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SARFAESI IS APPLICABLE ONLY IF LOAN IS NPA "BANKS MISUSE SARFAESI ACT" "THE RULES DO NOT GIVE LENDERS A COMPLETE WALKOVER"



By : M.S.Yatnatti Editor and Video Journalist Bengaluru : The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act 2002 is a powerful instrument in the hands of the banks and financial institutions (FIs) as secured creditors. This Act helps them enforce securities held as collateral to loans disbursed by them should such loans turn out as non-performing assets (NPAs) during the currency of the loan without interference from the Courts. Section 13 of the Act gives power to the secured creditor even to evict the tenant. It is our observation that the banks have been overenthusiastic in taking recourse to SARFAESI Act provisions as a first resort of recovering the micro, small and medium enterprises (MSME) loans, mostly violating guidelines of Reserve Bank of India (RBI).

Finance is the backbone of business. No trade or industry can run without adequate finance. The internal resources of a business organisation are often insufficient for meeting all its needs. It is also not always possible for the owners, promoters or the entrepreneurs to mobilize finance from their own resources. Therefore promoters raise capital through borrowings, keeping in view the short term, medium term or long term requirements of the trade or industry. Every industrial project requires finance in the form of risk capital, long term, medium term and short term or working capital and/or machinery on hire purchase/lease basis. All these types of financial assistance are provided by various institutional agencies, commercial banks, co-operative banks, Regional Rural Banks, State Financial Corporations and International Financial Institutions and Syndicated Loan Market and NSIC etc.,. A great emphasis has been placed by the government to ensure that all viable projects are provided adequate finance (Capital) for a sustained growth of trade and industry. The borrowed funds have enabled many promoters to realise their dreams and to bring their project to an actual shape. Timely availability of Institutional and bank finance at reasonable rates is essential for successful implementation of any commercial project. This requires thorough and upto date knowledge of lending schemes of various financial institutions like IDBI, IFCI, ICICI, IRBI, SCICI, Exim Bank, Commercial Banks, RCTC, SIDBI, UTI, LIC, SFCs etc., particularly with reference to the preparation of project report, appraisal by the lending institutions, assessment of financial requirements as per RBI norms, terms and conditions on which finance is available, procedure for filing application for finance, execution of documents and charging of securities. Besides the financing has to be done as per the RBI Credit Policy & Instructions contained in its various Circulars & Committee Recommendations. Special RBI instructions have also been issued on bank finance, for Leasing & Hire purchase Concerns, Diamond Exporters, Consortium Advances, Housing Finance, Priority Sector Advances, Export Credit, Commercial papers etc.

According to experts a default does not strip you of your rights or make you a criminal. Banks have to follow process and give you time to repay dues before repossessing your assets to realise the arrears. Typically, banks initiate such proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests (SARFAESI) Act. If the borrower's account is classified as a non-performing asset (NPA), where repayment is overdue by 90 days, the lender has to first issue a 60-day notice to the defaulter. "If the borrower fails to repay within the notice period, the bank can go ahead with sale of assets. However, in order to sell, the bank has to serve another 30-day public notice mentioning details of the sale," says banking and management expert. Do not write off your asset mentally the moment it is repossessed. Keep track of the auction process—it's easier to do so now as most lenders conduct e-auctions. Lenders are required to refund any balance after recovering the dues, which is a real possibility given that property prices can shoot up beyond the owed amount. "After recovering the dues and all expenses of conducting the auction, the bank has to refund the amount to the borrower as the money belongs to him legitimately," says financial experts. During the notice period, you can make your representation to the authorised officer and put forth your objections to the repossession notice. "The officer has to reply within seven days, giving valid reasons if he rejects the representation and objections raised by the borrower," says financial experts. Do not forget that banks are regulated entities that cannot behave like moneylenders while trying to collect dues. Following adverse reports about the conduct of recovery agents, the RBI had pulled up banks over the issue a few years ago. Banks too decided to voluntarily commit to certain best practices as part of their code of commitment to customers. For one, agents can contact borrowers at a place chosen by the latter. In case they have not specified a place, the agents can visit either the borrower's residence or place of work. They are required to respect borrowers' privacy during these visits and ensure civil and decent behaviour. They also cannot land up at unearthly hours. The window available is 7 am to 7 pm, unless the borrower's working hours necessitate different timings. Agents cannot resort to harassment or intimidation and nor can they humiliate the borrowers or their family members. The SARFAESI act gives the customer the right to appeal against the action of repossession taken by the bank in the Debt Recovery Tribunal u/s 17 within 45 days from the date when the action was taken. If the DRT passes an order against the borrower, then an appeal can be filed before the Appellate Tribunal within 30 days of receiving it. If it is held in the appeal that the possession of the asset taken by the secured creditor was wrongful, the Tribunal or the Appellate Tribunal may direct its return to the borrower, along with appropriate compensation and cost.

Financial experts suggest that the various options that can be worked out by borrowers include: Rescheduling your debt: After having analyzed your financial position, if the bank feels that the quantum of the EMI is what is troubling you, they may be willing to reschedule your debt by extending the loan tenure. That will bring down the monthly EMI commitment, though it will mean more interest outgo in the long-term. However, you should consider the immediate relief it can bring to your current situation. When the tide turns and you are facing better times you can try negotiating with your bank and revert to your old or higher EMI or even prepay your loan. Closing your loan early can help to save excessive interest outgo as long as the bank doesn't levy a heavy prepayment penalty. Deferring the payment: If your financial situation is such that there is likely to be a jump in cash flow going forward because of a change in job or any other reason, you may seek temporary relief from the bank for a few months. The bank may permit the same but may charge a penalty for not paying within the time frame agreed upon earlier. One-time settlement: If you express your desire to pay back and notify the bank about your current financial condition, banks may be willing to give you the option of a one-time settlement. Please note that this will be done on a case-to-case basis. This is a good way to get rid of your loan if you have some money. Usually the settlement amount lower than the original amount you would have had to pay. i.e. the bank may waive off some amount or charges. If your financial situation is really bad, then you may need to file for bankruptcy to free yourself from the loan commitment. Conversion of the loan in case of [unsecured loans](#): Banks tend to be stricter as far as [unsecured loans](#) are concerned. The borrower could opt for converting the unsecured loan to a [secured one](#) by offering a security. This will bring down the rate of interest and thus the EMI burden. Loan default can have serious consequences. Not only could it result in the seizure and auction of your assets, but [your Credit Score too, will go for a toss](#). Even rescheduling debt tarnishes your credit history to an extent and will reflect in your credit report. Obtaining a loan in the future will become an issue which is a huge financial setback. Make sure you take a loan only if you're sure you will be able to make timely repayments. A good way to do this is to ascertain your personal net worth in terms of assets you own and the money you have at your disposal after taking stock of your existing debts and other financial commitments. Also, if you ever default a loan payment, do not panic and remember to exercise the above mentioned rights.

According to financial experts Banks are registered organizations and can't act like independent money lenders when it comes to a loan default. In the past there have been reports of harassment and mistreatment of loan defaulters by collection agents but now banks have decided to follow a code of conduct that is polite and respectful. A collection officer has to politely request to meet you and the place and time of the meeting can be as per your convenience. If you don't respond to the request, the collection officer may meet you at your home or work place. Also, the agent can meet you only between 7 AM and 7 PM and can't harass you late at night or in the wee hours of morning. The collection agents are supposed to treat the defaulters in a respectful manner without resorting to abusive language and mistreatment. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act 2002 is a powerful instrument in the hands of the banks and financial institutions (FIs) as secured creditors. This Act helps them enforce securities held as collateral to loans disbursed by them should such loans turn out as non-performing assets (NPAs) during the currency of the loan without interference from the Courts. Section 13 of the Act gives power to the secured creditor even to evict the tenant. It is our observation that the banks have been overenthusiastic in taking recourse to SARFAESI Act provisions as a first resort of recovering the micro, small and medium enterprises (MSME) loans, mostly violating guidelines of Reserve Bank of India (RBI). The entire process under the Act involves several factors of fairness and technicalities. During our interactions with the borrowers and banks in the State Level Inter-institutional Sub-committee (SLIIC), we have noticed the banks jumping into coercive actions throwing overboard the due processes. It is surprising that tech-savvy systems of banks have not put in the measured timelines before pressing the red button to put the credit traffic of the MSMEs on halt.

RBI's timelines are as follows: If the account does not reflect credits into the account, 90 days preceding the date of balance sheet of the firm. Temporary deficiencies like late/ non-submission of stock statements or balance outstanding exceeding the drawing power, non-renewal of limits should not get categorised as NPA. If the borrower does not pay three installments continuously after 90 days but up to 12 months the account becomes sub-standard and NPA. Section 13 (2) empowers the Bank/ FI to serve a notice to the borrower for taking possession of the assets held as security for the money lent by it. But there is precursor to this action: the Bank/FI shall serve notice to the borrower to discharge his full liabilities within 60 days from the date of notice that should also detail out the legal consequences and penal provisions. Going by these two directions under the Act, the borrower should be getting at least 17 months' time before the Bank could proceed against the defaulting MSMEs. If the borrower becomes a 'wilful defaulter' as defined by the RBI Master Circular on wilful defaulters vide RBI circular (RBI/2014-15/73 DBR.No.CID.BC.57/20.16.003/2014-15 dated July 1, 2015) SARFAESI Act proceeding can be issued even without notice to the borrower. Who is a wilful defaulter?; Deliberate non-payment of the dues despite adequate cash flow and good net worth; Siphoning off of funds to the detriment of the defaulting unit; Assets financed either not been purchased or been sold and proceeds have been misutilised; Misrepresentation / falsification of records; Disposal / removal of securities without bank's knowledge; Fraudulent transactions by the borrower.

Banks/ FIs throwing overboard these norms, classify all the MSME NPAs as wilful defaulters to apply the SARFAESI lever. As per the Act, valuation of the asset has to be done and notify that valuation to the borrower before issuing public notice for auction of property. Bank has to give 30 days' notice to the borrower regarding its right to proceed against the mortgaged property if he does not pay up the entire principal and interest. However, we have noticed that in most cases all the above timelines are followed more in breach with impunity by the banks. For example, a public sector bank (PSB) branch in Jammikunta proceeded with sale of property within 15 days of declaring the asset as NPA. They have also fixed a reserve price without consulting the impugned borrower or without taking into consideration any objections raised by the borrowers as required under section 13 (3) (A) and proceed for auction of the properties. This is the case with most collateralised MSME NPAs. On top of this, in Jammikunta, the bank has also engaged agents for enforcing coercive recovery measures.

In quite a few other cases, the banks sold off assets to asset restructuring companies (ARCs). Here the process is that the bank bundles a few NPAs and sells them off at a discount, which is not disclosed either to the borrower or to the SLIIC sub-committee. Although it may be in order for the bank to entertain request of the enterprise under one-time settlement (OTS) within the rules of the RBI, its preference is to transfer to ARC at a far lesser price than OTS would have got to the bank. What is ARC and how does this operate? All transactions of securitisation, reconstruction and creation of security interest shall be registered with a Central Registry maintained with the Union Government. Within 30 days of securitising the asset, details of securities have to be filed with the central registry by paying the required fees. RBI has issued guidelines in 2003 on the form of offer and details to be incorporated therein. The most usual form is the Security Receipt (SR) and an agreement with the originator to continue to service the assets of the securitisation. It can also take the form of a debenture at no less than 1.5% above the Bank Rate. The ARC should notify a separate scheme for each financial asset acquired or proposed to be acquired. Scheme-wise the account shall be maintained. Although Security Receipt is a tradable receipt among the investor institutions there is no such evidence thus far. Realisation of the asset is held and applied towards redemption of the investments as assured while issuing the security receipt. It acts like a trustee managing the assets and does not become the owner of the assets. ARC can sell or lease out the assets for realising the value of the assets. The recovered



amount of the discounted price of the asset will be shared between the Bank and ARC in 85:15. For example, if a loan of Rs100 lakh is sold for Rs60 lakh to the ARC and the ARC realises only Rs50 lakh on sale or the entire armoury at its command, the Bank will get Rs42.50 lakh for fully wiping out the account from its books. Once the asset is sold off, it ceases to be NPA in its books. If the intention of the Bank were to recover as much as possible from the stressed asset, it would be wise to explore OTS as first option within the RBI guidelines. We have noticed that in no more than 5% of cases that this option is exercised as the bonafides in OTS transaction is suspect. It would be prudent on the part of the RBI to ensure that the OTS option is exhausted before going for securitisation and sale of the asset. The other option is to seek the Banking Ombudsman's intervention as Arbitrator to settle the distressed asset closure in cases where either the borrower or the bank has reason to believe that a mutually agreed price of the loan would be a better option than proceeding against the asset under SAFRAESI Act. The above points were suggested by *K Manicka Raj (IAS), is Director of Industries, Government of Telangana and B Yerram Raju is Adviser, MSE Facilitation Council, Department of Industries, Government of Telangana.*

Companies that are unable to repay their dues often approach lenders for a recast of their loans. Banks have several options to restructure such loans, including the 5:25 scheme, where borrowers get an extended tenure for repayment; the strategic debt restructuring, where lenders take control of the company and bring in new management; and the S4A, where unsustainable debt is converted into equity. All these are attempts to save an account from becoming a nonperforming asset, a stigma both the lender and the borrower want to avoid. There is, however, one more ingenious way out—funded interest term loan or FITL. FITL means It is giving loan for repaying a loan. Here, a lender gives the borrower money to repay the interest component of the loan. banks give loan to a company to repay its dues. When a company faces a severe financial crisis, it is not in a position to meet its loan obligations. However, if the lender is convinced that the project is viable and the borrower did not divert the earlier loans, . it recasts the loan factoring in the inability of the promoters to repay even the interest component. In such a situation, the loan is restructured based on the cash flow wherein the bank provides additional loan to the borrower, which can be used to repay the interest component of the original loan. The benefit of taking an FITL loan when the borrower has to pay anyway as borrower gets a breather to repay the loan, while the bank may be able to save the account from turning into an NPA. Reserve Bank allow such loans as under the debt recast scheme, RBI allows banks to offer FITL to borrowers. The RBI norms say that FITL should be given the same asset classification as that of restructured loans. Further, the upgrade or downgrade of a restructured loan will be applicable to FITL as well. Often do banks give FITL to borrowers as FITL is usually a part of deep restructuring, which involves longer-than-usual repayment terms, lower interest rates and a moratorium on repayment. The unpaid interest component of an existing loan is usually carved out as FITL, on which the bank gives the borrower a moratorium. Any way if the borrower fails to repay FITL? In any a case, the lender would have no option but to classify the account as an NPA. Expansion and generation of capital for smaller but aggressive companies can be realised through use of world legal banking practices that legally circumvent the web of securities regulations. These regulations were initiated ostensibly to discourage fraud in securities and exchange transactions. One cannot at this point determine to what degree those lobbying for such legislation may have had the interests of the smaller businesses in mind. In any case, the result is a regulatory nightmare that would discourage even the most stout-hearted. The current system succeeds magnificently in keeping small business just that small. Fittest will forge ahead and the industry leaders who have capabilities beyond difficult times and are geared up with skills and options like e-powered empowerment and proved turn around strategies and they don't fear the risk and change ,they embrace it to take the world head on , can never be behind in the progress of the rare order .

Many of Managers of the many Corporatism have Failed in Getting FDI/ECB International Finance for your Dream Project or Ideas. Many Dream Projects or Ideas failed for want of finance just in time. Beware of Bogus Lenders!!! Or Vulture capitalists!!! Now or never companies must change today to win the battle for FDI/ECB in the International Loan markets. Turn your good ideas and projects with cheaper loans and equity finance into money spinning businesses and bring idea to market place by making every employee and person in the organisation a business person and turning them as Money makers. Only Solvent Borrowers or Viable Project with good team of Management is Pre-Requisite. Expansion and generation of capital for smaller but aggressive companies can be realised through use of world legal banking practices that legally circumvent the web of securities regulations. These regulations were initiated ostensibly to discourage fraud in securities and exchange transactions. One cannot at this point determine to what degree those lobbying for such legislation may have had the interests of the smaller businesses in mind. In any case, the result is a regulatory nightmare that would discourage even the most stout-hearted. The current system succeeds magnificently in keeping small business just that small. Fittest will forge ahead and the industry leaders who have capabilities beyond difficult times and are geared up with skills and options like e-powered empowerment and proved turn around strategies and they don't fear the risk and change ,they embrace it to take the world head on , can never be behind in the progress of the rare order .Mobilisation of foreign currency finances and management of funds raised by tapping various sources are two important tasks facing finance managers today. External financial markets, euro markets and national markets offer a menu of products and currencies, and financial packaging is undertaken by the banks or merchant banks engaged in external financing. International financing is best with risks and uncertainties, apart from elaborate documentation and administrative formalities, practices in external markets keep changing and finance managers have to understand the dynamics of these markets in order to operate effectively. Moreover, with the removal of restrictions on funds flows, arbitrage opportunities have opened up and these have to be understood in order to benefit from them. Today's ever changing and intensely competitive world business climate demands that those of us in the business of providing financial services re-think and redefine our services to meet the challenges that face our Corporates in the development and expansion of their businesses. In an age where information's hold the key to success, we hope books on External Commercial Borrowing (ECB) would go a long way, in providing basic information needs of both our clients and readers.

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