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BANKING LAW

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I INTRODUCTION

BANKING Law has emerged as an important branch of legal practice over the years. Inclusion of this topic in the Annual Survey of Indian Law (ASIL) is a testament of the fact that this special law is being provided the importance it deserves, especially after enactment of the Insolvency and Bankruptcy Code (IBC) in 2016. Jurisprudence in banking law may be categorised into the following sections for the ease of review (i) Central Banking Functions[1]and Regulation of Scheduled Banks[2] (ii) Non-Performing Assets (NPAs) and its recovery[3] (iii) Supremacy of Recovery Laws over other Laws (iv) Banking Frauds (v) Cheque Bounce Cases[4] (vi) Consumer Protection[5] (vii) Non-Banking Financial Companies (NBFCs) and Cooperatives and (viii) International Banking. During analysis, there may be some overlap in these topics.

In the year 2022, the banking sector has reported decline in levelof non-performing assets (NPAs).[6] Economic Survey 2022-2023 notes that the total amount recovered by scheduled commercial banks under IBC has been the highest compared to other channels such as Lok Adalats, SARFAESI Act and DRTs in this period.[7] The survey further adds that:[8]

> Since the middle of the previous decade, RBI and the government have made dedicated efforts in terms of calibrated policy measures

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1 Reserve Bank of India Act, 1934 ('RBI Act').

2 Banking Regulation Act, 1949 ('BR Act') and Payments and Settlement Systems Act, 2007.

3 Recovery of Debs and Bankruptcy Act, 1993 ('RDB Act'); Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 ('SARFAESI Act'); and Insolvency and Bankruptcy Code, 2016 ('IBC').

4 Negotiable Instruments Act, 1881('NI Act').

5 Consumer Protection Act, 2019 and Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016.

6 FICCI-IBA Survey of Bankers Issue July 16– December 2022, *available at* :https://ficci.in/public/storage/SEDocument/20643/FICCI_IBA_Bankers_survey_report-Feb2023.pdf (last visited on April 30, 2022).

7 Government of India, Economic Survey 2022-23,

8 *Id*., para 4,14.

> like strengthening the regulatory and supervisory framework, implementation of 4R's approach of Recognition, Resolution, Recapitalisation and Reforms to clean and strengthen the balance sheet of the banking system. These continuous efforts over the years have culminated in the enhancement of risk absorption capacity and a healthier banking system balance sheet both in terms of asset quantity and quality over the years

On another front, the banking sector is rising up to new challenges posed by the evolving crypto and digital assets, digitization, cybersecurity, ESG compliance, and metaverse.[9]

II CENTRAL BANK AND ITS POWERS

Reserve Bank of India (RBI) discharges the central banking functions[10] and draws its power, as the apex financial institution of the country, under the RBI Act, 1934. RBI also operates the Monetary Policy of India through Monetary Policy Committee (MPC).[11]The jurisprudence under RBI Act is already well settled, however, sometimes, questions come up on the decisions taken by RBI, particularly with reference to a number of Master Circulars issued by RBI from time to time.[12] For example, in the case of *SIDBI* v. *SIBCO,*[13]the question was on the issue of RBI's power to issue directions to Non-Banking Financial Companies (NBFCs). The court observed that:[14]

> for efficient discharge of its functions, the RBI has been granted special powers for controlling and regulating various financial institutions, as is clear from different provisions ofthe RBI Act, 1934andThe Banking Regulation Act, 1949. As per the RBI Act, 1934, we find that the RBI has wide supervisory jurisdiction over all Banking Institutions in the country.

On the ground of 'public interest' the RBI is empowered to issue any directive to any banking institution, and to prohibit alienation of an NBFC's property. The term 'Public interest' has no rigid definition. It has to be understood and interpreted

9 KPMG, 2022 Banking Industry Survey: Navigating in Choppy Waters (2022) *available at*: banking-industry-survey.pdf (kpmg.com).

10 Currency regulator, banker to the Government, custodian of cash reserves, custodian of international currency (Foreign Exchange Management Act, 1999), controller of credit, *etc*.

11 Ch. IIIF of the RBI Act.

12 For the year 2022 RBI issued Master Circulars in many areas including, Credit Facilities to Minority Communities, Scheduled Castes (SCs) and Scheduled Tribes (STs), Deendayal Antyodaya Yojana - National Rural Livelihoods Mission (DAY-NRLM), Income Recognition, Asset Classification, Provisioning and Other Related Matters, Basel III Capital Regulations, Asset Reconstruction Companies, *etc*.

13 *Small Industries Development Bank of India* v. *SIBCO Investment (P) Ltd.* (2022) 3 SCC 56. The case involved withholding the payment on bonds by SIDBI pending finality of a dispute before company court (suspect spell) with reference to said bonds and the related directions of RBI issued in public interest.

14 *Ibid*.

with reference to the context in which it is used.The concept derives its meaning from the statute where it occurs, the transaction involved, the state of society and its needs. Summarising some of its own decisions,[15] the Supreme Court reiterated that "*it is not necessary for RBI to mention a specific provision before issuing directions, for it to have statutory consequences. All that is required is the authority under the law, to issue such direction.*"

In another matter,[16] a batch of petitions were preferred by several banks against the directions[17] of the RBI, which directed the banks to disclose confidential and sensitive information pertaining to their affairs, their employees and their customers under the Right to Information Act, 2005 in view of the Supreme Court decision in previous case.[18] While deciding this case, an ancillary but important issue came up for consideration of the apex court, that is, whether the Supreme Court can correct its own decisions exercising jurisdiction under article 32? Answering the question in affirmative, the court emphasised the "*need for drawing a balance ensuring certainty and finality of a judgment of the Court of last resort on one hand and dispensing justice on reconsideration of a judgment on the valid grounds on the other hand.*"[19] Referring to *K.S. Puttaswamy,*[20] the court further emphasised that the right to privacy is a fundamental right and no doubt that the right to information is also a fundamental right. In case of such a conflict, the court is required to achieve a sense of balance.

In *Ashok Bajirao Khade v. State of Maharashtra,*[21] the High Court of Bombay was dealing with a question[22] that there is an absolute prohibition on co-operative societies from using the words bank, banker, or banking as part of their names under the Banking Regulation Act,1949. The court held that this was not correct. The press release only warns members of the public that these societies, while they may be using the word 'bank', are not licensed banking companies under the Banking Regulation Act nor are they authorized by the Reserve Bank of India for

15 *Bihar Public Service Commission* v. *Saiyed Hussain Abbas Rizwi* (2012) 13 SCC. 61 and *Internet and Mobile Association of India* v. *RBI* (2020) 10 SCC 274.

16 *HDFC Bank Ltd.* v. *Union of India* 2022 LiveLaw (SC) 811, decided on Sept 30, 2022 [Coram: B.R. Gavai J., C.T. Ravikumar J.]

17 There directions were issued in compliance with the decision in the case of *Girish Mittal* v. *Parvati V. Sundaram* (2019) 20 SCC 747 and also the decision in the case of *Reserve Bank of India* v. *Jayantilal N. Mistry*, (2016) 3 SCC 525 (held *per incuriam* in HDFC Bank case). Also see Disclosure Policy of RBI available at https://www.rbi.org.in/commonman/English/Scripts/Content.aspx?Id=839.

18 *Girish Mittal, supra* note 17.

19 *Id.*, para 30.Applying the principle of *ex debito justitiae*, the court held that no man should suffer because of the mistake of the court. No man should suffer a wrong by technical procedure of irregularities. It has been held that the rules of procedure are the handmaidens of justice and not the mistress of justice. It has further been held that if a man has been wronged, so long as the wrong lies within the human machinery of administration of justice, that wrong must be remedied (para 32)

20 *K.S. Puttaswamy* v. *Union of India* (2017) 10 SCC 1.

21 2022 SCC OnLine Bom 8691

banking business. Thus, there was no absolute bar or ban on the use of word "Bank" by the respondent society.

III NPAS AND ITS RECOVERY

The Insolvency and Bankruptcy Code (IBC) 2016 has transformed the Corporate Insolvency Resolution Process (CIRP). The banking sector has seen a lot of transformation in view of the changes introduced by the law and practice of IBC. Generally, the banking sector faces a huge challenge in recovery of loans. To mitigate this challenge of rising NPAs, special legislations like Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "RDDFI Act") and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act") were enacted however, these legislations were not as effective as IBC. While IBC has lessened the work under these legislations, still the cases under SARFAESI forms the majority of jurisprudence on banking law relating to loan recovery.

In *Phoenix ARC* case,[23]the issue related to maintainability of writ petition against the Asset Reconstruction Company (ARC). Supreme Court held that ARC is a private financial institution, and thus writ petition shall not be maintainable against such entities. In this case, the High Court of Karnataka had entertained the Writ Petition under article 226 filed by *Vishwa Bharati Vidya Mandir* (an educational institution) and passed the interim order directing for maintaining *status quo* with regard to SARFAESI action under section 13(4) (possession of the secured assets).The ARC has challenged this before Supreme Court. The Supreme Court referred its own decisions,[24] reiterating that in view of the statutory, efficacious remedy available by way of appeal under section 17 of the SARFAESI Act, the high court ought not to have entertained the writ petitions: [25]

> Filing of the writ petition by the borrowers before the High Court is nothing but an abuse of process of Court. It appears that the High Court has initially granted an *ex-parte ad-interim* order mechanically and without assigning any reasons. The High Court ought to have appreciated that by passing such an interim order, the rights of the secured creditor to recover the amount due and payable have been seriously prejudiced. The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. The stay granted by the High Court would have serious adverse impact on the financial health of the secured.

In another case[26] involving section 13(8) of the SARFAESI Act, the court held that it was not correct for the high court to allow release of mortgaged property

22 Based on the interpretation of RBI Press Release dated Nov. 22, 2021, *available at:* https://rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=52596 (last visited on May 30, 2022).

23 *Phoenix ARC (Pvt.) Ltd.* v. *Vishwa Bharati Vidya Mandir* (2022) 5 SCC 345.

24 *Authorized Officer, State Bank of Travancore* v. *Mathew K.C.* (2018) 3 SCC 85.

25 *Id*.

26 *Bank of Baroda* v. *Karwa Trading Co.* (2022) 5 SCC 168.

to the borrower on part payment of the loan amount. The borrower cannot be said to have been relieved of the liability of the loan on making payment of the reserve price set in public auction of the secured property. However, it may be noted that in *Amrik Singh* v. *DCB Bank,*[27] the High Court of Punjab and Haryana distinguished *Phoenix ARC* to hold that DCB Bank was amenable to writ jurisdiction as DCB Bank as the asset reconstruction company was registered with the RBI, which registration could also be cancelled under section 4 of the SARFAESI Act and it was also a scheduled bank governed by Banking Regulation Act, 1949.

In *Lelamma Mathew* case,[28] the Bank had sold the auction property of 54 cents without having the possession of the same. At the time of possession, it was revealed that 14.40 cents of the property was already sold and only 34.60 cents of the property was available with the appellants. Trial court had ordered damages and compensation; however, High Court of Kerala had held otherwise on the grounds that the property was barred by section 34 of the SARFAESI Act and the bank was not liable as the property was put to auction on "as is where is" and "as is what is" basis. Supreme Court however, held that the suit before trial court was with respect to balance land, which could not have been decided by the DRT or appellate tribunal hence section 34 of SARFAESI shall not be applicable. Issuance of certificate by bank for a land parcel which it did not have at the time of issuance of sale certificate was held improper.[29]

Requirement of Permission of Borrower in public auction –High Court of Delhi [30]held that requiring the authorized officer to obtain the borrower's consent for selling property at or above the reserve price undermines the purpose of public auctions or tenders.It clarified that the second proviso to Rule 9(2) applies only when the sale price is below the reserve price[31] set under Rule 8(5). Consequently, the DRT's order rejecting the borrower's request for consent before selling the mortgaged property at the reserve price was upheld. It may be noted that High Court of Delhi entertained this case on behalf of Debt Recovery Appellate Tribunal (DRAT) as presiding officer's post was lying vacant.

Expeditious Remedy – In *Bank of Baroda* v. *Parasaadilal Tursiram Sheetgrah (P) Ltd*.[32] the Supreme Court reiterated the reason for providing a time limit of 45 days for filing an application under section 17 of the SARFAESI Act as

27 SCC OnLine P and H 3518; (2022) 2 RCR (Civil) 791.

28 *Lelamma Mathew* v. *IOB*- (Civil Appeal 7128 of 2022) decided on Nov. 17, 2022.

29 *Ibid.*

30 *Mahipal Singh Yadav* v. *Union Bank of India* (2022) 1 HCC (Del) 292.

31 The "reserve price" is entirely different from the "concept of valuation". Reserve price is the minimum price with which the public auction starts, and the auction bidders are not permitted to o er bids below the set price, the minimum bid at the auction. Thus, the reserve price so fixed in any public auction is not at all relatable to the valuation of the property which it would fetch or would have fetched, if sold in open market. See Ballyfabs case referring to *Anil Kumar Srivastava* v. *State of U.P.* (2004) 8 SCC 671, *Duncans Industries Ltd.* v. *State of U.P.* (2000) 1 SCC 633. 47.

32 2022 SCC OnLine SC 1006.

quick enforcement of security.[33] In this case, proceedings where a property that has been brought to sale and third-party rights created under the provisions of the Act, have remained inconclusive even after a decade. The court was of the opinion that "the High Court was not justified in staying the operation of the order of the DRAT which came to the conclusion that there was no error apparent on the face of record for the DRT to invoke the review jurisdiction and recall its order dismissing the application under Section 17 of the Act."[34]

Right of the Mortgagor to Redeem the Property – One of the questions before the High Court of Andhra Pradesh was "Till what time or date can the right of redemption of the mortgage be exercised by the mortgagor/borrowers in the light of the amendment to Section 13(8) of the SARFAESI Act." In this case,[35] bank issued the sale certificate in favour of the auction purchaser even after the mortgagor had deposited the entire amount prior to the date on which the auction purchaser had deposited the amount. Referring to Supreme Court in *Mathew Verghese,*[36] the court reiterated "the right of redemption of the mortgagor/borrower is not extinguished until the sale certificate is issued and the sale is registered in favour of the auction purchaser even where the sale is held under the SARFAESI Act. It does not get extinguished on the date fixed for sale, *i.e.* the date of public auction/ e-auction[37]."

Maintenance of Writ before High Court in absence of a Forum (DRT) – In a case before High Court of Kerala,[38] writ petition was filed alleging that the DRT at Ernakulam has not been functioning as on the date of filing of the writ petition. The remedy of an aggrieved person against any action initiated under the Securitisation Act law is to move the DRT under section 17 of the Securitisation Act. However, from the end of March 2021, one of the Presiding Officers of the Tribunal at Ernakulam was not sitting, while the remaining Presiding Officer resigned on September 23, 2021. Thus, as on the date of filing of this writ petition (October 11, 2021) there was no forum for the petitioners to ventilate their grievances. While entertaining the writ petition, court held that:

> Lack of forum to agitate a grievance creates an occasion of denial of access to justice. Access to justice is a fundamental right under the Constitution. An effective adjudicatory mechanism is also a facet of the said fundamental right.[39] When the fundamental right to have access to justice is denied, due to the absence of Presiding Officers of the forum created under the statute, the aggrieved are entitled to

33 *Id*., para 12, relying upon *Transcore* v. *Union of India* (2008) 1 SCC 125.

34 *Id*., para 14.

35 *Moonlight Poultry Farm* v. *Union Bank of India*, 2022 SCC OnLine AP 2424.

36 *Id*., para 13.

37 *Mathew Varghese* v. *M. Amritha Kumar* (2014) 5 SCC 610.

38 *Annam Steels (P) Ltd.* v. *Canara Bank Ltd*., 2022 SCC OnLine Ker 234.

39 *Anita Kushwaha* v. *Pushpa Sudan* 2016) 8 SCC 509).

> knock at the doors of this Court under Article 226 or 227 of the Constitution of India.[40]

While deciding the issue in question in this case, the court held that the concept of 'debt' in the RDB Act and the Securitisation Act has the same meaning. No different interpretations may be employed. Once an amount is declared as non-performing with the issuance of notice under section 13(2), the borrower is statutorily obligated to discharge the entire liability to overcome the rigours of the Securitisation Act.[41] A "*partial discharge of the debt*" is not sufficient to discharge the liability of the borrower and part payment of the amount under whatever mode (even through court order), otherwise a shrewd borrower will always be able to defeat the provisions of Act by making such a part payment and getting away with it.

Appointment of Advocate to take possession of secured assets – In case of recovery of loans under the SARFAESI Act,[42] a question arose before the court "whether it is open to the District Magistrate or the Chief MetropolitanMagistrate to appoint an advocate and authorise him/her to takepossession of the secured assets and documents relating thereto and to forward the same to the secured creditor.[43] There have been conflicting decisions of various High Courts on this question. Supreme Court discussed three types of subordination in this case, *i.e.,* "administrative subordination", "statutory subordination" and "functional subordination". Applying the 'functional subordination' interpretation,[44] Supreme Court held that the judgment and order of the High Court of Bombay impugned in the present appeals[45] is declared as not a good law. Whereas, the conclusion of the three high courts, namely, High Courts of Kerala, Madras and Delhi on the question under consideration were upheld that "there is no prohibition either on engaging any advocate commissioner for taking the position of the secured assets". In a similar case,[46] the question was whether DM/CMM will include the Additional District Magistrate or Additional Chief Metropolitan Magistrate. The court held that the powers exercised by CMM/DM are of a "purely ministerial nature" and

40 Anam, para 16.

41 *Id.,* para 25.

42 *NKGSB Cooperative Bank Ltd.* v. *Subir Chakravarty* (2022) 10 SCC 286.

43 Within the meaning of s. 14(1A) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2023.

44 "It is common knowledge that in the respective jurisdictions, there is only one CMM/DM. If he is expected to reach at every location himself for taking possession, in some jurisdictions it would be impracticable, if not impossible, for him to do so owing to large number of applications in the given jurisdiction being a commercial city. Accordingly, strict construct would defeat the legislative intent and purpose for enacting the 2002 Act. Indeed, logistical problems of the Office of the CMM/DM cannot be the basis to overlook the statutory provision. However, we are persuaded to take the view that an advocate is and must be regarded as an officer of the court and subordinate to the CMM/DM for the purposes of Section 14(1A) of the 2002 Act".

45 Judgment and order dated Nov.6, 2019 in Writ Petition (L) No.28480 of 2019.

46 *R.D. Jain and Co.* v. *Capital First Ltd.*, (2023) 1 SCC 675.

can be exercised by the Additional CMM/DM. In another case before High Court of Odisha,[47] the question was whether CJM can have authority when the words used in section 14 of the SARFAESI Act is CMM? It was held that powers and functions of CMM and CJM are equivalent and similar in relation to matters specified in Cr PC as also under section 14 of the SARFAESI Act.[48] Holding the power to be exercisable under Section 14to be purely non-judicial, ministerial and exercise of coercive power, it was held that merely because only the word/term "CMM" has been used, instead of chief judicial magistrate, it cannot be held that CJM becomes incompetent authority to entertain applications under section 14. CJM was thus held to be possessing equivalent authority to entertain applications for handing over of physical possession to the secured creditor.

Requirement of Issuance of Notice – In *HDFC Bank Ltd.* v. *Parwati Cotton,*[49] The High Court of Gujarat ruled[50] that a borrower can file a securitisation application under section 17 of the SARFAESI Act before the DRT only after the issuance of a notice under section 13(4), not before. The DRT's authority to examine the validity of measures arises only post such issuance. Consequently, the matter was remitted to the District Magistrate, Rajkot, for fresh adjudication in light of the amended section 14 and the absence of a section 13(4) notice by the secured creditor. The DM's order was quashed and set aside.

Sale in Public Auction to be considered as sale in Open Market –High Court of Calcutta held that the sale conducted by the authorised officer in exercise of the powers conferred under Rule 8 of the Security Interest (Enforcement) Rule, 2002 by public auction or by inviting tenders from the public would be regarded as the sale in the open market and the price so accepted shall be the price which it would fetch if sold in the open market under section 47-A of the Stamp Act. However, the sale must be conducted by making a wide publication at least in one newspaper widely circulated in the particular city/town/district where the property is situated and the authorised officer shall not have any relation or connection with the intending purchaser.[51]

Tenancy Rights and the rights of the Secured Creditors – In the case of *Balkrishna Rama Tarle v. Phoenix ARC (P) Ltd.,*[52] the Supreme Court was dealing with the question "whether while exercising the powers under section 14 of the SARFAESI Act, the district magistrate/designated authority could have passed such an order that unless and until the secured creditor terminates the tenancy rights of the third person by following due procedure of law and further orders regarding possession of the mortgaged property then and then only an application

47 *Bajaj Finance Ltd.* v. *Ali Agency*, AIR 2022 Ori 68.

48 *Indian Bank* v. *D. Visalakshi*, (2019) 20 SCC 47.

49 SCA 5773 of 2020 decided on April 29, 2022.

50 Referring to *Jagdish Singh* v. *Heeralal* (2014) 1 SCC 479 and *Standard Chartered Bank* v. *Noble Kumar*, (2013) 9 SCC 620.

51 *Ballyfabs International Ltd.* v. *State of W.B.* 2022 SCC OnLine Cal 863.

52 (2023) 1 SCC 662.

under section 14of the SARFAESI Act will be decided? The court upheld the finding of the high court that: [53]

> the powers exercisable by CMM/DM underSection 14of the SARFAESI Act are ministerial step and Section 14does not involve any adjudicatory process quapoints raised by the borrowers against the secured creditor taking possession of the secured assets. In that view of the matter once all the requirements underSection 14of the SARFAESI Act are complied with/satisfied by the secured creditor, it is the duty cast upon the CMM/DM to assist the secured creditor in obtaining the possession as well as the documents related to the secured assets even with the help of any officer subordinate to him and/or with the help of an advocate appointed as Advocate Commissioner. At that stage, the CMM/DM is not required to adjudicate the dispute between the borrower and the secured creditor and/or between any other third party and the secured creditor with respect to the secured assets and the aggrieved party to be relegated to raise objections in the proceedings underSection 17of the SARFAESI Act, before Debts Recovery Tribunal.

IV SUPREMACY OF RECOVERY LAWS OVER OTHER LAWS

In *Punjab National Bank* v. *Union of India,*[54] the Supreme Court held that "the dues of the secured creditor, *i.e.*, the appellant- bank, will have priority over the dues of the Central Excise Department[55] and the provisions contained in the SARFAESI Act, 2002 will have an overriding effect on the provisions of the Central Excise Act of 1944. Contrary to the above case, in another case,[56] where the question was whether RERA will give way to SARFAESI Act proceedings, the Supreme Court concurred with the view taken by the Rajasthan High Court, which referred to the decision of the Supreme Court in the case of *Bikram Chatterji*[57] in the event of conflict between RERA and SARFAESI Act the provisions contained in RERA would prevail. RERA would not apply in relation to the transaction between the borrower and the banks and financial institutions in cases where security interest has been created by mortgaging the property prior to the introduction of the Act unless and until it is found that the creation of such mortgage or such transaction is fraudulent or collusive." It is argued that the Supreme Court's ruling in the

53 *Id*. para 9.

54 (2022) 7 SCC 260.

55 Even after insertion of s. 11E in the Central Excise Act, 1944 *w.e.f.* April 8, 2011. S. 35 of the SARFAESI Act, 2002 *inter alia*, provides that the provisions of the SARFAESI Act, shall have overriding effect on all other laws. It is further pertinent to note that even the provisions contained in s.11E of the Central Excise Act, 1944 are subject to the provisions contained in the SARFAESI Act, 2002. See *Union of India* v. *SICOM Ltd.* (2009) 2 SCC 121.

56 *Union Bank of India* v. *Rajasthan Real Estate Regulatory Authority* 2022 LiveLaw (SC) 171.

57 Writ Petition (Civil) No. 940 OF 2017 decided on June 29, 2021.

Union Bank of India case prioritizes homebuyers over banks in developer defaults, benefiting buyers but potentially straining the banking sector. This may hinder asset recovery and discourage bank funding, impacting the real estate industry.[58]

While deciding a question whether proceedings under section 9 of the Arbitration and Conciliation Act, 1996 and under the SARFAESI Act can run simultaneously, High Court of Rajasthan [59] held that provisions of the SARFAESI Act are a remedy in addition to provisions of the Arbitration Act,[60] where under liquidation of secured asset through a more expeditious procedure is what has been envisaged for. They are "cumulative remedies" and not "substitutionary remedies" of each other. SARFAESI proceedings were held to be in the nature of enforcement proceedings, whereas arbitration is an adjudicatory process. In the event the secured assets are insufficient to satisfy the debt, the secured creditor can proceed against other assets in execution against the debtor after determination of the pending amount in arbitration proceedings by a competent forum.

High Court of Madras while dealing with the question about interplay and conflict between the provisions of IT Act, the RDDB Act, 1993 and the SARFAESI Act held that realisation of taxes by the State is a sovereign function, which must therefore be accorded primacy over other private debts. Accordingly, section 281 of the ITAct was interpreted to mean that no mortgage ought to be created during the pendency of IT proceedings, which would render the whole mortgage void.[61]

SEBI and RBI Circular – In *SEBI* v. *Rajkumar Nagpal,*[62] the Supreme Court was faced with a situation to interpret application of Companies Act, 2013, RBI Circular[63] and SEBI Circular[64] on same issue of restructuring of debt by banks as creditors and other debenture holders. Bothe these circulars provided for different threshold

58 Vaidya, Bhoumick, *RERA* v. *SARFAESI*, available at https://www.amsshardul.com/insight/rera-vs-sarfaesi/

59 *Om Prakash Kumawat* v. *Hero Housing Finance Ltd*., 2022 SCC OnLine Raj 1771, cited in Sidharth R. Gupta, *Landmark Judgments on Banking Laws (2022) Part I*, *available at* 2023 SCC OnLine Blog Exp 30 https://www.scconline.com/blog/post/2023/03/22/landmark-judgments-on-banking-laws-2022-part-i/(last visited on Sep. 10, 2022).

60 Referring to *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.* (2017) 16 SCC 741 and *Indiabulls Housing Finance Ltd.* v. *Deccan Chronicle Holdings Ltd.* (2018) 14 SCC 783.

61 *SBI* v. *Tax Recovery Officer* (2022) 441 ITR 516.

62 2022 SCC OnLine SC 1119.

63 The RBI Circular dated 7 June 2019 contains other provisions including those on the implementation of the Resolution Plan, consequences of delayed implementation, prudential norms, supervisory review, disclosures, and exceptions. The RBI Circular has prescribed a higher voting threshold than the threshold mandated by s. 230(6) of the Companies Act. Consequently, on and from (the date of issuance of the RBI Circular), lending institutions governed by Cl. 3 of the RBI Circular can avail of the special mechanism which has been introduced under it for the purpose of entering into a compromise, resolution, plan or arrangement for restructuring the debt due to lenders, with the ability to bind dissenters or those who abstain, without having to approach the NCLT under s. 230 of the Companies Act.

of acceptance of a compromise between creditor and debtor.[65] The mechanism which has been prescribed by the RBI Circular is restricted only to those lending institutions which fall within the ambit of clause 3. Apart from these lending institutions, debenture holders constituted another class of financial creditors to whom a debt may be due by the debtor company. Subsequently, SEBI issued a circular to cover the rights of the debenture holders. The court while holding that the SEBI Circular has a statutory character and the procedure under the same cannot be discounted, it invoked in the present facts of the case to do complete justice and held that:

> The different voting mechanism proposed under the SEBI Circular will further delay the resolution process and potentially disrupt the efforts undertaken by the stakeholders, including the retail debenture holders. Such unscrambling of the resolution process will not only prove time-consuming, but may also adversely affect the agreed realized gains to the retail debenture holders, who have already consented to the negotiated settlement before the High Court.[66] The compromise presently arrived at, which is in the interests of all the parties, will be disturbed if a new process is directed to be commenced in accordance with the SEBI Circular at the present stage.[67]

Jurisdiction of Civil Court vis-a-vis DRT – In a reference before Supreme Court of India,[68] the questions were "(a). Whether an independent suit filed by a borrower against a Bank or Financial Institution, which has applied for recovery of its loan against the plaintiff under the RDB Act, is liable to be transferred and tried along with the application under the RDB Act by the DRT?(b). If the answer is in the affirmative, can such transfer be ordered by a court only with the consent of the plaintiff? (c). Is the jurisdiction of a civil court to try a suit filed by a borrower

64 Dated Oct. 13, 2020 read with SEBI (Debenture Trustees) Regulations 1993. The SEBI Circular facilitates the process of seeking consent for enforcement of security and/or entering into an ICA. The SEBI Circular recognizes that investors in debt securities who are financial creditors falling outside the purview of the RBI Circular are approached by other lenders to sign the ICA under the RBI Circular. SEBI's circular has enunciated the modalities for standardizing the procedure.

65 In the case of an NCLT approved scheme of compromise or arrangement within the ambit of s. 230of the Companies Act, the threshold is of a ¯majority of persons representing 3/4th in value of the creditors or class of creditors or members or class of members •□L□•□ˇ. When it comes to the prudential framework for resolution governing lenders within the description of Cl. 3 of the RBI Circular, the threshold is 75% by value of the total outstanding credit facilities and 60% of lenders by number. The SEBI Circular on the other hand mandates the approval of not less than 75% of the investors by value of the outstanding debt and 60% of the investors by number at the ISIN level.

66 *SEBI* v. *Rajkumar Nagpal*, para 89

67 *Id*., para 93.

68 *Bank of Rajasthan Ltd.* v. *VCK Shares and Stock Broking Services Ltd.* [2022] 144 taxmann.com 193 (SC)

against a Bank or Financial Institution ousted by virtue of the scheme of the RDB Act in relation to the proceedings for recovery of debt by a Bank or Financial Institution?"[69] The above questions arose for reference due to conflicting opinions by the coordinate benches of the Supreme Court.[70]

Answering the first question in affirmative, the court clarified that there is no bar in law regarding the transfer of independent suit filed by the borrower against the bank to be decided as a counterclaim/set-off by the DRT in an original application filed by the bank. As regard the question of consent of the plaintiff, the court elaborated the objectives of the expedited procedure under DRT law[71]. The Supreme Court in this case of the view that "there is no provision in the RDB Act by which the remedy of a civil suit by a defendant in a claim by the bank is ousted, but it is the matter of choice of that defendant. Such a defendant may file a counterclaim, or may be desirous of availing of the more strenuous procedure established under the Code, and that is a choice which he takes with the consequences thereof. [72]" However, "there can be no question of stay of those proceedings by way of a civil proceeding instituted by a defendantbefore the Civil Court. The suit would take its own course while a petition before the DRT would take its own course."

69 *Id.*, para 16.

70 *United Bank of India, Calcutta* v. *Abhijit Tea Co. Pvt. Ltd.* (2000) 7 SCC 357 (as per the legislative scheme of the RDB Act, jurisdiction was conferred upon the DRT to try a counterclaim and set-off under s. 19 of the RDB Act and that all such counter-claims and set-offs, including a cross-suit filed independently, should be tried by the DRT) in *Indian Bank* v. *ABS Marine Products (P) Ltd.* (2006) 5 SCC 72 the jurisdiction of the civil courts was not barred in regard to any suit filed by the borrower against a bank for any relief. Jurisdiction was barred only in regard to applications by a bank or a financial institution for recovery of its debts. It was held that although a counterclaim and set-off may be made under sub-sec (6) and (11) of s. 19 of the RDB Act, no jurisdiction was conferred on the DRT to try independent suits or proceedings initiated by the borrowers. It was thus held that the borrower had the option to file a separate suit beforethe Civil Court and the counterclaim before the DRT was not the only remedy.

71 *Id.,* para 27. Banks and financial institutions lend public money to assist entrepreneurs in their business. Thus, on one hand, there is the interest of public, whose funds are utilised, while on the other hand are the business establishments which need funds for their business. Banks and financial institutions in a sense are intermediaries in the process.

28. Litigation instituted by banks and financial institutions became coloured by gross delays in the civil proceedings, as a result of which defaulters were at a premium. Borrowers who maintained financial discipline were the ones at a disadvantage. The borrowing process was being misused and a large amount of public funds were stuck in litigation.

29. In order to expedite the recovery of dues, the RDB Act was enacted by Parliament on 27.08.1993 and brought into force *w.e.f.,* 24.06.1993. The RDB Act provided for the establishment of a tribunal for expeditious adjudication and recovery of debts due to banks and financial institutions and for all matters connected therewith. The RDB Act is comprehensive in character in terms of providing the methodology towards the said objective.

72 *Id*., para 45.

V BANKING FRAUDS

Reserve Bank of India (RBI) has issued Master Directions on Frauds in 2016 with a view to provide a framework to banks, to enable them for managing of fraud risk and for early detection of loan frauds, prompt reporting to RBI and investigative agencies, and timely initiation of staff accountability proceedings. Also, RBI has issued a framework for dealing with loan frauds and red flagged accounts (RFA), requiring banks to classify potential fraud accounts as RFAs based on observation or evaluation of early warning signals noticed. As per the said direction, RBI has classified frauds for uniformity in reporting into following categories:- Misappropriation and Criminal breach of trust, fraudulent encashment through forged instruments, manipulation of books of account or through fictitious accounts and conversion of property, unauthorized credit facilities extended for reward or for illegal gratification, cash shortages, cheating and forgery, fraudulent transactions involving foreign exchange and any other type of fraud not coming under the specific heads as above.[73] Banking Fraud cases have been dealt with under the routine penal laws, however, owing to increasing digital banking frauds, there have been suggestions to have stringent penalties for online banking frauds.

The case of *Pradeep Kumar* v. *Postmaster General*[74] involved an illegal encashment of *Kisan Vikas Patra (KVP)* in complicity of an employee of the post office. The question in this case was about the vicarious liability of the post office for the faults attributed to its employees. NCDRC dismissed the petition finding the fault with the complainant on factual grounds absolving the post office from any liability, at the most complainants may proceed to recover the amount from the third-party agent or the state government. However, the Supreme Court disagreed with the finding of the NCDRC and held that the irresponsible and careless act of the employee of the post office is very much attributable to it. The amount was paid in cash whereas the Rules required it to be disbursed by account payee cheque. The cash was paid to a third-party facilitator who siphoned off the amount and it never reached the actual beneficiary.

VI CHEQUE BOUNCE CASES

A Constitution Bench of the Supreme Court[75] had issued various directions were issued with respect to the conduct of trials of complaints under section 138 of the Negotiable Instruments Act, 1881. The Supreme Court examined the issue further[76] and on the recommendation of the *amici curiae*, issued guidelines for established of pilot courts presided over by retired judges in five districts of five states having highest pendency.

73 Question answered by Ministry of Finance in Rajya Sabha on 20/12/2022 Unstarred Question No-1514 – Bank Frauds Reported by RBI, *available at* : https://sansad.in/(last visited on Ssep.10, 2022).

74 (2022) 6 SCC 35.

75 *Re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881*, 1 (2021) SCCOnline SC 325

76 *Suo Motu Writ (Criminal) NO. 2 OF 2020 in Re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881* order dated May 19, 2022, 2022 LiveLaw (SC) 508.

The pilot study shall be conducted in 25 Special Courts in total. One Special Court shall be established in each of the 5 judicial districts which have been identified as having the highest pendency by each of the five High Courts of the States (Maharashtra, Rajasthan, Gujarat, Delhi and Uttar Pradesh) with the highest pendency of NI Act cases.

VII CONSUMER PROTECTION

'Consumer'has been defined under the Consumer Protection Act (CPA), 1986 so as to include persons availing 'services' in the banking sector. The basic legal point which emerges in consumer-banker dispute revolves around the definition of a 'consumer'. A 'consumer' has been defined to exclude someone who buys a product or avails services for commercial purpose', however, there is an exception to this exception. A person buying a product or availing the service for earning his livelihood will not be considered as a person who avails the services for 'commercial purpose'. Thus, the person will be entitled to the speedy and exclusive remedy available to a normal consumer under the CPA. Consumers with commercial purpose has to seek the normal remedy through civil court or other mechanisms.

Supreme Court got an opportunity, in the case of *Shrikant G. Mantri* v. *Punjab National Bank,*[77] to further clarify the historical evolution of the concept of 'commercial purpose' and its exception under the 1993 and 2002 Amendments of the CPA:[78]

> It is thus clear that by the 2002 Amendment Act, the legislature has done two things. Firstly, it has kept the commercial transactions, insofar as the services are concerned, beyond the ambit of the term 'consumer' and brought it in parity with Section 2(1)(d)(i), wherein a person, who bought such goods for resale or for any commercial purpose, was already out of the ambit of the term 'consumer'. The second thing that the legislature did was that even if a person availed of the commercial services, if the services availed by him were exclusively for the purposes of earning his livelihood by means of self-employment, he would still be a 'consumer' for the purposes of the said Act. Thus, a person who availed of services for commercial purpose exclusively for the purposes of earning his livelihood by means of self-employment was kept out of the term 'commercial purpose' and brought into the ambit of 'consumer', by bringing him on par with similarly circumstanced person, who bought and used goods exclusively for the purposes of earning his livelihood by means of self-employment. It could thus be seen that the legislature's intent is clear.

77 [2022] 5 S.C.R. 945.

78 *Id.,* para 31.

While referring to and elaborating upon several case laws[79] on the point, the court reiterated that "as to whether a transaction is for a commercial purpose would depend upon the facts and circumstances of each case." In the present case, the Supreme Court upheld the findings of the National Consumer Disputes Redressal Commission (NCDRC) stating that: [80]

> the appellant had opened an account with the respondent-Bank, took overdraft facility to expand his business profits, and subsequently from time to time the overdraft facility was enhanced so as to further expand his business and increase his profits. The relations between the appellant and the respondent is purely "business to business" relationship. As such, the transactions would clearly come within the ambit of 'commercial purpose'. It cannot be said that the services were availed "exclusively for the purposes of earning his livelihood" "by means of self-employment". If the interpretation as sought to be placed by the appellant is to be accepted, then the 'business to business' disputes would also have to be construed as consumer disputes, thereby defeating the very purpose of providing speedy and simple redressal to consumer disputes

In another case,[81] the complaint of the appellant was that there was a deficiency on the part of the respondent bank in proceeding to credit the proceeds of a joint FD exclusively to the account of his father. Bank raised the objection that there was a dispute between father and son and this did not amount to a consumer dispute and thus there was no deficiency in service. Supreme Court while analysing the case dealt with the definition of 'service' under section 2(1)(o) of the 1986 Act, and referred to the interpretation provided in *Vodafone Idea Cellular Limited* v. *Ajay Kumar Agarwal*:[82]

> The definition of the expression "service" is couched in wide terms. The width of statutory language emerges from the manner in which the definition is cast. Parliament has used the expression "service of any description which is made available to potential users." The definition employs the "means and includes formula." The means part of the definition incorporates service of "any" description. The

79 *Laxmi Engineering Works* v. *P.S.G. Industrial Institute* (1995) 3 SCC 583; *Internet and Mobile Association of India* v. *Reserve Bank of India* (2020) 10 SCC 274 : [2020] SCR 297; *Lilavati Kirtilal Mehta Medical Trust* v. *Unique Shanti Developers* (2020) 2 SCC 265 : [2019] 14 SCR 563; *Paramount Digital Colour Lab* v. *AGFA India Private Limited* (2018) 14 SCC 81; *Sunil Kohli* v. *Purearth Infrastructure Limited* (2020) 12 SCC 235; CBI, AHD, *Patna* v. *Braj Bhushan Prasad* (2001) 9 SCC 432 : [2001] 3 Suppl. SCR 627; *Cheema Engineering Services* v. *Rajan Singh* (1997) 1 SCC 131: [1996] 8 Suppl. SCR 340; *Kalpavruksha Charitable Trust* v. *Toshniwal Brothers (Bombay) Pvt. Ltd.* (2000) 1 SCC 512 : [1999] 3 Suppl. SCR 619.

80 *Id*., para 47.

81 *Arun Bhatiya* v. *HDFC Bank*, 2022 LiveLaw (SC) 696.

82 (2022) 6 SCC 496.

> inclusive part incorporates services by way of illustration, such as facilities in connection with banking, finance, insurance, transport, processing, supply of electrical and other energy, board or lodging and housing construction. The inclusive part is prefaced by the clarification that the services which are specified are not exhaustive. This is apparent from the expression "but not limited to". The last part of the definition excludes (i) the rendering of any service free of charge; and (ii) services under a contract of personal service. Parliament has confined the exclusion only to two specified categories. The initial part of the definition however makes it abundantly clear that the expression "service" is defined to mean service of any description. In other words, a service of every description would fall within the ambit of the statutory provision.

Supreme Court in this case held that the SCDRC had no justification to relegate the appellant to pursue his claim before a civil court, assuming that there was a dispute between the appellant and his father, that was not the subject matter of the consumer complaint. The SCDRC ought to have determined whether the complaint related to deficiency of service as defined under the 1986 Act.[83]

Referring to *State Bank of India* case,[84] the Supreme Court reiterated that "for the employer to be liable, it is not enough that the employment afforded the servant or agent an opportunity of committing the crime, but what is relevant is whether the crime, in the form of fraud etc., was perpetrated by the servant/employee during the course of his employment. Once this is established, the employer would be liable for the employee's wrongful act, even if they amount to a crime. Whether the fraud is committed during the course of employment would be a question of fact that needs to be determined in the facts and circumstances of the case".[85] In this case it was held that the employee of the post office was complicit in the fraud during the course of the employment. It may be noted here that post offices are providing the banking services, especially now with the introduction of the India Post Payment Banks.[86]

VIII NBFCS AND COOPERATIVES

In *Nedumpilli Finance Co. Ltd.* v. *State of Kerala,*[87] the question before the Supreme Court was whether NBFC[88] regulated by the Reserve Bank of India could

83 *Id*., para 20.

84 *State Bank of India (Successor to the Imperial Bank of India)* v. *Shyama Devi*, 1978 3 SCC 399.

85 *Pradeep Kumar*, para 38.

86 *Available at:* https://www.ippbonline.com/web/ippb.

87 (2022) 7 SCC 394.

88 A Non-banking financial company (NBFC) is defined in clause (f) of Section 45-I of RBI Act states that "(f) "non-banking financial company" means – (i) a financial institution which is a company; (ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; (iii) such other non-banking institution or class of such institutions, as the Bank may, with the previous approval of the Central Government and by notification in the Official Gazette, specify."

also be regulated by State enactments such as Kerala Money Lenders Act, 1958 ("Kerala Act") and Gujarat Money Lenders Act, 2011 ("Gujarat Act"). Supreme Court in this case held that once the RBI has been provided with the complete power to regulate NBFCs, also allowing state governments to regulate the loan/ money-lending aspect of NBFCs would not be prudent.

Once it is found that Chapter III-B of the RBI Act provides a supervisory role for the RBI to oversee the functioning of NBFCs, from the time of their birth (by way of registration) till the time of their commercial death (by way of winding up), all activities of NBFCs automatically come under the scanner of RBI. As a consequence, the single aspect of taking care of the interest of the borrowers which is sought to be achieved by the State enactments gets subsumed in the provisions of Chapter III-B.

Therefore, in contrast to the state enactments regulating the business of money lending, whose one-eyed focus is only the protection of borrowers, the RBI Act takes a holistic approach to the business of banking, money lending and operation of the currency and credit system of the country.

Interestingly, in this case the Supreme Court has also analysed the principles of repugnancy of laws, doctrine of eclipse, and overriding effect of laws enacted by Parliament over the State laws on the subject.[89]

IX INTERNATIONAL BANKING

In order to provide with an exclusive platform for International Banking Units (IBUs), the international Financial Services Authority (IFSCA) has framed exclusive Regulations. Which has been further amended and notified to provide more clarity on the concept of Global Administrative Offices of international banks.[90] The IFSCA Banking Handbook which was issued and amended in 2021 has come into effect from January 1, 2022. Regulation of foreign exchange also comes under the purview of RBI[91].

In the case of *Noel Harper,*[92] The Supreme Court dealt with the petitions challenging the Constitutional Validity of the amendments made to the provisions of Foreign Contribution (Regulation) Act.[93] The challenge was with reference to the restrictions introduced to curb the misuse of foreign contributions by NGOs. The Amendment to FCRA in 2020 introduced additional requirements of mandatory

89 The moment the Parliament stepped in to codify the law relating to registration and regulation of NBFCs, by inserting certain provisions in Chapter III-B of the RBI Act, the same would cast a shadow on the applicability (even assuming it is applicable) of the provisions of the Kerala Act to NBFCs registered under the RBI Act and regulated by RBI.

90 IFSCA Annual Report – 2022-2023, *available at*: https://ifsca.gov.in/Document/ReportandPublication/ifsca-annual-report-2022-23_english10082023064856.pdf (last visited on Aug. 20, 2022).

91 Foreign Exchange Management Act (FEMA), 1999.

92 *Noel Harper* v. *Union of India*, 2022 SCC OnLine SC 434 decided on April 8, 2022.

93 Foreign Contribution (Regulation) Amendment Act, 2020, which has come into effect on Sep. 29, 2020, in particular, s. 7, 12(1A), 12-A and 17.

opening up of FCRA Account with State Bank of India New Delhi Main Branch (NDMB), utilisation of received funds only for the purpose for which it is received, *etc*. With reference to single entry point of foreign contribution for effective monitoring, the Supreme Court was of the view that: [94]

> The need to have only one entry point for the inflow of foreign contribution had been viewed by the Parliament as the best option for regulating the inflow of foreign contribution. This process is expected to increase the efficiency in continual supervision of the inflow of foreign contribution on real-time basis by the concerned Authorities and to enable them to take immediate corrective measures to deal with and pre-empt the impending threat perceived because of its volume including undesirable source of remittance. It is not open to the Court to have a second-guess approach in that regard

X CONCLUSION

In 2022, the market size was 584 billion dollars and is estimated to reach 1.5 trillion dollars by 2025. India has the highest FinTech adoption rate globally of 87% which is significantly higher than the Global average rate of 64%. RBI has taken several steps towards the growth of fintech, some of which may be enumerated as under:[95]

i. In January 2022, the RBI created a new department to promote innovation, identify challenges, and address them in the fintech sector.

ii. In November 2022, the RBI launched a pilot project on central bank digital currency (CBDC).[96]

iii. The RBI has encouraged the use of electronic payments to meet its objective of a "cash-less" society.

iv. The RBI launched a pilot to digitalize KCC lending to increase efficiency, reduce cost, and reduce turnaround time.

A review of the banking law and policy demonstrates that while there is a stability in the area of banking laws with reference to role of the RBI, the integration of technology in banking services is posing several challenges and new questions are emerging. Encouragement for greater use of electronic payments and cashless economy has further provided with safety, security, enhanced convenience and accessibility, leveraging technological solutions that enable faster processing. A number of non-banking entities have emerged which support the banking services and regulation of these entities have become paramount.India's fintech industry is one of the fastest growing in the world.

94 *Noel Harper*, para 77.

95 *Available at:* https://www.investindia.gov.in/sector/bfsi-FinTech-financial-services (last visited on Oct. 20, 2022).

96 Also see RBI, *Report of the Working Group on FinTech and Digital Banking* (Nov, 2017), *available at* https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?UrlPage=&ID=892.