



*APAC NEWSLETTER*

**Legal, Compliance and ESG**

---

8<sup>th</sup> December 2022

*Dear Readers, we bring to your reading and attention following topics:*

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## **A. Importance of stamping of Legal Documents**

*Vivek Ugale, Senior Officer, Legal*

### ***A) Importance of Stamping of Legal Documents:***

All the legal documents chargeable with stamp duty and executed by the person in India shall be stamped before or at the time of execution such documents. The stamp duty payable would be as per the stamp laws of the State in which the instrument/document is executed. The stamp duty varies from State to State.

In case of a document which is required to be stamped under the applicable Stamp Act but has been under-stamped or not stamped, the document becomes inadmissible as evidence before the Court of Law. Under-stamped document can be impounded and the penalty over and above the actual stamp duty can be levied by the stamp authorities. Further for the under-stamped document to be admitted as an evidence in the Court of Law, the document will have to be stamped with full stamp duty along with the penalty over and above the actual stamp duty (e.g. in the State of Maharashtra the penalty is @2% of the deficient portion of the stamp duty for each month or part thereof, from the date of execution of such instrument).

Further as per the stamp acts applicable to various states, any person who with the intention to evade the stamp duty executes or signs any instrument chargeable with duty without the same being duly stamped shall, on conviction, for every such offence be punished with rigorous imprisonment for a term which shall not be less than one month but which may extend six months and with a fine which may extend to rupees five thousand.

As per the new section 30A inserted in the Maharashtra Stamp Act in 2013, the liability to pay proper stamp duty on any instrument executed in favour of financial institutions such as bank, non-banking finance company or alike, is imposed on such financial institution.

## B. FAQs on Power of Attorney

- Vivek Ugale, Senior Officer, Legal

### FAQs on Power of Attorney

**1. What are the different types of Power of Attorney in India?**

**General Power of Attorney:** Used when the power of Attorney is granted by a person to his agent to act on behalf of him, generally. It can include authorization to operate bank accounts, register property on behalf of the principal etc.

**Special or Specific Power of Attorney:** This type is executed when the principal wishes to grant powers to the Attorney to act on his behalf only for specific tasks/areas.

**2. Is there any restriction on who one should choose as their Attorney?**

There are no limitations under the law that will restrict you from appointing a specific person as your Attorney.

**3. If a person grants Power of Attorney to an agent, whether his/her own rights to manage affairs cease?**

No. he/she has absolute right to manage their own rights even after they appoint a legal Attorney. This arrangement does not transfer powers unilaterally to the agent. They're only sharing it.

**4. What happens if the grantor of POA dies while this deed is active?**

All powers granted to the Attorney is naturally revoked by law. The Attorney will not be able to act on behalf of the grantor. If there is a Will in place, it will come into force.

**5. How to Make A General Power of Attorney By NRI?**

If a person is staying outside India and have properties or financial transactions within India, they can give the power to transact and deal with the properties or banking or tax payment etc. to any trustworthy and reliable person in India. Such person can be their close relatives or friends. One should follow the following steps:

- a. Get the Power of Attorney drafted.
- b. The person making the deed, the Grantor, should sign all pages of the deed.
- c. Get the deed notarized and apostilled in the country of residence.
- d. This attested deed should be sent to a known person in India.
- e. Finally, the person to whom the deed is sent should get it registered from the local Sub-Registrar office or Sub-Divisional Magistrate office in India, by paying the appropriate registration and stamping charges applicable in that state.

**6. What should be included in the Power of Attorney deed?**

While making the General Power of Attorney from outside India, make sure that your deed includes these details:

- a. Grantor's Details- The name, age, foreign address, Indian address and occupation of the person making the deed should be mentioned first.
- b. Attorney's Details- The name, age, address, father's name and occupation of the person in whose favour the deed has been made should be mentioned.

- c. Reason for the POA- You have to state why you are making this deed and for what purpose. For e.g. To buy or sell or rent out your properties in India, since you are staying abroad etc.
- d. Date of Commencement -You should clearly mention when the POA comes into force.
- e. Signature- The Grantor has to sign in all the pages and also in the last page.

**7. Points to know while making the Power of Attorney**

- a. The person making the deed should be mentally capable of making the deed. A mentally unsound person cannot make a Power of Attorney deed.
- b. Registration of the deed is mandatory at the Sub-Registrar office if the power of attorney is given to deal with any immovable property.
- c. Revocation: A Power of attorney can be revoked at anytime at the will of the grantor.

**8. When a person gives the power to my Attorney to buy property does it mean he can buy it in his name?**

No, the Attorney can buy the property only in your name if you have mentioned that he can purchase any property on your behalf, in the deed of General Power of Attorney. If he is buying his personal property from his money he can do so, but buying on your behalf means he has to buy it in your name only.



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### **C. Caselaw on Section 14 of SARFAESI Act, 2002.**

- **Vivek Ugale, Senior Officer, Legal**

#### **Case Details:**

#### **Issue:**

Whether Chief Metropolitan Magistrate/District Magistrate (Hereinafter referred to as “CMM” & “DM”) is required to give notice to borrower before taking possession of secured assets under SARFESI Act

**Decision:** Held no by Allahabad High Court in Shipra Hotels Limited (Petitioner) Vs. State of U.P and 3 Others (Respondent(s)) Writ C No: 27814 of 2022 (25<sup>th</sup> Nov 2022)

#### **Facts:**

The Court was dealing with a clutch of petitions pertaining to the validity of the order passed under Section 14 of the SARFAESI Act, 2002 by the authorized officer namely the Additional District Magistrate (Finance & Revenue), Ghaziabad, Meerut Commissionerate, and the Additional District Magistrate (Finance & Revenue), Varanasi. The challenge to the orders passed under section 14 of the SARFAESI Act was made on the ground that no notice or opportunity has been granted to the petitioners herein who are the borrowers and thus, the orders impugned suffer from violation of principles of natural justice.

#### **Finding:**

The High Court held the following:

- a) The CMM/DM acting under Section 14 of the SARFAESI Act, 2002 is not required to give notice to the borrower at the stage of the decision or passing order as no hearing can be demanded by the borrower at this stage. However, the Hight Court clarified that order passed by such Magistrate has to be duly served upon the borrower before taking any steps for his forcible dispossession by such steps or use of force, as may be necessary in the opinion of the Magistrate, and the date fixed for such forcible action shall be duly intimated to such borrower in advance giving him sufficient time to remove his belongings, or to make alternative arrangement.
- b) The High Court further observed that at the stage of assisting a secured creditor in taking possession of the secured assets, there is no question of dealing with rival claims and giving a reasoned judgment as regards the merits of the case the statutory obligation enjoined upon CMM/DM is to immediately move into action after receipt of written application under section 14(1) of the SARFAESI Act from the secured creditor.

c) The court further clarified that at the time of passing order under section 14 of the SARFAESI Act, 2002 CMM/DM will have to consider 2 aspects.

i) The CMM/DM must find out whether the secured asset falls within his territorial jurisdiction and;

ii) Whether notice under section 13(2) of SARFAESI Act is given or not.

In view of the above, all the connected writ petitions are Dismissed being devoid of merits.

### **Important Sections:**

**Section 13(2) of SARFAESI Act, 2002:** Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section 13(4).

**Section 13(4) of SARFAESI Act, 2002:** In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely: (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset; (b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset.

**Section 14 of the SARFAESI Act, 2002:** Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset: (1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or as the case may be, the District Magistrate shall, on such request being made to him: (a) take possession of such asset and documents relating thereto; and (b) forward such asset and documents to the secured creditor.

## D. Important Case law

- *Jayesh Gupta, Legal Manager*

### **Case Details:**

**Issue:** Whether the borrower can initiate Civil Proceedings against Financial Institutions / Banks

**Decision:** Held Yes by the Hon'ble Supreme Court in Bank of Rajasthan Ltd. Vs. VCK Shares & Stock Broking Services Ltd. Civil Appeal No. 8972-8973/2014.

### **Facts:**

The Supreme Court while passing the judgment in the case of Bank of Rajasthan Ltd. Vs. VCK Shares & Stock Broking Services Ltd. (Civil Appeal No. 8972-8973/2014) was posed with the question pertaining to the legal right of the borrower to initiate proceedings before a Civil Court against the bank or a financial institution, which seeks to recover the loan amount against the borrower.

### **Finding:**

In the present case, the Court dismissed the appeal filed by the Appellant and thereby upheld the decision passed in cases of Indian Bank v. ABS Marine Products (P) Ltd. (2004 5 SCC 72) and Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corporation (2009 8 SCC 646) wherein Courts had taken a view that the jurisdiction of the Civil Courts was not barred in regard to any suit filed by the borrower against a bank for any relief. The jurisdiction was barred only in regard to applications/suits filed by a bank or a financial institution for recovery of its debts. It was thus held that the borrower had the option to file a separate suit before the Civil Court and the counterclaim before the DRT was not the only remedy.

The Court further expressed that the law laid down in the judgments namely, United Bank of India v. Abhijit Tea Co. Put. Ltd., (2000 7 SCC 357) and State Bank of India v. Ranjan Chemicals Ltd. (2007 1 SCC 97) do not lay down the correct legal proposition and accordingly held that the law laid down in Section 17 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act) bars the jurisdiction of the Civil Court only in respect of applications filed by the bank or financial institution. Thus, the said provision does not bar the jurisdiction of the Civil Court to try a suit filed by the borrower. It was also observed that there was an absence of a provision in the RDB Act for transfer of suits and proceedings except as provided Section 31 of the RDB Act, which relates to pending suit proceedings by a bank or financial institution for recovery of debt. Accordingly, it was held that there is no provision in the RDB Act by which the remedy of a 'civil suit' by a defendant against the financial institution/ bank is ousted, but it is the matter of choice of that defendant.