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IBC vs. SARFAESI
An Overview

By VVSN Raju

AN INTRODUCTION:

The article seeks a brief comparative analysis of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(SARFAESI) in contrast with Insolvency and Bankruptcy Code, 2016 (IBC) –

a. The object of the SARFEASI is to enable the bank and the financial institutions to realise the secured assets and to take possession of the secured assets and sell them to reduce nonperforming assets by adopting measures for recovery or reconstruction.[1]. SARFAESI is a complete self-contained Code in itself, which provides effective measures for the banks and financial institutions to recover their dues without intervention of the Courts and adequate remedies are also provided in the Act itself to the persons aggrieved by those measures.[2] SARFAESI also regulates securitisation and reconstruction of financial assets and also provides for a central database of security interest created on property rights of the borrowers and mortgagors.

b. Whereas, IBC has been enacted in order to bring about a self-contained code with respect to corporate and personalinsolvency, liquidation ofCorporate Debtor and Bankruptcy of individuals. However, the primary object of IBC isto revive a Corporate Debtor and to put it back on its feet and that the IBC is not merely a recovery legislation for creditors. In that sense, the emphasis of the IBC is on creating a situation where a Corporate Debtor does not spiral into financial destruction, and at the same time resolution of the difficulties of a Corporate Debtor is achieved while taking care of the interests of all the stakeholder including creditors.It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor by protecting the Corporate Debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the Corporate Debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the Corporate Debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the Corporate Debtor itself, thereby preserving the assets of the Corporate Debtor during the resolution process. The timelines within which the resolution process is to take place again protects the Corporate Debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends.[3]

1. *Narayana Farm Produce Pvt. Ltd. v. Bank of Maharashtra*, 2015 SCC OnLine Bom 8370 : (2016) 3 Mah LJ 114 : (2016) 5 Bom CR 748 : (2017) 1 BC 447.
2. *Allahabad Bank v. Hemantkumar*, 2017 SCC OnLine Bom 6602 : (2017) 6 Mah LJ 252 : (2017) 204 Comp Cas 203: AIR 2017 Bom 208 : (2017) 5 AIR Bom R 322 : (2018) 1 Bom CR 629 : (2018) 182 AIC (Sum 16) 7 : (2018) 2 BC 421 : (2017) 140 CLA 238.
3. *Swiss Ribbons (P) Ltd. &Anr., v. Union of India&Ors.*, (2019) 4 SCC 17 : 2019 SCC OnLine SC 73

1. **Whether IBC will prevail over SARFAESI?**

   SARFAESIbeing an existing law, Section 238 of the 'IBC' will prevail over any of the provisions of the SARFAESIif it is inconsistent with any of the provisions of the 'IBC.[4]

2. **Absence of ARC:**

   SARFAESI contains the provisions of ARC["Asset Reconstruction Company"] which help in acquisition of bad debts through a specialized process, but IBC doesn't have such mechanism.

3. **Effective Recovery rate:**

   As of the latest data for 2021-22, the recovery rate under the IBC stood at 23.8 per cent, while the rates under SARFAESI and Hon'ble Debt Recovery Tribunal (**"DRT"**) stood at 25.7 per cent and 22.5 per cent, respectively. Whereas, if we see the overall recovery under IBC of past three or two year, it is more than SARFAESIand DRT.[5].

4. **Time period for recovery/ resolution/ liquidation of the matter:**

   Following the borrower's designation as an NPA,the secured creditor shall give 60 daysadvance notice for exercising the rights under section 13(2) of SARFAESI. The secured creditor can take the help of the Hon'ble court to take over the physical possessionin the event of default of repayment and resistance from the borrower to hand over the possession.Thereafter, the secured creditor shall publish seven (7) days advance notice in two (2) newspapersand takethe physical possession of the secured asset. Once the physical possession is taken over,the secured creditor shall obtain valuation of the secured assets. Following then, the secured creditor may sell the property through e-auction or some other modes as per SARFAESI. However, thirty (30) days advance notice shall also be given to themortgagor before effecting the sale.

   In lieu of the above, the tentative timelines for recovery under SARFAESI is six (6) months. However, the mortgagor has a right to challenge the action of the secured creditor under SARFAESI by filing securitisation appeal before the Hon'ble DRT. In such a case, the timelines will be extended.

   Under IBC the timeline for completion of Corporate Insolvency Resolution Process(**"CIRP"**) isOne Hundred and Eighty (180) days from the date of admission of application. However, the timelines cannot be extended beyond Three Hundred and Thirty days (330) days. Furthermore, the Hon'ble National Company Law Tribunal(**"NCLT"**) is empowered to extend the timelines beyondThree Hundred and Thirty (330) days in certain cases in the best interest of the Corporate Debtor and all the stakeholders.

   The timelines for completion ofliquidation areOne (1) year from the date of liquidation order passed by the NCLT. However, if the Liquidator decides to sell the Corporate Debtor as a going concern, the timelines maybe further be extended for additional Three (3) months.

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4. **Encore Asset Reconstruction Company Pvt. Ltd. Vs. Ms. Charu Sandeep Desai &Ors., [2019] ibclaw.in 57 NCLAT**
5. **Source, RBI Report of 2021-22**

5. Parallel/simultaneously proceedings

There are plethora of judgments on the proposition that parallel proceedings can be initiated under both the enactments, thus, *the pendency of actions under the* SARFAESI *or actions under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 does not create obstruction for filling an Application under Section 7 of IBC, specially in view of Section 238 of IBC.*[6] However, in the event of the CD is admitted for CIRP, the section 14 moratorium will come into effect and the proceeding under SARFAESI and RDBRT Act shall be stalled.

6. Exclusion of time

The Debt Recovery Tribunal is not a wrong forum for exclusion of time under section 14 of the Limitation Act, since a Financial Creditor is perfectly entitled to maintain the proceedings initiated by it under The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 before a Debt Recovery Tribunal for recovery of its dues.[7].

7. At what stage bank shifts from SARFAESI to IBC?

The SARFAESI proceedings are suspended during the moratorium, thereforeIBC proceeding will prevail over all the other litigations. Furthermore, if the resolution plan is approved after the moratorium, SARFAESI proceedings are rendered null and void, as the creditors shall be binding to the approved resolution plan and can't seek any further amount except as approved under the Resolution Plan.. The words "including any action under the SARFAESI" are significant as per section 14 of IBC. The legislative intent is clear that after the CIRP is initiated, all actions including any action under the SARFAESI to foreclose, recover or enforce any security interest are prohibited. Section 14(1)(c) of the IBC, which have overriding effect over any other law, any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI is prohibited. Therefore, Bank could not have continued the proceedings under the SARFAESI once the CIRP was initiated and the moratorium was ordered[8].

Conclusion:

The revival of Corporate Debtorunder IBC will benefit all the stakeholders including the secured creditors giving re-birth to the Corporate Debtor under a new management and saving employment of several people. At the same time SARFAESI is beneficial tosecured creditors alone. Hence,in the larger interest of all the stakeholders, IBC will be more advantageous for resolution/ liquidation of Corporate Debtor instead of selling out the secured assets under SARFAESI unless recovery from the secured assets are much more under SARFAESI..

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6. Rakesh Kumar Gupta Director, M/S Gupta Marriage Halls Pvt. Ltd Vs. Mahesh Bansal Interim Resolution Professional M/S Gupta Marriage Halls Pvt. Ltd, [2020] ibclaw.in 227 NCLAT.
7. The Federal Bank Limited Vs. UniworthLimited,:(2021) ibclaw.in 359 NCLT.
8. ***Indian Overseas Bank v. RCM Infrastructure Ltd.***, **(2022) 8 SCC 516 : (2022) 4 SCC (Civ) 475.**