CHAPTER – V

RECOVERY OF NPAs
Recovery of Non Performing Assets

CHAPTER V

RECOVERY OF NON PERFORMING ASSETS

Recovery of money through the attachment and sale of immovable properties the most commonly employed method of executing the decree. The reason being that value of the property appreciates with time against moveable properties, discussed in the subsequent chapters, where the value of the property depreciates with the passage of time. This means the recovery is also riddled with most grave and complicated legal issues. In this chapter, we shall deal with the manner of attachment of immovable property and the sale of the same towards the satisfaction of the decree. Along with this we shall also discuss the objections faced by the decree holder, before he could enjoy the fruits of the decree passed in his favor.

Measure introduced all these years to contain the problem loans, have no doubt helped to create sufficient awareness about the seriousness of the problem among the lenders, but have hardly made any impact of the on the borrowers to be more responsible and accountable on their part and extending co-operation to banks through time repayment. While genuine difficulties of the borrowers to repay the dues to banks because of circumstances beyond their control are understandable, misuse of the funds by the borrowers and taking shelter under the weakness of the legal system in order to avoid/delay payment of banks dues, is deliberate.

Banks have evolved policies for recoveries and write off bad loans by incorporating compromise and negotiated settlements with the approval of their Boards, particularly for old and unresolved cases falling under the category of Non Performing Advances. Banks have also set-up independent Settlement Advisory Committees headed by retired judges of the High Courts, to scrutinize and recommend compromise proposal. Other measures introduced, inter alia, include on time non-discretionary and non-discriminatory settlement of Non Performing Advances of Small Scale Sector (the scheme was operative up to September 2001), special guidelines for recovery of the stock of Non Performing Advances of Rs. 5 crores and less as on 31st March 1997 (Guidelines valid up to June 30, 2001) and One-Time Settlement Scheme covering advances of Rs. 25,000 and below.

Further, measures have been considered for faster legal process to enable the banks to bring down the level of Non Performing Advances. These broadly relate to:
1. Setting up of Lok Adalat Instructions to help banks settle dispute involving accounts in Doubtful and Loss categories with outstanding balance of Rs. 5 lakh for Compromise Settlements.

2. Empowering Debt Recovery Tribunals to organize Lok Adalats to decide on cases of Non Performing Advances of Rs. 10 lakh and above.

3. Strengthening the functioning of Debt Recovery Tribunals through amendment of the Act on Recovery of Debts due to banks and financial institutions in March 2000 and grant of more powers to Tribunals to:
   i. Attach defendant's property/ assets before judgment.
   ii. Penalize for disobedience of Tribunal's order or for breach of any terms of the order, and
   iii. To appoint receiver with powers or realization, management, protection and preservation of property.

These measures are expected to provide necessary teeth to the Debt Recovery Tribunals and speed up the recovery Non Performing Advances in times to come. In all 22 Tribunals and Five Appellate Tribunals have been set-up and they have recovered a sum of Rs. 1,864.30 crore out of NPAs of Rs. 6,264.71 crore referred to the Tribunals since their inception.

➢ **Recall of Advances:**

Other administrative measures to contain the menace of Non Performing Advances include:

1. Circulation of details of willful default of borrowers of bank and financial institutions. To serve as a Caution List while considering cases of new or additional credit limits from defaulting borrowing units and also from the Director/proprietor/Partners of these entities.

2. Publication of list of borrower (with outstanding aggregating Rs.1 cores and above) against whom suits have been filed by banks and financial institutions for recovery of their loans, as on 31st March every year.

3. Introduction of Corporate Debt Restructuring to minimize slippage of Standard Advances to NPAs.
Difficulties in Legal Procedure:

However, these measures have not contributed to any perceptible recoveries from the defaulting entities although they have served as negative basket of steps shutting off fresh loans to these defaulters. Measures are also being contemplated that in all cases of willful default of Rs. 1 core and above to tile criminal cases.

Thus, it is felt that chronic ailments require aggressive and drastic remedies.

The pernicious nature of the NPA crisis can be gauged from the following cross-section of observations.

"if someone takes what is not his own, he must give it back or go to prison".

...Market aphorism

Steal a few lakhs and you are a criminal. Steal a few hundred crores and you become in industrialist, rubbing shoulders with the high and mighty of the land. Or so it would seem from then Finance Minister Jaswant Singh’s statement in the Rajya Sabha that “Non-Performing Assets of Rs. 83,000 crore is loot and not debt”

There are sick companies; sick banks and unpaid workers, but there are hardly any sick promoters. There lies the heart of the matter (The Omkar Goswami Report on Industrial Sickness and Corporate Restructuring)

Need for Law Reforms:

The legal system in India has been cited as one of the major reasons for ever growing problem of NPAs in banks. General opinion on the subject is that present legal system favours the borrower and not the lender. It is perceived that this weakness is fully exploited by the borrowers. The Committee on Financial System (1991) and the committee of Banking Sector Reforms (1998), have made strong observation on the need to strengthen the legal infrastructure, to improve the recovery culture of commercial banks. The Committee on Banking Sector Reforms has also recommended setting up an Asset Reconstruction Company with appropriate legal backing to take over the assets of defaulting borrowers. Acts related to banking and sale of securities have been recommended to be suitably amended to enable banks to ensure speedy recoveries. The problem arising out of the legal infrastructure can be gauged from the fact that there are about 23 or more Acts operating simultaneously making it convenient for the borrower to find escape routes. The Acts required to be amended are:
Recovery of Non Performing Assets

01. Indian Contract Act, 1872
02. Negotiable Instrument Act, 1881
03. Transfer of Properties Act, 1882
04. Bankers Book Evidence Act, 1891
05. Indian Stamp Act, 1899
06. Co-operatives Societies Act, 1904
07. Code of Civil Procedure, 1908
08. Sale of Goods Act, 1930
09. Indian Partnership Act, 1932
10. Reserve Bank of India Act, 1934
11. Banking Regulation Act, 1949
12. State Financial Co-operation Act, 1951
13. Companies Act, 1956
14. Regulation Act, 1956
15. Securities Contract (Regulation) Act, 1959
18. Interest Tax Act, 1972
19. Public Financial Institutions (Obligations as to Fidelity and Secrecy) Act, 1972
20. Sick Industrial Companies Act, 1985
21. Securities and Exchange Board of Indian Act, 1992
22. Debt Recovery Tribunal Act, 1993
23. Insurance Regulatory and Development Act, 1999

It has been decided to do away with Sick Industrial Companies Act and referring of cases to Board for Financial and Industrial Reconstruction (BIFR) which impede the process of recoveries of banks dues.

Institutions like Confederation of India Industry (CII) Federation of Indian Chamber of Commerce and Industry (FICCI), Chamber of Commerce and Industry (CCI), Indian Merchant Chamber (IMC), Federation of Indian Exporters Organization (FIEO) have generally taken a view supportive of the interests of their respective member organizations, in the matter of NPAs, which have not appreciated the problem from the angle of the lenders viz. safely and return of banks funds which are mobilized from public.

Setting up of DRTs to ensure speedy recovery of banks dues have yielded only small benefits to banks so far and banks continue to suffer from the problem of Non Performing Advances. The saying that ‘Justice delayed is Justice denied’, is providing true in the banking scenario also, as several cases involving crores of rupees are pending disposal in various courts for a number of years. On an average it takes more than a decade to get a final verdict in a law suit here, as against six to eight months in USA.
Recovery of Non Performing Assets

In order to improve the legal infrastructure and help the banking system to recover its dues without the intervention of court, the Government set-up a committee under the chairmanship of Shri.T.R.Andhyarjina

Expert Committee Recommendations Relating to NPAs

Commenting on the directed lending programme, the Committee on Financial System (1991) observed that, unfortunately, over the years, the nexus between credit expansion and productivity has been weakened and is reflected in the blurring of the distinction between the concepts of credit need and credit worthiness. Collateral requirements have been eased and this combined with inadequate appraisal of credit applications in terms of productive use of credit and insufficient post-credit supervision, has affected recovery of dues and increased loan delinquencies. The disturbing growth in over dues is a consequence of the measure of laxity and departure from the principles of sound banking.

The intended socially oriented credits like IRDP have, in the process, degenerated into irresponsible lending. Loan waivers have added an additional element of politicization of banking, apart from the grave damage to the concept of credit discipline by encouraging defaults. The political element which condones over dues should also have paid regard to the social obligation which banks owe to their depositors to invest their funds with due prudence.

In a scenario of prevailing deterioration in credit accounts in respect of sick industries, banks had to conform to general and sometimes specific instructions from Governments (both Central and States) to continue extending credit to sick industrial units often against their better commercial judgment. Banks also had problems arising from the ‘advice’ received from BIFR and directions from Courts, to extend credit to sick units. These are regarded as a different form of directed credit. There is, therefore, urgent need to address the issue of infected loan portfolio in the various directed credit sectors.

The Tarapore Committee on Capital Market Convertibility felt that Non-Performing Assets (NPAs) of Public Sector Banks, estimated at 13.7 per cent of the total advances as at the end of March 1997, were very high. Quite clearly, the load of such a level of NPAs cannot be borne by the banks if the financial system is opened up to forces of international competition. The Committee recognized that the strengthening of the
financial system is the single most important pre-condition to move to Capital Account Convertibility (CAC). Drastic measures should be taken to reduce the level of NPAs. Noting the systemic dangers of some of the weak banks growing at rates faster than the system, the Committee recommended that the weak banks should be converted into what are called 'narrow banks'; the incremental resources of these narrow banks should be restricted only to investments Government securities and in extreme cases of weakness not only should such banks not be allowed to increase their advances but there would need to be a severe restraint on their liability growth. The Committee recognized that such measures are unavoidable if the financial system is to be safeguarded during the move towards CAC.

NPAs have been the most vexing problem faced by the weak banks with additions to NPAs often outstripping recoveries. A significant portion of the NPAs are chronic and / or tied up on BIFR cases. There are also loans given to State and Central public sector units which have not been repaid. The operations of Debt Recovery Tribunals are such that they have not so far made a dent in the NPA position of banks. The route of compromise has also not been very successful despite setting up of Settlement Advisory Committees. It is necessary that measures are found to ensure an early resolution of chronic NPAs. Where guarantees have been given by the Central or State governments and where these have been invoked by the banks, these demands need to be met.

NPAs – The International Experience

The problem of Non Performing Advances is not unique to India. This is a feature of banking throughout the world. The severity of the problem and approach to the problem however vary from country to country depending on the performance of the economy, general standards of education and living, philosophy of the Government to protect the financial system from turmoil through budgetary allocation of resources if warranted, corporate governance in practice, accounting and auditing standards, legal infrastructure, technological advancement and progress made in reforms in the financial system to ensure soundness and stability. Both developed and developing countries face this challenge in difference ways and only difference perhaps is that developed countries are able to absorb the problem fast without being noticed or before the impact is felt and gets spread to other segments of the economy. Developing countries try to keep the problem under the carpet and put up a brave front through some financial gimmicks of a temporary nature without any enduring result. Creative accounting practices are an
Recovery of Non Performing Assets

established truth in some developing countries particularly in Asian countries, to cover up the unsoundness in banking.

Restructuring of banking has been a predominant item on the agenda, in almost all developing economies, which have been willy-nilly in the process of liberalization. The literature on international experience, however, indicates that the cost on account of the problem of NPA of banks is ultimately borne by the Government irrespective of ownership of banks. In Indonesia, the problem of Non-Performing loans is acute and options are either to liquidate the bank or restructure them with capital support from Government which is estimated at roughly Rs 2700 crore. In Thailand, some of the crisis-ridden banks have been sold and some of the finance companies re swamped by bad loans accounting for a staggering 47 per cent of total lending. The Thai banks are reluctant to initiate new lending and are on their path to narrow banking. In South Korea, funds provided to the tune of Rs 2, 62,000 crore (US $ 57.6 billion) have been exhausted and another round of restructuring without delay is being contemplated. About 15 per cent of the total loans portfolio of banks in Philippines is deemed Non-Performing. Although, the Philippines banking system is regarded as sound compared with others in the region, the fact remains that the economy will not grow unless massive amounts of capital are poured into the financial system to restructure them.

In the Czech Republic, the problem of banks continues despite bailing them out by Government restoring to budgetary support to the tune of 8 per cent of GDP. In Brazil, the Non-Performing loans of banks are estimated in the range of Rs 13, 65,000 crores (US $ 300 billion).

The position of Non Performing Advances in some of the countries as per the estimates made by Ernst and Young is furnished in Table 4.

Table 1

<table>
<thead>
<tr>
<th>Countries</th>
<th>NPAs</th>
<th>NPA as percentage of Loans</th>
<th>NPA as percentage of GDP</th>
</tr>
</thead>
</table>

161
Recovery of Non Performing Assets

<table>
<thead>
<tr>
<th>Country</th>
<th>NPA</th>
<th>Problem Duration</th>
<th>Payback Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan</td>
<td>1,243</td>
<td>26</td>
<td>26</td>
</tr>
<tr>
<td>China</td>
<td>480</td>
<td>40</td>
<td>44</td>
</tr>
<tr>
<td>South Korea</td>
<td>104</td>
<td>16</td>
<td>25</td>
</tr>
<tr>
<td>Indonesia</td>
<td>21</td>
<td>60</td>
<td>14</td>
</tr>
<tr>
<td>India</td>
<td>25</td>
<td>16</td>
<td>14</td>
</tr>
</tbody>
</table>


Ernst Pegs, NPAs 50 per cent higher at $ 25bn-Bhupesh Bhandari Japan topped the list of countries with NPAs of $ 1,243 bn, followed by China $ 480 bn. Japan’s problem of bad loans is even worse than feared. Japan’s economy is till creating bad loans, as top of the mountain of problem assets that has dogged the banking system for the last decade. Japan’s bad loan is exacerbated by an ineffective regulatory regime and the lack of a realistic plan. Japan’s banking system is an economic black hole. Despite writing-off about Yen 60,000 bn ($ 500 bn) in bad loans and receiving millions of billions of yen from the Government, the country’s banks remain fragile and riddled with bad debt. The Government’s problems in clearing up the bank’s balance sheets have been made far more difficult by domestic economy, together with the global slowdown, is driving firms into default. Land prices are still falling, eroding the value of collateral. And price deflation means that while nominal interest rates are low, real interest rates are significantly positive. The real burden of any given nominal level of debt rises, year after year.

Some of the proposals to remedy the situation include:

(i) strengthening the examination system,
(ii) introduction of steps for speedy foreclosure of loans,
(iii) recapitalization of banks as done in US in the 1930s.
(iv) considering procedures to ensure against adverse selection of assets and lending assistance programmes,
(v) private risk sharing to avoid further credit crisis once the bad banks are forced to self-liquidate.

In China lending directed by the State is largely responsible for the burden of NPL in major banks. Official estimate puts bad loans at about 30 per cent of assets but most analysts believe the figure to be nearer 50 per cent. Bad loans elsewhere-such as at city commercial banks and rural credit cooperatives took the total to more than 50 per cent of the country’s GDP in 2000, say several academics in the State think tanks. World Trade Organization (WTO) accession will introduce foreign banking
competition in stages, putting pressure on Beijing to cleanse its State banks of bad loans or condemn them to failure. Most experts believe that this process will involve the shifting of banks; bad loans to the Finance ministry's books. Song Guoqing, a professor of economics, at Peking University, believes "the cost of writing off Non-Performing loans in State banks, financing pensions and paying unemployment benefit could cause domestic debt to rise from the current 15 per cent of GDP to more than 70 per cent. If the trend continues in the current way, then China will have the same problems as Japan. The only difference is that China's political system produces bad loans much more easily than Japan's because in China there is no rule of law or checks and balances applicable to the Government. If the Chinese Government wants loans, it just takes them. The lack of separation between Government and business is also at the root of a crisis in China's rural economy, home to about 900 million of its 1.3 billion populations.

The total NPAs in the Asia Pacific region are estimated at $ 2,000 billion. Opportunity Funds (which buy out the NPAs from banks and financial institutions and then recover the dues) have brought in $ 20 bn into the Asia Pacific region, with $ 16 bn being pumped into Japan alone. These funds have earned returns ranging from 20 per cent and above on their investments.

In a study 'Rejuvenating Bank Finance for Development in Asia and the Pacific', United Nations Economic and Social Commission for Asia and the Pacific (ESCAPO) has observed that the problem of Non-Performing Loans, which reached record numbers following the Asian financial crisis of 1997, has undermined the solvency of the banking system in many countries. High levels of Non-Performing Assets are the bane of the entire banking spectrum in the Asian region. Indeed, banks in Asia are afraid to lend, companies are reluctant to borrow and the region's monetary authorities have given little or no indications as to how they will solve this credit crunch. Economic growth is consequently to remain muted across much of the region. The study adds that most countries are at present experiencing ample liquidity with low and declining interest rates but there exists a shortage of "Credit Worthy Corporate borrowers".

The problem can be seen at its worst in Argentina. The US is also not an exception with the failure of instances of giant corporate houses like Enron, World.com, etc. The consolation perhaps is that the failure has not caused widespread contagion and a severe global financial crisis due
to many years of effort promoting financial stability which have begun to bear fruit.

No country has been free of costly banking crisis in the last quarter century. The prevalence of banking system failure has been at least as great in developing and transition countries as in the industrial world by one count, 112 episodes of systemic banking crises occurred in 93 countries since the late 1970s and 51 borderline crises were recorded in 46 countries. Governments and thus ultimately taxpayers have largely shouldered the direct costs of banking system collapses.

NPAs: A Cross-nation Study

Highlights of some empirical studies on banks' performance in India and abroad having relevance to the problem of Non Performing Advances have been brought out below. The studies have covered weaknesses of banks covering profitability, Non-Performing Loans, efficiency in operations, etc. they have however, not come out with any lasting/workable solution to contain the problem of NPAs and at the same time strengthening the Balance Sheets of banks recognizing formation of some NPAs by the very nature of banking business. Although some international studies have been included, it has to be recognized that cross-country comparisons are often difficult to interpret because the regulatory and economic environment encountered by financial entities are different across nations and also because the level and quality of services associated with deposits and loans in different countries could differ.

A study relating to the performance of Indian Banks, (Ojha, 1987) made a multivariable international comparison of Public Sector Banks' productivity and profitability by using data relating to 16 difference banks for the year 1985. The major finding observed pertain to high level of interest income compared to non-interest income. This high level preponderance of traditional banking business in India stressed the need for diversification of banking business.

Andreas Nicholas Philippines has used Hierarchical Ordinary Least Square Regression to test the relationship between the rates of change of Net Income (NI), Loan Loss Provisions (LLP) and Non-Performing Loans (NPL) and the rate of change of stock prices, for each of the five time periods. The functional form of Regression equation is derived by
Recovery of Non Performing Assets

combining a new simple stochastic process (according to which the variable behave) and a valuation mechanism that relates Stock Prices (SP) to NI, LLP and NPL. The findings suggest that Non-Performing Loans is an important variable in explaining Banking Holding Companies (BHC’s) stock prices. Its importance is evaluated after NI and LLP are taken into consideration. NI is the most important explanatory variable, while LLP appears insignificant.

A paper by Kim Myung-Sun examines the effect of a regulation change on management incentives and accrual estimates. The paper on the impact of the 1989 change in Bank Capital Standards and Loan Loss Provisions investigates whether managers of banks with loan capital ratio reduce their banks’ loan loss provisions after the 1989 change in capital standards. The loan loss provision has a positive effect on the capital ratio prior to 1989 and negative effect after the change in capital standards in 1989. The model is designed to test the hypothesis that the loan loss provision captures the capital ratio management incentives after controlling of:

1. non-discretionary factors in the loan loss provision decision such as gross loans and Non-Performing Loans.
2. earnings management incentives, and
3. interest rates.

The results support the hypothesis that managers of banks with low capital ratios reduced loan loss provisions during the 1990-92 period compared to the 1985-1988 period. Banks with high capital ratio do not exhibit such a change. As hypothesized, bank managers change their behavior in response to the change in the capital standards. Test results indicate that the findings are not due to one specific year’s LLP increase. In contrast, the change in the capital standards is not related to the loan loss provision decision of banks with capital ratios. A cross-sectional analysis provided evidence of a negative relation between the capital ratio and discretionary LLP during 1985-1988 and a weak positive relation between the two variables during 1990-1992.

Although the ‘size effect’ on the LLP decision is not explicitly hypothesized in this study, the size variable has been found to be constantly positive. It appears that the larger the bank, the more like it is to set a higher LLP, which results in a lower income. This result is constant with Watts and Zimmerman’s (1986) ‘Political Cost Hypothesis’. The results are also consistent with income smoothing.
In addition to providing evidence of Accounting Number Management in the banking industry, the said paper has further implications. One implication of the results is related to the fact that the different definitions of capital under Generally Accepted Accounting Practices (GAAP) and under 'bank regulations' have created a unique incentive to manage LLP or 'Bad Debt Expense' in a way different from that in other industries. The resulting LLP and Earning represent a different aspect of a firm within the banking industry and also of the banking industry as compared to other industries. The results should encourage Regulators and Accounting Standard Setters to consider the Incentive Effects of Regulation Change on Accounting Decisions. This might prevent unanticipated consequences of a regulatory change that might disrupt efficiency in applying the regulation. Auditors can also utilize the results to reduce their exposure to litigation.

A study by P.Secured Sarkar and Abhiman Das examines the inter-bank performance differences in the efficiency of banking sector with respect of profitability, productivity and financial management, for the year 1994-95. For each area of the performance criteria, area specific Efficiency index has been worked out based in 15 indicators, using Principal Component Analysis. The result shows that there is a wide variation in efficiency among the banks according to their ownership pattern. The performance of Public Sector Banks was relatively poor compared to other bank groups. While a wide variation of performance among the foreign banks was discernible, the (PSBs) resembled more or less a homogeneous group.

In the study on Risk Happens-The Risk and Performance Relationship in Banking, conducted in 1996, Ross Gary Howard, has observed with reference to Non-Performing Loans that Commercial bank experience both expected and unexpected outcomes from the loan approval decision process he also makes the comment that banks never approved a loan with the intent that loans will become a Non-Performing asset; insight into why and where Non-Performing Loans will occur, is important, while expressing his inquisitiveness as to how the decision makers have simply factored in Non-Performing Loans as a cost of doing business and not as a particular risk outcome. In his concluding remarks he has highlighted that growing banks were observed to have a growing number of Non-Performing Loans. The idea that an organization might learn from its prior decisions is not evident as banks continue to accumulate Non-Performing Loans in the normal course of business.
Recovery of Non Performing Assets

Notwithstanding the substantial freeing of resources from statutory pre-emption, credit off take has been subdued and (PLRs) are strictly downwards. Banks have generally found investment in Government securities worthwhile. Perhaps, a solution to this could be found in the reduction of NPAs of banks, which implies a more careful credit appraisal and regular follow-up. It must be recognized that the purpose of banks is to take risk through the extension of credit to business and households. This is so vital to the growth and stability of the economy.

Lighter and Lowell in their study in 1998 observed that under right conditions financial liberalization could enhance financial systems’ ability to increase profits and finance economic growth.

The paper on profitability in PSBs evaluates inter-bank variability of profit among Public Sector Banks during 1992-98 ensuing sequential decomposition models for profitability analysis. A reduction in the burden of arising working funds in the post reform period due to a gradual shift away from traditional banking, a distinct risk aversion indicated by the preference for investments over advances in bank portfolios and increased competition reflected in convergence in bank-wise performance in the reform period are among the principal findings. It was, however, warned by way of caution that in the near future public banks need to focus more on loans and advances as a rational response to the risk return trade off facing commercial banking in India.

The Indian Banking Sector is characterized by both a high average Non Performing Advances in total bank advances and a high dispersion between banks. This paper presents the findings of a formal attempt to explain inter-bank variations in NPAs for the year 1996-97. The specification tests for the impact of region of operation on domestically owned banks, as measured by percentage branches in each of a set of state clusters. One clusters of three eastern and seven north-eastern regions carries a robust and statistically significant negative coefficient. These findings bear out those of Demirguc-Kunt and Huizin on the significance of the separating environment for bank efficiency. No sustainable improvement in the performing efficiency or domestic banks is possible without prior improvement in the enforcement environment in difficult regions of the country. Another finding of some importance is that it is not foreign ownership in and of itself so much as the banking efficiency and technology correlates of the country of origin of the foreign bank which determine NPA performance in the Indian environment.
Recovery of Non Performing Assets

The main purpose of bank regulation is the maintenance of a sound banking system, which is usually narrowly interpreted to mean 'prevention of bank failure'. To this end, regulators examine the riskiness of assets and adequacy of capital. But do rigid capital adequacy ratios ensure adequate bank capitalization in reality? Alternatives such as value-at-risk and pre-commitment model have been used in some developed countries. India needs theoretical analysis of these models and empirical data before it can consider a shift from the current capital regulatory arrangements.

In a study on 'Declining Market Share' of Public Sector Banks, it has been observed that PSBs, still a dominant force in the Indian finance system, are losing their market share of business at the rate of more than one per cent per annum during the post-reform (1992-99) period. PSBs were losing ground heavily in metro market segment which warrants a serious introspection. Not only was the erosion visible in deposits and advances but also in the spread, non-interest income and profit. One hopes that the fast changing market scenario will compel the PSBs to shed their organizational rigidities and reorganize themselves, including mergers and acquisitions among themselves, to stay put and retrieve lost ground. Capital market fitness of PSBs is the need of the hour. It is time that the owner, the management and trade unions come together and act in unison to ensure remaining operationally efficient.

A study by Mr. P. Ganesan examines the determinants of profitability of Public Sector Banks in India by an empirical estimation of profit function model which showed that interest cost, interest income, deposits per branch, credit to total assets, proportion of priority sector advances and interest income loss, are the significant determinants of profits and profitability of Indian Public Sector Banks.

It is observed from the analysis of risk factors, that the Coefficient of Credit to Total Assets Ratio is negative and statistically insignificant in profitability function. This implies that overall performance of branch credit flow was not satisfactory and hence credit flow into the economy could not produce any positive impact over banks profitability due to higher NPA. The costs incurred on Defaulted and Other Loan Assets are higher than the expected low costs. However, the coefficient value of credit to total assets in profit function assumes positive sign with statistical insignificance.
Recovery of Non Performing Assets

The study on Non-Performing Loans of Public Sector Banks shows a panel regression on the definitionally uniform data available for a five year plan ending in 1999-2000. The exercise is confined to 27 PSBs. So as to investigate variations within a class that is homogenous on the ownership dimension. The Exercise Groups the banks with higher than average NPAs into those explained by poor operating efficiency and those where the operational indicator does not suffice to explain the higher level of NPAs and leaves an unexplained intercept shift. Two of the three weak banks identified by the Verma Committee viz., the Indian Bank and the United Bank of India, fall in this category. Recapitalization of these banks with operational restructuring may therefore not be the solution, since there is clearly a residual problem even after controlling for operating efficiency. For banks operating in regions where there has been marked industrial decline, such as United Bank of India with its branch concentration in West Bengal, recapitalization with operational restructuring amounts to use of public funds with no discernible public purpose. Closure with liquidation of assets including real estate at market value should prove to be far more cost effective even with full depositor protection.

➤ **Legal Measures of Recovery:**

The expression ‘immovable property’ is defined in section 3 (26) of the General Clauses Act, which is not exhaustive. It states that an immovable property shall include land, benefits to arise out of land and things attached to earth, or permanently fastened to any thing attached to the earth.

The transfer of property Act defines the phrases ‘attached to earth’ in section 3, Transfer of Property Act but gives no definition of immovable property beyond excluding standing timber, growing crops and grass. The expression ‘attached to earth’ means:

(a) Rooted in the earth, as in the cases of trees and shrubs;
(b) Imbedded in the earth, as in the case of walls or building;
(c) Attached o what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

➤ **Civil Suit:**

(I) Application for Attachment of Immovable Properties

Rule 13 of Order XXI of Code of Civil Procedure 1908, states that applications for attachment of immovable property belong to the judgment-debtor shall contain the following details about the property:
(a) a description of property sufficient to identify the property;
(b) in case of property can be identified by boundaries or numbers in a record of settlement or survey, the application must contain a specification of such boundaries or numbers;
(c) a specification about the share or the interest of the judgment-debtor to the best of the knowledge of the decree-holder.

Rule 14 of Order XXI of Code of Civil Procedure 1908 requires that where he land to be attached is registered in the office of the collect, the court may require the decree-holder, to produce a certified extract from the register of such office, specifying the persons registered as proprietors of or possession any transferable interest in the land or its revenue. The certified extract shall also give details of the shares of the registered proprietors.

(ii) Attachment before judgment

Rule 5, Order XXXVIII of Code of Civil Procedure 1908, and section 19 (13) of Reconstruction of Debtors due to Banks and Financial Institutions Act,1993, provides for attachment of property, before judgment is pronounced, where the court is satisfied by affidavit or otherwise, at any stage of the suit, that the defendant with an intent to obstruct or delay the execution of any decree is bout to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. The court may in such circumstances direct the defendant, within the stipulated time, either to furnish security in such same as may specified in the order or to appear and show cause as to why he should not furnish security.

The main object of an attachment before judgment is to enable the plaintiff to realize the amount of the decree, if one is eventually passed, from the defendant’s property. Further, object of this provision is to prevent a decree from becoming in fructuous. It is incumbent upon the plaintiff to state the grounds on which he entertains the belief or apprehension that the defendant would dispose of or remove the property, or, to give the source of his information and belief in the matter through an affidavit.

The following are the guiding principle in deciding an application for attachment before judgment:

(1) An order under Order XXXVIII can be issued only if circumstance exists as are stated therein to the satisfaction of the court.
Recovery of Non Performing Assets

(2) The court would not be justified in issuing an order to attachment before judgment, or for security, on the mere assumption that no harm would be done thereby or that the defendants would not be prejudiced.

(3) The affidavit in support of the contentions of the applicant should not be vague and it must be properly verified. Where it is affirmed true to knowledge or information, it must be stated as to which portion is true to knowledge and the source of information should be disclosed and the grounds for belief should be stated.

(4) A mere allegation that the defendant is selling off his properties is not sufficient. Particulars must be stated.

(5) An order of attachment before judgment is a drastic remedy and the power has to be exercised with utmost care and caution, as it may be likely to ruin the reputation of the party against whom the power is exercised. As the court must act with the utmost circumspection before issuing an order of attachment, the affidavit filed by the applicant should clearly establish that the defendant, with an intention to obstruct or delay the execution of the decree that may be passed against him, is about to dispose of the whole or any part of his property.

(6) A mere mechanical repetition of the provisions in the Code or the language therein without any basic strata of truth underlying the allegation or vague and general allegation that the defendant is about to dispose of the property or to remove it beyond the jurisdiction of the court, totally unsupported by particulars, would not be sufficient compliance with Order XXXVIII, Rule 5 of Code of Civil Procedure.

(7) An attachment before judgment is not a process to be adopted as a matter of course. The suit is yet to be tried and the defendant of the defendant is yet to be tested. At the nebulous juncture the reliefs, its grant, as per the provisions of the Code, stand satisfied. This process is never meant as a lever for the plaintiff to coerce the defendant to come to terms. Hence utmost caution and circumstances should guide the court.

Rule 6, Order XXXVIII of Code of Civil Procedure 1908, further state that where the defendant fails to show cause why he should not furnish security, or fails to furnish security, required by the court, within the time fixed, the court may order the property to be attached. Where however the defendant shows causes or furnished security, the court
shall order the attachment to be withdrawn or make such other order as it thinks fit.

Rule 7, of Order XXXVIII of Code of Civil Procedure, 1908, the mode of making of attachment incases of attachment of property prior to judgment is similar to one to be followed for attachment of property in execution of decree which is discussed herein below.

(iii) Attachment of Immovable Property in Civil Court Proceedings

Rule 54 of Order XXI, of Code of Civil Procedure, 19108, states that an immovable property shall be attached by an order prohibiting the judgment debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge the order attaching the property shall also require the judgment-debtor to attend court on a specified dare to take notice of the date to be fixed for settling the terms of proclamation of sale.

Mere passing of an order in the file of the court is not sufficient. It is further required that the order of attachment be proclaimed at some place on or adjacent to such property by beating of drums or other customary modes. The copy of the order shall be affixed at the following places:

(a) on a conspicuous part of the property;
(b) on a conspicuous part of the court house;
(c) on the office of the collector of the district in which the land is situated (where the property is paying revenue to the government);
and
(d) In the office of the Gram Panchayat (where the property is situated in a village).

Rule 54, Order XXI, Code of Civil Procedure, 1908, is subject to the High Court amendments. The amendments pertain only to the part of proclamation stated in sub rule (2) of rule 54. The amendments have been brought by the High Courts of Allah bad, Andhra Pradesh, Mumbai, Kolkata, Delhi, Gauhati, Gujarat, Himachal Pradesh, Karnataka, Kerala, Madhya Pradesh, Tamil Nadu, Orissa, Patna and Punjab.

Formalities prescribed by Order 21, Rule 54 are mandatory. In order to create a valid attachment, those formalities must be complied with. The purpose of the rule is to make the judgment debtor aware that attachment has been effected and that he should not make any transfer thereafter.
Recovery of Non Performing Assets

**Immovable Property Exempted from Attachment:**

Section 60 of Code of Civil Procedure prescribed the details of the properties, which are exempted from attachment. In this chapter we are dealing with land, houses and buildings, hence the categories of properties which are exempt from attachment are given herein below:

(a) Houses and Buildings belonging to an Agriculturist

Section 60(c) of Code of Civil Procedure, 1908 provided that houses and buildings belonging to an agriculturist, or a laborer or a domestic servant are exempt from attachment, provided the house and the building are wholly occupied by such agriculturist, laborer or a domestic servant.

Besides the houses and buildings, this provision also exempts from attachment, the material and the sites thereof and the land immediately appurtenant thereto and which is necessary for the enjoyment of the provided under clause (c) of sub-sc (1) of section 60, CPC shall not be available where the attachment or sale is in pursuance of execution of decrees of rent for any such house, building, site or land.

The expression ‘agriculturist’ has been defined in Explanation V of section 60, Code of Civil Procedure, as a person who cultivates land personally and who depends on his livelihood mainly on the income from agricultural land, whether as owner, tenant, partner or agricultural laborer.

An agriculturist as defined in clause V above shall be deemed to cultivate land personally, if he cultivates the land-

(1) by his own labour, or,
(2) by the labour of any member of his family, or
(3) by servants or laborers on wages payable in cash or in kind (not being as a share of the produce), or both.

The right under the above provision is a personal right available to an agriculturist or a laborer or a domestic servant. It is neither heritable nor alienable. It can be enforced only during the lifetime of the person who is entitled to claim the right and after the death of the person concerned; the said rights cease to exist. The protection given to the agriculturist against attachment of his residential house is based upon the public policy of the state as any interruption of agricultural operations conflicts with national interest and it may led to a fall in agricultural production. Such policy of State cannot be defeated and any waiver of such a right is opposed to public policy.
Recovery of Non Performing Assets

The State of Himachal Pradesh has introduced amendments in clause (c), sub-section (1), section 60 of Code of Civil Procedure. The Amendment of Himachal Pradesh extends the exemptions from the attachment also to compensation paid for such houses and buildings including compensation for the materials and the sites and the lands referred to above, acquired for a public purpose. Another clause (cc) which has been introduced in the State of Himachal Pradesh extends the compensation paid for agricultural lands belonging to an agriculturist and acquired for a public purpose. The difference between clause (c) and clause (cc) is that in the former it is the compensation for the house and buildings whereas, in the latter it is the compensation for the land.

Similarly amendments have also been introduced by the State of Punjab, which have been extended in the States of Chandigarh, Delhi and Haryana. The effect of the amendment in clause (c) is the words 'occupied by him' at the end of clause (c) is substituted by the following words 'not proved by the decree holder to have been let out on rent to persons other than his father, mother, wife, daughter in law, brother, sister or other dependants or left vacant for a period of a year or more'. This amendment extends the scope of exemption of to those housed and buildings which are either in occupation of the agriculturist or a laborer or domestic servant or the relations stated in clause (c) of the Punjab Amendments.

(b) Exemption of Attachments in Respect of Residential Houses and Buildings

The State of Punjab has also inserted clause (ccc) which extends the exemption from attachment to houses and buildings not belonging to the agriculturist, provided that the house seeking exemption is one main residential house and buildings attached to the main residential house. Further, the house should belong to the judgment-debtor and must be in his occupation. Needless to say this, amendment extends to states of Chandigarh, Delhi and Haryana, and bring lots of property out of the reach of the creditor to recovery their dues through execution of the decree.

Where however, the said main residential house and buildings attached to it is specifically charged with the debt sought to be recovered, like through mortgage and charge under section 58 and section 1000 of the Transfer of Property Act respectively, the benefits of clause (ccc) shall not be available to the judgment-debtor. Therefore, it means if the creditor have secured their debt by creating an interest in their favor, the chances of their recovering due are higher than the cases where the loan/due are not secured.
Recovery of Non Performing Assets

(c) Interest of a lessee of a residential building

Clause (kc) of sub-section (1) of section 60 of CPC, 1908, states that the interest of a lessee of a residential building to which the provisions of law for the time being in force relating to control of rents and conditions apply is also exempt from attachment. Thus, the tenancy rights of a judgment-debtor cannot be attached towards the satisfaction of money decree. The exclusion or property under this clause is specifically applicable only to residential premises and not to premises used for non-residential purposes.

(l) Civil Court Proceedings

Rule 58 of Order XXI of Code of Civil Procedure 1908, deals with objections filed by the third parties and not the parties to the suit. He parties to the suit shall file objections to the attachment of the property under section 47 of the Code of Civil Procedure 1908.

(a) Third Party Objections

Rule 58 is attracted in cases where any claim is preferred or any objection is made to the attachment of any property, attached in execution of a decree. The sole ground available for challenge is that the property attached is not liable for attachment. The objection or the claim shall be maintainable on the above stated ground irrespective of the fact, whether the attachment is prior to decree or before the decree.

The claim or the objection shall not be entertained in the following circumstances:

(i) Where before the claim is preferred or objection is made, the property attached has already been sold; or
(ii) Where the court considers that the claim or objection was designedly or unnecessarily delayed.

The court shall on receipt of objection or claim adjudicate the same in accordance with the provisions of this rule. The court after determining such objection or claim may pass any of the following orders:

(1) Allow the claim or objection and release the property from attachment either wholly or in part;
(2) Disallow the claim or objection;
(3) Continue the attachment subject to any mortgage, charge or other interest in favor of any person;
(4) Pass any such order in the circumstances of the case as it deems fit.
If however, for some reasons, the court refuses to entertain the claim or objection, the party, who is aggrieved by such order, may institute the suit to establish the right, he claims to the property in dispute.

(b) Objection by Parties to the Suit

Where the objection or claims are preferred relating to execution, discharge or satisfaction of the decree, by the parties or their representatives to the suit, in which the decree was passed, the objections are filed under section 47, of CPC 1908. The question whether a person is or is not a representative of a party, for maintaining the objection under this section is also to be determined by the court, hearing the objection or claim.

A plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to suit.

Similarly, the auction purchaser of a property is also a party to the suit. All questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree.

> Procedure followed for Recovery:

Once the objection or claim as stated above, filed either under section 47 or Odder XXI, Code of Civil Procedure 1908 are dismissed, the civil court, shall proceed to take steps for selling of the property attached to recover the money due to the decree-holder. Rule 64 of Order XXI, CPC 1908, provides that any court executing a decree may order that the property or any portion of the same, attached in the manner stated above, may be sold. The court may order only a portion of the property to be sold where it is of the view that only a portion may be sufficient to satisfy the decree. The proceeds of such sale or a sufficient portion thereof shall be paid to the decree-holder. The balance, if any, shall be reimbursed to the judgment-debtor.

Proclamation of Sale

Civil Court Proceedings

Rule 65, Order XXI, CPC 1908, states that in normal circumstances, every sale in execution of a decree, shall be conducted by an officer, of a court by any such person as the court may appoint in this behalf. Normally, the sale shall be made by public auction. There may be circumstances, where the sale may not take place by the officer of a
court or by a public auction, illustratively, where the property to be sold are shares of a corporation. In this chapter, since we are dealing with attachment and sale of immovable property, the primary focus shall be on land, houses and building etc.

A High Court Amendment has been introduced by the State of Madhya Pradesh in Rule 65, Order XXI, CPCP 1908, wherein it is provided that the officer or person so appointed for conducting the sale of the attached property, shall be competent to declare the highest bidder as purchaser at sale.

Rule 66, of Order XXI, CPC, 1908, states that the proclamation of the intending sale shall be made in the language of the court, which is ordering sale of a property by public auction in execution of decree.

The proclamation shall be drawn up after due notice to the decree-holder and the judgment-debtor. It shall not be prepared without notice to the judgment-debtor, however, where the date of setting the terms of proclamation has been given to the judgment-debtor, by means of an order to give notice under Rule 66 to the judgment-debtor.

The proclamation shall state the time and place of sale and shall also specify as fairly and accurately as possible the following details:

(a) The details of the property to be sold;
(b) Where a part of the property is sufficient to satisfy the decree then it shall provide the details of such part of the property;
(c) The details of the revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in the estate, paying revenue to the government;
(d) The details of any encumbrance to which the property is liable, like mortgage, attachment etc;
(e) The details of the amount for the recovery of which the sale is ordered; and
(f) Every other thing, which the court considers materials for a purchaser to know in order to judge the nature and value of the property.

The court is not required to enter into the proclamation of sale, its own estimate of the value of the property, however, it is incumbent upon the court to include the estimate in the proclamation of sale, if any, given by either or both the parties. It shall be open to the court to summon any person whose present is required for the purpose of ascertaining the matter to be specified in the proclamation. The person so summoned, may be called upon by the court to produce any document in his
possession or power relating to ascertainment of matters in the proclamation of sale.

Rule 67, Order XXI, CPC, 1908, states that the proclamation shall be made and published by proclaiming it at some place on or adjacent to the attached immovable properties by beat of drums or other customary mode. A copy of such proclamation shall also be affixed on a conspicuous part of a property or upon a conspicuous part of a court house. Where the property is land and is paying revenue to the government, the proclamation of sale, in addition to the above stated, shall also be proclaimed in the office of the collector of the district, in which the land is situated. Where the land attached is a part of the village then the proclamation of sale shall also be made in the office of the gram panchayat. The proclamation shall be made similar to the manner prescribed in Rule 54 of Order XXI, CPC 1908, for attachment of property, stated herein above.

The High Court of Patna has amended sub-rule 1 of Rule 67, Order XXI, CPC 1908, to the effect that the court may, on an application of the decree holder, order proclamation and publication of sale simultaneously with order of attachment under Rule 54, Order XXI, and CPC 1908. The Amendment of Patna is adopted by the Orissa High Court.

Where for the purposes of sale, the property is divided in lots, it shall not be necessary for making separate proclamations for each lot, unless the court is of the opinion that a proper notice cannot otherwise be given. The High Court of Madras has amended this rule to the effect that it shall be necessary to publish the proclamation of each lot separately. The Amendment of the Madras High Courts is also adopted by High Court of Andhra Pradesh, Karnataka and Kerala.

➢ **Execution of Decrees:**

Recovery of money through the attachment and sale of immovable properties the most commonly employed method of executing the Decree. The reason being that value of the property appreciates with time as against moveable properties, discussed in the subsequent chapters, where the values of the property depreciate with the passing of the time. This menace the recovery is also riddled with most grave and complicated legal issues. In this chapter, we shall deal with the manner of attachment of immovable property and the sale of the same towards the satisfaction of the decree. Along with this we shall also discuss the objection faced by the decree holder, before he could enjoy the fruits of the decree passed in his favour.
Sale of an immovable property in execution of a decree and recovery certificate shall be conducted by an officer of a court on any person appointed in this behalf. Rule 68 of Order XXI, of CPC 1908, states that the sale of an immovable property shall not take place until after the expiration of at least 15 days calculated from the date on which the copy of proclamation has been affixed on the court house or the Judge ordering the sale.

➢ Adjournment or Stoppage of Sale:

The sale may be adjourned or stopped in exercise of the discretion vested upon the court or the officer conducting such sale under Rule 69, of Order XXI, CPC 1908. If the sale is adjourned, it shall be adjourned to a specified date and hour. The court and the officer conducting the sale may record their reasons for such adjournment.

The sale may be postponed under Rule 83 of Order XXI, CPC 1908, if the judgment-debtor can satisfy the court that there is a reason to believe that the decrrial amount may be raised by the mortgage or lease or private sale of such property it may also be postponed if the judgment-debtor is able to satisfy the court that some portions of the attached property may be used for raising the funds through mortgage or lease or private sale of such portions. Further, if the judgment-debtor is able to satisfy that he has some other immovable property, which may be sold, mortgaged or leased, the court may postpone the sale on such terms as it deems fit. The postponement of sale on the ground of arranging funds shall be done on the condition that all monies payable under such mortgage, lease or sale, shall be paid not to the judgment-debtor but in the court except where a decree holder is entitled to set off such money on account of opting to bid for or purchase the property.

Where a sale is adjourned or stopped in exercise of discretion by the court or the officer conducting the sale for a period long than 30 days of fresh proclamation for sale shall have to be made in the manner of which is discussed herein above. The condition of fresh proclamation may be waiver, only if, the judgment-debtor consents to waive Income Tax

Restriction on Sale by Certain Class of People

Officer on Duty

The sale so conducted is to be conducted by public auction, so as every one is free to participate in the same, however on account of Rule 73, of Order XXI, CPC, 1908, no officer or other person, who have been given the duty to conduct the sale, shall acquire or attempt to acquire any
interest in the property old. The officer conducting the sale is not only debarred directly but also indirectly from participating in the bid.

➢ Decree Holder:

Restrictions have also been placed upon the decree-holder and the mortgage to bid and buy the immovable property in the public auction conducted for sale of immovable property, in execution of decree Rule 72, of Order XXI, CPC 1908, states that a decree-holder cannot bid for or purchase the property, without the express permission of the court. It is thus incumbent upon the decree-holder to seek specific permission to participate in the bid or purchase the property. The decree-holder has an advantage over the other builders; in the event they chose to participate in the bid or purchases the property, which is that the purchase money is set off with the amount due on the decree. The court executing the decree shall record the satisfaction of the decree in whole or in part accordingly.

The High Court of Patna has amended Rule 72, Order XXI, CPC, 1908, with the effect, that the decree-holder shall not as a matter of rule be precluded from bidding for or purchasing the property, thereby taking a position diametrically opposite to normal rule of CPC. The rule of Patna High Court permits the decree-holder to bid and purchase the property as a matter of rule, the decree-holder as an exception is not permitted to participate, if the court by an express order prohibits him from participating. The Orissa High Court has adopted the rule framed by the Patna High Court.

➢ Mortgagor

Similarly Rule 72A of Order XXI, CPC 1908, restricts the mortgage to bid for or purchase the property sold in auction conducted for execution of decree. The mortgage may bid or purchase the property where the court has permitted him to do so.

The court before granting the leave to a mortgage shall fix a reserve price for the mortgage. The reserve price shall ordinarily be fixed at a price shall not less than the amount due for principal, interest and costs in respect of the mortgage, if the property is sold in one lot. If however, the property is sold in more than one lot, the reserve price shall not be less than such sum as shall appear to the court to be properly attributable to each lot in relation to the amount then due for principal, interest and costs on the mortgage.

The object of the rule is to prevent a mortgagee purchaser from taking an undue advantage by purchasing the mortgaged property at a lower price
and then pursuing other remedies to recover the balance of the amount of the decree.

**Auction Purchaser**

The highest bidder at the auction shall be declared to be the purchaser of the immovable property. The said purchaser is required under Rule 84, Order XXI, CPC 1908, to pay immediately after being declared as a purchaser, a sum equivalent to 25% of his purchase money, which was being bid at the auction. The money is to be deposited to the officer or any person conducting the sale. In the event of money, not being deposited, the property shall forthwith be resold.

The balance of the purchase money shall have to be paid by the purchaser into court within 15 days from the sale of the property. The decree-holder who chooses to become the purchaser of the property shall have the advantage of any set off, to which he may be entitled under Rule 72, Order XXI, and CPC 1908. The requirement of Rule 85, Order XXI of CPC, 1908, is mandatory. Its non-compliance renders the sale a complete nullity.

The High Courts of Andhra Pradesh, Bombay, Gujarat, Kerala, Madhya Pradesh and Madras have carried out certain amendments in Rule 85, Order XXI, and CPC 1908.

Where a default takes place in payment of the balance amount, the court may under rule 86 of Order XXI, CPC 1908, after defraying the expense of the sale, allow the amount to be forfeited by the government. The property after forfeiture, shall be resold and the defaulting purchaser shall lose all the claims to the property or to any part of the sum for which it may subsequently be sold. A fresh proclamation needs to be made for resale of the property under rule 87, Order XXI, CPC 1908, if the resale is caused due to default on the part of the auction purchaser to deposit the balance sum.

Where a sale of an immovable property is set aside in a manner discussed herein below, the purchaser shall be entitled to an order for repayment of his purchase money under Rule 93, Order XXI, CPC 1908, with or without interest as the court may direct against any person whom it has been paid. If, however, the sale is made absolute, the court shall issue a certificate under Rule 94, of Order XXI, PCP 1908, specifying the property sold and the name of the person who at the time of the sale is declared to be the purchaser. Such a certificate shall also bear the date on which sale became absolute.
Setting Aside of Sale in Execution of a Decree

A set of an immovable property may be set aside under Rules 89, 90 and 91 of Order XXI, CPC 1908. The grounds for setting the sale are following:

(i) Setting aside of sale on deposit of money;
(ii) Setting aside of sale on ground or irregularity or fraud;
(iii) Setting aside of ground of judgment-debtor having no saleable interest.

Each of the grounds for setting aside of sale is briefly discussed herein below:

Setting Aside of Sale on Deposit of Money

An application for setting aside sale under Rule 89, Order XXI may be made by any person claiming an interest in the property by depositing in court-

(a) A sum equal to 5% of the purchase money for payment to the purchaser; and
(b) The amount specified in the proclamation of sale for payment of the decree-holder less any amount, which may, since the date of proclamation have been received by the decree-holder.

The application for setting aside the sale under Rule 89, Order XXI may be made after the property is sold, but before the sale is on freedom in favor of the auction purchaser.

The application for setting aside the sale by deposit of money is maintainable by-

(a) any person owning the property; or
(b) any person holding an interest in such property-by virtue of a title acquired before the sale.

The person contemplated under Rule 89, Order XXI includes the judgment-debtor and also persons having a lesser interest, such as a lessee, mortgagee or any other person, who has a inchoate title to the property or any person who is interested in protecting the property on account of his being in possession or otherwise in pursuance of an incomplete transfer of property.
The High Courts of Andhra Pradesh, Bombay, Karnataka, Kerala and Madras have amended Rule 89, Order XXI, and CPC 1908, which generally deals with the condition of deposit as stated in Rule 89.

Setting Aside of Sale on Ground of Irregularity or Fraud

The sale of an immovable property may be set aside on ground of material irregularity or fraud in publishing or conducting the sale. The application for setting aside sale on this ground may be made by any of the following persons:

(a) the decree-holder;
(b) the purchaser;
(c) any other person entitled to share in a ratable distribution of assets;
   or
(d) any person whose interest is affected by the sale.

The sale on grounds of irregularity or fraud may be set aside under Rule 90, Order XXI, and CPC 1908. On a plain reading of Rule 90, Order XXI three factors emerge, which require to be taken note of in the matter of setting aside the sale of immovable property namely:

(a) material irregularity and fraud in publishing or conducting the sale;
(b) the court dealing with such an application is satisfied that the applicant has sustained substantial injury by reason of such an irregularity or fraud; and
(c) no application would be entertained upon a ground which the applicant could have taken on or before the date of drawing up of the proclamation of sale.

The expression ‘material irregularity in the conduct of the sale’ must be benignly construed to cover the climax act of the court accepting the highest bid. Since the court itself conducts the sale, its duty of the court is to apply its mind to the material factors bearing on the reasonableness of the price offered. Upon failure to apply its mind to this aspect of the conduct, conduct of the sale may amount to material irregularity.

Material irregularity of fraud standing by itself is no ground for setting aside the sale, it must be accompanied by substantial injury occasioned irregularity or fraud and a substantial injury must be proved. The expression ‘conducting the sale’ refers only to the action of the officer who holds the sale and expression does not apply to anything done antecedent to the order of sale.
The High Court of Allahabad has amended Rule 90, Order XXI, CPC, by adding a proviso to the rule stating that an application to set aside a sale shall not be entertained unless the applicant deposits such amount not exceeding 12 ½ % of the sum realized by the sale or a security is furnished to the satisfaction of the court. The deposit of the money of submission of the security may be exempted if the court for reasons to be recorded dispenses with the same. The High Courts of Patna and Orissa have also adopted similar amendments. The High Courts of Madras and Andhra Pradesh provide for furnishing of security to the satisfaction of the court for deposit of an amount equivalent to the amount mentioned in the sale warrant or that realized of the sale, whichever is less. The High Courts of Calcutta and Gauhati have also amended rule 90 to the effect that a sale shall not beset aside on the ground of any defect in the proclamation of the sale at the instance of any person who after notice did not attempt the drawing of a proclamation. The sale shall also not be set aside on the an app; of a person who was present at the time of proclamation of the sale but did not challenge of defect at the time.

**Setting Aside of Sale of Grounds of Judgment Debtor having no Saleable Interest:**

The purchaser at the auction of immovable property in execution of a decree may also apply to the court under Rule 91, of Order XXI, CPC 1908, for setting aside of sale on the ground that the judgment-debtor has no saleable interest in the property sold. Such an application must be made before the confirmation of the sale. A purchaser is not entitled to have a sale set aside on the ground that the judgment-debtor had a saleable interest in a very small portion of the property but no such interest in the measure portion of the property.

**Confirmation of Sale**

In the proceedings pending before the civil court, the sale of the immovable property shall be confirmed under Rule 92, Order XXI, CPC 1908, fewer than two circumstances, namely:

(a) Where no application is made under Rule 89, 90 and 91 CPC 1908 and;
(b) Where though the application is made under rules 89-91, CPC 1908, but that application is disallowed.

Likewise, in the proceedings before the debt recovery tribunal, the sale shall be confirmed under Rule 63, Second Schedule Income Tax Act, 1961, if no application is made under Rules 60, 61, and 62, Second Schedule, Income Tax Act, 1961. The sale shall also be confirmed, if the application moved under Rules 60, 61 and 62 is made but is disallowed.
Recovery of Non Performing Assets

Certificate of Purchaser

Rule 94, of Order XXI, CPC 1908, states that where a sale of immovable property has become absolute, the court shall grant a certificate to the purchaser. The certificate shall specify the details of the property sold and the name of the person who is declared to be the purchaser. It shall also bear the date on which the sale became absolute. The High Court of Allahbad has amended Rule 94 by inserting a sub-rule 2, with the effect to include transfer, otherwise than by sale. The High Court of Bombay by way of amendment has required that the sale certificate shall also state the amount of purchase money. The High Court of Madhya Pradesh has adopted the amendment of Bombay High Court. The High Court of Patna and Orissa have also carried out amendments in rule 94 of Order XXI, CPC 1908, which deals with the filing of sale certificate stamp.

With regarding to proceedings before the debt recovery tribunal, Rule 65, Second Schedule Income Tax Act, 1961, states that the tax recovery officer shall grant a certificate to the purchaser, the certificate shall include description of the property sold, name of the person, who has been declared to be the purchaser and also the date on which the sale became absolute.

Possession of Immovable Property:

The purchaser after the confirmation of the sale and grant of sale certificate has to take the possession of the immovable property from the person in possession of the property. The property may broadly fall into the possession of the following class of people-

1) Judgment-debtor in person;
2) Some other persons on behalf of judgment-debtor;
3) Some person claiming under a title created by the judgment-debtor after attachment;
4) Tenant.

The civil court may, on an application of the purchaser, under Rule 95, of Order XXI, CPC 1908, order the delivery of the property to be made from person, classified as (1) to (4) above, the putting such purchaser or any person whom the purchase may appoint to receive delivery on his behalf in possession of the property. The court may also, if the need be, direct removal of the persons classified as (a) to (c) above, if they refuse to vacate the same.
The possession contemplated under Rule 95, Order XXI, CPC 1908, is actual possession.

The purchaser, on the strength of his sale certificate, entitled to get an order from the court for the delivery of the property to him by any person bound by the decree. This Rule does not contemplate any enquiry except that the court, before making an order, must satisfy itself that the person to be dispossessed belongs to one of the categories of persons set out in the Rule. This Rule has no application to the trespassers and accordingly proceedings to eject them must be not in execution but in a suit.

It may be observed that a purchaser at a court sale is not bound to apply for possession under this Rule, he may, at his option, bring a regular suit for possession. The remedies by way of application and by way of suit are concurrent.

The High Court of Madras has amended Rule 95, Order XXI, CPC 1908, to the effect that where the house of which the delivery is given, is found to be locked, the court shall order breaking open of lock and handing over of the delivery of possession to the purchaser.

**Possession with the Tenant**

Where however, the possession of the property is with the tenant, the delivery of the property is to be taken under Rule 96 of Order XXI, CPC 1908. In such circumstance, the possession contemplated is a symbolic possession, which should not be confused with paper possession. In a symbolic possession, there is real delivery of possession in the mode prescribed by Rule 96 and is as against the judgment-debtor as effective as actual delivery.

To take the possession from the occupancy of a tenant, it is necessary that the court on the application of the purchaser, shall order delivery to be made by affixing of a copy of certificate of sale in some conspicuous place on the property and by proclaiming to the occupants by the bet of drums or other customary mode that the interest of the judgment-debtor has been transferred to the purchaser. To take possession of the immovable property from the tenant, the principles of rule 36, Order XXI, CPC 1908, are also applicable.

Where a Rent Act is applicable, the inter se rights and obligations of the landlord and tenant are regulated and controlled by such Rent Act. In areas where any special law governing the incidences of tenancy is not applicable, the law relating to lesser and lessee as envisaged by the
general law of the land, namely, Transfer of Property Act, will regulate and determine inter se rights of landlord and tenant.

In dealing with the rights and obligations which a third party may have in respect of a property in which a receiver has been appointed, the receiver, like a party to the suit, will have same limitation. The receiver will be bound by the incidences of tenancy flowing from the statute regulating for eviction of the tenant can be passed by the court at the instance of its officer, the receiver without taking recourse to appropriate proceedings for eviction of the tenant under the appropriate statute regulating and governing the inter se rights of landlord and tenant.

The plea of tenancy rights is often adopted by the dishonest litigants to protect the possession of the immovable property. Often rent receipts, unregistered and unstamped lease deeds, rent attachment orders etc are produced before the court to substantiate their claim of tenancy rights. A vigilant creditor must lift the veil over documents filed by the court. They must appreciate that mere payment of rent does not bring about contractual tenancy.

A lease is created under section 107, of the Transfer of Property Act 1882, according to which a lease is made in either by oral tenancy accompanied by delivery of possession or a written lease deed. The lease deeds which have been reduced in writing requires registration of the same, however, section 18 of the Registration Act, creates certain categories of lease that do not require to be registered compulsorily.

**Resistance or obstruction to Possession of Immovable Property**

A purchaser of an immovable property sold in execution of a decree, may make an application under Rule 97, Order XXI, CPC 1908, to the court, if he is resisted or obstructed by any person is obtaining possession of the property. The application should give incidence of such resistance or obstruction in the application. The court on receipt of the application shall proceed to adjudicate upon the application in accordance with the provisions of Order XXI.

The court on receipt of the application, complaining of resistance shall adjudicate the application under Rule 98, Order XXI of CPC 1908, and may make either of the following orders:

(a) make an order directing applicant to be put in possession of the property;
(b) make an order dismissing the application; and
(c) pass such other order as in the circumstances of the case it may be fit.
Where, however, the court is satisfied that the resistance or obstruction was caused without any just cause by either of the following persons-

(a) The judgment-debtor
(b) Some persons at his instigation or on his behalf;
(c) By the transferee, where transfer was during the tendency of the suit or execution proceedings.

It shall direct the applicant to be put in possession of the property. If the resistance is continued by the above stated person, the court may also order the obstructionist to be detained in the civil prison for a term unto 30 days.

The Bombay High Court has amended Rule 98, Order XXI of CPC 1908, the effect of which is that compensation may also be paid by the persons responsible for resistance or obstruction to the decree-holder or purchaser. The reason for granting compensation is the delay and expenses caused by the decree-holder or purchaser in obtaining the possession.

It is only the purchaser at the court sale who can apply under this Rule, if any person in obtaining possession resists him. A purchaser of the property by a private treaty cannot apply under this rule. Hence, this Rule cannot be availed off when the property is not sold by the court in execution but transferred by the judgment-debtor to the decree-holder privately in satisfaction of the decree.

Recovery Through Section 138 of Negotiable Instrument Act, 1881

Many a time, civil proceedings for recovery of money do not bear fruitful results even through the creditor it relentlessly. However, the fear of imprisonment and criminal trial are sufficient to make the debtor realize the benefits of settlement with the creditor.

Section 138 of Negotiable Instrument Act, 1881, is employed as one the ways to pressurize the debtor to pay up without waiting for a decree to come through. The requirement of presence of the accused before the court on all dates of hearing is a factor that encourages the parties to settle the matter rather than pursue litigation. The remedy of section 138 is very effectively used against the persons who have limited exposure to litigation, however, where the accused has many pending litigations against him, it may not turn out to be very effective in short run. It is bound to succeed in the long run for sure.
The main object of the Negotiable Instrument Act, 1881, is to legalize the system by which, the instruments contemplated by it could be passed from hand to hand by negotiation like any other goods. The object of section 138 of Negotiable Instrument Act is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments. Section 138 has been incorporated to prevent the drawer of negotiable instruments. From drawing a cheque that he knows or intends to be dishonored due to insufficient funds in his bank account and still induces the payer or holder to act on such representation.

The Negotiable Instrument Act, 1881, was amended by Banking, Public Financial Institutions and Negotiable Instruments Law (Amendment) Act, 1988 wherein a new chapter, Ch XVII, was inserted for the penalties in case of dishonor of cheques due to insufficiency of funds in the account of drawer of the cheque.

These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instruments.

The existing provisions in the Negotiable Instrument Act, 1881, namely section138-42 were found deficient in dealing with dishonor of cheques. Not only the punishment provided in the Act has been proved to be inadequate, also, the procedure prescribed for the courts to deal with such cases expeditiously in time bound manner in view of the procedure contained in the Act. Thus, it was decided to bring out, inter-alia the following amendments in the Act of 1881, by Amendment of 2002-

(1) To increase the punishment s prescribed under the Act from one year to two years;
(2) To increase the period for issue of notice by the payee to the drawer from 15 days to 30 days;
(3) To provide discretion to the court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act?

The Amendments in the Act are aimed at-

(1) Earlier disposal of cases relating to dishonor of cheque;
(2) Enhancing punishment to offenders;
(3) Introducing electronic image of a truncated cheque and a cheque in the electronics form and
(4) Exempting an official nominee director from prosecution under the Negotiable Instrument Act, 1881.
Recovery of Non Performing Assets

On careful analysis of section 138, it is seen that an offence is created when the bank returns cheque unpaid for any of the reasons mentioned therein and the same is returned by the bank with the endorsement like:

(1) ‘Refer to the drawer’
(2) ‘Instructions for stoppage of payment’ and
(3) ‘Exceeds arrangement’.

The significant fact, however, is that the proviso lays down three conditions precedent to the applicability of the above section which is as follows:

(a) Drawing of the cheque;
(b) Presentation of the cheque of the bank;
(c) Returning the cheque unpaid of the drawer bank;
(d) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount and
(e) Failure of drawer to make payment within 15 days of the receipt of the notice.

The preconditions for the applicability of section 238 of the Negotiable Instruments Act is that

(1) The cheque should have been issued for a ‘debt or other liability’. The explanation to section 138 amplifies that for the purpose of the section; ‘debt or other liability’ means ‘a legally enforceable debt or other liability’.
(2) The cheque is given for the discharge of debt in whole or in part or other liability.
(3) The cheque is returned by the bank.
(4) The same is returned by the bank with the endorsement like
   (i) ‘refer to the drawer’
   (ii) ‘instructions for stoppage of payment’
   (iii) ‘exceeds arrangement’

If these conditions exist then it would amount to dishonor within the meaning of section 138 of the Negotiable Instruments Act.

The Supreme Court enhanced the scope of section 138 of Negotiable Instrument Act, by observing ‘account closed’ would mean that the cheque is returned as unpaid on the ground that ‘the amount of money standing to the credit of that account is insufficient to honor the cheque’, and thus proceedings under section 138 would be attracted.

If, however, a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposit the
amount thereafter, but before the cheque is put in the bank by the
drawer, and the cheque is honored, in such a situation, presumption of
dishonesty on the part of drawer under section 138 would not be
justified.

For prosecuting a person for an offence under section 138 of the
Negotiable Instruments Act, it is inevitable that the cheque is presented
to the banker within a period of six months from the date on which it is
drawn or within the period of its validity whichever is earlier.

When a post-dated cheque is written or drawn, it is only a bill of
exchange and therefore the same remains a bill of exchange, and so the
provisions of section 138 are not applicable to the said instrument.

The post-dated cheque becomes a ‘cheque’ within the meaning of section
138 of the Act on the date, which is written thereon. The date of cheque
can however be changed.

There are no provisions in the Negotiable Instruments Act or in any other
law, which stipulated that, a drawer if a negotiable instrument cannot
revalidate it. It is always open to a drawer to voluntarily revalidate a
negotiable instrument, including a cheque.

Section 3 of Negotiable Instruments Act, defines the ‘banker’ to include
any person acting as a banker and any post office savings bank. The
Bank’ referred to in clause (a) to the proviso to section 138 of the Act,
would mean the drawer bank on which the cheque is drawn and not all
banks where the cheque is presented for collection including the bank of
the payee, in whose favor the cheque is issued.

A combined reading of sections 3, 72 and 138 of the Act, leaves no doubt
that the law mandates, the cheque to be presented to the bank on which
it is drawn if the drawer is to be held liable. Such presentation is
necessarily to be made within 6 months at the bank on which the cheque
is drawn, whether presented personally, through another bank, namely
the collecting bank of the payee.

The non-presentation of the cheque to the drawer bank within the period
specified when the section would absolve the person issuing the cheque
of his criminal liabilities under section 138 of the Act, who shall
otherwise may be liable to pay the cheque amount to the payee in a civil
action initiated under the law.

The position for attraction of section 138 will not be different even if the
drawer has instructed the bank stop the payment prior to the
presentation of the cheque for encashment. The Supreme Court has
Recovery of Non Performing Assets

held that in case, after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or the holder in due course presents the cheque to the bank for payment and when it is returned on instructions, section 138 does not get attracted, does not fit in which the object and purpose of the provision which, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques.

Acceptance of this proposition will make section 138 a dead letter. By giving instruction to the bank to stop payment immediately after issuing a cheque against a debt or liability, the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed.

Once the cheque is issued by the drawer a presumption under section 139 must follow and merely because the drawer issues a notice to the drawer or the bank for stoppage of payment, it will not preclude an action under section 138 of the Act, by the drawer or the holder of a cheque in due course.

A cheque can be presented any number of times to the bank within the period of its validity. Clause (a) of the proviso to section 138 does not put any embargo upon the payee to successively present a cheque during the period of its validity.

This apart, in the course of business transaction it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after sometime, on his own volition or at the request of the drawer, in expectation that it would be encased. The primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally, is taken out of compulsion and not choice.

On each presentation of cheque and its dishonor, a fresh right and not cause of action accrues in his favor. He may, therefore, go an presenting the cheque without taking pre-emptor action in exercise of his right under clause (b) of section 138, so as to enable him to exercise such right at any point of time during the validity of cheques. However, once he gives a notice under clause (b) of section 138, he forfeits such right for in case of failure of the drawer to pay the money within the stipulated time, he would be liable for offence and the cause of action for filing the complaint would arise.
Recovery of Non Performing Assets

To continue an offence under section 138 of the Act, the complainant is obliged to prove its ingredients, which include the receipt of notice, by the accused under clause (b).

It has to be kept to mind that it is not the ‘giving’ of the notice, which makes the offence, but it is the ‘receipt’ of the notice by the drawer, which gives the cause of action to the complainant to file the complaint within the statutory period. It is therefore, clear that ‘giving notice’ in the context is not the same as receipt of notice. Giving is a process by which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address. The thrust in the clause (b) is on the need ‘to make a demand’. Though no form of notice is prescribed in clause (b), the requirement is that the notice shall be given in writing.

It is well-settled that a notice refused to be accepted by the addressee can be presumed to have been served upon him. Nowhere in the Act is said that the notice under section 138 must be sent by registered post or it should be dispatched through a messenger. The notice may be sent also by fax.

The object is issuing notice indicating the fulcrum of dishonor of the cheque is to give the opportunity to the drawer to make the payment within the stipulated time, so that it will not necessary for the payee to proceed against the payer in any criminal action, even though the bank has dishonored the cheque.

Section 142 of Negotiable Instruments Act provides that the payee or the holder in due course of the said cheque can make a complaint under section 138.

The complainant has to be a corporeal person who is capable of making an appearance in the court. However the complaint has been made in the name of an incorporeal person like company or a corporation, it is necessary that a natural person must represent such a juristic person in the court. There may be occasions when different persons can represent the company on different dates of hearing.

Any one can set the criminal law in motion by filing a complaint of facts constituting an offence before a magistrate entitled to take cognizance. It has been held that no court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint.

Thus, even presuming, that initially there was no authority, still the company can, at any stage, rectify that defect. At a subsequent stage, the company can send a person who is competent to represent the
company. The company can rectify the defect of the authority of the person representing the company before the court at any stage.

It has been held that if any special statute prescribed offences and makes any special provision for taking cognizance of such offences under the statute, then the complainant requesting the magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute.

If the person committing an offence under section 138 is a company, every person who, at the time of offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be proceeded against the unshed accordingly.

However, where a person is nominated as a director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by Central Government or the State Government, as the case may be, then the shall not be liable for prosecution under Ch XVII of the Negotiable Instruments Act. This has been amended by the Amending Act of 220, which has relaxed the strict rules of section 141 of the Negotiable Instruments Act.

(I) Complaint to be in Writing:

A complaint under sc 138 has to be in writing, made by the payee or, as the case may, the holder in due course of the cheque.

(II) Complaint within One Month from the Date of Receipt of Notice:

The complaint is to be made within one month of the date on which the cause of action arises under clause (c) if the proviso to section 138. Clause (c) of section 138 requires that the cause of action would accrue in favor of the complainant only when the drawer of such cheque fails to make the payment of the amount of the said cheques within 15 days of receipt of said notice. For the purposes of limitation, the computation would be starting on day next to receipt of notice.

The cognizance of offence punishable under section 138 is made under section 142 of Negotiable Instruments Act.

The Amending Act of 2002 gives discretion to the court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act. A complaint may be entertained after the prescribed period if the court is satisfied that the complaining has
sufficient cause for not making a complaint within such period. The words ‘sufficient cause’ should receive a liberal construction so as to advance substantial justice.

A complaint under section 138 of Negotiable Instruments Act may be presented in local jurisdiction of the court, within which any of the following acts were done:

1. Drawing of the cheque;
2. Presentation of the cheque to the bank;
3. Returning the cheque unpaid of the drawer bank;
4. Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount;
5. Failure of drawer to make payment within 15 days of receipt of notice.

As stated, these five acts are necessary to constitute an offence of section 138. It is not necessary that all the above five acts should have been perpetrated at the same place. It is possible that each of those five acts could be done at five different places. However, a concatenation of all the above five is a sine qua non for the completion of the offence under section 138.

In view of section 178 (d) of Criminal Procedure Code, it is clear any of the five different courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under section 138 of the Act. The complainant can choose any of those courts having jurisdiction over any one of the local area within the territorial limits of which any one of those five acts was done.

Section 22 of Sick Industrial Companies (Special Provisions) Act 1985 (herein after referred to as ‘the section’) does not create any legal impediment for instituting the proceeding with a criminal case on the allegations of an offence under section 138, Negotiable Instruments Act against the company or its directors. The section only creates an embargo against disposal of assets of the company for recovery of its debts. The purpose of such embargo is to preserve the assets of the company from being attached or sold for realization of dues of the creditors. The section does not bar payment of money by the company or its directors to other persons for satisfaction of their legally enforceable dues.

Section 138 of the Negotiable Instruments Act is a penal provision, the commission of which offence entails a conviction and sentence of proof of the guilt in duly conducted criminal proceedings.
Once the offence under section 138 is completed, the prosecution proceedings can be initiated not for recovery of the amount covered by the cheque but for bringing the offender to penal liability. It must therefore, be held that if commission of the offence under section 138 of the Act was completed before the commencement of proceedings under section 22 (1) of Sick Industries Companies Act, there is no hurdle in any of the provisions of sick Industrial Companies Act against the maintainability and prosecution of criminal complaint duly instituted under section 142 of the Negotiable Instruments Act.

There is no provision under the Companies Act, 1956, which prohibits enforcement of a debt due from a company.

When a company goes into liquidation, enforcement of debt due from the company is only made subject to the conditions prescribed therein. However, that does not mean that the debt as become unenforceable all together. Perhaps due to want of sufficient assets of the company, the realization of the debt would be difficult but that is no premise to hold that the debt is legally unenforceable. Enforceability of a debt is not be tested on touchstone of the modality or the procedure provided for its realization or recovery.

Complaint under section 138 of the Negotiable Instruments Act can be quashed under section 482 of the Code of Criminal Procedure.

However, jurisdiction under section 482 of the Code has to be exercised with great care.

In the exercise of its jurisdiction, the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing processes a criminal court has to exercise a great deal of caution. For the accused, it is a serious matter. The jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.

➢ **Out of Court Settlement**

1. **GENESIS:**

With the stabilization of Income Recognition, Asset classification and provisioning norms, banks are becoming increasingly sensitive to credit risk and there is growing awareness to contain Non-Performing Assets (NPAs) at a low level, as these greatly affect
banks profitability due to non-recognition of interest income and provisioning requirements.

Past experience has been that neither the conventional means of recovery nor even a reasonable well drawn Recovery Policy has yielded the desired results. Legal remedies presently available to the banks are expensive and time consuming. There is hence, urgency for adopting a new and pragmatic approach to step up recovery of NPAs.

From time to time, RBI has been issuing guidelines to be followed by the Banks while entering into compromise / negotiated settlement with the borrowers or considering waiver / write off of dues. Banks are required to have a "Loan Recovery Policy" which sets down the manner of recovery of dues, factors to be taken into account before considering waiver, norms for permitting sacrifice / waiver, decision levels, reporting to higher authorities and monitoring write off/ waiver cases.

Reserve Bank of India had set up a Working Group for evolving uniform guidelines on write off/ compromise settlement. The Governor, Reserve bank of India while announcing Monetary and Credit Policy for the year 1999-2000 on 20.04.1999, had also mentioned that Government has directed Public Sector Banks to set up Settlement Advisory Committees so that chronic cases especially those relating to the small Sector are settled in a timely and speedy manner.

Reserve Bank of India, vide latter dated 27.5.1999, issued guideline regarding constitution of settlement Advisory Committees for settlement of cases of small sector.

Reserve Bank of India vide their letter no. BP BC 11/21.01.40 / 99-00 dated 27th July 2000, modified the guidelines issued earlier vide their letter dated 25.5.1999. Revised guidelines now cover NPAs upto Rs.5 crore relating to all sectors, including the small sector. These guidelines are non discretionary and non discriminatory which will be uniformly implemented by all Public Sector Banks. Special guidelines will remain operative only upto 30.6.2001.

RBI vide aforesaid letter dated 27.07.2000 has also advised that the Board of Directors of banks may evolve policy guidelines regarding one time settlement of NPAs over Rs 5 crore covering the computation formula, realizable amount, cut off date and payment conditions with reference to factor of security and disposability,
etc, as part of its loan recovery policy including setting up of settlement advisory Committee, staff accountability and other relevant aspects and decide individual cases in accordance with such policy.

2. OBJECTIVE:

In respect of funds blocked up in NPAs. Bank has to –

a) maintain capital at the prescribed level to comply with adequacy norms.
b) Continue incurring cost to service the funds blocked in NPAs and
c) Bear the cost for loss of opportunity to lend these funds at favorable rates, if NPAs, are not reduced.

It is, therefore, imperative that the pace of reduction of NPAs be stepped up as per the prevent policy / practice in the system and one way to achieve it is entering into compromise / negotiated settlement with the Borrowers out of courts. This is one of the speedy ways of recovery of dues by which blocked funds may be made available for:

i. Recycling at favorable rates and earning profits;
ii. Reducing capital adequacy requirements; and
iii. Saving the cost of funds so blocked up as NPAs.

NPAs can be prevented / reduced through persuasion by way of compromise / negotiated settlements with the borrowers / guarantors or by resorting to legal proceedings. Legal action is a long drawn costly procedure and our intention should be not to waste good money after bad money. Our past experience of recovery of bank dues through legal actions has not been very encouraging and cost effective.

From cost benefit angle, approval of a settlement / compromise offer would be considered beneficial to the interest of the bank if the following criteria (all or major part of the same) are satisfied

i. A critical NPA would be realized.
Recovery of Non Performing Assets

ii. The amount to be realized would enable the bank to credit a part of it to its income account and would result release of provision.

iii. Bank would earn future interest on the compromise/negotiated settlement amount till it is actually paid.

iv. All loan assets generally being 100% risk weighted, as a result of compromise settlement. Realization of the NPAs would facilitate improvement of bank’s capital adequacy.

v. Compromise / settlement would result in saving of time & cost of the bank in suit filed / decreed accounts.

vi. Amount realized would be available for recycling and profitable use and will give opportunity to earn income at current rates of interest.

It should therefore be our endeavor to recover maximum possible dues through compromise route. However, it has to be ensured that the compromise / settlement decision are taken judiciously and in the best interest of the bank. The compromise should be a negotiated settlement under which the bank should ensure to recover its dues to the maximum extent possible at minimum expenses, in the shortest possible period.

Proper distinction needs to be made between willful defaulters and the borrowers defaulting in repayments due to the circumstance beyond their control.

Where security is available for assessing the realizable value, proper weight age has to be given to the location / condition and marketable title and possession thereof. What is Important in settlement cases is that the bank could promptly recycle the funds with Advantage instead of resorting to expensive recovery proceedings spread over a long period.

3. **Factors to be Taken in to Account While Considering Compromise / Negotiated Settlement:**

   a) Genuineness of the case and difficulties of the borrowers and his / their readiness to enter into compromise to enter into compromise for repayment of the dues.
Recovery of Non Performing Assets

b) Age and status of the Advance outstanding in the account.

c) Death of the borrowers / partners / guarantors during the course of the accounts with the Bank materially affecting the affairs of the borrowers.

d) Availability of primary and / or collateral securities and / or other attachable securities of the borrowers / partners / guarantors and reliability thereof in due time without any lengthy / costly court proceedings at the expenses of the Bank;

e) Realistic Realizable value of the primary and / or collateral Securities and other attachable securities and whether it covers the dues to be recovered by the bank.

f) Present business activities of the borrowers / partners / and guarantors and source of funds for compromise / negotiated settlement;

g) Advisability for compromise / negotiated settlement without recourse to legal process as it involves delay, cost and further increase in the dues to the Bank owing to addition of interest and other charges over a period of time;

h) Assessment of the chance and extent of recovery for the Bank, if recovery of the dues has to be achieved through Court Proceeding;

i) Possibility for the bank, even in suit filed accounts, to explore the chance of compromise / negotiated settlement without pursuing suits any further;

j) Possibility for the bank even in decreed accounts to explore, if compromise / negotiated settlement would be advisable if (i) there are no assets available, (ii) available assets may not fetch more than the compromise offer, (iii) there would be complications in executing the decree and realize the dues in a short time at minimum expense.
Recovery of Non Performing Assets

k) Sometime, after an account has turned NPA or after filing suit or obtaining decree, another party comes forward to purchase the Unit / business interest of the Debtors, Bank can consider compromise / negotiated settlement with the third party with or without the consent of the borrowers / partners / guarantors.

Norms Do Epwemirrinef Sacrifice / Waiver:

It should be the endeavor at all levels to recover maximum possible dues through compromise route. It is, however, to be ensured that recommendation for compromise are made and compromise decision taking judiciously and in the best interest of the bank.

Approach for considering waiver / sacrifice /loss on compromise can be in the following order based on merits and attendant circumstance of each individual case.

a) Waiver of penal interest only with or without compounding effect.

b) Waiver of effect of compounding of interest, if it facilitates recovery of dues fully by application of Interest in the account at documented rate on simple basis from the date say:

i) of filing suit in the account against the borrower/guarantors OR

ii) of transfer of dues to the protested Advances category OR

iii) account became NPA, OR

iv) the Unit was affected by some natural calamities and / or other external factors, beyond the control of the borrowers / guarantors OR

v) of death of the borrower / main partner / guarantor, during the period of loan materially affecting the affairs of the Party OR

vi) the closure of the unit /strike / lockout / Government. policy / Court order OR

vii) the unit stated incurring cash losses.
Recovery of Non Performing Assets

c) Waiver of a part or whole of simple interest can also be considered. In such an event, the Bank would recover the dues as on the cut-off date in full plus a part of interest at documented rate on simple basis, if part waiver is considered.

d) In exceptional cases, waiver of part of principal dues outstanding in the Bank’s books can also be considered wherever it is so justified on, merits by the facts / circumstances in each case.

e) The concept of compromise should be treated as an extension of the concept of Net Present Value / Discounted Cash Flow. Therefore, the opportunity cost of funds in hand vis-à-vis that of funds which could be in hand at a later period should be kept in view while considering the compromise proposal.

f) In case where compromise / negotiated settlements are to be entered into under the aegis of BIFR/AIFR, Bank will normally adhere to the direction / decision of such authorities.

➢ Recent Developments:

“The concern of the auditor is with the overall adequacy of provisions in respect of each of the heads under which advances are required to be shown in the balance sheet of a bank. Thus, for example, the auditors will have to examine the adequacy of the overall provisions made by the bank separately in respect of (a) bills purchased and discounted, (b) cash credit, overdrafts and loans repayable on demand and (c) terms loans. Similarly, the auditors should examine the overall adequacy of the provisions under each of the other heads of advances in the balance sheet. If, in his opinion, the overall provision made by the bank in respect of any of the heads is inadequate, he should make a suitable qualification in his report”.

Vide Reserve Bank of India Circular No: DOS.CO.BC.21/11/02/823/96-97 dated 31st October, 1996 about assessments relating to asset valuation and loan loss provisioning it is stated that “in the case of inspection of banks by Reserve Bank of India, it has been observed there have been divergence between the asset classification/evaluation made by banks/statutory auditors and the assessment made by Reserve Bank of India inspectors. Such divergence arises mainly due to non-adherence
Recovery of Non Performing Assets

to the aforesaid guidelines and ignoring certain qualitative factors like realizable value of security becoming suspect or unrecoverable having a bearing on the values of risk assets. In order to narrow down the divergence and ensure adequate provisioning by banks, it is suggested that the bank’s Statutory auditors, if they so desire, could have a dialogue with RBIs Regional Office/inspectors who carried out the inspection during the previous year with regard to accounts contributing to the difference.

Further, as per another circular bearing no: BP.1576/21-04-018/96 dated 18th December 1998 Reserve Bank of India stated that “It has been brought to our notice that the quantum of non performing assets is often assessed differently by the Statutory Auditors of banks due to varying interpretations of the Prudential Norms for Income Recognition, Asset Classification etc.

With a view to adopting a more uniform approach in this regard and providing clarifications, where necessary, Chief General Manager, Department of Banking Operations and Development, Central Office, Reserve Bank of India, Mumbai has been appointed as “Nodal Office” to clarify doubts on interpretation of the Prudential Norms for Income Recognition, Asset Classification, Provisioning and Capital Adequacy. The Statutory Auditors of the banks, if they so desire, could also have dialogue with the Reserve Bank of India inspectors who carried out the bank’s inspection for the previous year and also with the “Nodal Officer” on matters relating to Income Recognition/Asset Classification etc., so that there is uniformity in the accounting standards adopted by banks”.

Reserve Bank of India Circular No. Co.BP.BC.6/11.01.005/96-97 dated 15th May 1997 touch upon the independence of Statutory Auditors. Para 2 of the circular states as follows: “In this connection, we wish to clarify that the primary responsibility for making adequate provisions for any diminution in the value of the loan assets, investments or other assets is that of the bank management and the statutory auditors and the assessment made by the inspecting officers of Reserve Bank of India is furnished essentially to assist the bank management and the statutory auditors in taking a decision in regard to making adequate and necessary provisions in terms of the prudential guidelines issued to banks”.

The various Reserve Bank of India norms on Income Recognition, Asset Classification and Provisioning have been arranged in this thesis in proper sequence as a ready beckoner so that it may help the auditors and bank managers in understanding the subject easily an din ensuring compliance with the norms without resorting to reading and
Recovery of Non Performing Assets

understanding the various circulars of Reserve Bank of India. An easy method for identifying NPAS in situations where interest is charged separately or interest is loaded with installment is highlighted and a few worked out examples are also given. All Reserve Bank of India circulars on the subject are also furnished separately.

The Reserve Bank reiterates that banks and financial institutions should adhere to the Prudential Norms on Asset Classification and provisions correctly and avoid the practice of “evergreening”. The banks are advised to take effective steps for reduction of NPAs and also put in place risk management system and practices to prevent re-emergence of fresh Non Performing Assets. The banks are further advised to put in place formal assets/liability management systems with effect from April 1st, 1999. Banks have also been advised to ensure a loan review mechanism for larger advances soon after its sanction and continuously monitor the weakness developing in the accounts for initiating corrective measures in time. Reserve Bank of India has issued guidelines for recovery of dues relating to non performing assets of Public Sector Banks.