

“Enforcement of Security Interest under SARFAESI Act”

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Introduction:

The Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act (SARFAESI) regulates the enforcement of security interest. Security interest in simple terms means any right or interest of any kind is created in favor of a creditor. The purpose of creation of such interest is to secure the obligation on the part of borrower to pay the money due towards the said creditor. This security interest can be created on tangible or intangible asset. The agreement through which such security is created is called security agreement and the creditor in whose favor the said security is created is called secured creditor.

Procedure:¹

Provision of SARFAESI Act overrides the provisions of section 69 and 69A of Transfer of Property Act, 1882. The SARFAESI Act provides with the provisions to enforce the security interest created in favor of secured creditor without any intervention of court or tribunals. When a borrower makes default in repayment of secured debt then his account is classified as non performing asset by the secured creditor. In order to recover the due amount, secured creditor will issue a notice to the borrower to make payment of all the due money and to fully discharge his liability within sixty days from the notice. This notice will contain all the details of the amount due and the property over which borrower has created a charge to provide for security of such debt. The said notice should also specify the intention of the secured creditor to enforce the secured debt against such property.

In case where the borrower fails to discharge his liability after receiving of the above notice then the secured creditor can recover his secured debt either by taking possession of the asset over which the security is created or by taking over management of the business of the borrower. It is important to note that after receiving such notice the borrower can not transfer the secured asset except with the written consent of the secured creditor.

In order to take possession of the asset secured creditor has to make a written request before Chief Metropolitan Magistrate or a District Magistrate requesting to take the possession of the said property and to forward the same to secured creditor. This request by secured creditor has to be accompanied by an affidavit stating the actual amount that is due, specifics of security interest held by secured creditor, and that all the other provisions of this Act and rules made there under are duly complied with (for example, service of notice to repay within sixty days). After

¹ The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002

satisfying with the content of the affidavit the Magistrate has to pass such order as he thinks fit within thirty days.

When secured creditor gets the possession of the secured asset he will appoint a person to manage the same. In case if secured creditor wants to sell the secured asset and the sale could not be made due to want of bidding not less than reserve price of the secured asset then the secured creditor himself can make a bid in subsequent sale. In such situation the purchase money will be adjusted to satisfy the secured debt. It should be noted that all the expenses and costs that a secured creditor incurs in order to recover his secured debt is recoverable from the borrower. When any transfer of secured asset is made by the secured creditor after getting the possession of such secured asset the said transfer will have the same effect as the transfer is made by the true and real owner of the property.

Even after the secure asset is sold and still the debt of secured creditor is not fully discharged then he has a right to file an application with the Debt Recovery Tribunal to recover whatever amount is still due. If the secured creditor wants he can also directly bring an action against the guarantor without making any effort to take the possession of secured asset or to take over the management of the business of the borrower.

If the secured creditor opts to take over management of the business carried by the borrower then a notice has to be published in one English newspaper and one paper of vernacular language in the area where the principal place of such business is situated. In case if the borrower is a company then a person will be appointed by the secured creditor as a director of the company and all the directors and any person who has any control over decisions of the company will deem to have vacated their offices effective from the date of publication of notice in the newspaper. The person who is appointed as a director by the secured creditor under this Act will take custody over all the property of the borrower's business.

When the management of a company, as a borrower is taken over by a secured creditor then no director can be nominated or appointed by shareholders. Along with this all the decisions taken in any meeting of shareholders can not be given effect without taking prior approval of the secured creditor. All the directors and officers who had to vacate their offices during all these recovery processes do not have any right to claim for compensation on account of loss of office. Once the entire debt is recovered by the secured creditor the management of the business will be restored to the borrower.

Conclusion:

Thus we can conclude that in case borrower of any secured debt makes default in repayment of the money due to the secured creditor, the secured creditor have a few remedies that he can seek to recover his money. All the cost incurred by him during recovery of such money is also

recoverable as against the borrower. A fixed time is prescribed within which the matters are to be decided by the courts or tribunals. Thus, the interests of the secured creditors are fully recognized and duly protected.