

Repossession of Asset / Vehicle through various legal measures

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Discipline

Fair play

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REPOSSESSION

- Repossession of vehicles is a paramount, primary and important tool of recovery for Asset Finance Companies, which lend huge sums of money to its customers on the security of the vehicles.
- There have been plethora of judgments upholding the financiers right to take custody of the vehicles and there were also some disturbing judgments questioning the right of the financiers in taking custody of the vehicles without intervention of the courts.
- But, nevertheless the courts and even the RBI have empowered the financier to resume possession of the hypothecated asset with certain conditions.
- Repossession – Contractual and Legal

RBI CIRCULARS




RBI in their circulars have mandated the following:

- NBFCs must have a built in re-possession clause in the contract/loan agreement with the borrower which must be legally enforceable. The re-possession clause for enforcing their rights, should be legally valid, complies with the provisions of the Indian Contract Act in letter and spirit, and ensure that such repossession clause is clearly brought to the notice of the borrower at the time of execution of the contract. To ensure transparency, the terms and conditions of the contract/loan agreement should also contain provisions regarding:

(a) notice period before taking possession;

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- (b) circumstances under which the notice period can be waived;
 - (c) the procedure for taking possession of the security;
 - (d) a provision regarding final chance to be given to the borrower for repayment of loan before the sale /auction of the property;
 - (e) the procedure for giving repossession to the borrower; and
 - (f) the procedure for sale / auction of the property.

A copy of such terms and conditions must be made available to the borrowers.

Without intervention of court

- We are empowered to repossess the vehicles on our own, if we have the in-built repossession clause in our loan agreements with our customers as stated in the RBI circulars, either on our own or through a repossession agent, after we have complied with the conditions of that clause, like, issuing notice of settlement.
- RBI has recommended a training programme for the agents and it is advisable to choose those agents, to avoid incurring the wrath of both RBI and the courts.
- The repossession should be peaceful and documented.
- RBI has in some circulars advised the NBFC to recommend incentives and recognition to the staff for their disciplined behavior and well manners in times of repossession.

With Intervention of Court



All our agreements may contain an arbitration clause. In such a case, we can resort to following legal means to seize the vehicles/assets.

- We can file an application before arbitrator under Sec.17 of the Arbitration & Conciliation Act, 1996
- We can file under Sec.9 of the Arbitration & Conciliation Act, 1996 before the competent Civil Court having Jurisdiction .
- The asset can be seized through the orders of the court/tribunal by appointing a
 - Receiver
 - Commissioner

SEC.17

The Arbitration and Conciliation Act was amended vide act, 3/2016 which made the amendment applicable from 23.10.2015.

The amendment Act provides for enforcement of the orders passed by the Arbitrators as if they were orders of the court.

As per the amendment if an arbitration is pending before the arbitrator, we have to necessarily go only before the arbitrator for interim reliefs and not before the Civil Court under Sec.9 except in cases where the implementation of the orders passed under Sec.17 is not efficacious.

SEC.17 - BENEFITS



- No court fee is involved
- We need not incur expenses for engaging advocate.
- The process involved in securing section 17 orders is simple.
- The complicated court procedure involved in closure/withdrawal/sale permission under Sec.9 application is not involved in section 17.
- The time for securing orders is quick and expeditious.
- All the advantages of an order passed by the Civil court under sec. 9 can be availed even in Sec. 17 orders

SEC.9

We can approach the competent Civil Court having jurisdiction under Sec. 9 of the Arbitration and conciliation Act, 1996 seeking the interim reliefs to secure the amounts claimed in Arbitration.

The advantage of the sec. 9 order is that it is readily accepted by the authorities every where in the country

However, the biggest difficulty in filing section 9 applications now are:


- Difficulty after the arbitration is initiated
- Difficulty in jurisdiction issue, which as per the latest judgment of the SC is where the seat of arbitration is situated, which will make it mandatory to file all applications in only one court, which is not a good option.

When we go for Sec.9 before initiating arbitration proceedings, in such cases, we need to ensure that the arbitration is initiated within 90 days from the date of Sec.9, else court can dismiss our application.

PRECAUTIONS

- Ensure that we have sufficient correspondence with the customer and a demand notice as required is sent
- Avoid seizing the vehicles when the arrears are less than three instalments;
- As far as possible, repossess the vehicles on our own, if the customer is not a problematic/ cantankerous person;
- If the customer is problematic or cantankerous and the vehicle is available, Legal action may be preferred seeking for appointment of the Receiver/advocate commissioner to seize the vehicles;
- Services of Repossession agents can be utilised only when the vehicle is not available and the customer is a problematic/cantankerous person. Even in such cases, the

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repossession agents should be clearly advised that if he anticipates any problem during repossession, he should withdraw his attempt to repossess. Any untoward incident caused by the agent shall attract penal provisions against all of us including our top management

- Repossession Kit should contain a clause that the agent shall employ only the lawful means to seize the vehicle.
- Utmost care shall be taken in appointment of repossession agents
- Whenever repossession agents are appointed, even in such stray cases, we should get the full profile of the repossession agent/s duly completed,
- Considering the present trend, politeness shall be observed at any cost while interacting with customers for collection of arrears even provocation is caused by the defaulting customers ;

CHALLENGES IN REPOSSESSION AND SALE



- The biggest challenge – conflicting decisions of various courts;
- Cumbersome procedure involved in complying with the RBI guidelines;
- Attitude of the customers – intervention of police authorities without any cause;
- Complicated procedures for getting FRC;
- Multiple funding on the same assets – forgery by the customers;
- Faulty or no endorsements of hypothecation;
- Suits filed by the customers



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