

Powers and Limitations of Authorised Officers Under SARFAESI Act

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The main object which is sought to be achieved by the SARFAESI Act is to reign in the defaulting borrowers from deliberately delaying the obligatory repayment of their debts to Banks and Financial Institutions. SARFAESI Act removes the fetters which were in existence on the rights of the secured creditors as the law as existed was not able to cope up with the changing needs of time.

Simultaneously, the Bank/Financial Institution is a trustee of public funds. It cannot compromise the public interest for benefiting private individuals. Any lapse in repayment of a Bank loan has to be viewed seriously and the Bank is not only entitled but duty bound to recover the amount by adopting all legally permissible methods.

The SARFAESI Act is enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. SARFAESI Act enables the Banks and Financial Institutions to realize long term assets to manage problems of liquidity, asset- liability mismatch and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non-performing assets by adopting measures for recovery and reconstruction.

The SARFAESI Act also empowers the Asset Reconstruction Companies to take over the management of the business of the borrower. SARFAESI Act provides for stepping up of Asset Reconstruction Companies, special purpose vehicles, and Asset Management companies etc. which are empowered to take possession of secured

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assets of the borrower including the right to transfer by way of lease, assignment or sale. The basic legal idea is that apart from obligation to pay, the borrower undertakes to keep margin and the value of securities hypothecated/ mortgaged so that there is no mismatch between the asset-liability in the books of Bank. This obligation is different and distinct from the obligation to repay. It is the former obligation of the borrower which attracts the provisions of the SARFAESI Act.

SARFAESI Act is inspired by the provisions of the State Financial Corporations Act, 1951 ('SFC Act'), in particular Sections 19 & 31 thereof. The object of the RDDB Act as well as SARFAESI Act is recovery of debt. These two enactments provide for cumulative remedies to the secured creditors. The secured creditor is given a right to choose one or more of the cumulative remedies. The object behind Section 13 of SARFAESI Act and Section 17 read with Section 19 of the RDDB Act is the same, namely recovery of debt. Conceptually, there is no inherent or implied inconsistency between the two remedies. The object behind the enactment of SARFAESI Act is to accelerate the process of recovery of debt and to remove deficiencies/obstacles in the way of realization of the debt under the RDDB Act by the enactment of SARFAESI Act, 2002.

Under SARFAESI Act, the 'Authorised Officer' has been given very important role to play while carrying out the objectives of the Act.

There are various provision in the Act. And the Rules which empower the "secured creditor" to exercise various power and discharge certain duties. Since in its generic sense "secured creditor is not a natural person and obviously has to act through some person, it is precisely the reason why Section 13 (12) indicates that the rights of the secured creditor may be exercise by "one or more of his officers in this behalf in such manner as may be prescribed." This itself contemplates that the secured creditor in the generic sense can authorize one or more officers in such manner as may be prescribed so that the rights of the secured creditor" in the generic sense would be exercised. This is a matter obviously within the administrative discretion of the persons who are in the helm of affairs.. The definition clause in the Rules provides that unless the context otherwise requires the "Authorized Officer " means an officer as specified. Such specification or delegation can be done by any other person or authority exercising power of superintendence, direction and control of business or affairs of the secured creditor, to exercise the rights of a secured creditor. However, the definition itself contemplates that such an officer should not be less than a Chief Manager of a Public Sector Bank; or equivalent.

The term 'Authorised Officer' is not defined in SARFAESI Act. But Rule 2 (a) of the Rules, defines the term. The said Rule is given hereunder for ready reference of the reader:

Rule 2 (a) "'authorized officer' means an officer not less than a chief manager of a public sector bank or equivalent, as specified by the Board of Directors or Board of Trustees of the secured creditor or any other person or authority exercising powers of superintendence, direction and control of the business or affairs of the secured creditors, as the case may be, to exercise the rights of a secured creditor under Security Interest Act..."

The Rule itself makes it clear that the definition is applicable unless the context otherwise required. Therefore, the expression "authorized officer" may mean different

officers in different contexts and obviously as specified by the persons in charge of the institution. Chief Manager level officer is chosen because with rich experience and maturity of mind he will be able to take action with due care and caution in view of stringent nature of the provisions of SARFAESI Act.

To be an 'Authorised Officer', a person has to be a Chief Manager of a Public Sector Bank or an officer of equivalent rank. Secondly, such officer shall have to be specified by the Board of Directors of the Bank to be Authorised Officer for the purpose of exercising powers under chapter III of SARFAESI Act. As per Rule 2(b) a, demand can be issued by the secured creditor or Authorised Officer. Needless to mention that the secured creditor means as defined in Section 2(zd) of SARFAESI Act and an Authorised Officer through whom the secured creditor exercises the rights, is one who falls within the ambit of Rule 2(a) of the Rules.

But the secured creditor obviously being an artificial person is required to act through some agency or delegated authority or officers vested with discharging particular power, function or duties. Though in generic sense the expression "secured creditor" would only mean the bank, financial institution, or group of banks or financial institutions as contemplated in Section 2(zd), invariably and inevitably such secured creditor being an artificial person has to act through some "natural person" authorized in its behalf which can be conveniently and compendiously described as the authorize officer or authorized person.

Under Section 13 (12) of the SARFAESI Act such a right to issue notice of demand is exercised by Secured Creditor by one or more of his officers authorized for the purpose.

An advocate, even if instructed by a Bank, Financial Institution and even if such advocate is specified by Board of Directors, can not be treated as an Authorised Officer. Even if the Board of Directors of a public sector Bank specifies an advocate to be Authorised Officer, the same would be *ultravires* the provisions referred to herein above. Any Possession Notice issued on such notice under Section 13(2), will be liable to be quashed.¹

At many places in SARFAESI Act, the expression 'secured creditor' has been used which may not necessarily mean the authorized officer in every instance. For reference, we may refer to Rule 9 (2) where it is pointed out that the sale shall be confirmed by the Authorised Officer whereas such confirmation" shall be subject to confirmation by the secured creditor". This is an example where secured creditor has to be construed as different from Authorised Officer.

It is also true that very wide powers are entrusted to secured creditor and on Authorized Officer. Therefore, there can be no denial that such wide powers should be exercised within strict parameters indicated in the statute and Rules.

When statutory Rules contemplate a special provision, it does not lie in the mouth of the secured creditor contend that even though the Rules lay down a particular procedure, the Authorised Officer while discharging their duties under SARFAESI Act and the Rules is not required to follow the procedure contemplated merely on the ground that violation is 'technical' according to a secured creditor Bank/ Financial Institution. It is no doubt true that a borrower's property is put to auction only because there is default on the part of the borrower, but that does not give

right to Bank or Authorised Officer to flout the mandatory provisions. Authorised Officer of the Banks and Financial Institutions enjoy statutory powers as quasi-judicial authorities. They are supposed to exercise their discretion with all reasonable and discipline having regard to the facts and circumstances of a particular case with fair play and transparency. The legislation enacted by the Parliament for recovery of Bank dues are code unto themselves in as much as they not only contain comprehensive procedure for recovery of dues but also have envisaged constitution of quasi judicial bodies for redressal of the grievances of any aggrieved person.

Authorised Officer, who is clothed with statutory power has to perform his action as per prescription of law. Performing action or omitting to perform SARFAESI Action contrary to prescription of law contemplated is not permissible (expression *unius est exclusion alterius*). He enjoys immunity from civil and criminal prosecution if his acts are *bond fide*. For *mala fide* acts, he is not only answerable personally but also binds his secured creditor for vicarious liability in Civil and Criminal prosecution. He possesses unlimited pecuniary jurisdiction (provided the financial asset is not below one lac rupees) and unlimited territorial jurisdiction for enforcement of security interest. Demand notice served by him operates as injunction against borrowers from dealing with secured assets. He represents secured creditor. The purpose of choosing Chief Manager level officer as Authorized Officer is that on account of rich experience and maturity of mind he will be able to take action with due care and caution in view of stringent nature of the provisions of SARFAESI Act.

The Authorised Officer is required to maintain the records honestly and correctly. Legality of action of Authorised Officer will be judged on following parameters-

1. Whether the Authorised Officer while making a decision has exceeded his powers.
2. Whether he has committed an error of law.
3. Whether he has committed a breach of the Rules of natural justice.
4. Whether he has reached a decision which no other reasonable Authorised Officer would have reached.
5. Whether he has abused his powers.

However, it will not be for the Tribunal or High Court whether a particular policy or a particular decision taken in fulfillment of the policy is fair. The Court is concerned only with the manner in a decision has been taken. What a Tribunal Court will do is to consider whether something has gone wrong of a nature and degree which requires intervention.

Therefore, when an Authorised Officer was found that he has not acted in good faith in accordance with the provisions of SARFAESI Act, the appellant under Section 17 was declared as entitled to claim damages from the Bank including Authorised Officer responsible for the violation.²

Section 32 of The SARFAESI Act provides for protection of action taken in good faith. Section 32 is reproduced hereunder for the ready reference of the reader:

Section 32: Protection of action taken in good faith– “... No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under this Act.

When a thing is done honestly, is called done in good faith. The Authorised Officer in under legal obligation to perform his duty with truth, honesty, honour, loyalty and faith etc.. The Authorised Officer must have respectful obedience to law. Good faith has been defined under Section 3 (22) of the General Clauses Act, 1897 to mean a thing which is in fact done honestly whether it is done negligently or not. Anything which is done with due care and attention, can not be called malafide while discharging his duties. The Authorised Officer should not have personal ill will or malice, no intention to malign and scandalize. Whenever an issue of good faith is raised or protection is sought under Section 32 of SARFAESI Act, the facts and circumstances of the case under examination will be considered. Good faith can not be determined on the basis of hypothesis. A duty performed in good faith is to fulfill a trust reposed in an official. If any action is not traceable to any lawful discharge of duty, that by itself will not be sufficient to conclude that the duty has been performed in bad faith. For this very reason the immunity clause is engrafted under SARFAESI Act. The immunity clause is to protect the Authorised Officer on the presumption that acts performed in good faith are free from malice or ill will.

The immunity is a kind of liberty conferred on the Authorised Officer in the form of exemption while performing or discharging official duties and responsibilities. SARFAESI Acts so performed are such for which an official stands excused by reason of his office or post. Therefore, whenever a question of good faith is raised, the full chain of events is to be examined in order to find out whether SARFAESI Act is dutiful and in good faith and not maliciously motivated. Bad faith occurs SARFAESI Act is tainted by personal motives and is not connected with the discharge of official duty. Therefore, though an act of Authorised Officer may appear to be wrong or a decision may not be correct yet the same will not necessarily turn into a malicious act or decision.

When a criminal complaint was filed against a Chief Manager of Bank while acting as Authorised Officer on the basis of provisions of Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Section 3(1)(v) which runs as under:

Section 3. Punishment for Offences of Atrocities–(1) Whoever not being a member of a scheduled caste or a scheduled tribe:

(v) Wrongfully disposes a a member of scheduled caste or scheduled tribe from his land or premises or interferes with the enjoyment of his rights over any land premise or water..”

It was held³ that since Bank has taken possession through its Authorised Representative, there will be total immunity to the Authorised Officer.

It should not be forgotten that Section 17(2) empowers D.R.T. to examine whether measures under Section 13(4) are in accordance with the provisions of this Act and in case the same are not, it may order for restoration of possession, restoration of management and may declare any measure under Section 13(4) to be invalid.

And further D.R.T. is empowered to pass appropriate & necessary orders and that shows that action of Authorised Officer will be scrutinized by a judicial authority through the prism of the entire Act & Rules. Being under judicial scrutiny, the means and ways adopted by Authorised Officer have to pass the test of law & reason. Transparency is a must in the functioning. Though the transactions relating to enforcement of securities are of the nature of private contract nevertheless those transactions have far reaching effect on the economy of the country. The transactions through Banks and Financial Institutions involve money of the public. The greater the public money as such the public interest becomes involved in the transactions. The responsibility of the officers dealing with the transactions also becomes greater.

The Authorised Officer has twofold responsibilities:

Authorised Officer owes the primary responsibility to the secured creditor/Bank generally being part & parcel of secured creditor; it may be difficult at given occasions to take a bold decision in accordance with the spirit of SARFAESI Act. While acting for the secured creditor, Authorised Officer should never forget that he is a statutory delegatee and his authority flows from SARFAESI Act of legislature and therefore he has to perform his duty as prescribed and directed by legislature. Banks generally are in hurry for recovering their dues and this may be suggestive for committing default in compliance of various statutory provisions.

Though Enforcement agencies may be appointed for performing and carrying out the instructions of Authorised Officer but ultimate responsibility lies with Authorised Officer. Actions/omissions committed in good faith are protected but negligence, gross in nature may tantamount bad faith and courts may refuse to protect such gross negligence. Section 33, going one step further, declares that the in charge and responsible to the company for the conduct of the business shall be guilty and shall be liable to be proceeded against for the offences committed by company. Thus by carrying out minimum alertness the Authorised Officer can save himself as well as the Institution from any precarious/embarrassing situation.

The ultimate object of SARFAESI Act is to recover the dues; therefore thrust of Authorised officer will also be on recovery but simultaneously stepping towards disposal of security. All the deeds and acts of Authorised Officer will be subject to judicial scrutiny. Therefore needless to say that proper recording and its maintenance is must. Since the whole Act relates to immovable property, the disputes of title may be raised even after years. It will be advisable to maintain records for sufficient time and properly in order to use the same as and when need arise

Recovery of dues should be made expeditiously but Financial Institutions concerned with their recovery can not be permitted to behave like properly declares and be permitted further to dispose off the secured assets in any unreasonable manner in violation of statutory provisions. Right to hold property is a constitutional right as well as human right. It is a legal obligation on Authorised Officer that property be sold in such a manner that it may fetch best price. The prime responsibility towards borrower lies in the point that his property should not be sold for inadequate price. Further, a humanitarian approach is a must while dealing with the borrower, the Authorized Officer must always remember the effect of actions under SARFAESI Act, is necessarily termination of the borrower. The life of the borrower is under a

drastic change. The deprivation of property from a person though may be legal and moral still not desirable and can never be the object of secured creditor. Secured creditor/Bank always prefer that its dues are recovered without adopting the drastic measures. Therefore at each and every step of proceedings the Authorised Officer has to keep an eye as to the resources of the borrower so that bank dues can be recovered without entering into the process of sale. Even legislature has felt the serious consequences of the sharp edged weapons given to the secured creditor and therefore, has allowed to make sale even through private treaty with the consent of borrower.

Secondly the duty towards borrower will flow from the fact that Authorised Officer is responsible for properly observing the procedure in disposal of security. Any flaw in procedure may deprive the borrower from his valuable right. Opportunity of hearing is the foundation for any coercive action. Authorised Officer should never believe in any shortcut method.

The efforts for serving the various notices have to be genuine. Reasonable opportunities are Rule. Lastly, in 'Mardia Chemicals'⁴, it is held where two contesting parties making rival claims, the statutory authority becomes quasi-judicial authority. In view of above the designation of Authorised Officer vests in a person the responsibility to act judicially and judiciously.

In every determination by an Authorised Officer that affects the rights of a citizen or leads to any civil consequences, the authority concerned is bound to adopt what is in legal parlance called a "Judicial approach" in the matter.

The duty to adopt a judicial approach arises from the very nature of the power exercised by it. It must be remembered that the importance of a judicial approach in quasi-judicial determination lies in the fact that so long as the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the Authorised Officer acts *bona fide* and deals with the subject in a fair, reasonable and objective manner. Judicial approach in that sense acts as a check against flaws and extraneous consideration.

The Authorised Officer has to decide the contentions of borrower on merits and thus has to correct the mistakes of the Bank. Being the excel in carrying out the objects of SARFAESI Acts, the role given to him is the role of leader. The Aauthorised Officer has to take decision at every stage and has to satisfy the requirements of judicial authorities, secured creditor authorities and borrower. Thus the nice balance amongst all concerned will be the key.

Where the procedure adopted by the Authorised Officer has not infringed the substantive rights of the borrower under law, it will not be reasonable to analyse the procedure in the hair splitting manner.⁵

Similarly, when dispossession can not be said wrongful, the Authorised Officer will be protected.⁶

End Notes

1. *Sampoorna Battu v. ICICI Bank and Another* MANU/AP/0835/2012; 2012 (2) DRT Cases 496

2. *Shripad Madhao Kapil v. State Bank of Indore and Others* MANU/DR/0001/2010: 2011 (1) DRT Cases 295 (DRT Jabalpur)
3. *M.A. Rashid v. Gopal Chandra and Another* MANU/DE/1141/2012: 2012 (2) DRT Cases 519 (Delhi)
4. *Mardia Chemicals Ltd. v. Union of India* MANU/SC/0323/2012: 2004 (1) Bank CLR 641 (SC).
5. *Orient (R) Mills and Others v. UCO Bank* 2008 (2) Bank CLR 4 (DRT Kolkata).
6. *M.A. Rashid v. Gopal Chandra and Another* MANU/DE/1141/2012: 2012 (2) DRT Cases 519 (Delhi)