

Banking Baatein: T.R. Radhakrishnan



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SARFAESI ACT, 2002 - BORROWERS' WOES.

Many instances have come to light about borrowers' woes particularly those belonging to the SME sector and who are languishing because of the callous and apathetic treatment being meted out to them by Authorised Officers of banks and some DRT Presiding Officers in violation of the rules and regulations under the SARFAESI Act..

Section 28 and Section 29 of the SARFAESI Act, 2002 stipulates the penalties to be imposed for non-compliance of Reserve Bank of India directions and contravention or abetting the provisions of the SARFAESI ACT respectively. Section 28 states, "**Penalties for non-compliance of direction of Reserve Bank:** if any Securitisation company or reconstruction company fails to comply with any direction issued by Reserve Bank [under section 12 or section 12(A)], 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 case of continuing offence, with an additional fine which may extend to ten thousand rupees for every day during which the default continues."

Section 29 stipulates, “If any person contravenes or attempts or abets the contravention of the provisions of this Act or of any rules made thereunder, he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.”

In practice, however, the aforesaid provisions of the Act are neither taken into consideration by the Authorised Officer of Banks or DRT Presiding Officers even when sufficient evidence of non-compliance of RBI directions and contravening or abetting of the rules of the SARFAESI Act is produced by the borrower..

The Law of evidence plays a pivotal role in the effective functioning of the judicial system.

“The existence of substantive rights can only be established by relevant and admissible evidence.” Relevancy of facts is the key to determine the outcome of the judicial process which is based on fair trial without fear or favour and upholding the principles of Natural Justice, Fundamental Rights as enshrined in the Constitution of India and Human Rights. Hence the importance of evidence can neither be overlooked nor ignored. The proof of evidence comes out of documents and the establishment of relevant evidence is through the verification of documents. Hence, the documents and verification of documents are very important and very essential to establishing the truth and to bring about justice.

Section 3 of the Indian Evidence Act defines evidence as under:

“Evidence means and includes-

- (a) All statements which the court permits or requires to be made before it by witnesses, in relation to matters of facts under inquiry, such statements are called oral evidence;

(b) All documents including electronic records produced for the inspection of the court; such documents are called documentary evidence.”

Besides, Article 141 of The Constitution of India states, “The law declared by the Supreme Court shall be binding on all courts within the territory of India.’ DRT is also akin to a civil court. This has been elaborated under section 22 (2) and (3) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Further, Section 17(7) of the SARFAESI ACT also states about the disposal of application in accordance with the provisions of RDDB ACT1993 (51 of 1993) and the rules made thereafter. In this connection, the following two Supreme Court judgments regarding withholding of documents are worth recalling. The first is Supreme Court judgment under Civil Appeal No. 994 of 1972, D/-27-10-1993 wherein the judgment states, “Civil P.C. (5 of 1908), S.2 (2) – Evidence Act (1 of 1872), S.44- Proceeding in court – Fraud by litigant – Withholding of vital document relevant to litigation – It is fraud on Court – Guilty party is liable to be thrown out at any stage” and the second is the leading judgment by Hon’ble Supreme Court on discovery of documents vide citation AIR 1972 SC 2379, H.L. Sethi vs. R.P. Kapur vide extract of Para 6 reproduced below stated:-

“It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trial of enquiry which may have either of these two consequences.” In spite of the citations of Supreme Court judgments, the Presiding Officer in many cases neither instructs the bank to produce the relevant material documents nor permit the

cross examination of bank officials and the Authorised Officer of the bank does not consider such citations and simply overlook them.

Yet another aspect is that when the borrower applicant submits his claim for loss and damages incurred due to many wrong doings of the bank, such claims are straight away rejected by the Authorised Officer of the bank and the Presiding Officer at DRT stating that the SARFAESI ACT does not have any rule for claiming loss and damages which they categorize as “counter claim”. But the applicant borrower does not submit a counter claim as allowed under section 19(8) of DRT Act, 1993, he is claiming loss and damages under Law of Torts. This again is overlooked by the Authorised Officer and the Presiding Officer. In most of the cases the claim of loss and damages by the borrower under his application is much more than that of the demand of the Bank and hence a “No Debt Due” situation arises which should be adjudicated first before proceeding further.

In the well known Mardia Chemical judgment, the Supreme Court observed “Liquidity of finances and flow of money is essential for any healthy and growth oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.” Besides, “In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub -Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non- compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the

reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act,” Invariably the Authorised Officer of the bank simply rejects the representation and objections raised by the borrower as a matter of ritual without the application of the mind and in derogation of the rights which are guaranteed to the people under the Constitution. The Presiding Officer also follows the same practice of not minding what is stated in the application filed by the borrower by way of his S.A. and clearly favouring the Bank.

It is again observed that when review application is submitted by the borrower applicant against the order of Presiding Officer, the same is not allowed in many cases stating that there is no provision in the SARFAESI ACT for a review of the order already passed overlooking Section 17(7) of the SARFAESI ACT 2002 and The Code of Civil Procedure, 1908 order XLVII - Review. Further, Section 5A (1) (2) (3) of the RDDB Act 1993 also narrates the rules about Review application. It must be remembered that Violation of law declared by the Supreme Court amounts to 'Error Apparent on Face of Records' and hence such orders of the DRTs become amenable to correction by way of Review. It may also be noted that in the light of the contentions of the Supreme Court in the matter of Mardia Chemicals, no deposit is required once the court fee is paid with the application u/s 17 of the Act.

In the ultimate analysis, if the Authorised Officer of the Bank and the Presiding Officer of DRTs adhered to the system and procedures as enshrined in the various laws of the land and conduct themselves accordingly, then only the borrower applicants in the SARFAESI cases can fulfill their expectations of upholding their Fundamental rights, respect for the Principles of Natural Justice and Human rights. In this connection, the observance of Supreme Court in the matter of Smt. Swaran Lata Ghosh, Appellant v. Harendra Kumar

Banerjee and another (AIR 1969 Supreme Court 1107 V 56 C 215) is worth recalling. "Trial of a civil dispute in Court is intended to achieve, according to law and the procedure of the court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on questions of law as well as practice, ascertainment of facts by means of evidence tendered by the parties, and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial the judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the court or by law, he must record the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the judge ; a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest; it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the Court has decided against him, and more so, when the judgment is subject to appeal. The Appellate Court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just." It further states, "The function of a judicial trial is to hear and decide a matter in contest between the parties in open Court in the presence of parties. According to the procedure prescribed for investigation of the dispute, and the rules of evidence. The conclusion of the Court ought normally to be

supported by reasons duly recorded. The requirement transcends all technical rules of procedure.”

The only way the borrower can tackle such a prevailing situation is to organize the aggrieved borrowers to enforce their right to be heard by the Presiding Officer by strictly following the established laws and practice failing which to take up the matter with higher Court by exposing the misdeeds of the Presiding Officer and the Authorised Officer so as to enable them to seek justice. “There may be times when we are powerless to prevent injustice, but there must never be a time when we fail to protest.”

Links to Bondia’s articles in previous issues:

http://www.fisme.org.in/newsletters/July_15_2012/docs/Banking_baatein.pdf

http://www.fisme.org.in/newsletters/July_1_2012/docs/Banking_baatein.pdf