CASE MANAGEMENT AND ADR FOR BANKING SECTOR

1. INTRODUCTION

The Phenomenon of Case Management and ADR is sweeping the globe. It is said "Time and tide waits for none." Therefore, there can be no better time and opportunity than the present to deliberate about Case Management and ADR. Quite rightly, the Law Commission has seized the opportunity and has presented the draft Rules on Case Management and ADR besides arranging the present International Conference.

Being a member of the legal fraternity and concerned about the alarming phenomenon of non-performing assets in banking industry which makes heavy inroads into the economic and moral well being of the Society, the author of this article humbly submits with anxiety the following aspects for consideration before this august forum.

2. RELAVANCE OF CASE MANAGEMENT AND ADR

2.1 BACKLOG OF CASES

Cases pending before Civil/Usual Forums

There are three crore civil cases pending in various courts in the Country. There are 2.5 Crore cases in lower Courts, 50 lakh cases in High Courts and 17,000 cases in the Supreme Court.[1] At least 80 cases were pending a decision or hearing for the past 20 years in the Supreme Court. In addition, over five lakh cases, involving criminal and civil laws, were pending in different High Courts for over 10 years. Moreover, over eight lakh cases were awaiting disposal by the Country's Subordinate Courts in 32 States and Union Territories.[2]

2.2 POSITION OF INDIAN JUDICIARY

The popular belief is that law courts are the main reason for the huge backlog of cases. But, scientific study done by Law Commission of India as explained by His Lordship Justice S P Baruacha, Chief Justice of India (as he then was) reveals the contrary, which is as follows:

> The expenditure on judiciary in terms of GNP is only 0.2 per cent and, of this, half is recovered by the State Governments through court fees and fines. The expenditure in other countries is 4 per cent on the average...As a result of the neglect of the judiciary by the Governments, the judge-population ratio is one of the lowest in the world.

[1] Sunday Times of India, Mumbai, July 7,2002 'Special Report', page 14
[2] Times of India, Mumbai, 26, March 2001

The Law Commission, in its 127th report made in 1988, had recommended that the ratio should be immediately raised from the then 10.5 judges per million people to at least 50 judges per million within five years. It has further recommended that by 2000, the country should command at least 107 judges per million. But the present ratio is 12 or 13 judges per million.

This ratio evokes disbelief among judges of other countries. The ratio 12 years ago was about 41 in Australia, 75 in Canada, 51 in England and 107 in the US.

The reason why we do not have more judges across the board is that the state governments are simply not willing to provide the finances required. In one of the cases pending in the Supreme Court, the Petitioner has sought an increase in the strength of the judges all over the country. Each and every State in the country has stated in reply that it has no more money for the judiciary.[3]

Recently, the High Court of Madras has treated the letter sent by its Registry to the Tamilnadu Government for filling up vacant position of judges in the Subordinate Judiciary and the reply in the negative received from the State Government quoting lack of budgetary allocation as a writ petition.

2.3 FRESH WORKLOAD

Every day around 1.5 lakh cases are filed in different Courts of the Country (i.e., roughly 5.48 crores per year). The existing number of judges across the country disposed of around 1.6 Crore cases an year.[4]

Thus, with less number of courts and increasing caseload, it is a mathematical certainty that Justice in time will be difficult to achieve. Therefore, the wiser option would be to deliberate about effective alternatives available within the limited resources. And certainly, Case Management and ADR is the only solution to this predicament and accordingly, it assumes solid relevance.

3. IMPORTANCE OF CASE MANAGEMENT & ADR FOR BANKING

[3] Excerpts from the Speech Of His Lordship Justice S P Bharucha, Chief Justice of India (as he then was) as reported in "Business Standard" 28th November 2001.
[4] Times of India, Mumbai, 1 March 2002.

3.1 Sound Economy presupposes sound Financial Sector, of which banking is a very vital component. The major threat, which is presently questioning the very edifice of Banking, is the threat of non-performing assets. If this trend is allowed to continue unchecked (fortunately not so due to the recent active intervention of Indian Government and Regulators), the Banking sector will be affected immediately, which through a cascading effect, will ultimately lead to further reduction in budgetary support for the Judiciary. This, in turn, will push the caseload backlog from a bad to worse situation.

3.2 POSITION OF NON-PERFORMING ASSETS

The gross non-performing assets (NPAs) of Scheduled Commercial Banks (SCBs) stood at Rs.70,904 crore as on March 31, 2002 as compared with Rs.63,741 crore at the end of the previous year. The gross NPAs for end-March 2002 includes an amount of Rs. 4,512 crore on account of merger. During the same period, net NPAs increased by 9.5 per cent to Rs.35,546 crore from Rs.32,461 crore at end-March 2001.[5]

3.3 SUIT FILING – THE LAST ALTERNATIVE

Regarding recovery through legal process, Department of Banking Supervision, RBI in one of its report has stated as follows:

"The data from 33 banks (27 public sector and 6 private sector) and the study of the files relating to measures taken for recovery by way of suit filed by 15 banks have revealed that banks do file suits after exhausting other means of recovery. During 1996 the amounts involved in suit filed cases accounted for 26.21% of these banks' NPAs. In 1997 and 1998 this was further increased to 33.91% and 46.38% respectively. **The recoveries made out of suit filing by these 33 banks during the last three years were 7.33%, 4.74% and 4.32% respectively of the suit filed amounts evidencing decreasing trend of recovery through this route. In view of such meager recovery, the banks before filing suit weigh the likely recovery prospects out of the suit and the opportunity cost of any amounts that could be recovered immediately. Suit filing, as such, is resorted to as the last alternative.**"

Thus, it has to be noted that the present pendency of Bank cases before Courts/DRTs is the result of final alternative chosen by banks left with no other option.

3.4 BACKLOG BEFORE DEBT RECOVERY TRIBUNALS

a) Cases pending before the Debt Recovery Tribunals

Parliament has established specialized tribunals called 'Debt Recovery Tribunals' (shortly called DRTs) under the "Recovery Debts due to Banks and Financial

[5] RBI's Report on Trend and Progress of Banking in India 2001-2002, Table II.16

Institutions Act, 1993" for expeditious disposal of recovery cases of Banks/Financial Institutions. At present, there are 29 DRTs and 5 Debt Recovery Appellate Tribunals (Shortly called DRATs) functioning all over the country. The pecuniary jurisdiction of these Tribunals in each case is Rs.10 lakhs and above.

The number of recovery cases filed before these Tribunals for the period between 1994 to 21.10.2002 is 56,988; amount involved is Rs.1,08,665 crores; number of cases disposed of 23,393; amount involved Rs.18,556 crores and amount recovered is Rs.4,737 crores.[6]

As per Deshpande Committee Report, the Presiding Officer of DRT should have not more than 30 cases on board on any given date and there should not be more than 800 cases pending before it at any given point of time.[7] However, at present, each DRT has at least a few thousand cases at any given point of time. The highest number of cases so far have been filed at Chennai DRT-I with 5,076 followed by Bangalore with 5,049, Ahemedabad 4,047 and Hyderabad 3,933 cases.[8] Further, under Sections 17 and 18 of Securitisation & Reconstruction of Financial Assets & Enforcement Act, 2002, (shortly called SARFAESI Act, 2002) DRTs and DRATs have been made as appellate forums. This aspect will also increase the caseload of DRTs and DRATs besides DRT being the eventual forum for enforcing personal covenants of borrowers/guarantors by Banks and Financial Institutions even in cases where the provisions of SARFAESI Act, 2002 have been enforced. Other problems such as inadequate infrastructure, lack of manpower etc also afflict DRTs as is the case with other regular Courts.

Thus, though DRTs and DRATs have certainly speeded up the process of recovery, yet they have fallen short of expected level particularly in the Banking/Financial Sector where time is money.

As discussed supra, banks do file suits/applications for recovery of their money as a last resort. In Financial Sector time is money. Therefore, the longer the time taken for disposal of cases, the more will be the harm to Banks immediately and the Society mediately. After protracted litigation, even if the banks succeed in the cases filed by them, they may face two dangers: 1. The more the time taken for disposal of cases, less will be the chance of recovery due to asset stripping/dissipation by borrowers/guarantors/time etc and 2. Opportunity costs working against the bank due to the inordinate delay. Therefore, it is all the more necessary to have a system of Case Management and ADR customized to the needs of Banks/Financial Institutions, which is both effective and time-bound.

5. MECHANISM OF CASE MANAGEMENT & ADR FOR BANKING

[6] The Indian Express, New Delhi, 21 October, 2002
[7] Report of the 'Working Group to Review the functioning of DRTs' constituted by RBI with Shri N.V. Deshpande, Principal Legal Advisor of RBI as its Chairman, Page 13
[8] The Indian Express, New Delhi, 21 October, 2002

5.1. **EXISTING CASES:** Under the present Law, recovery cases filed by banks/Financial Institutions (FIs) with claim amounts below 10 lakhs are filed before the usual Civil Courts and cases with claim amounts from 10 lakhs and above are filed before the DRTs.

5.1.1 As discussed supra, cases for recovery are filed by banks/FIs only as a last option. Therefore, in most of the cases, being cases of willful default, consent for ADR (either in the form of mediation, conciliation or arbitration is less likely to come from the borrowers. The cases filed by the banks are based on documents and as such, would fall under Track-2 of the Draft Flow of Case Management Rules prepared by the Law Commission of India. Such cases should be tried by the respective Courts or the Fast Track Courts but strictly within the time frame of 9 months as suggested by the Law Commission.

5.2 **FUTURE CASES:** With respect to recovery cases to be filed by Banks/FIs, Statutory Arbitration may be introduced by appropriate provision in the Banking Regulation Act, 1947 and/or Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970/1980 on the lines of Statutory Arbitration available under the bye-laws of Stock Exchanges[9] or through mandatory arbitration stipulated in loan documents on the lines of arbitration clause in Credit Card Business in USA. Recently, the Supreme Court of USA has upheld mandatory arbitration clauses Consumer Loan Contracts, which lends credence to the above proposition.[10]

5.2.1 Banks and FIs have been now empowered to seize and sell even immovable properties without the intervention of Courts under the SARFAESI Act, 2002 (referred supra). Therefore, they should be given liberty to proceed under the said Act for the enforcement of "Security Interest"[11] by appropriate statutory provision besides providing for enforcement of personal covenants under the Statutory/Contractual arbitration found above. Further, appropriate provision should be made providing for suspension of limitation once notice by registered post is sent to the other party calling for the aforesaid arbitration. Rules of arbitration should be framed and notified under any of the Acts mentioned under 5.2. The maximum time limit for arbitration should be strictly six months and if either of the party fails to complete their pleadings/evidence at any stage within the time stipulated, the arbitral tribunal shall proceed ahead without such pleadings/evidence and shall pass award accordingly, which shall be final. Arbitration shall be by a Sole Arbitrator and an appeal shall lie to a panel of three arbitrators, if preferred within 30 days of the receipt of the award.

5.3 Arbitrators

5.3.1. Banks and FIs recruit Advocates with adequate experience (depending upon the cadre to which they are recruited) as "Law Officers". These Law Officers as arbitrators

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[9] Bye-law 282 of the Stock Exchange framed pursuant to the provisions of Clauses (k) and (n) of Section 9 (2) of the Securities Contracts (Regulations) Act, 1956.

[10] Green Tree Financial Corporation, Alabama v. Radolph, U.S.No.99-1235, 12/11/200

[11] Section 2 of SARFAESI Act, 2002

should conduct the arbitration deliberated under 5.2 and this would ensure speed, impartiality and flexibility to the mechanism of arbitration.

5.3.2 Reserve Bank of India, being the Central Bank of the Country, should approve a panel of Law Officers of different banks to officiate as arbitrators, both for the purpose of arbitration and appeal found under 5.2.1 found above. Indian Banks Association should maintain this panel and suitable infrastructure at different centers based on need. Whenever a Bank requests for arbitration, IBA should select a Law Officer from the above panel either drawn by lot or according to serial numbers. The selected Law Officer may either belong to the same bank which requests for arbitration or of different bank. Law Officer belonging to the same Bank officiating as arbitrator will not fall foul of law as the Apex Court in a decision reported in AIR 1966 SC 1036 has held that mere fear of bias could not be the basis for challenging/revoking an arbitration clause. A specific provision has been made to this effect in the Arbitration and Conciliation (Amendment) Bill, 2001.[12]

5.3.3 IMPARTIALITY: The prohibition against full time salaried employment by an advocate found under Rule 49 of All India Bar Council Rules is not applicable to an Advocate appointed as Law Officer of the Central Government or the Government of a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under Section 28(2)(d) read with Section 24 of the Advocates Act, 1961.[13] The explanation regarding the term "Law Officer" under the aforesaid Rule reads as follows: "Law Officer for the purpose of this Rule means a person who is so designated by the terms of his appointment and who by the said terms, is required to act and or plead in Court on behalf of his employer." Already some banks like Corporation Bank, Bank of Maharastra, Punjab National Bank etc have permitted their Law Officers to appear and conduct cases of the respective banks before Civil Courts, Debt Recovery Tribunals, the Consumer Forums etc[14]

5.3.3.1 COURTS' DICTA: Hon'ble Indian Supreme Court in U.P. State Law Officers' Association Case reported in 1994 (2) SCC 204 made an observation regarding Rule 49 as follows:

"The Lawyer of the Govt. or a Public body was not its employee but was a professional practitioner engaged to do the specified work. This is so, even today, though the lawyers on the full time rolls of the government and the public bodies are described as their Law Officers. It is precisely for this reason that in the case of such Law Officers, the saving clause of Rule 49 of the Bar Council of India Rules waives the prohibition imposed by the said Rule against the acceptance by a lawyer of a full-time employment." [15]

[12] Section 10 A of the Bill
[13] Proviso to Rule 49 of All India Bar Council Rules.
[14] V.Adhivarahan, "Role of Law Officers – A New Dimension" IBA Bulletin January 1999, Vol XXI No.1, page 18.
[15] State of U.P v. U.P.State Law Officers' Association reported in 1994 (2) SCC 204

The recent decision of the Hon'ble Supreme Court reported in AIR 2001 SC 509[16] (based on which recently Bar Council of India has passed resolution deleting the proviso to Rule 49) is distinguishable on facts in as much the Law Officer in that case was not an Advocate who later became Law Officer but a person in full time employment who later got enrolled as Advocate on the recommendations of his Institution and therefore, his very enrollment is against Rule 49.

Hon'ble Bombay High Court in a case reported in AIR 1982 Bom 6[17], while analyzing the role of Law Officers in Public Sector Undertakings (in the said case being Municipal Corporation) has held as follows:

"Law Officers are regarded by law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the Court. They must respect the same confidence. They and their clients have the same privileges. The relationship between a Law Officer and the Institution concerned is that of a client and his legal advisor."

Further, in Duncan Agro's case, the Hon'ble Supreme Court has held that the legal opinion of a Law Officer cannot be faulted with unless the opinion is per se malafide.

Considering the aspects discussed under 5.3.3 and 5.3.3.1, it can be discerned that though a Law Officer (ie., an advocate who later become Law Officer) is on the permanent pay rolls of the aforesaid institutions, they remain as Advocate not being subjected to the disciplinary control at least regarding their professional conduct. Thus, their impartiality is preserved legally. New Section 10A sought to be introduced under the Arbitration and Conciliation (Amendment) Bill, 2001 is in tune with this spirit.

5.3.4 EXPEDITIOUS DISPOSAL

The aforesaid suggestion to utilize the services of Law Officers (in-house) has been made with the primary view to increase the pace of arbitration, being compulsorily 6 months for final disposal from the date when the matter has been referred to the Arbitrator. This time-stipulation has to be taken care by stipulating appropriate provision in the rules with categorical time schedule for each stage. The Law Officers working as in-house legal counsels will devote their full time for conducting arbitration thereby paving way for speedy disposal of cases. In Course of time, they will gain much proficiency thereby further increasing the momentum.

5.3.5 FLEXIBILITY

[16] Sathish Kumar Sharma, Appellant v. Bar Council of Himachal Pradesh, Respondent, reported in AIR 2001 SC 509.
[17] Municipal Corporation of Greater Bombay v. Vijay Metal Works reported in AIR 1982 Bom.6

If Law Officers officiate as arbitrators, then banks, either individually or collectively, can have as many officials as they require depending on caseload. Further, the place of arbitration offices can also decided based on concentration of cases. This would ensure higher flexibility without waiting budgetary support from Governments. Similar flexibility can be achieved in the hearing of appeals before the panel of 3 arbitrators.

6. CONCLUSION

Law Commission of India has done yeoman services to the Corpus Juris of India - the present endeavor on Case Management and ADR being one more feather to its cap and deserves appreciation of a higher order. Banking Sector also being a major contributor to the caseload of Courts at all levels, it may not be out of place to contemplate about the above suggestions.

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