

Lesson 18

Securitisation

LESSON OUTLINE

- Introduction
- Scheme of the Act
- Constitutional validity of the Act
- Definitions of terms and expressions
- Important provisions
- Procedure for Registration
- Enforcement of security interest
- Measures for asset reconstruction
- Offences
- Securities Interest (Enforcement) Rules, 2002.

LEARNING OBJECTIVES

The banks and financial institutions (FIs) were facing numerous problems in recovery of defaulted loans on account of delays in disposal of recovery proceedings. The Government, therefore, enacted the Recovery of Debts and Bankruptcy Act, 1993 and SARFAESI Act in 2002 for the purpose of expeditious recovery of Non-Performing Assets (NPAs) of the banks and FIs.

The Securities and Reconstruction of Financial assets and enforcement of Security Interest Act, 2002 was amended in 2004 and 2012 respectively. In 2016, the Indian parliament has passed the Enforcement of Security Interests and Recovery of Debt Laws and Miscellaneous Provisions (Amendment) Act, 2016 to improve the efficacy of Indian debt recovery laws.

The objective of the study lesson is to familiarize the students with the legal requirements stipulated under the SARFAESI Act.

INTRODUCTION

In the traditional lending process, a bank makes a loan, maintaining it as an asset on its balance sheet, collecting principal and interest, and monitoring whether there is any deterioration in borrower's creditworthiness.

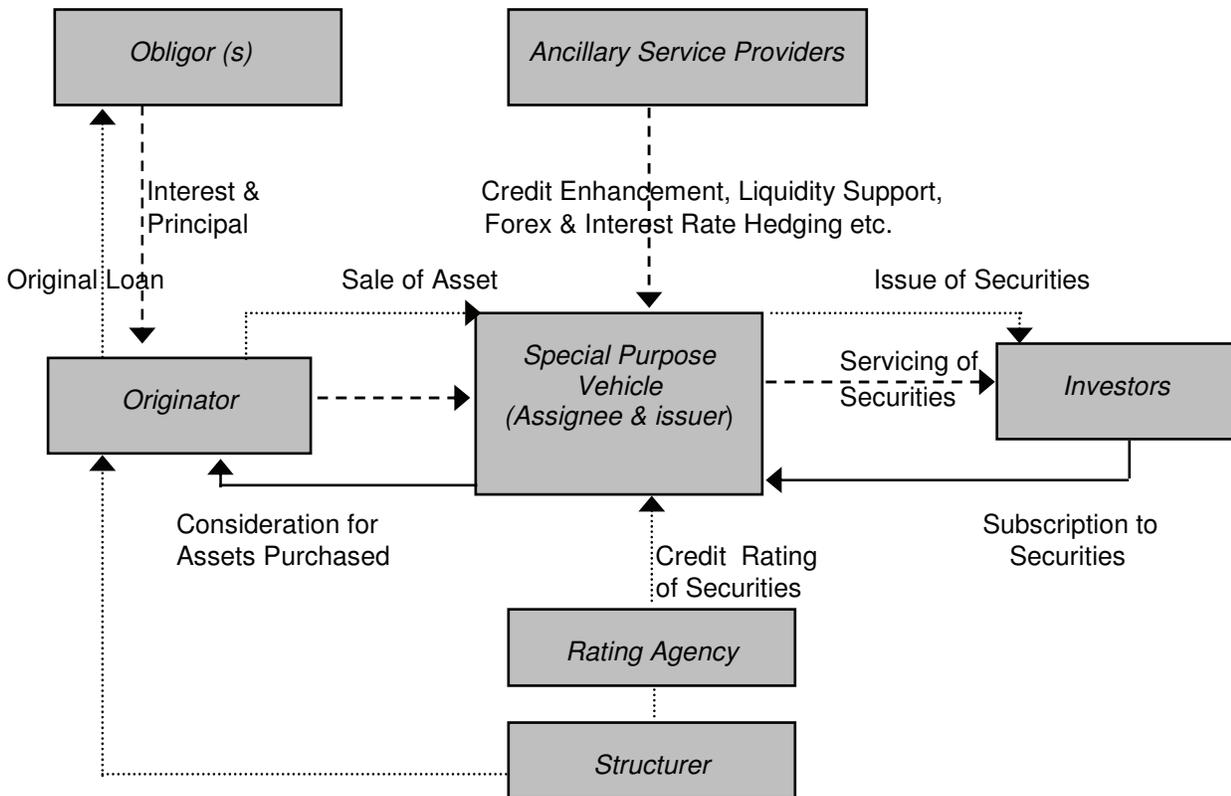
This requires a bank to hold assets till repayment of loan. The funds of the bank are blocked in these loans and to meet its growing fund requirement a bank has to raise additional funds from the market. Securitisation is a way of unlocking these blocked funds.

One of the most prominent developments in international finance in recent decades and the one that is likely to assume even greater importance in future is securitisation. Securitisation is the process of pooling and repackaging of homogenous illiquid financial assets into marketable securities that can be sold to investors. Basically Securitisation is a method of raising funds by way of selling receivables for money.

The process leads to the creation of financial instruments that represent ownership interest in, or are secured by a segregated income producing asset or pool of assets. The pool of assets collateralises securities. These assets are generally secured by personal or real property (e.g. automobiles, real estate, or equipment loans), but in some cases are unsecured (e.g. credit card debt, consumer loans).

Securitisation is a method of raising funds by way of selling receivables for money.

The Securitisation process



Note: Continuing flow of funds from the Obligor to the SPV is routed through the Originator in its capacity as

administrator. Any other party appointed by the SPV/Trustee can also perform the role of administrator. It is also possible that the SPV receives the amounts directly from the Obligor.

Source: rbi.org.in

Steps in securitisation:

- (i) Acquisition of Financial Assets by Asset Reconstruction Company (i.e. SPVs) from the originator. Here financial assets are loans backed by properties. The originator is banks or FIs who has lent money to the original borrower.
- (ii) the SPV, with the help of an investment banker, issues security receipts which are distributed to investors; and
- (iii) the SPV pays the originator for the financial assets purchased with the proceeds from the sale of securities.

Parties involved in Securitisation

Primary parties

- The Originator (Banks/FIs who has lent loan against properties)
- SPVs (Asset Reconstruction Company)
- Investors (To whom securities are issued, which is a participative interest against the pool of receivables which is bought by the SPVs from the originator)

Besides above parties the following are involved in the process of securitizations:

- The obligor (i.e. original borrower of the loan)
- Rating agency
- Administrator etc.

How Securitisation gained importance?

When a borrower, who is under a liability to pay to secured creditor, makes any default in repayment of secured debt or any instalment thereof, the account of borrower is classified as non-performing asset (NPA). NPAs constitute a real economic cost to the nation because they reflect the application of scarce capital and credit funds to unproductive uses. The money locked up in NPAs are not available for productive use and to the extent that banks seek to make provisions for NPAs or write them off, it is a charge on their profits. High level of NPAs impact adversely on the financial strength of banks who in the present era of globalization, are required to conform to stringent International Standards.

The public at large is also adversely affected because bank's main source of funds are deposits placed by public continued growth in NPA portfolio threatens the repayment capacity of the banks and erode the confidence reposed by them in the banks.

The banks had to take recourse to the long legal route against the defaulting borrowers beginning from filing of claims in the courts. A lot of time was usually spent in getting decrees and execution thereof before the banks could make some recoveries. In the meantime the promoters could seek the protection of BIFR and

could also dilute the securities available to banks. The Debt Recovery Tribunals (DRTs) set up by the Govt. also did not prove to be of much help as these get gradually overburdened by the huge volume of cases referred to them. All along, the banks were feeling greatly handicapped in the absence of any powers for seizure of assets charged to them.

All these issues gave the passage for evolution of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) is a unique piece of legislation which has far reaching consequences. This Act is having the overriding power over the other legislation and it shall go in addition to and not in derogation of certain legislation.

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 enacted with a view to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The Act enables the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The said Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured assets and take over the management of the business of the borrower.

With increasing levels of non-performing or stressed assets in the Indian financial services sector, reforming the debt recovery and bankruptcy framework has been a key focus area for the Indian government. The Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016 was introduced by the Minister of Finance, Mr. Arun Jaitley, in Lok Sabha on May 11, 2016. It seeks to amend four laws: (i) Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), (ii) Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI), (iii) Indian Stamp Act, 1899 and (iv) Depositories Act, 1996.

Following the recent enactment of the Insolvency and Bankruptcy Code, 2016 (Bankruptcy Code), the Indian parliament has now passed the Enforcement of Security Interests and Recovery of Debt Laws and Miscellaneous Provisions (Amendment) Act, 2016 to improve the efficacy of Indian debt recovery laws. The amendment act introduces a number of changes to the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (SARFAESI Act) and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act). These changes will however come into effect as and when the government issues appropriate notifications in the Official Gazette to implement the relevant provisions of the amendment.

STATEMENT OF OBJECTS AND REASONS OF SARFAESI ACT

It is necessary at the outset, to reiterate the statement of objects and reasons for the SARFAESI Act, which reads as under:

The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow

pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the level system in respect of these areas. These Committees, *inter alia*, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and sell them without the intervention of the court.

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance of liquidity, asset liability mismatches and improves recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction."

The main purpose of the SARFAESI Act is to enable and empower the secured creditors to take possession of their securities and to deal with them without the intervention of the court and also alternatively to authorise any securitisation or reconstruction company to acquire financial assets of any bank or financial institution.

The SRFAESI Act, 2002 has empowered the Banks and Financial Institutions with vast power to enforce the securities charged to them. The Banks can now issue notices to the defaulters to pay up the dues and if they fail to do so within 60 days of the date of the notice, the banks can take over the possession of assets like factory, land and building, plant and machinery etc. charged to them including the right to transfer by way of lease, assignment or sale and realize the secured assets. In case the borrower refuses peaceful handing over of the secured assets, the bank can also file an application before the relevant Magistrate for taking possession of assets. The Banks can also take over the management of business of the borrower. The bank in addition can appoint any person to manage the secured assets the possession of which has been taken over by the bank. Banks can package and sell loans via "Securitisation" and the same can be traded in the market like bonds and shares.

Apex Court Upheld Constitutional Validity of the Securitisation Act

The Securitisation Act, 2002 was challenged in various courts on grounds that it was loaded heavily in favour of lenders, giving little chance to the borrowers to explain their views once recovery process is initiated under the legislation. Leading the charge against the said Act was Mardia Chemicals in its plea against notice served by ICICI Bank. The Government had, however, argued that the legislation would bring about a financial discipline and reduce the burden of Non Performing Assets (NPAs) of banks and institutions.

In *Mardia Chemicals Ltd. v. UOI* [2004] 59 CLA 380 (SC), it was urged by the petitioner that

- (i) there was no occasion to enact such a draconian legislation to find a short-cut to realise non-performing assets ('NPAs') without their ascertainment when there already existed the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('Recovery of Debt Act') for doing so;
- (ii) no provision had been made to take into account lenders liability;
- (iii) that the mechanism for recovery under Section 13 does not provide for an adjudicatory forum of inter se disputes between lender and borrower; and
- (iv) that the appeal provisions were illusory because the appeal would be maintainable after possession of the property or management of the property was taken over or the property sold and the appeal is not entertainable unless 75 per cent of the amount claimed is deposited with the Debts Recovery Tribunal ('DRT').

The Hon'able Supreme Court held that though some of the provisions of the Act 2002 be a bit harsh for some of the borrowers but on those grounds the impugned provisions of the Act cannot be said to unconstitutional in the view of the fact that the objective of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would sub-serve the public interest.

The Supreme Court observed that the Act provides for a forum and remedies to the borrower to ventilate his grievances against the bank or financial institution, inter alia, with respect to the amount of the demand of the secured debt. After the notice is sent, the borrower may explain the reasons why the measures may or may not be taken under Sub-section (4) of Section 13. The creditor must apply its mind to the objections raised in reply to such notice. There must be meaningful consideration by the Court of the objections raised rather than to ritually reject them and to proceed to take drastic measures under Sub-section (4) of Section 13. The court held that such a procedure/mechanism was conducive to the principles of fairness and that such a procedure was also important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would serve as guidance to secured debtors in general in conducting their affairs.

The court opined that the fairness doctrine, cannot be stretched too far, such communication is only for the purposes of the secured debtors knowledge and cannot give an occasion to the secured debtor to resort to any proceeding, which are not permissible under the provisions of the Act. Thus, a secured debtor is not allowed to challenge the reasons communicated or challenge the action likely to be taken by the secured creditor at that point of time unless his right to approach the DRT as provided under section 17 matures on any measure having been taken under Sub-section (4) of Section 13.

Moreover, another safeguard is also available to a secured borrower within the framework of the Act i.e. to approach the DRT under Section 17 though such a right accrues only after measures are taken under Sub-section (1) of Section 13.

The Hon'ble Supreme Court, however, found that the requirement of deposit of 75 per cent of the amount claimed before entertaining an appeal (petition) under Section 17 is an oppressive, onerous and arbitrary condition and against all the canons of reasonableness. Held this provision to be invalid and ordered that it was liable to be struck down.

Definitions

Section 2 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) defines various terms used in the Act.

Section 2 (1): In the SARFAESI Act, unless the context otherwise requires,-

- (a) "Appellate Tribunal" means a Debts Recovery Appellate Tribunal established under sub-section (1) of section 8 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);
- (b) "asset reconstruction" means acquisition by any [*asset reconstruction company*] of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance;
- [(ba) "*asset reconstruction company*" means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitisation, or both;]¹

¹ Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016

- (c) "bank" means—
- (i) a banking company; or
 - (ii) a corresponding new bank; or
 - (iii) the State Bank of India; or
 - (iv) a subsidiary bank; or
 - (iva) a multi-State co-operative bank; or
 - (v) such other bank which the Central Government may, by notification, specify for the purposes of this Act;
- (f) "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 [asset 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];
- (g) "Central Registry" means the registry set up or cause to be set up under sub-section (1) of section 20;
- [(ga) "company" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013);]²
- [(ha) "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 (51 of 1993) and includes—
- (i) unpaid portion of the purchase price of any tangible asset given on hire or financial lease or conditional sale or under any other contract;
 - (ii) any right, title or interest on any intangible asset or licence 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 licence of such asset;]³
- (i) "Debts Recovery Tribunal" means the Tribunal established under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993); [name changed Recovery of Debts and Bankruptcy Act, 1993]
- [(ia) "debt securities" means debt securities listed in accordance with the regulations made by the Board under the Securities and Exchange Board of India Act, 1992 (15 of 1992);]⁴

2 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016

3 Substituted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016. Prior to its substitution, clause (ha), as inserted by the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, w.r.e.f. 11-11-2004, read as under :

'(ha) "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 (51 of 1993);'

4 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

- [(j) "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 favour security interest is created for the benefit of holders of such debt securities;]⁵*
 - (k) "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 [*including funds provided for the purpose of acquisition of any tangible asset on hire or financial lease or conditional sale or under any other contract or obtaining assignment or licence of any intangible asset or purchase of debt securities*];
 - (l) "financial asset" means debt or receivables and includes—
 - (i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
 - (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
 - (iii) a mortgage, charge, hypothecation or pledge of movable property; or
 - (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
 - (v) 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
 - [(va) 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*
 - [(vb) any right, title or interest on any intangible asset or licence 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 licence of the intangible asset; or]⁶*
 - (vi) any financial assistance;
 - (m) "financial institution" means—
 - i. a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956);

5 Substituted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016. Prior to its substitution, clause (j), as amended by the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, w.r.e.f. 11-11-2004, read as under :

'(j) "default" means non-payment of any principal debt or interest thereon or any other amount payable by a 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;'

6 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

- ii. any institution specified by the Central Government under sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);
- iii. the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958);

[(iiia) a debenture trustee registered with the Board and appointed for secured debt securities;

*(iiib) asset reconstruction company, whether acting as such or managing a trust created for the purpose of securitisation or asset reconstruction, as the case may be;]*⁷

- iv. any other institution or non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act;

[(ma) "financial lease" means a lease under any 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 the 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;]⁸

(n) "hypothecation" means a charge in or upon any movable property, existing or future, created by a borrower in favour of a secured creditor without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallisation of such charge into fixed charge on movable property;

[(na) "negotiable document" means a document, which embodies a right to delivery of tangible assets and satisfies the requirements for negotiability under any law for the time being in force including warehouse receipt and bill of lading;]⁹

(o) "non-performing asset" 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,—

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

(q) "obligor" means a person liable to the originator, whether under a contract or otherwise, to pay a financial asset or to discharge any obligation in respect of a financial asset, whether existing, future, conditional or contingent and includes the borrower;

(r) "originator" means the owner of a financial asset which is acquired by a [asset reconstruction company]¹⁰ for the purpose of securitisation or asset reconstruction;

(f) "property" means—

i) immovable property;

7 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

8 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016

9 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016

10 Substituted for "securitisation company or reconstruction company" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

- ii) movable property;
- iii) any debt or any right to receive payment of money, whether secured or unsecured;
- iv) receivables, whether existing or future;
- v) 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 Reserve Bank*];¹¹
- (u) [qualified buyer]¹² means a financial institution, insurance company, bank, state financial corporation, state industrial development corporation, trustee or [asset reconstruction company]¹³ 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 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]¹⁴ or any other body corporate as may be specified by the Board;
- (z) "securitisation" means acquisition of financial assets by any [asset reconstruction company]¹⁵ from any originator, whether by raising of funds by such [asset reconstruction company] from [qualified buyers]¹⁶ by issue of security receipts representing undivided interest in such financial assets or otherwise;
- (zb) "security agreement" means an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor including the creation of mortgage by deposit of title deeds with the secured creditor;
- (zc) "secured asset" means the property on which security interest is created;
- [(zd) "secured creditor" means—
 - I. 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);
 - II. debenture trustee appointed by any bank or financial institution; or
 - III. an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or
 - IV. debenture trustee registered with the Board appointed by any company for secured debt securities; or
 - V. 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.]¹⁷

11 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

12 Substituted for "qualified institutional buyer" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016

13 Substituted for "securitisation company or reconstruction company" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016

14 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 4-11-2016

15 Substituted for "securitisation company or reconstruction company" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

16 Substituted for "qualified institutional buyers" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016

17 Substituted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016. Prior to its substitution, clause (zd), as amended by the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, w.r.e.f. 11-11-2004, read as under :

- (ze) "secured debt" means a debt which is secured by any security interest;
- [(zf) "security interest" means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes—
- i. 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
 - ii. such right, title or interest in any intangible asset or assignment or licence 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 licence of intangible asset;]¹⁸
- (zg) "security receipt" means a receipt or other security, issued by a [asset reconstruction company]¹⁹ to any [qualified buyer]²⁰ pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in securitisation;

Asset Reconstruction Companies [ARC]

"Asset Reconstruction Company", means a company registered with Reserve Bank under section 3 of SARFAESI Act for the purposes of carrying on the business of asset reconstruction or securitisation, or both.

The problem of non-performing loans created due to systematic banking crisis world over has become acute. Focused measures to help the banking systems to realise its NPAs has resulted into creation of specialised bodies called asset management companies which in India have been named asset reconstruction companies ('ARCs'). The buying of impaired assets from banks or financial institutions by ARCs will make their balance sheets cleaner and they will be able to use their time, energy and funds for development of their business. ARCs may be able to mix up their assets, both good and bad, in such a manner to make them saleable.

The main objective of asset reconstruction company ('ARC') is to act as agent for any bank or financial institution for the purpose of recovering their dues from the borrowers on payment of fees or charges, to act

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- '(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes—
- (i) debenture trustee appointed by any bank or financial institution; or
 - (ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or
 - (iii) any other trustee holding securities on behalf of a bank or financial institution,
- in whose favour security interest is created for due repayment by any borrower of any financial assistance;'

18 Substituted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016. Prior to its substitution, clause (zf) read as under :

'(zf) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31;'

19 Substituted for "securitisation company or reconstruction company" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

20 Substituted for "qualified institutional buyer" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

as manager of the borrowers' asset taken over by banks, or financial institution, to act as the receiver of properties of any bank or financial institution and to carry on such ancillary or incidental business with the prior approval of Reserve Bank wherever necessary. If an ARC carries on any business other than the business of asset reconstruction or securitisation or the business mentioned above, it shall cease to carry on any such business within one year of doing such other business.

Regulation of Securitisation and Reconstruction of Financial Assets of Banks and Financial Institutions

Section 3 of SARFAESI Act deals with the Registration of [Asset Reconstruction Companies]²¹.

(1) No *asset reconstruction company* shall commence or carry on the business of securitisation or asset reconstruction without—

- (a) obtaining a certificate of registration granted under this section; and
- [(b) *having net owned fund of not less than two crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify:*]²²

Provided that the Reserve Bank may, by notification, specify different amounts of owned fund for different class or classes of *asset reconstruction companies*:

Provided further that an *asset reconstruction company*, existing on the commencement of this Act, shall make an application for registration to the Reserve Bank before the expiry of six months from such commencement and notwithstanding anything contained in this sub-section may continue to carry on the business of securitisation or asset reconstruction until a certificate of registration is granted to it or, as the case may be, rejection of application for registration is communicated to it.

(2) Every *asset reconstruction company* shall make an application for registration to the Reserve Bank in such form and manner as it may specify.

(3) The Reserve Bank may, for the purpose of considering the application for registration of a *asset reconstruction company* to commence or carry on the business of securitisation or asset reconstruction, as the case may be, require to be satisfied, by an inspection of records or books of such *asset reconstruction company*, or otherwise, that the following conditions are fulfilled, namely:—

- (a) that the *asset reconstruction company* has not incurred losses in any of the three preceding financial years;
- (b) that such *asset reconstruction company* has made adequate arrangements for realisation of the financial assets acquired for the purpose of securitisation 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]²³ or other persons;
- (c) that the directors of *asset reconstruction company* have adequate professional experience in matters related to finance, securitisation and reconstruction;

21 Substituted for "securitisation companies or reconstruction companies" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

22 Substituted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016. Prior to its substitution, clause (b) read as under :

"(b) having the owned fund of not less than two crore rupees or such other amount not exceeding fifteen per cent of total financial assets acquired or to be acquired by the securitisation company or reconstruction company, as the Reserve Bank may, by notification, specify :"

23 Substituted for "qualified institutional buyers" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

- (d) [***]²⁴
- (e) that any of its directors has not been convicted of any offence involving moral turpitude;
- [(f) *that a sponsor of an asset reconstruction company 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;*]²⁵
- (g) that *asset reconstruction company* has complied with or is in a position to comply with prudential norms specified by the Reserve Bank;
- [(h) that *asset reconstruction company* has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose.]

(4) The Reserve Bank may, after being satisfied that the conditions specified in sub-section (3) are fulfilled, grant a certificate of registration to the *asset reconstruction company* to commence or carry on business of securitisation or asset reconstruction, subject to such conditions, which it may consider, fit to impose.

(5) The Reserve Bank may reject the application made under sub-section (2) if it is satisfied that the conditions specified in sub-section (3) are not fulfilled:

Provided that before rejecting the application, the applicant shall be given a reasonable opportunity of being heard.

(6) Every *asset reconstruction company*, shall obtain prior approval of the Reserve Bank for any substantial change in its management [*including appointment of any director on the board of directors of the asset reconstruction company or managing director or chief executive officer thereof*]²⁶ or change of location of its registered office or change in its name:

Provided that the decision of the Reserve Bank, whether the change in management of a *asset reconstruction company* is a substantial change in its management or not, shall be final.

Explanation.—For the purposes of this section, 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*]²⁷ amalgamation or transfer of the business of the company.

Cancellation of Certificate of Registration (Section 4)

24 Omitted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016. Prior to its omission, clause (d) read as under :

"(d) that the board of directors of such securitisation company or reconstruction company does not consist of more than half of its total number of directors who are either nominees of any sponsor or associated in any manner with the sponsor or any of its subsidiaries;"

25 Substituted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016. Prior to its substitution, clause (f) read as under :

"(f) that a sponsor, is not a holding company of the securitisation company or reconstruction company, as the case may be, or, does not otherwise hold any controlling interest in such securitisation company or reconstruction company;"

26 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

27 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

Section 4 of the SARFAESI Act deals with the Cancellation of certificate of registration.

(1) The Reserve Bank may cancel a certificate of registration granted to a *asset reconstruction company*, if such company—

- (a) ceases to carry on the business of securitisation or asset reconstruction; or
- (b) ceases to receive or hold any investment from a [*qualified buyer*]²⁸; or
- (c) has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or
- (d) 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
- (e) fails to—
 - I. comply with any direction issued by the Reserve Bank under the provisions of this Act; or
 - II. 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
 - III. submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or
 - IV. obtain prior approval of the Reserve Bank required under sub-section (6) of section 3:

Provided that before cancelling a certificate of registration on the ground that the *asset reconstruction company* 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 *asset reconstruction company*, 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 fulfilment of such conditions.

(2) A *asset reconstruction company* aggrieved by the order of [***]²⁹ cancellation of certificate of registration 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:

Provided that before rejecting an appeal such company shall be given a reasonable opportunity of being heard.

(3) A *asset reconstruction company*, which is holding investments of [*qualified buyers*]³⁰ 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 a *asset reconstruction company* until it repays the entire investments held by it (together with interest, if any) within such period as the Reserve Bank may direct.

28 Substituted for "qualified institutional buyers" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

29 Words "rejection of application for registration or" omitted by the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, w.r.e.f. 11-11-2004.

30 Substituted for "qualified institutional buyers" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

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

Section 5 of the SARFAESI deals with the Acquisition of rights or interest in financial assets.

(1) Notwithstanding anything contained in any agreement or any other law for the time being in force, any *asset reconstruction company* may acquire financial assets of any bank or financial institution—

- (a) 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
- (b) 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.

[(1A) Any document executed by any bank or financial institution under sub-section (1) in favour of the asset reconstruction company acquiring financial assets for the purposes of asset reconstruction or securitisation shall be exempted from stamp duty in accordance with the provisions of section 8F of the Indian Stamp Act, 1899 (2 of 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 securitisation.]³¹

(2) If the bank or financial institution is a lender in relation to any financial assets acquired under sub-section (1) by the asset reconstruction company, such asset reconstruction company 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 such financial assets.

[(2A) 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 licence of intangible asset, such right, title or interest shall vest in the asset reconstruction company on acquisition of such assets under sub-section (1).]³²

(3) Unless otherwise expressly provided by this Act, 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 under sub-section (1) 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 asset reconstruction company, 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, asset reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of asset reconstruction company, as the case may be.

(4) If, on the date of acquisition of financial asset under sub-section (1), 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 (1 of 1986) the same shall not abate, or be discontinued or be, in any way,

31 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016

32 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

prejudicially affected by reason of the acquisition of financial asset by the asset reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the asset reconstruction company, as the case may be.

[(5) On acquisition of financial assets under sub-section (1), the asset reconstruction company, 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 asset reconstruction company in such pending suit, appeal or other proceedings.]³³

Transfer of pending applications to any one of Debts Recovery Tribunals in certain cases (Section 5A)

- (1) If any financial asset, of a borrower acquired by a *asset reconstruction company*³⁴, comprise of secured debts of 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 *asset reconstruction company*³⁵ 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.
- (2) 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.
- (3) 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.
- (4) 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)

Section 6 deals with the Notice to obligor and discharge of obligation of such obligor.

(1) The bank or financial institution may, if it considers appropriate, give a notice of acquisition of financial assets by any *asset reconstruction company*, to the concerned obligor and any other concerned person and to the concerned registering authority (including Registrar of Companies) in whose jurisdiction the mortgage, charge, hypothecation, assignment or other interest created on the financial assets had been registered.

(2) Where a notice of acquisition of financial asset under sub-section (1) is given by a bank or financial institution, the obligor, on receipt of such notice, shall make payment to the concerned *asset reconstruction*

³³ Inserted by the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012, w.e.f. 15-1-2013.

³⁴ Substituted for "securitisation company or reconstruction company" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

³⁵ Substituted for "securitisation company or reconstruction company" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

company, as the case may be, and payment made to such company in discharge of any of the obligations in relation to the financial asset specified in the notice shall be a full discharge to the obligor making the payment from all liability in respect of such payment.

(3) Where no notice of acquisition of financial asset under sub-section (1) is given by any bank or financial institution, any money or other properties subsequently received by the bank or financial institution, shall constitute monies or properties held in trust for the benefit of and on behalf of the *asset reconstruction company*, as the case may be, and such bank or financial institution shall hold such payment or property which shall forthwith be made over or delivered to such *asset reconstruction company*, as the case may be, or its agent duly authorised in this behalf.

Issue of security by raising of receipts or funds by asset reconstruction company (Section 7)

Section 7 of the SARFAESI Act deals with the issue of security by raising of receipts or funds by *asset reconstruction company*.

(1) Without prejudice to the provisions contained in the Companies Act, 2013, the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992), any *asset reconstruction company*, may, after acquisition of any financial asset under sub-section (1) of section 5, 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,]³⁶ for subscription in accordance with the provisions of those Acts.

(2) A *asset reconstruction company* 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 realisations of such financial asset is held and applied towards redemption of investments and payment of returns assured on such investments under the relevant scheme.

[(2A)(a) The scheme for the purpose of offering security receipts under sub-section (1) or raising funds under sub-section (2), may be in the nature of a trust to be managed by the *asset reconstruction company*, and the *asset reconstruction company* shall hold the assets so acquired or the funds so raised for acquiring the assets, in trust for the benefit of the *qualified buyers* holding the security receipts or from whom the funds are raised.

(b) The provisions of the Indian Trusts Act, 1882 (2 of 1882) shall, except in so far as they are inconsistent with the provisions of this Act, apply with respect to the trust referred to in clause (a) above.]³⁷

(3) In the event of non-realisation under sub-section (2) of financial assets, the *qualified buyers* of a *asset reconstruction company*, holding security receipts of not less than seventy-five per cent of the total value of the security receipts issued under a scheme by such company, 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.

(4) The *qualified buyers* shall, at a meeting called under sub-section (3), follow the same procedure, as nearly as possible as is followed at meetings of the board of directors of the *asset reconstruction company*, as the case may be.

36 Substituted for "(other than by offer to public)" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 4-11-2016

37 Substituted for "qualified institutional buyer" by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

Exemption from registration of security receipt (Section 8)

Section 8 deals with the exemption from registration of security receipt.

Notwithstanding anything contained in sub-section (1) of section 17 of the Registration Act, 1908 (16 of 1908),—

- (a) any security receipt issued by the [*asset reconstruction company*], as the case may be, under sub-section (1) of section 7, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except insofar as it entitles the holder of the security receipt to an undivided interest afforded by a registered instrument; or
- (b) any transfer of security receipts,

shall not require compulsory registration.

Measures for Asset reconstruction (Section 9)³⁸

Section 9. deals with the measures for Asset Reconstruction.

(1) Without prejudice to the provisions contained in any other law for the time being in force, an asset reconstruction company may, for the purposes of asset reconstruction, provide for any one or more of the following measures, namely:—

- (a) the proper management of the business of the borrower, by change in, or take over of, the management of the business of the borrower;
- (b) the sale or lease of a part or whole of the business of the borrower;
- (c) rescheduling of payment of debts payable by the borrower;
- (d) enforcement of security interest in accordance with the provisions of this Act;
- (e) settlement of dues payable by the borrower;
- (f) taking possession of secured assets in accordance with the provisions of this Act;
- (g) 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.

(2) The Reserve Bank shall, for the purposes of sub-section (1), 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.

(3) The asset reconstruction company shall take measures under sub-section (1) in accordance with policies and directions of the Reserve Bank determined under sub-section (2).]

Other functions of asset reconstruction company (Section 10)

Section 10 deals with the other functions of asset reconstruction company.

(1) Any *asset reconstruction company* registered under section 3 may—

- (a) act as an agent for any bank or financial institution for the purpose of recovering their dues

³⁸ Substituted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

from the borrower on payment of such fee or charges as may be mutually agreed upon between the parties;

- (b) act as a manager referred to in clause (c) of sub-section (4) of section 13 on such fee as may be mutually agreed upon between the parties;
- (c) act as receiver if appointed by any court or tribunal :

Provided that no *asset reconstruction company* shall act as a manager if acting as such gives rise to any pecuniary liability.

(2) Save as otherwise provided in sub-section (1), no *asset reconstruction company* which has been granted a certificate of registration under sub-section (4) of section 3, shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitisation or asset reconstruction :

Provided that a *asset reconstruction company* which is carrying on, on or before the commencement of this Act, any business other than the business of securitisation 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.

Explanation.—For the purposes of this section, *asset reconstruction company* does not include its subsidiary.

Resolution of disputes (Section 11)

Section 11 deals with the resolution of disputes. It provides that 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 *asset reconstruction company* or *qualified buyer*, such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 (26 of 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, 12A and 12B)

Section 12 deals with the power of Reserve Bank to determine policy and issue directions.

(1) If the Reserve Bank is satisfied that in the public interest or to regulate financial system of the country to its advantage or to prevent the affairs of any *asset reconstruction company* from being conducted in a manner detrimental to the interest of investors or in any manner prejudicial to the interest of such *asset reconstruction company*, it is necessary or expedient so to do, it may determine the policy and give directions to all or any *asset reconstruction company* 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 *asset reconstruction company*, as the case may be, and such company shall be bound to follow the policy so determined and the directions so issued.

(2) Without prejudice to the generality of the power vested under sub-section (1), the Reserve Bank may give directions to any *asset reconstruction company* generally or to a class of *asset reconstruction companies* or to any *asset reconstruction company* in particular as to—

- (a) 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;
- (b) the aggregate value of financial assets which may be acquired by any *asset reconstruction company*;
- [(c) *the fee and other charges which may be charged or incurred for management of financial assets acquired by any asset reconstruction company*;

- (d) *transfer of security receipts issued to qualified buyers.*]³⁹

Section 12A deals with the power of Reserve Bank to call for statements and information.

It states that the Reserve Bank may at any time direct a asset reconstruction company 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 asset 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 purposes of this Act.

[Section 12B deals with the power of Reserve Bank to carry out audit and inspection.

(1) The Reserve Bank may, for the purposes of this Act, carry out or caused to be carried out audit and inspection of an asset reconstruction company from time to time.

(2) It shall be the duty of an asset reconstruction company and its officers to provide assistance and co-operation to the Reserve Bank to carry out audit or inspection under sub-section (1).

(3) 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—

- (a) *remove the Chairman or any director or appoint additional directors on the board of directors of the asset reconstruction company; or*
- (b) *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.

(4) 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.]⁴⁰

Enforcement of Security interest by a Creditors (Section 13)

(1) 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.

(2) 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

39 Clauses (c) and (d) inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

40 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4) :

[Provided that—

- (i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and
- (ii) 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.]⁴¹

(3) The 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.

(3A) If, on receipt of the notice under sub-section (2), 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 fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

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.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely :—

- (a) 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;
- (b) 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 :
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.

Case Law

Powers under Companies Act cannot be wielded by Company Judge to interfere with proceedings by a secured creditor who has opted to stay outside winding up process to realize its secured

⁴¹ Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

interests as per provisions of SARFAESI Act:

Pegasus Assets Reconstruction (P.) Ltd. v. Haryana Concast Ltd, CIVIL APPEAL NOS. 3646 OF 2011, 9293-9294 OF 2014 AND 14736 TO 14738 OF 2015, DATED DECEMBER 29, 2015, [2015] 64 taxmann.com 394 (SC)

Section 283 of the Companies Act, 2013/Section 456 of the Companies Act, 1956, read with section 13 of the Securitisation And Reconstruction of Financial Assets And Enforcement of Security Interest Act, 2002. The Supreme court in the matter of Winding up and Custody of company's property opined that SARFAESI Act is a complete code in itself and there is no lacuna or ambiguity in it to warrant reading something more into it or to borrow anything from Companies Act. The Court mentioned that as per section 13 of SARFAESI Act, a secured creditor has right to enforce its security interest without intervention of court or tribunal and the powers under Companies Act cannot be wielded by Company Judge to interfere with proceedings by a secured creditor who has opted to stay outside winding up process to realize its secured interests as per provisions of SARFAESI Act.

(5) Any payment made by any person to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(5A) 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.

(5B) 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.

(5C) 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).

(6) Any transfer of secured asset after taking possession thereof or takeover of management, 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.

(7) 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, firstly, in payment of such costs, charges and expenses and 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.

[(8) 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,—

(i) *the secured assets shall not be transferred by way of lease assignment or sale by the*

secured creditor; and

- (ii) *in case, 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 sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.]⁴²*

(9) [Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of]⁴³ 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 :

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Act:

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under the Act, 1956, may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of the Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of the 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.—For the purposes of this sub-section,—

- (a) "record date" means the date agreed upon by the secured creditors representing not less than [sixty per cent] in value of the amount outstanding on such date;
- (b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets,

42 Substituted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

43 Substituted for "In the case of" by the Insolvency and Bankruptcy Code, 2016, w.e.f. 15-11-2016.

the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice from the secured creditor 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.



In the case of *Nik-Nish Retail Pvt. Ltd & Anr. Versus Union Bank & Ors. G.A. 1380 of 2012 in W.P. 6 of 2010 25 June, 2012, Dipankar Datta, J*, the Calcutta High Court held that the scheme of the Act envisages grant of 60 days time to the defaulter for clearance of the liability or to raise objection. Even if the defaulting party falls short of paying Rs. 1/- of the amount specified in the demand notice within the permitted period, its account would still be a 'non- performing asset' and continue to be treated as such and the secured creditor is, in the circumstances, entitled to initiate further action in terms of provisions of the Act including taking measures to take possession of the secured assets after the period of 60 days has expired if no objection is received in the meantime or the objection to the demand notice has been overruled. Question of waiver does not and cannot arise simply because certain payments had been credited in the cash credit account. The period of 60 days is the time limited for clearing the liability and if the liability does not stand cleared, notwithstanding part payment the secured creditor is well within its right to exercise power conferred by Section 13(4) of the Act.

Assistance by Chief Metropolitan Magistrate or the District Magistrate

Section 14 of the SARFAESI Act provides for assistance for taking possession of secured asset from the Chief Metropolitan Magistrate or the District Magistrate.

(1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such 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-

- a) take possession of such asset and documents relating thereto; and
- b) forward such asset and documents to the secured creditor.

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that—

- (i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

- (ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;
- (iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;
- (iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;
- (v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a nonperforming asset;
- (vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;
- (vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;
- (viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;
- (ix) that the provisions of the Act and the rules made thereunder had been complied with.

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets [*within a period of thirty days from the date of application*]⁴⁴:

[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:]⁴⁵

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]

(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,—

- (i) to take possession of such assets and documents relating thereto; and
- (ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

44 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016

45 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

Manner and effect of takeover of Management

Section 15 of the SARFAESI Act provides for the manner and effect of takeover of management.

(1) When the management of business of a borrower is taken over by a *asset reconstruction company* under clause (a) of section 9 or, as the case may be, by a secured creditor under clause (b) of sub-section (4) of section 13], 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 as defined in the Companies Act, 1956 (1 of 1956), 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.

(2) On publication of a notice under sub-section (1),—

- (a) in any case where the borrower is a company as defined in the Companies Act, 1956 (1 of 1956), all persons holding office as directors of the 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 notice under sub-section (1), shall be deemed to have vacated their offices as such;
- (b) any contract of management between the borrower and any director or manager thereof holding office as such immediately before publication of the notice under sub-section (1), shall be deemed to be terminated;
- (c) 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 notice;
- (d) the directors appointed under this section shall, for all purposes, be the directors of the company of the borrower and such directors or as the case may be, the administrators appointed under this section, shall alone 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 whatsoever.

(3) Where the management of the business of a borrower, being a company as defined in the Companies Act, 1956 (1 of 1956), 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,—

- (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.

(4) Where the management of the business of a borrower had been taken over by the secured creditor, the secured creditor shall, on realisation of his debt in full, restore the management of the business of the borrower to him:

[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.]⁴⁶

The Change in or takeover of the Management of the business is subject to 'The Change in or takeover of the Management of the business of the borrower by Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines 2010'.

The Reserve Bank of India vide its circular No. RBI/2009-2010/418 DNBS/ PD (SC/RC) No. 17 /26.03.001/2009-10 April 21, 2010 issued Guidelines on Change in or Take Over of the Management of the Business of the Borrower by Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines, 2010.

1. Short Title and Commencement

(a) These guidelines shall be known as "The Change in or Take Over of the Management of the business of the borrower by Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines, 2010".

(b) These guidelines shall come into force with effect from April 21, 2010.

Explanation: For the purpose of these guidelines: (i) "change in management" means effecting change by the borrower at the instance of SC/RC in the person who has responsibility for the whole or substantially whole of the management of the business of the borrower and / or other relevant personnel.

(ii) The term "Takeover of management" means taking over of the responsibility for the management of the business of the borrower with or without effecting change in management personnel of the borrower by the SC/RC.

2. Object of the Guidelines: The objective of these guidelines is to ensure fairness, transparency, nondiscrimination and non arbitrariness in the action of Securitisation Companies or Reconstruction Companies and to build in a system of checks and balances while effecting change in or take over of the management of the business of the borrower by the SC/RCs under Section 9(a) of the SARFAESI Act. The SC/RCs shall follow these guidelines while exercising the powers conferred on them under Section 9(a) of the SARFAESI Act, 2002.

3. Powers of SC/RC and Scope of the Guidelines: A SC/RC may resort to change in or take over of the management of the business of the borrower for the purpose of realization of its dues from the borrower subject to the provisions of these guidelines. The SC/RCs resorting to take over of management of the business of the borrower shall do so after complying with the manner of takeover of the management in accordance with the provisions of Section 15 of the SARFAESI Act. On realization of its dues in full, the

⁴⁶ Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

SC/RC shall restore the management of the business to the borrower as provided in Section 15(4) of the SARFAESI Act.

4. Eligibility conditions to exercise power for change in or take over of management: In the circumstances set forth in paragraph 5 (a) A SC/RC may effect change in or take over the management of the business of the borrower, where the amount due to it from the borrower is not less than 25% of the total assets owned by the borrower; and 3 (b) Where the borrower is financed by more than one secured creditor (including SC/RC), secured creditors (including SC/RC) holding not less than 75% of the outstanding security receipts agree to such action. Explanation : 'Total Assets' means total assets as disclosed in its latest audited Balance Sheet immediately preceding the date of taking action.

5. Grounds for effecting change in or takeover of management: Subject to the eligibility conditions set forth in paragraph 4, SC/RC shall be entitled to effect change in management or take over the management of business of the borrower on any of the following grounds : (a) the borrower makes a willful default in repayment of the amount due under the relevant loan agreement/s; (b) the SC/RC is satisfied that the management of the business of the borrower is acting in a manner adversely affecting the interest of the creditors (including SC/RC) or is failing to take necessary action to avoid any events which would adversely affect the interest of the creditors; (c) SC/RC is satisfied that the management of the business of the borrower is not competent to run the business resulting in losses/ non repayment of dues to SC/RC or there is a lack of professional management of the business of the borrower or the key managerial personnel of the business of the borrower have not been appointed for more than one year from the date of such vacancy which would adversely affect the financial health of the business of the borrower or the interests of the SC/RC as a secured creditor; (d) the borrower has without the prior approval of the secured creditors (including SC/RC), sold, disposed of, charged, encumbered or alienated 10% or more (in aggregate) of its assets secured to the SC/RC 4 (e) there are reasonable grounds to believe that the borrower would be unable to pay its debts as per terms of repayment accepted by the borrower ; (f) the borrower has entered into any arrangement or compromise with creditors without the consent of the SC/RC which adversely affects the interest of the SC/RC or the borrower has committed any act of insolvency; (g) the borrower discontinues or threatens to discontinue any of its businesses constituting 10% or more of its turnover; (h) all or a significant part of the assets of the borrower required for or essential for its business or operations are damaged due to the actions of the borrower, (i) the general nature or scope of the business, operations, management, control or ownership of the business of the borrower are altered to an extent, which in the opinion of the SC/RC, materially affects the ability of the borrower to repay the loan; (j) the SC/RC is satisfied that serious dispute/s have arisen among the promoters or directors or partners of the business of the borrower, which could materially affect the ability of the borrower to repay the loan; (k) failure of the borrower to acquire the assets for which the loan has been availed and utilization of the funds borrowed for other than stated purposes or disposal of the financed assets and misuse or misappropriation of the proceeds; (l) fraudulent transactions by the borrower in respect of the assets secured to the creditor/s. Explanation A: For the purpose of this paragraph, willful default in repayment of amount due, includes - 5 (a) non-payment of dues despite adequate cash flow and availability of other resources, or (b) 'routing of transactions through banks which are not lenders/ consortium members' so as to avoid payment of dues, or (c) siphoning off funds to the detriment of the defaulting unit, or misrepresentation / falsification of records pertaining to the transactions with the SC/RC Explanation B: The decision as to whether the borrower is a willful defaulter or not, shall be made by the SC/RC keeping in view the track record of the borrower and not on the basis of an isolated transaction/incident which is not material. The default to be categorized as willful must be intentional, deliberate and calculated.

6. Policy regarding change in or take over of management: (A) Every SC / RC shall frame policy guidelines regarding change in or take over of the management of the business of the borrower, with the

approval of its Board of Directors and the borrowers shall be made aware of such policy of the SC/RC. (B) Such policy shall generally provide for the following: (i) The change in or take over of the management of the business of the borrower should be done only after the proposal is examined by an Independent Advisory Committee to be appointed by the SC/RC consisting of professionals having technical / finance / legal background who after assessment of the financial position of the borrower, time frame available for recovery of the debt from the borrower, future prospects of the business of the borrower and other relevant aspects shall recommend to the SC/RC that it may resort to change in or take over of the management of the business of the borrower and that such action would be necessary for effective running of the business leading to recovery of its dues; (ii) The Board of Directors including at least two independent directors of the SC/RC should deliberate on the recommendations of the 6 Independent Advisory Committee and consider the various options available for the recovery of dues before deciding whether under the existing circumstances the change in or take over of the management of the business of the borrower is necessary and the decision shall be specifically included in the minutes. (iii) The SC/RC shall carry out due diligence exercise and record the details of the exercise, including the findings on the circumstances which had led to default in repayment of the dues by the borrower and why the decision to change in or take over of the management of the business of the borrower has become necessary. (iv) The SC/RC shall identify suitable personnel / agencies, who can take over the management of the business of the borrower by formulating a plan for operating and managing the business of the borrower effectively, so that the dues of the SC/RC may be realized from the borrower within the time frame. (v) Such plan will also include procedure to be adopted by the SC/RC at the time of restoration of the management of the business to the borrower in accordance with paragraph 3 above, borrower's rights and liabilities at the time of change in or take over of management by the SC/RC and at the time of restoration of management back to the borrower, rights and liabilities of the new management taking over management of the business of the borrower at the behest of SC/RC. It should be clarified to the new management by the SC/RC that the scope of their role is limited to recovery of dues of the SC/RC by managing the affairs of the business of the borrower in a prudent manner. Explanation: To ensure independence of members of Independent Advisory Committee (IAC), such members should not be connected with the affairs of the SC/RC in any manner and should not receive any pecuniary benefit from the SC/RC except for services rendered for acting as member of IAC.

7. Procedure for change in or take over of management: (a) The SC/RC shall give a notice of 60 days to the borrower indicating its intention to effect change in or take over the management of the business of the borrower and calling for objections, if any. (b) The objections, if any, submitted by the borrower shall be initially considered by the IAC and thereafter the objections along with the recommendations of the IAC shall be submitted to the Board of Directors of the SC/RC. The Board of Directors of SC/RC shall pass a reasoned order within a period of 30 days from the date of expiry of the notice period, indicating the decision of the SC/RC regarding the change in or take over of the management of the business of the borrower, which shall be communicated to the borrower.

8. Reporting SC/RCs shall report to the Bank all cases where they have taken action to cause change in or take over the management of the business of the borrower for realization of its dues from the borrower in terms of circular DNBS (PD) CC. No. 12 / SCRC / 10.30.000/ 2008-2009 dated September 26, 2008.

No compensation to directors for loss of office (Section 16)

Section 16 states that no compensation is payable to directors for loss of office.

(1) Notwithstanding anything to the contrary 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 of any contract of management entered into by him with the borrower.

(2) Nothing contained in sub-section (1) shall affect the right of any such managing director or any other director or manager or any such person in charge of management 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)

[Section 17 deals with the *application against measures to recover secured debts*.

17. (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 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.

(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

- (a) *the cause of action, wholly or in part, arises;*
- (b) *where the secured asset is located; or*
- (c) *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.]*

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) 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 sub-section (4) of section 13, 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,—

- (a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and
- (b) 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.]

(4) 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.

(4A) 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 (4 of 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*
- (ii) 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.

(5) 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).

(6) 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 part 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.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.]

Appeal to Appellate Tribunal (Section 18)

18. (1) 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:

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 to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal 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, 1993 (51 of 1993) and rules made thereunder.

Validation of fees levied

Section 18A: Any fee levied and collected for preferring, before the commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, an appeal to the Debts Recovery Tribunal or the Appellate Tribunal under this Act, 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: 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 :

Provided that 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 to in the first proviso.]

Right to lodge a caveat

Section 18C deals with the right to lodge a caveat

(1) Where an application or an appeal is expected to be made or has been made under sub-section (1) of section 17 or section 17A or sub-section (1) of section 18 or section 18B, the secured creditor or 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.

(2) Where a caveat has been lodged under sub-section (1),—

- (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 under sub-section (1);
- (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 under sub-section (1).

(3) Where after a caveat has been lodged under sub-section (1), 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.

(4) 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.

(5) Where a caveat has been lodged under sub-section (1), 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 referred to in sub-section (1) has been made before the expiry of the said period.

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

Section 19 provides that 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 the ⁹³[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.

Setting up of Central Registry (Section 20)

Section 20 deals with the setting up of Central Registry.

(1) 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 securitisation and reconstruction of financial assets and creation of security interest under this Act.

(2) 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 to in sub-section (1), there may be established at such other places as the Central Government may think fit, branch offices of the Central Registry.

(3) The Central Government may, by notification, define the territorial limits within which an office of the Central Registry may exercise its functions.

(4) 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 (16 of 1908), the Companies Act, 1956 (1 of 1956), the Merchant Shipping Act, 1958 (44 of 1958), the Patents Act, 1970 (39 of 1970), the Motor Vehicles Act, 1988 (59 of 1988), and the Designs Act, 2000 (16 of 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.

Section 20A deals with the Integration of registration systems with Central Registry.

(1) 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.

Explanation.—For the purpose of this sub-section, the registration records includes records of registration

under the Companies Act, 2013 (18 of 2013), the Registration Act, 1908 (16 of 1908), the Merchant Shipping Act, 1958 (44 of 1958), the Motor Vehicles Act, 1988 (59 of 1988), the Patents Act, 1970 (39 of 1970), the Designs Act, 2000 (16 of 2000) or other such records under any other law for the time being in force.

(2) The Central Government shall after integration of records of various registration systems referred to in sub-section (1) 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 to in sub-section (1) shall be deemed to be registered with the Central Registry for the purposes of this Act.

Section 20B delas with the Delegation of powers.

It provides that 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)

Section 21 deals with the Central Registrar.

(1) 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, to be known as the Central Registrar.

(2) 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, authorise them to discharge.

Register of Securitisation, reconstruction and security interest transactions

Section 22 deals with the Register of securitisation, reconstruction and security interest transactions.

(1) For the purposes of this Act, 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; and
- (c) creation of security interest.

(2) Notwithstanding anything contained in sub-section (1), it shall be lawful for the Central Registrar to keep the records wholly or partly in computer, floppies, diskettes or in any other electronic form subject to such safeguards as may be prescribed.

(3) Where such register is maintained wholly or partly in computer, floppies, diskettes or in any other electronic form, under sub-section (2), any reference in this Act to entry in the Central Register shall be construed as a reference to any entry as maintained in computer or in any other electronic form.

(4) The register shall be kept under the control and management of the Central Registrar.

Filing of Particulars

Filing of transactions of securitisation, reconstruction and creation of security interest.

23. [(1)]⁴⁷ The particulars of every transaction of securitisation, asset reconstruction or creation of security

⁴⁷ Renumbered as sub-section (1) by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. a date yet to be notified.

interest shall be filed, with the Central Registrar in the manner and on payment of such fee as may be prescribed [***]⁴⁸:

[***]⁴⁹

[**Provided** [***]⁵⁰that the Central Government may, by notification, require registration of all transactions of securitisation, or asset reconstruction or creation of security interest which are subsisting on or before the date of establishment of the Central Registry under sub-section (1) of section 20 within such period and on payment of such fees as may be prescribed.]

[(2) 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.

(3) 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.]⁵¹

Modification of security interest registered under this Act.

Section 24 provides that 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 ;*asset reconstruction company* or the secured creditor, as the case may be, to send to the Central Registrar, the particulars of such modification, and the provisions of this Chapter as to registration of a security interest shall apply to such modification of such security interest.

Satisfaction of Security interest (Section 25)

Section 25 deals with the *Asset reconstruction company* or secured creditor to report satisfaction of security interest.

(1) The *asset reconstruction company* 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 *asset reconstruction company* or the secured creditor and requiring registration under this Chapter, within thirty days from the date of such payment or satisfaction.

(1A) On receipt of intimation under sub-section (1), the Central Registrar shall order that a memorandum of satisfaction shall be entered in the Central Register.

(2) If the concerned borrower gives an intimation to the Central Registrar for not recording the payment or satisfaction referred to in sub-section (1), the Central Registrar shall on receipt of such intimation, cause a notice to be sent to the *asset reconstruction company* or the secured creditor calling upon it to show cause within a time not exceeding fourteen days specified in such notice, as to why payment or satisfaction should not be recorded as intimated to the Central Registrar.

48 Words ", within thirty days after the date of such transaction or creation of security, by the securitisation company or reconstruction company or the secured creditor, as the case may be" omitted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. a date yet to be notified.

49 Omitted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. a date yet to be notified.

50 Word "further" omitted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. a date yet to be notified.

51 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. a date yet to be notified.

(3) If no cause is shown, the Central Registrar shall order that a memorandum of satisfaction shall be entered in the Central Register.

(4) If cause is shown, the Central Registrar shall record a note to that effect in the Central Register, and shall inform the borrower that he has done so.

Right to Inspect

Section 26 deals with the right to inspect particulars of securitisation, reconstruction and security interest transactions.

(1) The particulars of securitisation 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.

(2) The Central Register referred to in sub-section (1) maintained in electronic form, shall also be open during the business hours for the inspection by any person through electronic media on payment of such fee as may be prescribed.

Section 26A deals with the rectification by Central Government in matters of registration, modification and satisfaction, etc.

(1) The Central Government, on being satisfied—

- (a) that the omission to file with the Registrar the particulars of any transaction of securitisation, 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 section 23 or section 24 or section 25 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
- (b) that on other grounds, it is just and equitable to grant relief,

may, on the application of a secured creditor or *asset 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.

(2) Where the Central Government extends the time for the registration of transaction of security interest or securitisation 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.

Section 26B⁵² deals with the registration by secured creditors and other creditors.

(1) 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 sub-section (1) of section 2, 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.

52 Chapter IVA, consisting of sections 26B to 26E, inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. a date yet to be notified.

(2) From the date of notification under sub-section (1), 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.

(3) 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.

Section 26C deals with the Effect of the registration of transactions, etc.

(1) Without prejudice to the provisions contained in any other law, for the time being in force, 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 for creation, modification or satisfaction of such security interest or attachment order, as the case may be.

(2) 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 under the provisions of Chapter IV and this Chapter, 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 licence 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.

(4) 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.

(5) 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.

Section 26D deals with the right of enforcement of securities.

Notwithstanding anything contained in any other law for the time being in force, from the date of commencement of the provisions of this Chapter, 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.

Section 26E deals with the Priority to secured creditors.

Notwithstanding anything contained in any other law for the time being in force, 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.

Explanation.—For the purposes of this section, it is hereby clarified that on or after the commencement of the

Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.]

Penalties

27. If a default is made—

- (a) in filing under section 23, the particulars of every transaction of any securitisation or asset reconstruction or security interest created by a ⁵³[*asset reconstruction company*] or secured creditor; 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,

every company and every officer of the company or the secured creditor and every officer of the secured creditor who is in default shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues:

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.]⁵³

Penalties for non-compliance of direction of Reserve Bank

As per Section 28⁵⁴ of the Act, if any securitisation company or reconstruction company fails to comply with any direction issued by the Reserve Bank under Section 12 or Section 12A, such company and every officer of the company who is in default, shall be punishable with fine which may extend to five lakh rupees and in the case of a continuing offence, with an additional fine which may extend to ten thousand rupees for every day during which the default continues.

Offences

Any person who contravenes the provisions of this Act or of any rules made thereunder shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

Non-Applicability in certain cases

Section 31 deals with the provisions of this Act not to apply in certain cases.

The provisions of this Act shall not apply to—

- (a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 (9 of 1872) or the Sale of Goods Act, 1930 (3 of 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 (9 of 1872);
- (c) creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934 (24 of 1934);

53 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. a date yet to be notified.

54 Omitted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. a date yet to be notified. Prior to its omission, section 28, as amended by the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, w.r.e.f. 11-11-2004, read as under :

- (d) creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958);
- (e) [***]⁵⁵
- (f) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930 (3 of 1930);
- (g) 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 (5 of 1908);
- (h) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;
- (i) any security interest created in agricultural land;
- (j) any case in which the amount due is less than twenty per cent of the principal amount and interest thereon.

Civil Court Not to have jurisdiction

Section 34 provides that 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 (51 of 1993).



*In the case of **BPV Classic Tea Factory (P.) Ltd. v. Corporation Bank, [2008] 87 SCL 14 (MAD.)** It was held that SARFAESI Act, 2002 is a special Act while Companies Act, 1956, is a general law and, therefore, with regard to enforcement of a security asset under section 34, provisions as contained in 2002 Act alone would apply with regard to sale of an immovable property by secured creditor and same cannot be challenged before company court under provisions of 1956 Act.*

Limitation Act (Section 36)

Limitation Act, 1963 is applicable to the claims made under this Act. Accordingly, 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.

Applicability of other Acts

Section 35 provides that 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.

In accordance with 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, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and 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.

⁵⁵ Omitted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016. Prior to its omission, clause (e) read as under :

"(e) any conditional sale, hire-purchase or lease or any other contract in which no security interest has been created;"

Rule making power

Power of Central Government to make rules.

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 (21 of 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) *other business or commercial rights of similar nature under clause (t) of section 2;*⁵⁶
- [(aa)] the form and manner in which an application may be filed under sub-section (10) of section 13⁵⁷;
- (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;
- [(ba)] the fee for making an application to the Debts Recovery Tribunal under sub-section (1) of section 17;
- (bb) the form of making an application to the Appellate Tribunal under sub-section (6) of section 17;
- (bc) the fee for preferring an appeal to the Appellate Tribunal under sub-section (1) of section 18;]
- [(bca) *the manner of integration of records of various registration systems with the records of Central Registry under sub-section (1) of section 20A;*
- (bcb) *the terms and conditions of delegation of powers by the Central Government to the Reserve Bank under section 20B.]*
- (c) the safeguards subject to which the records may be kept under sub-section (2) of section 22;
- (d) the manner in which the particulars of every transaction of securitisation shall be filed under section 23 and fee for filing such transaction;
- [(da) *the form for registration of different types of security interests and fee thereof under sub-section (3) of section 23;*]⁵⁸
- (e) 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;
- (f) the fee for inspecting the Central Register maintained in electronic form under sub-section (2) of section 26;
- [(fa) *the form and the manner for filing particulars of transactions under sub-section (2) of section 26B;*
- (fb) *the form and manner of filing attachment orders with the Central Registry and the date under sub-section (4) of section 26B;*
- (fc) *the form and manner of filing particulars of attachment order with the Central Registry and the fee under sub-section (5) of section 26B.]*⁵⁹

56 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

57 Clause (a) renumbered as clause (aa) by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

58 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

59 Inserted by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, w.e.f. 1-9-2016.

- (g) 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.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

SECURITY INTEREST (ENFORCEMENT) RULES, 2002.

Demand notice

Rule 3 (1) provides that the service of demand notice as referred to in sub-section (2) of section 13 of the SRFSAESI Act shall be made by delivering [*including hand delivery*]⁶⁰ or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgement due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or by courier or by any other means of transmission of documents like fax message or electronic mail service.

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

(2) 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).

(3) 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.

*[(5) The demand notice may invite attention of the borrower to provisions of sub-section (8) of section 13 of the Act, in respect of time available to the borrower, to redeem the secured assets.]*⁶¹

Reply to Representation of the borrower (Rule 3A)

- (a) After issue of demand notice under sub-section (2) of section 13, if the borrower makes any representation or raises any objection to the notice, the Authorized Officer shall consider such representation or objection and examine whether the same is acceptable or tenable.
- (b) If on examining the representation made or objection raised by the borrower, the secured creditor is satisfied that there is a need to make any changes or modifications in the demand notice, he shall

60 Inserted by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016

61 Sub-rule (5) inserted by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016.

modify the notice accordingly and serve a revised notice or pass such other suitable orders as deemed necessary, within [fifteen days]⁶² 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 [fifteen days]⁶³ 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 (Rule 4)

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 Act for taking possession of movable property, namely:—

- (1) 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 a Panchnama drawn and signed by the witnesses as nearly as possible in Appendix I to these rules.
- (2) 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.

[(2A) The borrower shall be intimated by a notice, enclosing the panchnama drawn in Appendix I and the inventory made in Appendix II.

(2B) All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes specified under rule 3.]⁶⁴

- (3) 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 an owner of ordinary prudence would, under the similar circumstances, take of such property:

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

- (4) 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.
- (5) 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 :—
 - (i) in the case of a debt, prohibiting the borrower from recovering the debt or any interest

62 Substituted for "seven days" by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016.

63 Substituted for "seven days" by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016.

64 Sub-rules (2A) and (2B) inserted by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016.

thereon and the debtor from making payment thereof and directing the debtor to make such payment to the authorised officer; or

- (ii) in the case of the shares in a body corporate, directing the borrower to transfer the same to the secured creditor and also the body corporate from not transferring such shares in favour of any person other than the secured creditor. A copy of the notice so sent may be endorsed to the concerned body corporate's Registrar to the issue or share transfer agents, if any;
- (iii) in the case of other movable property (except as aforesaid), calling upon the borrowers and the person in possession to hand over the same to the authorised officer and the authorised officer shall take custody of such movable property in the same manner as provided in sub-rules (1) to (3) above;
- (iv) movable secured assets other than those covered in this rule shall be taken possession of by the authorised officer by taking possession of the documents evidencing title to such secured assets.

Valuation of movable secured assets (Rule 5)

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 realisation of the dues of the secured creditor.

Sale of movable secured assets (Rule 6)

(1) The authorised officer may sell the movable 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—

- (a) obtaining quotations from parties dealing in the secured assets or otherwise interested in buying such assets; or
- (b) inviting tenders from the public; or
- (c) holding public auction *including through e-auction mode*⁶⁵; or
- (d) by private treaty.

(2) The authorised officer shall serve to the borrower a notice of thirty days for sale of the movable secured assets under sub-rule (1):

Provided that if the sale of such secured assets is being, effected by either inviting 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,—

- (a) details about the borrower and the secured creditor;
- (b) description of movable secured assets to be sold with identification marks or numbers, if any, on

⁶⁵ Clause (c) substituted by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016. Prior to its substitution, said clause read as under :
"(c) holding public auction; or"

them;

- (c) reserve price, if any, and the time and manner of payment;
- (d) time and place of public auction or the time after which sale by any other mode shall be completed;
- (e) depositing earnest money as may be stipulated by the secured creditor;
- (f) 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.

[Provided further that if sale of movable property by any one of the methods specified under sub-rule (1) fails and the sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower for any subsequent sale.]⁶⁶

(3) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled *[between the secured creditors and the proposed purchaser]*⁶⁷.

Issue of certificate of sale (Rule 7)

(1) 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 ordered for sale again.

(2) On payment of sale price, the authorised officer shall issue a certificate of sale in the prescribed form as given in 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.

[(2A) All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes prescribed under sub-rule (1) and sub-rule (2) of rule 8.]⁶⁸

(3) Where the movable secured assets are those referred in sub-clauses (iii) to (v) of clause (1) of sub-section (1) of section 2 of the 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 (Rule 8)

(1) 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.

(2) 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 newspapers in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such

66 Second proviso inserted by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016.

67 Substituted for "between the parties in writing" by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016.

68 Sub-rule (2A) inserted by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016.

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 a owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) 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.

(5) 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:—

- (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or
- (b) by inviting tenders from the public;
- (c) by holding public auction [*including through e-auction mode*]⁶⁹; or
- (d) by private treaty.

[Provided that in case of sale of immovable property in the State of Jammu and Kashmir, the provisions of Jammu and Kashmir Transfer of Property Act, 1977 shall apply to the person who acquires such property in the State.]⁷⁰

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5) :

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,—

- (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
- (b) the secured debt for recovery of which the property is to be sold;
- (c) reserve price, below which the property may not be sold;
- (d) time and place of public auction or the time after which sale by any other mode shall be completed;
- (e) depositing earnest money as may be stipulated by the secured creditor;
- (f) 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.

69 Clause (c) substituted by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016. Prior to its substitution, said clause read as under :

"(c) by holding public auction; or"

70 Inserted by the Security Interest (Enforcement) (Amendment) Rules, 2012, w.e.f. 12-7-2012.



In the case of *Pvt. Ltd. & Ors vs Union Of India & Ors* on 14 November, 2011 writ petition no. 1956 of 2011 decided on 14 November 2011 Dr. D.Y. Chandrachud, A.A. Sayed JJ in the High Court of judicature at Bombay held that Rule 8(6) of the Rules of 2002 provides the necessary safeguard if the action is taken in arbitrary and unreasonable manner and if the valuation of the property is not properly fixed.

The whole object of Rule 8 (6) of the Rules of 2002 appears to be that the borrower gets clear thirty days' notice before the sale takes place. During this period, the borrower can raise objections and can also point out before the appropriate forum as regards the correct and true valuation of the property. The essential purpose of sub-rule (5) of Rule 8 of the Rules of 2002 is to see that there is proper valuation by an approved valuer, who would be considered as an expert, and the view of the secured creditor on the aspect of fixation of reserved price is taken into consideration by the authorized officer. Just because the borrower is excluded from Rule 8 (5) of the Rules of 2002 or has no voice at the time when the valuation is fixed and the reserved price is also fixed, by itself will not render Rule 8 (5) unconstitutional.

(7) 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 web-site of the secured creditor on the Internet.

(8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled [between the secured creditor and the proposed purchaser in writing]⁷¹.

Time of sale, issue of sale certificate and delivery of possession, etc. (Rule 9)

[(1) No sale of immovable property under these rules, in first instance shall 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) of rule 8 or notice of sale has been served to the borrower:

Provided further that if sale of immovable property by any one of the methods specified by sub-rule (5) of rule 8 fails and sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower, for any subsequent sale.]⁷²

(2) 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 8]⁷³ :

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

[(3) 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 twenty five per cent of the amount of the sale

71 Substituted for "between the parties in writing" by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016.

72 Sub-rule (1) substituted by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016. Prior to its substitution, said sub-rule read as under :

"(1) No sale of immovable property under these rules shall 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."

73 Substituted for "rule 9" by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016.

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.]⁷⁴

(4) 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 purchaser and the secured creditor, in any case not exceeding three months]⁷⁵.

(5) 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.

(6) 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.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.

Provided that it after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen day, from date of finalisation of the sale.

(8) 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.

(9) 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) above.

(10) 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.

Appointment of Manager (Rule 10)

(1) The Board of Directors or Board of Trustees, as the case may be, may appoint in consultation with the borrower any person (hereinafter referred to as the Manager) to manage the secured assets the possession of which has been taken over by the secured creditor.

Provided that the manager so appointed shall not be a person who is, or has been, adjudicated insolvent, or has suspended payment or has compounded with his creditors, or who is, or has been, convicted by a criminal court of an offence involving moral turpitude.

(2) 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

74 Sub-rule (3) substituted by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016. Prior to its substitution, said sub-rule read as under:

"(3) 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."

75 Substituted for "as may be agreed upon in writing between the parties" by the Security Interest (Enforcement) (Amendment) Rules, 2016, w.e.f. 3-11-2016.

omission of acts of the Manager unless such commission or omission are due to improper intervention of the secured creditor or the authorised officer.

(3) 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 to may become due to the borrower.

(4) 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.

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

Procedure for recovery of shortfall of secured debt (Rule 11)

(1) 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.

(2) 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).

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

Application to the Tribunal/Appellate Tribunal (Rule 12)

(1) 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.

(2) 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.

GOLF TECHNOLOGIES (P). LTD & ANR v. AXIS BANJ LTD & ORS (DEL)

SARFAESI Act – section 13 and 17 – jurisdiction of civil court- recovery proceedings initiated by bank against the defaulting borrower- borrower filed civil suit alleging fraud played by the bank- whether maintainable

ISSUE

The plaintiffs' case is that the letter dated 31.12.2012 was not issued by them and that it was fraudulently created by the Bank, hence the transfer of monies from the plaintiffs' account to M/s. Tulip Telecom Limited was wrong and the said amount was depleted from their account only to classify it as an NPA. This according to the plaintiffs amounts to fraud and would form the basis of the maintainability of the present suit.

This is a suit challenging the measures taken by defendant Bank under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest. The ground alleged in the suit is fraud by the bank played upon the plaintiffs.

On 21.4.2015, after summons were issued, the Bank took a preliminary objection to the maintainability of the suit on the ground that the appropriate remedy available to the plaintiffs is under Section 17 of the Act and

that it was always open to the plaintiffs to have approached the Debts Recovery Tribunal (for short “DRT”) concerned for the reliefs sought in the present suit. Accordingly, the learned counsels for the parties were heard on the issue of maintainability of the suit.

Decision held – Suit Dismissed

Grounds for Dismissal

- As per *Mardia Chemicals (supra)*, jurisdiction of civil courts can be invoked only when the action of the secured creditor is alleged to be fraudulent or his claim so absurd and untenable. The plaintiff does not aver any complicated facts leading to the case of fraud or how the measures adopted by the Bank are fraudulent/absurd/ untenable. There is nothing in the plaintiff which would lead to the conclusion that the plaintiffs’ case falls under the exception carved out by *Mardia Chemicals (supra)*, i.e., the plaintiffs’ grievances ought to be determined in a suit.
- There is no force in the contention advanced on behalf of the plaintiffs that the DRT is not empowered to determine the issues sought to be agitated in the present suit. It is not as if the remedy provided under Section 17 of the Act is illusory. The expression “evidence produced by the parties” occurring in Section 17(3) would include all such which can be produced by the plaintiffs to show that the measures taken by the Bank under Section 13 were not in conformity with the provisions of the Act. It has been so held in *V.Thulasi (supra)*.
- In the context of the preceding discussion this Court is of the view that the ground of fraud raised by the plaintiff can be duly addressed in proceedings under Section 17 of the SARFAESI Act, 2002 and the said plea of fraud, in the peculiar facts and circumstances of the case, does not fall in the exception carved out in *Mardia Chemicals (supra)*.

Therefore, the suit is not maintainable and is accordingly, dismissed.

LESSON ROUND UP

- The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 enacted with a view to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto.
- 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.
- Any borrower or any other person aggrieved by the action of the secured creditors can file an appeal to the concerned Debt Recovery Tribunal (DRT).
- Any person aggrieved by the order of DRT, may prefer an appeal to the Appellate Tribunal within thirty days from the date of receipt of the order of Debt Recovery Tribunal.
- In exercise of the powers conferred by subsection (1) and CL (b) of sub-section (2) of Sec. 38 read with sub-sections (4), (10) and (12) of Sec. 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Central Government notified Security Interest (Enforcement) Rules, 2002.
- Rule 8(6) of the Rules of 2002 provides the necessary safeguard if the action is taken in arbitrary and unreasonable manner and if the valuation of the property is not properly fixed. The whole object of Rule 8 (6) of the Rules of 2002 appears to be that the borrower gets clear thirty days’ notice before the sale takes place. During this period, the borrower can raise objections and can also point out before the appropriate forum as regards the correct and true valuation of the property.

