After the Bank's Notice

What actually happens under the SARFAESI Act, 2002 — and the dates on which the whole matter turns.

> This note accompanies the film of the same name. Every provision quoted below is reproduced from the bare Act. It is general legal information and nothing in it is advice on any particular case.

60	15	45	30
DAYS TO PAY S. 13(2)	DAYS FOR THE BANK'S REASONS S. 13(3A)	DAYS TO THE TRIBUNAL S. 17(1)	DAYS TO THE APPELLATE TRIBUNAL S. 18(1)

01 THE NOTICE IS NOT A COURT ORDER

A demand notice under Section 13(2) is issued by the bank itself. No judge has signed it, and no court has seen it. It is not an eviction order. It follows the classification of the account as a non-performing asset, and it must give the borrower sixty days.

> *"…the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within* **sixty days** *from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4)."*

Section 13(2), SARFAESI Act, 2002.

02 DURING THOSE SIXTY DAYS NOTHING CHANGES HANDS

The bank has no possession of the property during the notice period. The borrower continues in occupation and remains the owner; if the property is let out, the rent continues to come to the borrower. Receiving a notice and losing a property are two different events, separated by a considerable amount of law.

03 THE REPLY THAT MOST BORROWERS NEVER SEND

Section 13(3A) allows the borrower to make a representation or raise an objection on receipt of the notice. The secured creditor is bound to consider it, and if it is not accepted, must communicate the reasons in writing within fifteen days. A conversation at the branch counter is not a representation. Nothing that is not in writing exists on the record later.

> *"If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate* **within fifteen days** *of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower."*

Section 13(3A), SARFAESI Act, 2002.

THE TRAP — THE POINT MOST OFTEN MISUNDERSTOOD

The bank's communication of reasons does **not**, by itself, give the borrower the right to approach the Debts Recovery Tribunal. The door of the Tribunal opens only when the bank actually takes a measure under Section 13(4). Sending the representation is necessary — but on its own it carries no one to the Tribunal.

> *"Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons* **shall not confer any right upon the borrower** *to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A."*

Proviso to Section 13(3A); to the same effect, the Explanation to Section 17(1).

04 THE MEASURES UNDER SECTION 13(4)

Where the dues remain unpaid after the sixty days, the secured creditor may take possession of the secured asset, sell it, lease or assign it, or take over its management. It is the taking of such a measure — not the notice, and not the reasons — that starts the period under Section 17.

SYMBOLIC POSSESSION

Possession on paper. A notice affixed at the property and a publication in the newspaper. The borrower is still in occupation.

PHYSICAL POSSESSION

Actual possession, normally obtained by approaching the District Magistrate or Chief Metropolitan Magistrate under Section 14, supported by an affidavit.

Section 14 is itself a stage at which defects in procedure can be identified.

05 THE REMEDY — FORTY-FIVE DAYS

Any person, including the borrower, aggrieved by a measure taken under Section 13(4) may apply to the Debts Recovery Tribunal having jurisdiction. The period is forty-five days from the date the measure was taken. This is the date missed more often than any other: three months are spent going back and forth to the branch, a lawyer is consulted afterwards, and by then the period has run out.

> *"…to the Debts Recovery Tribunal having jurisdiction in the matter within* **forty-five days** *from the date on which such measure had been taken."*

Section 17(1), SARFAESI Act, 2002.

06 WHAT THE TRIBUNAL ACTUALLY EXAMINES

Not whether the borrower had the money, and not what the borrower's intentions were, but whether the secured creditor followed the procedure. In practice the enquiry runs along these lines:

1. Was the notice served at the correct address?
2. Were the full sixty days given?
3. Was the representation or objection replied to, and within fifteen days?
4. Was the property valued before sale?
5. Was thirty days' notice given before the sale, as required by the Security Interest (Enforcement) Rules, 2002?

A failure at any one of those points weakens the entire action.

07 TWO THINGS THE ACT CANNOT TOUCH AT ALL

> *"The provisions of this Act shall not apply to — … (h) any security interest for securing repayment of any financial asset* **not exceeding one lakh rupees***; (i) any security interest created in* **agricultural land***."*

Section 31(h) and Section 31(i), SARFAESI Act, 2002.

SARFAESI proceedings cannot be taken directly against agricultural land. Small borrowers are very often unaware of both exclusions and, out of fear, accept a position that the law itself does not support.

08 THE APPEAL — AND THE DEPOSIT

An appeal against an order of the Debts Recovery Tribunal lies to the Appellate Tribunal within thirty days. It carries a hard condition: no appeal is entertained unless the borrower deposits fifty per cent of the amount of debt due, which the Appellate Tribunal may reduce, for reasons recorded in writing, to not less than twenty-five per cent.

> *"…may prefer an appeal … to the Appellate Tribunal within* **thirty days** *from the date of receipt of the order of Debts Recovery Tribunal. … Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal* **fifty per cent** *of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less: Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to* **not less than twenty-five per cent** *of debt referred to in the second proviso."*

Section 18(1), SARFAESI Act, 2002.

This is why the real contest is the one before the Tribunal at the first stage. By the time the appeal is reached, the burden on the borrower's pocket is severe.

09 THE CIVIL COURT IS BARRED

> *"No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine…"*

Section 34, SARFAESI Act, 2002.

Months are routinely spent in a civil suit only to receive exactly that answer — and by then the forty-five days under Section 17 have also gone.

10 THE SEQUENCE AT A GLANCE

Day 0	s. 13(2)	Demand notice received. The account has been classified as a non-performing asset.
Days 1–60	s. 13(3A)	Representation or objection sent *in writing*. Possession, occupation and rent all remain with the borrower.
+15	s. 13(3A)	The bank must communicate its reasons in writing if the objection is not accepted.
After 60	s. 13(4)	A measure may be taken — possession, sale, lease or management. Symbolic possession usually comes first.
—	s. 14	Physical possession normally requires the District Magistrate or CMM, on affidavit.
45 days	s. 17(1)	From the date of the measure — application to the Debts Recovery Tribunal.
30 days	s. 18(1)	From the Tribunal's order — appeal to the Appellate Tribunal, on deposit of 50% (reducible to not less than 25%).

In one line. It is not a case about money. It is a case about dates. The borrower who replies in writing the moment the notice arrives, and keeps counting the dates, usually has a great deal to argue. The borrower who stays silent and waits is usually left with nothing but regret.