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LEGAL RECOVERY FRAMEWORK VIS-A-VIS NON PERFORMING ASSETS.

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Legal Recovery Framework vis-a-vis Non Performing Assets

This paper analyses the existing legal procedures for NPAs identification and management. It also studies about the SARFAESI Act, RDDBI/ DRT Act, and IBC. The proposed paper pertains to the extent of the important provisions of the recovery laws of Non Performing Assets with respect to its concept, nature, and operation. It specifically deals with the important provisions of SARFAESI Act, RDDBI/DRT Act and IBC Act, 2016. This paper concludes mentioning despite having ample number of legislations, the banking system as well as government has failed to control the increasing Non Performing Assets, one of the major reason is overregulation.

Key Words: Non Performing Assets, Sarfaesi Act, DRT, IBC

1. INTRODUCTION

Recovery of NPAs has always been a difficult procedure. NPAs is a debt which has become outstanding for ninety days. The question here arises, what are debt and its recovery process. Debt is any liability with interest which is due to the bank by any person. Recovery of debt is a process in which the due amount is recovered in an expeditious manner. Bad lending decisions give rise to growing no. of NPAs, so such decisions shall be taken after proper scrutiny. It can be said that if there is a risky loan portfolio and it gets combined with low net income, it will give uncertain results, giving rise to low credit growth and increase in the process of underwriting. Earlier in case of NPA, security collateral to the bank was taken by the intervention of the courts. It was time consuming process, and there was no provision for hypothecation in the previous laws, which was introduced by the SARFAESI Act, 2002. It was also very difficult to manage such a risky portfolio with its complexity and ambiguity, there were so many incidental problems which occurred due to such loan portfolios.¹ There

¹ Daniela Klingebiel, *The use of Asset management companies in the resolution of Banking crises: cross country experience*, World Bank Organisation, (Mar. 22, 2019, 11.53 p.m.), <http://documents.worldbank.org/curated/en/887671468760186237/pdf/multi-page.pdf>.

were so many attempts being made to resolve such bad debts, but no way could be found to deal with it. If we consider the international approach, resolution of NPAs can be attained by using a public or private sector approach. Countries like Indonesia, Korea, Malaysia, and Thailand have adopted asset reconstruction companies which are government owned and funded asset reconstruction company.² But the countries like Philippines, Taipei, and China have enacted laws for the establishment of private organisations to combat bad loans from the banking sector. This problem kept on rising so it was necessary for the Indian government to introduce ARCs. Thus, the Indian government followed the private sector based international model of ARCs, for the resolution of NPAs.

Securitization of Non Performing Assets is a tool which is used by banking and financial institutions in converting liabilities into investments, by transferring assets to a qualified intentional buyer or by issuing security receipts, and the assets once transferred are removed from the balance sheet. These asset management companies have played an important role in changing economies over the past few years and introducing asset reconstruction companies by passing of the SARFAESI Act, 2002. This act envisaged the formation of Securitisation companies.³ In this chapter researcher will deals with the existing legal recovery framework of Non Performing Assets and their working.

2. HISTORY AND EVOLUTION OF THE CONCEPT OF ARCs IN INDIA

Committee on Financial system (Committee I)- In 1991 there was a committee on financial system constituted which suggested setting up an Asset Reconstruction Fund (ARF). Aim of this committee was to recapitalize the banks by writing off loans and in the process of this lose capital. But this failed and remained on the paper as the government was suffering from financial constraints.

Narasimham Committee I: This committee was formed in 1998, It was about recommendations

² In Asia, in particular, the four crisis-affected countries of Indonesia, Republic of Korea, Malaysia, and Thailand established centralized Asset Management Companies soon after the onset of the financial crisis in 1998 to help clear their bad loans.

Prashanth K. Reddy, *A Comparative Study of Non-Performing Assets in India in the Global Context - Similarities and Dissimilarities, Remedial Measures*, Social Science Research Network, (Mar. 22, 2019, 10 pm), <http://papers.ssm.com/sol3/papers.cfin?abstractid=361322>.

³ Rohit Bafna, *'Non Performing Assets in Public Sector Banks, Legal Services'* Legal Services India, (23rd Mar., 2019, 5.20 pm), <http://www.legalservicesindia.com/article/1027/Non-Performing-Assets-in-PSB's.html>.

of the committee on banking sector reforms. It was for the first time the term "Asset Reconstruction Company" was used. This committee tried to solve the problem of NPAs by this approach.

ARC to work on the realization of the amount could be setup by one or many banks together, The first approach was that all loan assets which falls in the category of doubtful and loss assets could be transferred to ARC. By calculating the realisation value of assets, the ARCs would issue NPA swap bonds to the banks in lieu of the assets transferred, but the stamp duties shall not be excessive in cost than the assets that are to be transferred. Funding of the ARC could be done by applying tax incentives or by securitising them. This approach is acceptable only if the stamp duty is minimal and tax incentives are provided to the banks.

Narshimham committee II: report of 1998 proposed norms for classification and reporting of Assets. But both these committees failed to achieve their results.

Verma Committee, 1999: This committee also proposed the recovery of NPAs and restructuring weak public sector banks by establishing a new body comprising financial restructuring authority, an ARF, and an Asset Management Company (AMC). The financial restructuring authority was to be an independent government agency, ARF would be a part of it and it would appoint the AMC. ARF would be the one to acquire the weak NPAs of public sector banks, AMC, a private body, would manage and dispose the NPA for an amount. There was so much of conflict regarding the structure and operation of the ARCs which was proposed by the Verma committee. Thus, the decided structure was, a single ARC constituting many ARCs established under the existing legal framework.

Andhyarajuna committee was introduced to deal with the rising problem of NPAs. It suggested the need for a new statute for the disposal of NPAs. The Recovery of Debts due to banks and Financial Act, 1993 was enacted for the recovery of bank dues.

So it can be said that there were two phases of banking reforms to deal with the NPA crisis., one when RDDB act came into existence and the other when SARFAESI Act, 2002 came into existence.⁴

⁴ S. Venugopalan: *Securitization Ordinance- An Overview*, SCL (Magazine), (2002), 76.

3. LEGAL RECOVERY FRAMEWORK OF NON PERFORMING ASSETS

At present there are four main legal recovery framework for the recovery of Non Performing Assets.

3.1. Lok Adalat

Legal Services Authorities Act, 1987 introduced and developed the concept of Lok Adalat. It is also known as people's court. Lok Adalats is a non adversial system, and are mock courts under state authority, district authority, Supreme Court legal services committee, High court local services committee, or Taluk legal services committee. Lok Adalats is used to settle cases. It has a wide scope, lok adalats is used to solve disputes related to partition, marriage, compoundable criminal offences as well as civil disputes. The IBA has been issued guidelines to the member institutions for taking up of cases for settlement through Lok Adalats. There are certain advantages in using the forum of Lok Adalats by banks and financial institutions in compromise settlement of their NPAs. There is no court fees involved when fresh disputes are referred to it. It can take cognizance of any existing suit in the court as well as look into and adjudicate upon fresh disputes. If no settlement is arrived at, the parties can continue with court proceedings. Its decrees have legal status and are binding. Lok Adalat has played an important role in realising recovery of bad loans by way of compromising between bankers and defaulters. Debt Recovery tribunal has authorised lok adalats to decide cases on NPAs. It can take cases upto value of 5 lakhs or more. Lok adalats has been used in recovery of small amount of loans by the process of speedy judgements.⁵

3.2. Recovery of Debt due to Banks and Financial Institutions Act, RDDB Act, 1993/ DRT Act.

In the year 1993, the government took an initiative regarding recovery process based on the recommendation of banking sectors reforms given by Narshimham committee, which was headed by former governor of RBI, Shri M. Narshimham, and passed the act, Recovery of Debts due to Banks and Financial institution. It was formed with the objective of providing for the establishment of the tribunals for adjudication and speedy recovery of debts due to banks and financial institutions. This framework of debt recovery mechanism was capable of recovery

⁵ V. Rama Krishna Rao Cheupuri et al. Dr. Remmaniel et al. P.V.V. Kumar, *Role of Lok Adalat in managing Non-Performing Assets in Scheduled Commercial Banks*, 3, IJIRMF, 105, 105-109 (2017).

of claims of banks and financial institution which involved a matter of Rs. 10 Lakh and above. It adjudicated matters by many debt recovery tribunals established under this act. This framework initially seemed to be capable enough to deal with the recovery of rising NPAs, but it failed due to the poor performance of DRTs.

Before the enactment of this act, the recovery process was very bulky and time consuming. As recovery was to instituted as a suit in the civil courts, which took a lot of time because of ambiguous and slow court procedures. It took many years to recover the loan amount, as most of the time was spent in the adjudication process deciding the liability. After this lengthy process, still, there was difficulty at the time of the execution process of recovery related to the sale of goods.⁶ Heavy discounts were given to the parties, but there were problems related to the recovery process, then also. Government of India, to solve this issue instituted DRTs, they dealt with recovery cases due to banks and financial institutions which would solve the problem from mounting NPAs in the banks. It follows the summary procedure.

DRT (Debt Recovery Tribunal)

DRTs are specialized courts that have the power to entertain and decide cases filed by banks for recovery of NPAs, where outstanding amount together with interest in the NPA account is more than Rs.10 lakhs. For loans of less than Rs.10 lakhs, the legal remedy is before the ordinary civil courts. DRTs follow the summary procedure as opposed to full-fledged trial of cases in civil cases. RDB Act mandates that cases filed before DRTs should be decided within a period of maximum six months.⁷ The Debt Recovery Tribunal has been established in India under an act of parliament (act 51 of 1993). DRT and DRAT act establishes tribunals for expeditious adjudication and recovery of debts due to banks and financial institution and to deal with matters related to it. DRT also has the power to adjudicate matters related to the secured creditor, filed by the borrower, under the securitisation act. The DRT is also the appellate authority for appeals filed against the proceedings initiated by secured creditors under SARFAESI Act 2002. There are 38 DRTs and 5 DRATs functioning in India. Six new DRTs has been created by the government to speed up loan related settlements.⁸ Approximately 70,000 cases are pending in DRTs and DRATs involving 5 lakh crore and more.⁹

⁶ Rishabh Dara, Supreme Court Cases, Rishabdara (31.03.2019, 6.54 pm), <http://www.rishabhdara.com/sc/view.php?case=77575>.

⁷ The RDDBI Act, 51, Acts of Parliament, 1993, S.19 (6).

⁸ Debt Recovery Tribunals and Appellate Tribunals, (Mar. 28th, 2019 12.00 am), <https://www.drt.gov.in/>.

⁹ Gottumukkala Venkata Krishnamraju vs. Union of India & Ors., (2018), Writ Petition (civil) no. 732.

Mechanism of DRT¹⁰

Certification and authentication as required under RDB Act should be done before filing the application before DRT. Objections raised by the borrowers should be properly replied duly supported by proof. RDB Act provides that any party, whether bank or the borrower if aggrieved by the orders of DRT may file appeal. RDB law has created an appeal tribunal, namely Debt Recovery Appellate Tribunal (DRAT) to entertain, hear and decide appeals against the orders of DRT. As a part of recovery machinery, DRTs have recovery officers whose main duty is to recover money by the sale of assets of the borrower or by the arrest of the borrower.

- Application to be made to the tribunal¹¹: If any bank¹² or financial institution¹³ involves a case of recovery of any debt¹⁴ from a specified person, an application has to be made to the tribunal within the limit of whose jurisdiction the defendant or defendants are residing or working for gain or where the cause of action wholly or partially arises.¹⁵ Though it has been provided by Section 19 of RDDB act that bank or financial institutions with the permission of DRT can withdraw the application which was filed to take action under the SARFAESI Act.¹⁶ It does not matter whether it is done before or after the enforcement of Security interest and Recovery of Debt Laws (Amendment) Act 2004.
- If one or more bank or financial institution has to recover debts from a specified person, they can form a consortium and file an application to the tribunal at any stage of proceedings before the passing of final order. If the appeal is made under DRAT, then, an appeal can be made within 45 days to DRAT¹⁷, if the parties are not satisfied by the judgement. If any order is passed by the tribunal no such appeal lies.¹⁸
- The tribunal may ask the defendants to summon in court within 30 days of summon being served, and if the appeal is made to DRAT, it may ask the DRT to make modification regarding confirming or setting aside the order of the tribunal.¹⁹
- Proceedings of summons, filing of written statement, set off, counterclaim

¹⁰ The RDDBI Act, 1993, 51, Acts of Parliament, S. 19.

¹¹ Id. at Section 2(o).

¹² Id. at Section 2(d).

¹³ Id. at Section 2(h).

¹⁴ Id. at Section 2(g).

¹⁵ Prateek Kanda, *Consumer Protection Act*, Legal Services India (Mar. 28th, 2019 12.00 am), <http://www.legalservicesindia.com/article/article/consumer-protection-act-an-alaysis-of-branch-office-994-1.html>.

¹⁶ *Transcore v. Union of India*, (2007), 1, DRTC 298 SC.

¹⁷ The RDDBI Act, 51, Acts of Parliament, 1993, S.20.

¹⁸ Id. at Section 20(2).

¹⁹ The RDDB Act, 51, Acts of Parliament, 1993, S.20(4).

- Tribunal after the proceedings will pass an order either directing the defendant to furnish security within a fixed time or any sum. If the defendant is not able to furnish the security, will be asked to give a show cause notice. If the defendant is not able to show a cause, the attachment of property will be ordered in the favour of applicant.
- Tribunal may further order²⁰ grant of certificate of recovery of debts. Tribunal may appoint a receiver for realisation, management, protection, preservation and improvement of the property. Tribunal after giving the applicant and the defendant an opportunity of being heard will pass interim or final order.²¹ It will be duly signed between parties recording as an agreement.

According to the amendment made in 2018 the Central government has raised the pecuniary limit from Rs 10 lakh to Rs 20 lakh for filing application for recovery of debts in the Debts Recovery Tribunals by such banks and financial institutions.²²

3.3. The SARFAESI Act, 2002

Loopholes in previous legislations led by Andhyurjan committee to recommend reforms which eventually led to the Umarji committee framing up of SARFAESI Act in 2002. It is an act to regulate securitisation and reconstruction of financial assets and enforcement of security interest and to provide for a central database or security interests created on property rights and for matters connected therewith or incidental thereto.

SARFAESI Act covers any kind of asset, both movable or immovable which has been given as security whether it is by the way of mortgage, hypothecation or creation of security interest. One important thing to be noted down though is that the property which has been given as security, only that can be proceeded with as per this act. It has been held that before going after the borrower, the bank may proceed against the guarantor as well.²³ After a bank has classified particular loans to be NPA, recovery of debts can be done through the SARFAESI Act, 2002.

²⁰ The RDDB Act, 51, Acts of Parliament, 1993, S.19(18).

²¹ The RDDB Act, 51, Acts of Parliament, 1993, S.19 (20).

²² *Monetary limit for filing cases in DRT doubled to Rs. 20 Lakhs*, The Hindu Business Line, (Mar. 06, 2019, 22:05 pm), <https://www.thehindubusinessline.com/money-and-banking/monetary-limit-for-filing-cases-in-drt-doubled-to-rs-20-lakh/article24884061.ece>.

²³ *Dr. Vishnu Kumar Agarwal vs. M/S Primal Enterprises Ltd.*, (2018), Company Appeal AT (Insolvency) No.346, NCLT, New Delhi.

Requisites for recovery under this act are:

- The debt must be secured as this act applies only for the secured assets, that is the one which is backed by security for relief to secured creditors.
- The debt must have been classified as NPA that is as per the RBI norms and after 60 days notice given to the borrower.
- The outstanding dues must be of Rupees Ten Lakhs and above. The security which is meant to be enforced should not be agricultural land as that falls out of the purview of SARFAESI Act and also does not follow the 90 days norm of RBI guidelines. The outstanding dues are supposed to be more than the 20% of the principal and the loan amount along with the interest thereon.²⁴

Bank issues a notice in writing to the borrower calling him to discharge all his liabilities to the Bank. After the serving of notice, the borrower fails to discharge the dues within a period of sixty days from the date of the notice, the bank's can claim against the borrower. Notice shall be sent within the limitation period as on the date of issuance of the notice. The documents creating the security shall be valid and enforceable under law. The security intended to be acquired is free from any litigation and should be easily marketable.

This act has provided three alternatives for the recovery of non-performing assets:

- Securitization
- Asset Reconstruction
- Enforcement of security without enforcement of the court

What is Securitization?

Securitisiation is a process in which there is pooling of assets which are kept as collateral for debt and sell them to the third party to receive money. When there arises the issue of security receipt by raising funds or receipts by Asset Reconstruction companies. It is the Qualified Institutional borrowers from whom the securitization company acquire funds by the means of different schemes. Qualified Institutional Buyers are those who have the expertise and sound knowledge to evaluate and make their investment in the Capital Markets. They have maintained records in the form of account book for each and every transaction.

What are Asset Reconstruction and Asset Reconstruction companies?

Asset Reconstruction is a process where there is restructuring of any financial institution. ARCs

²⁴ The SARFAESI Act, 54, Acts of Parliament, 2002, S. 13.

are the companies which helps banks or financial institution to restructure by buying NPAs and take measures to recover bad loans from the borrower and help in its management and restructuring. Shareholding shall not exceed 26% of the post converted Debt Equity as a reconstruction. The companies under equity reconstruction, as a part of Enforcement of Security interest, the permission given by Secured Creditors holding should not be less than 60 percent of the amount outstanding to a borrower as against 75% as on date. The amount recovered through this process will be used by ARCs, to reconstruct the company's management.²⁵

Definition of Securitisation of standard Assets given by RBI, *"A process by which a single performing asset or a pool of performing assets is sold."*

SARFAESI Act is enacted to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith.²⁶ This act enables the Banks and Financial Institutions to realize long term assets to manage problems of liquidity, asset liability and to improve recovery of debts by exercising powers to take possession of securities, sell them and therefore it can be concluded that SARFAESI Act is well drafted and suits the requirements of banks. Simultaneously, the rights of the borrower are also taken care of up to a certain reasonable extent to reduce non-performing assets by adopting measures for recovery and reconstruction.

Enforcement of Security Assets: This act provides for the enforcement of security interest without the intervention of the court, provided that it should not be contrary to anything contained in the Registration Act, 1908 and Section 69 or Section 69 A of Transfer Property Act, 1882.²⁷

Procedure to be followed under SARFAESI Act:

Reconstruction company ensures maintaining a separate account in respect of every such scheme for every single financial asset acquired as a result of the investments that have been made by the qualified institutional buyers. The realisation process is done according to the

²⁵ Neeraj Tiwari, *Resolution of NPA in India: The Role of Asset Reconstruction Companies*, 7 Pratt's J. Bankr. L552 -580, (Mar 23, 2019 01:40 p.m.),

https://heinonline.org/HOL/Page?public=true&handle=hein.journals/prattjb7&div=64&start_page=552&collecton=journals&set_as_cursor=0&men_tab=srchresults#.

²⁶ Ram Kishan, *Supreme Court Judgement on DRT, Securitisation and Travancore*, DRT Legal Solutions (2nd, Apr., 2019, 1.12 am), http://drtolutions.com/sc_judgement_on_drt,_securitisation_transcore.htm.

²⁷ The SARFAESI Act, 54, Acts of Parliament, 2002, S.13 (1).

specified scheme.

The Securitization Companies takes help under Section 2(za) and Reconstruction Companies as under Section 2(v) of the concerned act. These companies are incorporated under the companies act 1956, (to be registered under Section 3 of Securitization and Reconstruction of Financial Assets and enforcement of Security Interest Act, 2002, but carry the same meaning as that of in the Companies Act, 2013).²⁸

Section-13 of The SARFAESI Act, 2002

Section 13 of the SARFAESI Act, 2002 talks about enforcement of security interest without any intervention of the court. It also provides means for a situation where the default is on the part of the borrower and if borrower fails to pay within 90 days, he will be given further notice, to pay within sixty days.²⁹

To issue demand notice under the abovementioned procedure for borrower and guarantor, it should be signed by the authorised officer. The notice shall give details of the amount payable by the borrower and the secured assets which is to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.³⁰

The bank might have taken any one or more immovable properties as security. This has to be carefully evaluated before taking possession.

The following aspects require to be looked into for taking possession of mortgaged immovable assets.

- Notice to the owner of the property that could be borrower or guarantor, should be issued to take possession of secured for fixing the date and time of taking possession.
- A panchnama and inventory of movables, if any has to be drawn at the time of taking possession of the assets and the same should be signed by the authorized officer and by two independent witnesses. The copy of the same to be served to the borrower.

²⁸ Para 3(ii) of "The Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003".

²⁹ The SARFAESI Act, 54, Acts of Parliament, 2002, S.13 (2).

³⁰ The SARFAESI Act, 54, Acts of Parliament, 2002, S.13 (2).

- After taking the physical possession of the properties, possession notice to be published in two leading newspapers within seven days.

If borrower has any issues regarding the actions taken under SARFAESI Act, they can question bank and raise an objection, and the bank is liable to answer the questions,³¹ and that the possession matter can be set aside during that interval.³² As it was dealt in case of Tensils steels Ltd., section 13(A) which mentions that a borrower is allowed to question to the secured creditor for reasons of classification of his account as NPA. If the borrower fails to pay the secured creditor within the period specified, the recourse of section 13(4) will be taken by the secured creditors. It has been held in this case that, the competent jurisdiction of the resolution process will fall under that tribunal where the secured asset is falling.

According to section 13(4) these are the measures that can be taken by the secured creditor:

- The secured creditor may take possession of the secured assets, which will include the right to transfer by way of sale for realizing the secured asset, this was introduced from the 2013 amendment. They cannot keep those secured property beyond 7 years³³ and this could extend upto 12 years³⁴ by prior permission of RBI. If no one buys that property during the auction, in that case, secured creditor has to buy that property himself to settle the dues. If during the bidding process highest bidder does not pay 25% of the amount, such auction will be conducted again.
- Secured creditor will take over the management and all its business. If in case somebody owes money to the borrower, he will have to pay that money to the secured creditor. If the borrower feels that he has been deceived regarding his property, he can approach DRT within 45 days.³⁵
- If in case even by the sale of secured assets, dues of the secured creditor are not fully satisfied, under such circumstances, secured creditor has option open to file an application for recovery of balance amount in the tribunal.
- It also provides that once a notice has been given as for 60 days, borrower is not supposed to transfer by sale, lease or otherwise any of his secured assets, without the consent of secured creditor and though such notice if not given, it would be against the provisions of the act.

³¹ Krishna Chandra Sahoo v. Bank of India, 2009(1) DRT 101, (Orissa).

³² The SARFAESI Act, 54, Acts of Parliament, 2002, S.13(2) proviso.

³³ The Banking Regulation Act, 10, Acts of Parliament, 1949, S.9.

³⁴ The Enforcement of Security interest and Recovery of Debt Laws (Amendment) Act, 12, 2012.

³⁵ UCO Bank v. Kanji Manji Kothari and Company & others, 2008(2) DRTC 179 (Bom).

If in case where financial assets acquired has been kept as a security debt of many banks, then application will be filed in a DRTs or DRATs, regarding transfer of all the files to one tribunal, where the jurisdiction lies.³⁶

Section 12 of the SARFAESI Act empowers RBI to give directions time to time in the form of guidelines regarding the classification of the account as NPA, which is to be done by banks or financial institutions. After 2004 and 2013 amendment, the act mentions that any security interest created in favor of any secured creditor may be enforced without the enforcement of the court, notwithstanding the provisions of Section 69 of Transfer of Property Act. Section 17(1) & 17(6) provides the right to appeal under DRT and DRAT. For applying in DRAT the borrower will have to deposit 50 percent of the debt amount.

Secured creditor may seek help and assistance of the CMM or the DM for the purpose of taking over of the possession of the secured asset or property, in case the mortgagor borrower fails to handover peaceful possession of the secured assets.³⁷

Provisions of this act will override all other laws which are inconsistent with this act.³⁸ In this case, Kohinoor Creations v. syndicate bank³⁹, Delhi High Court with regards to using Arbitration and conciliation act to resolve a dispute of recovery, it was held that as per section 35 of SARFAESI Act will override the provisions of all other laws inconsistent with it. In this case, Noble Aqua Pvt. Ltd. vs. SBI⁴⁰, it was held that provisions of SARFAESI will prevail over the SICA Act. As earlier the NPA efficiency was affected due to the stay proceedings mentioned in the SICA Act.

There are 24 ARCs registered with a bank in India, as of November 2017.⁴¹ It is failing to resolve NPAs, thus Insolvency and Bankruptcy code was introduced.

Sale Procedure under the SARFAESI Act- The Authorized officer may sell the secured assets taken in possession, by adopting any of the following methods to secure maximum sale price

³⁶The SARAFESI Act, 54, Acts of Parliament, 2002, S. 5(a).

³⁷ The SARAFESI Act, 54, Acts of Parliament, 2002, S.14(1).

³⁸ The SARAFESI Act, 54, Acts of Parliament, 2002, S. 35.

³⁹ Kohinoor Creations v. Syndicate Bank, 2005 (2) Raj 622 (Del).

⁴⁰ Noble Aqua Pvt. Ltd. v. SBI, 008(2) DRTC 341 Orissa DB.

⁴¹<https://rbidocs.rbi.org.in/rdocs/content/pdfs/LSCRCRBI07092016.pdf>.

for the assets which is to be so sold.⁴² Obtaining quotations from parties dealing in the secured assets or otherwise interested in buying such assets, inviting tenders from the public, holding public auction including through e-auction mode or by private treaty provided that if the sale of such secured assets is being effected by either inviting tenders from the public or by holding a public auction. Creditor shall publish a public notice in two leading newspapers, one in vernacular language by mentioning the terms of sale, which will include details about the borrower and the secured creditor description of secured assets to be sold, reserve price, if any, and the time and manner of payment, time and place of public auction or the time after which sale by any other mode shall be completed, depositing earnest money as may be stipulated by the secured creditor, any other thing which the authorised Officer considers it material for a purchaser to know. If the sale of property by any one of the methods fails then 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. Sale by any methods other than public auction or public tender shall be on such terms which may be decided between the secured creditors and the proposed purchaser.⁴³

Subsequently the said Act has undergone two major amendments i.e. Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 and The Enforcement of Security interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016.

Mardia Chemicals vs. Union of India⁴⁴

In this case, major issues were that all the banks and financial institutions enjoy arbitrary powers but there is no guideline for as to how they are supposed to exercise it and as there is no appropriate set of guidelines in that respect, there is clear cut lacking a capable and adequate mechanism so as to give decision on the dispute in connection with that of actual dues. Borrower, before selling out the property or thereby taking over the management, was not given a chance to be heard. D.R.T. act exists, why bring out yet another legislation for the same purpose wherein borrower is cornered more as one won't be able to raise the funds amounting to that of 75 percent of demand, specially once he is no longer in possession or no longer

⁴² The Security Interest Enforcement Rules, 2002, Rule 8.

⁴³ The Security Interest Enforcement Rules, 2002, Rule 9.

⁴⁴ Mardia Chemicals v. Union of India (2004) 4 SCC 311.

managing the secured assets as per the section 17 of the concerned act.

The amendment introduced major changes in relation to the mandatory publication of Possession. Notice within seven days from the date of taking possession and definition of "approved value" was added. Thus there has been a major modification in the principle of obtaining possession of the property by due process of law as it stands modified in the context of the right of secured creditor apparently covered by the Act to enforce security interest.

The salient features of the amending Act are (amendment in Jan. 2013) follows⁴⁵

- Definition of 'Bank' is now inclusive of the term "Multi State Co-operative Bank.
- In case if the situation turns out as such wherein no bidder turns out, now secured creditor may purchase the price of defaulter at the reserve price.
- A special right to lodge a caveat application has been given to the Secured Creditor so that borrower may not obtain any relief from DRT/Court ex-parte.
- Detailed procedure is prescribed for moving an application before D.M./C.M.M for obtaining possession.
- Powers have been provided to the Central Government to condone the delay in registering the particulars.
- Central Government has been given powers to exclude any class or classes of Banks from the purview of SARFAESI Act.
- Cognizance of an offence as for the contravening of provisions of SARFAESI Act can be made only upon a complaint in writing by Reserve Bank of India or Central Registry.
- Secured Creditors representing not less than sixty percent value of outstanding as on record in the case of joint financing may take decision to proceed under the SARFAESI Act.

This amendment introduced amendments which were necessary for the proper regulation of the recovery process. This case differentiated the DRT Act and SARFAESI Act.

Comparison between the DRT Act and the SARFAESI Act:

- DRT Act did not provide for the assignment of debts to Securitisation companies and therefore, secured assets also could not be liquidated in time. Under SARFAESI Act,

⁴⁵ The Amendment Enforcement of Security Interest and Recovery of Debt laws, 1, Act of Parliament, 2013.

authority is given to the banks/ FIs, which is not there in the DRT Act, to assign the secured interest to securitisation company/ asset reconstruction company.

- The SARFAESI Act proceeds on the basis that the liability of the borrower to repay has exhausted that the debt has become due and that on account of delay the account of the borrower has become sub-standard and non-performing. Therefore, there is no scope of any dispute regarding the liability.
- Meaning of 'debt' under the DRT Act is broader and covers secured, unsecured and assigned debts. It also covers debts payable under a decree, arbitration award or under a mortgage. DRT Act provides for adjudication of disputes as far as the debt due is concerned. DRT Act does not rule out the applicability of the provisions of the Transfer of Property Act, in particular, Sections 69 and 69A of that Act. Section 35 of the NPA Act gives it an overriding effect with all other laws if such other laws are inconsistent with the NPA Act.
- There is this question which always arises, whether or not if the suit is pending in DRT, the bank can resort to the enforcement of security interest under Section 13(4) of the SARFAESI Act, 2002.⁴⁶ It was discussed in the case of *Sushil Kumar Agarwal vs. Allahabad Bank II*⁴⁷, whether or not against the enforcement of security interest, one can opt for DRT than the SARFAESI Act, 2002. Thus, it was held by the court that DRT can be used to appeal as provided in the SARFAESI Act⁴⁸. It has been held that either of the methods can be opted for the recovery of NPAs.⁴⁹
- Another comparison between both the acts are that, RDDB Act and SARFAESI Act have been enacted with the objective to deal with the recovery of debts, but the difference is RDDB Act covers both unsecured as well as secured debts whereas SARFAESI act covers only secured debts.
- RDDB Act is more of an adjudicatory process whereas the SARFAESI Act is more of meant for execution purpose. This line of difference was clearly provided in the case of *M/S Gar Re-Rolling Mills*⁵⁰ decided by the Supreme Court, where it clearly held that "no question of applying doctrine of election here when the very path of both the acts goes different way, it's not a question of two remedies being available for the same problem as one deals with only secured debts." A similar case came up before DRAT,

⁴⁶ Authorised officer, Indian Overseas Bank & Anr. v. Ashok Saw Mill, 2009(8) SCC 366.

⁴⁷ Sushil Kumar Agarwal v. Allahabad Bank II (2004)BC94 (DRT, Ranchi).

⁴⁸ The SARFAESI Act, 54, Acts of Parliament, 2002, S.17.

⁴⁹ Supra note 16.

⁵⁰ Andhra Pradesh State Financial Corporation v. M/S Gar Re- Rolling Mills, AIR 1994 SC2151.

Chennai in 2005 as regarding the doctrine of election in *ARCIL vs. Kumar Metallurgical Corporation*⁵¹ where it was held by the tribunal that RDDB Act is for both unsecured and secured debt, SARFAESI Act is for secured debt, and they serve a different purpose.

DRT and SARFAESI Act does not give parallel remedy: *Transcore vs. Union of India*⁵², In this case, An application was filed by Indian Overseas Bank before the DRT, Chennai for recovery of dues from M/s Transcore and bring the properties to sell. The claim was disputed. Later on, a notice under Section 13(2) of the SARFAESI Act was issued where Transcore was called upon to repay the amount due together with interest within sixty days. Transcore failed to repay the amount. The Bank took the possession of the immovable properties and the same became subject to the charge of the Bank. Here the main issue was whether the withdrawal of original application in terms of the first proviso to Section 19(1) of the RDDBI Act is a condition precedent to taking action under the SARFAESI Act, 2002.

In this case apex court in this pointed out some crucial differences and similarities between the DRT Act and SARFAESI Act in terms of their relief, object and purpose, etc. apart from clarifying the meaning of certain related terms. It was held that in cases where a secured creditor has taken action under Section 13(4), it would be open to the borrower to file an application under Section 17 of the SARFAESI Act. The object behind Section 13 of the SARFAESI Act and Section 17 read with Section 19 of the DRT Act is the same, i.e. recovery of debt is both the same. The tribunal under the DRT Act is also the tribunal under the SARFAESI Act, i.e. DRAT.

Main features of the amendment to the SARFAESI Act, 2016: Central Government has amended the SARFAESI Act in August 2016 to empower the Asset Reconstruction Companies to revive Debt Recovery Tribunals (DRTs) and to enhance the effectiveness of asset reconstruction under the new bankruptcy law. The amendment has given more regulatory powers to the RBI on the working of ARCs. It has also aimed to empower asset reconstruction and the functioning of DRTs in the context of the newly enacted bankruptcy law. As per the amendment the scope of the registry that contains the central database of all loans against properties given by all the lenders has been widened to include more information. DRTs will

⁵¹ *ARCIL v. Kumar Metallurgical Corporation RA-10/2005 (SA) (DRT, Chennai).*

⁵² *Transcore v. Union of India (2008) 1 SCC 125.*

be the backbone of the bankruptcy code and deal with all insolvency proceedings involving individuals. The defaulter has to deposit fifty percent of the debt due before filing an appeal at a DRT. With the above amendments to SARFAESI Act and RDDBI Act and with the assistance of Insolvency and Bankruptcy Code 2016, the banks are now in warpath to recover their dues to reduce the nonperforming assets to a large extent. This will infuse the much needed funds to the banking system to boost the economy of the country. secured asset within a period of thirty days from the date of application.

3.4 Insolvency and Bankruptcy Code:

IBC has been enacted by the parliament with an objective to consolidate and amend the laws relating to reorganization and insolvency resolution of Corporate Persons, Partnership Firms and Individuals. IBC process can be initiated by the Financial creditor, operational creditor or any other corporate debtor for resolution process.⁵³ The amount involved should be more than Rupees one lakh. Insolvency and Bankruptcy code has been introduced to resolve the problem of rising Non Performing Asset. The bankruptcy code was introduced to reduce the burden of courts, as the litigation related to corporate insolvency shall be entertained by the NCLT for corporate insolvency and DRT for individual insolvency process and unlimited partnership firm.

The aim of this code is to rescue and rehabilitate companies or financial institution in a given course of time according to the code. It also gives more power and control to the creditor through the resolution professional. It also allows to intervene timely with the regulatory bodies. This code is trying to create a formal insolvency resolution process by providing new measures of speedy liquidation and its main aim is to deal with a large number of pending cases. The Insolvency and Bankruptcy Code, 2016 has introduced the following entities for successful implementation and smooth function, they are Insolvency and Bankruptcy Board of India, Adjudicating Authority, Insolvency Professional Agencies, Insolvency Professionals, Information Utilities.

Insolvency and bankruptcy board has wide functions such as registration of insolvency professional agencies, insolvency professionals and it also has the power to renew, cancel or suspend their registration.⁵⁴ It also lays down regulations for the functioning of insolvency

⁵³ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S. 2.

⁵⁴ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S. 196(1)(a).

professional agencies.⁵⁵ This board looks on the overall governance and functioning of the insolvency process by promoting transparency and best practices.⁵⁶ These professionals will handle cases of insolvency and insolvency professional agencies will look after the supervision of the Insolvency Board. This code also provides a mechanism for redressal of grievances if it is done by the insolvency professional.⁵⁷ This code also provides for using information utilities⁵⁸, by collecting information, organising them, collecting financial information, authenticating those documents and publish those financial information of listed companies and financial and operational creditors of companies. This will make the resolution process easy by keeping an account of all the financial details about the companies. NCLT appoints an insolvency professional or Resolution Professional to manage the Insolvency Resolution Process.⁵⁹ The Resolution Professionals primary function is to take over the management of the corporate borrower and operate its business as a going concern under the broad directions of a committee of creditors.⁶⁰ The Resolution Professional identifies the financial creditors and constitutes a creditors committee. Operational creditors above a certain limit are allowed to attend meetings of the committee but do not have voting power. Each decision of the creditors committee requires 75 percent majority vote. Decisions of the creditors committee are binding on the corporate debtor and all its creditors. The creditors committee considers proposals for the revival of business of the debtor and must decide whether to proceed with a revival plan or liquidation within a period of 180 days.⁶¹

Under this code, a borrower company will go for liquidation in the following condition:

- Where 75 percent majority of the creditor's committee resolves to liquidate the corporate debtor at any time during the insolvency resolution process.
- The creditor's committee does not approve a resolution plan within 180 days or within the extended time frame of 90 days.
- The NCLT rejects the resolution plan submitted to it on technical grounds.
- The debtor contravenes the agreed resolution plan and an affected person makes an application to the NCLT to liquidate the corporate debtor.⁶²

⁵⁵ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S. 199.

⁵⁶ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016 S. 196(1)(m).

⁵⁷ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S. 196(1)(q).

⁵⁸ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S. 213.

⁵⁹ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S. 16.

⁶⁰ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S. 17.

⁶¹ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S. 17.

⁶² The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S. 33.

When the resolution is in the process the debtor will be given time for 180 days, during which there will be hearing of proposals regarding the revival and the next step of IRPs to resolve the matter. In the time span of 180 days at least 75 percent of the financial creditors have to agree to the revival plan. If they do not agree then the company or firm will go into liquidation. Extension of 90 days can be provided by the adjudicator only if it is decided by the three fourth of the financial creditors. Within those 180 days, 75 percent of financial creditors must agree to a revival plan. Thus, IBC has provided 270 days limit to deal with any resolution case, in a complex matter.

A moratorium period is issued once the petition has been admitted under the IBC code, which means that there will be no judicial proceedings for recovery against the corporate debtor.⁶³ The code mentions the period between insolvency commencement and till the end of corporate insolvency resolution process period, there will be no proceeding regarding recovery, enforcement of security interest, sale of transfer of assets will take place against the corporate debtor. It gives absolute benefit to the corporate debtor. Once the resolution plan has been approved by NCLT, then it would be binding on the corporate debtor and its employees, members, guarantors and other stakeholders who are related to the resolution process.⁶⁴ To avoid any overlapping a case of Allahabad High Court proceedings has stayed against the guarantors till the corporate insolvency resolution plan has been approved. Thus, the moratorium period should be absolute and apply to all cases where the primary liability lies with Corporate Debtor.⁶⁵ In the case of Deccan chronicle limited it was held that moratorium period in the favour of the corporate debtor has not been provided absolute right, as it will not affect the proceedings under Article 32, 136, 226 and 227 of the constitution of India.⁶⁶

Insolvency and Bankruptcy code has different positions in regards to the individuals and the unincorporated entities. Any bankruptcy order passed should not affect the rights of the secured creditor in any manner.

Insolvency and Bankruptcy Code (Amendment) Ordinance 2018

This amendment was introduced to strengthen the corporate insolvency process. It aims at protecting and balancing the interest of small stakeholders like buyers, micro, small enterprises,

⁶³ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S.14.

⁶⁴ The Insolvency and Bankruptcy Code, 33, Acts of Parliament , 2016, S. 31(c).

⁶⁵ Sanjeev Shriya v. State Bank of India and others, civil writ petition no. 30285 of 2017.

⁶⁶ Deccan Chronicles Holdings Limited v. Canara Bank CA No 06 of 2018.

etc. It promotes insolvency process rather than the liquidation process. This ordinance has made the process easy for initiation of corporate insolvency process by operational creditors. As earlier operational creditor was not allowed to file an application directly to the NCLT, unlike the financial creditor.⁶⁷ They were asked to bring a certificate from the banker, Now this has become optional. It has also made easy to file suit as it does not require any evidence regarding the pendency of any suit or arbitration proceedings. Thus, leniency has been provided in the initiation process under the IBC code. Earlier Committee of Creditors decisions was approved at the majority vote of 75% of the voting shares, now it has changed to 66 percent. The assets of guarantors are outside the purview of this act, so the moratorium period would not be applicable on the guarantors.⁶⁸ Amendment to Section 29 A has widened the scope of eligibility criteria for submission of the resolution plan. It has included any financial entity to initiate the resolution process. Earlier MSMEs were not allowed to participate in the bidding, but now it has been removed. Limitations Act, 1963 is applicable to the proceedings or appeal under the code.⁶⁹

Effect of Insolvency and Bankruptcy Code, 2016 on SARFAESI Act, DRT Act

This Code also amends 11 laws, including the Companies Act, 2013, Recovery of Debts and Bankruptcy Act, 1993 (DRT Act), and Securitization and Reconstruction of the Financial Assets and Enforcement of the Securitization Act, 2002 (SARFAESI Act). From the amendments, it is clear that all these 11 Acts are affected by the enactment of the Code. This code provides that during the insolvency resolution process as defined in the Code, the code takes precedence over the DRT Act and SARFAESI Act.⁷⁰ All pending proceedings are stayed for a period of 180 days from the date of admission of the application to initiate such proceeding in terms of Section 12 of the Code. Thus, it is thus clear that for a period of 180 days as provided in sections above, from the dates of different mechanisms taken under the Code, the proceedings under the DRT Act and SARFAESI Act remain suspended, without affecting the limitation period for filing the same, though an order to that effect must be passed by the respective Adjudicating Authority.⁷¹

⁶⁷ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S.8.

⁶⁸ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016, S.14.

⁶⁹ The Insolvency and Bankruptcy Code (Second Amendment Bill), 2018, (Apr. 24 2019, 08.07 pm), <https://www.prsindia.org/billtrack/insolvency-and-bankruptcy-code-second-amendment-bill-2018>.

⁷⁰ The Insolvency and Bankruptcy Code, 2016; S. 14(1)(c).

⁷¹ The Insolvency and Bankruptcy Code, 33, Acts of Parliament, 2016; S. 8.

So far 1322 cases have been admitted by NCLT. 4452 cases have been disposed at the preadmission stage and 66 have been resolved after adjudication. 260 cases have been ordered for liquidation. In 66 resolution cases, realization by creditors was around Rs. 80,000 crores. Some of the big 12 cases such as Bhushan Power and Steel Ltd. and Essar Steel India Ltd. are in advanced stages of resolution and are likely to be resolved in this financial year in which realization is expected to be around Rs 70,000 crores. Increase in conversion of NPAs into standard accounts and decline in new accounts falling in NPA category show a definite improvement in the lending and borrowing behaviour.⁷²

3.4 AMENDMENT IN BANKING REGULATION ACT

The Government of India has amended the Banking Regulation Act, 1949, to control the rise of NPAs. There has been amendment introduced in the Banking Regulation Act to enable RBI to make sure that the bank file all the defaulters under this code. It has also made a list of 50 companies that accounts for at least 50 percent of NPAs.⁷³ It has invested banks with some powers in resolving bad loans without inviting the prosecutorial gaze of central investigative agencies. Banking Regulation (Amendment) Act, 2017, the RBI can issue directions to banks for resolution of stressed assets. The RBI can specify authorities or committees to advise banks on resolution of stressed assets. The members on the committees will be appointed or approved by the RBI. But at the same time, the amendment to the Banking Regulation Act has failed to provide a lower level of NPAs. The reason is slow down progress in the short run. Government has tried to combat this but the entire process is based on signalling system i.e. it would be very difficult to trace each and every account which is Non Performing Assets.⁷⁴ The other problem was writing off the debts. Public sector banks lacks to tackle the volume of NPAs and its effect is now visible in the balance sheet of the banks. The government has inserted Section 35AA in the Act which mentions that the Central Government has power to authorise the Reserve Bank to issue directions to any banking company or companies to initiate insolvency resolution in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016. The RBI will also create committees of experts to advise banks.⁷⁵ Here two major issues arise, they

⁷² Arun Jaitley, *Two Years of Insolvency and Bankruptcy Code*, Facebook, (Jan. 03, 2019), https://ibbi.gov.in/Two_years_of_insolvency_and_Bankruptcy_Code_IBC_Facebook.pdf

⁷³ The Banking Regulation Amendment Ordinance, 2017, (Apr. 23rd 2019, 07.40 pm), <https://www.prsindia.org/billtrack/banking-regulation-amendment-ordinance-2017>

⁷⁴ The International Monetary Fund's 2017 Article IV report on India shows that while NPA recognition by Public sector banks turned their return on assets negative in 2015-16, aggregate provisioning coverage ratio still remained low, indicating weak capital bases. The IMF report also shows that Public sector banks are continuously writing off their loans rather than recovering them. The third problem lies in the wording of the amendment.

⁷⁵ E.A.S. Sarma, *The Banking Regulation (Amendment) Ordinance, 2017: A Critique*, Madhyam (May 8, 2017),

are the amendment does not explicitly protect bankers from future problems, nor is there any implicit signal system introduced to protect the bankers. The amendment is unclear about how the Centre proposes to take the resolution forward, will the government monitor each individual asset resolution or provide a limit enabling the RBI to take action on cases which falls under that ambit, depending on the merits of each case. Both possibilities have their own consequences.

4. CONCLUSION AND SUGGESTIONS

Reports on Reserve Bank of India mentions that Banking regulation of India is sufficient with capitalisation and fairly regulated. The financial condition and economy are far better than the other countries, according to many surveys and studies. RBI is the central framework with all other legislative framework operating the banking sector. The Reserve Bank of India Act, 1934, Banking Regulation Act, 1949, PMLA, Limitation Act, SEBI, RBI, Consumer Protection Act, Banker's Books Evidence Act, RDDBI Act 1993, SARFAESI Act, IBC and many more trade and finance related laws.

Thus, we can say that the Banking system despite a proper banking system and laws present is not able to cope with the problem of rising Non Performing Assets. One of the reason is overregulation in the banking sector. Banking recovery laws for NPAs are sufficient to deal with the problem of NPAs, but in many cases, there is a clash of jurisdiction between the DRT and the SARFAESI. Another issue here is related to the overlapping of laws. There is always overlapping of laws regarding the secured asset, PMLA, and SARFAESI, IBC, and PMLA, etc.

Changes that can be brought in present legislations-

- There should be stringent penal provisions regarding the recovery process of NPAs. There should be provisions where the bank should bar any company or person to give loans if defaulted more than once.
- The Bankers should be given more powers to deal with recovery cases.
- Section 35 of SARFAESI Act and Section 238 of Insolvency and Bankruptcy Code should be amended as for there are many cases regarding the issue of overlapping laws

with other prevalent laws. So it should be amended in such a way that it could be in benefit of the secured creditors.

- IBC in many cases is failing to achieve the strict timeline policy, so 180 days rule should be extended and some time space should be given to the borrower to deal with the problem.
- Question of recovery with complex matters which constitutes many laws should be dealt with High Court or any other equivalent court rather than these recovery tribunals.

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