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REPORT TO THE GOVERNMENT OF INDIA
MINISTRY OF URBAN DEVELOPMENT

REVISION OF INDIA'S MORTGAGE FORECLOSURE LAWS

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ABSTRACT

Central to an effective housing finance system, India's current foreclosure practice should be completely overhauled to shorten the overlong judicial process and improve enforcement. Because such a broad scale revision is likely to take years to accomplish, this report recommends in the interim the adoption by Parliament of draft amendments to the National Housing Bank Act, which would provide two summary recovery procedures and a judicial procedure for dealing with both monetary and non-monetary defaults. The report also discusses the formation of a secondary market and the implementation of a program of mortgage insurance. It concludes that the extensive reforms to overcome structural impediments to secondary markets may not be necessary because of the availability of effective tools for raising capital. Mortgage insurance is also not a priority because of the substantial downpayments already generally required, and moreover, would discourage the development of disciplined lending practices.

TABLE OF CONTENTS

SUMMARY	1
ACKNOWLEDGMENTS	4
INTRODUCTION	6
A. A Secondary Market	7
B. Mortgage Insurance	10
C. Current Foreclosure Practices	12
REVISION OF INDIA'S MORTGAGE FORECLOSURE SCHEME	13
A. An Interim Measure	14
1. The Enforcement Scheme	14
2. The Security Transaction	25
3. Access to the Summary Enforcement Procedures	26
B. Elements of a Restructured Foreclosure System	28
APPENDIX: Draft National Housing Bank Act Amendments	

SUMMARY

India's current foreclosure procedure, governed by the Transfer of Property Act of 1882, is unworkable. It should be completely overhauled to eliminate the distinctions among the half-dozen types of mortgages it enumerates, to provide for power-of-sale foreclosure so that a note holder, because of court delays, no longer has to wait upwards of ten years to foreclose, and to assure that marketable title emerges from a foreclosure sale. However, the consensus among the people interviewed for this report is that broad-scale revision of the 1882 Act will likely take years to accomplish. And the rapidly growing mortgage finance industry simply cannot wait years to have access to speedy, efficient and balanced enforcement mechanisms.

Accordingly, this report recommends that Parliament be urged to adopt draft amendments to the National Housing Bank Act developed by its staff, with certain modifications suggested below. Those amendments would provide two alternative summary recovery procedures for enforcing simple monetary defaults and a judicial procedure for dealing with both monetary and non-monetary defaults, such as fraud, waste and failure to maintain insurance.

The draft amendment should be altered to broaden access to the summary procedures to include certain banks and the Life Insurance Corporation, as well as the Housing Finance Institu-

tions currently specified. Procedures for invoking the summary remedies, for notice to defaulting borrowers, and for fair hearings should be provided. Proposed language is suggested below. But the long-term goal must be a complete revision of the 1882 Act. To that end, the latter part of the report provides a number a possible statutory sections, with extensive comments.

The report also discusses the formation of a secondary market and the implementation of a program of mortgage insurance. It concludes that for the present, there are structural impediments to secondary market operations which only a broad scale reform of the mortgage, land registration and related laws can remedy. It also questions the current need for a secondary market as a device for raising additional capital, given the tools presently available to the current participants.

Though there are no structural impediments, mortgage insurance, too, can await the maturing of India's mortgage banking industry. Mortgage insurance should be viewed as an alternative to substantial downpayments. Current practice is to make loans for no more than 50% to 75% of value, with relatively short maturities. Mortgage insurance should not be necessary until loans exceed 80% of the value of the security property. This, of course, assumes that there is a functioning enforcement system in place. But in any event, mortgage insurance should not be looked upon, even temporarily, as a substitute for enforcement. If it is, the likelihood is that what is now the lenders' problem will

become the insurers' problem. Finally, mortgage insurance can discourage the development of disciplined lending practices on the part of loan originators, since they are effectively protected from loss.

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INTRODUCTION

Since the 1970s, the Government of India has established two entities to encourage, through public, joint and private sector lending, the construction, rehabilitation and purchase of houses: the Housing and Urban Development Corporation (HUDCO), and most recently, the National Housing Bank (NHB). The third major actor in this effort, the Housing Development Finance Corporation (HDFC), was established with private capital and is owned by its shareholders.

It was not until the mid-1980s that concentrated public policy attention was focused on the development of a housing finance system. The thrust of the Seventh Five Year Plan (October, 1985) was that the supply of funds available for housing finance should be increased by tapping household savings rather than by increasing government outlays. Even prior to that, however, HDFC had pioneered the development of a number of lending devices that appear to have been remarkably successful in delivering housing loans to a wide range of income levels, including below median-income households. More recently, HDFC has encouraged the development of a number of local housing finance companies. HUDCO is on-lending to housing agencies who, in turn, are making increasing numbers of mortgage-like loans.

The NHB, established in 1988, will exercise both a regulatory and an on-lending function, and in this respect, it is similar to the Federal Home Loan Bank Board in the United States.

Its statutory authority to examine the books and records, and to regulate the operations, of housing finance institutions (HFIs)¹, is wide-ranging. See, National Housing Bank Act (hereinafter "NHB Act") Sections 21, 22, 24, 25, 31-35. While its lending policies have not yet been finally determined upon, the NHB will clearly provide credit to other institutions in the public, joint and private sectors. See NHB Act, Sections 14, 18, 19. They, in turn, will undertake mortgage lending to households.

For HUDCO, HDFC and the NHB and the other lending institutions effectively to address India's formidable housing deficit, a number of structural problems must be solved. Foremost among them, at least in the initial stages, is the establishment of a fast, efficient way to prompt ultimate borrowers to repay their loans in a timely fashion, either by foreclosing on the mortgage or by some other device which achieves the same result.

A. A Secondary Market

Considerable attention has also been focused on the generation of additional capital for the housing finance system. Currently, much of that capital is funnelled into the system through government credit allocation requirements imposed on organizations such as the Life Insurance Corporation (LIC) and the Gen-

¹HFIs are defined as including "every institution, whether incorporated or not, which primarily transacts or has as its principal object, the transacting of the business of providing finance for housing, whether directly or indirectly." National Housing Bank Act, 1987, Section 2(d).

eral Insurance Corporation (GIC) and through the issuance of government-backed debentures. There appears to be a growing consensus that the development of a secondary mortgage market is a useful way to attract private, or perhaps better stated, discretionary capital into the system.

For a secondary mortgage market to function efficiently, there must be a high degree of standardization of mortgage instruments, lending and servicing procedures, and underwriting and appraisal practices. Also required are negotiability of the mortgage notes (so that the buyer of the mortgage note acquires it free of any defenses which the maker may have), a system of registration of mortgages unburdened by exorbitant stamp duties, and finally, a legal matrix within which foreclosure and liquidation of the security can be completed cheaply, fairly and quickly. For reasons which are explained below, the prospects for achieving negotiability and mortgage registration in the immediate future are remote. The development of a true secondary market may have to abide those events.

There are more fundamental questions, however:

First, is a secondary market necessary at this time? There does not appear to be any formal impediment to HDFC, for example, raising capital by selling obligations backed by the mortgages it holds. The mortgages themselves do not have to be sold. Simil-

arly, advances by the NHB to HFIs and Banks can be backed by mortgages held by the HFIs, without the NHB buying those mortgages and assuming the credit risks.

Second, is there a realistic market for mortgages originated by HFIs given the returns available on other investments in the Indian capital markets? If not, sellers will be strongly tempted, perhaps required, to offer attractive returns by deeply discounting those mortgages. This is a not a circumstance that will contribute to keeping loans to ultimate borrowers at the lowest rates possible.

But whether the concern is with facilitating a primary or a secondary mortgage market, a functioning foreclosure system is critical. Failing that, there will be an increasing reliance on mortgage insurance or guarantees, and on an underwriting process at the origination level which largely disregards the value of the security property and relies almost wholly on borrowers' credit worthiness and devices such as the assignment of life insurance policies and personal guarantees. In a nation where so many people rely successfully on income from the informal sector, such an unbalanced underwriting process discriminates against otherwise worthy borrowers.

B. Mortgage Insurance

Notwithstanding its almost magical attraction, mortgage insurance can be a trap. While the primary function of this report is to suggest revisions in the foreclosure process, it may be useful briefly to review some of the pitfalls of mortgage insurance:

First, knowing that it is immunized from loss, there is virtually no incentive for an originating lender rigorously to appraise the value of the security property to assure that if a default occurs, a foreclosure sale will retire the debt, or to properly assess the credit-worthiness of its borrower.

Second, there is no incentive for a secondary market entity to insist that the originators from whom it buys mortgages engage in sound underwriting practices.

Third, if a mortgage insurance fund is to be operated on an actuarially sound basis, a premium adequate to cover losses and expenses will have to be charged borrowers. The result is an increase in borrowing costs and a corresponding increase in the amount of income the borrower must have to service the loan. Some lower income applicants may thus be excluded.

Fourth, if a high loss rate is experienced, either because of poor loan underwriting or because the foreclosure system simply fails to work, the premium rate will have to be adjusted upward to maintain the solvency of the fund. It is likely that the entire burden of any premium increases will have to be borne by new borrowers.

Fifth, mortgage insurance cannot responsibly be viewed as a substitute for an efficient foreclosure system. If it is, what is now the lenders' problem will become the problem of the insurers who are subrogated to the lenders' rights against the borrowers.

Sixth, mortgage insurance is probably not necessary save where the loan amount is very high in relation to the value of the property, in the range of 90% to 100%. Currently, the practice of the local housing agencies to whom HUDCO on-lends is to make loans for no more than 70% to 80% of value, and HDFC rarely makes loans for more than 40% to 50% of the purchase price of the property. In addition, there is a very high rate of appreciation on properties in urban areas, though this may be transient. If note holders are able to liquidate delinquent loans promptly, the presence of an equity "cushion" of between 20% and 60% should be more than adequate to assure both primary and secondary

lenders that they do not need the added protection of mortgage insurance.

In short, mortgage insurance and guarantees should properly be regarded as substitutes for a sizeable down payment. Where there are substantial down payments, relatively fast principal retirement because of short maturities (15-20 years), and rapid appreciation in property values, the real need for a such a scheme should be evaluated carefully.

C. Current Foreclosure Practices

Mortgage lending is a seamless web. Central to the entire process is a mortgage foreclosure procedure that works. As currently structured, India's does not. Because all mortgages must be foreclosed through judicial process, and because the court system is sclerotic, it can take anywhere from eight to fifteen years to obtain a foreclosure decree and get it enforced. Order No. 34 of the Code of Civil Procedure, which governs court procedures in foreclosures, is an invitation to delay because it requires joinder in the proceeding of anyone with an interest in the mortgaged property. This, in turn, encourages borrowers to transfer interests to third parties for the sole purpose of delay. Once the multitude of allowable appeals have been dealt with, there is the problem of enforcing the decree, which can be complicated by matters as varied as corruption on the part of the court officers charged with responsibility for conducting a fore-

closure sale, to impediments to getting the property vacated posed by the rent control laws. The balance of this report is devoted to an examination of how the foreclosure law might be changed so that it does work.

REVISION OF INDIA'S MORTGAGE FORECLOSURE SCHEME

Chapter IV, Sections 58-104, Transfer of Property Act of 1882 (hereinafter "1882 Act"), sets out the entire substantive body of Indian immovable property mortgage law. Last amended in 1929, it reflects ancient concepts of English mortgage law largely developed during the reign of Henry II and gifted to India by the Raj. While the basic principle (a mortgage is a pledge of an interest in property made to secure the performance of an obligation) would be left intact, the 1882 Act should be uprooted, discarded and replaced by a comprehensive statute embodying modern principles of secured real property transaction law. But not now.

In the more than 25 interviews conducted for the preparation of this report, it was made clear, first, that repeal of the 1882 Act and wholesale reform would likely require years, and second, that if the public policy goals reflected in the establishment of HUDCO, the NHB and HDFC are to be brought within reach, a fast, inexpensive procedure must be implemented immediately. Accordingly, this report proposes that, as a first step, the NHB Act be amended by seeking adoption of portions of a draft amendment,

with certain modifications, prepared by the NHB staff (hereinafter "NHB draft"). As a second step, using the experience gained in the administration of those amendments, the Law Commission of India, or a similar body charged with law revision responsibilities, should constitute a drafting committee to prepare a replacement for the 1882 Act.

A. An Interim Measure

1. The Enforcement Scheme

The draft amendment to the NHB Act, a copy of which is appended to this report, provides alternative enforcement mechanisms for simple defaults based on the failure to pay an installment when due. Where there has been a default in payment, Section 36.C would permit an eligible HFI to take possession of the property and sell it free and clear of encumbrances to satisfy the debt. Section 36.G permits an HFI to refer a monetary default to a State government, which would certify under established procedures that the amount claimed is actually due. The State authority would then transmit the certificate to the Collector, an official charged with responsibility for collecting arrearages of land revenue, who would then collect the amount in his normal fashion (if the borrower failed to pay, presumably by conducting an auction sale) and turn over to the HFI an amount sufficient to satisfy the debt. Section 36.H gives an HFI access to a Magistrate to assist in obtaining control of the security

property, presumably as a device to overcome obstacles to possession posed by the rent control laws.

Sections 36.D, 36.E and 36.F set out an alternative, judicial, enforcement scheme. The scope of these provisions is somewhat broader than those discussed above, since it permits enforcement of claims based not only on simple monetary defaults, but also based on the borrower's fraud, insolvency, waste or failure to maintain insurance.

There is some justification for distinguishing between simple monetary defaults and matters such as fraud, insolvency, etc. In a monetary default, there is little in the way of factual dispute possible: Was the borrower obligated to pay the money? Did he pay? As a practical matter, a determination of this kind hardly requires the elegance of a full-blown judicial proceeding, with formal rules of evidence. Fraud and the other matters addressed in Sections 36.D, 36.E and 36.F may require a more formal proceeding to guarantee fairness. While it is unlikely that this procedure would be invoked very often, its presence in the legislation may help to allay concerns about fairness, simply because it makes clear a determination to treat matters of greater complexity with the procedural protections they deserve. In short, while the judicial procedure language may not be necessary to serve the short term goal of being able to enforce monetary defaults quickly, the contrast may be useful

either politically or in a challenge to the legality of the summary procedure.

The proposed amendment thus puts three arrows in the HFIs' enforcement quiver: (1) summary possession and sale, (2) a judicial procedure to enforce a wide range of covenants, in addition to simple monetary defaults, and (3) recovery as an arrear of land revenue. The choice of which to fire belongs to the HFI.

This enforcement arsenal is virtually identical to the State Financial Corporations Act (63 of 1951), under which secured loans are made to small business enterprises. Recently, the Kerala High Court decided a case, K. Surendranathan v. Kerala Financial Corp., AIR 1988 Kerala 330, in which a borrower whose property had been taken under the Financial Corporation's possession remedy challenged it as "harsh, and capable of arbitrary exercise and thus violative of Article 14 of the Constitution."² He also claimed that the unfettered discretion given the Corporation to pick and choose among remedies was illegal.

The court rejected the claim of arbitrariness, pointing out that the composition of the Corporation's board, its purposes, the necessity to avoid the problems presented by prolonged court

²Article 14 provides:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

delays and a variety of other provisions provided the requisite guidance for the informed and reasonable exercise by the Corporation of choice among the remedies. In closing, however, the court cautioned that even where the provisions of a statute are not arbitrary, the exercise of the power granted by it can be. It noted that here, the Board had not acted "vindictively or arbitrarily," that the borrower was informed of the action to be taken against him and given an opportunity to bring his account current, and that he did not.

In another case relevant here, Ramchandra v. Collector, Nagpur, 1970 Mh.L.J. 116, the High Court set aside an auction sale conducted by the Collector to recover a debt to a Cooperative Land Development Bank pursuant to the Maharashtra Co-operative Societies Act, 1960. In a procedure apparently similar to what would happen under the NHB draft amendment, the Collector conducted the sale of the security property based on a certificate issued by the Cooperative Land Development Bank. After reviewing the statute, the court held that notice to the borrower and an opportunity to be heard were required before any certificate stating the amount due could be issued and acted upon. It reached that conclusion by applying what it characterized as three fundamental rules of natural justice:

1. No one shall be a Judge in his own case.
2. No decision shall be given against a party without affording him a reasonable hearing.

3. Quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily.

No proper enquiry having been held to determine the propriety of the claimed default, the auction sale was set aside and the property restored to the borrower.

There are several important lessons to be drawn from these cases:

First, the court in the Kerala Financial Corp. case relied heavily on the fact that the choice among the remedies was being made by the Corporation itself under the guidance of statutory purposes and goals. The draft NHB amendments would vest that authority in the HFIs themselves, who are not operating under a statutory mandate and some of whom would have no more of a relationship with the NHB than that of lender and borrower, or even more distant, that of regulator and regulatee. HDFC, for example, is not a creature of statute, but a private corporation, many of whose activities may be regulated by the NHB. HDFC's corporate charter has not been reviewed for this report. Even if it did contain some or all of the language relied on by the Kerala court, query whether a corporate charter would be given the same weight as a statute. The same question can be raised with respect to the HFIs to whom the NHB will on-lend.

Consideration should thus be given to (1) reviewing the NHB Act for conformity with the language relied on by the court in the Kerala case with respect to duties, powers and purposes and amending where necessary; and (2) developing additional statutory language for the NHB Act which would establish a simple procedure under which the HFIs could apply to the NHB for permission to invoke either of the two summary remedies. (Presumably no NHB action would be necessary for an HFI to use the judicial procedure.) As an alternative to describing the procedure in detail in the draft amendment, it might be possible (assuming that Indian administrative law principles permit) to add an additional clause to the rule-making authority granted the NHB under Section 55 of the Act, giving it explicit authority to formulate rules under which it would act on requests from HFIs to invoke either of the summary remedies. It may also be possible simply to rely on the broad rule-making authority set out in Section 55(2)(k) of the NHB Act. Finally, language in Sections 36.C(1) and 36.G of the draft amendments should be modified so that after the second appearance of "housing finance institution" is added "pursuant to authority granted it in each case by the National Housing Bank under [regulations duly made] or [Section ___ of this Act]."

Second, part of the learning of the Ramchandra case is that requirements for notice to borrowers that action is to be taken against them will have to be provided. The notice requirement should not be particularly troublesome. The statute (or, if

administrative law principles permit, a regulation) could provide something along the following lines:

Section __. Notice of intention to collect amounts due by taking possession (Section 36.C) or as an arrear of land revenue (Section 36.G) shall be given to a borrower by a writing, substantially in the form set forth below, in English and in the language of the borrower, sent to him by [registered] and ordinary mail at his last known address and affixed prominently to the property which secures the loan to the borrower.

NOTICE OF INTENT TO COLLECT

You are in danger of losing your property. Please read this notice carefully and observe the time limits. If you do not understand this notice, contact a lawyer.

You are in default on your loan because you have not made your payments for [dates] in the amounts of Rs _____ each. _____

— Unless you take one of the steps described in this Notice the law permits us to take possession and sell your property at

auction [or turn the matter over to the Collector who will sell your property at auction] in four months. You may be able to prevent this if you:

(1) Pay the installments now due. If you pay all the installments now due, you can prevent the sale of your property. You have the right to make up all the missed installments any time up to five days before the public sale. However, if you wait until we have begun advertising the sale, the law requires that you reimburse us for all expenses incurred.

(2) Disagree with our claim that you are in default. If you have a defense to our claim that you are in default for the reasons(s) stated in this Notice, you are entitled to a hearing. You should contact us at once so that we can arrange for a hearing at which you can present your defenses.

(3) Attempt to sell your property. The law provides you with a three-month period of time (beginning with the receipt of this Notice) in which to sell your home privately. If you decide that you want to do this, we will assist you by providing the title documents to your buyer. After deducting the amount that

you owe us on your loan and the costs of this collection effort, we will pay the balance to you.

If you do not understand this Notice, you are advised to call the undersigned and to contact a lawyer.

[Name of HFI]

by _____

Tel:

Third, the Ramchandra decision also requires a hearing before an impartial trier of the facts at which the borrower has an opportunity to present his defenses. Under this standard it is clear that an officer or agent of an HFI could not function as a hearing officer. The next choice appears to be someone named by the NHB, or perhaps "collection officers" appointed on a regional, or state-by-state basis, by the NHB (assuming it would be considered sufficiently disinterested) pursuant to regulations, or by the State governments, to conduct very simple hearings and render brief written summaries of the proceedings and findings, sufficient to support either the seizure of the property or the issuance of a certificate to the Collector. Failing that, there is the possibility of establishing an administrative tribunal.

At the meeting chaired by Mr. Sundaram on February 22, a number of questions were raised about a hearing and who should conduct it. First, the matter of how the summary process is to be invoked should be considered separately from the question of what kind of hearing to provide a borrower against whom a monetary default has been asserted and who should conduct that hearing. Under the Kerala Financial Corp. decision it is clear that, upon a request from an HFI or a bank, the NHB could properly make the decision to invoke one of the alternative summary procedures. The NHB should be able to exercise its rule-making authority to establish a procedure for that purpose.

The second question is whether the NHB, in its capacity as a regulator, could also conduct a hearing and issue either an order for possession and sale or a certificate to the Collector. A concern was expressed that because in certain circumstances the funds sought to recovered could be traceable to the NHB, in its capacity as an on-lender to HFIs, it might lack a sufficient measure of disinterestedness. If that is true, then the hearing responsibility could be turned over to the appropriate state officers, as appears to be the case with the State Financial Corporations, or to the Collectors. Again, it may be possible to provide for such a procedure by the exercise of the NHB's rule-making authority.

Finally, the suggestion that it would be useful to fund either the States or the Collectors to assume this added respon-

sibility seems a good one. The major concern, however, is to keep the procedure simple, a goal not well-served by the establishment of an administrative tribunal.

For a number of years, administrative tribunals have been resorted to for the collection and enforcement of private sector obligations to the joint or public sectors.³ While legal scholars might quibble over the wisdom of establishing an extensive array of tribunals outside the regular court system, given the delays in the courts, it may, in many cases, be the only alternative.⁴ However, because tribunal members tend to be appointed from among retired judges, there is a likelihood that a substantial measure of courtroom formality would creep into a procedure that should be kept very simple. Because the matter to

³In 1976, the Indian Constitution was amended expressly to provide for tribunals. Constitution of India, Part XIV A. Because its author lacks both the time and the qualifications, this report is not an examination of Indian Constitutional law. Accordingly, no view is expressed as to whether Article 323B(2) could be interpreted to include authority for establishing a tribunal to adjudicate claims by HFIs that borrowers have defaulted. But it is an issue that merits examination.

⁴For many years, the United States has resorted to similar devices at the state and federal levels. For example, disputed claims in the states for unemployment insurance and for compensation for workers injured on the job are adjudicated in the first instance at the level of what would be known in Indian parlance as an administrative tribunal. At the federal level, claims by and against contractors on public works project are initially determined by tribunals. Similarly, disputes arising under the Internal Revenue Code are initially determined outside the courts. In all cases, an appeal to the appellate courts is available, and the Indian Constitution imposes a similar requirement, though it does permit the omission of one level of appeal. Constitution of India, Article 323B(3)(d).

be determined -- default -- is so straightforward, it does not need a hearing mechanism as troublesome to establish and cumbersome to operate as an administrative tribunal. However, should such a scheme be resorted to, appeals should be limited to the Supreme Court, and solely on issues of law.

2. The Security Transaction

The 1882 Act specifies no less than six different types of mortgages, some of which have not been heard from in hundreds of years and others of which can only be utilized in specified cities and by persons of specified national and religious origin. Section 58. When broad-scale revision is undertaken, the possibility of dropping the term "mortgage" and substituting for it "security interest" should be considered. The classification problem would thus be eliminated.

The states have imposed documentary stamp duties at a rate so high, 14%, as to be confiscatory. The result -- which serves neither the States' interest in raising revenue, nor the land tenure system's interest being able to maintain records of titles and encumbrances -- is that documents identified as mortgage-related in most developed countries are simply not entered into or registered in India. Loans on immovable property are secured by depositing the deeds with lenders, thus creating equitable mortgages. With no effective system of registering documents which reflect an encumbrance on property, it is difficult to

understand how, short of hand-to-hand combat, priorities are established among competing lien holders.

This is a problem that deserves urgent attention if an even modestly sophisticated mortgage finance system, primary and secondary, is to mature in India. But it is not a problem addressed by the NHB draft amendment, nor can it be. Resolution will have to await a much broader effort at fiscal and law reform.

3. Access to the Summary Enforcement Procedures

As it stands, the NHB draft amendment allows only HFIs which have made use of the NHB's refinance or credit facilities to use the summary enforcement mechanisms. Section 36.B. If HDFC and HUDCO's borrowers, the local housing agencies, will be using those facilities, the mechanisms will be available to them. Also, we have been advised that there is a desire to afford access to banks (looking forward to the expansion of their mortgage finance business) and to LIC. To accommodate those interests, as well as to assure access by all HFIs, even if they are not availing themselves of the NHB's credit facilities, the section might be redrafted along the following lines:

The provisions of this Chapter shall apply to
Banks [describe by schedule] and the Life
Insurance Corporation of India in respect of

financing they provide for housing, and to housing finance institutions.

Given the broad definition of HFIs in Section 2(d) of the NHB Act, this should assure access to the summary mechanisms by HDFC and by the local agencies to whom HUDCO on-lends, as well as to banks and to LIC. Modest conforming changes will have to be made elsewhere in the draft as well.

Interest was also expressed in assuring that loans to households buying cooperative units could be enforced. In a 1975 decision, R.H. Shah v. H.J. Joshi, AIR Supreme Court 1470, the Supreme Court held that a cooperative occupancy certificate was a property right that could be pledged or assigned. Section 36.C of the draft amendment refers to taking possession of "the property pledged," In light of the Supreme Court holding, this language appears to cover cooperative occupancy certificates and the dwelling units. Section 36.G authorizes the Collector to enforce "in the same manner as an arrear of land revenue." If the Collector can sell an occupancy certificate to collect a land arrear he can certainly do the same thing with respect to a defaulted housing loan. If not, the remedy would be either to amend the statute which defines the authority of Collectors or to add the following sentence to Section 36.G:

For purposes of this Section, the Collector may recover the amount by selling, in the

same manner as he would sell any immovable property, a cooperative housing occupancy certificate.

If adopted with some of the modifications suggested here, the NHB draft should provide a speedy enforcement mechanism. Its selective and effective use in a relative handful of situations should provide an example which will promote prompt payment by many more borrowers than those against whom it is actually used.

The next step is a systematic and comprehensive revision of the laws which have an impact on immovable property financing, beginning with the documentation, carrying through registration, and including foreclosure. Below, we offer some statutory language, together with comments, that might be useful as a starting point.

B. Elements of a Restructured Foreclosure System

Section 101. Title. This Act shall be known and may be cited as the Residential Mortgage Foreclosure Act.

Section 102. Scope. This Act applies to any transaction, regardless of its form, which is intended to create a security interest in property which is the principal residence of its owner, or which is intended to create a security interest in owner-occupied real estate which is used for farming or related

purposes, including but not limited to a mortgage, deed of trust, security deed, contract for deed, land sale contract, and any other consensual lien or title retention contract intended as security for an obligation.

Comment

This section embraces all transactions in which the parties intend to create a security interest in real estate covered by the Act. It therefore excludes those security interests created by operation of law, and depends solely on the parties' intent. It operates in disregard of the distinction between "lien theory" and "title theory" and covers a transaction whether the title to the collateral is in the secured creditor or in the debtor. The listing of traditional security devices is illustrative, and it is the parties' intent in transacting, not the manner in which they choose to label the transaction, that is determinative.

Coverage is limited to owner-occupied properties used primarily for residential and farms simply because the drafter has no knowledge of how other immovable property secured transactions operate in India. Most of the principles reflected here could be made applicable to non-residential and non-farm transactions as well.

Section 103. Purposes; Rules of Construction. This Act shall be liberally construed and applied to promote its underlying purposes and policies, which are:

(1) to modernize the law governing residential and farm mortgage transactions;

(2) to protect borrowers against practices which may cause unreasonable risk and loss to them;

(3) to provide certain and equitable procedures whereby secured creditors may protect their security interest and realize their obligations from the proceeds of the collateral of debts; and

(4) to ensure stability and marketability of title.

Comment

This Act should be construed in accordance with its underlying purposes and policies, and each section should be read as narrowly or as broadly as possible to conform to those purposes and policies.

Among the goals of the Act is to extend modern consumer protections to an area of law which has been largely neglected. While the Act limits the freedom of the parties to contract, it does not jeopardize the fundamental right of the secured creditor to protect the security property and to satisfy the debt. The

procedures made available balance the secured creditor's interest in repayment of the debt with the debtor's interest in protecting and realizing his equity.

Section 104. Waiver. The provisions of this Act shall not be waived and any agreement to waive them or covenant not to rely upon them shall be void.

Comment

Even though many persons covered by this Act could "knowingly, freely, and intelligently" waive its protections, the endless litigation which permissive waivers could generate would thwart the Act's purpose of stability and marketability of title; hence a blanket prohibition on waivers is imposed.

Section 105. Supplemental General Principles of Law Applicable. The principles of law and equity including the law relative to capacity to contract, marshalling of assets, subrogation, estoppel, fraud, misrepresentation, duress, coercion, mistake, unconscionability, bankruptcy, or other validating or invalidating cause, supplement this Act unless displaced by particular provisions of it.

Comment

This Act displaces existing law only as stated by specific sections and by reasonable implication therefrom. The listing is intended to be illustrative of the fact that, except as expressly modified herein, common law rights remain intact.

Section 106. Construction Against Implied Repeal. This Act is intended as a unified coverage of its subject matter. No part of it may be construed to be impliedly repealed by subsequent legislation if that can be reasonably avoided.

Comment

Acts which are of a uniform, permanent and comprehensive nature should not be subject to easy repeal by implication.

Section 107. Severability. If any provisions of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Comment

This is severability language frequently used in model acts in the United States.

Section 108. Definitions. In this Act:

(1) "Debtor" means the person who owes payment or other performance of the obligation secured, but if the debtor and the owner of real estate are not the same person, the term means the owner of real estate in any provision of this Act dealing with the collateral, the obligor in any provision dealing with the obligation, and the term may include both where the circumstances so require.

(2) "Default" means the nonperformance of a duty arising under a security agreement.,

(3) "Forbear" means refraining from foreclosing on the security agreement even though the debtor is in default.

(4) "Secured creditor" means a lender, seller, or other person in whose favor there is a security interest.

(5) A "security agreement" means a writing that creates or provides for a security interest in real estate.

(6) "Security interest" means an interest in an owner-occupied, one- to four-unit residential dwelling or farming operation which secures payment or performance of an obligation.

Comment

~ The terms chosen have no common law or statutory roots in order to avoid the implication that existing law referable to any of the numerous terms now used to describe secured transactions in real estate is applicable. Thus, the relationship of "mortgagor-mortgagee," "grantor-debtor," "settlor-debtor," or "purchaser-seller" -- terms which describe the participants in a "mortgage" or "deed of trust" -- becomes "secured creditor-debtor" to describe the participants in a "security agreement," if the "security interest" is in a residential dwelling or farm.

The term "security agreement" can include a purchase money mortgage in favor of a commercial creditor and does not alter existing law pertaining to its priority over certain categories of claimants.

Section 109. Notice of Intent to Foreclose. A secured creditor may seek to foreclose on the security interest which is the subject of a security agreement by mailing to the debtor by [registered] and regular mail and by posting prominently on the security property a Notice of Intent to Foreclose, in English and in the language of the debtor, in substantially the following form:

NOTICE OF INTENT TO FORECLOSE

You are in danger of losing your property. Please read the enclosed carefully and observe the time limits. If you do not understand this notice, contact a lawyer.

You are in default on your security agreement no. _____
because [reason(s) for and underlying facts of claimed default]

Unless you take one of the steps described in this Notice the law permits us to hold a public sale of your home in four months. You may be able to prevent this if you:

1. Pay the installments now due. If you pay all the installments now due, you can prevent the sale of your home. You have the right to make up all the missed installments any time up to five days before the public sale. However, if you wait until we have begun advertising the sale, the law requires that you reimburse us for all expenses incurred.

(2) Disagree with our claim that you are in default. If you have a defense to our claim that you are in default for the reasons(s) stated in this Notice, you are entitled to a court hearing. You should contact a lawyer at once so that you can file a lawsuit within thirty days.

(3) Attempt to sell your home on the private real estate market. The law provides you with a three-month period of time

(beginning with the receipt of this Notice) in which to sell your home privately. If you use the services of a real estate broker, or other sales techniques, it is more likely that you will obtain a higher price for your home than we will be able to if we are forced to sell it at a public auction. You are urged to take this opportunity to minimize your losses.

If you do not understand this Notice, you are advised to contact a lawyer.

Comment

The creditor may trigger the foreclosure process by mailing a Notice of Intent to Foreclose to the debtor. No attempt is made to impose restrictions on when the Notice may be mailed, or what constitutes a default. As a practical matter, if, as it usually will be, the claimed default is failure to make a payment, the creditor will not possess the administrative capability to issue a notice until one month after the date of the last payment. The grounds for default may be determined by reference to the security agreement, and traditional remedies are available for unconscionable terms.

The main purpose of the Notice is to explain to the debtor the options the law provides -- private sale, the opportunity to be heard in court on a contractual defense, and cure and reinstatement rights -- and to point out the time limits on the exercise of the various options.

The Notice must be written in a manner substantially equivalent to the one provided. Both the Notice and its attachment must be written in plain and understandable English and in the language of the debtor.

Section 110. Opportunity to Raise Contractual Defenses.

(1) The debtor may assert any judicially cognizable defense to the claim of the existence of a valid obligation or to the creditor's claim of default by filing a [civil action] seeking an injunction within one month of receipt of the Notice of Intent to Foreclose.

(2) The prevailing party shall be entitled to court costs and reasonable attorney's fees.

Comment

While the overall purpose of the Act is to permit a power of sale to be exercised within a reasonable period of time, and to avoid a judicial foreclosure proceeding in every instance -- and its attendant costs in terms of time and money -- this section affords a debtor with a contractual defense a reasonable opportunity to be heard. Court costs and attorneys' fees are automatically awarded to the prevailing party to encourage meritorious defenses and to discourage dilatory defenses.

Section 111. Cure and Reinstatement Rights. A debtor in default shall have the right to cure and reinstate the security agreement any time until five days before the date of the public sale, provided that the debtor reimburse the creditor for any expenses the creditor has incurred in satisfying the requirements of Section ___ of this Act.

Comment

This section establishes a mandatory time period within which the secured creditor must accept a debtor's offer to pay all of the monthly payments then due, as well as any expenses incurred by the creditor in advertising the property for sale. The right to cure and reinstatement is extinguished five days before the date of public sale in order to avoid chilling competitive bidding at the sale. If it is believed that permitting cure and reinstatement until that time may not avoid depressing the sale price, an earlier time may be set. It is important, however, in order to avoid disputes over whether an offer to cure was timely, to set an easily calculated date after which the right is cut off.

It may also be appropriate to limit the number of times a debtor may cure and reinstate after the creditor has set the 30-day public sale advertisement period in motion. Even though the debtor is required to reimburse the creditor for expenses incurred, direct and indirect, including newspaper advertising

fees, fees for the production of appraisal reports, labor, and overhead, some indirect costs are incapable of measurement and it may be unfair to sanction the unlimited exercise of cure and reinstatement rights.

Section 112. Private Sale by the Debtor. All debtors covered by this Act shall have three months from the date of receipt of the Notice of Intent to Foreclose to sell the real estate which is the subject of the security agreement. The real estate shall be deemed to be sold if, at the end of the three- or six-month period, title has not been transferred but all the following conditions have been met:

(1) all contingencies have been satisfied;

(2) the amount of the prospective buyer's deposit on the real estate is at least equal to the amount necessary to permit the debtor to cure and reinstate the security agreement as of the date of final closing; and

(3) the debtor and prospective buyer have agreed in writing that, in the event title is not transferred to the buyer, the secured creditor shall be entitled to that portion of the deposit which is necessary to permit the debtor to cure and reinstate the security agreement.

If no sale within the definition of this section has occurred upon the expiration of the three-month period, the

creditor may conduct a public sale in accordance with the procedures set forth in Section ____.

Comment

This section grants all debtors who have received a Notice of Intent to Foreclose three months in which to attempt a private sale of the property. One of the least satisfactory aspects of present mortgage foreclosure procedures is the method of sale. Sale by public auction -- even if it is conducted in the commercially reasonable fashion required by this Act -- is inherently inferior to a private sale in a true market setting. While the three-month limitation does not simulate a true market model, it should give most debtors a reasonable opportunity to recover their equity.

It is likely, however, that the debtor may have a buyer but that the transaction will not be closed at the end of the three-month period. This section draws a line between transactions which are still contingent upon the happening of some future event, such as the ability to obtain financing, and transactions where all contingencies have been satisfied and it is likely that the sale will be completed. As a protection for the creditor against the possibility that closing does not occur, two other conditions must be met by the end of the three months: (1) the deposit given by the prospective buyer must be sufficient to cover all missed payments due to the creditor at the end of the

three-month period; and (2) the debtor and buyer must agree in writing that if closing does not take place, the creditor is entitled to that portion of the security deposit necessary to cure and reinstate the debtor. If the three conditions are met, the creditor is precluded from commencing the public sale procedures because he is adequately protected.

This section operates to the clear advantage of both debtor and creditor and, if extensively utilized, could dramatically reduce both parties' losses associated with traditional foreclosure. It is to the creditor's advantage to urge its use in the Notice of Intent to Foreclose and to provide assistance to debtors on the best methods of promoting a private sale.

It should be noted that the opportunity to effect a private sale is automatically granted any debtor who receives a Notice of Intent to Foreclose, and the three months begin running regardless of whatever other options the debtor elects.

Section 113. Public Sale by the Secured Creditor. Whenever a public sale by the creditor is authorized by this Act, the sale must be preceded by good faith efforts to publicize as broadly as possible that the following sale procedures will be utilized:

(1) inspection of the premises at any reasonable time during the thirty-day advertisement period will be permitted;

(2) [appraisal reports] and all other reports customarily furnished prospective buyers will be furnished upon request;

(3) written bids may be submitted prior to the date of the sale;

(4) on acceptance of a written or oral bid, the bidder must deposit 10 percent or more of the bid price in cash, or letter of credit or bank obligation and complete the transaction within five weeks; and

(5) if the successful bidder fails to make the deposit at the time of acceptance of the bid or fails to pay the balance of the price, the real estate may be resold subject to the provisions of this section. A defaulting bidder is liable on his bid which may be specifically enforced against him or, at the option of the creditor, the deposit may be retained or recovered. Any sums retained or recovered shall be applied in the same manner as the proceeds of a completed sale.

Comment

This section prescribes public sale procedures which may be instituted whenever the debtor has failed to sell privately. An independent trustee, public or otherwise, with express fiduciary responsibilities to both creditor and debtor was not believed to be necessary because the sale requirements will afford sufficient protection of both parties' interests.

The purpose of this section is to avoid the artificially depressed sales price that public auctions of foreclosed properties can produce. Thus, an effort to generate as much buyer interest as possible is required.

Section 114. Application of Proceeds from Sale. The proceeds from a sale shall be applied in the following order:

- (1) the expenses of a public sale, including direct and indirect expenses incurred pursuant to Section _____;
- (2) the reasonable expenses of securing possession before sale; holding, maintaining, and preparing the real estate for sale, including taxes, insurance, and reasonable attorney's fees;
- (3) the satisfaction of the indebtedness secured;
- (4) the satisfaction in the order of priority of subordinate security interests of record; and
- (5) remittance of any excess to the debtor.

Comment

This is the typical manner in which proceeds of a sale are applied, except, under this Act, the expenses of a public sale may be greater because of the efforts necessary to obtain the highest possible sale price.

Section 115. Effect of Disposition; Right of Redemption

Repealed. Upon payment by the purchaser at a public or private sale, a deed shall be executed to the purchaser reciting the facts that the sale was conducted in accordance with the requirements of this Act, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers.

The deed executed to the purchaser shall convey the interest in the real estate which the debtor had the power to convey, free of the security interest under which the sale occurred and any subordinate interests of record.

After sale as provided for in this Act, no person shall have any right by statute or otherwise to redeem from the sale.

Comment

This section makes clear that a purchaser under either method of sale takes free of interests of the debtor and all subordinate parties by requiring a recital of these facts in the deed. The weight accorded such a recital eliminates a rigorous examination by the purchaser to determine whether the details of the statutory requirements were met and further assures that the sale price will more properly reflect the real market value of the property.

In addition, this section prohibits post-sale redemption, a right generally accorded by statute, because of its depressant effect on sale price due to the inability of the buyer to receive full and effective title immediately.

[If felt appropriate for public policy reasons:]Section ____.

Anti-deficiency Judgment. No debtor covered by this Act shall be liable for a deficiency judgment if the proceeds of the sale of the secured property fail to satisfy the outstanding debt.

Comment

The primary argument in favor of a blanket prohibition against deficiency judgments is that in making the loan, the secured creditor has, by the very nature of the loan, agreed to look to the security property and not to the personal credit of the debtor for satisfaction of the debt. Even if the creditor did implicitly look to both the security property and the debtor's personal credit in making a decision to loan, anti-deficiency judgment legislation will force the creditor to look solely to the security, thus fostering prudent lending policies.

The real impact of anti-deficiency legislation will be on the second and third mortgage holder. In the United States, banks and savings and loan institutions, the bulk of the industry making first mortgages, have not utilized their authority to seek

a personal judgment against a debtor when the proceeds of the judicial sale fail to satisfy the debt. Those lenders who are inclined to seek deficiency judgments, the second and third mortgage holders, will be discouraged from over-mortgaging a home by anti-deficiency judgment legislation.

Section ____ . Foreclosure by Judicial Proceeding.

(a) Any real estate security interest may be foreclosed in a judicial proceeding that directs a judicial sale of the real estate that is subject to the security interest.

(b) In his initial pleading the secured creditor shall state facts showing that the notice of intention to foreclose was properly given.

(c) Process shall be served on all persons whose interest is to be cut off by the judicial sale. If the court finds that the debtor is in default and that the creditor has properly given notice of intention to foreclose, it shall enter judgment for the amount due with costs and order the sale of the real estate. The judgment also shall specify the official, secured creditor, the debtor, or other person authorized to conduct the sale. Unless otherwise specified in the judgment, the sale shall be conducted in accordance with Section ____ of this Act.

(d) The person conducting the sale must seek potential buyers and bidders through means of communication reasonable for the type of real estate involved, even though there has been or

will be notice by publication for the purpose of service of process or informing persons having a claim to the property.

(e) The judgment shall direct the person conducting the sale to make a report to the court. If it appears to the court that justice has been done, it shall confirm the sale.

(f) If the sale is confirmed the person conducting it shall execute an instrument of conveyance under Section ____.

(g) If possession the property is wrongfully withheld after confirmation of the sale, the court may compel delivery of possession to the person entitled thereto by order directing the appropriate official to effect delivery of possession.

Comment

This section prescribes the procedure for foreclosure by judicial sale. It makes applicable to such a proceeding the rules of civil procedure. Subsection (b) states certain rules of pleading necessary to make operative rights given elsewhere in the Act. Subsection (c) calls for entering a judgment for the amount adjudged to be due and then prescribes how the court official is to conduct the sale. Subsection (d) repeats for judicial sales the requirement for exercise of power of sale, that the official or other person conducting the sale use some means other than publication of a legal notice to find buyers. If a judicial sale is held, subsection (e) requires that the sale

details be presented to the court for confirmation. Subsection (f) states the formalities of the instrument of conveyance when the sale is conducted by the court. Finally, subsection (g) enables the court to put the purchaser in possession where possession is wrongfully withheld after confirmation of the sale.

Section ____ . Commencement of Judicial Foreclosure Proceedings When Waste or Abandonment is Alleged.

(a) Whenever a secured creditor has reason to believe that the debtor is committing waste or has abandoned the security property, and as a consequence there is a threatened inadequacy of the security to meet the outstanding debt, a complaint setting forth the facts relating to such acts and seeking a foreclosure order and the right to be placed in immediate possession may be filed. The complaint shall be served in the manner required by law on the debtor and on holders of all subordinate security interests of record.

(b) A preliminary hearing on the complaint shall be held within 5 days of service of the complaint and if the court is satisfied that the allegations of waste or abandonment have been proven are credited, the secured creditor shall be placed in immediate possession. A foreclosure order authorizing sale of the security property in accordance with Section ____ shall be automatically entered within 21 days after the date of the

preliminary hearing unless the debtor asserts claims or defenses to the default prior to the expiration of the 21-day period.

Comment

This section provides as a matter of law that an act of waste or abandonment which threatens to decrease the value of the security property is grounds for foreclosure and establishes an expedited and what may be a summary hearing procedure to place the creditor in possession of the property prior to sale. However, there must be actual or threatened inadequacy of the security property to meet the outstanding debt to ensure that the extraordinary relief granted is necessary to the creditor's repayment.

There is a 21-day delay between the time the creditor is placed in possession and the date of entry of a foreclosure decree authorizing a public sale in order to prevent an unjust summary termination of the debtor's interests. The debtor may have a defense to the default which led to abandonment, or may have appeared to have abandoned the property when in fact he was merely temporarily absent. The five day period before the preliminary hearing may not be sufficient time to raise the first defense properly; and in the latter case, where the court is in doubt, the creditor may be placed in possession pending entry of a foreclosure decree.

D. G. S. R. S.

AMENDMENTS TO THE NATIONAL HOUSING BANK ACT, 1922

CHAPTER V A

SPECIAL PROVISION FOR ENFORCEMENT OF CLAIMS

Definition 36.A In this Chapter unless the context otherwise requires, -

"borrower" means any person to whom any credit line has been sanctioned for housing by any housing finance institution, whether availed of or not, and includes -

- (i) in the case of a company or Corporation, its subsidiaries;
- (ii) in the case of a Hindu undivided family, any member thereof or any firm in which such member is a partner;
- (iii) in the case of a firm, any partner thereof or in any other firm in which such partner is a partner, and
- (iv) in the case of an individual, any firm in which such individual is a partner.

Applicability of Chapter V 36.B The provisions of this Chapter shall apply to only those Housing finance institutions which have availed of any refinance or credit facilities from the National Housing Bank under any of its schemes.

Right of housing finance institutions in case of default 36.C(1) Where any borrower, who is under a liability to a housing finance institution under an agreement, makes any default in repayment of any housing loan or advance or any instalment thereof or otherwise fails to comply with the terms of the said agreement, the housing finance institution shall have the right to take possession as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to it.

(2) Any transfer of property made by the housing finance institution in exercise of its powers under sub-section(1), shall vest in the transferee all rights in or to the property transferred, as if the transfer had been made by the owner of the property.

(3) Where any action has been taken against the borrower under the provisions of sub-section(1), all costs, charges and expenses, which in the opinion of the housing finance institution have been properly incurred by it as incidental thereto, shall be recoverable from the borrower and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the housing finance institution, and the residue of the money so received shall be paid to the person entitled thereto.

Power to
call for
repayment
before
agreed period

36.D Notwithstanding anything in any agreement to the contrary, the housing finance institution may, by notice in writing, require any borrower to whom it has granted any housing loan or advance to discharge forthwith in full, its liabilities to the housing finance institution -

- (a) if it appears to the housing finance institution that false or misleading information in any material particular was given by the borrower in his application for the housing loan or advance; or
- (b) if the borrower has failed to comply with the terms of its contract with the housing finance institution in the matter of the housing loan or advance; or
- (c) if there is a reasonable apprehension that the borrower is unable to pay his

debts or that proceedings for liquidation may be commenced in respect thereof; or

- (d) if the property pledged, mortgaged, hypothecated or assigned to the housing finance institution as security for the housing loan or advance is not insured and kept insured by the borrower to the satisfaction of the housing finance institution or ~~depreciates~~ depreciates in value to such an extent that in the opinion of the housing finance institution, further security to its satisfaction should be given and such security is not given; or
- (e) if, for any reason it is necessary to protect the interests of the ~~banking company~~ housing finance/ institution.
- 36.E(1) Where a borrower, in breach of any agreement, makes any default in repayment of any housing loan or advance or any instalment thereof or otherwise fails to comply with the terms of his agreement with the housing finance institution or where the housing finance institution requires a borrower to make immediate repayment of any housing loan or advance under section 36D and the borrower fails to make such repayment then, without prejudice to the provisions of section 36.C of this Act and of section 69 of the Transfer of Property Act, 1882 (4 of 1882), any officer of the housing finance institution, generally or specially authorised by the National Housing Bank in this behalf, may apply to the District Judge within the limits of whose jurisdiction the borrower carries on the whole or substantial part of his business for one or more of the following reliefs, namely :-

Special provisions for enforcement of claims by housing finance institutions

- 4
- (a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the housing finance institution as security for the housing loan or advance; or
 - (b) for an ad interim injunction restraining the borrower from transferring or removing his assets from the premises of the borrower without the permission of the housing finance institution which such removal is apprehended.

(2) An application under sub-section(1) shall state the nature and extent of the liability of the borrower to the housing finance institution, the ground on which it is made and such other particulars as may be prescribed.

Procedure of District Judge in respect of applications under 36E.

36.F(1) When the application is for the reliefs mentioned in clause (a) and (b) of sub-section(1) of Section 36E(1), the District Judge shall pass an ad-interim order attaching the security, or so much of the property of the borrower as would on being sold realise in his estimate an amount equivalent in value to the outstanding liability of the borrower to the housing finance institution, together with the costs of the proceedings taken under section 36E, with or without an ad interim injunction restraining the borrower from transferring or removing his assets.

(2) Before passing any order under sub-section(1) the District Judge may, if he thinks fit, examine the officer making the application.

(3) At the same time as he passes an order under sub-section(1), the District Judge shall issue to the borrower a notice accompanied by copies of the order, the application and the evidence, if any, recorded by him, calling upon him to show cause on a date to be specified in the notice why the ad interim order of attachment should not be made absolute or the

injunction confirmed.

(4) If no cause is shown on or before the date specified in the notice under sub-section(3), the District Judge shall forthwith make the ad interim order absolute, and direct the sale of the attached property or confirm the injunction.

(5) If cause is shown, the District Judge shall proceed to investigate the claim of the housing finance institution in accordance with the provisions contained in the Code of Civil Procedure[Act⁵ of 1908] in so far as such provisions may be applied thereto.

(6) After making an investigation under sub-section(5), the District Judge, may -

- (a) confirm the order of attachment and direct the sale of attached property;
- (b) vary the order of attachment so as to release a portion of the property from attachment and direct the sale of the remainder of the attached property;
- (c) release the property from attachment;
- (d) confirm or dissolve the injunction;

Provided that when making an order under clause(c), the District Judge may make such further orders as he thinks necessary to protect the interests of the housing finance institution and may apportion the costs of the proceedings in such manner as he thinks fit.

Provided further that unless the housing finance institution intimates to the District Judge that it will not appeal against any order releasing any property from attachment, such order shall not be given effect to until the expiry of the period fixed under sub-section(8) within which an appeal may be preferred or, if
 an XXXXXXXX

54

an appeal is preferred, unless the High Court otherwise directs until the appeal is disposed of.

(7) An order of attachment or sale of property under this section shall be carried into effect as far as practicable in the manner provided in the Code of Civil Procedure, 1908 (Act 5 of 1908) for the attachment or sale of property in execution of a decree as if the housing finance institution were the decree holder.

(8) Any party aggrieved by an order under sub-section(4) or sub-section(6) may, within thirty days from the date of the order, appeal to the High Court, and upon such appeal the High Court may, after hearing the parties, pass such orders thereon as it thinks proper.

(9) Where proceedings for liquidation in respect of a borrower have commenced before an application is made under sub-section(1) of Section 36E, nothing in this section shall be construed as giving to the housing finance institution any preference over the other creditors of the borrower not conferred on it by any other law.

(10) The functions of a District Judge under this section shall be exercisable -

- (a) in a presidency town, where there is a city civil court having jurisdiction, by a judge of that court and in the absence of such court, by the High court, and
- (b) elsewhere, also by an additional District Judge or by any judge of the principal court of civil jurisdiction.

55

(11) For the removal of doubts it is hereby declared that any court competent to grant an ad-interim injunction under this section shall also have the power to appoint a Receiver and to exercise all the other powers incidental thereto.

recovery of
amounts due
to the housing
finance
institution as
in arrear of
land revenue

36G. Where any amount is due to the housing finance institution in respect of any accommodation towards housing granted by it to any borrower, the housing finance institution or any person authorised by it in writing in this behalf, may, without prejudice to any other mode of recovery, make an application to the State Government for the recovery of the amount due to it and if the State Government or such authority, as that Government may specify in this behalf, is satisfied, after following such procedure as may be prescribed, that any amount is so due, it may issue a certificate for that amount to the Collector, and the Collector shall proceed to recover that amount in the same manner as an arrear of land revenue.

Chief Metropolitan
Magistrate and
District Magistrate
to assist housing
finance
institution in
taking charge of
property

364(1) Where any property, effects or actionable claims have been sold or leased in pursuance of any power conferred under this Chapter, the housing finance institution or any other person authorised by the housing finance institution may, for the purpose of taking into custody or control any such property, effects or actionable claims may request in writing the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any property or books of accounts or other documents^{relating}

56

such property or effects or actionable claims may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or ~~the District Magistrate~~ as the case may be, the District Magistrate shall, on such request being made to him,-

- (a) take possession of such property, effects or actionable claims and books of accounts and other documents relating thereto; and,
- (b) forward them to the housing ~~finance~~ finance institution or other person, as the case may be.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

Power of the court to repay construction loan

36I(1) No court shall pass any order or title on any matter relating to immovable property in the purchase or construction of which, any loan or advance has been made by a housing finance ~~institution~~ institution, unless an order is passed ~~for~~ for repayment of the dues of such housing finance institution.

(2) Where the circumstances require, the court may, having regard to the conditions in which any loan or advance has been made by the housing

finance institutions, pass any interim order permitting the concerned party to let out the house or any other immoveable property, as the case may be, which is accepted as security for the loans and advances given by the housing finance institutions for such rent as may be considered proper in the circumstances, to facilitate recovery of dues by the housing finance institutions.

AMENDMENT TO SECTION 14-
CHAPTER IV OF THE NHB ACT

14... ..

- (a) promoting, establishing supporting or aiding in the promotion, establishment and support of housing finance institutions and industries engaged in construction of houses and manufacture of building materials.
- (b) making of loans and advances or rendering any other form of financial assistance whatsoever to housing finance institutions, scheduled banks, and industries engaged in construction of houses and manufacture of building materials;

Power to take over and complete the housing project

24A(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, the National Housing Bank, may impose such conditions as it may think necessary or expedient for completion of the housing project, when such project may fall within any of its schemes for the economically weaker sections of society.

(2) The National Housing Bank may, in case of housing project falling under any of the schemes for the economically weaker sections of the society may take over continuation and completion of the housing project, notwithstanding any offer by the borrower or the concerned party to repay in full and so discharge the liability under any agreement in respect of such project.

59