



 **K. S. Hareesh Kumar\***

## CERSAI and Registration of Charge by the Banks

Registration of Charges is intended to act as a public notice about the encumbrances on the properties. Earlier, Section 125 of the repealed Companies Act, 1956 (presently Section 77 of the Companies Act, 2013) provided for registration of charges with Registrar of Companies and non-registration of charges would make the secured creditors unsecured if the Company concerned is wound up. However, such registration of charges was restricted only to the movable and immovable properties of the companies. Except for the companies Act, 1956, no other law mandated registration of charges created on the assets of the borrowers till the advent of SARFAESI Act, 2002.

The system of Creation of Equitable Mortgage, i.e. Deposit of title deeds, which does not require any registration of charges, though simple and inexpensive for the Banks and borrowers alike, was prone to frauds as there was no way to find out encumbrances on the property. Unscrupulous borrowers fraudulently obtained multiple finance by depositing forged documents with various Banks and financial institutions and it was the Banks which used to bear the brunt of the same. It is observed that the incidences of fraudulent transactions in the housing finance sector have been growing by leaps and bounds during the last few years. The modus operandi adopted by the fraudsters is

- Production of coloured Xerox copies of the title deeds including encumbrance certificates, fake stamp papers etc. which are difficult to identify or distinguish from the original one.

- In many cases, same property was offered as security to different banks by submitting fake title deeds. In some cases, the properties, which were mortgaged to the banks, were found to be non-existent.
- Builders/developers had defrauded the banks by pocketing the housing loans which they managed to obtain in the names of fictitious persons by submitting forged documents.
- Vehicle/consumer loans were obtained by submitting fake/forged invoices/quotations and were misappropriated without creating charge on the security.
- In some cases, the booking of the flats/homes is cancelled after the initial loan amount was disbursed to the borrowers and the borrowers directly took the refund from the builders.
- In some other cases, property is sold through duplicate/fake title deeds even though the legal title is with the Banks.

Some State laws provide for registration of transactions of Equitable Mortgages also, but, generally it was difficult to verify and search such transactions.

### **Central Registry of Securitisation, Asset Reconstruction And Security Interest Of India (CERSAI):**

Hence, in a significant step, to curb such malpractices, the Parliament, conceived an idea of creating a Central Registry. Accordingly, Chapter IV, Section

\*Chief Manager (Law), Union Bank of India.

20(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 envisaged setting up of a Central Registry under an authority called as Central Registry of Securitisation, Asset Reconstruction and Security Interest of India (CERSAI) for registration of transactions of Securitisation, reconstruction and creation of security interest to address the problem of multiple financing on the strength of forged documents. This registration is in respect of all securities whether created by Companies, individuals or any other entity. The provisions related to CERSAI had come into force from 31<sup>st</sup> March, 2011. CERSAI had been incorporated as a company under Section 25 of the Companies Act, 1956 with Government of India having a shareholding of 51%, PSBs and National Housing Bank as other shareholders. The registrations of the said transactions are entered into a register called Central Registry. The headquarter of CERSAI is located at New Delhi.

As per Section 21(1) of the Act, for the purpose of registration of transactions related to securitisation, reconstruction of financial assets and security interest created over properties, Central Government has appointed a Central Registrar.

These provisions are analogous to the registration of charge with Registrar of Companies in respect of charges created by the Companies. The Secured Creditors can register the charges, modify and satisfy the charges in CERSAI.

Section 23 of the Act originally mandated for filing of particulars of every transaction of securitization, asset reconstruction or creation of security interest. The Government of India has subsequently issued a Gazette Notification dated January 22, 2016 for filing of the following types of security interest on the CERSAI portal:

- a. Particulars of creation, modification or satisfaction of security interest in immovable property by mortgage other than mortgage by deposit of title deeds.
- b. Particulars of creation, modification or satisfaction of security interest in hypothecation of plant and

machinery, stocks, debts including book debts or receivables, whether existing or future.

- c. Particulars of creation, modification or satisfaction of security interest in intangible assets, being know how, patent, copyright, trademark, licence, franchise or any other business or commercial right of similar nature.
- d. Particulars of creation, modification or satisfaction of security interest in any 'under construction' residential or commercial or a part thereof by an agreement or instrument other than mortgage.

Therefore, CERSAI is now a complete registry of immovable, movable, intangible properties and assignment of receivables. It provides access to all kinds of creditors and also provides facility for filing of attachment orders and court orders, so as to provide a complete picture of any encumbered / attached property.

Further, as per Section 2(B)(5) of the Act, Banks not only can register their charge on security interest created but can register/upload attachment orders of unsecured properties also, when an order of attachment is obtained from a court of law or DRT. This will help banks to recover their money from the defaulting borrowers.

### **Fee for Registration, Modification and Satisfaction of charges**

Earlier, an amount of Rs.250/- up to credit facility of Rs.5.00 lakh and Rs.500/- for credit facility above Rs.5.00 lakh was being charged. Further, an amount of Rs.5000.00 towards penalty for delayed fee from 22.1.2016 made it further cost effective unlike the fee charged for registration of encumbrance under various state legislations. The maximum fee for registration of charge with CERSAI is Rs.100 for a loan of Rs.5.00 lakh and above and Rs.50 for a loan up to Rs.5.00 lakh and there is no fee for satisfaction of any existing security interest with CERSAI. The fee for inspection of charges is only Rs.10. In fact, fee for registration of charge in respect of mortgage other than by way deposit of title deeds is NIL. Where particulars of transaction of creation or modification

of more than one security interest are filed by a person, the fee payable by such person shall be the one that is highest among the fee prescribed for security interests for which particulars of creation or modification are filed by such person.

### **Forms used for Registration and Satisfaction of Charges**

For registration of charges created on security interest or modification thereof, Form I is used and Form II is used for satisfaction of charges. Form III is used for creation or modification of charge related to securitization and reconstruction and Form IV for satisfaction or modification of charge related to the transactions of securitization and reconstruction.

### **Registration Under CERSAI**

Section 20(4) of the Act states that registration of charge with CERSAI is in addition to and not in derogation of Registration Act, Companies Act, 2013 etc. This means that if a charge on the Asset of a Company is required to be registered, the lending Bank must ensure that the charges are created under both the Acts, SARFAESI Act, 2002 (with Central Registrar) and Companies Act, 2013 (with Registrar of Companies).

The Act mandated the filing of such particulars within 30 days of the transaction or creation of security. It also provided that the Central Registrar may also allow filing of such particulars within next 30 days following the expiry of the said period of 30 days on payment of such additional fee not exceeding ten times the amount of such fee.

In the case of Edison Antony Vs. Bank of India [MANU/DR/0001/2015], Debts Recovery Tribunal (DRT), Ernakulam, had held that the borrower cannot plead that the mortgage created by him would be invalid as the charge with CERSAI was not registered. In that case, Bank did not register charge with CERSAI whereas invoked the provisions of SARFAESI Act for enforcement of securities.

In the case of Dhanavan P.R. Vs. The Ernakulam District Co-operative Bank Ltd. [MANU/DR/0077/2018], it was held by the Debts Recovery Tribunal (DRT), Ernakulam that mere non-registration of charge of

the Bank with CERSAI will not render the charge of the Bank void. It appears that the DRT came to such conclusion on the ground that the consequences of non-registration of charge with CERSAI have not been provided under Section 20 of the Act.

However, subsequently, the said Section 23 was amended by Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2016 and done away with the time limit. The said amendment also inserted Section 26D which provided that no secured creditor shall be entitled to exercise the rights of enforcement of securities unless the security interest created in its favour by the borrower has been registered with the Central Registry. Therefore, where a Secured Creditor fails to register the charge of Security Interest under the provisions of SARFAESI Act, 2002, in such a case, though a Secured Creditor's right of enforcement of securities by other means, like filing of suit etc. shall be available, the privilege to enforce Security Interest without intervention of the courts will not be available.

### **Priority**

By the same amendment, Parliament had inserted Section 26E which provided that on registration of security interest with the Central Registry, the debts due to the secured creditor shall be paid in priority over all other debts and all revenues, taxes, cess and others payable to the Central Government or State Government or local authority. These amendments had come into force from 24.1.2020.

### **Penalty**

Earlier, Section 27 of the Act provided that any default in registering the charges or modification of the charges or satisfaction of the charges, the secured creditor and every officer of the Secured Creditor who is in default shall be punishable with fine extending up to Rs.5000/- for everyday during which the default continued.

The said amendment had done away with the penalty clause and provided that the said section 27 shall be deemed to have been omitted from the date of coming into force of the amendment made to section 23. Therefore, presently, there is no penalty for the

default in registration of charge with CERSAI. But, if the registration of charge is delayed and some other Secured Creditor's Security Interest is registered in the meanwhile, the charge of the other secured creditor shall prevail or get priority. Therefore, it is imperative for the Banks to be careful to register the charges with CERSAI immediately after creation of Security Interest.

### **Power of Central Government to Rectify the Records of CERSAI**

Section 26A of the Act empowered the Central Government to extend the time limit where it is satisfied that the omission was due to inadvertence or accidental or some other sufficient cause. However, since the time limit has been done away with, this provision has become redundant.

### **Inspection of the Records of CERSAI**

The transactions of securitisation, reconstruction and creation of security interest can be inspected by any person during business hours, both physically and electronically (online) on payment of a fee during business hours. Generally, Banks obtain title search reports by verifying the encumbrances on the property from the records of Sub-Registrar offices only. Since the transactions related to Equitable Mortgages are not entered in those records, such reports are not complete. Hence, Banks should mandate their advocates to also search records of CERSAI and include the report thereon.

### **Integration of Registration Systems with Central Registry**

Section 20A of the Act, for the purpose of providing a central data base, envisages integration of registration records with the records of Central Registry. The explanation thereto indicates that the registration records include records of registration under the Companies Act, 2013, the Registration Act, 1908, the Merchant Shipping Act, 1958, the Motor Vehicles Act, 1988, the Patents Act, 1970 and the Designs Act, 2000. Accordingly, the Department of Financial Services on 3.5.2019 issued a notification about integration of the VAHAN, i.e., Motor Vehicles Registry with CERSAI. It is clarified that registration of charges related to motor vehicles is to be made

only on the VAHAN registry and not on the CERSAI. It is further clarified that any vehicle registered with the VAHAN registry shall be deemed to be registered with the CERSAI for the purposes of SARFAESI Act, 2002.

### **Exclusions**

However, any Security Interest created in Agricultural land and other securities mentioned in Section 31 of the SARFAESI Act, 2002 are excluded from the purview of registration with CERSAI. Since SARFAESI Act is not applicable to any security interest less than Rs.1.00 lakh, such security interest are also excluded.

### **Conclusion**

The objective of setting up of a Central Registry is to prevent frauds in loan cases involving multiple lending from different banks on the same immovable property. It is a great initiative on the part of the legislation to incorporate the provisions for registration of Security Interest. Till now, there is no such simple format for registration, modification and satisfaction of charge which is cost effective. The inspection of records can be done online, which is an easy and simple way to find out encumbrances on the properties. Further, search can be made based on Assets as well as Debtors. Therefore, the concept of CERSAI is unique and innovative. The advantages of CERSAI are manifold, like 1) Simple and easy way to inspect records of CERSAI at the time of sanction of loan on a specific property/security. 2) Avoid multiple financing/litigation by registering security interest with CERSAI. 3) Enforce the registered security interest without intervention of the courts under SARFAESI Act in the event of default by the borrower and 4) get to enforce the said security interest in priority over the Government dues. Now, CERSAI 2.0 has been unveiled whereby the effectiveness of the system is further improved. Therefore, Banks need to effectively use this system and avoid frauds and ensure that charge in respect of security interest is registered with CERSAI immediately after creation of security interest lest the Bank shall become unsecured creditor. Banks have to train their personnel to get thorough operational knowledge of registration, modification and satisfaction of the charges.

