



APAC NEWSLETTER
Legal, Compliance and ESG

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Dear Readers,

We bring to your reading and attention following topics:

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A. LEGAL AND REGULATORY UPDATES:**1. New Definition of Micro, Small and Medium Enterprises – Clarification¹****Date of Master Circular:** February 18, 2022**Effective Date:** Date of publication in the Official Gazette

RBI, vide its circular dated February 18, 2022, has issued a clarification on the New Definition of Micro, Small and Medium Enterprises. RBI has clarified that the existing Entrepreneurs Memorandum (EM) Part II and Udyog Aadhaar Memorandum (UAMs) of the MSMEs obtained till June 30, 2020, shall remain valid till 31st March 2022.

The validity of documents obtained in terms of O.M. No.12(4)/ 2017-SME dated 8th March 2017 for classification of MSMEs upto 30th June 2020, are also valid upto 31st March 2022. Previously, all existing enterprises registered under EM-Part-II or UAM shall register again on the Udyam Registration portal on or after the 1st of July 2020. Further, it has notified that all other provisions of the circular remain unchanged. The new way of classifying MSMEs was first notified on 26th June 2020 right after the end of the first wave of Covid-19 pandemic. It gave a classification of enterprises, criteria of investment and turnover for classification, and calculation of investment in plant and machinery or equipment etc.).

2. Implementation of ‘Core Financial Services Solution’ by Non-Banking Financial Companies (NBFCs)²**Date of Master Circular:** February 23, 2022**Effective Date:** October 01, 2022

RBI vide its notification dated February 23, 2022, has been decided that NBFCs – Middle Layer and NBFCs – Upper Layer with 10 and

more ‘Fixed point service delivery units’¹ as on October 1, 2022, shall be mandatorily required to implement ‘Core Financial Services Solution (CFSS)’, akin to the Core Banking Solution (CBS) adopted by banks. The CFSS shall provide for seamless customer interface in digital offerings and transactions relating to products and services with anywhere / anytime facility, enable integration of NBFCs’ functions, provide centralised database and accounting records, and be able to generate suitable MIS, both for internal purposes and regulatory reporting. The timeframe for implementation of the requirement as indicated in Para 2 above shall be as under:

Category of NBFC	Timeframe for implementation
NBFC – Middle and Upper Layers with 10 or more ‘Fixed point service delivery units’	On or before September 30, 2025. However, NBFC-UL shall ensure that the CFSS is implemented at least in 70 per cent of ‘Fixed point service delivery units’ on or before September 30, 2024
NBFC – Base Layer and NBFC – Middle and Upper Layers with fewer than 10 ‘Fixed point service delivery units’	Not mandatory. However, they may consider implementation of a Core Financial Services Solution for their own benefit.

A quarterly progress report on implementation of the Core Financial Services Solution, along with various milestones as approved by the Board / Committee of the Board, shall be furnished by the NBFC to the Senior Supervisory Manager (SSM) Office of Reserve Bank starting from quarter ending March 31, 2023.

¹<https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12233&Mode=0>

²<https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12247&Mode=0>

B. TYPES OF MORTGAGES EXPLAINED

~ Yogesh A. Babar, Assistant Manager- Legal

INTRODUCTION: -

A mortgage is to be understood as a transfer of interest explicitly in immovable property as security for a loan. The essential element of a mortgage is that it is a transfer of a legal interest in the property with a provision for redemption i.e., upon repayment of the loan, the transfer shall become void, or the interest shall be re-conveyed. The provisions pertaining to a mortgage are contained in Section 58 of the Transfer of Property Act, 1882 (hereinafter "TPA").

Loans may be of two types, secured debt or unsecured debt. Where the loan is secured against any movable property it is called a pledge while where the loan is secured against some immovable property of the debtor it is called a mortgage. A mortgage is a transfer of an interest in specific immovable property as a security for the repayment of debt. It is observed that the whole law of mortgage in India is embodied in the TPA read with Order 34 Rules 1 to 15 of Civil Procedure Code, 1908 ('CPC') which deals with suits relating to mortgages of immovable property. It is important to note that the court cannot travel beyond these statutory provisions.

Clause (a) of Section 58 reads: *'A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement that may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is affected is called a mortgage-deed.'*

Now, as we know, a 'mortgage' is a transfer of an interest in immovable property in order to secure a loan, which may or may not give rise to any personal liability. The person who needs a loan and gives his property as security is a 'mortgagor' while the person giving loan is a 'mortgagee'. The principal amount and the interest to be paid for the time being is called the mortgage money, and the instrument through which the transfer of property takes place is called the mortgage deed.

KINDS OF MORTGAGE:

(1) Simple Mortgage [Section 58(b)]

Clause (b) of Section 58 reads: *'Simple mortgage.—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.'*

A simple mortgage can be created only through a registered document. According to Section 59, even when the sum of money secured is less than rupees 100, a simple mortgage needs to be effected by a registered instrument.

The basic elements of a simple mortgage are:

1. The mortgagor must have bound himself personally to repay the loan.
2. The possession of the property is not given to the mortgagee; and
3. To secure the loan he has transferred to the mortgagee the right to have the specific immovable property sold in the event of his failure to repay.

(2) Mortgage by Conditional Sale [Section 58(c)]

Clause (c) of Section 58 reads: *'Mortgage by conditional sale.—Where, the mortgagor ostensibly sells the mortgaged property— on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: Provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which affects or purports to affect the sale.'*

Basic elements of a mortgage by conditional sale are:

- The mortgagor must ostensibly sell the property to the mortgagee.
- There must be a condition on such sale that either,
- on the repayment of the debt on a certain date,
- the sale shall become void, or the buyer shall transfer the property to the seller, or in default of payment on the agreed date, the sale shall become absolute.
- The condition must be contained in the same document.

(3) Usufructuary Mortgage [Section 58(d)]

Clause (d) of Section 58 reads: *'Usufructuary mortgage.—Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or payment of the mortgage-money, or partly in lieu of interest partly in payment of the mortgage money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.'*

The basic elements of usufructuary mortgage are:

- The mortgagor either delivers possession or expressly or impliedly binds himself to deliver possession of the mortgaged property to the mortgagee.
- The mortgagor authorises the mortgagee till the payment of the mortgage money is satisfied.
- to retain such possession.
- to receive the rents and profits or any part of such rents and profits arising from the property; and
- to appropriate such rents and profits in lieu of interest, or payment of the mortgage money, or partly in payment of the mortgage money.

(4) English Mortgage [Section 58(e)]

Clause (e) of Section 58 reads: *'English mortgage. —Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.'*

Basic elements of an English mortgage are:

- There is a consensus to pay the amount on the due date. The mortgagor has to repay the mortgage money on the due date.
- There is an absolute transfer of property to the mortgagee.
- Such absolute transfer needs to be subject to a proviso that the mortgagee will transfer the property to the mortgagor upon payment of mortgage money on the agreed date.

(5) Mortgage by deposit of title deeds (Equitable Mortgage) [Section 58(f)]

Clause (f) of Section 58 reads: *'Mortgage by deposit of title-deeds.—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.'*

In English Law, this type of mortgage is called an 'equitable mortgage' as opposed to a 'legal mortgage' because there is just a deposit of a document of the title without writing or without any other additional formalities. The intention of the legislature in providing such a mortgage is to give facilities to the mercantile community in situations where it may be necessary to raise money all of a sudden before any opportunity of preparing a mortgage deed can be afforded. Thus, this type of mortgage does not require any writing, and being an oral transaction is not affected by the Law of Registration.

The basic elements of this type of mortgage are:

- There must be a debt.
- There must be a deposit/delivery of the title deeds.
- There is an intention that the deeds shall be security for the debt; and
- Territorial restrictions

It is important to note that such a mortgage can be made only in certain areas and not everywhere in India. The said restriction to certain areas means the place where the deeds are to be delivered and not the situation of the property mortgaged. Also, a deposit of deeds beyond that area will neither create a mortgage nor an exchange.

(6) Anomalous Mortgage [Section 58(g)]

Clause (g) of Section 58 reads: *'Anomalous mortgage. —A mortgage that is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage, or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage.'*

In order to protect various customary mortgages prevailing in different parts of the country, clause (g) was enacted by the legislation. An anomalous mortgage is said to be a combination of two or more mortgages.

This section shall be read with Section 98 of the TPA which reads: *Rights and liabilities of parties to anomalous mortgages. —In the case of an anomalous mortgage the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage.*

Such agreement which is made between the mortgagor and the mortgagee according to their terms and conditions is called an anomalous mortgage. Where it is not a simple, usufructuary, mortgage by conditional sale, etc. is termed as an anomalous mortgage.

Conclusion:

Hence, a mortgage is defined as an express transfer of an interest in immovable property as collateral for a loan. The most important feature of a mortgage is that it is a transfer of a legal interest in the property with a provision for redemption, which means that the transfer will become void, or the interest will be re-conveyed upon repayment of the debt.

C. MAJOR CHANGES IN THE HINDU SUCCESSION ACT, 1956.

~ Kiran Thakur, Manager- Legal

The Hindu Succession Act, 1956 ("Act") was amended in 2005 to add or remove different clauses within the earlier Act, some changes in the Act are as follows:

- **Section 4(2) amendment-**

This is revoked in 2005 by adding the right to claim inheritance over agricultural lands. The Act was amended to ensure greater equality between men and women, so that women could exercise their rights on the lands they have been toiling.

- **Revamping of Section 6-**

Section 6 of the Hindu Succession Act stated that women could enjoy property rights only if it was gifted by the woman's relatives or strangers. However, in both the cases, the absolute ownership or the rights were retained by the relatives or the strangers. The revamping of Section 6 and adding new clauses helped in making women enjoy equal rights as her brothers or other male members in the family.

- **Omitting Section 3-**

Section 3 of the Hindu Succession Act did not grant women the right to seek for partition within a house unless the male members wanted so. This reduced the autonomy and rights of the women and hindered her privacy. As a result, the amendment omitted Section 3 of this Act.

Who is a Legal Heir and what is Inheritance?

The term inheritance is exclusively used in the context of succession. Upon the death of an individual, his/her property, title, debts and obligations may devolve upon the heir. Although different societies treat inheritance differently, tangible and immovable property are often treated as inheritance.

Can daughters claim father's property after marriage?

Prior to 2005, sons enjoyed rights over the deceased father's property, whereas daughters could do so only till she was unmarried. It was understood that after marriage, a woman attaches herself to the husband's family and therefore, has rights in another Hindu Undivided Family (HUF) altogether. Now, married and unmarried daughters have the same rights on their father's property as their brothers. They are also entitled to equal duties and liabilities as their brothers. In 2005, it was also ruled that a daughter has the same rights, if both, father and daughter, were alive on September 9, 2005. In 2018, the SC stated that a daughter can inherit her deceased father's property no matter whether the father was alive on this date or not. Hereon, women were also accepted as coparceners. They can demand a share in the father's property.

In 2022, the Supreme Court ruled that daughters have the right to inherit their parents' self-acquired property and any other property of which they are absolute owners, adding that this rule would apply even in cases where the parents of a daughter died intestate before the codification of the Hindu Succession Act, 1956.

Share of married daughters in father's property-

What is the share which married daughters can claim in their father's property?

According to the Supreme Court judgment, in her father's ancestral property, a daughter gets an equal right along with her brothers. However, this does not mean the property will be equally divided between a brother and the sister after the demise of the father. Since inheritance laws also confer property rights on other legal heirs of the deceased, the division of the property will be based on the share of each heir according to the applicable inheritance laws. A married daughter having an equal share in her father's property simply means that whatever share her brother claims, she will get the same share, too.

Can daughter claim father's property after marriage?

Yes, as per law, a married daughter has every right to claim a share in her father's property. She has as much right as her brother or unmarried sister.

Supreme Court Judgment expands daughter's legal rights to father's property in the following case-

The Supreme Court Judgment dated 20.01.2022, in the matter of Arunachala Gounder has whipped up a lot of interest and intrigue - more so among the general population than the legal community. One can understand why. The Judgment delivered by a Bench of Hon'ble Justice Abdul Nazeer and Hon'ble Justice Krishna Murari delves into the realms of a daughter's rights on her father's self-acquired property or his share in partitioned coparcenary/family property. The issue concerns the public at large and hence the curiosity.

What the Supreme Court has said:

The Honorable Court, in unambiguous terms declared that a self-acquired property or the share received in partition of a coparcenary property by a Hindu male having died intestate (without leaving behind a legally valid Will) will devolve (i.e. be transferred) by 'inheritance' and not by 'survivorship' - meaning that the daughter of a Hindu male shall be entitled to such property in preference to any other collaterals.

In the present case - The Hindu male died intestate. He was living in a joint family. However, the property in question was his 'self-acquired' property and therefore, his sole surviving daughter had all the rights to inherit his property and not his brother's son (through survivorship).

Conclusion:

The recent Supreme Court pronouncement clarifies the inheritance laws as applicable to a Hindu female as follows:

- (a) The Hindu daughter inherits the self-acquired property of her father
- (b) The rule of 'inheritance' prevails and not the rule of 'survivorship'
- (c) The Hindu female has an 'absolute' right in such property (in terms of the Hindu Succession Act, 1956) and not a limited 'lifetime' interest.
- (d) Such property can revert to the 'source' only when the Hindu female dies without leaving behind a child.
- (e) In absence of a Will/Testament, such property devolves upon her legal heirs as per the terms of Section 15 and 16 of The Hindu Succession Act, 1956.

D. LOK- ADALAT: THE MOST EFFICACIOUS TOOL IN LEGAL SYSTEM

~ Jayesh Gupta, Manager- Legal

Lok Adalat, People's Court - Lok, means people, and Adalat means court. Therefore, it means the court of the people, for the people, and by the people themselves. The Indian Judiciary is looking at a time when it will not be possible for courts to deal with stalls. If something is not done, the result will be the production of a line of justice that none of us would like to see. The Lok Adalat Center has evolved as one of the most important means of resolving disputes.

The first incident of the Lok Adalat program was in 1982, in the village of Una, in the state of Junagarh, Gujarat. Although this was in the growth phase, a modern version of the existing Lok Adalat system began in Chennai, in 1986 equally equitable justice at a minimal cost. At the heart of this justice system is designed to help the common man voice his or her concerns to other citizens or organs of state and achieve a peaceful settlement.

Lok Adalat is a combination of all two types of traditional ADR viz Mediation and Reconciliation. Therefore, the researcher created this article to contribute to the concept and explanation of the difficulties of use and to propose appropriate solutions for the successful implementation of the Lok Adalat program.

INTRODUCTION:

Lok-Adalat is another India-based dispute resolution system. India has a long history of resolving disputes through the mediation of district elders. The Lok-Adalat program is based on the principles of the Panch Parmeshwar of Gram Panchayats. Lok-Adalat's view was strongly promoted by Justice P.N. Bhagwati, former Chief Justice of India. Lok-Adalat is a rival system, in which the Jurisdictional Courts (called Lok-Adalat) are headed by a Regional Authority, a High Court Legal Services Committee/a Supreme Court Legal Services Committee/a Legal Services Legal Committee.

The term 'Lok Adalat' refers to the concise process of dismissal of cases in various courts with a process of mediation and mediation between the parties involved during an institution called Lok Adalat.

SO THE EXPRESSION “LOK ADALAT” CAN BE APPLIED TO THE FOLLOWING TWO SENSES:

1. Procedure pending cases in various courts are resolved with the consent of the parties in a concise manner.
2. The institution that takes the initiative to settle.

Lok Adalat is overseen by a resident or retired officer and two other members, usually a lawyer and a social worker and no Court Fee is levied, once a case has been filed in the ordinary court the amount paid will be refunded once the dispute is resolved in Lok Adalat. The rules of procedure, as well as the Law of Evidence, are not strictly followed when assessing the validity of a claim by Lok Adalat.

The main condition of Lok Adalat is that both parties to a dispute must agree on a solution. The decision of Lok Adalat binds the parties to a dispute and its order may be made by law. There is no complaint against the order of Lok Adalat.

LEGAL SERVICES AUTHORITIES ACT, 1987

Lok Adalat is a court where disputes/cases are still pending in a court of law or in a court of law that is settled peacefully. Lok Adalat has been granted legal status under the Legal Services Authorities Act, 1987. Under the said Act, the award made by Lok Adalat is deemed to be a decision of a Civil Court and is final and binding on all parties.

HOW TO REFER A CASE TO LOK ADALAT FOR RESOLUTION:

A. Pending case:

1. If the parties agree to settle the dispute in Lok Adalat or
2. One of the parties is applying to the court either
3. The court is satisfied that the matter should be resolved in Lok Adalat

B. Any dispute in the pre-trial stage

The State Legal Services Authority or the District Legal Services Authority as such may, upon receipt of a request from any party to any pre-trial proceedings, refer the matter to Lok Adalat for a peaceful settlement Permanent Lok-Adalat⁶ is in advance. a Lok-Adalat version with additional features for remaining power. As such, Permanent Lok-Adalat is a legal entity and its decision is binding and may determine the issue even if, the parties fail to reach an agreement and agreement.

Therefore, the permanent Lok-Adalat has the residual authority, in addition to the Lok-Adalat enjoyment, to determine a dispute over S.22C (8) even if the dispute between the parties fails after conciliation. An amendment was introduced in Section 22 of the Act, 2002, which provides for the establishment of the Permanent Lok Adalat to provide for a compulsory trial to recover and resolve cases relating to public services, such as post, telephone. etc.

THE PERMANENT LOK-ADALAT AWARD IS OPEN TO CHALLENGE AND IS SUBJECT TO LEGAL REVIEW FOR THE FOLLOWING REASONS:

1. The case for non-compliance with nature.
2. The Eternal Lok-Adalat cannot pay attention to all the cases, if it is still pending before any court. Such pending cases can only be referred to Lok Adalat and not to Permanent Lok Adalat - An order approved by Permanent Lok Adalat will be binding.

THE ADVANTAGES OF LOK ADALAT:

Lok Adalat Court Claim is not required to be paid and once the Court Fee has been paid the amount will be refunded if the dispute is resolved in Lok Adalat by the rules. There is process flexibility and rapid testing of disputes. There is no strict application of procedural rules such as the Civil Procedure Code and the Evidence Act when investigating a claim against LOK ADALAT.

The parties to the dispute have the opportunity to participate and can negotiate directly with their Chief Executive Officer which is not possible in the ordinary courts of law.

The Lok Adalat award is final and binding on the parties and has the status of a decision of the Civil Court and is irrevocable and does not cause a delay in resolving disputes in the end. The Lok Adalat program is a blessing to ordinary people as they can resolve their disputes quickly and free of charge without cost.

Although Lok-Adalat has no jurisdictional or judicial functions, its functions are only related to reconciliation and the attempt to reach an agreement and settle the dispute.

IMPORTANT REVIEW OF LOK ADALAT

Currently, Lok Adalat is considered one of the Best Dispute Resolution Programs. Like all other programs, Lok Adalat also has many positive features and suffers from a few illnesses as well. As the saying goes, "Delayed justice is a rejected justice but urgent justice is a buried justice".

The Supreme Court noted, "In the name of the speedy resolution of disputes, the just interests of the parties cannot be ignored, which is especially important when the complainants involved are children, insane and disabled."

In expressing its regretful comments on the current Lok-Adalat program, the Kerala High Court ruled in favor of the latter - mainly in agreeing or resolving problems between the parties. If the parties do not reach an agreement or settle, the case is referred back to the court of law, or the parties are advised to seek redress in a court of law. This creates unnecessary delays in the administration of justice.

If Lok Adalat empowers the parties to adjudicate fairly if the parties fail to reach an agreement or settlement, this problem can be resolved to a large extent ". However, this feature has been removed from the eternal Lok-Adalat. It was also noted that since the Lok-Adalat court was led by a person from the judiciary, they took the role of Lok-Adalat as a court of justice and deviated from the basic objectives for which it was built. The Supreme Court has also complained about the matter.

E. SARFAESI EXPLAINED

~ Vivek Ugale, Senior Officer- Legal

What is SARFAESI Act?

The SARFAESI (Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest) Act, was passed on December 17, 2002, in order to lay down processes to help Indian lenders recover their dues quickly. The SARFAESI Act empowers banks and other financial institutions to directly auction residential or commercial properties that have been pledged with them to recover loans from borrowers. Before this Act took effect, financial institutions had to take recourse to civil suits in the courts to recover their dues, which is a lengthy and time-consuming process.

As per the SARFAESI Act, if a borrower defaults on a loan financed by a bank against collateral, then the bank gets sweeping powers to recover its dues from the borrower. After giving a notice period of 60 days, the lender can take possession of the pledged assets of the borrower, take over the management of such assets, appoint any person to manage them or ask debtors of the borrower to pay their dues too, with respect to the asset. This recovery procedure saves banks and financial institutions a lot of time which otherwise would be long drawn out due to the intervention of courts.

Which Assets are covered under the SARFAESI Act?

Any asset, i.e., movable or immovable, given as security by way of hypothecation, mortgage, or creation of a security interest in any other form except those excluded under Section 31 of the Act are covered under the SARFAESI Act.

Is SARFAESI Act applicable to NBFCs (Non-Banking Financial Companies)?

As per the union budget 21-22, it is notified that the NBFCs with asset size of Rs.100 crores or more are eligible NBFCs that are covered under the SARFAESI Act to enforce security interest on debts amounting to at least Rs.20 lacs which was previously Rs.50 lacs.

When can SARFAESI be initiated?

Under the SARFAESI Act, a lender can take possession of the property or mortgaged assets after a 60-day notice. The Act is applicable to home loans, loan against property and loan against collateral for micro small medium enterprises (MSMEs).