

RDDB Vs SARFAESI

Both these statutes throw an insight on the recovery of money due from defaulters to the banks and financial institutions	RDDB	SARFAESI
scope and legislative utility	to establish Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions	an act to regulate securitisation and reconstruction of financial assets and enforcement of security interest;
Type of Creditors	RDDB&FI is for all types of creditors whether or not they are secured or unsecured	only secured creditors can refer to SARFAESI
Intervention of the Court	expeditious adjudication at the hands of Tribunals	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.
Nature of the legislation	RDB is an adjudicating act	SARFAESI Act is executory in nature
Intervention by adjudicating authority	Legality of the action taken by secured creditor under Section 13(4) can be challenged by filing appeal under Section 17 of the SARFAESI Act.	no adjudication process at least, till action under Section 13(4) is taken

Question?

whether during pendency of the suit, the defendant Bank can resort to Section 13(4) of the SARFAESI Act, 2002.
Answer: 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".

Case Law: The Debt Recovery Tribunal, Ranchi dealt with this issue in Sushil Kumar Agarwal v Allahabad Bank

Debt Recovery Appellate Tribunal, Chennai in ARCIL v Kumar Metallurgical Corporation Limited :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.

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----Background of DRT----One of problems of banks in India is large amount of bad debts. Recovery through Courts is very slow and time consuming. Hence 'Recovery of Debts due to Banks and Financial Institutions Act, 1993' (RDDBFI Act) was passed. The Act came into effect on 24-6-1993. ----

Applicability of Debt Recovery Act-Banking companies, SBI, subsidiaries of SBI, Regional Rural Banks and multi state cooperation banks can make application to Debt Recovery Tribunal (DRT) - section 2(d) of RDDBFI Act.-----Financial Institutions can also make application to DRT for recovery of debt.----Financial Institutions mean – Public Financial Institutions within the meaning of section 4A of Companies Act -----Asset Reconstruction Companies registered under SARFAESI Act-----*debenture trustees registered with SEBI and*-----Other institutions as may be notified by Central Government - section 2(h) of RDDBFI Act.

Public Financial Institution - "Public financial institution" means—

- (i) the Life Insurance Corporation of India, established under section 3 of the Life Insurance Corporation Act, 1956
- (ii) the Infrastructure Development Finance Company Limited, referred to in of section 4A(l)(vi) of the 1956 Act (which is repealed under section 461 of the Companies Act, 2013)
- (iii) specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002
- (iv) institutions notified by the Central Government imder section 4A(2) of the 1956 Act (which is now repealed under section 465 of the Companies Act, 2013)
- (v) such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India [section 2(72) of the Companies Act, 2013],

Public Financial Institution' [PFI] means IDBI, ICICI, IFCI, LIC, UTIIRBI, GICI, SCICI, SIDBI, State Financial Corporations, NABARD, NCDC etc.

DRT Act does not extend to Cooperative Banks - The Act applies to 'banking company'. A cooperative bank is not a 'company'. Dispute between cooperative society and its members are to be decided by Registrar of Societies. Hence, DRT Act does not apply to cooperative societies - *Greater Bombay Cooperative Bank v. United Yarn Tex (P) Ltd.* (2007) 78 SCL 42 (Mag) (SC) = 137 Comp Cas 63 (SC).

Monetary limit for applicability of the Act - *Save as otherwise provided*, the provisions are applicable where amount of debt due to bank or FI or consortium of banks/FIs is *Rs. 20 lakhs* or more. Central Government can reduce this ceiling to Rs one lakh by issuing a notification, [section 1(4) of RDDBFI Act as amended *vide* 2016 Amendment Act. The words in italics have been inserted *vide* 2016 Amendment Act, as the Act wiU deal with adjudications relating to bankruptcy also after those provisions are notified and made effective],

[The limit was Rs 10 lakhs, which has been increased to Rs 20 lakhs *vide* Notification No. SO 4312(E) F No. 3/4/2018-DRT dated 6-9-2018].

RDB Act and SARFAESI Act are complimentary to each other, actions under both possible - RDB Act and SARFAESI Act are complimentary to each other *Transcore V.* [70/(2008) 1 SCC 125 = 73 SCL 11 = 135 Comp Cas 1 (SC) quoted with approval in *Baleshwar Dayal Jaisv^al v. Bank of India* (2016) 1 SCC 444 = 132 SCL 129 = 61 taxmann.com 104 (SC).

Limitation Act applicable - Limitation Act is applicable for making application to Debt Recovery Tribunal, [section 24 of RDDBFI Act].

Priority of secured creditors - Secured Creditors will have priority as specified in Insolvency and Bankruptcy Code, 2016, after relevant provisions that Act is notified and made effective - *Explanation* to section 3 IB of RDDBFI Act.

Section 31B of the Act gives priority to realise secured debts due and payable to them by sale of assets. This is in priority over all Government dues including taxes.

Hence, in *AC (CT) v. Indian Overseas Bank* (2017) 99 VST 222 (Mad HC FB), it has been held that under section 3IB of RDDBFI Act, banks and financial institutions have priority over all dues, including tax dues.

In *Axis Bank v. State of Maharashtra* (2017) 100 VST 48 (Bom HC DB), it has been held that bank's dues have priority over statutory dues under SARFAESI Act.

DRT and DRAT to deal with bankruptcy cases also - DRT and DRAT will deal with bankruptcy cases also as specified in Insolvency and Bankruptcy Code, 2016, after that Act is notified and made effective.

Overriding provisions of Act

Provisions of the Act have overriding effect [section 34(1) of RDDBFI Act].

However, the provisions are in addition to and not in derogation of provisions of IFCI Act, State Financial Corporation Act, UTI Act, IRBI Act and SICA. In other matters, provisions of this Act will have effect notwithstanding anything inconsistent in any other law. [section 34(2) of RDDBFI Act].

‘Any person’ can make application under section 17(1) SARFAESI Act against action taken by Bank under section 13(4) of the SARFAESI Act to DRT.

Meaning of 'debt'

"Debt" means 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 the 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 on, and legally recoverable on, the date of the application *and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of debt securities* - section 2(g) of RDDBFI Act. Words in italics inserted w.e.f. 1-9-2016.

Debt securities - "Debt securities" means debt securities listed in accordance with regulations made by SEBI under SEBI Act - section 2(ga) of RDDBFI Act inserted w.e.f. 1-9-2016.

Security interest - “Security interest” means mortgage, charge, hypothecation, assignment or any other right, title or interest of any kind whatsoever upon property, created in favour of any bank or financial institution and includes - (a) such right, title or interest upon tangible asset, retained by the bank or financial institution as owner of the property, given on hire or financial lease or conditional sale which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or any credit provided to enable the borrower to acquire the tangible asset; or (b) such right, title or interest in any intangible asset or licence of any intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit extended to enable the borrower to acquire the intangible asset or licence of intangible asset - section 2(ga) of RDDBFI Act inserted w.e.f. 1-9-2016.

Financial lease - “Financial lease” means a lease under a lease agreement of tangible asset, other than negotiable instrument or negotiable document, for transfer of lessor’s right therein to the lessee for a certain time in consideration of payment of agreed amount periodically and where lessee becomes the owner of the such assets at the expiry of the term of lease or on payment of the agreed residual amount, as the case may be - section 2(ha) of RDDBFI Act inserted w.e.f. 1-9-2016.

Secured creditor - “Secured creditor” shall have the meaning as assigned to it in section 2(l)(zd) of SARFAESI Act - section 2(la) of RDDBFI Act inserted w.e. 1-9-2016.

Property - “Property” means –

(a) immovable property

(b) movable property

© any debt or any right to receive payment of money, whether secured or unsecured

(d) receivables, whether existing or future

(e) intangible assets, being know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature, as may be prescribed by the Central Government in consultation with RBI - - section 2(jb) of RDDBFI Act inserted w.e.f. 1-9-2016.

Wide definition of ‘debt’ - The debt may be any liability (inclusive of interest) due to bank or FT. It may be secured or unsecured or even assigned. The transaction might have been in cash or otherwise (e.g. bank guarantee. Letter of Credit etc.). It should be legally recoverable on date of application. It includes amount payable under a decree or order of any civil Court or any arbitration award or otherwise, [section 2(g) of RDDBFI Act].

Act is mainly a procedural Act

The DRT Act does not make any substantive provision in respect of debt or its recovery. It is primarily a procedural Act where powers of ordinary Civil Court are transferred to a special tribunal, with many procedural simplifications. There is no framing of issues and evidence can be obtained through affidavits. Cross Examination may be permitted only if the Presiding Officer of DRT is of the view that cross examination is indeed necessary. Otherwise, he can refuse permission for cross examination. As per new Civil Procedure Code, cross examination can be conducted by appointing a Commission.

Debt Recovery Tribunal

Central Government will establish 'Debt Recovery Tribunals' (DRT) to exercise jurisdiction under the Act - section 3(1) of RDDBFI Act.

Central Government will also establish DRT to exercise jurisdiction, powers and authority of Adjudicating Authority conferred on such Tribunal under Insolvency and Bankruptcy Code, 2016 - section 3(1 A) of RDDBFI Act inserted *vide* 2016 Amendment Act. This section will be made effective after the Insolvency and Bankruptcy Code, 2016 is notified and made effective.

DRT will also exercise jurisdiction, powers and authority to entertain and decide applications under Part III of Insolvency and Bankruptcy Code, 2016. DRT shall have circuit sittings in all district headquarters - section 17(1 A) of RDDBFI Act inserted *vide* 2016 Amendment Act. This section will be made effective after the Insolvency and Bankruptcy Code, 2016 is notified and made effective.

DRT is a one person tribunal who is designated as ‘Presiding Officer’ [section 4(1) of RDDBFI Act],

Qualification, appointment, terms of office, salaries and allowances, resignation, removal and other terms and conditions of service of Presiding Officer of Tribunal shall be governed by section 179 of Finance Act, 2017 - Section 6A of RDDBFI Act inserted *vide* section 174 of Finance Act, 2017 w.e.f. date to be notified.

Central Government can authorize a Presiding Officer to discharge functions of another Presiding Officer, in addition to his present charge [section 4(2)(a) of RDDBFI Act]

Central Government can authorize Judicial Member of any other Tribunal established under the law to discharge functions of Presiding Officer of DRT, in addition to his present charge [section 4(2)(b) of RDDBFI Act as inserted w.ei. 1-9-2016],

Presiding Officer of any other Tribunal can be authorized by Central Government to discharge functions of Presiding Officer - rule 2(f) of DRT (Procedure) Rules amended w.e.f. 4-11-2016.

The presiding officer should be qualified to be a District Judge. He will be appointed for five years or till he attains age of 65 years, whichever is earlier [the age limit has been increased from 62 to 65 years w.e.f. 1-9-2016.].

He can be reappointed but not beyond age of 65 years.

He will be assisted by Recovery Officers and other officers and staff, [section 7 <n RDDBFI Act].

DRT shall exercise jurisdiction, powers and authority to entertain and decide applications from Banks and Financial Institutions for recovery of debts due to them, [section 17(1) of RDDBFI Act].

DRT is not a civil Court - *Nahar Industrial Enterprises v. Hong Kong and Shanghai Banking Corpn* (2009) 8 SCC 646 = 95 SCL 21(MAG) (SC).

[Procedure for application before DRT](#) - Procedure to be followed for application before DRT is specified in DRT (Procedure) Rules, 1993.

[Application should be filed in form I](#) as per rule 4 of DRT (Procedure) Rules, 1993. Fees as specified in rule 7 are payable.

DRT can review its interim and final orders - DRT is empowered to review its decisions. Review is only for mistake apparent from records. Prescribed application fees are payable.

As per rule 5A of DRT (Procedure) Rules, 1993, the application for review should be made to DRT within 30 days, supported by affidavit verifying the application, to review mistakes apparent from records [The time limit was 60 days upto 4-11-2016].

Publication of name of defaulter - DRT can order publication of names of defaulters in newspaper or otherwise, after final order/recovery certificate has been passed. [Rule 15A of DRT Rules].

Appellate Tribunal

Central Government will establish 'Debt Recovery Appellate Tribunal' (DRAT), [section 8 of RDDBFI Act],

More than one Appellate DRAT can be established by Central Government.

DRAT will hear appeal against orders of (a) Presiding Officer of DRT - section 17(2) of RDDBFI Act (b) Orders of Adjudicating Authority under Part HI of Insolvency and Bankruptcy Code, 2016 - sections 8(1 A) and 17(2A) of RDDBFI Act. These sections will be made effective after the Insolvency and Bankruptcy Code, 2016 is notified and made effective.

This will be one person tribunal, who is designated as Chairperson, (section 9 of RDDBFI Act).

Qualification, appointment, terms of office, salaries and allowances, resignation, removal and other terms and conditions of service of Presiding Officer of Tribunal shall be governed by section 179 of Finance Act, 2017 - Section 15A of RDDBFI Act inserted *vide* section 174 of Finance Act, 2017.

Central Government can authorize Chairperson of one DRAT to discharge functions of Chairperson of another DRAT, in addition to his present charge [section 8(3) of RDDBFI Act]

Appeal against order of DRT lies with Appellate Tribunal, [section 17(2) of RDDBFI Act].

Chairperson of DRAT to supervise and control DRT - DRT will be under superintendence and control of Chairperson of DRAT. The Chairperson of DRAT can call for information relating to pending cases and convene meeting of presiding officers of DRT periodically - section 17A(1A) of RDDBFI Act inserted w.e.f. 1-9-2016.

Chairperson of DRAT can recommend Central Government to take action against any DRAT for misbehavior or incapacity - section 17A(1B) of RDDBFI Act inserted w.e.f. 1-9-2016.

Procedure for appeal before DRAT - Procedure to be followed for appeal before DRAT is specified in DRAT (Procedure) Rules, 1994. Appeal should be filed in form annexed to DRAT (Procedure) Rules, 1994. Fees as specified in rule 8 are payable.

General provisions relating to DRT and DRAT

Staff for DRT and DRAT will be provided by Central Government [sections 7 and 12 of RDDBFI Act].

Salary and allowances and Presiding Officer of DRT and Chairperson of DRAT shall be prescribed by rules - section 13 of RDDBFI Act.

Vacancies in posts of Presiding Officer of DRT and Chairperson of DRAT shall be filled by Central Government. Proceedings can continue from stage at which vacancy was filled. Thus, entire proceedings need not be conducted afresh - section 14 of RDDBFI Act.

Presiding Officer of DRT and Chairperson of DRAT can resign after giving three month notice. They can be removed for proved misbehaviour after conducting enquiry - section 15 of RDDBFI Act.

Order valid despite defects in appointment - Order of Presiding Officer of DRT and Chairperson of DRAT would be valid despite defects in appointment – section 16 of RDDBFI Act.

Powers of civil court to DRT and DRAT - DRT and DRAT have powers of Civil Court and proceedings before Tribunal and Appellate Tribunal shall be deemed to be judicial proceedings, [section 22 of RDDBFI Act].

Representation before DRT/DRAT - The case can be represented by bank/ defendant through any of its officers or by a legal practitioner. The defendant can himself represent his case, if he so desires [section 23 of RDDBFI Act].

Presiding Officer, Chairperson and staff are public servants - Presiding Officer of DRT, Chairperson of DRAT, recovery officer and staff of DRT/DRAT are public servants - section 32 of RDDBFI Act.

Their acts done in good faith are protected against suit, prosecution or other legal proceedings - section 33 of RDDBFI Act.

Procedure at Debt Recovery Tribunal

Bank/FI has to file application in prescribed form along with necessary appeal fees for recovery of any debt from any person. Application should be accompanied with true copies of all documents relied upon in support of the claim - section 19(3) of RDDBFI Act.

Application shall be supported by affidavit sworn in verifying all the facts and pleadings - section 19(10A) of RDDBFI Act.

Part of fees will be refunded if claim is settled before final orders - section 19(3B) of RDDBFI Act.

‘Document’ includes statement of account or any entry in banker’s book duly certified under Bankers’ Books Evidence Act - *Explanation* to section 19(3) of RDDBFI Act.

Application should be accompanied by details as specified in section 19(3 A) of RDDBFI Act as inserted vide 2016 Amendment Act.

Application to DRT under Insolvency and Bankruptcy Code, 2016 - In case of application to DRT to exercise powers of adjudicating authority under the Insolvency and Bankruptcy Code, 2016 shall be dealt with in manner prescribed under that Code - section 19A of RDDBFI Act inserted *vide* 2016 Amendment under Insolvency and Bankruptcy Act. This section will be made effective after the Insolvency and Bankruptcy Code, 2016 is notified and made effective.

[Note - Due to drafting mistake, same section No. 19A has been given to two provisions. Government will have to amend the mistake in due course. This has happened as amendments were made in two different Amendment Acts passed separately].

Jurisdiction of DRT - The jurisdiction of DRT is (a) where branch or office of Bank/FI is maintaining account of debt claimed as outstanding or (aa) defendant or each of defendant is actually residing or carrying on business or personally working (b) any defendant or each of defendant is actually residing or carrying on business or personally working (c) cause of action in whole or in part arises - section 19(1) of RDDBFI Act.

Withdrawal of application if Bank/FI intend to take action under SARFAESI Act - *Bank/FI can withdraw application if they intend to take action under SARFAESI Act - proviso to section 19(1) of RDDBFI Act.*

If such application for withdrawal is made, it should be decided within 30 days

- second *proviso to* section 19(1) of RDDBFI Act.

If permission for withdrawal is made, written order giving reasons should be passed by DRT - third *proviso to* section 19(1) of RDDBFI Act.

Another Bank/FI can join - If one Bank/FI has made application to DRT, another Bank/FI can also apply if they have claim against the same person. Such application can be made anytime before passing of final order by DRT - section 19(2) of RDDBFI Act.

Summons to defendant - On receipt of application from Bank/FI, summons shall be issued to defendant to (a) show cause within thirty days (b) direct defendant to disclose properties and assets (i) restrain defendant from dealing with assets pending hearing - section 19(4) of RDDBFI Act.

After receipt of summons, defendant cannot transfer, sale or lease property, except in ordinary course of business - section 19(4A) of RDDBFI Act.

Defendant shall be liable to account for sale proceeds of secured assets in ordinary course of business and deposit sale proceeds in the account of Bank/ FI - second proviso to section 19(4A) of RDDBFI Act.

Defendant to reply within 30 days - Defendant should reply within 30 days and can claim set off - section 19(5 A) of RDDBFI Act.

Period of filing reply can be extended by DRT by further 30 days.

Reply with claim of set off and counterclaim shall be supported by affidavit sworn in verifying all the facts and pleadings - section 19(10A) of RDDBFI Act.

The written statement is as if it is a cross suit so that DRT can pass final order in respect of original claim and of set off. - section 19(7) of RDDBFI Act.

If defendant admits some amount, DRT can order defendant to pay the amount within 30 days.

Civil arrest if reply not given - If no reply is given by defendant, DRT can direct that the person shall be detained in civil jail for term not exceeding three months, after giving opportunity of personal hearing - section 19(5)(iii) of RDDBFI Act.

Defendant can claim set off and counter claim - Defendant can claim set off. The DRT can consider claims to set off [section 19(6) of RDDBFI Act] and counter-claims of defendant borrower, [section 19(8) of RDDBFI Act].

Reply by applicant to counter claim - Applicant can submit reply to counter claim within prescribed period - section 19(10) of RDDBFI Act.

The reply shall be supported by affidavit sworn in verifying all the facts and pleadings - section 19(10A) of RDDBFI Act.

Interim orders by DRT to provide security - If defendant is likely to obstruct or delay or frustrate execution of order for recovery of debt, DRT can direct defendant to furnish security, after giving him show cause notice and opportunity of hearing - section 19(13) of RDDBFI Act.
DRT can order attachment of property, after giving him hearing - DRT can *order attachment of property, after giving him hearing* - section 19(15) of RDDBFI Act.

DRT can order civil imprisonment if orders are disobeyed - DRT can order civil imprisonment upto three months if orders are disobeyed - section 19(17) of RDDBFI Act.

DRT can appoint receiver - DRT can appoint receiver to receive property of defendant and take in possession - section 19(18) of RDDBFI Act.

Distribution of sale proceeds in case of winding up of company - In case of winding up of company, DRT can direct that sale proceeds of secured assets be distributed in manner prescribed in section 326 of Companies Act, 2013 - section 19(19) of RDDBFI Act.

Final order within 30 days from conclusion of hearing - DRT should pass final order within 30 days from conclusion of hearing, deciding claims, counter claims and set off. The order should include payment of interest - section 19(20) of RDDBFI Act.

DRT can make orders and give directions to prevent abuse of process or to secure ends of justice - section 19(25) of RDDBFI Act.

Effort should be made to complete proceedings in two hearings and dispose of application within 180 days from date of receipt - section 19(24) of RDDBFI Act.

Distribution of assets - The order should direct recovery officer to distribute sale proceeds in following order - (i) costs incurred for preservation and protection of secured assets, cost of valuation, public notice for possession and auction and other expenses (ii) debts recovered to Bank/FI - section 19(20AB) of RDDBFI Act.

After commencement of Insolvency and Bankruptcy Code, 2016, the distribution of assets shall be as specified in that code - Explanation to section 19(20AB) of RDDBFI Act.

Copy of final order and recovery certificate shall be sent to applicant and defendant - section 19(21) of RDDBFI Act.

Certificate of recovery - DRT shall issue certificate of recovery to recovery officer, along with final order. It shall be deemed to be a decree or order of Court - section 19(22A) of RDDBFI Act.

The certificate can be sent to more than one DRT if property is in different jurisdictions.

Proceedings against guarantor before DRT

Liability of guarantor (surety) is co-extensive with that of Principal debtor. Debt Recovery Tribunal (DRT) can proceed against guarantor. Creditor is not bound to exhaust his remedy against the principal debtor before suing the surety - *Industrial Investment Bank of India v. Biswanath Jhunjhunwala* (2009) 9 see 478.

Procedure to be followed

Debt Recovery Tribunal (Procedure) Rules, 1993 have been notified for the procedural aspects of DRT (Debt Recovery Tribunal).

Plural remedy permitted - Rule 10 of DRT (Procedure) Rules provided that plural remedies will not be permitted in one single application. This rule has been omitted w.e.f. 21-1 -2003. Thus, now, an applicant can seek relief or reliefs based on more than single cause of action, in one single application.

Evidence by Affidavit - Rule 12(6) provides that DRT can order that any fact can be proved by affidavit or affidavit of any witness may be read at the hearing. Once affidavit for proving any fact is submitted, cross examination will be allowed by Tribunal only if in the opinion of Tribunal, it is necessary to do so and for sufficient reasons. Reasons should be recorded for allowing cross examination.

Registrar of DRT - Registrar of DRT is administrative head. He can receive, scrutinise and place the applications before Presiding Officer. Any of powers of Registrar can be assigned/delegated to Assistant Registrar by Presiding Officer.

Applications, documents and statements in electronic form

Presently, all applications, documents and statements have to be filed in physical form.

However, Central Government can make rules to file these documents in electronic form - section 19A(1) of RDDBFI Act inserted w.e.f. 1-9-2016.

Publication of interim or final order by DRT or DRAT on its website shall be deemed to be public notice served on that party - section 19A(2) of RDDBFI Act inserted w.e.f. 1-9-2016.

[Note - Due to drafting mistake, same section No. 19A has been given to two provisions. Government will have to amend the mistake in due course. This has happened as amendments were made in two different Amendment Acts passed separately].

Appeal against order of DRT

Appeal from order of 'Debt Recovery Tribunal' should be filed within 30 days to 'Appellate Tribunal', [section 20(3) of RDDBH Act, 2016 amended w.e.f. 1-9-2016.]. DRAT can grant further time of 30 days [Earlier, i.e. till 1-9-2016, the time limit for filing appeal was 45 days plus extension of 45 days].

Appeal cannot be filed against a consent order, [section 20(2) of RDDBFI Act],

Appeal can be filed only after paying 50% of amount of debt due as determined by Tribunal. However, the Appellate Tribunal can waive or reduce the amount of deposit, [section 21 of RDDBFI Act amended w.e.f. 1-9-2016]. [Earlier, the amount to be deposited was 7596]. DRAT can reduce the pre-deposit to 25% for reasons to be recorded in writing - rule 9 of DRAT (Procedure) Rules.

Appeal against order of Adjudicating Authority under Insolvency and Bankruptcy Code - Appeal against order of Adjudicating Authority under section 20(1) under RDDBFI Act or under section 181(1) of Insolvency and Bankruptcy Code, 2016 shall be made to DRAT. DRAT shall have opportunity of personal hearing and pass such orders as it thinks fit, confirming, modifying or setting aside the order appealed against - section 20(4) of RDDBFI Act. Words in italics inserted *vide* 2016 Amendment Act. This amendment will be made effective after the Insolvency and Bankruptcy Code, 2016 is notified and made effective.

Financial Powers of DRAT - Financial powers of DRAT have been specified in DRAT (Financial and Administrative Power) Rules, 1997.

Further appeals after order of DRAT

There is no provision for appeal against order of Appellate Tribunal. Of course, writ jurisdiction of High Court under Article 226 and supervisory jurisdiction of High Court under Article 227 is not and indeed cannot be ousted by any Parliamentary Act. SLP before Supreme Court is also maintainable.

Jurisdiction of civil courts barred

These tribunals will have exclusive jurisdiction to entertain and decide applications from banks and FIs for recovery of debts. Only Supreme Court and High Courts will have jurisdiction under Articles 226 and 227 of Constitution, [section 18 of RDDBFI Act].

Provision of Insolvency Code not applicable if sale under SARFAESI Act or RDB Act, even if company is under winding up - The provisions of Regulation 36 in respect of sale of assets of company under winding up shall not apply if the secured creditor enforces his security interest under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 or the Recovery of Debts and Bankruptcy Act, 1993. Thus, in that case. Liquidator under Insolvency Code does not come into picture at all

- Regulation 37(7) of IBBI (Liquidation Process) Regulations, 2016.

Recovery Powers after issue of certificate

After issue of certificate by Tribunal, Recovery officer can recover the debt by one or more of following modes - (a) Attachment and sale of movable or immovable property of defendant (aa) *taking possession of property over which security interest is created or any other property of the defendant and appointing receiver for such property and to sell the same* (b) Arrest of defendant and his detention in prison (c) Appointing a receiver for management of movable or immovable properties of defendant (d) *any other mode of recovery as may be prescribed by Central Government* [section 25 of RDDBFI Act. Words in italics inserted w.e.f. 1-9-2016].

Validity of recovery certificate cannot be challenged before Recovery Officer. However, presiding officer can withdraw certificate or correct clerical or arithmetical mistake - section 26 of RDDBFI Act.

Presiding Officer of DRT can grant time and stay proceedings - Presiding Officer of DRT can stay order of recovery and grant time if defendant makes 25% down payment and agrees to pay balance within reasonable period. Once he applies for time, he cannot file appeal before DRAT. If defendant does not pay as agreed, the stay is withdrawn - section 27(1A) to 27(1C) inserted w.e.f. 1- 9-2016.

Recovery by garnishee proceedings - The Recovery Officer may require any person who is indebted to defendant to deduct the amount of debt due from defendant and pay the amount to Recovery officer. Receipt of Recovery Officer will be full discharge of his liability towards the defendant, [section 28(3) of RDDBFI Act].

Recovery by distraint and sale of movable property - Recovery Officer can recover any amount by distraint and sale of movable property of defendant in manner laid down in third schedule of Income Tax Act - section 28(5) of RDDBFI Act.

Appeal against order of recovery officer - Appeal against order of Recovery Officer can be made to DRT. [section 30 of RDDBFI Act].

Such appeal shall be entertained only if 50% of amount due as determined by DRT is deposited with DRT - section 30A of RDDBFI Act.

Recovery procedures - Provisions of Second and Third Schedules of Income- tax Act, 1961 and Income Tax (Certificate Proceedings) Rules, 1992 will, as far as possible, apply with necessary modifications for recovery of dues, [section 29 of RDDBFI Act]

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

The securitisation and reconstruction of financial assets and enforcement of security interest act, 2002

- The act which regulates securitisation and reconstruction of financial assets and enforcement of security interest and provide for a central database of security interest created on property rights, is called as the SARFAESI act, 2002
- Extends to the whole of India
- Came into force on 21st day of june, 2002
- Asset reconstruction company shall have a minimum net owned fund of:
 - Not less than two crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify. Rs.300 crores by virtue of notification dated 12.10.2022
<https://economictimes.indiatimes.com/news/economy/finance/arcs-must-have-minimum-net-corpus-of-rs-100-crore-by-2019-rbi/articleshow/58419458.cms>
- An asset reconstruction company aggrieved by the order of cancellation of certificate of registration may prefer an appeal, within a period of 30 days from the date on which such order of cancellation is communicated to it, to the central government
- An asset reconstruction company may acquire financial assets of any bank or financial institutions:

- By issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institutions, incorporating therein such terms and conditions as may be agreed upon between them
- By entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them
- An asset reconstruction company may, for the purposes of asset reconstruction, provide for:
 - The proper management of the business of the borrower, by change in, or takeover of, the management of the business of the borrower
 - The sale or lease of a part or whole of the business of the borrower
 - Rescheduling of payment of debts payable by the borrower
- Any asset reconstruction company registered under section 3, may:
 - Act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fee or charges as may be mutually agreed upon between the parties
 - Act as a manager referred to in section 13(4)(c) on such fee as may be mutually agreed upon between the parties
 - Act as receiver if appointed by any court or tribunal

- Where on audit on inspection or otherwise, the Reserve Bank is satisfied that business of an asset reconstruction company is being conducted in a manner detrimental to public interest or to the interest or to the interest of investors in security receipts issued by such asset reconstruction company, the Reserve Bank may, for securing proper management of an asset reconstruction company, by an order:
- Remove the chairman or any director
 - Appoint additional directors on the board of directors
 - Appoint any of its officers as an observer to observe the working of the board of directors of such asset reconstruction company
- Notwithstanding anything contained in section 69 or section 69A of the transfer of property act, 1882 any security interest created in favour of any secured creditor, may be enforced without the intervention of the court or tribunal
- Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as Non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditors within 60 days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under section 13 (4)

- Classification of advance as non-performing advance is not necessary in the following case:
 - Borrower who has raised funds through issue of debt securities
- If, on receipt of the notice under section 13(2), the borrower makes any representations or raise any objection, the secured creditor shall consider such representations or objection and if the secured creditor comes to the conclusion that such representations or objection is not acceptable or tenable, he shall communicate Within 15 days of receipt of such representations or objection the reason for non-acceptance of the representations or objection to the borrower
- In case the borrower fails to discharge his liability in full within the period specified in section 13(2), the secured creditor may take resource to one or more of the following measures to recover his secured debt:
 - Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset
 - Take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset
 - Appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor

- Where the management of the business of a borrower being a company as defined in the companies act, 2013 is taken over by the secured creditor, then, notwithstanding anything contained in the said act or in the memorandum or articles of association of such borrower:
 - It shall not be lawful for the shareholders of such company or any other persons to nominate or appoint any person to be a director of the company
 - No resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the secured creditor
 - No proceeding for the winding up of such company or for the appointment of a receiver in respect thereof shall lie in any court, except with the consent of the secured creditor
- Any person(including borrower), aggrieved by any of the measures referred to in section 13 (4) taken by the secured creditor or his authorised officer under is chapter, may make an application to the debts recovery tribunal having jurisdiction in the matter within 45 days from the date on which such measure had been taken
- An application against measures to recover secured debt under section 17(1) shall be filed before the debts recovery tribunal within the local limits of whose jurisdiction:
 - The cause of action, wholly or in part, arises
 - Where the secured asset is located

- The branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is o/s for the time being
- Any person aggrieved, by any order made by the debts recovery tribunal under section 17, may prefer an appeal to the appellate tribunal within 30 days from the date of receipt of the order of debts recovery tribunal
- For making an appeal before the DRAT 50% of the amount of debt due from the borrower, as claimed by the secured creditors or determined by the debts recovery tribunal, whichever is less is required to be deposited by the borrower
- Any borrower residing in the state of Jammu and Kashmir and aggrieved by any order made by the court of district judge under section 17A may prefer an appeal, to the High Court having jurisdiction over such court, within 30 days from the date of the order of the court of district judge
- The central government may set-up a registry to be known as the central registry for the purpose of:
 - Registration of transaction of securitisation and reconstruction of financial asset and creation of security interest under this act
 - The central government may delegate its powers and functions under chapter IV in relation to establishment, operations and regulations of the central registry to the RBI subject to such terms and conditions as may be prescribed

- The central register of the central registry shall have the transactions relating to Securitisation of financial assets, Reconstruction of financial assets & Creation of security interest
- If any person contravenes or attempts to contravene or abets the contravention of the provisions of SARFAESI act or of any rules made there under, he shall be punishable with:
 - Imprisonment for a term which may extend to 1 year, or with fine, or with both
- Where any asset reconstruction company or any person fails to comply with any directions issued by the Reserve Bank under the SARFAESI act the adjudicating authority may, by an order, impose on such company or person in default:
 - A penalty not exceeding 1 crore rupee or twice the amount involved in such failure where such amount is quantifiable, whichever is more and where such failure is a continuing one, a further penalty which may extend to one lakh rupee for every day, after the first, during which such failure continues
- The provisions of the SARFAESI shall not apply to:
 - A lien on any goods, money or security given by or under the Indian Contract Act, 1872, The Sale of Goods Act, 1930 or any other law for the time being in force
 - Any security interest created in agricultural land
 - Any case in which the amount due is less than 20% of the principal amount and interest thereon

- No suit, prosecution or other legal proceedings shall lie, for anything done or omitted to be done in good faith under the SARFAESI act, against:
 - The Reserve Bank
 - The central registry
 - Any secured creditor or any of its officers
- No civil court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which a debts recovery tribunal or the appellate tribunal is empowered by or under the SARFAESI act to determine
- Secured creditor shall be entitled to take all or any of the measures under section 13(4), provided his claim in respect of the financial asset is made:
 - Within the period of limitations prescribed under the limitations act
- The provisions of the SARFAESI act or the rules made there under shall be in addition to, and not in derogation of:
 - The Securities Contracts (Regulation) Act, 1956
 - The SEBI Act, 1992
 - The RDB Act, 1993
- “Authorised officer” means an officer not less than a chief manager of a public sector bank or equivalent, as specified by the board of directors

- How the services of demand notice as referred to in section 13(2) of the SARFAESI act shall be made:
 - By delivering including hand delivery
 - By registered post with acknowledgement due
 - By speed post or by courier or by any other means of transmission of documents like fax message or electronic mail service
- 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 rule 3(1)
- Where the possession by 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 a panchnama drawn and signed by the witnesses
- After taking possession of movable secured asset and in any case before sale, the authorised officer shall obtain the estimated value of the movable secured asset and thereafter, if considered necessary, fix in consultation with the secured creditor, the Reserve price of the assets to be sold in realisation of the dues of the secured creditor

➤ The authorised officer may sell the movable secured assets taken possession under rule 4(1) in one or more lots to secure maximum sale price for the assets, to be sold, by adopting any of the following means:

- Obtaining quotations from parties dealing in the secured assets or otherwise interested in buying such assets
- Inviting tenders from the public
- Holding public auction including through e-auction mode or by private treaty

➤ The certificate of sale issued by the authorised officer shall contain:

- The specification of the movable secured assets sold
- Price paid
- The name of the purchaser

➤ The possession notice of secured immovable assets shall be published by the authorised officer as soon as possible but in any case not later than the seven days from the date of taking possession, in two leading newspaper, one in vernacular language having sufficient circulation in that locality

➤ Fixation of reserve price for sale of secured immovable property :

- By obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying such assets
- By inviting tenders from the public

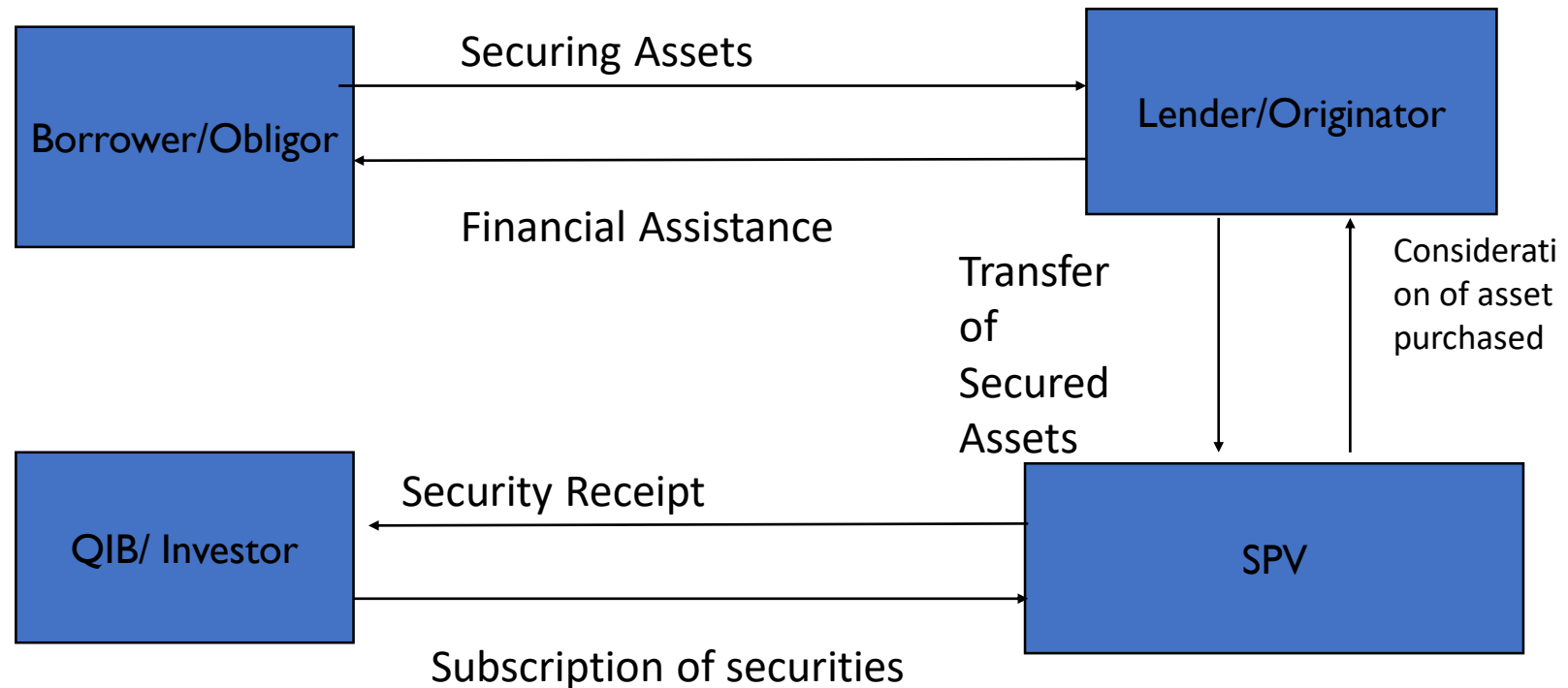
- By holding public auction including through e-auction mode or by private treaty
- The sale of immovable property under the SARFAESI rules, in first instance shall take place before the expiry of 30 days from the date on which the public notice of sale is published in newspapers
- On every sale of immovable property, the purchaser shall immediately, i.e. on the same day or not later than next working day, as the case may be, pay a deposit of 25% of the amount of the sale price, which is inclusive of earnest money deposited, if any to the authorised officer conducting the sale and in default of such deposit, the property shall be sold again
- The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the 15th day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months

SARFAESI ACT, 2002

ENFORCEMENT OF SECURITY INTERESTS

SECURITIZATION

- Securitisatation means acquisition of financial assets by any securitization company or reconstruction company. from any originator, whether by raising funds by securitization co. through QIB's by issue of security receipts representing, undivided interest in such financial asset or otherwise.



SARFAESI ACT, 2002

□ Introduction:-

It is an act to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto.

□ The Act Deals with the Following:-

- a. Registration and regulation of Asset Reconstruction Companies (ARCs) by the Reserve Bank of India;
- b. Facilitating securitization of financial assets of banks and financial institutions with or without the benefit of underlying securities.

- c. Facilitating easy transferability of financial assets by the ARC to acquire financial assets of banks and financial institutions by issue of debentures or bonds or any other security in the nature of a debenture;
- d. Empowering ARCs to raise funds by issue of security receipts to qualified buyers
- e. Facilitating reconstruction of financial assets acquired by 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
- f. Declaration of any securitization company or reconstruction company registered with the Reserve Bank of India as a public financial institution for the purpose of section 4A of the Companies Act,1956
- g. 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;

- h. Empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower's account as non-performing asset in accordance with the directions given or under guidelines issued by the Reserve Bank of India from time to time
- i. The rights of a secured creditor to be exercised by one or more of its officers authorized in this behalf in accordance with the rules made by the Central Government;
- j. 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;
- k. Setting up or causing to be set up a Central Registry by the Central Government for the purpose of registration of transactions relating to securitization, asset reconstruction and creation of security interest.

- l. 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
- m. Non-application of the proposed legislation to security interests in agricultural lands, loans not exceeding rupees one lakh and cases where eighty per cent, of the loans have been repaid by the borrower.

How to remember this:

अरे राम चंदर security अफसर की ट्रांसफर हो गयी. Power , facility, बैंक की नौकरी तो गयी ही जो finance लिया था वो भी बैंक ने interest समेत वसूल लिया। अफसर ने possession ले लिया। बात क्या थी register में application नहीं enter की थी

❑ The Act is divided into six chapters having 42 sections:

The Act introduced multiple new concepts and infrastructures to support ease of recovery actions such as:

- Formation of Securitization or Reconstruction companies
- Recovery without interference of courts
- Framework for revival or reconstruction of the borrowers' business
- Central registry
- Qualified buyers
- Security receipts

❑ Some of the Key Definitions:-

- **“Asset reconstruction”** means acquisition by any securitisation company (SC) or reconstruction company (RC) of any right or interest of any bank or financial institution in any financial assistance for the purpose of realization of such financial assistance [Section 2(b)]
- The term **“financial assistance”** means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution; **[Section 2(k)]**

- The purpose of acquisition by securitization company (SC) or reconstruction company (RC) is to realize such assets and not to stay invested by becoming the shareholders of the company. However it has the right to take over the management of the business, subject to RBI's guidelines from time to time. Such realized amount should be held and applied towards redemption of investments and payment of returns assured to the QIBs
- **“Asset reconstruction company (ARC)”** means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitization, or both. **[Section 2(ba)]**
- An ARC is not a banking company although it is regulated by RBI. Such company cannot carry out any other business other than securitization or reconstruction.

- **“Borrower”** means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitization company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities . [Section 2(f)]
- **“default”** means:
 - i. Non-payment of any debt or any other amount payable by the borrower to any secured creditor consequent upon which the account of such borrower is classified as non- performing asset in the books of account of the secured creditor; or
 - ii. Non-payment of any debt or any other amount payable by the borrower with respect to debt securities after notice of ninety days demanding payment of dues served upon such borrower by the debenture trustee or any other authority in whose favor security interest is created for the benefit of holders of such debt securities. [Section 2(j)]

❑ **Conditions for calling default under this act is:**

- Debt or any other amount- The amount due should be in the nature of debt.
- Secured creditor- An unsecured creditor doesn't have recourse to this act
- Classification of NPA- A stressed asset which is yet to be classified as NPA cannot be resolved through this act.
- For non-payment of debenture or bonds to be called default, a notice of 90 days is a pre-requisite by the debenture trustee or beneficiary of the security

❑ **"Debt"** shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and includes—

- a) Unpaid portion of the purchase price of any tangible asset given on hire or financial lease or conditional sale or under any other contract;

b) Any right, title or interest on any intangible asset or license or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable any borrower to acquire the intangible asset or obtain license of such asset; [Section 2(ha)]

❑ **“financial asset”** means debt or receivables and includes-

Significance: An asset which is not a financial asset cannot be securitized, acquired or transferred under this Act.

- a. A claim to any debt or receivables or part thereof, whether secured or unsecured; or
- b. Any debtor receivables secured by, mortgage of, or charge on immovable property; or
- c. Mortgage, charge, hypothecation or pledge of movable property; or
- d. Any right or interest in the security, whether full or part underlying such debt or receivables; or
- e. Any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or

- f. Any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or
- g. Any right, title or interest on any intangible asset or license or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain license of the intangible asset;
- h. Any financial assistance; [Section 2(I)]

❑ "Non-performing asset (NPA)" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,
Note: (Please refer to RBI Norms as to classification)

- a) In case such bank or financial institution is administered or regulated by an 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 classifications 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. [Section 2(o)]

❑ "Qualified buyer" means a financial institution, insurance company, bank, state financial corporation, state industrial development corporation, trustee or asset reconstruction company which has been granted a certificate of registration under sub-section (4) of section 3 or any asset management company making investment on behalf of mutual fund or pension fund or a foreign institutional investor registered under the Securities and Exchange Board of India Act, 1992 (15 of 1992) or regulations made thereunder, any category of non-institutional investors as may be specified by the Reserve Bank under sub-section (1) of section 7 or any other body corporate as maybe specified by the Board;[Section 2(u)]

Note: In the event of non realization of financial assets, QB holding not less than 75% security receipts shall be entitled to call a meeting of all the qualified buyers and every resolution passed in such meeting shall be binding on the company.

An ARC cannot raise funds from investors which is not a qualified buyer (QB) as defined above.

❑ "Securitization" means acquisition of financial assets by any asset reconstruction company from any originator, whether by raising of funds by such asset reconstruction company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise [Section 2(z)];

The process of securitization helps the ARC to acquire financial assets like Loans from banks due to which the ARC shall be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to such financial assets.

❑ "Secured creditor" means-

- Any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);
- Debenture trustee appointed by any bank or financial institution; or

- An asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitization or reconstruction, as the case may be; or
- Debenture trustee registered with the Board appointed by any company for secured debt securities; or
- Any other trustee holding securities on behalf of a bank or financial institution,

In whose favour security interest is created by any borrower for due repayment of any financial assistance [section 2(zd)]

☐ "Security interest" means right, title and interest of any kind, other than those specified in section 31, upon property created in favor of any secured creditor and includes—

- a) Any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

- b) Such right, title or interest in any intangible asset or assignment or license of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or license of intangible asset [Section 2(zf)];
- ☐ A creditor shall not be called as secured creditor unless its interest over the assets of the debtor or borrower is covered under the above definition. Refer section 31 (Provisions of this Act not to apply in certain cases) for specific exclusions of rights that shall not be treated as security interest.
- ☐ Financial Institution includes:
- ☐ PFI as per section 4A of Companies Act
 - ☐ Any Institution specified by Central Govt u/s 2(h)(ii) of RDB Act, 1993
 - ☐ Intl Fin. Corporation

REGULATION OF SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS OF BANKS AND FINANCIAL INSTITUTIONS

- This part of the Act is covered in chapter II of the Act, comprising of Sections 3 – 12. This chapter provides for regulation of securitization and reconstruction of financial assets of banks and financial institutions.

❑ Registration of ARCs (Section 3)

- Commencement of business of securitization or asset reconstruction: Such a company can commence or carry on the business of securitization or asset reconstruction only after obtaining a certificate of registration granted under this section and having the net owned fund of not less than one hundred crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify.

However, the term "net owned fund" is not defined in the Act and hence we have to refer to the definition of "net owned fund" as mentioned in the explanation to Section 45I of the Reserve Bank of India Act.

- **Conditions:** Power of RBI to inspect Books and Records of ARC

The Reserve Bank may, for the purpose of considering to grant its approval for the application for registration of an ARC to commence or carry on the business of securitization or asset reconstruction, as the case may be, require to be satisfied, by an inspection of records or books of such ARC, or otherwise, that the following conditions are fulfilled, namely:-

- i. That the ARC has not incurred losses in any of the three preceding financial years;
- ii. That such ARC has made adequate arrangements for realization of the financial assets acquired for the purpose of securitization or asset reconstruction and shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified buyers or other persons;
- iii. That the directors of ARC have adequate professional experience in matters related to finance, securitization and reconstruction;

- iv. That any of its directors has not been convicted of any offence involving moral turpitude;
- v. That a **sponsor of an ARC** is a fit and proper person in accordance with the criteria as may be specified in the guidelines issued by the Reserve Bank for such persons;

Note: Sponsor is a person holding not less than 10% of capital of the Company.

- v. That ARC has complied with or is in a position to comply with prudential norms specified by the Reserve Bank.
 - i. That ARC has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose.
- **Issue of certificate of registration to ARC:** A certificate of registration is thereafter granted to the ARC to commence or carry on business of securitization or asset reconstruction, and it must be noted that the Reserve Bank may also prescribe any other conditions, which it may consider, fit to impose. In case the Reserve Bank is of the opinion that the above conditions are not satisfied then it may reject the application, after the applicant is given a reasonable opportunity of being heard.

- **Requirement of prior approval of RBI in case of change:** Once a company is registered as an ARC, it must obtain prior approval of the Reserve Bank for the following purposes:-
 - a. Any substantial change in its management, including appointment of any director managing
 - b. Director or chief executive officer
 - c. Change of location of its registered office
 - d. Change in its name
- **Decision of RBI shall be final & binding:** The decision of the Reserve Bank, whether the change in management of an ARC is a substantial change in its management or not, shall be final and binding. The expression "substantial change in management" means the change in the management by way of transfer of shares or change affecting the sponsorship in the company by way of transfer of shares or amalgamation or transfer of the business of the company.

❑ Cancellation of certificate of registration (Section 4)

- The Reserve Bank may cancel a certificate of registration granted to an ARC, if such company-
 - i. Ceases to carry on the business of securitization or asset reconstruction; or
 - ii. Ceases to receive or hold any investment from a qualified buyer; or
 - iii. Has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or
 - iv. At any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (3) of section 3; or
 - v. Fails to-
 - a. Comply with any direction issued by the Reserve Bank under the provisions of this Act; or
 - b. Maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or

- c) Submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or
- d) Obtain prior approval of the Reserve Bank required under sub-section (6) of section 3:
 - Before cancelling a certificate of registration on the ground that the ARC has failed to comply with the provisions of clause (c) or has failed to fulfil any of the conditions referred to in clause (d) or sub-clause (iv) of clause (e), the Reserve Bank, unless it is of the opinion that the delay in cancelling the certificate of registration granted under sub-section (4) of section 3 shall be prejudicial to the public interest or the interests of the investors or the ARC, shall give an opportunity to such company on such terms as the Reserve Bank may specify for taking necessary steps to comply with such provisions or fulfillment of such conditions. Indirectly it implies that cancellation may be immediate as well.
 - Appeal to an order of cancellation: In case the ARC is aggrieved by the order of cancellation of certificate of registration by the Reserve Bank, then it may prefer an **appeal, within** a period of **thirty days** from the date on which such order of cancellation is **communicated** to it, to the Central Government (**Secretary, Ministry of Finance, and Government of India**). The Central Government must also give such company a reasonable opportunity of being heard before rejecting the appeal.

- It must be noted that an ARC, which is holding investments of qualified buyers and whose application for grant of certificate of registration has been rejected or certificate of registration has been cancelled shall, notwithstanding such rejection or cancellation be deemed to be an ARC until it repays the entire investments held by it (together with interest, if any) within such period as specified by the Reserve Bank.

❑ Acquisition of rights or interest in financial assets (Section 5)

- Acquiring of financial assets of any bank or financial institution: Notwithstanding anything contained in any agreement or any other law for the time being in force, any ARC may acquire financial assets of any bank or financial institution-
 - i. By issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or
 - ii. By entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them

- Any document executed by any bank or financial institution as mentioned above, in favour of the ARC acquiring financial assets for the purposes of asset reconstruction or securitization shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899

Provided that the provisions of this sub-section shall not apply where the acquisition of the financial assets by the asset reconstruction company is for the purposes other than asset reconstruction or securitization.

Such exemption is provided in order to encourage banks or FIs to resolve non-performing assets (NPA) issues by offloading it to ARCs.

- Debenture in common parlance is an acknowledgement of debt. Bond also refers to the same nature of instrument as a debenture. Both of them acknowledge a debt and hence an obligation to pay.
 - **Stepping into the shoes of the Bank-Both rights and liabilities including suits and appeals**
- In case where bank or financial institution is a lender in relation to any financial assets acquired by the ARC: Then such ARC shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to the subject financial assets.

- If the bank or financial institution is holding any right, title or interest upon any tangible asset or intangible asset to secure payment of any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire the tangible asset or assignment or license of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets.
- All contracts, deeds, bonds, agreements, powers-of-attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the ARC, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitisation company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of ARC, as the case may be.

- If, on the date of acquisition of financial asset, any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the ARC, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the ARC, as the case may be.
- On acquisition of financial assets, the ARC, may with the consent of the originator, file an application before the Debts Recovery Tribunal or the Appellate Tribunal or any court or other Authority for the purpose of substitution of its name in any pending suit, appeal or other proceedings and on receipt of such application, such Debts Recovery Tribunal or the Appellate Tribunal or court or Authority shall pass orders for the substitution of the ARC in such pending suit, appeal or other proceedings

❑ Transfer of pending applications to any one of debts Recovery Tribunals in certain cases (Section 5A)-Clubbing of applications filed

- If any financial asset, of a borrower acquired by an ARC, comprise of secured debts or more than one bank or financial institution for recovery of which such banks or financial institutions has filed applications before two or more Debts Recovery Tribunals, the ARC may file an application to the Appellate Tribunal having jurisdiction over any of such Tribunals in which such applications are pending for transfer of all pending applications to any one of the Debts Recovery Tribunals as it deems fit.
- On receipt of such application for transfer of all pending applications under sub-section (1), the Appellate Tribunal may, after giving the parties to the application an opportunity of being heard, pass an order for transfer of the pending applications to any one of the Debts Recovery Tribunals.
- Notwithstanding anything contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, any order passed by the Appellate Tribunal under sub-section (2) shall be binding on all the Debts Recovery Tribunals referred to in sub-section (1) as if such order had been passed by the Appellate Tribunal having jurisdiction on each such Debts Recovery Tribunal.

- Any recovery certificate, issued by the Debts Recovery Tribunal to which all the pending applications are transferred under sub-section (2), shall be executed in accordance with the provisions contained in sub-section (23) of section 19 and other provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 shall, accordingly, apply to such execution.

❑ Notice to obligor and discharge of obligation of such obligor (Section 6)

- The bank or financial institution may give a notice of acquisition of financial assets by any ARC to the concerned obligor and any other concerned person and to the concerned registering authority.
- The obligor shall make payment to the concerned ARC in discharge of any of the obligations in relation to the financial asset specified in the notice.

❑ Issue of security by raising of receipts or funds by ARC (Section 7)

- Any ARC, may, after acquisition of any financial asset under Section 5(1), offer security receipts to qualified buyers (or such other category of investors including non-institutional investors as may be specified by the Reserve Bank in consultation with the Board, from time to time) for subscription in accordance with the provisions of those Acts.
- An ARC may raise funds from the qualified buyers by formulating schemes for acquiring financial assets and shall keep and maintain separate and distinct accounts in respect of each such scheme for every financial asset acquired out of investments made by a qualified buyer and ensure that realizations of such financial asset is held and applied towards redemption of investments and payment of returns assured on such investments under the relevant scheme.

❑ Exemption from registration of security receipt (Section 8)

- Any security receipt issued by the ARC and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder of the security receipt to an undivided interest afforded by a registered instrument, or any transfer of security receipts, shall not require compulsory registration under section 17 of the Registration Act, 1908.

❑ Measures for assets reconstruction (Section 9)

- AN ARC may, provide for any one or more of the following measures, for the purposes of asset reconstruction-
- The proper management of the business of the borrower, by change in, or takeover of the management of the business of the borrower;
- The sale or lease of a part or whole of the business of the borrower;
- Rescheduling of payment of debts payable by the borrower;
- Enforcement of security interest in accordance with the provisions of this Act;
- Settlement of dues payable by the borrower;
- Taking possession of secured assets in accordance with the provisions of this Act;
- Conversion of any portion of debt into shares of a borrower company;

- Provided that conversion of any part of debt into shares of a borrower company shall be deemed always to have been valid, as if the provisions of this clause were in force at all material times.
- The Reserve Bank shall, for the purposes as given above, determine the policy and issue necessary directions including the direction for regulation of management of the business of the borrower and fees to be charged.
- The asset reconstruction company shall take measures in accordance with policies and directions of the Reserve Bank determined under Section 9 (2).

❑ Other functions of ARC (Section 10)

- Any ARC may-
 - i. Act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be mutually agreed upon between the parties;
 - ii. Act as a manager referred to section 13(4)(c) on such fee as may be mutually agreed upon between the parties;
 - iii. Act as receiver if appointed by any court or tribunal

Provided that no ARC shall act as a manager if acting as such gives rise to any pecuniary liability.

- No ARC which has been granted a certificate of registration section 3(4) shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitization or asset reconstruction.

Provided that an ARC which is carrying on, on or before the commencement of this Act, any business other than the business of securitization or asset reconstruction or business referred to in sub-section (1), shall cease to carry on any such business within one year from the date of commencement of this Act.

- For the purposes of this section, ARC does not include its subsidiary.

❑ Resolution of disputes (Section 11) between Bank ,FI, ARC, QIB through Arbitration and Conciliation

Where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely,

- The bank, or
- Financial institution, or
- ARC or
- Qualified buyer,

Such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996, as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.

❑ Power of Reserve Bank to determine policy and issue directions (Section 12)-RBI is MIL of ARC

- In the public interest, Reserve bank may determine the policy and give directions to any ARC in matters relating to income recognition, accounting standards, making provisions for bad and doubtful debts, capital adequacy based on risk weights for assets and also relating to deployment of funds by the ARC.
- Without prejudice to the generality as above, the Reserve bank may give directions to any ARC in particular as to:

- The type of financial asset of a bank or Financial institution which can be acquired and procedure for acquisition of such assets and valuation thereof;
- The aggregate value of financial assets which may be acquired by any securitisation company or reconstruction company.
- The fee and other charges which may be charged or incurred for management of financial assets acquired by any asset reconstruction company;
- Transfer of security receipts issued to qualified buyers

❑ Power of Reserve Bank to Call for Statements and information (Section 12A)

- The Reserve Bank may direct ARC to furnish it within such time as may be specified by the Reserve Bank, with such statements and information relating to the business or affairs of such securitisation company or reconstruction company (including any business or affairs with which such company is concerned) as the Reserve Bank may consider necessary or expedient to obtain for the purpose of this Act.

❑ Power of Reserve Bank to carry out audit and inspection (Section 12B)

- The Reserve Bank may, for the purposes of this Act, carry out or cause to be carried out audit and inspection of an asset reconstruction company from time to time.
- It shall be the duty of an asset reconstruction company and its officers to provide assistance and cooperation to the Reserve Bank to carry out audit or inspection.
- Where on audit or inspection or otherwise, the Reserve Bank is satisfied that business of an asset reconstruction company is being conducted in a manner detrimental to public interest or to the interests of investors in security receipts issued by such asset reconstruction company, the Reserve Bank may, for securing proper management of an asset reconstruction company, by an order—
 - i. remove the Chairman or any director or appoint additional directors on the board of directors of the asset reconstruction company; or
 - ii. appoint any of its officers as an observer to observe the working of the board of directors of such asset reconstruction company:

- Provided that no order for removal of Chairman or director under clause (a) shall be made except after giving him an opportunity of being heard.
- It shall be the duty of every director or other officer or employee of the asset reconstruction company to produce before the person, conducting an audit or inspection under sub-section (1), all such books, accounts and other documents in his custody or control and to provide him such statements and information relating to the affairs of the asset reconstruction company as may be required by such person within the stipulated time specified by him.

ENFORCEMENT OF SECURITIZATION

- Provisions dealing with enforcement of security interest are contained in Chapter III of the Act, comprising of Sections 13 – 19.

☐ **Enforcement of security interest (Section 13)**

- Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.
- **Where borrower makes a default payment of debt:** Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non- performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within

Sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4) of Section 13.

Provided that –

- i. The requirement of classification of secured debt as non-performing asset under this sub-section
 - ii. Shall not apply to a borrower who has raised funds through issue of debt securities; and in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;
- **Notice prescribing the details of the debts:** This notice shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. The procedure for the service of the notice is prescribed in the Security Interests (Enforcement) Rules.

- **Objection or rejection to the borrower on the notice:** If, on receipt of the notice, the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate **within 15 days** (????) of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:
- **No right to borrower to prefer an application:** Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts recovery Tribunal under section 17 or the Court of District Judge under section 17A.
- **Borrower fails to discharge his liability:** If the borrower fails to discharge his liability in full within the above specified period, the secured creditor may take recourse to one or more of the following measures to recover his secured debt:-

- a. Take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;
- b. Take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

- c. Appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
- d. Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

- **Modes of enforcement of security:**

- i. Take possession of the secured asset
- ii. Take over the management (which is relatable to secured debt)
- iii. Appoint any person as the manager, to manage the secured assets
- iv. Demand notice to the person who has acquired the secured assets from the borrower

- **Discharge from payment:** Any payment made by any person referred to in section 5(4)(d) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.
- **Right with respect to the immovable property :** Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale [sub-section(5A)]

Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13. **[Sub-section (5B)]**

The provisions of section 9 of the Banking Regulation Act, 1949 shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A). **[Sub-section (5C)]**

- **Right related to transfer of secured assets by the secured creditor:** Any transfer of secured asset after taking possession thereof or takeover of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

- **Recovery of expenses from the borrower:** Where any action has been taken against a borrower, all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied –
 - a) Firstly, in payment of such costs, charges and expenses and
 - b) Secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.
- **Payment of dues of the secured creditors:** Auction ruk bhi sakti hai
Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—

- a. The secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and
 - b. Incase, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this subsection, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.
- **Joint financing:** 60% or more should agree for action . In case of liquidation.. distribution as per Section 326 of the Companies Act,2013
Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors. [Section 13(9)]. But in case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of section 326 of the Companies Act, 2013.

- **No transfer of secured assets by borrower:** Consent of Secured creditor necessary for transfer in case of receipt of notice
- No borrower shall, after receipt of notice, transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.
- ❑ **Chief metropolitan magistrate or district magistrate to assist secured creditor in taking possession of secured asset (Section 14)- Aunty police Bula legi**
- The secured creditor may, for the purpose of taking possession or control of secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him-
 - i. Take possession of such asset and documents relating thereto; and
 - ii. Forward such asset and documents to the secured creditor within a period of thirty days from the date of application.

Provided further that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.

❑ Manner and effect of takeover of management (Section 15)- by ARC or Bank by appointing director or an administrator

- **Appointment of persons by secured creditors:** When the management of business of a borrower is taken over by an ARC under section 9(a) or, by a secured creditor under section 13(4) (b) as the case may be, the secured creditor may, by publishing a notice in a newspaper published in English language and in a newspaper published in an Indian language in circulation in the place where the principal office of the borrower is situated, appoint as many persons as it thinks fit-
 - a) In a case in which the borrower is a company under the Companies Act, 2013, to be the directors of that borrower in accordance with the provisions of that Act; or
 - b) In any other case, to be the administrator of the business of the borrower

- **On publication notice:** सिंहासन खाली करो

All persons holding office as directors of the company (if the borrower is a company) and in any other case, all persons holding any office having power of superintendence, direction and control of the business of the borrower immediately before the publication of the above notice, shall be deemed to have vacated their offices.

- **When any contract of management shall be deemed to be terminated:** कस्टडी में ले लो

Any contract of management between the borrower and any director or manager thereof holding office as such immediately before publication of the above notice, shall be deemed to be terminated. The directors or the administrators appointed under this section shall take such steps as may be necessary to take into their custody or under their control all the property, effects and actionable claims to which the business of the borrower is, or appears to be, entitled and all the property and effects of the business of the borrower shall be deemed to be in the custody of the directors or administrators, as the case may be, as from the date of the publication of the above notice.

- **Exercise of the powers of the person so appointed for the borrowers:** Deeming fiction for directors or administrators
All directors appointed in accordance with the above notice shall, for all purposes, be the directors of the company of the borrower and such directors or the administrators (if the borrower is other than a company) appointed under section 15, shall only be entitled to exercise all the powers of the directors or as the case may be, of the persons exercising powers of superintendence, direction and control, of the business of the borrower whether such powers are derived from the memorandum or articles of association of the company of the borrower or from any other source.
- **Management of borrower taken by the secured creditor:** शेयर होल्डर्स की पावर कम हो गयी
Where the management of the business of a borrower, being a company as defined in Companies Act, 2013, is taken over by the secured creditor, then, notwithstanding anything contained, such borrower- in the said Act or in the memorandum or articles of association of such company-
 - a) It shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company.

- b) No resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the secured creditor;
- c) No proceeding for the winding up of such company or for the appointment of a receiver in respect thereof shall lie in any court, except with the consent of the secured creditor.
- **Obligation of secured creditor:** कर्ज़दार ने पेमेंट कर दिया उसके डायरेक्टर को बैठने दो लेकिन अगर शेयर ले लिए तो फिर कण्ट्रोल वापिस नहीं करेंगे
The secured creditor is under an obligation to restore the management of the business of the borrower, on realization of his debt in full, in case of takeover of the management of the business of a borrower by such secured creditor.
- Provided that if any secured creditor jointly with other secured creditors or any asset reconstruction company or financial institution or any other assignee has converted part of its debt into shares of a borrower company and thereby acquired controlling interest in the borrower company, such secured creditors shall not be liable to restore the management of the business to such borrower.

❑ **No compensation to directors for loss of office** (Section 16)-compensation for loss of office भूल जाओ हाँ कोई dues बाकी हैं तो ले लो

- Irrespective of anything contained in any contract or in any other law for the time being in force, no managing director or any other director or a manager or any person in charge of management of the business of the borrower shall be entitled to any compensation for the loss of office or for the premature termination under this Act. However any such managing director or any other director or manager or any such person in charge of management has the right to recover from the business of the borrower, moneys recoverable otherwise than by way of such compensation.

❑ **Application against measures to recover secured debts** (Section 17)-To DRT within 45 days of the date of taking such measure

- Filing of an application: Any person (including borrower), aggrieved by any of the measures given in section 13(4) taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

- Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.
- **Explanation:** For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.
- **Jurisdiction :** An application under sub-section (1) shall be filed before the Debts Recovery Tribunal
- Within the local limits of whose jurisdiction—
- The cause of action, wholly or in part, arises;
- Where the secured asset is located; or
- The branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

- **Measures taken shall be in compliance:** DRT to ensure this . Otherwise invalidation and restoration.
The Debts Recovery Tribunal shall consider whether any of the measures referred to in section 13(4) taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.
- If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in section 13(4), taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—
 - i. Declare the recourse to any one or more measures referred to in section 13(4) taken by the secured creditor as invalid; and
 - ii. Restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub- section (1), as the case may be; and

c) Pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13.

- Remedies opted by the securities creditor: किरायेदार बैठा दिया कर्जदार ने तो उसको खाली करना पड़ेगा
- If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

Where-

- i. Any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—

- a. Has expired or stood determined; or
 - b. Is contrary to section 65A of the Transfer of Property Act, 1882; or
 - c. Is contrary to terms of mortgage; or
 - d. Is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and
- The Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.
 - **Time limit for disposal of an application:** ASAP within 60 days. Total period not to exceed 4 months. Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

- **Order by the appellate tribunal for expeditious disposal of the pending application** 4 महीने के बाद DRAT जाओ

If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.

❑ Making of application to Court of district Judge in certain cases (Section17A)-J&K

In the case of a borrower residing in the State of Jammu and Kashmir, the application under section 17 shall be made to the Court of District Judge in that State having jurisdiction over the borrower which shall pass an order on such application.

- **Explanation:** It is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons shall not entitle the person (including borrower) to make an application to the Court of District Judge under this section.

❑ Appeal to Appellate Tribunal (Section18)-Appeal to DRAT within 30 days

- Appeal to an order of DRT: Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.
- Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower;

- **Condition for the appeal:** अपील से पहले 50 % जमा करवाओ. चलो 25 % करवा दो

Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred above.

- **Dispose of appeal as per the RDDBFI Act, 1993:** Save as otherwise provided in this Act, the Debts Recovery Tribunal under section 17 or the Appellate Tribunal under section 18 shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act (RDDBFI), 1993 and rules made thereunder.

❑ Validation of fees levied (Section 18A)- 2004 से पहले वाली फीस एडजस्ट कर लो

Any fee levied and collected for preferring an appeal to the Debts Recovery Tribunal or the Appellate Tribunal under this Act, before the commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, shall be deemed always to have been levied and collected in accordance with law as if the amendments made to sections 17 and 18 of this Act by sections 10 and 12 of the said Act were in force at all material times.

❑ Appeal to High Court in certain cases (Section 18B)-J&K

- Any borrower residing in the State of Jammu and Kashmir and aggrieved by any order made by the Court of District Judge under section 17A-may prefer an appeal, to the High Court having jurisdiction over such Court, within thirty days from the date of receipt of the order of the Court of District Judge.
- Requirement for preferring an appeal: अपील से पहले 50 % जमा करवाओ. चलो 25 % करवा दो

No appeal shall be preferred unless the borrower has deposited, with the Jammu and Kashmir High Court, fifty per cent of the amount of the debt due from him as claimed by the secured creditor or determined by the Court of District Judge, whichever is less. Provided further that the High Court may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. Of the debt referred here.

❑ Right to lodge a caveat (Section 18C)-पेचे में लंगर डालना जज साहब अपील की सुनवाई में मुझे भी मौका देना

- Filing of a caveat: Where an application or an appeal is expected to be made or has been made under section 17(1) or section 17A or section 18(1) or section 18B.

- a) The secured creditor, or
- b) Any person claiming a right to appear before the Tribunal or the Court of District Judge or the Appellate Tribunal or the High Court, as the case may be, on the hearing of such application or appeal, may lodge a caveat in respect thereof.
- Notice of caveat: Where a caveat has been lodged –लंगर डाल दिया तो रजिस्टर्ड AD नोटिस दो दूसरी पार्टी को
 - a) The secured creditor by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made.
 - b) Any person by whom the caveat has been lodged (hereafter in this section referred to as the caveator) shall serve notice of the caveat by registered post, acknowledgement due, on the person by whom the application has been or is expected to be made.

- **Notice on the caveat or by adjudicating authority:** जज साहेब भी बुलाएँगे लंगर डालने वाले को

Where after a caveat has been lodged, any application or appeal is filed before the Tribunal or the court of District Judge or the Appellate Tribunal or the High Court, as the case may be, the Tribunal or the District Judge or the Appellate Tribunal or the High Court, as the case may be, shall serve a notice of application or appeal filed by the applicant or the appellant on the caveator.

- **Furnishing of copy of application and documents:** एप्लिकेंट ^{cc} लंगर डालने वाले को भी करेगा

Where a notice of any caveat has been served on the applicant or the Appellant, he shall periodically furnish the caveator with a copy of the application or the appeal made by him and also with copies of any paper or document which has been or may be filed by him in support of the application or the appeal.

- **Validity of period of caveat:** लंगर 90 दिन तक Where a caveat has been lodged, such caveat shall not remain in force after the expiry of the period of ninety days from the date on which it was lodged unless the application or appeal has been made before the expiry of the period.

❑ Right of borrower to receive compensation and costs in certain cases (Section 19)

गलत possession में कर्जदार को भरपाई का अधिकार

- If the Debts Recovery Tribunal or the Court of District Judge, on an application made under section 17 or section 17A or the Appellate Tribunal or the High Court on an appeal preferred under section 18 or section 18A, holds that the possession of secured assets by the secured creditor is not in accordance with the provisions of this Act and rules made thereunder, and
- Directs the secured creditors to return such secured assets to concerned borrowers or any other aggrieved person, who has filed the application under section 17 or section 17A or appeal under section 18 or section 18A, as the case may be,
- The borrower or such other person shall be entitled to the payment of such compensation and costs as may be determined by such Tribunal or Court of District Judge or Appellate Tribunal or the High Court referred to in section 18B.

CENTRAL REGISTRY

- The provisions related to Central Registry is contained in chapter IV of the Act. It covers Sections 20 to 26 of the Act.

❑ Central Registry (Section 20)

- **Setup of Central Registry:** The Central Government may, by notification, set up or cause to be set up from such date as it may specify in such notification, a registry to be known as the Central Registry with its own seal for the purposes of registration of transaction of securitization and reconstruction of financial assets and creation of security interest under this Act.
- The head office of the Central Registry shall be at such place as the Central Government may specify and for the purpose of facilitating registration of transactions referred above, there may be established at such other places as the Central Government may think fit, branch offices of the Central Registry.

- **Central Government notifies territorial jurisdiction of the Central Registry:** The Central Government may, by notification, define the territorial limits within which an office of the Central Registry may exercise its functions. The provisions of this Act pertaining to the Central Registry shall be in addition to and not in derogation of any of the provisions contained in the Registration Act, 1908, the Companies Act, 2013, the Merchant Shipping Act, 1958, the Patents Act, 1970, the Motor Vehicles Act, 1988 and the Designs Act, 2000 or any other law requiring registration of charges and shall not affect the priority of charges or validity thereof under those Acts or laws.

Central Registry of Securitization Asset Reconstruction and Security Interest of India is a Government of India Company licensed under section 8 of the Companies Act, 2013 with Govt. of India having a shareholding of 51% by the Central Government and select Public Sector Banks and the National Housing Bank also being shareholders of the Company.

- The object of the company is to maintain and operate a Registration System for the purpose of registration of transactions of securitisation, asset reconstruction of financial assets and creation of security interest over property, as envisaged in the SARFAESI Act.

❑ Integration of registration systems with Central Registry (Section 20A)

- The Central Government may, for the purpose of providing a Central database, in consultation with State Governments or other authorities operating registration system for recording rights over any property or creation, modification or satisfaction of any security interest on such property, integrate the registration records of such registration systems with the records of Central Registry established under section 20, in such manner as may be prescribed.
- The Central Government shall after integration of records of various registration systems referred with the Central Registry, by notification, declare the date of integration of registration systems and the date from which such integrated records shall be available; and with effect from such date, security interests over properties which are registered under any registration system referred shall be deemed to be registered with the Central Registry for the purposes of this Act.

❑ Delegation of powers (Section 20B)

- The Central Government may, by notification, delegate its powers and functions under this Chapter, in relation to establishment, operations and regulation of the Central Registry to the Reserve Bank, subject to such terms and conditions as may be prescribed.

❑ Central Registrar (Section 21)

- The Central Government may, by notification, appoint a person for the purpose of registration of transactions relating to securitisation, reconstruction of financial assets and security interest created over properties, who shall be known as the Central Registrar.
- The Central Government may appoint such other officers with such designations as it thinks fit for the purpose of discharging, under the superintendence and direction of the Central Registrar, such functions of the Central Registrar under this Act as he may, from time to time, authorize them to discharge.

❑ Register of securitization, reconstruction and security interest transactions (Section 22)

- A record called the Central Register shall be kept at the head office of the Central Registry for entering the particulars of the transactions relating to-
 - a. Securitisation of financial assets;

b) Reconstruction of financial assets;

c) Creation of security interest

- The Central Registrar can keep the records wholly or partly in computer, floppies, diskettes or in any other electronic form subject to the prescribed safeguards. Records kept in these form shall also form a part of the Central Register. The register shall be kept under the control and management of the Central Registrar.

❑ Filing of transactions of securitization, reconstruction and creation of security interest

- The particulars of every transaction of securitization, asset reconstruction or creation of security interest shall be filed, with the Central Registrar in the prescribed manner and on payment of the prescribed fees, [Section 23(1)]
- Provided that the Central Government may, by notification, require registration of all transactions of securitization, or asset reconstruction or creation of security interest which are subsisting on or before the date of establishment of the Central Registry under section 20(1) within such period and on payment of such fees as may be prescribed.

- The Central Government may, by notification, require the registration of transaction relating to different types of security interest created on different kinds of property with the Central Registry [Section23(2)]
- The Central Government may, by rules, prescribe forms for registration for different types of security interest under this section and fee to be charged for such registration.

❑ Modification of security interest registered under this Act (Section24)

- Whenever the terms or conditions, or the extent or operation, of any security interest registered under this Chapter, are, or is, modified it shall be the duty of the ARC to send to the Central Registrar, the particulars of such modification.

❑ ARC or secured creditor to report satisfaction of security interest (Section25)

- The ARC or the secured creditor as the case may be, shall give intimation to the Central Registrar of the payment or satisfaction in full, of any security interest relating to the ARC or the secured creditor and requiring registration under this Chapter, **within thirty days** from the date of such payment or satisfaction.

- On receipt on intimation, the Central Government shall order that a memorandum of satisfaction shall be entered in the Central Registry.

❑ Right to inspect particulars of securitisation, reconstruction and security interest transactions (Section 26)

- The particulars of securitization or reconstruction or security interest entered in the Central Register of such transactions kept under section 22 shall be open during the business hours for inspection by any person on payment of such fee as may be prescribed.

RECTIFICATION BY CENTRAL GOVERNMENT IN MATTER OF REGISTRATION , MODIFICATION AND SATISFACTION (SECTION 26A)

- The Central Government, on being satisfied-
 - d) That the omission to file with the Registrar the particulars of any transaction of securitization, asset reconstruction or security interest or modification or satisfaction of such transaction or; the omission or mis-statement of any particular with respect to any such transaction or modification or with respect to any satisfaction or other entry made in pursuance of section23 or section24 or section25 of the principal Act was accidental or due to inadvertence or some other sufficient cause or it is not of a nature to prejudice the position of creditors; or
 - e) That on other grounds, it is just and equitable to grant relief,

May, on the application of a secured creditor or securitization company or reconstruction company or any other person interested on such terms and conditions as it may seem to the Central Government just and expedient, direct that the time for filing of the particulars of the transaction for registration or modification or satisfaction shall be extended or, as the case may require, the omission or mis-statement shall be rectified.

- Where the Central Government extends the time for the registration of transaction of security interest or securitization or asset reconstruction or modification or satisfaction thereof, the order shall not prejudice any rights acquired in respect of the property concerned or financial asset before the transaction is actually registered."

REGISTRATION BY SECURED CREDITORS AND OTHER CREDITORS

- The government has introduced new provisions in the form of Chapter IVA in order to encourage registration of security interest by the secured creditors, which shall facilitate uniformity, completeness and transparency in the status of security interest of the creditors over the borrower's assets.

☐ **Registration by secured creditors and other creditors (Section 26B)**

- The Central Government may by notification, extend the provisions of Chapter IV relating to Central Registry to all creditors other than secured creditors as defined in clause (zd) of section 2(1), for creation, modification or satisfaction of any security interest over any property of the borrower for the purpose of securing due repayment of any financial assistance granted by such creditor to the borrower.

- From the date of notification, any creditor including the secured creditor may file particulars of transactions of creation, modification or satisfaction of any security interest with the Central Registry in such form and manner as may be prescribed.
- unsecured creditor भी रजिस्टर कर सकता है लेकिन उसको इस एक्ट का बेनिफिट नहीं मिलेगा
- However A creditor other than the secured creditor filing particulars of transactions of creation, modification and satisfaction of security interest over properties created in its favour shall not be entitled to exercise any right of enforcement of securities under this Act.
- अटैचमेंट आर्डर के भी particulars रजिस्टर करवाओ
- 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, shall file with the Central Registry such attachment order with particulars of the assessee and details of tax or other Government dues from such date as may be notified by the Central Government, in such form and manner as may be prescribed.
- अटैचमेंट आर्डर में क्लेम मिला? ऑर्डर की कॉपी फीस के साथ जमा करवाओ Also if any person, having any claim against any borrower, obtains orders for attachment of property from any court or other authority empowered to issue attachment order, such person may file particulars of such attachment orders with Central Registry in such form and manner on payment of such fee as may be prescribed.

❑ Effect of the registration of transactions, etc. (Section 26C)

- Any registration of transactions of creation, modification or satisfaction of security interest by a secured creditor or other creditor or filing of attachment orders under this Chapter shall be **deemed to constitute a public notice** from the date and time of filing of particulars of such transaction with the Central Registry.
- रजिस्टर की हुयी ट्रांसक्शन्स को बेनिफिट मिलेगा किसी भी subsequent ट्रांसफर के मुक़ाबले Where security interest or attachment order upon any property in favour of the secured creditor or any other creditor are filed for the purpose of registration, the claim of such secured creditor or other creditor holding attachment order shall have priority over any subsequent security interest created upon such property and any transfer by way of sale, lease or assignment or license of such property or attachment order subsequent to such registration, shall be subject to such claim:

Provided that nothing contained in this sub-section shall apply to transactions carried on by the borrower in the ordinary course of business.

❑ Right of enforcement of securities (Section 26d) -No Registration , no enforcement

- No secured creditor shall be entitled to exercise the rights of enforcement of securities under Chapter III unless the security interest created in its favour by the borrower has been registered with the Central Registry.

❑ Priority to secured creditors (Section 26e)-Priority over Govt Dues except under IBC

- After the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.
- However such priority shall be subject to the provisions of the Insolvency and Bankruptcy Code, 2016, where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower.

OFFENCES AND PENALTIES

- This chapter V of the Act provides for the offences and penalties for the commission of default in filing of particulars of every transaction of securitization, asset reconstruction or creation of security interest with Central registry. This chapter covers section 27 to 30 of the Act.

☐ Penalties (Section 27)

If a default is made-

- a) In filing under section 23, the particulars of every transaction of any securitization or asset reconstruction or security interest created by an ARC or secured creditors; or
- b) In sending under section 24, the particulars of the modification referred to in that section; or

- c) In giving intimation under Section 25, then, every company and every officer of the company or the secured creditors and every officer of the secured creditor who is in default shall be punishable with fine which may extend to five thousand rupees for everyday during which the default continues.-5000 every day

Provided that provisions of this section shall be deemed to have been omitted from the date of coming into force of the provisions of this Chapter and section 23 as amended by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016

❑ Offences (Section 29)

- If any Person:-

- i. Contravenes or
- ii. Attempts to contravene or
- iii. Abets the contravention of the provisions of this Act or of any rules made thereunder, he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

❑ Cognizance of offence (Section 30)-Only on Receipt of Complaint from officer of RBI or Central Registry

- No court shall take cognizance of any offence punishable under section 27 in relation to non-compliance with the provisions of section 23, section 24 or section 25 or under section 28 or section 29 or any other provisions of the Act, except upon a complaint in writing made by an officer of the Central Registry or an officer of the Reserve Bank, generally or specially authorized in writing in this behalf by the Central Registrar or, as the case may be, the Reserve Bank.
- No court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

❑ Power of adjudicating authority to impose penalty (Section 30A)

- Where any asset reconstruction company or any person fails to comply with any direction issued by the Reserve Bank under this Act the adjudicating authority may, by an order, impose on such company or person in default, a penalty not exceeding one crore rupees or twice the amount involved in such failure where such amount is quantifiable, whichever is more, and where such failure is a continuing one, a further penalty which may extend to one lakh rupees for everyday, after the first, during which such failure continues.

- The adjudicating authority shall serve a notice on the asset reconstruction company or the person in default requiring such company or person to **show cause** why the amount specified in the notice should not be imposed as a penalty and a **reasonable opportunity** of being heard shall be given to such person.
- Any **penalty** imposed under this section shall be **payable within a period of thirty days** from the date of issue of notice, **failure** of which adjudicating authority shall **cancel its registration**.
- No complaint shall be filed against any person in default in any court pertaining to any failure under sub-section (l) in respect of which any penalty has been imposed and recovered by the Reserve Bank under this section.
- Where any complaint has been filed against a person in default in the court having jurisdiction
- No proceeding for imposition of penalty against that person shall be taken under this section.
- "Adjudicating authority" means such officer or a committee of officers of the Reserve Bank, designated as such from time to time, by notification, by the Central Board of Reserve Bank.
- "Person in default" means the asset reconstruction company or any person which has committed any failure, contravention or default under this Act and any person in charge of such company or such other person, as the case may be, shall be liable to be proceeded against and punished under section 33 for such failure or contravention or default committed by such company or person.

❑ Appeal against penalties (Section 30B)

- A person in default, aggrieved by an order passed in section 30A(4), may, within a period of **thirty days** from the date on which such order is passed, prefer an appeal to the Appellate Authority.
- Appellate Authority **may entertain** an appeal after the expiry of the said period of thirty days, if it is satisfied that there was **sufficient cause** for not filing it within such period.

❑ Appellate Authority (Section 30C)

- **The Central Board of Reserve Bank may designate such officer or committee of officers as it deems fit to exercise the power of Appellate Authority.**
- The Appellate Authority shall have power to pass such order as it deems fit after providing a reasonable opportunity of being heard to the person in default.
- The Appellate Authority may, by an order stay the enforcement of the order passed by the adjudicating authority under section 30A, subject to such terms and conditions, as it deems fit.

- Where the person in default fails to comply with the terms and conditions imposed by order without reasonable cause, the Appellate Authority may dismiss the appeal.

❑ **Recovery of penalties (Section 30d)**

- Any penalty imposed under section 30A shall be recovered as a “recoverable sum” and shall be payable **within a period of thirty days** from the date on which notice demanding payment of the recoverable sum is served upon the person in default and, in the case of failure of payment by such person within such period, the Reserve Bank may recover the sum as per the section.

MISCELLANEOUS

- Chapter VI of the Act comprises of Miscellaneous provisions dealt under sections 31-42 of the Act.

❑ Provisions of this Act not to apply uncertain cases (Section 31)

- The situations in which the provisions of this Act do not apply are as follows :
 - a) A lien on any goods, money or security given by or under the Indian Contract Act, 1872 or the Sale of Goods Act, 1930 or any other law for the time being in force;
 - b) A pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872;
 - c) Creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934;
 - d) Creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958;

- e) Any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930;
- f) Any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act) or sale under the first proviso to sub-section(1) of section 60 of the Code of Civil Procedure, 1908;
- g) Any security interest for securing repayment of any financial asset not exceeding one lakh rupees; <https://ibclaw.in/application-of-sarfaesi-act-security-interest-enforcement-rules-2002-in-the-process-of-recovery-of-the-loans-in-case-of-default-non-payment-non-performing-assets-by-ansul-j-bhuta/>
- h) Any security interest created in agricultural land;
- i) Any case in which the amount due is less than twenty per cent of the principal amount and interest thereon

Provisions of the Act not to apply in some cases (Section 31A)

- The Central Government may, by notification in the public interest, direct that any of the provisions of this Act,-

- a) Shall not apply to such class or classes of banks or financial institutions; or
 - b) Shall apply to the class or classes of banks or financial institutions with such exceptions, modifications and adaptations, as may be specified in the notification.
- A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days, and if, both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.
 - In reckoning any such period of thirty days as is referred to in sub-section (2), no account shall be taken of any period during which the House referred to in sub-section (2) is prolonged or adjourned for more than four consecutive days.
 - The copies of every notification issued under this section shall, as soon as may be after it has been issued, be laid before each House of Parliament

❑ Protection of action taken in good faith (Section 32)

- No suit, prosecution or other legal proceedings shall lie against the Reserve Bank or the Central Registry or any secured creditor or any of its officers for anything done or omitted to be done in good faith under this Act.

❑ Offences by companies (Section 33)

- Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company, for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished in accordance with the provisions of the Act.
- But if such person is able to prove that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence, then section 33 does not apply to such person.

- It must also be noted that, where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished in accordance with the provisions of the Act.

- **For the purposes of section 33:-**

"Company" means any body corporate and includes a firm or other association of individuals; and "director", in relation to a firm, means a partner in the firm.

❑ Civil Court not to have jurisdiction (Section 34)

- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

❑ The provisions of this Act to override other laws (Section 35)

- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

❑ Limitation (Section 36)

- No secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963.

❑ Application of other laws not barred (Section 37)

- The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 2013, the Securities Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or any other law for the time being in force.

❑ Power of Central government to make rules (Section 38)

- 1) The Central Government may, by notification and in the Electronic Gazette as defined in clause (s) of section 2 of the Information Technology Act, 2000, make rules for carrying out the provisions of this Act.
- 2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--
 - a. The form and manner in which an application may be filed under sub-section (10) of section 13;
 - b. The manner in which the rights of a secured creditor may be exercised by one or more of his officers under sub-section (12) of section 13;
 - c. The fee: fee making an application to the Debts Recovery Tribunal under sub-section (1) of section 17;
 - d. The form of making an application to the Appellate Tribunal under sub-section (6) of section 17;
 - e. The fee for preferring an appeal to the Appellate Tribunal under sub-section (1) of section 18;"
 - f. The safeguards subject to which the records may be kept under sub-section (2) of section 22;
 - g. The manner in which the particulars of every transaction of securitisation shall be filed under section 23 and fee for filing such transaction;

- i) The fee for inspecting the particulars of transactions kept under section 22 and entered in the Central Register under sub-section(1) of section 26;
- j) The fee for inspecting the Central Register maintained in electronic form under sub-section (2) of section 26;
- k) Any other matter which is required to be, or may be,prescribed, in respect of which provision is to be, or may be, made by rules.

THE SECURITY INTEREST (ENFORCEMENT) RULES , 2002

In exercise of the powers conferred by sub-section (1) and clause (b) of sub-section (2) of Section 38 read with subsections (4), (10) and (12) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Act) the Central Government hereby makes the following rules, namely:-

- **Important definitions are given below:**

- ☐ Some of the key Definitions.

In these rules, unless the context otherwise requires,-

- a) "**Authorised officer**" means an officer not less than a chief manager of a public sector bank or equivalent, as specified by the Board of Directors or Board of Trustees of the secured creditor or any other person or authority exercising powers of superintendence, direction and control of the business or affairs of the secured creditor, as the case may be, to exercise the rights of a secured creditor under the Act;

b) Demand notice means the notice in writing issued by a secured creditor or authorised officer, as the case may be, to any borrower pursuant to sub-section (2) of section 13 of the Act;

❑ Procedure for issue of demand notice.-

The service of demand notice as referred to in sub-section (2) of section 13 of the Act shall be made 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:

- 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.
 - 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 (1).
 - 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.
- 4) Where there are **more than one borrower**, the demand notice shall be **served on each borrower**.

❑ 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 Authorised 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.

❑ Procedure after issue of notice:

- If the amount mentioned in the demand notice is not paid within the time specified therein, the authorised 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 Ac for taking possession of movable property, namely:-
- 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.
- 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.

- 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:
- 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.
- 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.

In case any secured asset is:-

- a) A debt not secured by negotiable instrument; or
- b) A share, in a body corporate;
- c) 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:-

- 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 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;
- 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;
- 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.

❑ Valuation of movable secured assets.

- After taking possession under sub-rule (1) of rule 4 and in any case before sale, the authorised 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 be sold in realization of the dues of the secured creditor.

❑ Sale of movable secured assets.-

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-

- obtaining quotations from parties dealing in the secured assets or otherwise interested in buying such assets; or
- inviting tenders from the public; or
- holding public auction; or
- by private treaty.

The authorised officer shall **serve to the borrower a notice of thirty days for sale** of the movable secured assets,: If the sale of such secured assets 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 that locality by setting out the terms of sale, which may include,-

- Details about the borrower and the secured creditor;
- Description of movable secured assets to be sold with identification marks or numbers, if any, on them;
- Reserve price, if any, and the time and manner of payment;
- Time and place of public auction or the time after which sale by any other mode shall be completed;
- Depositing earnest money as may be stipulated by the secured creditor;
- 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.

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.

❑ Issue of certificate of sale.

- 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.
- On payment of sale price, the authorised officer shall issue a certificate of sale in the prescribed 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.
- Where the movable secured assets are those referred in sub-clauses (iii) to (v) of clause (l) of sub-section (1) of section 2 of the 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.

❑ **Sale of immovable secured assets.**

- 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.
- The possession notice as referred to in sub-rule (1) 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 newspaper one in vernacular language having sufficient circulation in that locality, by the authorised officer.
- In the event of possession of immovable property 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.

- 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.
- 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 such assets; or
 - ii. By inviting tenders from the public;
 - iii. By holding public auction; or
 - iv. By private treaty.

- The authorised officer shall serve to the borrower a **notice of thirty days** for sale of the immovable secured assets, under sub-rule (5)
- 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, -
- The description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
- The secured debt for recovery of which the property is to be sold;
- Reserve price, below which the property may not be sold;
- Time and place of public auction or the time after which sale by any other mode shall be completed;
- Depositing earnest money as may stipulated by the secured creditor;
- 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.

- 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.
- 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.

❏ Time of sale, Issue of sale certificate and delivery of possession

- Sale of immovable property under these rules shall not take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower.
- 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 :

- 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.
- **25% immediately**: 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.
- **Balance on or before the 15th day**: 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.
- In default of payment within the period mentioned in sub-rule (4), 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.
- 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.

- 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.
- And 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 days** from date of finalisation of the sale.
- 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.
- 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 (7).
- The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.

❑ Steps for Appointment of manager

- 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.
- 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
- 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.
- 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.

- The Manager shall give such person who has made payment under sub-rule (3) a valid discharge as if he has made payments to the borrower.
- The Manager shall apply all the monies received by him in accordance with the provisions contained in subsection (7) of section 13 of the Act.

❑ Procedure for Recovery of shortfall of secured debt-Application to DRT either personally or through registered post

- 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.
- Please note that 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).

- An application under sub-rule (1) shall be accompanied with fee as provided in rule 7 of the Debts Recovery

❑ Application to the Tribunal / Appellate Tribunal

- 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.
- 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.

❑ Fees for applications and appeals under section 17 and 18 of the Act

- 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.

(2) The amount of fee payable has been prescribed in rule 18.

- There are nine annexures under THE SECURITY INTEREST (ENFORCEMENT) RULES, 2002 Appendix-i [See rule-4(1)] Panchnama
- Appendix-ii [See rule-4(2)] inventory
- Appendix-iii [See rule-7(2)] Certificate of Sale (for movable property)
- Appendix-iv [See rule-8(1)] Possession notice (for Immovable property)
- Appendix-V [See rule-9(6)] Sale Certificate (for Immovable property)
- Appendix Vi FORM [See rule 11(1)] Application under sub-section (10) of Section 13 of the Securitisation and Reconstruction of Financial
- [Appendix-Vii [See rule 12(1)] Application under sub-section (1) of Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- Appendix-Viii [See rule 12(2)] Application under sub-section (6) of Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002
- Appendix-ix [See Rule 12(2)] Appeal under Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

Introduction

The Insolvency and Bankruptcy Code, 2016 was introduced primarily to protect the interests of all the creditors and stakeholders of the corporate debtor. The intention behind this act was to consolidate the laws having insolvency and reorganization resolution issues as their subject-matter. On the other hand, The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) focuses on securitization and reconstruction of financial assets and enforcement of security interest without any intervention from the court or tribunals. The entire process is regulated by the Reserve Bank of India and in case of a default in repayment, it allows the secured creditors to take possession over the collateral against which the loan had been provided.

Under the IBC, once the corporate insolvency resolution process (CIRP) is initiated, the Moratorium is applicable to “any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002”. Therefore, any asset reconstruction company or financial institution seeking to enforce its security under the SARFAESI has to be circumspect of any impending proceeding under the IBC. An overview of the interplay between the IBC and the SARFAESI Act, seeks to trace the IBC in operation and analyse as to how it affects various stakeholders involved.

The conflict between “IBC” and “SARFAESI”

The Insolvency and Bankruptcy Code, 2016 and the SARFAESI Act, both the legislations have a similar objective i.e. to recover bad debts by identifying and directing the assets of a debtor to repay the bad debt. Therefore, it was quite clear that both these legislations would cross paths at one point of time. Applicability of some overlapping provisions was clarified by the NCLAT in *Encore Asset Reconstruction Company Pvt. Ltd. v. Ms. Char Sandeep Desai*.

Section 18 of the IBC has provisions regarding ‘duties of interim professional’ and clause (f) and (f)(i) allows the interim resolution professional to take “control” and “custody” of assets of corporate debtor. On the other hand, under section 13(4) of the SARFAESI Act once a corporate debtor defaults in repaying the loan amount taken from the bank, the bank can file an application to take over the physical possession of the property belonging to the corporate debtor. The inconsistency here was that under the IBC, the resolution professional could have taken over the physical possession of the property of the corporate debtor whereas under SARFAESI Act bank is legally entitled to take over the physical possession of the property of the defaulting corporate debtor.

In *Encore Asset Reconstruction Company Pvt. Ltd. v. Ms. Charu Sandeep Desai*[2], NCLAT held that a secured creditor who has taken physical possession of the mortgaged property before the admission of insolvency proceedings must hand over custody of that property to the Interim Resolution Professional (IRP), as section 18 of the Insolvency and Bankruptcy Code, 2016 will prevail over Section 13(4) of the SARFAESI Act. Therefore, NCLAT through this judgment clarified that when any inconsistency arises between the two laws the provision of IBC will prevail over the SARFAESI Act, 2002.

Even after the pronouncement of this judgment, the issue regarding simultaneous proceedings under the IBC and the SARFAESI was not clear. In *Punjab National Bank Vs. M/s Vindhya Cereals Pvt. Ltd.*[3], NCLAT has dealt with this particular issue. The question before the appellate tribunal was whether a financial creditor can initiate parallel proceedings under SARFAESI Act, 2002 as well as under the IBC. In this particular case, the Financial creditor filed an application against the corporate debtor under section 7 of the IBC. However, before filing the application under the IBC, the financial creditor had served the notice to the corporate debtor under Section 13 (2) of SARFAESI Act, 2002. NCLAT held that the Financial Creditors can proceed simultaneously under SARFAESI Act as well as under IBC. Section 238 of IBC states that “the provisions of this code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by the virtue of any such law”. Thus, the non-obstante clause of the Code will prevail over any other law for the time being in force.

Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act 2016 (“SARFAESI Amendment Act”): into effect from January 24, 2020.

The Ministry of Law and Justice through the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 (“Amendment Act”)[4] brought in certain amendments in the SARFAESI Act. The Ministry of Finance through a notification dated 26.12.2019[5], notified Sections 17, 18 and 19 of the Amendment Act, 2016 which has come into force from 24th January 2020. Before this notification, “priority” in terms of the distribution of assets was one of the major issues which the lenders faced under the SARFAESI Act as statutory dues had the same priority in payment of debt. The changes in the SARFAESI Act has given primacy to the secured creditors. The debts due to any secured creditor would be paid on a priority basis in comparison to all other debts, taxes, revenues and cesses payable to the state government, central government or any local authority.

The intention of this particular amendment is to harmonize the provisions of the SARFAESI Act with Section 53 of the IBC which deals with the liquidation process and the distribution of assets. However, the amended section 26E under the SARFAESI Act has an explanation to the priority rule. It states that in situations where the proceedings under the IBC are pending, the priority given to secured creditors regarding payment of debt shall be subject to the provisions of IBC. Under the IBC, there is much more clarity with regards to the distribution of assets. Section 53 of the Insolvency and Bankruptcy Code, 2016 creates a waterfall mechanism under which the proceeds from the sale of the liquidation assets of the corporate debtor are distributed in a certain order of priority. Even after the recent changes in the SARFAESI Act, lenders based on their past experience are more inclined towards the IBC for recovery of dues and they are sticking to that process.

Lenders preferring “IBC” over the “SARFAESI Act” for recovery of dues.

Even after amendments in the SARFAESI Act, a lot of issues are still unaddressed due to which lenders tend to choose the IBC over the SARFAESI Act. Over 248,000 cases were referred for recovery through the SARFAESI Act in 2018-19, involving an amount of Rs.2.89 lakh crore. Banks recovered Rs. 41,876 crores, or 14.5% of the amount involved, which was lower than the recovery rate of 32.3% in 2017-18. Under the IBC, the amount recovered in 2018-19 was Rs. 70,819 crores, or 42.4% of the amount of Rs. 1.66 lakh crore involved. Further, pending cases have been an issue with SARFAESI. As on June 30, 2017, there were 109,598 cases pending across Debt Recovery Tribunal (DRT) with recovery dues of Rs 6,35,000 crore. Under the IBC, as of November 2019, the resolved cases were 160. The number of cases admitted till September 2019 was 2,542[6]. Therefore, considering the recovery rate and the issue of pending cases over the last few years lenders tend to stick to the process under the IBC in comparison to the SARFAESI Act.

Apart from these shortcomings, the SARFAESI Act provides protection to secured financial creditors by allowing them to enforce their security interests without any intervention from the court or tribunal. On the other hand, under the IBC, the interests and rights of all types of creditors have been taken into consideration which includes the secured creditors and the entire process is driven by the National Company Law Tribunal (NCLT) and the lenders prefer IBC over SARFAESI as there is a definite timeline involved.

Further, the legal and economic impact of COVID-19 could see many profitable businesses undergoing financial distress. To prevent companies from being forced into insolvency proceedings due to default caused by the Covid-19 crisis government has decided to suspend the IBC for a year. This would be a major relief for corporate borrowers but suspension of these provisions would mean that fresh insolvency proceedings would not be triggered under the Code during the given time period. This could attract more lenders to go under the SARFAESI Act for recovery of dues.

Conclusion

Therefore, the overriding provision under the IBC coupled with the imposition of the moratorium on any action undertaken under other statute has provided the creditors with a greater chance to achieve the target of maximisation of assets of the corporate debtor during the resolution process and time-bound resolution of insolvency. In smaller cases such as housing loans, SARFAESI still could be a better bet and it could be beneficial in cases where only one lender is involved. However, it is likely that some of the high-priced cases may move from DRTs to the NCLT for resolution as even the banks are facing difficulties as delays in DRT resolution are adding to their non-performing assets (NPAs). Therefore, even after the amendment which was brought in to streamline the process under the SARFAESI Act, lenders still feel that IBC is a safer tool for recovery where the lenders involved are more than one or it's a big account. IBC still attracts more lenders especially since it has now been established that secured financial creditors have supremacy and the issue of attachment of assets has been resolved.

THE SARFAESI ACT, 2002

Valuation of and sale of immovable secured assets are referred under Rule 8 of Security Interest (Enforcement) Rules, 2002 as under:

Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorized 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 such assets; or
- ii. By inviting tenders from the public; or
- iii. By holding public auction; or
- iv. By private treaty.

Rule 2(d) of Security Interest (Enforcement) Rules, 2002 defines "Approved Valuer" which means a valuer approved by the Board of Directors or Board of Trustees of the secured creditor, as the case may be.

In case of immovable property valuation by an approved valuer and fixing of reserve price is mandatory.

Questions on SARFAESI Act

Case Study on RDDB Act, 1993

- Sohan Lal residing in Delhi and having Factory in Noida had availed cash credit facility of Rs.20 lakhs from PNB, Noida. However there was a default in repayment. Bank is secured against house property owned by the wife of Sohan Lal. The Notices sent to Sohan Lal have returned unanswered and PNB is contemplating initiating proceedings under DRT Act after payment of fees of Rs.22000. After a certificate was issued to the recovery officer, Sohan Lal approached the Presiding Officer after making a down payment of 25% of the amount specified in the recovery certificate and has given an unconditional undertaking to pay the Balance Amount within a reasonable time, which is acceptable to the Bank
- In view of the above please answer the following questions:

- Q.1.Where the application should be filed by the Bank?
- A)DRT,Delhi
- B)DRT,Lucknow
- C)Either A or B
- Section 19(1)

- Q.2. In case the amount is repaid by Sohan Lal before the commencement of the proceedings , whether PNB is entitled for refund of filing fees?
- A)No
- B)Yes
- C)Fees is refundable at any stage of the proceedings before final order is passed
- D)Fees is refundable at any stage of the proceedings before final order is passed at the discretion of the Tribunal

Ans D

Refer Section 19(3B)

- Q.3.Describe the Proceedings in brief after filing of application by Bank
Notice to the defendant to reply and file his written statement within 30 days extendable by 15 days
- Proceeds from sale of secured assets shall be distributed in the following order:
Costs incurred for preservation and protection of secured assets
- Costs of valuation
- Cost of public notice for possession and auction
- Other expenses for sale
- Debts owed to the Bank

- Q.4.Timelines
- Expeditious completion by DRT within 180 days
- Appeal to Tribunal within 30 days after payment of 50% of the amount due(Minimum 25%)
- Section 27

- Q.5. In this case a certificate was issued to the recovery officer. However Sohan Lal approached the Presiding Officer after making a down payment of 25% of the amount specified in the recovery certificate and has given an unconditional undertaking to pay the Balance Amount within a reasonable time, which is acceptable to the Bank. Is this action correct?
- A) No
- B) Yes
- C) Yes but 100 % payment should be made
- D) Bank Guarantee has to be furnished
- Ans Yes
Section 27(1)

Case Studies on SARFAESI, DRT, Arbitration and Conciliation and Limitation Act

- Equipment Conductors and Cables (ECCL) filed an application before Arbitral Council which was denied on the ground that the same was barred by limitation. On appeal against the award of Arbitral Council, ECCL-Equipment Conductors appealed to Hyderabad High Court. However no relief was granted to the ECCL. ECCL-Equipment Conductors and cables thereafter filed an application under Section 9 of IBC after issuing a demand notice to Transmission Corporation of AP under Section 8. Transmission corporation specifically denied the claim on the ground that nothing was due to Equipment Conductors. Despite denial by Transmission Corporation, Equipment Conductors filed the application before NCLT which rejected the application. On appeal to NCLAT, NCLAT asked the Transmission Corporation to pay the amount to ECCL otherwise CIRP would be initiated against TCAP.

- KCPL got a tender for road construction which it sub contracted to VCPL. Disputes arose as to payment and matter was referred to arbitration which settled the dispute in favour of VCPL. The amount involved was Rs.2 lakhs. KCPL filed an appeal under Section 34 of Arbitration and Conciliation act. While the appeal was pending , VCPL issued a notice to KCPL under Section 8.KCPL pointed out that a dispute exists and the award is under appeal and is yet to be adjudicated upon. VCPL had filed the copy of the arbitral award as the basis for sending demand notice under section 8. The period of filing the appeal against the Arbitral award is 90 days plus the discretionary period of 30 days which is not yet over.

- Whether the provision of SARFAESI Act apply to agricultural land?

- Appeal filed against NCLT order after delay of more than 6 months without any application for condonation of delay

- Operational creditor issued demand notice on 13.06.2017
- Operational creditor filed Application under Section 9 on 13.09.2017
- Corporate Debtor filed Civil suit filed on 12.12.2017
- CD replied on affidavit that they have already paid through cheques. However the same was disputed by the OC and he attached certificate from a CA that the amount has not been paid.

- A Hotelier availed loan facility from a Financial Institution and mortgaged its hotel property as security interest. On default after issuing demand notice under SARFAESI, the Financial Institution took constructive or symbolic possession. After initiating recovery proceedings in DRT, the Financial Institution sold the property in Public auction. Hotelier moved to High court which annulled the sale.