

# Dispute Resolution Hotline

July 24, 2017

## CALCUTTA HIGH COURT WAVES A RED FLAG FOR TIME-BARRED CLAIMS OF BANKS UNDER THE SARFAESI ACT

- Remedy under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“**SARFAESI Act**”) - New means of enforcing a pre-existing right, and cannot revive rights which do not exist, including time-barred claims.
- Pendency of a proceeding under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (“**RDDB Act**”) would not stop the limitation period for a proceeding to be initiated under SARFAESI Act.

### INTRODUCTION

The Calcutta High Court (“**High Court**”), in its recent decision of *Dr. Dipankar Chakraborty* (“**Petitioner**”) v. *Allahabad Bank & Ors.*, held that the rights under these two statutes are independent of each other. Relief can be sought under both statutes parallel to each other, subject to the law of limitation. Since enforcement of security interests tantamount to proceedings for mortgage, under the Limitation Act 1963, the limitation period for invocation of proceedings under SARFAESI Act is 12 years – same as that of mortgage proceedings.<sup>1</sup>

### FACTS

The Petitioner had taken a loan from Canara Bank and claimed to have repaid the same. Later, he had availed credit facilities from Punjab National Bank (“**Bank**”). Subsequently, the Bank initiated proceedings under Section 19 of the RDDB Act in 2001, pending which, the Bank initiated proceedings under the SARFAESI Act by issuing notices under Sections 13(2) and 13(4). However, these notices were later withdrawn. Subsequently, another notice under Section 13(2) was issued on July 5, 2011. Thereafter, the Petitioner disputed the maintainability of the proceedings under the SARFAESI Act.

#### Sequence of Events

- Mortgage created in 1995- Last installment paid in October, 1995
- Suit for damages filed by Petitioner against Bank in City Civil Court, Calcutta- Money Suit No. 120 of 2000
- Bank initiated proceedings under Section 19 (RDDB Act) - O.A. No. 137 of 2001 before DRT- Kolkata
- Civil Suit transferred before DRT- Both are pending
- Bank issued Notice under Section 13(2) of SARFAESI Act on February 4, 2011
- Bank initiated proceedings under Section 13 (4) of SARFAESI Act, on April 13, 2011
- Withdrawal of Notices by Bank-June 6, 2011
- Fresh notice issued by Bank under Section 13(2) of SARFAESI Act on July 5, 2011

### ISSUE

Whether the period of limitation stops on the filing of a proceedings under Section 19 of the RDDB Act for a bank or financial institution to invoke provisions under the SARFAESI Act in respect of the same claims as in the Section 19 proceedings?

### ARGUMENTS

Referring to Section 36 of SARFAESI Act<sup>2</sup>, the Petitioner contended that the proceedings initiated by the Bank under SARFAESI Act was barred by limitation and therefore should be quashed. The mortgage of the concerned immovable property was created in 1995. Since the last installment towards the loan was paid in October 1995, under the Limitation Act, 1963, a suit for mortgage could have been instituted by 2007 (12 years from 1995). Since, the proceedings under Section 19 of the RDDB Act are not proceedings for mortgage, the period of 12 years (under the Limitation Act)<sup>3</sup> is not available to the Bank for the purposes of invoking the SARFAESI Act. Even otherwise, 12 years had already elapsed prior to the invocation of the SARFAESI Act.

The Bank contended that initiation of the proceedings under Section 19 of the RDDB Act in 2001, had automatically stalled the period of limitation. Thus, invocation of SARFAESI Act in the given case, is not time-barred.

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As per Section 36 of the SARFAESI Act, a secured creditor can initiate proceedings or take actions under the said statute, including measures under Section 13, subject to compliance with the Limitation Act 1963.

The High Court referred to an earlier decision of the Division Bench of the Delhi High Court which held – when a bank loses its remedy of enforcing the mortgage owing to lapse of the limitation of 12 years, no such right would subsequently arise under Section 13(2) of SARFAESI Act, as there was no such existing or subsisting right qua mortgage.<sup>4</sup> The remedy under SARFAESI Act is simply a new means of enforcing a pre-existing right. Thus, in the event of extinguishment of rights to sell a mortgaged property towards recovery of outstanding sums, the SARFAESI Act would not revive the extinguished claim.

Thus, the Bank would have been entitled to rightfully invoke the SARFAESI Act if:

- A mortgage suit had already been filed, within the limitation period, and it was pending, or
- A mortgage suit had not been filed, however, the limitation period of 12 years was still in existence.

Thus, pendency of a proceeding under the RDDB Act would not stop the limitation period for a proceeding to be initiated under SARFAESI Act. A proceeding under the SARFAESI Act is independent of the proceedings made under Section 19 of the RDDB Act,<sup>5</sup> and both can run parallel to each other, subject to the law of limitation.

The High Court further held that the narrow scope of enlargement of period of limitation (Sections 14 and 15 of the Limitation Act contemplate exclusion of time in computation of the period of limitation) would not be attracted to the given facts. Section 14 of the Limitation Act does not warrant two simultaneous proceedings, i.e. proceedings under Section 19 of RDDB Act and Section 13 of SARFAESI Act, on same cause of action. It would be applicable if there is a withdrawal of proceedings for defects in jurisdiction or otherwise.<sup>6</sup> Besides, there is nothing in the present case which suggests that there has been condonation of delay in any event. Further, there were no transaction between the parties, subsequent to proceedings initiated under RDDB Act being initiated, to extend the limitation period till 5 July 2011 (when the proceedings under SARFAESI Act were initiated). Pendency of the proceedings before DRT under RDDB Act would not save the period of limitation for a proceeding under SARFAESI Act if the proceeding itself is barred by limitation.

The High Court specifically held that if a recovery certificate is obtained in the proceedings under Section 19 of the RDDB Act, the option to proceed under the SARFAESI Act can be availed, even after the limitation period, to ensure parties are not deprived of their existing rights. This would entail enforcement of the rights under the SARFAESI Act which are revived pursuant to the recovery certificate. The law of limitation does not take away a subsisting right, merely postpones the enforcement of an existing right to be revived by enforcement upon happening of a future event.

A similar approach had also been adopted by the Punjab and Haryana High Court in *Surinder Mahajan v.*

*DRAT*<sup>7</sup> where the provisions of the Limitation Act were given primacy, as recognized under the SARFAESI Act.

However, the extent of powers of the Debts Recovery Tribunal (“DRT”) to condone delays under the RDDB Act and SARFAESI Act, was distinguished by the Supreme Court in *Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corporation*.<sup>8</sup> It referred to Section 18 of SARFAESI Act and Section 20 of RDDB Act where proviso to Section 20(3) of RDDB Act gave specific powers to the DRT to condone delay and such a power was not mentioned in Section 18 of SARFAESI Act.

– Shweta Sahu, Payel Chatterjee & Vyapak Desai

You can direct your queries or comments to the authors

<sup>1</sup> See, Article 62 of the Schedule to the Limitation Act, 1963. The limitation period of a mortgage suit is 12 years.

<sup>2</sup> SARFAESI Act, Section 36: “No secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13, unless his claim in respect of financial asset is made within the period of limitation prescribed under the Limitation Act, 1963”

<sup>3</sup> supra note 2

<sup>4</sup> Owing to limited information (including the dates on which such loans were taken etc.), this hotline is restricted to the primary legal findings in the judgment.

<sup>5</sup> See, *Transcore v. Union of India & Anr.* (2008) 1 SCC 125

<sup>6</sup> Limitation Act 1963, Section 14: “Exclusion of time of proceeding bona fide in court without jurisdiction. — (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.— For the purposes of this section,—

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction”;

Section 15: “Exclusion of time in certain other cases—

(1) In computing the period of limitation of any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded. Explanation.— In excluding the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be counted.

(3) In computing the period of limitation for any suit or application for execution of a decree by any receiver or interim receiver appointed in proceedings for the adjudication of a person as an insolvent or by any liquidator or provisional liquidator appointed in proceedings for the winding up of a company, the period beginning with the date of institution of such proceeding and ending with the expiry of three months from the date of appointment of such receiver or liquidator, as the case may be, shall be excluded.

(4) In computing the period of limitation for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

(5) In computing the period of limitation for any suit the time during which the defendant has been absent from India and from the territories outside India under the administration of the Central Government, shall be excluded.”

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