

## Section 17 of SARFESI: Is it effective for the borrowers?

### Introduction

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“**Act**”) provides a structured platform to the banking sector for its humongous non-performing assets. As per the Act, banks follow a procedure to determine the outstanding amount payable by the borrower and take steps required in accordance with the Act in realizing their due. For this, the bank issues a demand notice under section 13 (2) of the Act and then entertains the objections from the borrowers within the prescribed time. Thereupon, the bank takes symbolic possession of the property under section 13 (4), following which it takes physical possession and conducts auction of the same in accordance with the provisions of the Act. Against this action of the bank, the relief for the borrowers is provided under section 17 of the Act where they have a right to appeal to the Debt Recovery Tribunal (“**DRT**”) and then the appeal lies before the Debt Recovery Appellate Tribunal (“**DRAT**”). Even though the procedures are well settled that the remedy lies before the DRT still the borrowers approach the High Court (“**HC**”) under Article 226 of the Constitution of India for a quick relief.

In this bulletin we will examine the right to appeal available to the borrowers under section 17 of the Act. Further, we will analyze some judgments of Supreme Court (“**SC**”) and HC to understand when the borrowers can directly approach courts bypassing the option of approaching the DRT and/or DRAT and whether such a strategy works well for them.

#### 1. Rights of borrowers for appeal under section 17 of the Act

Section 17 of the Act provides the remedy of appeal for the borrowers against the actions taken by the bank. Any aggrieved person i.e. the borrowers can file an application under section 17 before DRT against the measures taken by the bank within 45 days from the date of the section 13 (2) notice issued by the bank. But when the borrowers face a possession notice they tend to file a writ petition before the HC to obtain an injunction on the said notice for a quicker breathing time which may not be available before DRT/DRAT. However, HCs entertain such petitions on exceptional cases only. Such exceptional cases include instances when banks have not followed the procedures under the Act for taking possession of the mortgaged property or if the banks have accepted one-time settlement from the borrower which was agreed to be paid in a specified time and if the bank in the mean time files an application before the DRT. Under these situations there is always an option for the borrower to approach the HC as it is clearly against the principles of natural justice. It is a well settled legal proposition that a writ petition under Article 226 of Constitution of India is not maintainable where there is an efficacious alternative remedy. Nowadays in respect of SARFAESI matters banks are very cautious in defending writ petitions challenging the bank’s action under the provisions of the Act.

When the borrower approaches the DRT for relief as provided in the Act and subsequently approaches the HC on the ground that the remedy is really not efficacious, then, HC may give directions to the DRT or DRAT to dispose off the matter within a specific period of time. The important issue which the borrower should be in a position to prove and satisfy the HC is that the conduct of the bank or its officials is bad in law and are against the principles of natural justice when proceeding against the borrower under the provisions of the Act.

## 2. Practical issues faced by the borrower

Even though if the borrower is before the right forum, the DRT and DRAT will always direct the borrowers to pay a substantial amount of the outstanding loan with the bank. It is usually a conditional order to be complied within a specified period. So the borrower tries to settle the issue by offering one-time settlement. Some issues which the borrowers face while approaching Hon'ble HC directly are:

(a) The borrower can simultaneous to a pending proceeding before the DRT or DRAT try to negotiate with the bank for a settlement. This may create confusion and cause delay in filing appeal against the bank.

(b) The borrower has a right to object to the demand or the notice issued by the bank under section 13 (2) of the Act. But, the borrower may choose not to raise any objection considering the settlement talks with the bank for the outstanding amount.

(c) The law prescribes a time limit for filing an appeal pursuant to the notice issued by the bank under section 13 (4) of the Act. However, in view of the continuous talks, assurances from the bank or the manager concerned, the borrower may not choose to exercise his right of appeal.

(d) It is in most of the cases that the DRT insists for “substantial deposit” of the outstanding amount while granting a temporary stay of bank’s proceedings. In many cases, this temporary relief ends even without looking at the allegations in the appeal seriously.

In effect, there are two basic problems here that are apparent. First, borrowers are made to pay a substantial amount of the outstanding loan to the bank during the pendency of the matter before the DRT/DRAT, secondly, courts can provide immediate injunctive relief which DRT/DRAT cannot do so. Even DRT has the power of granting injunctive relief but it is not immediate.

## 3. Courts issuing guidelines

In *Union Bank of India vs Satyawati Tondon*<sup>1</sup> injunction was granted by HC when the bank had followed the procedures for taking possession under section 13(4) of the Act against the borrower’s property for the outstanding amount payable by the borrower. In this matter the borrower approached the HC directly and obtained an interim order without

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<sup>1</sup> (2010) 8 SCC 110

raising the objections before the appropriate forum. SC took this matter seriously and directed that the HCs should take utmost care before entertaining the borrowers who skip the statutory remedies. The SC laid down the following guidelines which HC should consider before giving any interim remedy to the borrowers:

- (a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;
- (b) the petition reveals all material facts;
- (c) the petitioner has any alternative or effective remedy for the resolution of the dispute;
- (d) person invoking the jurisdiction is guilty of unexplained delay and laches;
- (e) ex facie barred by any laws of limitation;
- (f) grant of relief is against public policy or barred by any valid law; and host of other factors.

The SC in this matter rightly observed that “When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation.”

In *Hemabushan vs ICICI Bank*<sup>2</sup> and *Kaniyalal Chand Sachdev and State of Maharashtra*<sup>3</sup> where the borrowers approached the Hon’ble HC for interim stay against the order of Chief Judicial Magistrate without approaching the appropriate forum. Hon’ble Judges while dismissing the case of the petitioner explained the scope of section 14 of the Act by citing the landmark judgment in *Trade Well vs Indian Bank* where it was clearly stated held:

*“Remedy provided under Section 17 of the NPA Act is available to the borrower as well as the third party. Remedy provided under Section 17 is an efficacious alternative remedy available to the third party as well as to the borrower where all grievances can be raised. In view of the fact that efficacious alternative remedy is available to the borrower as well as to the third party, ordinarily, writ petition under Articles 226 and 227 of the Constitution of India should not be entertained. In exceptional cases of gravest injustice, a writ petition could be entertained by this Court. Great care and caution must be exercised while entertaining a writ petition because in a given case it may result in frustrating the object of the NPA Act. Even if a writ petition is entertained, as far as possible, the parties should be relegated to the remedy provided under Section 17 of the NPA Act before the DRT by passing an interim order which will protect the secured assets. Adjudication and final order should be left to the DRT as far as possible”*

There are numerous judgments in support of the bank against the borrowers approaching the writ jurisdiction for temporary relief for the action taken against them by the bank under the Act. The ratio decidendi behind all the judgments is “When statutory remedies are available under Act itself for violation of provision of Act, Article 226 of Constitution of India cannot be invoked.”

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<sup>2</sup> 2010-5-LW567

<sup>3</sup> 2011(2)ACR1507(SC)

## Conclusion

It is apparent that the Act is mainly created for the banks for the speedy recovery of the money. Borrowers should know their rights clearly if the bank is intending to take action against them under the provisions of the Act. It is needless to say that it is pertinent to file applications or petitions in the right forum. It is well settled that HC only entertains a writ petition if there are procedural irregularities against the borrower or it is against the principles of natural justice. Even the proposed amendments to the Act for the speedy recovery of the bad loans and to reduce non-performing assets, poses a real threat to the borrowers in approaching writ jurisdiction. Borrower cannot explain the HC regarding the delay in approaching the right forum after a third party interest has been created over the mortgaged property. Therefore, the borrowers must be very careful in approaching HC for relief against the action taken by the bank under the Act, as it will prove to be costly if the borrower's intention is mala fide in nature.

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