the amount payable by the borrower by delivering or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgement due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or

by courier or by any other means of transmission of documents like fax message or electronic mail service: Provided that where authorised officer has reason to believe that the borrower or his agent is avoiding the service of the notice or that for any other reason, the service cannot be made as aforesaid, the service shall be effected by affixing a copy of the demand notice on the outer door or some other conspicuous part of the house or building in which the borrower or his agent ordinarily resides or carries on business or personally works for gain and also by publishing the contents of the demand notice in two leading newspapers, one in vernacular language, having sufficient circulation in that locality.

b) Where the borrower is a body corporate, the demand notice shall be served on the registered office or any of the branches of such body corporate as specified under sub-rule (a).

c) Any other notice in writing to be served on the borrower or his agent by authorised officer, shall be served in the same manner as provided in this rule.

d) Where there are more than one borrower, the demand notice shall be served on each borrower.

8.2 **:** *Reply to Representation of the Borrower*

a) After issue of demand notice under sub-section (2) of Section 13, if the borrower makes any representation or raises any objection to the notice, the Authorized Officer shall consider such representation or objection and examine whether the same is acceptable or tenable.

b) If on examining the representation made or objection raised by the borrower, the secured creditor is satisfied that there is a need to make any changes or modifications in the demand notice, he shall modify the notice accordingly and serve a revised notice or pass such other suitable orders as deemed necessary, within seven days from the date of receipt of the representation or objection.

c) If on examining the representation made or objection raised, the Authorized Officer comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection, the reasons for non-acceptance of the representation or objection, to the borrower.

8.3 ***:*** *Procedure after Issue of Notice*

If the amount mentioned in the demand notice is not paid within the time specified therein, the authorized officer shall proceed to realise the amount by adopting any one or more of the measures specified in sub-Section (4) of **Section 13** of the Act for taking possession of movable property, namely:-

a) Where the possession of the secured assets to be taken by the secured creditor are movable property in possession of the borrower, the authorised officer shall take possession of such movable property in the presence of two witnesses after Panchnama drawn and signed by the witnesses as nearly as possible in Appendix I to these rules.

b) After taking possession under sub-rule (1) above, the authorised officer shall make or cause to be made an inventory of the property as nearly as possible in the form given in Appendix II to these rules and deliver or cause to be delivered, a copy of such inventory to the borrower or to any person entitled to receive on behalf of borrower.

c) The authorised officer shall keep the property taken possession under sub-rule (1) either in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as owner of ordinary prudence would, under the similar circumstances, take of such property: Provided that if such property is

subject to speedy or natural decay, or the expense of keeping such property in custody is likely to exceed its value, the authorised officer may sell it at once.

d) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

e) In case any secured asset is:-

(i) a debt not secured by negotiable instrument; or

(ii) a share, in a body corporate;

(iii) other movable property not in the possession of the borrower except the property deposited in or in the custody of any Court or any like authority, the authorised officer shall obtain possession or recover the debt by service of notice as under:-

(I) in the case of a debt, prohibiting the borrower from recovering the debt or any interest thereon and the debtor from making payment thereof and directing the debtor to make such payment to the authorised officer, or

(II) in the case of the shares in a body corporate, directing the borrower to transfer the same to the secured creditor and also the body corporate from not transferring such shares in favour of any person other than the secured

creditor. A copy of the notice so sent may be endorsed to the concerned body corporate's Registrar to the issue or share transfer agents, if any;

(III) in the case of other movable property (except as aforesaid), calling upon the borrowers and the person in possession to hand over the same to the authorised officer and the authorised officer shall take custody of such movable property in the same manner as provided in sub-rules (1) to (3) above;

(IV) movable secured assets other than those covered in this rule shall be taken possession of by the authorised officer by taking possession of the documents evidencing title to such secured assets.

8.4 **:** *Valuation of Movable Secured Assets*

After taking possession under sub-rule (1) of rule 4 and in any case before sale, the authorized officer shall obtain the estimated value of the movable secured assets and thereafter, if considered necessary, fix in consultation with the secured creditor, the reserve price of the assets to he sold in realization of the dues of the secured creditor.

8.5 **:** *Sale of Movable Secured Assets*

a) The authorised officer may sell the moveable secured assets taken possession under Sub-rule (1) of Rule 4 in one or more lots by adopting any

of the following methods to secure maximum sale price for the assets, to be so sold-

(i) obtaining quotations from parties dealing in the secured assets or otherwise interested in buying such assets; or

(ii) inviting tenders from the public; or

(iii) holding public auction; or

(iv) by private treaty.

b) The authorised officer shall serve to the borrower a notice of thirty days for sale of the movable secured assets, under sub-rule (1): Provided that if the sale of such secured assets is being, effected by either inviting lenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers, one in vernacular language, having sufficient circulation in that locality by setting out the terms of sale, which may include :-

(i) details about the borrower and the secured creditor;

(ii) description of movable secured assets to be sold with identification marks or numbers, if any, on them;

(iii) reserve price, if any, and the time and manner of payment;

(iv) time and place of public auction or the time after which sale by any other mode shall be completed;

(v) depositing earnest money as may be stipulated by the secured creditor;

(vi) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of movable secured assets.

c) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled between the parties in writing.

8.6 : Issue of Certificate of Sale

a) Where movable secured assets is sold, sale price of each lot shall be paid as per the terms of the public notice or on the terms as may be settled between the parties, as the case may be, and in the event of default of payment, the movable secured assets shall be liable to be offered for sale again.

b) On payment of sale price, the authorised officer shall issue a certificate of sale in the prescribe form Appendix III to these rules specifying the movable secured assets sold, price paid and the name of the purchaser and thereafter the sale shall become absolute. The certificate of sale so issued shall be prima facie evidence of title of the purchaser.

c) Where the movable secured assets are those referred in sub-clauses (iii) to (v) of clause (1) of sub-section (1) of Section 2 of the 12[Act], the provisions contained in these rules and Rule 7 dealing with the sale of movable secured assets shall, mutatis mutandis, apply to such assets.

8.7 **:** *Sale of Immovable Secured Assets*

a) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

b) The possession notice as referred to in sub-rule (a) shall also be published as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers (one in vernacular language) having sufficient circulation in that locality by the authorised officer.

c) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property.

d) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed off.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

e) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

(i) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(ii) by inviting tenders from the public;

(iii) by holding public auction; or

(iv) by private treaty.

f) the authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (e): Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include :-

(i) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(ii) the secured debt for recovery of which the property is to be sold;

(iii) reserve price, below which the property may not be sold;

(iv) time and place of public auction or the time after which sale by any other mode shall be completed;

(v) depositing earnest money as may stipulated by the secured creditor;

(vi) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

g) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the Internet.

h) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled between the parties in writing.

8.8 : Time of Sale, Issue of Sale Certificate and Delivery of Possession, etc.

a) No sale of immovable property under these rules shall take place before the expiry of thirty (30) days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (7) or notice of sale has been served to the borrower.

b) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor: Provided that no sale under this rule shall be confirmed, if the amount

offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9 : Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

c) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent. of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.

d) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.

e) In default of payment within the period mentioned in sub-rule (d), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

f) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

g) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him. [Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen day, from date of finalisation of the sale.]

h) On such deposit of money for discharge of the encumbrances, the authorised officer [shall] issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make, the payment accordingly.

i) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (g) above.

j) The certificate of sale issued under sub-rule (f) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.

8.9 ***:*** *Appointment of Manager*

a) The Board of Directors or Board of Trustees, as the case may be, may appoint in consultation with the borrower any person (hereinafter referred to as the Manager) to manage the secured assets the possession of which has been taken over by the secured creditor. [Provided that the manager so appointed shall not be a person who is, or has been, adjudicated insolvent, or has suspended payment or has compounded with his creditors, or who is, or has been, convicted by a criminal court of an offence involving moral turpitude.]

b) The Manager appointed by the Board of Directors or Board of Trustees, as the case may be, shall be deemed to be an agent of the borrower and the borrower shall be solely responsible for the commission or omission of acts of the Manager unless such commission or omission are due to improper intervention of the secured creditor or the authorised officer.

c) The Manager shall have power by notice in writing to recover any money from any person who has acquired any of the secured assets from the borrower, which is due or may become due to the borrower.

d) The Manager shall give such person who has made payment under sub-rule (c) a valid discharge as if he has made payments to the borrower.

e) The Manager shall apply all the monies received by him in accordance with the provisions contained in sub-section (7) of section 13 of the Act.

8.10 **:** *Procedure for Recovery of Shortfall of Secured Debts*

a) An application for recovery of balance amount by any secured creditor pursuant to Sub-section (10) of Section 13 of the Act shall be presented to the Debts Recovery Tribunal in the form annexed as Appendix VI to these rules by the authorised officer or his agent or by a duly authorised legal practitioner, to the Registrar of the Bench within whose jurisdiction his case falls or shall be sent by registered post addressed to the Registrar of Debts Recovery Tribunal.

b) The provisions of the Debts Recovery Tribunal (Procedure) Rules, 1993 made under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), shall mutatis mutandis apply to any application filed by under sub-rule (1).

c) An application under sub-rule (1) shall be accompanied with fee as provided in rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993.

8.11 ***:*** *Application to the Tribunal / Appellate Tribunal*

a) Any application to the Debt Recovery Tribunal under sub-section (1) of **Section 17** shall be, as nearly as possible, in the form given in Appendix VII to the rules.

b) Any application to the Appellate Tribunal under Sub-section (6) of Section 17 of the Act shall be, as nearly as possible, in the form given in Appendix VIII to the said rules. Any Appeal to the Appellate Tribunal under Section 18 of the Act shall be, as nearly as possible, in the form given in Appendix IX to the said rules.

8.12 ***:*** *Fees for Applications and Appeals under Sections 17 and 18 of the Act*

a) Every application under sub section (1) of section 17 or an appeal to the Appellate Tribunal under sub-section (1) of section 18 shall be accompanied by a fee provided in the sub-rule (2) and such fee may be remitted through a crossed demand draft drawn on a bank or Indian Postal Order in favour of the Registrar of the Tribunal or the Court as the case may be, payable at the place where the Tribunal or the Court is situated.

b) The amount of fee payable shall be as follows:

Sr. No.	Nature of Application	Amount of Fee payable
1.	Application to a Debt Recovery Tribunal under sub-section (1) of Section 17 against any of the measures referred to in sub-section (4) of Section 13	
	(a) Where the applicant is a borrower and the amount of debt due is less than Rs.10 Lakhs	Rs. 500 for every Rs.1 Lakh or part thereof
	(b) Where the applicant is a borrower and the amount of debt due is Rs. 10 Lakhs and above	Rs. 5,000 + Rs. 250 for every Rs. 1 Lakh or part thereof in excess of Rs. 10 Lakhs subject to a maximum of Rs. 1,00,000
	(c) Where the applicant is an aggrieved party other than the borrower and where the amount of debt due is less than Rs.10 Lakhs	Rs. 125 for every Rupees One Lakh or part thereof
	(d) Where the applicant is an aggrieved party other than the borrower and where the amount of debt due is Rs.10 Lakhs and above	Rs. 1,250 + Rs. 125 for every Rs. 1 Lakh or part thereof in excess of Rs. 10 Lakhs subject to a maximum of Rs. 50,000
	(e) Any other application by any person	Rs. 200
2.	Appeal to the Appellate Authority	Same fees as provided at

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

	against any order passed by the Debt Recovery Tribunal under Section 17	clauses (a) to (e) of serial number 1 of this rule]

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

CHAPTER 9 : PROCEDURE FOR SALE/AUCTION THAT THE SECURED CREDITOR NEEDS TO FOLLOW

The procedures laid down in SARFAESI Act, 2002 as well as the Security Enforcement (Rules), 2002 are mandatory and no divulgence from the same is permitted, as held by the Hon'ble Supreme Court of India. The procedures to be followed under the Act are stated hereinbelow.

9.1: Procedure of Physical Possession of the Secured Assets

a) If borrower defaults in repayment, under Section 13(2) demand notice is to be sent by Secured Creditor to the borrower to discharge his liabilities. Such demand notice persists for 60 days which shall contain details and amounts of the amount payable by the borrower. This demand notice can also be objected by the borrower, which should be replied by secured creditor within 15 days and the reply should enumerate reasons for non-acceptance of such objection. This position was clarified by the Hon'ble Supreme Court of India and later amended into SARFAESI Act, as Section 13 (3A).

b) When 60 days period concludes, without any discharge by the Borrower, actions can be taken by the Secured Creditor as enumerated under Section 13

(4) wherein they can take possession of the secured assets, take over the management of the asset, appoint any person to manage the secured asset,

c) Require any person who has acquired any of the assets from the borrower to pay the secured creditor.

d) The actions under Section 13 (4) are appealable as enumerated in Sections 17 and 18. Therefore, the borrower can Appeal the actions of the secured creditor in Debt Recovery Tribunal (DRT), Debt Recovery Appellate Tribunal (DRAT), Writ in High Court and Special Leave Petition (SLP) in Supreme Court of India.

9.2 ***:*** *Procedure of Sale and Auction under the SARFAESI Act, 2002*

a) A Sale Notice is required in the case of auctioning off of the secured asset if inviting tenders from the public, or by way of public auction. This sale notice shall be published in 2 leading newspapers, on the website of the secured creditor, and as per the Directions of the Ministry of Finance directions, upload the tender notice on tender.gov.in

b) The sale notice or possession notice should be effectively served, i.e. in 2 newspapers in circulation in the area as provided for in the Security Interest (Enforcement) Rules, 2002.

c) More particularly, the procedure for an auction of immovable assets is given in Rule 8, Security Interest (Enforcement) Rules, 2002. The methods of sale of the immovable secured assets include:

i) Quotations from the persons dealing with similar secured assets or otherwise interested in buying such assets; or

ii) by inviting tenders from the public;

iii) by holding public auction; or

iv) by private treaty (after the possession of the asset by a Bank or Financial Institution, they might be willing to sell it to an appropriate buyer through a private deal with a third party).

9.3: Procedure regarding Payment by Purchaser

The first step is determining the Reserve Price which is the minimum fair market value of immovable asset as stipulated by the authorized officer, followed by the relevant notice according to the obligations enumerated in Rule 8 (6). The bidding process for public auction shall be done in accordance with Rule 9, Security Interest Rules, 2002 wherein the bidder shall deposit:

a) Earnest money deposit (at the time of bidding)

b) 25% of the accepted sales price (including EMD) after successful bidding

c) 75% of the balance amount within 15 days of the auction.

Upon completion of the above, sale certificate shall be issued. Any sale by any other method other than public auction shall be on terms and conditions as decided by the parties. It is also mandatory under the Security Interest Rules, 2002 that the amount of sale shall not be less than the reserved price.

9.4 ***:*** *The Other Remedies available to the Secured Creditors*

Section 14 of the Act provides provision for assistance of District Magistrate and Chief Metropolitan Magistrate in taking possession of the property. The Hon'ble High Court of Madras has held that this provision should be given a purposive interpretation in consonance with Statement of Objects and Reasons of the SARFAESI Act, 2002. It was also held that the purpose of this provision is to aid the secured creditor to obtain possession of the asset at the earliest, and convert a Non-Performing Asset into a source of recovery for the amount due, and transfer the secured asset to a willing third party. However, it is pertinent to mention that all rights and interests of symbolic and/or physical possession guaranteed to the secured creditor under the said Act extinguish after the sale to the third party is complete. From the date of registration of the sale deed, secured creditor does not have any remedy or course of action under Sections 13 or 14 of the SARFAESI Act, 2002.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

In instance, where the secured creditor is unable to claim possession over the secured asset after the expiry of the period of the demand notice under Section 13(2) of the Act, 2002 specifically due to tenancy rights that might exist over the said asset, the rent or any other amount which might become due on the said secured asset from the lessee to the borrower (if any) becomes due to the secured creditor. This position was enumerated in Section 13 (4) of the Act, 2002, and was solidified by the Hon'ble Supreme Court [*Harshad Govardhan Sondgar v. International Asset Reconstruction (2014) 6 SCC 1*]

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

CHAPTER 10 : OFFENCES AND PENALTIES

The offence and penalties prescribed under the Securitisation Act:

a) Default in filing particulars of modifications / transactions relating to asset securitisation, asset reconstruction and creation of security interest. For default in filing particulars of transactions mentioned above, every company and every officer of the company or every lender or officer of the lender shall be punished with a fine which may extend to Rs. 5,000/- for every day during which the default continues.

b) Default in giving intimation of particulars satisfaction.

c) Non-compliance of RBI directives by SCO and RCO.

For non-compliance of the RBI directives, every company and every officer of the company shall be punished with a fine which may extend to Rs. 5,00,000/- and for continuing offence, an additional fine of Rs. 10,000/- everyday during which the default continues.

Only a Metropolitan Magistrate or Judicial magistrate of the First Class has powers to take cognizance and try an offence under the Securitisation Act.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

CHAPTER 11 : RIGHTS OF THE BORROWER

a) SARFAESI Act was able to provide effective methods to secured creditors to recover their long outstanding dues from the Non-Performing Assets, yet the rights of the borrowers could not be ignored and have been duly incorporated in the law.

b) The borrowers can at any time before the sale is conducted, remit the dues and avoid losing securities.

c) In case any unhealthy / illegal act is done by the Authorized Officer, he would be liable for Penal consequences.

d) The borrowers will be entitled to get compensation for such acts.

e) For redressing the grievances, the borrowers can approach the DRT (within 45 days) and then DRAT (within 30 days) in Appeal

The Act stipulates four conditions for enforcing the rights by a creditor.

a) The debt is secured;

b) The debt has been classified as an NPA by the banks ;

c) The outstanding dues are one lakh and above and more than 20% of the principal loan amount and interest there on;

d) The security to be enforced is not an Agricultural land;

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

CHAPTER 12 : AMENDMENTS TO THE SARFAESI ACT

The SARFAESI Act has been amended on 12.08.2016 to extend the scope of the Act to provide for registration of security interest held by all other creditors, in addition to the banks and financial institutions defined as secured creditors under the Act. This will give confidence to the secured creditors qua the value of the security, by obviating the risk of the same borrower obtaining credit on the same security from multiple lending institutions without informing the extend of the earlier charges. It will also benefit borrowers, as better access of lenders to secured credit information will lead to ease in getting credit.

Sub-section 4 of Section 26B of the amended Act enjoins every authority or officer of the Central Government or any State Government or local authority entrusted with the function of recovery of tax or other Government dues and for issuing any order for attachment of any property of any person liable to pay the tax or Government dues, to file with the Central Registry (CERSAI) any order of attachment of any property issued by them. This becomes very important in view of provisions of Section 26C dealing with effect of such registration. As per sub-section 1 of Section 26C, registration with CERSAI shall be deemed to constitute a public notice of such a transaction. Sub-section 2 of Section 26C

lays down that such a registered security interest shall have priority over any subsequent security interest created upon such property in any fashion like sale, lease or attachment by any other authority/person. Therefore it becomes very important that as soon as an attachment order is issued under the Income Tax Act, a copy of the same is sent to CERSAI as well.

Keeping in view the above changes in the provisions of SARFAESI Act 2002, it has become very important for the field authorities to notify CERSAI of any attachment order already issued and also endorse a copy of attachment orders to CERSAI whenever the same are issued in future so that not only the value of the attached property remains intact but also the right of the Department over the attached property remains at the top. This would have to be done in the form prescribed for the purpose which can be downloaded from the website of CERSAI i.e. www.cersai.org.in The field officers may also be instructed to approach CERSAI for getting information in respect of properties already attached by other creditors for not only exploring the collection out of the same but also to find out the hidden and undeclared assets of the tax defaulter.

As per the amendment, the scope of the registry that contains the central database of all loans against properties given by all lenders has been widened to include more information. Reserve Bank of India will get more powers to audit

and inspect Asset Reconstruction Companies and will get the freedom to remove the chairman or any director. It can also appoint central bank officials into the boards of Asset Reconstruction Companies.

The amendment has brought hire purchase and financial lease under the coverage of the SARFAESI Act. Regarding Debt Recovery Tribunals, the amendment aims to speed up the Debt Recovery Tribunals procedures. Online procedures including electronic filing of recovery applications, documents and written statements will be initiated. Further, in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided in Section 13 with necessary modifications and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee. The amendments are important for Debt Recovery Tribunals as they can play an important role under the new Bankruptcy law. Debt Recovery Tribunals will be the backbone of the bankruptcy code and deal with all insolvency proceedings involving individuals. The defaulter has to deposit 50% of the debt due before filing an appeal at Debt Recovery Tribunals.

12.1 **:** *New changes made in the Amendment Act 2016 are as follows :*

a) **Sub-rule (1) of Section 3** – The Demand Notice can be served / delivered by hand delivery also, apart from the other prescribed mode.

b) **Section 14** - The application before the District Magistrate and Chief Metropolitan Magistrate for physical possession of the charged property must be disposed of within a period of 30 days from the date of application and in any case, not later than 60 days.

c) **Section 3(A)** – Time prescribed for making change or modification, if any, to the Section 13(2) notice on the basis of representation of the borrower to the said notice or to reply to the representation of the borrower has been enhanced to 15 days.

d) **Section 26(E)** - SARFAESI Act first tie introduced priority of charge of banks dues over any other due of Central / State Government. (Landmark amendment)

e) **Section 30(A)** of DRT Act – An Appeal against any order of recovery officer under Section 30 shall not be entertained unless 50% of the amount due is deposited with DRT.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

CHAPTER 13 : SARFAESI & IBC

The **Insolvency and Bankruptcy Code, 2016** offers uniform comprehensive insolvency legislation to Corporations, Firms and Individuals (other than financial firms). One of the fundamental features of the Code is that it allows creditors to assess the viability of a debtor as a business decision, and agree upon a plan for its revival or a speedy liquidation. The IBC creates a new institutional framework, consisting of a regulator, insolvency professionals, information utilities and adjudicatory mechanisms, that will facilitate a formal and time bound insolvency resolution process and liquidation.

To provide easy exit with a painless mechanism in cases of insolvency of individuals as well as companies, the code has significant value for all stakeholders including various Government Regulators. Introduction of this Code has done away with overlapping provisions contained in various laws –

Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and The Companies Act, 2013.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

13.1 ***:*** *Applicability of the Code*

The provisions of the Code shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of the following entities:-

13.1.1: For the Corporate Debtors' the Code proposes two independent stages

a) Insolvency Resolution Process –

   wherein the financial creditors assess the debtor's business and evaluate whether the business can be subjected to revival procedure and evaluate options for its rescue and revival.

b) Liquidation –

   if the insolvency resolution process fails or financial creditors decide to wind down and distribute the assets of the debtor.

13.1.2 : Insolvency Resolution Process for Individuals/Unlimited Partnerships

a) For individuals and unlimited partnerships, the Code applies in all cases where the minimum default amount is INR 1000 (USD 15) and above (the Government may later revise the minimum amount of default to a higher threshold). The Code envisages two distinct processes in case of insolvencies: (a) automatic fresh start and (b) insolvency resolution.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

b) Under the automatic fresh start process, eligible debtors (basis gross income) can apply to the Debt Recovery Tribunal (DRT) for discharge from certain debts not exceeding a specified threshold, allowing them to start afresh.

c) The insolvency resolution process consists of preparation of a repayment plan by the debtor, for approval of creditors. If approved, the DRT passes an order binding upon the debtor and creditors to the repayment plan. If the plan is rejected or fails, the debtor or creditors may apply for a bankruptcy order.

13.2 **: SARFAESI ACT V/S INSOLVENCY AND BANKRUPTCY CODE, 2016**

SARFAESI Act, 2002 provides a safety net to secured financial creditors (banks and financial institutions) by empowering them to enforce their security interests without the intervention of any court. On the other hand, under IBC, the rights and interests of all types of creditors have been taken into consideration including that of secured creditors.

Section 14(1)(c) of the Insolvency and Bankruptcy Code, 2016 clearly provides that during the insolvency resolution process as defined in the Code, the Code takes precedence over the DRT Act and SARFAESI Act.

The Code is a welcome step in resolving issues faced in these archaic laws. Moreover, it consolidates laws relating to insolvency and repeals the Presidency

Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. Other than that, the Code also amends 11 laws, including the Companies Act, 2013, Recovery of Debts and Bankruptcy Act, 1993 (DRT Act), and Securitization and Reconstruction of the Financial Assets and Enforcement of the Securitization Act, 2002 (SARFAESI Act). From the amendments, it is clear that all these 11 Acts are affected by the enactment of the Code.

The Code has differentiated liquidation and Insolvency process between Corporate Debtors (which shall be dealt by the NCLT) and Individuals and firms liquidation process (which shall be of the jurisdiction of DRT), the Corporate Debtors default should be at least INR 100,000 (USD 1495) (which limit may be increased up to INR 10,000,000 (USD 149,500) by the Government). The Code devises two separate processes for corporate insolvency matters and individual/ un-incorporated bankruptcy matter. Part II of the Code deals with corporate insolvency mechanism pertaining to companies incorporated under the Companies Act, 1956 and 2013 and limited liability partnership incorporated under the Limited Liability Partnership Act, 2008; matters in this regard will be dealt by the National Company Law Tribunal. Part III deals with the bankruptcy process for individuals and partnership firms (unincorporated entities) and is maintainable before the Debt Recovery Tribunal.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

CHAPTER 14 : CASE LAWS

1) **Swarup Packaging Vs. State Bank of India [(2004) 53 SCL 394 (ALL HC DB)] :**

Securitization Act overrides DRT; it was held that SARFAESI Act, 2002 is a Special Act and it prevails over the DRT Act.

2) **Cambridge Solutions Ltd Vs. Global Software Ltd (AIR 2009 Mad 74) :**

Decided on 30 September, 2008 observed and held as follows :

"16. Section 34 of the SARFAESI Act debars the civil court from entertaining any suit in respect of any matter which falls within the jurisdiction of the Debts Recovery Tribunal or the Appellate Tribunal as the case may be. As already pointed out by this court, as regards the ***allegation of fraud*** *in obtaining certain orders depriving the valuable right of a third party,* ***it is only the civil court which has got jurisdiction to deal with it. Such an issue falls outside the purview of the Debt Recovery Tribunal (DRT) or the Debt Recovery Appellate Tribunal (DRT).***"*

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

3) **Mardia Chemicals Ltd. Vs. Union Of India (AIR 2004 SC 2371) :**

The Constitutionality of the Securitization Cat was upheld except for Section 17(2) of the said Act. In this landmark judgment, the Hon'ble Supreme Court of India held that,

> *"The provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act) are valid except sub-section (2) of Section 17, which is ultra vires of Article 14 of the Constitution Of India. The Court upholds the constitutionality of the SARFAESI Act, whereby the Banks / FI's were allowed to act independently without approaching the courts of law."*

4) **ICICI Bank Ltd. Vs. Official Liquidator of APS Star Industries Ltd. [(2010) 10 SCC 1] :**

The Hon'ble Supreme Court of India held that an outstanding in the account of the borrower is a debt due and payable by the borrower to the bank and the bank is the owner of such debt. The Bank can always transfer its assets and such transfer in no manner affects any right or interest of the borrower.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

5) **Sushil Kumar Agarwal Vs. Allahabad Bank [11(2004) BC 94 (DRT, Ranchi)] :**

The Debt Recovery Tribunal, Ranchi dealt with this issue in wherein it held that,

"The question that arises is whether during pendency of the suit, the defendant Bank can resort to Section 13(4) of the SARFAESI Act, 2002. So when alternative method has been prescribed to recover the amount, which the petitioner is liable to pay, and the bank in order to enforce payment has taken recourse to the Act, which has the overriding effect over other laws, no fault can be found with defendant bank in proceeding under the Act".

6) **Transcore Vs. Union of India and Anr.**

A claim by a bank or a financial institution, before SARFAESI Act and Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDDB Act") came into force, would ordinarily have been filed in the civil court having the pecuniary jurisdiction. The setting up of the Debt Recovery Tribunal under the RDDB Act resulted in this specialized tribunal entertaining such claims by banks and financial institutions. In fact, suits

from the civil jurisdiction were transferred to the Debt Recovery Tribunal. The Tribunal was, thus, an alternative to a civil court recovery proceeding. Upon the SARFAESI Act being brought into force seeking to recover debts against security interest, a question was raised whether parallel proceedings could go on under the RDDB Act and the SARFAESI Act. This issue had come up for consideration before JJ. Arijit Pasayat and JJ.S.H. Kapadia of the Hon'ble Supreme Court of India wherein it was held,

"According to American Jurisprudence, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Principles of Equity (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application."

The remedy under SARFEASI Act is additional remedy, which is not inconsistent with DRT Act, 1993 and therefore, doctrine of election has no application.

7) **Mathew Varghese Vs. M. Amritha Kumar [(2014) 5 SCC 610] :**

In this case, the Hon'ble Supreme Court held that,

"A close reading of Section 37 shows that the provisions of the SARFAESI Act or the Rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, it will have to be held that in the event of any of the provisions of the RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, the SARFAESI Act and the RDDB Act, would be complementary to each other."

A reading of section 37 discloses that the application of the SARFAESI Act will be in addition to and not in derogation of the provisions of the RDDB Act.

In other words, it will not in any way nullify or annul or impair the effect of the provisions of the RDDB Act. The Supreme Court was also pleased to fortify the above statement of law as the heading of the said section also makes the position clear that application of other laws are not barred. The effect of section 37 would therefore be that in addition to the provisions contained under the SARFAESI Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the provisions of the other legislation mentioned in Section 37.

8) **ITC Limited Vs. Blue Coast Hotels Ltd. & Ors. [CIVIL APPEAL Nos. 2928-2930 OF 2018] :**

The Hon'ble Supreme Court held that once the proceedings have been initiated by a secured creditor under Section 13 of the Act, it is mandatory for the secured creditor to consider the representations made by the debtors under Section 13 (3A) of the Act.

"We find the language of sub-section (3A) to be clearly impulsive. It states that the secured creditor 'shall' consider such representation or objection and further, if such representation or objection is not

acceptable or tenable, he shall communicate the reasons for non-acceptance" thereof. We see no reason to marginalize or dilute the impact of the use of the imperative 'shall' by reading is as 'may'. The word 'shall' invariably raises a presumption that the particular provision is imperative."

The Hon'ble Supreme Court further held that,

"As the section stood originally, there was no provision for the above-mentioned requirement of a debtor to make a presentation or raise any objection to the notice issued by the creditor under Section 13(2). As it was introduced via sub-section (3A), it could not be the intention of the Parliament for the provision to be futile and for the discretion to ignore the objection/representation and proceed to take measures, be left with the creditor. There is a clear intendment to provide for a locus poenitentiae which requires an active consideration by the creditor and a reasoned order as to why the debtor's representation has not been accepted.

...We have no doubt that the failure to furnish a reply to the representation is not of much significance since we are satisfied that the creditor has undoubtedly considered the representation and the proposal for repayment

made therein and has in fact granted sufficient opportunity and time to the debtor to repay the debt without any avail. Therefore, in the fact and circumstances of this case, we are of the view that the debtor is not entitled to the discretionary relief under Article 226 of the Constitution which is indeed an equitable relief."

Accordingly, in view of the Hon'ble Supreme Court of India's judgment in the aforesaid matter, it is mandatory (and not discretionary) for all banks who have issued a notice under Section 13(2) of the Act to give consideration to the representations or objections that may be raised by the borrower under Section 13(3A) of the Act and if the said representations or objections are not acceptable or tenable then the banks are mandated to communicate the reasons for the same to the borrower within 15 days of receipt of such representations or objections.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

CONCLUSION :

The SARFAESI Act is enacted with a distinct purpose to facilitate banks and financial institutions to recover dues in a speedy manner by enforcement of security interest without intervention of the court. The object of the debt recovery laws is to reduce non-performing assets and increase liquidity in the market. Though the enactment of the SARFAESI Act sought to mobilise blocked funds of the banks in the non-performing assets, the various provisions of the acts have created deep sorrows for the genuine buyers. The various provisions meant to balance the requirements of the borrowers and the banks, have their balance of favour tilted towards the banks. These powers are, at majority of the times, mis-utilised by the banks to appropriate their interests against the interests of the buyers. Commendably, the Ruling has attempted to preserve the right to property of the borrower by ensuring that a borrower is not disposed without due process of law, the underlying premise being that secured creditors are not allowed to abuse the wide powers provided to them under the SARFAESI Act.

Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*

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Research by: *Adv. Pankti Dedhia, Associate*
Verified : *Adv. Ashish Ved, Co- Founder & Sr. Partner*
Mentor : *Adv. Yusuf Iqbal Yusuf, Founder & Managing Partner*