NON PERFORMING ASSETS - LEGAL REMEDIES

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BACKGROUND

The focus of my paper is going to be on the remedies of non performing assets, particularly, the legal remedies. Any account is deemed to have gone in NPA if, it goes in default in payment of principal or interest for a period of 180 days, which period will be reduced to 90 days from April, 2004. The Banks can demand the entire amount in case any account goes into NPA.

We all know that, eventually all non performing assets have a very great possibility of coming into the Court system. It is after the bankers come to a conclusion that no amicable and accommodative solution to NPA borrower is possible that they send the matter to their lawyers. The focus of my paper is going to be on the present legal remedies available for recovery of bank's NPA dues. For this purpose, the paper is concentrating on the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993

Before coming into force of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 the suits of the banks were always filed in Regular Civil Courts. The statistics showed that on 30th September, 1990, more than 15 lakh of cases filed by Public Sector Banks and about 304 cases filed by Financial Institutions were pending in various Courts. Recovery of debts involved more than Rs.5622 Crores in dues of Public Sector Banks and about Rs.391/- Crores of dues

of the Financial Institutions. The locking up of such a huge amount of public money in litigation, prevented proper utilization and recycling of the funds for the development of the country.

The Banks suits in the Civil Courts were treated like any other litigation and hence did not get any priority. Furthermore, application of the entire Civil Procedure Code made the trials lengthy and time consuming. The requirements of proving documents by leading oral evidence was cumbersome as many of the Officers of the Banks who had actually made the documents at the time of disbursal of loan had got transferred, retired or even some times were found to be dead by the time suits came up for hearing.

The Central Government, therefore, enacted the Recovery of Debts to Banks and Financial Institutions Act, 1993. The Act has further been amended in the year 2000.

SALIENT FEATURES OF RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993

1. The preamble to the Acts states that it is an Act to provide for the establishment of Tribunal for **expeditious adjudication and recovery of debts** due to Banks and Financial Institutions.

2. The Act applies only when the amount of debt due to any Bank or Financial Institutions or to Consortium of Banks is more than Rs.10/- Lacs.

3. The word **"Debt"** under the Act means any liability (inclusive of interest) which is claimed as due by Bank during the course of any business activity undertaken by the Bank.

4. Under the Act a person who is or has been or is eligible to be a District Judge is appointed as a Presiding Officer of the Debt Recovery Tribunal. For the region covering the Districts of Kolhapur, Sangli, Solapur and Pune, the Presiding Officer seats at Pune. The term of such a Presiding Officer is fixed for a period of 5 years or until he attains the age of 62 years whichever is earlier.

5. Under the Act, apart from the Debt Recovery Tribunal, a Debt Recovery Appellate Tribunal is also constituted for appeals from the Debt Recovery Tribunal. For our region the said Appellate Tribunal seats at Bombay. The Appellate Tribunal consists of one person who again is or has been qualified to be a judge of the High Court.

6. Under the Act, a Bank which has to recover any debt from any person is required to make an application to the Tribunal under Section 19. On the receipt of the application, the Tribunal issues a notice to the Defendant of 30 days to give his written statement. The Defendant is allowed to make or counter claim in the same proceeding.

7. The Tribunal is empowered to make interim orders of injunction, stay, attachment against Defendant to bar him from transferring, alienating or otherwise dealing with or disposing of any property and assets belonging to him without prior permission of the Tribunal.

8. It is expected that the Tribunal shall dispose of every matter finally within 180 days from the date of receipt of the Application.

9. As far as the appeals to the Appellate Tribunal are concerned, the same has to be filed within a period of 45 days from the date of order of the Tribunal.

10. It is very important to note that where an appeal is preferred by any person, the same is not to be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal 75% of the amount of Debt

so due from him as determined by the Tribunal under Section 19. However, for reasons which may be thought to be sufficient by the Tribunal, this deposit can be waived or reduced.

11. The Tribunal and the Appellate Tribunal are given same powers as are given to the Civil Court under the Code of Civil Procedure, 1908. However, they are not bound by the lengthy procedure prescribed under the Code of Civil Procedure but are to be guided by the principles of natural justice. They have powers to regulate their own procedure. The essence of the matter therefore is that both the sides must be given due opportunity.

12. The Act has created the office of the Recovery Officer with powers of different types of attachment and sale of properties. An appeal from the order of the Recovery Officer is provided to the Presiding Officer of the Tribunal.

13. The rules framed under the Act provide for review of the orders of the Tribunal in case it is found that the orders are passed due to some mistakes apparent on the face of the record.

14. Under the rules, the Tribunal can accept proof of any fact by way of affidavit.

CRITICAL ANALYSIS OF THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993

1 After having seen the implementation of the Act up till now, it is general experience that the object of the Act of expeditious adjudication is fulfilled to a large extent mainly due to the fact that the Tribunals under the Act have been accepting evidence by way of Affidavits and avoiding Examination in Chief and Cross Examination of the witnesses except under very special circumstances. It is our experience as I have mentioned before in this paper that the major time which is taken for disposal of Civil Suits is taken in trial

which consists of Examination in Chief and Cross Examination of the witnesses.

2. Again since the Tribunals are specially appointed and empowered to administer only these types of bank's and financial institution's legal proceeding, the Presiding Officer gets a good grip of the banking operations and also the law relating to banking which in turns enables him to dispose off the cases in a very expeditious manner.

3. There also seems to be, therefore, a development of specialized branch of law, lawyers, law officers of various banks who are specializing in this work of the debt recovery tribunals.

4. All in all I see that at least the first object of the Act of expeditious adjudication has been fulfilled to a great extent. Debts recovered were Rs.1864.30 Crores up to 30.09.2001. DRTs now cover almost all important States in India.

5. However, the second object of the act of recovery having been started at least in this region only from last 5 years, its effectiveness needs to be still established. Moreover, recovery would need creation of proper infrastructure.

THE SECURITIES & RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002

As per the present law, Banks and Financial Institutions have to enforce their security through Court. This is a very slow and time consuming process and also full with legal hurdles. Many a times, by the time Banks are able to get possession of the assets, the assets either do not exist or have become valueless. This Act is therefore based on Narsimhan Committee 1 & 2 and Andhyarjuniya Committee Reports. The working group under the Chairmanship of Shri. M.R. Umarji,

Executive Director, RBI, prepared a draft bill and submitted it to the Central Government.

SALIENT FEATURES OF THE SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002

Securitizing and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has come into force from 17th December, 2002. Chapter III of the Act provides for enforcement of security interest as under :-

1. Notwithstanding anything contained in Section 69 or 69A of the Transfer of Property Act, 1882, the secured interest created in favour of any secured creditor may be enforced under the Act without intervention of the Court or Tribunal by such creditor in accordance with the provisions of this Act. The term Security Interest has been defined in the Act so as to mean, right, title and interest of any kind whatsoever upon property created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31 of the Act.

2. Where any borrower who is under a liability to a secured creditor under a Security Agreement makes any default in repayment of secured debt or any installment thereof, and the account in respect of such debt is classified by security creditor has NPA, then the Secured Creditor may require the borrower by a notice in writing to discharge in full his liability to the secured creditor within 60 days from the date of notice, failing which, the secured creditor shall be entitled to exercise all or any of the following rights :-

a) Take possession of the secured assets of the borrower including the right to transfer by way of lease, assessment or sale for realizing the secured assets.

b) Take over the management of the secured asset of the borrower including of right to transfer by way of lease, assessment or sale and realize the secured assets.

c) Appoint any person to manage the secured assets, the possession of which has been taken over by the secured creditor.

d) Require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom the money is due and may become due to the borrower to pay the secured creditor so much of the money as is sufficient to pay the secured debt.

3. Under the Act, the Banks are allowed to take help of the Chief Metropolitan Magistrate or District Magistrate in taking possession of the secured assets and the documents relating thereof.

4. When the management of business of a borrower is taken over by the secured creditor, the secured creditor may by publishing a notice in a newspaper, appoint as many persons as he thins fit.

a) In a case in which the borrower is a Company as defined in the Companies Act, 1956, to be the Directors of the borrower in accordance with the provisions of this Act.

b) In any other case, to be the administrator of the business of the borrower.

5) Any person aggrieved by any of the measures referred above, may prefer an appeal to the Debts Recovery Tribunal within 45 days from the date on which such measures have been taken. Where an appeal is preferred by borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal 75% of the amount claimed in the notice referred above. However, the Debts Recovery Tribunal may for any reasons to be recorded in written, waive or reduce the amount to be deposited under this Section. Any person aggrieved by any order made by Debt Recovery Tribunal, may prefer an appeal to the Appellate Tribunal within 30 days from the date of receipt of the order of the Debt Recovery Tribunal.

6. The Act further ousts jurisdiction at Civil Court in respect of any matter which is to be tried by the Debt Recovery Tribunal or the Appellate Tribunal.

7. The provisions of this Act are made to be having overriding effect notwithstanding anything inconsistent therewith in any other law for the time being in force or any instrument having effect by virtue of any such law.

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

1. The Securitisation Act has been enacted so as to tackle the growing NPAs in this country. The effect of the Act up till now has been encouraging as in most of the cases where notice for attachment and seizure of property has been sent under this Act, the parties are observed to have come for compromise with the Banks. The Act has created a new regime between the debtors and creditors. It is probably an outcome of what was thought by many as the position that many industries in the country took the financial sector for a ride up till now.

2. At the same time, however, care should also be taken to see to it that due to Acts of this nature which are termed by some as financial Pota, entrepreneurship in the country should not suffer. The Act is also termed by some as, 'Shoot first - Act later'. The legislations up till now were debtor centric but now are turned to creditor centric.

3. The Banks also have to learn to answer the usual criticism against them which is "When you do not need the funds, the Banks have a lot of them and when you need them, they have none".

4. Some critics have also pointed out that such an Act is an over reaction and the NPA norms do not take into account the agro based industries, oil industries, sugar industries which have seasonal product. The distinction is also be made between willful V/s. bonafide defaulters. An Exit policy should be adopted for bonafide borrowers who due to reasons beyond their control have gone into default. As against that a strict policy and application of the Act needs to be stringently applied to willful defaulters who many a time are found to be siphoning and misappropriating the funds of the Bank.

5. It must be borne in mind that one of the causes of NPAs is also non prudent lending of money.

A LANDMARK JUDGEMENT OF SUPREME COURT

Central Bank of India V/s. Ravindra & Others (AIR 2001 SC 3095)

In the oft quoted judgement of Central Bank of India Vs. Ravindra & Others reported in AIR 2001 SC 3095, the Supreme Court has laid down the following landmark principles.

a) Subject to a binding stipulation contained in a contract or an established practice or usage, interest on loans and advances are allowed to be charged on periodical rests and also capitalized on remaining unpaid. The principal sum actually advanced coupled with interest on periodical rests so capitalized is capable of being adjudged as principal sum on the date of the suit.

b) The principal sum so adjudged is "such principal sum" within the meaning of Section 34 of CPC on which interest pending litigation and future interest i.e. post decree interest at such rate and on such period which the Court may deem fit can be awarded by the Court.

It is further made clear in this ruling by the Supreme Court that the Bank cannot take advantage of deliberately filing the belated suit and continuing to charge interest and capitalizing the same. The effect of this judgement is therefore that the Banks are able to get decrees as per their contractual terms of rests and interest up to the date of suits and even after the date of the suit till judgement and even after the date of the decree by way future interest. However, it is only the penal interest which Supreme Court has not allowed to be capitalized i.e. the Banks are not allowed to compound the penal interest.

CONCLUSION :

On the one hand therefore we see that due to the mounting non performing assets and the pressure from the Finance Ministry, new legal remedies have evolved enabling the banks to reduce their non performing assets. However, apart from the above positive aspects, I feel that the Banks and banking sector also need to imbibe a few guidelines.

a) It is our experience that banks many a times do not completely maintain their documents and duly fill them in at proper times. It is to be noted that since the Courts have allowed grant of special interest to banks, even at quarterly rests and which can go even beyond what is prescribed by Code of Civil Procedure of 12%, the Courts expect the Banks to be perfect with the documents on the basis of which such interest can be granted.

b) In spite of several resolutions, guidelines and directives from the RBI, the Banks still hesitate to go for one time settlement of its dues and some times tend to behave like a private litigant. Again there does not appear to be any uniformity or consistent policy amongst the Banks and complete transparency in the banks as to in which types of cases they are ready and willing to go for one time settlement. In other words, the Banks are many a times found to be lacking in proper identification of bonafide and willful defaulters as mentioned above. Lack of uniformity and transparency in application of one time settlement policies has therefore resulted in discrimination by the banks in choosing the borrowers for one time settlement.

c) Some Banks also have a tendency of completely detaching themselves from a particular account once the same is handed over to the lawyers and Courts. It is the duty of the banks to see to it that even when the account is given to the lawyers for filing the suit for legal proceeding, the same should be pursued very vigorously with the help of lawyers till the end. If the Banks loose interest in their accounts and just leave the same to the lawyers, the result will not be expeditious and healthy.

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