RECOVERY OF DEBTS AND THE ROLE OF RECOVERY TRIBUNALS

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INTRODUCTION:

A financial institution is a company engaged in the business of dealing with monetary transactions, such as deposits, loans, investments and currency exchange. Banks are one of the forms of financial institution falling under the category of depository institutions. The banking regulation act 1949 defines a banks as "**banking**" means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise. Banks provide for Loans which are often money lend by these institutions at a higher interest. This in turn gives rise to debts ."debt" means any liability inclusive of interest which is claimed as due from any person by a bank of a financial institution.

There exists a thin line of demarcation between 'recovery of debts' and 'collection of debts'. The primary difference is that in case of collection of debts the creditor confronts the borrower directly or through a third party agency like a collection agency or a firm to recover the debts while debts recovery indicates the expensive process by which the creditor approaches the court.

Banks are huge financial institutions that provide loans for individuals, companies, partnership firms etc. In the event of the default of the debtor the banks rely on the recovery of debts through courts. But the courts having the need to tend to the immense piling cases were underhanded and this caused the lagging of cases and in turn increased the non performing assets of the banks (NPAs). Under the Securitisation and Reconstruction of Financial Assets

and Enforcement of Security Interests Act, 2002, non-performing Asset (NPA)[1] means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,-

(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;

(b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank.

In simple terms a non performing assets are those assets which do not yield any profit for the lender. This was seen as a dire situation and often led to 'bad debts' which is a debt which cannot be recovered completely. In 1981, a committee was set up under the chairmanship of Shri T. Tiwari. The committee scrutinized the legal background and the difficulties faced by the banking sector and financial institutions and suggested the need for fortifying the laws and even put forth a recommendation to set up special tribunals to cope up with the mounting cases. The committee stated that[2]

'The civil courts are burdened with diverse types of cases. Recovery of dues due to banks and financial institutions is not given any priority by the civil courts. The banks and financial institutions like any other litigants have to go through a process of pursuing the cases for recovery through civil courts for unduly long periods.'

Whereas on 30th September, 1990 more than fifteen lakhs cases filed by the public sector banks and about 304 cases filed by the 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. This caused a huge catastrophe as it plunged the economy to the dirt since such huge amounts of public money were not able to be properly utilized.

[1] Section 2(1)(o), Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

[2] Jain, Sankalp, Recover of Debt Due to Banks and Financial Institutions: Legal Framework in India, November 12, 2015

Owing to this a commission was set up under the tutelage of former RBI Governor M. Narasimham in the month of August 1991. On the recommendations of the Narasimham Committee I, the Recovery of Debt due to Banks and Financial Institutions Act of 1993 was enacted.

The recovery of debts due to banks and financial institutions Act came into force on 24th June, 1993. While initially the debts recovery tribunals were able to provide swift relief to the lenders, their performance was stunted with the advent of large and powerful borrowers. These borrowers were able to stall the proceedings on various grounds.

Therefore Again in the year 1998 narashimham committee II was set up which stressed on banking sector reforms. In the year 1999 another committee under the head of Andhyarujina the former solicitor general of India was set up. These committee worked together and proposed for a new legislation for securing the assets and the creation of asset reconstruction fund. The report of this Committee was submitted in May, 2000 which led Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. The preamble of the act states *"the act to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto"*

The provisions of the act would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches .One of the fundamental aspects of this act was that it empowered the secured creditors to take possession of the securities of the borrowers in the event of default and sell such securities. This process cannot be intervened by the court provided the banks issue a 60 days notice after the loan becomes a non performing asset.

Overview of the RDDBFI act,1993:

There are a total of 37 sections comprised within the act. Section 3 deals with the establishment of the tribunal by the order of the central government. The section also specifies the areas which come under the jurisdiction of the concerned DRT court.

Section 2 is the definition clause and throws light on the key aspects involved in the recovery of debts.

"Banking Company" shall have the meaning assigned to it in clause (c) of section 5 of the Banking Regulation Act, 1949[3]

"debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application [and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of debt securities][4]

Section 4 deals with the composition of the tribunal. The tribunal shall the headed by the 'presiding officer'. The eligibility of the presiding officer is stated in section 5 which states that the officer should be or was or is qualified to be a district judge. The terms of the office is stated in section 6 which after the 2016 amendment was increased to five years and the age of retirement was increased from 62 years to 65 years

Debts recovery tribunals:

The preamble of the act states

"*An Act to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto*."

The tribunals have been set up under article 247 of the Indian constitution.

" *Power of Parliament to provide for the establishment of certain additional courts Notwithstanding anything in this Chapter, Parliament may by law provide for the establishment*

[3] Sec 2(e), Recovery of debts due to banks and financial institutions act, 1993.
[4] Sec 2(g), Recovery of debts due to banks and financial institutions act, 1993.

of any additional courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List"[5]

At present there are 38 debts recovery tribunals and 5 debts recovery appellate tribunals functioning in India. The DRT courts were able to provide relief swiftly in comparison with the civil courts. This allowed for the banks to reduce the non performing assets and bad debts.

But even after the setting up of DRT they were still slow in dealing with the mountain load of cases. Back in 2016 nearly 93,000 cases were reportedly pending before the tribunals. The world bank reported that it took India on an average of 4.3 years to solve insolvency cases which is twice as that of china.

Therefore an amendment was undertaken in 2016 which increased the powers of the tribunals and established guidelines to reduce delays overall. The amendment allowed for the banks to file cases in or near the branch of the bank instead of filing it near the residence or the business area of the defendant. Borrowers have to deposit at least 25% of the outstanding amount with the appellate tribunals before filing for appeals. It allowed for Electronic filing of recovery applications, summons, documents and written statements.

Procedure of the DRTs:

The concerned bank shall file an application against the defendant in the tribunal as mentioned in the section 19. Only those debt amounts of 10 lakhs or above can be filed before the tribunal. Amounts between 5 lahs to 10 lakhs are to submitted before the high court and amounts lower than 5 lakhs before the civil courts .the banks need to submit the record of the loan and the debts incurred due to interest and it should also prove that there was a default in the part of the defendant. The submitting of recovery application in electronic form is also allowed as per section 19A provided that it is not inconsistent with the information technology act 2000. Supposedly if another bank needs to recover the debts from the same defendant then the latter bank may join the suit at any time during the proceedings before the final order is passed. On receiving the recovery application the tribunal will summon the defendants and instruct them to disclose particulars of properties or assets other than the property involved in

[5] Article 247, The Indian constitution

the case and also impose restriction to prevent the defendant to sell the aforesaid property or asset.

Pursuant to section 19(5) of the act the defendant must file a written statement of his defence within 30 days from the date of summon. If the borrower after the receipt of notice does not appear before the tribunal, the tribunal will pass an ex parte order against him. After hearing the sides of both the defendants and the applicant the court may on the merits of the case adjudge the case. The defendants can counter sue the applicant while filing the written statement of defence. The amount to be paid by the defendants is completely unto the discretion of the tribunal.

The tribunal after hearing from both the sides will pass an interim or a final order to issue the payment of the debts including the interest thereof. If the amount is not paid then the presiding officer shall issue a certificate of recovery to the recovery officer.

Modes of recovery:

The recovery officer on receiving the certificate of recovery will proceed to recover the debts as mentioned in section 25

(a) attachment and sale of the movable or immovable property of the defendant;

[(aa) taking possession of property over which security interest is created or any other property of the defendant and appointing receiver for such property and to sell the same;]

(b) arrest of the defendant and his detention in prison;

(c) appointing a receiver for the management of the movable or immovable properties of the defendant;

3 [(d) any other mode of recovery as may be prescribed by the Central Government.][6]

Role of debts recovery appellate tribunal:

If the rights of the borrower is violated or if there is any miscarriage of justice the aggrieved person can approach the appellate tribunal and file an appeal as laid down in section

[6] Section 25, Recovery of debts due to banks and financial institutions act, 1993.

20. The appeal should be made within 30 days of the passing of the order of the tribunal. Before filing the appeal to the appellate tribunal it is mandatory for the party to deposit fifty percent of the said debt issued by the tribunal under section 19.

Debts recovery tribunals- a pure administrative body:

The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:— (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses or documents; (e) reviewing its decisions; (f) dismissing an application for default or deciding it ex parte; (g) setting aside any order of dismissal of any application for default or any order passed by it ex parte; (h) any other matter which may be prescribed[7].

Although the tribunals do have the power to function like a civil court they are not accustomed to abide by the code of civil procedures, 1908.

The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings[8]. From this we can deduce that the tribunal is guided by the principles of natural justice.

There are Two core points in the concept of principles of natural justice

1. Nemo in propria causa judex, esse debet - No one should be made a judge in his own case, or the rule against bias.

2. Audi alteram partem - Hear the other party, or the rule of fair hearing, or the rule that no one should be condemned unheard.

[7] Section 22(2), Recovery of debts due to banks and financial institutions act, 1993.
[8] Section 22(1), Recovery of debts due to banks and financial institutions act, 1993.

Both of these principles are stringently followed by the tribunals. The principle of audi alteram partem is laid down in section 19(20).”*The Tribunal may, after giving the applicant and the defendant, an opportunity of being heard, in respect of all claims, set-off or counter-claim, if any, and interest on such claims.....”*

The first principle of the rule of bias states that the judge should be impartial to the parties. If the judge acts in favour of or against either party then he is not qualified to be a judge. This principle is the legal basis of all the judicial and uasi judicial authorities.

In **Cofex Exports Ltd. vs. Canara Bank Delhi High court**[9] it was ruled that Debt Recovery Tribunal is not a court but a Tribunal established by a statute, provided with a special jurisdiction to hear only applications by banks or financial institutions for recovery of any debt. Although keeping in view the provisions given in clauses (a) to (b) of sub-section (2) of Section 22 of the Act it had every aspect and power of a civil court yet it was held not to be a civil court.

Constitutionality of the DRT Act:

The validity of the act was questioned with the case **Delhi bar association & ors v. Union of India & ANR**[10]. The act was held as unconstitutional as it violated the principle of independence of judiciary and it derogated the constitution and it was questioned under article 14.

The court held that even though the tribunal does not comply with article 323A and 323B it does very well comes under the ambit of entry 11 A of list III which states ‘Administration of justice; constitution and Organisation of all courts, except the Supreme Court and the High Courts.’ It further held that entry 45 of List I would cover the law relating to the recovery of debts. Entry 45 of List I relates to "Banking". Banking operations would, include accepting of loans and deposits, granting of loans and recovery of the debts due to the bank. As recovery of debts is an essential function of the banks the tribunals were set up for the speedy recovery of debts

[9] AIR 1997 Delhi 355
[10] AIR 1995 Del. 323.

CONCLUSION AND SUGGESTIONS :

The actual role of tribunals under the purview of administrative law is to ensure the handling of matters which have overburdened the courts. These tribunals are set up to be less formal, less expensive, and a faster way to resolve disputes than by using the traditional court system. Tribunal members who make decisions usually have special knowledge about the topic they are asked to consider. Judges, however, are expected to have general knowledge about many areas of law.

The recovery of debts is an integral part of banking law and as it can determine the fate of the economy the debts recovery tribunals play a vital role. The function of eliminating the non performing assets determines the fate of the economy. Before the advent of legislative actions to recover debts the banks were not able to effectively recover the debt amount. This further led to the piling of nonperforming assets which sullied the Indian economy to a great extent. This in turn led to 'bad debts' and the banks were at a huge loss. The problem has eaten into bank profits and choked off new lending, especially to smaller firms, at a time when an economy that depends on them is stalling. Therefore there was crippling need for a legislation and the result being the RDDBFI Act 1993, and the SAERFASI Act ,2002. Furthermore the SAERFASI Act added even more fuel and allowed the secured creditors to take possession of the borrowers assets in event of default.

Despite the enactment of SAERFASI act the estimated value of NPAs of public and private sector banks in 2016 was approximately Rs.6 lakh crores out of which Rs.1.54 lakh crores was of public sector. Therefore the bankruptcy and insolvency code was introduced in 2016 to further aid insolvency cases.

Similarly the RDDBFI Act,1993 was also amended in 2016 adding new provision to fortify the process of recovery of debts.

But the problem is that there are a very few DRTs which are present at the moment there are only 38 DRTs and 5 DRAT. With the loading number of cases especially in cases of big borrowers the present number of DRTs cannot effectively handle all the cases. Therefore there is a need for the implementation of a few more tribunals across India.

Further more a lot of loopholes also are responsible for the delaying of cases. An aggrieved person should usually confront the appellate tribunal. But instead they file a writ petition under article 226 in the high court. This has also caused considerable lacuna in the act.

In the case of **United Bank Of India vs Satyawati Tondon & Ors** the supreme court observed ‘*’This was one of the most radical legislative measures taken by the Parliament for ensuring that the dues of secured creditors are recovered from the defaulting borrowers without any obstruction. Though the tribunal initially functioned with great zeal, “with the passage of time the proceedings before them became synonymous with those of the regular courts and the lawyers representing the borrowers and defaulters used every possible mechanism and dilatory tactics to impede the expeditious adjudication of such cases.*

Therefore there is a onerous need to close up this lacuna to limit the delaying of cases.