

THE SARFAESI ACT, 2002
AND
THE NEGOTIABLE INSTRUMENTS ACT,
1881

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

History

- Before SARFAESI, Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB & FI Act, 1993) was used for recovery of loans which were defaulted. Before this, Banks and FIs used to file recovery suits in civil courts.
- No effective mechanism available under the Act of 1993 for direct recovery by Banks and Financial Institutions.
- Banks had to approach DRT for recovery of their own loan amount.
- Banks did not have power to take possession of securities and sell them.

Introduction

- The SARFAESI Act came into force w.e.f. 21/06/2002.
- The RDDB&FI Act still in force and acts as a support pillar to the SARFAESI Act. The recovery process provided under the old Act is still available.
- The Act allows Banks and FIs to take physical possession and auction secured assets of the Borrowers (residential and commercial) when they fail to repay their loans by declaring their account as Non-Performing Asset (NPA).
- Enables banks to reduce their NPAs by adopting measures for recovery or reconstruction.
- Gives power to the Banks & FIs to recover the NPAs by taking possession of the secured asset and selling the same.

Features of SARFAESI Act

- Constituted of 42 Sections (VI Chapters)
- First 3 chapters important for us
- **Chapter – I** – Preliminary - Applicable to whole of India including J&K. (why?) (RDDB&FI Act not applicable in J&K)
- Certain important concepts / definitions
 - **Asset Reconstruction / Asset Reconstruction Company**

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- **Borrower** – includes guarantor
- **Default** – non payment of any debt which is payable by the borrower to a secured creditor
- **Financial Assistance** – loans or advances granted
- **Financial Asset** – means debt or receivables
- **Non-Performing Asset** – Asset or account of a borrower classified by Bank or FI as sub-standard, doubtful or loss asset in accordance with Asset Classification guidelines.

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- **Securitisation** – acquisition of a financial asset by any ARC from a Bank or FI.
- **Secured Asset** – property on which security interest is created.
- **Secured Creditor** – any bank / FI / Debenture Trustee / ARC / Any other trustee, in whose favour security interest is created by a borrower.
- **Security Interest** – right, title or interest of any kind upon a property created in favour of any secured creditor

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- **Chapter – II** – Regulation of Securitisation and Reconstruction of Financial Assets of Banks and Financial Institutions
- This chapter explains –
 - registration of ARCs with RBI.
 - Acquisition of rights or interest in financial assets by an ARC from a Bank or FI.
 - Notice to borrower of such acquisition
 - Other responsibilities of ARC qua its investors / other functions of ARC
 - **Measures for Asset Reconstruction** - Very Imp.

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- **Chapter – III** – Enforcement of Security Interest
- This chapter explains –
 - **Enforcement of security interest** – section 13 (very important)
 - Detailed procedure provided in this section relating to enforcement
 - **Application in writing before Chief Metropolitan Magistrate / District Magistrate for assistance in taking physical possession of secured asset** – section 14
 - **Manner and effect of takeover of management of a borrower by a secured creditor or an ARC** – section 15

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- Application before DRT by a borrower or any person aggrieved of action taken u/s 13(4) by the secured creditor - section 17 (important to note – here borrower goes before DRT instead of Bank or FI as in the case of RDDB Act).
- In case of borrower residing in J&K, such application to be made before District Judge – section 17A (why?)
- Appeal to DRAT – section 18
- Compensation and cost to borrower in certain cases – section 19

Rights of the Borrower

- Borrower can at any time before the sale is concluded, remit the dues / debt in default and avoid losing the secured asset.
- In case any malafide / illegal act done by the Bank or its Authorised officer, the borrower is entitled to compensation and cost and Authorised Officer of Bank is liable for penal consequences.
- If aggrieved by measures u/s 13(4), borrower can approach DRT and thereafter DRAT in appeal. The limitation period is 45 days and 30 days respectively.

Important highlights

- This Act gives power of “seize and desist” to banks.
- Bank or FI doesn't have to go before any authority to take permission for acquiring the possession of secured asset and its sale / auction.
- Strengthened the position of Indian Banks vis-a-vis foreign banks.
- Provides for establishment of ARCs regulated by RBI to acquire / purchase financial assets from Banks and FIs for their reconstruction. This lowers the financial burden of a Bank or FI.

Important Judgments

- Mardia Chemicals Ltd. Vs. Union of India – (2004) 4 SCC 311. (Validity of the Act)
- Central Bank of India vs. State of Kerala and Others - (2009) 4 SCC 94 (Overriding effect of the Act)
- State Bank of Travancore vs. Mathew K.C. – (2018) 3 SCC 85 (High Court not to interfere in SARFAESI Act proceedings, DRT has exclusive jurisdiction)

The Negotiable Instruments Act, 1881

Important Sections

- Section 138: Dishonour of cheque for insufficiency, etc., of funds in the account.
- Section 139 : presumption
- Section 141: Offences by Companies
- Section 143A: Power to direct interim compensation.
- Section 148: Power of Appellate Court to order payment pending appeal against conviction

TIME LIMITS U/S 138

3Months

- For presentation of Cheques from the date on Cheque.
- As per RBI circular dated 04.11.2011

30 Days

- Issuance of notice from the date of receipt of Information in case of Dishonour of Cheques.
- As per 138(b) of the N.I. Act, 1881.

15 Days

- For payment of Dishonoured Cheque by Drawer from the date of receipt of notice.
- As per 138(c) of the N.I. Act, 1881.

1 Months

- Filing of criminal complaint by Payee from the expiry of 15 days limit as mentioned aforesaid.
- As per 142(b) of the N.I. Act, 1881.

Grounds for Dishonour of Cheques

- Insufficiency of Funds
- Irregular Signature
- Alterations
- Stale Cheque
- Stop Payment Instructions
- Frozen Account

Important Defence for Accused

- Security Cheque
- Cheque not given for discharge of debt
- Money Lender License in case of Money Lending not available
- Amount given in cash above income tax limit
- Financial capability of complainant to give such amount mentioned in cheque
- Debt already repaid

THANK YOU
ANY QUESTIONS/QUERIES
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