

Banking Baatein: T.R. Radhakrishnan



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Borrowers can seek relief under SARFAESI Act via counter-claim for losses and damages

Under the SARFAESI Act there have been many instances of the Authorised Officer of the lending bank and the Presiding Officer of DRT rejecting counter claims filed by borrowers for losses and damages arising out of any negligence on the part of the lending bank to carry out its duty of serving its customers with care and concern. Such rejections are based on the mistaken notion that there is no rule under the SARFAESI ACT that allows consideration of such claims. Owing to this false notion, advocates also often do not encourage borrowers to file counter claims in the DRT. A scrutiny of the SARFAESI ACT, however, shows that it does not prevent the borrower from claiming losses and damages. In some cases, this counterclaim amount can even be more than the demand of the lending bank which, in turn, will create a “NO DEBT DUE” situation. Let us see why this is so.

Under the heading **Application of other laws not barred**, Section 37 of the SARFAESI ACT states that “The provisions of this act or rules made thereunder shall be in addition to, and not in derogation of, the Companies Act 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956(42 of 1956) the Securities and Exchange Board of India Act, 1992(15 of 1992), the Recovery of Debt Due to Banks and Financial Institutions Act, 1993(51 of 1993) or any other law for the time being in force.”

This section clearly and without any ambiguity states that the provisions of the SARFAESI ACT is applicable **in addition to and not in derogation of the existing laws for the time being in force** which means that other laws for the time being in force particularly those Acts in Section 37 of the SARFAESI ACT mentioned above, are also equally applicable while adjudicating cases under the SARFAESI ACT. The Presiding Officer of any Debt Recovery Tribunal should not overlook or set aside other laws that are in force while adjudicating cases under the SARFAESI ACT.

In this connection, the following Acts will also come into play while delivering judgment under the SARFAESI ACT:

- A.** Section 19 (6) to (11) of The Recovery of Debts Due To Banks and Financial Institutions Act, 1993 under “Application to the Tribunal” stipulate the procedure with regard to set-off and counter claim. Section 19(8) states “A defendant in an application may, in addition to his right of pleading a set-off under subsection (6), set up, by way of counter claim against the claim of the applicant, any right or claim in

respect of a cause of action accruing to the defendant against the applicant either before or after the filing of the application but before the defendant has delivered his defense or before the time limited for delivering his defense has expired, whether such counter-claim is in the nature of a claim for damages or not.”

Hence, what is applicable under The Recovery of Debts Due To Banks and Financial Institutions Act, 1993 is also equally applicable under SARFAESI ACT, 2002.

B. ORDER VIII [WRITTEN STATEMENT, SET-OFF AND COUNTER CLAIM] of The **Code of Civil Procedure, 1908** stipulates under section 6, 6A, 6B, 6C the rules to set-off and counter claim. Rule 6 under Particulars of set-off to be given in written statement states, “(1) where in a suit for the recovery of money the defendant claims to set-off against the plaintiff’s demand any ascertained sum of money leally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff’s suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off.” Besides, Section 6A stipulates under Counter claim by defendant: “(1). A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defense or before the tile limited for delivering his defense has expired, whether such counter claim is in the nature of a claim for damages or not:

Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

2. Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and the counter claim.

3. The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the Court.

4. The counter claim shall be treated as a plaint and governed by the rules applicable to plaints.” Hence, the borrower can claim losses and damages under the SARFAESI ACT by invoking the aforesaid sections of CPC.

C. An aggrieved borrower can claim losses and damages under the Law of Tort. Tort as defined in Salmond and Heustor, Law of Torts, 14,15 (20th edition, 1992) is, “A tort is a civil wrong for which the remedy is a common law action for unqualified damages, and which is not exclusively the breach of contract or breach of trust or other merely equitable obligation.” Winfield and Jolowicz on Tort (12th Edition 1984) state, “Tortious liability arises from the breach of a duty primarily fixed by law, this duty is towards persons generally and its breach is redressable by an action for liquidated damages.” These two definitions were cited by Supreme Court in Jay Laxmi Salt Works Pvt. Ltd vs. State of Gujarat, JT (1994) 3 SC 492 At p.501. Hence, the borrowers have every right to claim losses and damages or put up a counter claim under SARFAESI ACT, 2002.

D. The borrowers also can claim compensation on account of losses and damages due to deficiency in services under The Consumer Protection Act, 1980 and as amended by Act No. 62 of 2002. Section 2(1) (g) of The Consumer Protection Act states, “(g)

“Deficiency” means any fault, short coming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.” Non-compliance of Reserve Bank of India directions to Banks and Financial Institutions also come under the category of deficiency in service. For example, in the case of Mrs. Visalakshmi Shashidaram vs. Branch Manager, Syndicate Bank, Belgaum, 1997 (1) CPR 107 “mere filing of the bank suit for recovery of the amount may not be absolute bar on Consumer Commission to go into question of deficiency in banking service.” Thus, if pursuant to the contract, the bank did not disburse the amount and if there was any resultant default in the payment on account thereof, that may be a ground open to the Account Holders to complain of deficiency in service by the bank.”

- E. The Universal Declaration of Human Rights, whose preamble starts with “whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of human family is the foundation of freedom, justice and peace in the world”, declares under the following articles, “Article 3:- Everyone has the right to life, liberty and the security of person”, “Article 7:- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration and against any incitement to such discrimination”, “Article 8:- Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”, **“Article 12: no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honour and reputation. Everyone has a right to protection of the law against such interference or attacks”**, “Article 17: 1. Everyone has a right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property”, **“Article 25:1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”** Hence, the borrowers can also seek remedy under the Human Rights Act to claim loss and damages and compensation for the wrong-doings of the bank. In commensuration with the Human rights declaration, the Indian Constitution also has incorporated the various tenets of Human Rights under the Fundamental Rights and the Directive Principles of the State.

- F. Yet another law that is very important during the adjudication under the SARFAESI ACT is the Principles of Natural Justice. In the famous Maneka Gandhi vs. Union of India case reported in AIR 1978 Supreme Court 597 the Hon’ble Supreme Court discussed the increasing importance of Natural Justice and observed that Natural Justice is a great humanizing principle intended to invest law with fairness and to secure Justice and over the years it has grown in to a widely pervasive rule. The Supreme Court extracted a speech of Lord Morris in the House of Lords which is a very interesting speech, “That the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described by many authorities. But any analysis must bring into relief their spirit and their inspiration rather than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must,

in various divergent situations, be done. **The principle and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only “fair play in action”. Nor do we wait for directions from Parliament.”**

Section 22 of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 clearly confirms that procedures and powers of the Tribunal and the Appellate Tribunal shall be governed by Principles of Natural Justice. **“22.Proceedure and powers of the Tribunal and the Appellate Tribunal: - (1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice** and, subject to the other provisions of this act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.” Besides, in view of section 22(1) of the DRT ACT, 1993, in the case of Allahabad Bank vs. Radha Krishna Maity, (1999) 6, SCC 755, the Supreme Court ruled that “the Tribunal can exercise powers contained in CPC and can even go beyond the Code as long as it passes orders **in conformity with the principles of natural justice.”**

In fact, a separate study should be initiated into the various rules of the SARFAESI ACT, 2002, to check whether the said act has taken into account and incorporated the Principles of Natural Justice in all its fairness, justice and good conscience and also whether the Authorised Officer of the bank and the Presiding Officer at DRT follow the same in its letter and spirit.

Last but not the least, coming back to the importance of putting up a claim for loss and damages or a counter claim under SARFAESI ACT, the most important aspect is as stated in Section 6D of The Code of Civil Procedure, 1908 which states, **“6D. Effect of discontinuance of suit. If any case in which the defendant sets up a counter claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter claim may nevertheless be proceeded with.”** Further, Section 7 of The Code of Civil Procedure, 1908 states, **“7. Defence or set off founded upon separate grounds.** Where the defendant relies upon several distinct grounds of defence or set off (or counter claim) founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.” This means that even if the suit of the plaintiff is stayed, discontinued or dismissed, the counter claim will continue till final adjudication.

In view of what has been stated in the SARFAESI ACT, 2002, it is apparent and necessary that the borrowers should make it mandatory to file their claim for losses and damages arising out of wrong-doings by the lending bank in their application to DRT against the notice of possession served by the Authorised Officer of the bank and the advocates also must invariably incorporate this claim in their pleadings before DRT.

Preparation of an effective claim for losses and damages as per the prevailing laws is the job of a knowledgeable, articulate, competent professional expert.