BALANCING OF INTERESTS OF BOTH CREDITORS AND DEBTORS - CRITICAL ANALYSIS OF JUDICIAL INTERPRETATION OF SARFAESI ACT 2002

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ABSTRACT

As a coin has two sides, a statutory provision / a rule is also capable of having more than one meaning and to ascertain the intended meaning of legislature is the province of sovereign courts. The statement of objects and reasons of SARFAESI Act 2002 throws ample light on intention of the legislature to legally empower the creditor in terms of enforcement of security interest. However any action – legislative or administrative, must live up to the standard of reasonableness and balance the conflicting interest. SARFAESI Act 2002 when enacted was perceived as draconian by the debtors and was also branded as absolutely Pro-creditor, therefore it becomes pertinent to examine whether the judicial pronouncements have an absolute Pro-Creditor interpretation or they have also protected the legal rights of borrowers.

Keywords- Debt Recovery, Creditors Protection, Security Interest

1. Introduction-

SARFAESI Act 2002 initially was perceived as draconian by Debtors and therefore it becomes pertinent top examine if the judicial approach was absolutely Pro-Creditor or the Debtor's rights were also upheld and balancing of interests of both Creditors and Debtors was also ensured by the Judicial interpretation. Critical appraisal of following important provisions which confer both substantive and procedural safeguards to the debtors throws light on this aspect.

2. Safeguards related to SECTION 13 :

1. Secured Creditor can give notice under section 13(2) only when preconditions are fulfilled- Borrower is in default &Borrowers loan account is classified as NPA.[1]

2. Issuance of notice under section 13 (2) & 13 (4) are mandatory and in absence of such notice as per rule 3 of 2002- entire proceedings initiated by the bank are invalid.[2]

3. Account of borrower is required to be classified as NPA before invocation of section 13 (2) of SARFAESI Act 2002 and issuance of notice under 13 (2).[3]

4. Even though word may is used in section 13(2),13(3) & 13(3)A, it may be draftsman's oversight but compliance in letter and spirit is necessary for self realization provisions of this Act.[4]

5. Issue of notice even after the knowledge of death is a nullity and any subsequent action under section 13(4) is a nullity recognizable by law.[5]

6. Secured Creditors may waive off his rights under section 13(4) and issue notice under section 13(2) again , However the same can not be with regard to same liability of the borrower. It is bound to change with each passing day.[6]

7. Notice under section 13 (2) to the guarantor also is mandatory so as to allow him to either persuade the borrower to pay or to make arrangements to pay himself.[7]

8. Notice is liable to be struck down when date on which debt became NPA is not mentioned.[8]

9. Notice is liable to be struck down if amount stated in the notice and amount mentioned in the statement of accounts are materially different.[9]

[1]Core Ceramics Ltd.and others v. Union of India and others AIR 2008 Cal 88

[2]Sheeba Philominal Merlin v. The Repatriates Co Op Finance & others III (2011) BC7 (Mad)(DB)

[3]Prakash Khandelwal v. State Bank of India II (2006) BC 102

[4]Mahavir Plantations Pvt.Limite v. ICICI Bank Limited IV (2005)BC154(DRAT-DRT)

[5]Narendra Singh v. Punjab & sind Bank IV (2009) Bc 84 (DRAT)

[6]Hotel Payal & Another v. Central Bank of India & Another III (2011) BC 363 (Cal)

[7]Mahavir Plantations Limited v. ICICI Bank Limited IV (2005)BC 154 (DRAT-DRT)

[8]Kayappan Vanijya P.Ltd. v. UCO Bank II (2006) BC 96 (DRAT-DRT)

[9]Ashok Brothers v. Bank of India II (2006)BC137 (DRT-DRAT)

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10. It is mandatory for the bank to consider the representation of the borrower with due application of mind and get back to the borrower with a reasoned answer.[10]

11. Notice under Sec 13 (2) shall give details of the amount payable by the borrower on the secured assets intended to be enforced. As no details of the amount payable has been supplied to the borrower, showing the debit and credit balance resulting therein, there is a serious infirmity in issuing the notice and vitiates the entire procedure adopted for realization. [11]

12. Representation by borrower to the bank need not be addressed to any one particular officer of the bank as throughout the SARFAESI Act 2002 words secured creditors are used. Therefore secured creditors cannot contend that representation was not properly addressed. [12]

13. Although representation process is not a quasi judicial proceedings , but if borrower raises any objections or places for consideration of secured creditor –such reply to notice must be considered with due application of mind and reasons for nonacceptance of objections must be communicated to the borrower.[13]

14. If borrower raises any objections / places facts for consideration of secured creditors, such representation must be considered with due application of mind and reasons for not accepting the objections howsoever brief they may be must be communicated to the borrower.[14]

15. Period of 7 days (15 days after amendment) notice under section 13(3) is directory and any delay in replying to the representation beyond 7 days would not render such disposal of representation invalid.[15]

16. Debt assigned by NBFC is not covered under SARFAESI Act therefore no action by assignees of NBFC s can be taken under SARFAESI Act 2002.[16]

17. Public Notice of auction sale and personal notice to Borrower both are essential for the purpose of sale of secured asset by secured creditors.[17]

18. Any mode of sale of secured asset can be adopted. The only requirement is that it should be fair and transparent.[18]

19. Even if auction is taking place for number of times, 30 days notice to Borrower is mandatory.[19]

20. Sale of secured asset without following the mandatory provisions of Rule 8 is void.[20]

21. Powers under section 13 can be used only in against properties against which security interests are created and not against properties which are not given as security.[21]

22. Bank has no unfettered / unguided /unbridled discretion in the matter of choosing and proceeding against any property given as security. While right to choose is undeniable, the action of choosing is not dependent on the sweet will of the bank because bank financing in public domain is bound by Art.14 of the constitution in every aspect of its decision-making power which affects the rights of the third party. Therefore the discretion must be exercised on the basis of sound principles and in transparent manner.[22]

23.Wide powers are given to Banks under SARFAESI Act 2002 for selling assets without invoking the adjudicatory process and even the action taken is not challengeable in Civil Courts. Therefore power must be exercised bonafide. If there is no credible explanation-court can assume that impugned action was improper.[23]

[10] M.R.Gawai Enterprises v. Vidarbha Urban Cooperative Bank (2005) 57 SCL 290 Bom

[11] Madhusudhan Ghosh v. Bank of Baroda 2010 TLCAL 668

[12] M/s Jayanti Agencies v. Canara Bank & another III (2011) BC 297

[13] Mardia Chemicals Ltd.and Another v. Union of India AIR 2004 SC 2371

[14] M.R.Gawai Enterprises v. Vidarbha Urban Cooperative Bank (2005)57 SCL 290 (Bom)

[15] M/S Clarity Gold Pvt.Ltd. v. Debt Recovery Tribunal No.II,Mumbai AIR 2011 Bom 42

[16] Kotak Mahindra Bank Ltd v. Trupti Sanjay Mehta and others (2015) 131 SCL 699

[17] Mathew Varghese v. M.Amritha Kumar (2014) 5 SCC610

[18] Punjab Financial Corporation v. M/s Surya Auto Industries (2010)1SCC297

[19] Vasu P.Shetty v. M/S Vandana Palace & Others (2014)126 SCL 449

[20] J.Rajiv Subramaniyan& another v. M/s Pandya & others (2014) 126 SCL346

[21] M/S Ormi Textiles & another v. State of Uttar Pradesh & others (2008) 5 SCC 194

[22] Shyam Kishore Prasad v. Bank of Baroda 2009 (1) DRTC548(Pat)

[23] Bhupinder Singh v. State Bank of Patiala AIR 2008 Pun& Har148

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24. Sale by Secured Creditor of the secured asset below reserve price without consent of borrower is liable to be set aside.[24]

25. RBI circular on recovery agents engaged by Banks is a precondition for exercise of powers under section 13(4). [25]

26. Confirmed Sale can not be set aside on receiving higher offer. However when auction is subject to confirmation by some authority, no rights accrue to auction purchaser and therefore on receipt of highest offer-unconfirmed sale may be set aside because it is the duty of secured creditors to get maximum value for the property sought to be sold through auction.[26]

27. In absence of Valuation Report & Reserve Price, the auction sale only becomes pretence. If intending purchasers are not able to know the details of assets or itemized valuation, auction sale can be said to be in accordance with law. If publicity and maximum participation is to be attained, all bidders must know the details of asset and valuation thereof.[27]

28. Supreme Court in this case held that Right to hold property is a constitutional and human right. A person can not be deprived of his property except in accordance with provisions of the statute.[28]

29. Concept of Reserve Price is not synonymous with valuation of the property. The valuation is a question of fact which should be fixed on the basis of relevant factors. Therefore there must be application of mind by the authority while approving or accepting report of the approved valuer and fixing reserve price because failure would amount to irregularity and vitiate subsequent proceedings.[29]

30. Completed Sale may be set aside after suitably compensating the first bidder if there is a substantially higher bid than the amount of first bid. Supreme Court observed that attempt should be to get maximum value so that maximum claimants of the company could be paid their claims.[30]

31. Public Sector Banks need to exercise more caution and use the power to purchase the mortgaged properties on failure of auctions only in exceptional cases. It is not permissible for the banks to always purchase the mortgaged properties.[31]

32. SARFAESI Act 2002 is not retrospective in operation as for invoking provisions of SARFAESI Act 2002-on the date of alleged agreement the financial institution and secured creditors must be financial institution and secured creditors within the meaning of SARFAESI Act 2002.[32]

33. If there is only a guarantee and not a mortgage, SARFAESI Act has no relevance because there is no security interest created by the guarantor to be enforced. SARFAESI Act is only limited to enforcement of security interest and not for enforcement of contractual obligations of parties.[33]

34. When no security interest is created ie to say there is no secured asset of the borrower with the B/FI, provisions of SARFAESI Act 2002 can not be invoked.[34]

35. Banks and Financial Institutions should act in fair and equitable manner and not like private money lender. Powers under section 13(2) to be exercised fairly and reasonably.[35]

36. Uttaranchal high court made recommendations to RBI to issue guidelines to bank regarding recovery of dues from principal borrower and to the effect that residential houses should be sold as a matter of last resort.(However these guidelines were subsequently diluted after Transcore case).[36]

[24]K.Raamselvam v. Indian Overseas Bank (Writ Petition No.9729of2009)

[25]ICICI Bank v. Shanti Devi Sharma & Others (2008)7SCC532.

[26]Valji Khimji & Co v. Official Liquidator of Hindusthan Nitroproduct (Gujrat) Ltd & others (2008) 86 SCL 81 (SC)

[27]Gajraj Jain v. State of Bihar and others (2004)7SCC151

[28]Lachhman Dass v. Jagat Ram & others AIR 2007 SC(Supp)1169

[29]Anil Kumar Sriwastawa v. State of Uttar Pradesh AIR 2004 SC 4299

[30]FCS Software Solutions Ltd v. La Medical Devices Ltd & others.(2008)10 SCC440

[31]P.K.Thampi Raj v. the State Bank of Travancore (2012) 272 KLR 096

[32]Subhash Chandra Panda v. State of Orissa and others I92009) BC 443

[33]Pandurang v. State Bank of Hyderabad I (2006) BC 59 (DRAT/DRT)

[34]Chief Manager,Bank of India v. Gunawantiben Bhawarlal Mehta II (2006) BC 207 (DRAT-DRT)

[35]Amit Raj Enterprises and others v. UCO Bank and others (2008) 56 BLJR 894

[36]Unique Engineering Works v. Union of India II (2004) BC 241

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37. Allahabad High court held that secured creditor may move against any secured asset and it is not essential that all secured properties are put to sale simultaneously. If by sale of any one property substantial recovery could be made, it is not necessary that all the properties should be sold or possession is taken under 13 (4) of the Act.[37]

38. State governments cannot interfere with the recovery proceedings in relation to bank loans initiated under revenue recovery Act.[38]

39. Gujarat High Court held that a copy of conveyance deed can not create any right, title or interest in favour of secured creditor bank. In absence of any security interest ,there can be no question of any enforcement of security interest under SARFAESI Act 2002.[39]

40. Only if the title deeds are original then only it creates security interest and only then security interest can be enforced under SARFAESI Act 2002 and not otherwise.[40]

41. During pendency of the One Time Settlement proposal, it is not open to the bank to take steps under the provisions of SARFAESI Act 2002. It is only after OTS Scheme proposal is rejected or after noncompliance by the borrower even after acceptance of proposal that the bank can proceed under SARFAESI Act 2002. If contrary is permitted it would be like wielding sword & stick at the same time.[41]

42. Proceeding against collateral security when principal security of the borrower is itself sufficient is arbitrary on the part of Banks and financial institutions because power to do an act is one thing and justification to do the same is another. While implementing the provisions of SARFAESI Act 2002 for speedy recovery, it is also to be ensured that no unnecessary hardship, harassment or distress is caused to the borrower in the recovery process. The power with which bank officers are clothed have to be exercised with due application of mind instead of in a mechanical and arbitrary manner. Fairplay has to be the mainstay of the proceedings against the secured assets for the realization of the dues of the bank.[42]

43. When authorized officer has accepted the highest bid, the secured creditor generally can not go back and deny confirmation of sale. However there may be several circumstances when after verification it may be found that there are certain defects which may result in some further litigations and therefore may not confirm sale. However if the highest bidder is willing to take property with defects-Banks and Financial institutions must confirm sale.[43]

44. It is not open to the bank to accept the amount from the borrower after the date of sale and return the amount to auction purchaser.[44]

45. Bank cannot ask the employer of the borrower to make recoveries from out of salary of the borrower and pay it to Bank.[45]

46. Services of Enforcement Agents and Recovery Agents come within the purview of profession and the said persons cannot charge exorbitantly for their services. Grant of exorbitant amount of commission to the recovery agents and enforcement agents at a minimum rate of 10% is excessive and disproportionate to the nature of the work to be performed by them. The Court has expressed hope and trust that the bank would focus its attention on payment of fees to the agents and take appropriate measures for remedying the situation, if necessary in consultation with the RBI. [46]

47. Since ownership of secured asset is with the borrower, unless other person stakes claim for the surplus the borrower is entitled to the surplus therefore the secured creditor to hold the surplus amount in trust. [47]

[37]Wasan Shoes v. Chairperson DRAT IV (2009) BC 344 (All)

[38]Abdul Nawas v. Dhanalakshmi Bank Limited II (2009) BC 160

[39]Shokalingam Kappuswami Mudaliyar v. Indian Bank II (2008) BC 637

[40]Syndicate Bank v. Estate Officer & Manager APITC Limited (2007) 8SCC 361

[41]M/s Shyam Ice & Cold Storage (P) v. M/s Syndicate Bank & Another III(2012) BC 573 (DB)(Andhra)

[42]UCO Bank v. Achal Bansal II 2009 BC 63 (DRAT-Delhi)

[43]Shabbir Ahmed Khan v. Central Bank of India IV (2008) BC 155

[44]Gourav Enterprises v. SBI II (2012) BC 377 (MP)

[45]Ambika B. v. State Bank of India AIR 2013 Kerala 38

[46]Badugu Vijaya Laxmi v. State Bank Of India 2010-LAP-0-169

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The amount should be appropriated as under-

1. Costs & expenses of auction.
2. In discharge of dues of secured creditors.
3. Surplus to the entitled persons.

48. Right to redemption is a statutory right available to borrowers till transfer or sale of mortgaged property is completed. Therefore till completion of conveyance if bank accepts part payment, right to redemption is still on.[48]

49. Unless and until claims of workmen are adjudicated in accordance with section 529 and 529A, secured creditors claims can not be paid.[49]

3. Safeguards related to SECTION 14 :

50. Secured Creditor while enforcing security interest under 13 (4) to take only symbolic possession so that application under section 17 to DRT does not become illusory or meaningless.[50]

51. Borrower or any other person cannot be physically dispossessed at the time of issuing notice under section 13 (4) so as to defeat the adjudication of his representation under section 17 by DRT and only symbolic possession can be taken. Physical possession can be taken by following procedure under section 14 after confirmation of sale.[51]

52. Secured Creditor cannot take possession of mortgaged property given on lease unless lease is terminated or lease period has expired. (2014) 125 SCL378.[52]

53. Tenant's statutory rights under Rent Control Acts cannot be bulldozed by SARFAESI Act 2002.[53]

54. If secured asset is in possession of bonafide lessee or tenant, he can not be thrown out by invoking section 13 & 14. Secured creditor in such cases can only take symbolic possession of premises from bonafide tenant or lessee.[54]

55. SARFAESI Act 2002 does not confer any rights on the secured creditors to trench upon the rights of the tenants inducted by the borrower before creation of security interest.[55]

56. In nonmetropolitan area, for the purpose of section 14, reference to magistrate means Chief Judicial Magistrate.[56]

57. In all cases assistance of magistrate need not be taken under section 14. Assistance should be taken only if there is resistance while taking possession.[57]

4. Safeguards related to SECTION 17 :

58. If Bank resorts to action under section 14 for taking possession without complying with procedural requirement of section 13 (2) to (4) ,borrower can challenge such action in writ petition particularly because of finality conferred by virtue section 14(3) and because no civil court has jurisdiction by virtue of section 34 to entertain any suit questioning order of district magistrate passed under section 14.[58]

59. Debt Recovery Tribunal under section 17 may declare any action by secured creditors under 13(4) as invalid and also may restore possession if action is illegal.[59]

60. Bank has no lien on predeposit made under section 18 in terms of section 171 of Indian Contract Act 1872.[60]

61. It cannot be said that if possession is taken before confirmation of sale the rights of borrower to get back the possession are defeated because 13 (4) read with 17 (3) shows that if borrower is dispossessed not in accordance with provisions of the Act-DRT is entitled to put the clock back by restoring possession status quo ante.[61]

[47]Gaurangbhai Bipinbhai Pandya v. Bank of Baroda AIR 2008 Guj 241

[48]Mr.Manoj D.Kapasi and another v. The union of India and others (2005)125 Comp.Cas.676

[49]IFCI Ltd. v. AP Scooters Limited (2008) 84 SCL128 (AP)

[50]Arun Kumar Arora v. Union of India and others (2007) 74 SCL 237 (P&H HC DB)

[51]Kalyani Sales v. Union of India (2006) 70 SCL 177 (P&H HC DB)

[52]Harshad Govardhan Sondagar vs International Assets Reconstruction Company limited (2014)125 SCL 378

[53]Vishal N.Kalsaria v. Bank of India & others (2016) 3 SCC 762

[54]Hutchisson Essar South Limited v. Union Bank of India AIR 2008 Kar 14

[55]Pushpangadan v. Federaal Bank Limited II (2012) BC 115 (Ker)

[56]Solaris System Pvt.Limited v. Oriental Bank of Commerce (2006) 72 SCL 168 (Ker HC)

[57]Aboobacker v. Punjab National Bank (2005)64SCL42(Ker HC)

[58]Kumar v. The Authorised Officer Standard Chartered Bank (2010)159 Comp.Cas.515(Mad.)

[59]Authorised Officer,Indian Oversears Bank v. M/S Ashok Saw Mill (2009)8SCC366

[60]Axis Bank v. SBS Organics Pvt.Ltd.(2016)135SCL415

[61]M/s Transcore v. Union of India and another AIR 2007 SC 712.

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62. Debt Recovery Tribunal is required to decide whether action of banks and financial institutions under section 13(4) is in accordance with the provisions of the Act and rules framed thereunder. [62] Borrower may raise grounds which render the action of the bank illegal like –

1. Adjustment of amount is not reflected in notice.
2. Calculation of interest is not according to agreement.
3. Action of bank is barred by limitation.
4. Action of bank is not in accordance with 13(4).

Therefore amended section 17 is not an empty formality and is therefore constitutionally valid.

5. Safeguards related to SECTION 18 :

63. 75 % Pre-deposit requirement under section 18 is unconstitutional and unreasonable.[63]

64. 50% Pre-deposit requirement under section 18 is constitutionally valid, however DRT may reduce it to 25%.[64]

6. Safeguards related to SECTION 34 :

65. Disputes as regards debt itself cannot be resolved under this law. Therefore the scheme of appeals under section 17 is apparently only for measures taken under section 13 (4).Therefore it is implied that if there are contentions about debt itself then remedies before civil courts would still lie.[65]

7. Safeguards related to SECTION 35 & 37 :

66. Contrary to Akola Oil case, Madras High court held that if proceedings under SARFAESI Act 2002 have not commenced but if winding up proceedings have commenced, secured creditors have to approach company court for realization of proceeds of secured assets.[66]

67. Application of other laws is not barred when its provisions are not inconsistent with SARFAESI Act 2002.[67]

68. Once winding up is ordered, official liquidator can not be kept out of recovery process and distribution of proceeds of sale can be only with the concurrence of official liquidator.[68]

8. Conclusion :

Hon'ble Supreme Court in Mardia Chemicals vs Union of India while judicially scrutinizing the legal vires on the touchstone of Constitution has rightly concluded that a law empowering the Secured Creditors was needed so badly and also remarked that the plea of Natural Justice Principles does not suit the Chronic defaulters. The decision in Mardia Chemicals case while acknowledging the necessity of effective security interest law at par with international standards has at the same time struck down Section 17 (2) of SARFAESI Act 2002 which was unreasonable and harsh for the borrowers. It is crystal clear from the following observations of Supreme Court in Mardia Chemicals case that the judicial approach in interpreting the provisions of SARFAESI Act 2002 has not been absolutely Pro-Creditor but it is of striking balance between Private and Public Interest-

1. Though the transaction may have a character of a private contract yet the question of great importance behind such transaction as a whole having far reaching effect on the economy of the country cannot be ignored,

2. Wherever public interest to a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest.

3. The interest of individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact in the socio-economic drive of the country.

[62] Misons Leather Ltd. v. Canara Bank (2007) 139 Cop.Cas.302 (Mad.) AIR 2004 SC 2371

[63] Creative Home Fashions Limited v. Union of India & Others (2011)106SCL343

[64] M/s Transcore v. Union of India and another (2008)1SCC125

[65] Asset Reconstruction v. Official Liquidator (2006) 72 SCL 18 (Mad HC DB)

[66] Mathew Varghese v. M.Amritha Kumar (2014) 5 SCC 610

[67] Rajasthan Financial Corporation & Another vs The Official Liquidator & another (2005)8SCC190

[68] AIR 2004 SC 2371

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4. Even if a few borrowers are affected here and there, that would not impinge upon the validity of the Act which otherwise serves the larger interest.

5. In the present day of global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, it cannot be said that a step taken to evolve means for faster recovery of the NPA's was not called for.

It is clear from these judicial pronouncements that Debt Recovery Tribunals, Debt Recovery Appellate Tribunals, High Court and Supreme Court have interpreted the provisions of SARFAESI Act 2002 and relevant rules framed under it- consistent with the object of legally empowering the Secured Creditors in terms of enforcement of security interest. While the Creditors Protection Regime is strengthened by this judicial approach, it has not been an "Absolute Pro-Creditor " approach but borrowers legal rights guaranteed under law and equity are also protected.

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