Submissions to the Parliamentary Joint Committee

on the

Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill 2016

The Centre for Law & Policy Research ("CLPR") is a non-partisan, not-for profit law and policy research institution based in Bangalore. We have in the past, made submissions on the draft Insolvency and Bankruptcy Code to the Joint Committee of Parliament. We have also worked extensively on the implementation framework of the Insolvency and Bankruptcy Bill 2015. (*See generally,* Aparna Ravi, "*Implementing the New Insolvency Law"* Business Standard, March 26, 2016)

The Enforcement of Security Interest and Recovery of Debt Laws and Miscellaneous Provisions (Amendment) Bill, 2016 ("2016 Amendment Bill") is an attempt to create an umbrella framework for banking and insolvency related matters, and for expediting the process of debt recovery. As per the Statement of Objects and Reasons, the government wants to bring in these amendments in keeping with its goal of easing the regulatory regime for doing business and responding to the changing credit landscape. This will be done, keeping in mind the importance of facilitating an investment climate for ensuring higher economic development and growth. In doing so, it seeks to amend four laws: (i) Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), (ii) Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDB Act), (iii) Indian Stamp Act, 1899 and (iv) Depositories Act, 1996.

This submission and response by the CLPR is on Part III of 2016 Amendments which relate to the Recovery of Debts Due to Financial Institutions Act, 1993 (RDB Act). As per the Statement of Objects and Reasons, these amendments are being proposed to facilitate the speedy disposal of cases by the Debt Recovery Tribunals. However, the

amendments suggested, give the Tribunals draconian powers in the name of speedy disposal. They deny basic principles of natural justice, are one-sided in favouring banks and financial institutions and violate basic principles of a fair trial.

This response is structured in four parts. Part A deals with the jurisdiction of the Debt Recovery Tribunal. Part B deals with the disclosure requirements of particulars of assets other than those specified by the applicant. Part C pertains to the issue of mandatory ex-parte orders restraining the defendant from dealing with or disposing of properties under section 19(4) and the deletion of section 19(14). Finally Part D relates to the amendments proposed to section 19(5) dealing with the imposition of time limits on the defendant to present a written statement of his defence.

A. Section 19 (a) ~ Basis of Jurisdiction of the DRT:

The 2016 Amendment Bill amends Section 19 of the RDB Act in the following manner:-

> **29. In the principal Act, in Section 19,—**
> **(i) in sub-section (1), clause (a) shall be re-numbered as clause (aa) and before clause (aa) so renumbered, the following clause shall be inserted, namely:—**
> **"(a) the branch or any other office of the bank or financial institution is functioning and maintains an account in which debt claimed is outstanding, for the time being; or";**

This amendment, by widening the jurisdiction hitherto available to Banks and Financial Institutions to include the place where the branch of office of the bank or financial institution is functioning, will have adverse consequences for the debtor. It also runs contrary to the traditional principles of jurisdiction well established under the Civil Procedural Code, 1908 (for short, “the Code”).

Determination of territorial jurisdiction of a civil court is governed by Section 16 to Section 20 of the Code. Section 20 of the Code provides that the suits which do not come within the purview of Sections 16 to 19 of the Code are to be instituted where the

defendants resides, or carries on business, or personally works for gain, or where cause of action arises. It says so in the following terms:

> "**20. Other suits to be instituted where defendants reside or cause of action arises.--Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction_**
> **(a) *the defendant*, or each of the defendants where there are more than one, at the time of the commencement of the suit, *actually and voluntarily resides, or carries on business, or personally works for gain*; or**
> **(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry or business, or personally work for gain, as aforesaid, acquiesce in such institution ; or**
> **(c) *the cause of action, wholly or in part, arises.***
> **[Explanation].--A corporation shall be deemed to carry on business at its sole or principal office in [India] or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."**

The objective of this Section is that justice should not be out of reach for any person and more specifically, that the defendant should not be unduly inconvenienced by being required to travel long distances in order to defend himself. The proposed amendment undoes this internal check and balance in the Code by widening the jurisdiction clause to include any branch or office of the bank or the financial institution.

The 2016 Amendment Bill proposes a new jurisdiction rule in favour of banks and financial institutions to provide for filing of claims where the applicant is carrying on business. This kind of a jurisdictional provision in favour of plaintiffs can also be found in Section 62 of the Copyright Act. The objective of adding such a provision in the Copyright Act was to ensure that authors who were deterred from instituting infringement proceedings because of the distance from the place of their ordinary residence were not discouraged from claiming their rights under the Copyright Act, 1960. Section 62 of the Copyright Act, reads as follows:-

> **62. Jurisdiction of court over matters arising under this Chapter.—**
> **(1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any**

other right conferred by this Act shall be instituted in the district court having jurisdiction.

(2) For the purpose of sub-section (1), a "district court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them *actually and voluntarily resides or carries on business or personally works for gain.*

In this section, no reference is made to the notion of 'cause of action' which is mentioned in Section 20 of the CPC. This is precisely where the Supreme Court and the Delhi High Court have stepped in to clarify the scope of the law through ***The Indian Performing Right Society vs Sanjay Dalia And Anr.*** **[(2015) 10 SCC 161] and *Ultra Homes Construction Pvt. Ltd vs Purushotam Kumar Chaubey & Ors*** (FAO(OS) 494/2015, CM 17816/2015)***.***

In ***The Indian Performing Right Society vs Sanjay Dalia And Anr.*****, (2015) 10 SCC 161** the Hon'ble Supreme Court had held that:

"In our opinion, the expression "notwithstanding anything contained in the Code of Civil Procedure" does not oust the applicability of the provisions of section 20 of the Code of Civil Procedure and it is clear that additional remedy has been provided to the plaintiff so as to file a suit where he is residing or carrying on business etc."

Further, the Court has said in Paragraph 18,

"In our opinion, in a case where cause of action has arisen at a place where the plaintiff is residing or where there are more than one such persons, any of them actually or voluntarily resides or carries on business or personally works for gain would oust the jurisdiction of other place where the cause of action has not arisen though at such a place, by virtue

of having subordinate office, the plaintiff instituting a suit or other proceedings might be carrying on business or personally works for gain."

The Hon'ble Division Bench of the Delhi High Court in ***Ultra Homes (Supra)*** relying on the Judgement of ***Sanjay Dalia*** *(supra)* has given the example of four fact situations, to determine jurisdiction. In the first case, where the plaintiff has a sole office, the jurisdiction would be at the location of the sole office. In the second situation, where the plaintiff has a principal office at one place and a subordinate or branch office at another place and the cause of action has arisen at the place of the principal office, the plaintiff would have to sue at the place of the principal office and not the subordinate office. In the third case, where the plaintiff has a principal office at one place and the cause of action has arisen at the place where its subordinate office is located, the court of relevant jurisdiction would be at the place of his subordinate office and not at the place of the principal office. Finally, in the fourth scenario, where the cause of action has arisen at a place other than the place of the principal office and the place of the subordinate office, jurisdiction would said to have arisen at the place of the principal office.

Thus through these decisions, the Supreme Court and the Delhi High Court has clarified that as far as determining jurisdiction is concerned, one cannot cherry pick forums as per the convenience of any one party and the same must be done in accordance with the settled and established principles of law pertaining to the cause of action.

Conclusion:

Hence, the proposed amendment should not allow banks / financial institutions to cherry pick Tribunals for filing applications. The proposed amendment which provides that an application can be filed also in the jurisdiction where "*the branch or any other office of the bank or financial institution is functioning and maintains an account in which debt claimed is outstanding*" should take into account the interpretation of the Supreme Court that it should be read in conjunction with section 20 of the CPC, and it should be where the cause of action has arisen.

B. Amendments of Section 19 (3A), 19 (4) and deletion of Section 19 (14): Orders to Disclose particulars of assets other than those specified by the applicant

The amendments proposed to Section 19 (3A), (4) and (14) of the RDB Act are as follows:

> **"19(*3A*) Every applicant, in the application filed under sub-section *(1)* or sub-section *(2)* for recovery of debt, shall—**
> **... *(c)* if the estimated value of such other assets is not sufficient to recover the debt, seek an order directing the defendant to disclose to the Tribunal particulars of other properties or assets owned by the defendants.";**
>
> **"19*(4)* On receipt of application under sub-section *(1)* or sub-section *(2)*, the Tribunal shall issue summons with following directions to the defendant,—**
> **... *(ii)* direct the defendant to disclose particulars of properties or assets other than properties and assets specified by the applicant under clauses *(a)* and *(b)* of sub-section (*3A*);...**
>
> **"*19 (5) (iii)* In case of non-compliance of any order made under clause *(ii)* of sub-section *(4)*, the Presiding Officer may, by an order, direct that the person or officer who is in default, be detained in civil prison for a term not exceeding three months unless in the meantime the Presiding Officer directs his release:**
>
> **25(aa) taking possession of property over which security interest is created or *any other property* of the defendant and appointing receiver for such property and to sell the same;"**

The Amendments proposed to Section 19 (3A), (4) and (5) provide that if the value of securities is not sufficient to satisfy the debt, the Bank / Financial institution can seek an order directing the Defendant to disclose to the Tribunal particulars of other properties or assets owned by the defendants. Under Section 19 (4), the Tribunal while issuing

summons to the Defendant to show cause shall also direct the defendant to disclose the particulars of properties or assets other than the properties secured by the Bank. This requirement that the borrower be made to disclose all its other properties and assets that are not securities under the loan must be juxtaposed with the basic principles of a contract. At its heart, the relationship between a bank (or financial institution) and a borrower is a contractual one. Anson's Law of Contract (at page 3) notes that one of the basic functions of a contract is the prior allocation of economic risk between the parties to the contract. This amendment strikes at the root of this principle. It allows banks to completely restructure the risk they take in granting a loan to a borrower by allowing the attachment and sale of unsecured assets. This in effect makes any clauses in a contract regarding the securities granted for the debt meaningless in contracts with banks.

These amendments also cause problems when considered from the perspective of similarly placed debtors. Under the RDB Act, only banks and financial institutions can approach the DRT. If these institutions would be given an interest in other, unsecured assets of a borrower it could have a cascading effect on other debt holders and devalue the securities held by other creditors who are not banks or financial institutions. For instance, in a case where the borrower in question is a company, the company may have taken several loans. One such loan may be from a bank, another from a foreign investor, another from another company and so on. All of these loans are secured against different assets owned by the company. In this case, if the company were unable to pay back the loan from the bank and the bank was to find that the security it had been given is insufficient for the loan, the bank may appropriate other assets of the company in order to recover its loan amount. This would in turn affect the value of the other secured loans that the company has issued which would result in a loss to the other creditors of the company which in this case would include the other company and foreign investors. As a result, it may be seen that such a provision places the interest of banks and financial institutions above that of other secured creditors. This provision is therefore at odds with the stated objectives of the Amendment Bill which states that it seeks to facilitate investment and improve the ease of doing business.

The principle that creditors should be treated equally under the law is a basic principle laid down by the United Nations Convention on International Trade Law (UNCITRAL) Legislative Guide on Insolvency. The Guide states (part 1 page 12) that "*an insolvency*

law should address problems of fraud and favouritism that may arise in cases of financial distress by providing, for example, that acts and transactions detrimental to equitable treatment of creditors can be avoided."

The requirement that the Borrower be made to disclose all its other properties and assets that are not securities under the loan is unprecedented as such provisions are not made in any other legislation. The general principle in all statutes, including for recovery of dues or attachment is that it is the claimant or the applicant or the decree holder who has to specify the properties of the defendant, over which orders can be sought from the court. This has been the underlying principle in the RDB Act as well, because in the present section 19 (14) it states that-

> **"(14) The applicant shall, unless the Tribunal otherwise directs, specify the property required to be attached and the estimated value thereof."**

This Section represents an important safeguard for the borrower under this Act. It is in consonance with the principle of economic risk in contracts stated above. The onus should be on the Bank or financial institution to ensure that when it gives out debts, the value of the securities is sufficient to cover the debt.

Section 19(14) is proposed to be deleted and the entire burden of disclosing the properties and assets other than those secured is put on the Defendant or the Borrower. Through such a provision, the 2016 Amendment Bill seeks to take the exceptional power of the tribunal under section 19 (13)(A) to require that the defendant provide additional security only where it concludes that the defendant is trying to obstruct or delaying execution of any order of recovery of debt to be the the standard rule even with a fully compliant defendant at the start of the recovery proceedings.

The amendment, by giving powers to the Tribunal to pass orders directing the defendant to disclose all its assets (which are not secured or mortgaged to the bank) without any finding that the defendant is due to make payment, and is attempting to delay or obstruct recovery as per orders passed, and without hearing the defendant is

arbitrary. It is further unreasonable that as soon that this disclosure is ordered, the Tribunal would also pass ex-parte immediate interim orders imposed on these properties, restraining their sale or alienation. These requirements are against basic principles of natural justice enshrined in Article 14 and 21 of the Constitution of India 1950.

Further, section 25(aa) permits the Tribunal to pass orders in recovery proceedings against 'any other property' including those not covered within the contract between the lender and borrower rendering the very idea of securitized lending unstable and unpredictable in legal outcome.

Conclusion:

It is submitted to the Committee that the amendments to Section 19(3A), (4), (5)(iii) and Section 25(aa) are in conflict with the stated aims of the amendments to facilitate investment and ease of business. In light of this it is recommended that the amendments mentioned be dropped. In addition it is recommended that Section 19(14) not be deleted.

C. Mandatory Ex-parte orders Restraining Defendant from dealing with or disposing of such properties under Section 19(4)

The following amendments have been proposed to Section 19(4)-

> **"*(4)* On receipt of application under sub-section *(1)* or sub-section *(2)*, the Tribunal shall issue summons with following directions to the defendant,—**
> **... *(iii)* pass an interim *ex-parte* order restraining the defendant from dealing with or disposing of such assets and properties disclosed under clause *(c)* of sub-section (*3A*) pending the hearing and disposal of the application for attachment of properties.";**

The above amendments require that a court *must* pass an interim *ex-parte* order restraining the borrower from disposing of assets declared under Section 19(3A).

It must be noted that it is settled law that Courts must consider three considerations before issuing an interim order of this nature. These include the existence of a prima facie case, the balance of convenience and the possibility of irreparable harm being caused to the plaintiff. The Amendment in question does not allow for any of these considerations being taken into account by the DRT.

Further, the Supreme Court in ***Ramrameshwari Devi and ors. v. Nirmala Devi and Ors*.** [(2011) 8 SCC 249] has laid down numerous principles to be followed by any Court issuing interim relief of this nature in addition to the three principles mentioned above. Most notably, the Court held that,

> **"The courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing concerned parties appropriate orders should be passed."**

This amendment makes the grant of such an ad interim ex-parte stay order a mandatory part of the proceedings of the DRT. This in effect normalizes an extraordinary power of a court or tribunal.

The amendment which allows the passing of such an order directing stay of transfer of property by the Defendant without a prior hearing would represent an unreasonable and arbitrary interference with their right to enjoy property under Article 300A of the Constitution. This finds support in the ruling of a constitutional bench of the Supreme Court in ***K.T. Plantation Ltd. v. State of Karnataka*** [(2011) 9 SCC 1] which held that any limit or restriction on the right to enjoy property must be "just, fair and reasonable" as understood in terms of Articles 14, 19(1)(g), 26(b), 301, etc.. It is well established that the right to fair hearing is a vital requirement for a law to stand the test of Article 14 of the Constitution. In another constitutional bench in ***Dwarkeshwari Cotton Mills v. Commissioner of Income Tax*** [AIR 1955 SC 65] the Supreme Court held that not giving a right to adduce evidence would be fatal to any adjudication of the issue. In the present amendment, no attempt is made to allow the borrower to show that the secured property would be sufficient to satisfy the debt owed.

Conclusion

In light of the above discussion it is submitted to the Committee that the amendment requiring a mandatory ex-parte stay on transfer of the borrower's property goes against the principles expounded by the Supreme Court. As such it is recommended that this amendment be dropped.

D. Section 19 (5): Time limits imposed

Clause 29 of the 2016 Amendment Bill substitutes section 19(5) of the RDB Act, which specifies the time available to the defendant to present a written statement of his defence. The provision as it now stands, states that:

> ***(5)*** **The defendant shall, at or before the first hearing or within such time as the Tribunal may permit, present a written statement of his defence.**

Thus, at present, the provision allows the defendant to prepare and present his written statement up to the time of conduct of the first hearing, or within such time as the Tribunal may permit. The Amendment Bill through Clause 29 (viii) replaces section 19(5) in the following terms:

> **"(5) (i) The defendant shall within a period of *thirty days from the date of service of summons*, present a written statement of his defence *including claim for set-off* under sub-section (6) *or a counter-claim* under sub-section (8), if any, and such written statement *shall be accompanied with original documents or true copies* thereof with the leave of the Tribunal, relied on by the defendant in his defence:**
>
> **Provided that where the defendant fails to file the written statement within the said period of thirty days, the Presiding Officer may, *in exceptional cases and in special circumstances to be recorded in writing, extend the said period by such further period not exceeding fifteen days* to file the written statement of his defence.**

Instead of a period that runs up to the conduct of the first hearing, a specific time-limit of 30 days is prescribed by the Amendment Bill, starting from the date of service of summons upon the defendant, within which he/she must submit a written statement. Any set-off or counter-claim contemplated by the defendant is to be submitted with the written statement itself, and this deadline will also apply to all true copies and affidavits to be submitted therewith. If the defendant fails to adhere to the 30-day period, an extension may be provided to him/her in "exceptional cases and in special circumstances".

Additionally, the Amendment Bill also inserts sub-section 10A within section 19 to prescribe that all affidavits verifying the facts and pleadings, documents and evidence relied upon and also the affidavits of witnesses are required to be filed within the 30-day period along with the written statement. Section 10B is also inserted to prescribe that parties shall not be allowed to rely upon such facts or pleadings as evidence, if not verified in the prescribed manner. The two sub-sections, as drafted in the 2016 Amendment Bill are re-produced below:

> **"(10A) Every application under sub-section (3) or *written statement of defendant* under sub-section (5) or *claim of set-off* under sub-section (6) or a *counter-claim* under sub-section (8) by the defendant, or written statement by the applicant in reply to the counter-claim, under sub-section (10) or any other pleading whatsoever, shall be *supported by an affidavit* sworn in by the applicant or defendant *verifying all the facts and pleadings*, the statements pleading *documents and other evidence* annexed to the application or written statement or reply to set-off or counter-claim, as the case may be:**
>
> **Provided that if there is any evidence of witnesses to be led by any party, the *affidavits of such witnesses* shall be filed simultaneously by the party with the application or written statement or replies filed under sub-section (10A).**
>
> **(10B) If any of the facts or pleadings in the application or written statement are not verified in the manner provided under sub-section (10A), a party to the proceedings shall *not be allowed to rely on such facts or pleadings as evidence or any of the matters set out therein.*"**

The 2016 Amendment Bill in its 'Statement of Objects and Reasons' states that though the RDB Act provides for a period of 180 days for disposal of recovery application, approximately seventy thousand cases are pending before the Debt Recovery Tribunals ("DRTs") due to various adjournments and prolonged hearings. By laying down a timeline for filing of written statement and other necessary documents, the Amendment Bill perhaps seeks to facilitate expeditious disposal of recovery applications.

The success of any law lies in the fairness and ease with which it can be implemented. The proposed amendments highlighted above give rise to two main questions that require some consideration, the first being: Is the time-limit prescribed for filing of written statement by the defendant before the DRTs too short? The benefit sought to be achieved by means of adhering to a rigid deadline, might ultimately be defeated by the amount of distress caused to a borrower-defendant in organizing and producing complex financial documents that relate to multiple factual situations involved in the resolution of financial claims. Second, are the rights of a fair-trial and adequate hearing compromised upon the imposition of a rigid deadline upon only the defendant, and no mention of a similar, rigid timeline prescribed for the borrower-banks and financial institutions?

The general rule for filing of written statement by defendants, is provided for in Order VIII Rule 1 of the Civil Procedure Code (CPC) as amended by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976). It prescribes a time period of 30 days for filing of written statement, which may be extended by a further period of 60 days in "exceptional circumstances", thus providing a total time-limit of 90 days to the defendant. The object of this amendment, similar to the purpose of the Amendment Bill, *inter alia* is to expedite the disposal of suits such that the ends of justice are not defeated.

The Hon'ble Supreme Court has laid down its interpretation of the application and use of this procedural timeframe prescribed by the CPC. In ***Kailash v. Nanhku & Ors.*** (Civil Appeal No. 7000 of 2004) decided on 06.04.2005, the Hon'ble Supreme Court considered the object and purpose of Order VIII Rule 1 and laid down that the provision, though couched in *mandatory form* is *directory* in nature. The Court made the following

points that serve to explain that a rule of procedure should not be construed such that it defeats the process of justice:

> **"…Considering the object and purpose behind enacting Rule 1 of Order VIII in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired.**

A time-frame is prescribed under procedural law by the CPC to ensure that the process of justice is not delayed due to trivial circumstances or because the defendant is not vigilant, or is adopting delaying tactics. Thus, the Hon'ble Supreme Court in the above-mentioned judgment on the reason for amending of Order VIII Rule 1 explains circumstances when the defendant may not be allowed any extensions such that the process of justice delivery is delayed by adjournments:

> **"…the object behind substituting Order VIII, Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics,... and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments."**

Referring to the scope for extension that is provided in the case of "exceptional circumstances" furnished by the defendant, the Hon'ble Supreme Court also explained that

> **"...exceptional circumstances are those that are beyond the control of the defendant and when grave injustice would be occasioned, if the time was not extended."**

The desirable effect of the proposed amendments should be such that the process of justice may be speeded up and even hurried, but fairness which is a basic element of justice, cannot be compromised by robbing legal procedure of its flexibility. The short

time-period, if interpreted as a mandatory requirement, could have the effect of denying to the defendant the opportunity of participating in the process of justice dispensation. There could be any number of reasons why the borrower-defendant is prevented from filing the required documents within the prescribed time-limit. If he is subjected to more distress than any amount of convenience in presenting his case before the DRT, the borrower-defendant would only lose faith in the formal credit system, being wary of the manner in which an action for recovery of debts, by its very procedure disfavours him.

The rights of borrowers of loans appearing before the Debt Recovery Tribunals cannot be outweighed by the need for speedy recovery of debt and disposal of cases. This could have the effect of reducing borrower's faith in the legal system and serve to negatively impact the formal credit recovery system.

Given the short time-frame proposed by the Amendment Bill, reference may also be made to a case pertaining to Section 13 of the Consumer Protection Act, which provides for the same time frame. The Supreme Court in ***Topline Shoes Ltd. v. Corporation Bank***, [2002] 3 SCR 1167 gave its views on Section 13, which requires the opposite party to a complaint to give his version of the case within a period of 30 days or such extended period not exceeding 15 days as may be granted by the District Forum. The Hon'ble Supreme Court took into consideration the Statement of Objects and Reasons and the legislative intent behind providing a time frame to file reply and held:

> **"The Statement of Objects and Reasons of the Consumer Protection Act, 1986 indicates that it has been enacted to promote and protect the rights and interests of consumers and to provide them *speedy and simple redressal* of their grievances…"**

The Court also opined that Section 13 is not mandatory in nature and should be interpreted to facilitate speedy disposal of cases:

> **"Thus the intention to provide a time frame to file reply, is really meant to *expedite the hearing of such matters and to avoid unnecessary adjournments* to linger on the proceedings on the pretext of filing reply. The provision however, as framed, *does not indicate that it is mandatory in nature.* In case**

the extended time exceeds 15 days, no penal consequences are prescribed therefore."

The proposed amendments, if conferred a mandatory character, would provide no flexibility, justice and procedural fairness to the defendant. Natural justice through its rule of *audi alteram partem* requires that complete justice is occasioned through an adequate hearing given to both parties to a case. There could be any number of reasons that are truly beyond the control of the Defendant which disable him/her from filing his written statement - that too along with original documents, true copies, witness' statements and numerous affidavits.

This becomes an even more serious matter for consideration as no such corresponding time limit is imposed on the Applicant in filing its Reply to the counter- claim. The fact that there is no corresponding provision that subjects a timeline on to the creditors and banks to furnish a rejoinder to the counter-claim points to the one-sided nature of the amendment and this uneven approach is unreasonable. In ***Kailash v. Nankhu*** that was discussed above, the Hon'ble Supreme Court makes the following relevant points on this matter:

> **"The CPC which consolidated and amended the laws relating to the procedure of the Courts of Civil Judicature in the year 1908, has in the recent times undergone several amendments based on the recommendations of the Law Commission displaying the anxiety of Parliament to secure an early and expeditious disposal of civil suits and proceedings but without sacrificing the fairness of trial and the principles of natural justice in-built in any sustainable procedure."**

It is seen as a settled position of law that while every effort should be made to expedite the disposal of suits, it should not be done at the cost of a fair trial in accordance with the accepted principles of natural justice. Given that no corresponding urgent time-frame has been inserted for the Bank / Financial institution to file its written statement to the counter-claim, the proposed amendments seem to facilitate the creation of a very one-sided judicial proceeding between the bank and the borrower. The Tribunal continues to be given the flexibility to fix the relevant time-periods for the banks and

financial institutions. The Amendment Bill should not lay down procedure that has the effect of rendering speedy decisions, that might however be arrived at without giving due consideration to the claim of the defending party.

Conclusion:

Cumulatively, the proposed amendments result in the denial of a fair trial and defy the directions of the Supreme Court. The amendments may either revise the time limits or make them directory. In any event, it is unlikely that the Supreme Court will enforce these legislative proposals as suggested, and is likely to interpret them in line with requirements of natural justice.

E. Conclusion

The Centre for Law and Policy Research is honoured to be invited to present its views on the 2016 Amendment Bill. In our submissions we have concentrated on Part III of the Bill on the amendments to the RDB Act. We urge the Joint Committee to take the following into consideration in their review of the amendments:

- Prevent banks and financial institutions from cherry-picking tribunals for recovery by ensuring that the cause of action remains a primary consideration for conferring jurisdiction on the tribunal
- Prevent the creation of one-sided legal proceedings in the Tribunals where mandatory ex-parte orders based on mandated defendants disclosures may vitiate a fair trial
- Ensure that there is a fair trial in the Tribunals without imposition of mandatory and impractical time lines on the defendant and no corresponding restraints on the applicants