A M/S KUT ENERGY PVT. LTD. & ORS.

v.

THE AUTHORIZED OFFICER, PUNJAB NATIONAL BANK, LARGE CORPORATE BRANCH, LUDHIANA & ORS.

B (Civil Appeal Nos. 6016-6017 of 2019)

AUGUST 20, 2019

[UDAY UMESH LALIT AND VINEET SARAN, JJ.]

Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002: s. 13(2) – Security interest – Enforcement of, in favour of secured creditor – Held: 'Secured creditor' would be entitled to proceed only against the 'secured assets' mentioned in the notice u/s. 13(2) – On facts, in loan settlement, debtor deposited Rs.40 crores in terms of the order of the High Court only to show his bona fides when a revised offer was made by them – Deposit was not towards satisfaction of the debt in question and that is why the High Court had directed that the deposit would be treated to be a deposit in the Registry of the High Court – Thus, the debtor entitled to withdraw the sum deposited by them in terms of said order – Claim of the debtor cannot be negated by any direction that the money may continue to be in deposit with the Bank – Thus, the amount deposited by debtor to be returned to them.

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Allowing the appeals, the Court

HELD: 1.1 In the instant case the deposit of Rs.40 crores in terms of the order of the High Court on 11.10.2017 was only to show the *bona fides* of the appellants when a revised offer was made by them. The deposit was not towards satisfaction of the debt in question and that is precisely why the High Court had directed that the deposit would be treated to be a deposit in the Registry of the High Court. [Para 11] [744-H; 745-A]

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1.2 Going by the law laid down by this Court in *Axis Bank's* case, the *'secured creditor'* would be entitled to proceed only against the *'secured assets'* mentioned in the notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets

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and Enforcement of Securities Interest Act, 2002. On the strength of the law laid down, the appellants are entitled to withdraw the sum deposited by them in terms of said order dated 11.10.2017. Their entitlement having been established, the claim of the appellants cannot be negated by any direction that the money may continue to be in deposit with the Bank. The judgment and order passed by the High Court is set aside, and CMP No.5386 of 2018 preferred by the appellants is allowed and the amount deposited by the appellants in terms of the order dated 11.10.2017 is directed be returned to them within two weeks along with interest, if any, accrued thereon. [Para 11, 12] [745-B; D-E]

Axis Bank v. SBS Organics (P) Ltd. **(2016) 12 SCC 18 : [2016] 2 SCR 920 - referred to.**

Case Law Reference

[2016] 2 SCR 920 referred to. Para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6016-6017 of 2019.

From the Judgment and Order dated 19.03.2019 of the High Court of Himachal Pradesh at Shimla in CMP No. 4761 of 2018 and CMP No. 5386 of 2018 in CWP No. 2274 of 2017.

P. S. Patwalia, Sr. Adv., Yashraj Singh Deora, Ms. Sonal Mashankar (for M/s. Mitter & Mitter Co.), Advs. for the Appellants.

S. Guru Krishna Kumar, Sr. Adv., P. B. Suresh, Vipin Nair, Prithu Garg, Karthik Jayashankar, Kishore Kunal, Alok Kumar, Ms. Somya Yadava, Ms. Snigdha Singh, Chirag Babbar, Ashutosh Jain, Ketul Hansraj, Balaji Srinivasan, P. B. Suresh, Karthik Jayashankar, Advs. for the Respondents.

The Judgment of the Court was delivered by

UDAY UMESH LALIT, J.

1. These appeals arise out of the judgment and order dated 19.03.2019 passed by the High Court of Himachal Pradesh at Shimla in CMP Nos.4761 and 5386 of 2018 in CWP No.2274 of 2017.

2. An agreement was entered into between the appellants and the Government of Himachal Pradesh on 26.05.2008 for setting up 24 MW "Kut Hydro Electric Project" in District Shimla. For commissioning

A said Project, the appellants availed loan from the consortium of Punjab National Bank ('the Bank', for short), Corporation Bank and Central Bank of India. On 29.09.2015 the account of the appellant was declared NPA[1] by the Bank. A demand notice was thereafter issued by the Bank under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("SARFAESI Act", for short) on 15.03.2017. The amount due to the Bank as on 14.03.2017 was stated to be Rs.106,07,91,644.26/-.

3. Soon thereafter, three proposals were made by the appellants in quick succession on 27.06.2017, 01.08.2017 and 19.08.2017 offering Rs.84, 87 and 90 crores respectively for One Time Settlement ("OTS", for short). On 22.08.2017 a possession notice under Section 13(4) of the SARFAESI Act was issued by the Bank in respect of the Project in question. On 29.08.2017 a sale notice was issued in terms of which the concerned properties were to be sold by e-auction on 06.10.2017 with a reserve price of Rs.120 crores.

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4. Immediately an application seeking interim relief being SA No.481 of 2017 was moved by the appellants before the Tribunal[2], which prayer was rejected by the Tribunal by its order dated 06.10.2017. On 06.10.2017 itself, the e-auction was conducted by the Bank in which a bid was received from 2nd respondent for Rs.120,00,11,000/-. This prompted the appellants to revise the OTS proposal to Rs.140 crores. Such offer was made on 07.10.2017 and was followed by filing of CWP No.2274 of 2017 before the High Court on 10.10.2017 challenging (i) The notices dated 15.03.2017 and 22.08.2017 (ii) Sale Notice dated 29.03.2017 and (iii) Order dated 06.10.2017 passed by the Tribunal refusing to grant interim relief.

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5. The matter came up for preliminary hearing before the High Court on 11.10.2017 and the Counsel for the appellants submitted that in order to establish their *bona fides*, the appellants were willing and ready to deposit a sum of Rs.140 crores with the Bank. The submission was recorded and directions were issued by the High Court as under:

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> "Mr. B.C. Negi, learned Senior Advocate, states that without prejudice to the respective rights and contentions of the parties and subject to the outcome of the writ petition, pursuant to

[1] Non-Performing Asset

H [2] Debt Recovery Tribunal-(1), Chandigarh

petitioners' request (Annexure P-18), which is pending consideration with the lead Consortium Bank, in order to establish their bona fides, petitioners are ready and willing to deposit a sum of Rs.140 crores with the lead Consortium Bank (Punjab National Bank) in the following manner:-

(i) Rs.3 crores already deposited along with communication, dated 7th October, 2017 (Annexure P-18);

(ii) Rs.15 crores on or before 16th October, 2017;

(iii) Rs.22 crores on or before 1st November, 2017 and

(iv) Rs.100 crores on or before 11th December, 2017.

We direct that subject to the petitioners depositing a sum of Rs.140 crores with the Punjab National Bank, in terms of their statement, no coercive action shall be taken against them, more so when they are still in the actual physical possession of the assets, which fact is not disputed before us. Also, such deposit shall be subject to further orders, which may be passed by the Court. Deposit with the bank shall be treated to be a deposit in the Registry of this Court. Further, bank shall take a decision on the petitioners' request, dated 7th October, 2017 (Annexure P-18), which Mr. Ajay Kumar, learned Senior Advocate, states shall be taken within a period of four weeks from today. We further direct that in the event of petitioners' succeeding in the present petition and/or the bank agreeing with the petitioners' request, petitioners shall be liable to pay interest to the auction bidder on the amount already deposited pursuant to the auction. We further direct that till further orders, it shall not be obligatory on the auction purchaser to deposit the remaining balance amount.

We have not expressed any opinion with regard to the rights and claims of the State."

6. On 31.10.2017 the Bank rejected the revised OTS proposal for Rs.140 crores i.e. even before the sum of Rs.140 crores was deposited by the appellants. The appellants, therefore, filed CMP No.9618 of 2017 seeking modification of the aforementioned order dated 11.10.2017 stating *inter alia* that deposit of Rs.100 crores be made subjection to the sanction of the settlement proposal. It may be noted here that as on the date the

appellants had deposited a sum of Rs.40 crores in keeping with the commitment of first three stages as set out in the order dated 11.10.2017.

7. The Bank challenged the order dated 11.10.2017 by filing Special Leave Petition(C) Nos.4898-4904 of 2018 in this Court, submitting *inter alia* that the High Court ought not to have interfered in the matter while exercising writ jurisdiction, as alternate remedy was available to the appellants. The submission was accepted by this Court and the appeals arising from SLP(C) Nos.4898-4904 of 2018 were disposed of by this Court as under:

> "Heard learned counsel for the parties.
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> Delay condoned.
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> Leave granted.
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> The respondent is a debtor to the tune of Rs.325,00,00,000/- (Rupees Three hundred Twenty Five crores only) and above. The Bank has rejected a One Time Settlement proposal to settle for a figure of Rs.150,00,000/- (Rupees one hundred Fifty crores only), of which the debtor has deposited only Rs.40,00,00,000/- (Rupees Forty crores only) till date.
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> Meanwhile, an auction of the mortgaged property has already taken place, but, as no interim relief was granted by the Debt Recovery Tribunal by its order dated 06.10.2017, Respondent No.5, who is the highest bidder, has paid 25% of the bid amount, after which sale confirmation has taken place by a letter dated 07.10.2017. We may hasten to add that on 18.10.2017, a cheque for the balance of 75% was furnished by respondent No.5, but not encashed, and this was done again on 17.03.2018.
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> In a recent judgment delivered by one of us in Authorised Officer, State Bank of Travancore and Anr. Vs. Mathew K.C. (2018) 3 SCC 85, we have cautioned against the High Court interfering in such matters in the writ jurisdiction. Such caution has unfortunately not been heeded in the present case. Given the facts of the present case, we, therefore, set-aside the impugned orders passed by the High Court.
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> The appeals are allowed in the aforesaid terms.
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> Pending applications, if any, shall stand disposed of."

8. On 22.05.2018 the Bank filed CMP No.4761 of 2018 in aforesaid CWP No.2274 of 2017 seeking appropriation of amount of Rs.40 crores deposited by the appellants in terms of the order dated 11.10.2017, against the dues of the appellants. On the other hand, CMP No. 5386 of 2018 was filed by the appellants on 29.05.2018 in said Writ Petition for refund of said amount of Rs.40 crores. These applications were disposed of by the High Court by its judgment and order dated 19.03.2019. The submissions advanced by the rival parties were dealt with and the directions were passed as under:-

> "9. We have heard the learned counsel for the parties at a considerable length and gone through the record. So far as the prayer of the borrowers for the refund of the amount of Rs.40.00 crores is concerned, we do not find any substance in the same. It is not a case where the entire loan liability, as determined by the Consortium of Banks, has been satisfied on appropriation of sale proceeds of secured assets. The lead Bank has already filed suit for the recovery of Rs.129.47 crores, which is pending adjudication before the DRT. While the borrower/guarantors have a right to contest the bank's claim before the DRT, it is highly premature and presumptuous for this Court to comment upon the likely outcome of those proceedings.
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> 10. It goes without saying that if the bank's suit is decreed, fully or partially, the amount of Rs.40.00 crores, deposited by the petitioners before this Court, is liable to be adjusted/appropriated towards the decretal amount. However, in the event of dismissal of such suit, with a finding that the borrower or the guarantors are no longer under any liability, the amount so deposited by them can be refunded to them. Since all these issues are yet to be adjudicated by the DRT, we are of the view that the prayer made by the borrower/guarantors for refund of the amount is liable to be turned down and we order accordingly.
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> 11. The prayer made by the bank, on the other hand, deserves to be accepted in part to the extent that let the amount of Rs.40 crores lying deposited with the bank 'without any lien' be deposited with DRT, who in turn is directed to keep the same in a Nationalized Bank to fetch maximum rate of interest. The amount shall remain in FDRs till the decision of the suit filed by the lead Bank (Punjab National Bank). In case the suit is decreed and the decretal amount

A is more than Rs.40.00 crores or the interest accrued thereupon, the DRT is directed to transfer the said amount in favour of the Punjab National Bank for adjustment towards loan liability. In the event of dismissal of the suit, the borrower/guarantors shall be at liberty to seek refund of the said amount from the DRT."

B 9. While challenging the aforesaid view taken by the High Court, Mr. P.S. Patwalia, learned Senior Advocate for the appellants submitted that the deposit of Rs.40 crores with the Registry of the High Court in terms of the order dated 11.10.2017 was only to establish the *bona fides* of the appellants in support of the offer made by them. Once the Writ Petition itself was held not to be maintainable and the offer made C by the appellants was rejected by the Bank, the amount so deposited must be returned to the appellants. Reliance was placed on the decision of this Court in *Axis Bank vs. SBS Organics (P) Ltd.*[3]. Mr. S. Guru Krishna Kumar, learned Senior Advocate, appearing for the Bank however contended that the view taken by the High Court was perfectly D justified. It was submitted that since the dues of the appellants were far in excess of the value fetched by the sale of assets, the directions issued by the High Court not only secured the interest of the Bank but subserved public interest. In his submission the directions issued by the High Court were consistent with the principles laid down in *Axis Bank*[3], as the High Court had not allowed the application preferred by the Bank in its entirety E but had directed that amount be kept in deposit "without any *lien*."

10. In *Axis Bank*[3] the questions that arose for consideration were whether the money deposited, in order to maintain an appeal under Section 18 of the SARFAESI Act before the Debts Recovery Appellate Tribunal ('DRAT', for short) could be adjusted towards the amount due F to the concerned bank and whether the concerned bank had a lien over the money so deposited. The submissions of the concerned bank were recorded in para 4, the definitions of terms '*secured asset', 'secured creditor', 'secured debt'* and *'security interest'* were set out in paras 9 to 12. It was observed in para 14 that the secured creditor was entitled G to proceed "only against the secured assets" mentioned in the notice under Section 13(2) of the SARFAESI Act. The nature of pre-deposit in terms of Section 18 of the SARFAESI Act was considered in para 21 and it was concluded that such deposit was neither a '*secured asset'* nor was a *'secured debt'* and in the circumstances, the prayer for refund

H [3] (2016) 12 SCC 18

of amount in deposit was required to be allowed. This Court also considered the submission that the concerned bank had lien on the deposited amount in terms of Section 171 of the Contract Act, 1872. The submission was rejected. Paragraphs 14, 21, 22 and 23 of the decision of this Court in *Axis Bank*[3] were as under:-

> **"14.** A conspectus of the aforesaid provisions shows that under the scheme of the SARFAESI Act, a secured creditor is entitled to proceed against the borrower for the purpose of recovering his secured debt by taking action against the secured assets, in case the borrower fails to discharge his liability in full within the period specified in the notice issued under Section 13(2) of the Act. It is the mandate of Section 13(3) of the Act that the notice issued under Section 13(2) should contain details of the amount payable by the borrower and also the secured assets intended to be enforced by the secured creditor in the event of non-payment of the dues as per Section 13(2) notice. Thus, the secured creditor is entitled to proceed only against the secured assets mentioned in the notice under Section 13(2). However, in terms of Section 13(11) of the Act, the secured creditor is also free to proceed first against the guarantors or sell the pledged assets. To quote:
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> > "**13. (11)** Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (*a*) to (*d*) of sub-section (4) in relation to the secured assets under this Act."
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> … … …
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> **21.** The appeal under Section 18 of the Act is permissible only against the order passed by DRT under Section 17 of the Act. Under Section 17, the scope of enquiry is limited to the steps taken under Section 13(4) against the secured assets. The partial deposit before DRAT as a precondition for considering the appeal on merits in terms of Section 18 of the Act, is not a secured asset. It is not a secured debt either, since the borrower or the aggrieved person has not created any security interest on such pre-deposit in favour of the secured creditor. If that be so, on disposal of the appeal, either on merits or on withdrawal, or on being rendered infructuous, in case, the appellant makes a prayer for refund of

A the pre-deposit, the same has to be allowed and the pre-deposit has to be returned to the appellant, unless the Appellate Tribunal, on the request of the secured creditor but with the consent of the depositors, had already appropriated the pre-deposit towards the liability of the borrower, or with the consent, had adjusted the amount towards the dues, or if there be any attachment on the B pre-deposit in any proceedings under Section 13(10) of the Act read with Rule 11 of the Security Interest (Enforcement) Rules, 2002, or if there be any attachment in any other proceedings known to law.

C **22.** We are also unable to agree with the contention that the Bank has a lien on the pre-deposit made under Section 18 of the SARFAESI Act in terms of Section 171 of the Contract Act, 1872. Section 171 of the Contract Act, 1872 on general lien, is in a different context:

> D "**171.** ***General lien of bankers, factors, wharfingers, attorneys and policy-brokers***.—Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such E balance, goods bailed to them, unless there is an express contract to that effect."
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> … … …

23. Section 171 of the Contract Act, 1872 provides for retention of the goods bailed to the bank by way of security for the general F balance of account. The pre-deposit made by a borrower for the purpose of entertaining the appeal under Section 18 of the Act is not with the bank but with the Tribunal. It is not a bailment with the bank as provided under Section 148 of the Contract Act, 1872. Conceptually, it should be an argument available to the depositor, G since the goods bailed are to be returned or otherwise disposed of, after the purpose is accomplished as per the directions of the bailor."

11. In the present case the deposit of Rs.40 crores in terms of the order of the High Court on 11.10.2017 was only to show the *bona fides* H of the appellants when a revised offer was made by them. The deposit

was not towards satisfaction of the debt in question and that is precisely why the High Court had directed that the deposit would be treated to be a deposit in the Registry of the High Court.

Going by the law laid down by this Court in *Axis Bank*[3] the *'secured creditor'* would be entitled to proceed only against the *'secured assets'* mentioned in the notice under Section 13(2) of the SARFAESI Act. In that case, the deposit was made to maintain an appeal before the DRAT and it was specifically held that the amount representing such deposit was neither a *'secured asset'* nor a *'secured debt'* which could be proceeded against and that the appellant before DRAT was entitled to refund of the amount so deposited. The submission that the bank had general lien over such deposit in terms of Section 171 of the Contract Act, 1872 was rejected as the money was not with the bank but with the DRAT. In the instant case also, the money was expressly to be treated to be with the Registry of the High Court.

On the strength of the law laid down by this Court in *Axis Bank*[3], in our view, the appellants are entitled to withdraw the sum deposited by them in terms of said order dated 11.10.2017. Their entitlement having been established, the claim of the appellants cannot be negated by any direction that the money may continue to be in deposit with the Bank.

12. We, therefore set aside the judgment and order dated 19.03.2019 passed by the High Court, allow CMP No.5386 of 2018 preferred by the appellants and direct that the amount deposited by the appellants in terms of the order dated 11.10.2017 be returned to them within two weeks along with interest, if any, accrued thereon.

13. These appeals stand allowed in aforesaid terms. No costs.

Nidhi Jain Appeals allowed.