

**IN THE HIGH COURT OF PUNJAB & HARYANA  
AT CHANDIGARH**

**RA-CW No. 267 of 2020 (O&M) in  
CWP No. 2930 of 2019  
Date of Decision: 26.03.2021**

M/s. Hari Kewal Pvt. Limited, Anaj Mandi Sunam  
District Sangrur and others

.....Applicants/Petitioners

**Versus**

Debts Recovery Appellate Tribunal, New Delhi and others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE JASWANT SINGH  
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU**

Present: Mr. Aalok Jagga, Advocate  
for the applicants - review petitioners.

Mr. Anant Bir Sidhu, Advocate for the non-applicants /  
**contesting** respondent Nos. 3 & 4 – Punjab and Sind Bank.

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*[ The aforesaid presence is being recorded through video conferencing  
since the proceedings are being conducted in virtual court ]*

**HARINDER SINGH SIDHU & JASWANT SINGH, JJ.**

This application has been filed by the petitioners (defaulting borrowers) under Order 47 Rule 1 read with Section 151 CPC seeking review of the final order dated 13.01.2020 passed by this Court, to the extent that respondent No.3 - Bank be directed to refund Rs.2.40 crores deposited by the petitioner under interim orders of this Court during the pendency of the aforesaid writ petition.

**[2]** The applicant - Petitioner Company was incorporated on 01.05.1982. It was to set up a solvent plant engaged in rice husking and to act as millers and wholesale sellers of rice and allied products and undertake various other activities. It availed a Cash Credit Limit of Rs.6 Crores from the respondent No.3-Bank on 31.03.2008 and also availed of a Term Loan

of Rs.65 lakhs on 28.02.2009. On account of the default of the petitioner in

keeping with the re-payment schedule, the account of the petitioner was declared as NPA on 31.07.2009. The Bank initiated action under the SARFAESI Act, 2002 (for short “the 2002 Act”) and issued Demand Notice dated 01.09.2009 under Section 13 (2) of the 2002 Act claiming a total sum of Rs.7,64,76,821.68 as on that date. The request of the petitioner to regularize that amount was not accepted. Ultimately, the Bank issued notice dated 29.01.2010 under Section 13 (4) of the 2002 Act for taking symbolic possession of the properties against which the petitioner filed SA No.197 of 2010. The same was dismissed on 19.12.2014 by Debts Recovery Tribunal-II (DRT-II), Chandigarh. The appeal filed by the petitioner before the Debts Recovery Appellate Tribunal, Delhi, was dismissed vide order dated 18.09.2015 for its failure to comply with the requirement of pre-deposit and hence held not maintainable. The petitioner filed CWP No.23767 of 2015 assailing the order of the Tribunal and the Appellate Tribunal, which was withdrawn on 22.05.2017 with liberty to the petitioner to approach the Bank for amicable settlement. On 02.01.2018 the petitioner submitted a proposal for One Time Settlement offering to pay 50% of the NPA amount. Before any decision was taken on his proposal the Bank obtained order dated 12.07.2018 from the District Magistrate under Section 14 of the 2002 Act to take physical possession of the mortgaged properties.

[3] The petitioner filed CWP No.2930 of 2019 assailing the order of the District Magistrate and various consequential orders. It also prayed for a direction to the respondent - Bank to consider its application for One Time Settlement under the Scheme dated 08.09.2018.

[4] During the pendency of this petition, respondent – Bank issued order dated 11.02.2019 rejecting the offer of settlement submitted by the

petitioner. The petitioner, thereafter, filed CWP No.12142 of 2019 assailing the letter dated 11.02.2019 vide which its application for One Time Settlement was rejected. The petitioner had also prayed that respondent – Bank be directed to consider its offer for One Time Settlement. Both the writ petitions, i.e. CWP No. 2930 of 2019 and CWP No. 12142 of 2019 were heard together. CWP No.12142 of 2019 was dismissed vide order dated 13.01.2020 in view of the One Time Settlement (OTS) proposal for Rs. 3 crores only against an outstanding amount of Rs. 24.60 crores as on 30.09.2018 being not in consonance with the Recovery Management Policy, as also the availability of the mortgaged assets worth about Rs. 14 crores. In view of the dismissal of the said petition, the instant CWP No.2930 of 2019 was disposed of as having become infructuous vide order of even date, i.e. 13.01.2020.

[5] It is stated that with a view to show its *bona fide* intent to settle the loan account which was the subject matter of CWP No.2930 of 2019 the petitioner, under various interim orders of this Court, through different deposits had deposited a total amount of Rs.2.40 crores with the Bank. The said amount was deposited not for adjustment against the loan account, but merely to show the *bona fides* of the petitioner for effecting settlement with the Bank through 'One Time Settlement' (OTS). The amount was liable to be adjusted against the loan account only in the event of the prayer of the petitioner for such settlement being accepted by the Bank. As the Bank did not accept the prayer for 'One Time Settlement' and the petition was dismissed as infructuous the aforesaid amount deposited by the petitioner was required to be returned to the petitioner. It is stated that the petitioner

borrowed amount has to be returned back.

In support of his contention, Mr. Jagga, learned counsel for the applicant-petitioner has relied on a decision of the Hon'ble Supreme Court in *Axis Bank Versus SBS Organics (P) Ltd., 2016 (12) SCC 18 and M/s Kut Energy Pvt. Ltd Versus Punjab National Bank and Ors 2019 SCC Online 1057*. He also placed reliance on order dated 26.09.2019 in *C.M. No.6239-CWP-2019 in CWP No.23351 of 2018, Amiti Gupta and another Vs. State Bank of India and ors*, where relying on the aforesaid decision the amount of Rs.2 Crore deposited by the petitioners therein to show their *bona fide* in respect of their challenge to the sale notice was ordered to be returned consequent on the dismissal of the writ petition.

[6] Reply to the Review Application has been filed by the respondent- Bank. The entire thrust of the reply is that the judgments relied on by the petitioner are distinguishable and cannot be relied on in support of the petitioner's claim that the amount deposited be returned to it. It is stated that the present case the amount of Rs.2.40 crores deposited by the petitioner in compliance of various interim orders passed by this Court was directed to be encashed. The amount has been appropriated by the Bank in the loan account of the petitioner towards its outstanding dues. This Court had, at no stage, directed the Bank to keep the deposits in the No Lien Account. Moreover, the petitioner had never objected to the appropriation of the said amount in the loan account towards the total outstanding dues. Thus, the petitioner is estopped by his act and conduct from claiming refund of the said amount at this stage. That apart, the principle of General Lien as provided in Section 171 of the Contract Act, 1872 would also be

applicable.

It is submitted on behalf of the respondent- Bank that in *M/s Kut Energy Ltd. (supra)* the amount had been directed to be deposited in the Registry of the High Court. The amount was never appropriated in the loan account. Thus, it could not be treated towards satisfaction of the debt, whereas, in the present case, the amount deposited by the petitioner was expressly directed to be encashed and it has been appropriated in the loan account of the petitioner.

[7] Learned counsel for the petitioners while rebutting the aforesaid argument has raised the following submissions :-

- (a) Firstly, the entire argument of the bank that there is an implied consent on the part of the petitioner because no objection was raised while the bank had appropriated the amount of Rs.2.40 Crore is unsustainable. Perusal of interim orders, particularly order dated 04.02.2019 would reveal that the amounts were being deposited for a specific purpose i.e. only to show *bona fide* intent of the petitioner to settle the loan account.
- (b) Secondly, the interim orders further state that the encashment of the demand drafts were without prejudice to the rights in the pending writ petition.
- (c) Thirdly, petitioner at no point of time had ever given its consent for appropriation of the amounts towards adjustment against loan liability, so deposited pursuant to the interim orders passed by this Court. There is nothing on record which could lead to presumption on the part of petitioner of waiver of its right to seek refund in case of

rejection. He relies upon para No. 23 to 25 of the judgment of Hon'ble Supreme Court in the case of ***State of Punjab Vs Davinder Pal Singh Bhullar and Ors.*** reported as ***2011(14)SCC 770***, to contend that waiver is an intentional and conscious relinquishment and abandonment of an existing legal right, which cannot be waived unless the person is fully informed as to his rights and with full knowledge about the same abandons his right, leaving no room for presumption and assumption.

- (d) As per Section 171 of the Indian Contract Act, 1872 (hereinafter referred to as "Act, 1872"), which has been relied upon by the bank, to claim lien upon the amounts so deposited by the petitioner under the interim orders of this Court, the said provision itself uses the words, "any goods bailed to them...". The issue of bailment and the rights and obligations of the bailor and bailee are dealt with under Section 148 of the Act, 1872 which clearly provides that bailment by the bailor to the bailee is for "*some purpose*". As and when the purpose of bailment is accomplished, the goods so bailed are to be returned, as per the directions of the bailor. In the present case, the purpose of bailment was to enable the bank to consider the settlement proposal of the petitioner. The said purpose was accomplished pursuant to the act of rejection by the bank of the proposal of the petitioner. Consequently, as per Section 148 the amount bailed by the petitioner to the respondent, is to be

returned as per the directions of the petitioner. In this view of the matter, the bank cannot retain the said amounts contrary to the directions of the petitioner.

- (e) Hon'ble Supreme Court in the case of ***Axis Bank Vs SBS Organics (P) Ltd. 2016 (12) SCC 18*** has also noticed the inter play between Section 171 and Section 148 of the Indian Contract Act, 1872. In para No. 23 of the judgment, it is noticed that after the rejection of the proposal, conceptually it would be an argument available to the borrower/bailor to claim refund of the amount so bailed to the bank.

[8] Having heard learned counsel for the parties, we are of the view that the present application deserves to be allowed.

It is not disputed that the amount was deposited by the petitioner during the pendency of the petition only with a view to show its *bona fide* to enter into a One Time Settlement with the Bank. The contention of the petitioner as recorded in the order dated 04.02.2019 when the case came up for preliminary hearing clearly bears this out:

*“Present: Mr. Tarunveer Singh Khehar, Advocate for the petitioners.*

*Learned counsel for the petitioners inter-alia submitted that the petitioners are prepared to settle the loan account under 'One Time Settlement'. In order to show the bonafides, learned counsel for the petitioners has produced four demand drafts Nos.723333 to 723335 and 723337 dated 1.2.2019 and 2.2.2019 totalling Rs.40 lakhs in Court today on account of part payment towards the outstanding liability.*

*Notice of motion to respondent Nos.3 to 5 only for 25.2.2019.*

*Notice re: stay.*

*Process dasti only.*

*Status quo shall be maintained till the next date of hearing.*

*At this stage, Mr.Gaurav Goel, Advocate and Mr.ABS Sidhu, Advocate, who are present in Court, accept notice on behalf of respondent Nos.3 to 5. The aforesaid original demand drafts have been handed over to learned counsel for respondent Nos.3 to 5 which shall be sent to the Bank for being encashed without prejudice to its rights in the pending writ petition. The photocopies of the said demand drafts have been retained on record.*

*Requisite copies of the writ petition have been supplied to learned counsel for respondent Nos.3 to 5.*

*A copy of this order be given dasti to learned counsel for the petitioners under the signatures of Special Secretary of this Court.”*

The Court had directed that the Demand Drafts handed over by the petitioners be encashed by the Bank without prejudice to its rights in the writ petition. Because of the deposit, the Court had ordered maintenance of status quo. The interim order was continued vide subsequent orders as the petitioner continued to make additional deposits making a total of Rs.2.40 crores. It is thus clear that it is only because of the interim orders of this Court did the respondent – Bank receive a sum of Rs. 2.40 crores and not otherwise.

**[8.1]** In *Axis Bank (supra)* Hon'ble Supreme Court considered the question as to whether the amount deposited before the DRAT as a pre-condition for entertaining an appeal under Section 18 of the SARFAESI

amount could be set off against the outstanding dues of the borrower.

Hon'ble Supreme Court in the aforesaid judgment held that the 'secured creditor' was only entitled to proceed against the 'secured assets' as mentioned in the notice under Section 13(4) of the SARFAESI Act, 2002. The deposit made for maintaining an appeal was not a 'secured asset'. The relevant discussion is 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:*

*“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.”*

The Court held that as the deposit made before the DRAT was not a secured asset it was required to be returned to the depositor on disposal of the appeal. It was held that in certain circumstances the amount

was not required to be returned to the depositor. These were where:

- (i) *the Appellate Tribunal, on the request of the secured creditor and with the consent of the depositors, had already appropriated the pre-deposit towards the liability of the borrower, or*
- (ii) *where with the consent of the borrower the amount had been adjusted towards the dues, or*
- (iii) *if there was any attachment on the pre-deposit in any proceedings under Section 13(10) of the Act read with Rule 11 of the Security Interest (Enforcement) Rules, 2002, or*
- (iv) *if there was any attachment under any other legal proceedings.*

The relevant observation is :

***“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 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 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.”*

***(Emphasis supplied)***

**[8.2]** As regards, the argument of the respondent that the petitioner had impliedly waived his right to claim refund of the amounts so deposited under the interim orders of this Court, we find difficult to accept the same, for the following reasons :-

- (a) Firstly, the interim order dated 04.02.2019 passed by this Court notices the contention of the Ld. Counsel for the petitioner, that they are prepared to settle the loan account under One Time Settlement. In order to show *bona fide*, the petitioner had produced 4 demand drafts totalling to Rs. 40 lakhs which were handed over to the learned counsel for the respondent without prejudice to its rights in the pending petition. This clearly shows that the precise purpose of depositing the amounts were only to enable the bank to consider the settlement proposal submitted by the petitioner and the amounts so deposited were to prove its *bona fide* intention to settle the account. Thus, the purpose of such deposited was not to appropriate against the outstanding liability, but only to be utilised towards settlement, if at all the proposal of the petitioner would have been accepted.
- (b) Secondly, learned counsel for the respondent has not been able to draw the attention of this Court to any part of the record or any such letter or communication of the petitioner reflecting its consent that the bank may

appropriate the amounts so deposited under the interim orders of this Court towards the outstanding liability, even if the settlement proposal is rejected. Thus, there is no consent of the petitioner for appropriation of the amount towards the outstanding liability.

- (c) Thirdly, as regards, the contention of the respondent that there is an implied consent or waiver of right to object, on the part of the petitioner to claim refund of the amount, the law is well settled that waiver constitutes to be an intentional relinquishment of its right and cannot be assumed in absence of any supporting material on record. Hon'ble Supreme Court in ***Provash Chandra Dalui v. Bishawanath Banerjee 1989 AIR (SC) 1834***, in Para No. 21 held as under:-

***“ 21. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right. It means the forsaking the assertion of a right at the proper opportunity. The first respondent filed suit at the proper opportunity after the land was transferred to him, and no covenant to treat the appellants as Thika tenants could be shown to have run with the land. Waiver is distinct from estoppel in that in waiver the essential element is actual intent to abandon or surrender right, while in estoppel such intent is immaterial. The necessary condition is the detriment of the other party by the conduct of the one estopped. An estoppel may result though the party estopped did not intend to lose any existing right. Thus voluntary choice is the essence of waiver for***

*which there must have existed an opportunity for a choice between the relinquishment and the conferment of the right in question. Nothing of the kind could be proved in this case to estopp the first respondent.* ”

*(Emphasis supplied)*

[8.3] Still further, Hon'ble Supreme Court in the case of *State of Punjab Versus Davinder Pal Singh Bhullar*, reported as 2011 (14) SCC 770 held as under:-

“23. *Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them.* (Vide: *Dawsons Bank Ltd. v. Nippon Menkwa Kabushihi Kaish*, AIR 1935 PC 79; *Bashesar Nath v. Commissioner of Income-tax, Delhi and Rajasthan & Anr.*, AIR 1959 Supreme Court 149; *Mademsetty Satyanarayana v. G. Yelloji Rao & Ors.*, AIR 1965 Supreme Court 1405; *Associated Hotels of India Ltd. v. S. B. Sardar Ranjit Singh*, AIR 1968 Supreme Court 933; *Jaswant Singh Mathura Singh & Anr. v. Ahmedabad Municipal Corporation & Ors.*, (1992) Suppl 1 SCC 5; *M/s. Sikkim Subba Associates v. State of Sikkim*, AIR 2001 Supreme Court 2062; and *Krishna Bahadur v. M/s. Purna Theatre & Ors.*, 2004(4) S.C.T 137).

24. *This Court in Municipal Corporation of Greater Bombay v. Dr. Hakimwadi Tenants' Association & Ors.*, AIR 1988 Supreme Court 233 considered the issue of waiver/acquiescence by the non-parties to the proceedings and held:

*" In order to constitute waiver, there must be voluntary and intentional relinquishment of a*

*right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case.....*

*There is no question of estoppel, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of abandonment of right. That apart, the question of waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights, by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition."*

**(Emphasis Supplied)**

The aforesaid judgment was reiterated by the Hon'ble Supreme Court in *M/s Sonell Clocks and Gifts Limited Vs. New India Assurance Co. Ltd.* reported as **2018 (9) SCC 784**, and para 12 of the said judgment reads as under:-

*“ 12. It is well established position that waiver is an **intentional relinquishment of a right**. It must involve **conscious abandonment of an existing legal right**, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. **It is an agreement not to assert a right**. To invoke the principle of waiver, the person who is said to have waived must be fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. [See para 41 of State of Punjab (supra)]. There must be a specific plea of waiver, much less of abandonment of a right by the opposite party. ”*

**(Emphasis Supplied)**

It is thus, apparent that to apply waiver, there has to be an "actual intent" to abandon or surrender a right by the said party. Further, voluntary choice between relinquishment and conferment of the right, is the essence of waiver which is conspicuously missing in the present case, as no such choice was ever given by the respondent to the petitioner and hence, there arose no situation where petitioner could have waived its right. There has to be an intentional and a conscious act of the part of a party, to abandon its legal right. Such act must be evident because it involves serious civil consequences i.e. relinquishment of its legal enforceable right. In view of the above, we do not see any act of the petitioner which would have led to waiver of its right to seek refund of the amounts so bailed, to the respondent in terms of Section 171 read with Section 148 of the Act, 1872.

[9] The issue under consideration in the present application stands concluded by the decision of Hon'ble Supreme Court in the ***Kut Energy case (supra)***.

In ***Kut Energy (supra)***, Hon'ble Supreme Court accepted the contention of the appellant -borrower that the deposit of Rs.40 crores with the Registry of the High Court in terms of the order dated 11.10.2017 of the High Court was only with a view to establish the *bona fides* of the appellants in support of the offer of settlement made by them. Once the Writ Petition itself was held not to be maintainable and the offer made by the appellants was rejected by the Bank, the amount deposited was required to be returned to the appellants. The Hon'ble Court observed as under:

**“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 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.*

- 12.** *Going by the law laid down by this Court in Axis Bank 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.*
- 13.** *On the strength of the law laid down by this Court in Axis Bank, 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.*
- 14.** *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. ”*

The contention of learned counsel for the respondent Bank that

the aforesaid decision is not applicable to the present case as in the case

Court whereas in the present case the amount had been deposited with the Bank and had been appropriated towards the outstanding loan account without any protest by the applicant- petitioner is not tenable.

The clear ratio of the decision in ***Kut Energy Ltd.*** is that the amount deposited by the borrower during the pendency of the writ petition with a view of show his *bona fide* to enter into a settlement was required to be returned to the borrower in the event of the petition being dismissed and the settlement offer not being accepted.

That being so, where and in what manner the amount was deposited, whether with the Registry of the Court or in the shape of an FDR with the Bank / Secured Creditor or any other manner would not be material as long as it is clear that the deposit was made only with a view to establish the *bona fide* of the depositor to enter into a settlement. The position may be otherwise if there is a clear and unequivocal consent of the depositor that the deposited amount be appropriated towards the outstanding dues.

In the present case, the interim orders clearly indicate that the deposit was only with a view to show the *bona fide* of the depositor. It was only on such deposit that the Court proceeded to issue notice and granted interim stay. The interim orders were continued only on further deposits being made as offered by the petitioner. The interim orders clearly mention that the amount would be encashed by the Bank without prejudice to its rights in the writ petition.

[10] A similar view was propounded by a Division Bench of this Court in ***CWP No.5518 of 2020, titled “Anu Bhalla and another Vs. District Magistrate, Pathankot and another”*** while considering the

Article 226 of the Constitution has the jurisdiction to extend the period of One Time Settlement and (ii) the guidelines which would need to be taken into consideration to determine whether the applicant would be entitled for extension.

The Court held that the High Court in exercise of the power under Article 226 could extend the period of settlement beyond that provided in the OTS as sanctioned by the Bank. Among the guidelines to be considered to determine the entitlement of an applicant for such extension was the *bona fide* intent of the borrower to pay the remaining amounts under the settlement.

The relevant discussion is as under:

“v. ***Bona fide Intent of the borrower to pay the remaining amounts under the settlement*** – In order to test the bonafide intention of such an applicant, it could be reasonably be tested while asking such an applicant to deposit some further amount, towards the balance amount before calling upon the bank to consider the issue of extension. If such amounts are deposited under the orders of Court and the bonafides are established, such an applicant would be entitled for a favourable consideration of an application for extension.

We would like to add a caveat, that if for any reason, the effort does not lead to extension of time, as prayed for by the petitioner, then the amounts deposited by the borrower/depositors under the interim orders of the Court, would have to be returned back by the creditor to the petitioner. We draw strength from the recent judgment of the Hon'ble Supreme Court in ***M/s Kut Energy Pvt. Ltd. v. Authorized Officer, Punjab National Bank bearing Civil Appeal No. 6016-6017/2019 decided on 20.08.2019***. In the said case, the petitioner therein deposited upfront amount with the Registry of the Court to show its bonafide in

*support of its OTS proposal which was offered for consideration to the bank. The bank while rejecting the proposal sought to adjust the upfront amount against the contractual dues. The plea of refund raised by the petitioner was rejected by the High Court, which led to filing of an appeal before the Hon'ble Supreme Court. While allowing the appeal, it was held that deposit of the amounts in terms of the interim order of the High Court 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. Hence, the bank was not justified in retaining the said upfront amount, while rejecting the OTS offer of the appellant therein and hence the bank ought to have refunded the upfront amount, if the OTS offer of the borrower was found to be unacceptable."*

It was held that if the applicant deposited some additional amount under the orders of the Court to show his *bona fides*, such applicant would be entitled for a favourable consideration of his application for extension. The Court, **however, made it clear that if the effort does not lead to extension of time as prayed for, the amount deposited would have to be returned to the applicant by the creditor.**

[11] The argument of the bank regarding its entitlement to retain the amounts so deposited by the petitioner, under the interim orders of this Court, on the basis of principle of General Lien as enshrined under Section 171 of the Indian Contract Act, 1872 also cannot be accepted. The basic fallacy in the argument of the respondent is that it intends to rely upon Section 171 of the Act, 1872 in isolation and without referring to Section 148 of the Act, 1872. For ready reference, Section 171 of the Act, 1872 which prescribes *general lien* in favour of the bank reads as under:-

***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 balance, goods bailed to them, unless there is an express contract to that effect. "***

**(Emphasis Supplied)**

The provision states that in absence of the contract to the contrary goods bailed to the bank can be retained as a security for a general balance of the account. Since, Section 171 itself is based on the goods having been bailed to it, it would be imperative to refer to Section 148 of the Act, 1872 which deals with the aspect of bailment, to mean delivery of goods by one person to another for “*some purpose*”, upon a contract which when accomplished, such goods are to be returned or otherwise are to be disposed of as per the directions of the bailor. Section 148 of the Act, 1872 reads as under: -

**“ 148. Bailment, bailor and bailee defined.** *A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, **be returned or otherwise disposed of according to the directions of the person delivering them.** The person delivering the goods is called the bailor. The person to whom they are delivered is called the bailee.*

**Explanation.** *If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment. ”*

**(Emphasis Supplied)**

It is thus apparent, that the deposit by the petitioner under the interim orders of this Court, is to be considered as bailment within the meaning of Section 148 of the Act, 1872, as a deposit for a particular purpose, i.e. to show *bona fide* intent of the petitioner towards consideration of the proposal for final settlement (OTS) of the outstanding liabilities of the bank. Hence, after the proposal came to be rejected by the bank, the disposal of the upfront amount deposited pursuant to the interim orders of this Court, had to be either returned or otherwise disposed off according to the directions of the depositor (applicant-petitioner).

[11.1] Further, Hon'ble Supreme Court in the case of ***SBS Organics (supra)*** had rejected the same argument as advanced by the bank with regard to its competence to retain the amount deposited by the petitioner by applying Section 171 of Indian Contract Act, 1872. The extract of the judgment, which is relevant to the controversy at issue, reads as under:-

**"23. 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 Indian Contract Act, 1872. Section 171 of The Indian Contract Act, 1872 on general lien, is in a different context:**

**"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 balance, goods bailed to them, unless there is an express contract to that effect."**

**24. Section 171 of The Indian Contract Act, 1872 provides for retention of the goods bailed to the bank by way of security**

*for the general 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 Indian Contract Act, 1872. **Conceptually, it should be an argument available to the depositor, since the goods bailed are to be returned or otherwise disposed of, after the purpose is accomplished as per the directions of the bailor.***

*(Emphasis supplied)*

It is true that the facts of the aforesaid case involved deposit of the amount with the Tribunal under Section 18 of the SARFAESI Act, 2002 and not with the bank, but the Hon'ble Court also noticed the interplay between Section 148 and 171 of the Act, 1872. Since, Section 171 of the Act, 1872 itself uses the words "*any goods bailed to them..*", Section 148 of the Act, 1872 which deals with the aspect of bailment, would assume significance while interpreting the former. Moreso, the observations of the Hon'ble Supreme Court in the later part of para 24 of the aforesaid judgment, if read alongwith Section 148 of the Act, 1872 *supra*, while dealing with the argument of the creditor to its entitlement to hold the deposit on the basis of Section 171, clearly shows twin elementary aspects, which are :-

- (i) Firstly, bailment is delivery of goods by the bailor to bailee "*for some purpose*".
- (ii) Secondly, when the purpose of bailment is accomplished, either the goods so bailed are to be returned or otherwise disposed off according to the directions of the bailor.

The importance of the purpose of bailment assumes significance because it is the accomplishment of the same, which would lead to the arising of the second situation i.e. the manner in which such goods are to be disposed off. The purpose of the bailment in the present case, can be seen from the pleadings and interim orders passed by this Court, which is to test *bona fide* intent of the petitioner and to enable the creditor to consider the settlement proposal. Since the said purpose of bailment is accomplished on consideration of OTS proposal by the bank leading to its rejection, the second issue comes up for consideration i.e. the manner in which such goods so bailed, are to be dealt with. Section 148 of the Act, 1872 states that either such goods are to be returned or it can be appropriated only with the consent of the bailor. Undisputedly, the applicant-petitioner has not given any consent to the bank to appropriate the amount and therefore appropriation of the amount so bailed could not be effected by the bank without the consent of bailor. In such a situation, the only option left with the bank is to return the said amount so bailed, back to the bailor/applicant-petitioner.

[11.2] That apart, even as per the One Time Settlement Policy of the Respondent – Punjab and Sind Bank , titled as “*Recovery Management Policy and Guidelines for settlement / write off in Borrowal Accounts (amended)*” dated 08.08.2018 bearing Law Circular No. 266 itself requires the borrower to deposit upfront amount in no lien account, in order to ascertain the *bona fide* of the borrower, while consideration their proposal for settlement under One Time Settlement. Further, the Policy itself provides that upfront amounts are to be appropriated only in case if such

proposal is accepted. As a necessary corollary, in case of non-acceptance,

the said upfront amount, would be refunded. The relevant extract of which reads as under :-

**“ 14. UPFRONT / DOWN PAYMENT**

*Party has to deposit upfront payment to show seriousness in settlement of OTS Proposal. The upfront amount may be kept in an 'Escrow/'No Lien Account' with a mandate to appropriate the proceeds towards adjustment of the dues in the event of acceptance of OTS proposal.*

*The upfront amount will be taken as follows:-*

- (i) 5 % of the amount is to be deposited at the time of submission of OTS proposal **which will be kept in "No Lien" account. The same will be appropriated in case if the OTS proposal is accepted by the bank.***
- (ii) 10% of the OTS amount has to be deposited within 30 days of receipt of intimation of acceptance of OTS proposal to the party. This amount will be over and above the 5% amount deposited by the party at the time of submission of OTS proposal, thus making the total to 15%. ”*

***(Emphasis supplied)***

Not only this, we have been informed, that various banks as per their respective One Time Settlement Policies, have such similar conditions. For the purposes of illustration, we would refer to one such Policy of Punjab National Bank titled as “*Policy of Bank on Recovery & Management of NPAs*” bearing Sastra Division Circular No. 57/2019 dated 13.11.2019, relevant extract of which reads as under :-

**“23. DOWN PAYMENT/UPFRONT PAYMENT**

**23.1** *Sanctioning authority should ensure that:*

- a)** *Frivolous OTS cases without upfront are generally not entertained.*
- b)** *Sources from which the OTS amount will be paid should be specifically mentioned instead of stereo-type statement like*

*borrowing from friends & relatives.*

*Therefore, efforts should be made to get upfront payment to show borrowers' seriousness in settlement of OTS proposal as under:*

| <i>Sr. No.</i> | <i>Details of OTS Offer Upfront Amount</i>               | <i>Upfront Amount</i> |
|----------------|----------------------------------------------------------|-----------------------|
| <i>1</i>       | <i>OTS Offer up to Rs. 10 lacs</i>                       | <i>Upfront 20%</i>    |
| <i>2</i>       | <i>OTS offer more than Rs. 10 lacs up to Rs. 50 lacs</i> | <i>Upfront 15%</i>    |
| <i>3</i>       | <i>OTS offer more than Rs. 50 lacs</i>                   | <i>Upfront 10%</i>    |

***23.2 The upfront amount may be kept in an ‘Escrow/ ‘No Lien Account’ with a mandate to appropriate the proceeds towards adjustment of the dues in the event of acceptance of OTS proposal.”***

***(Emphasis supplied)***

It is thus clear that even the respondent bank(s) follow this settled principle (whether specifically provided or not in the instructions) that the upfront amounts deposited with the banks are to be appropriated only in case, if the settlement proposal pursuant to such deposits is finally accepted. This is based on the principle of law, that the upfront amount deposited by the borrower is treated as bailment for the purpose of considering its proposal for settlement. If the proposal is accepted, the upfront is adjusted in terms of approved OTS and in case if rejected, then the upfront amount is to be returned back to the borrower, which is so contemplated by Section 148 of the Act, 1872. Thus, the aforesaid condition as contained in the OTS Policy of the Respondent-Punjab and Sind Bank is in consonance with the principles regarding interplay between Section 148 and 171 of the Act, 1872 as explained above. The action of the bank in retaining/appropriating the upfront amount deposited by the petitioner in

settlement inspite of non-acceptance of the proposal of the borrower, cannot be approved on this ground as well.

[11.3] Still further, in ***Pradyumna Kumar Sahoo V/s Assistant General Manager cum Authorised Officer, SBI*** reported as ***2018 AIR Orissa 84***, a Division Bench of Orissa High Court was considering an identical issue, where the petitioner therein had approached the High Court challenging the sale of mortgaged property conducted by the bank under the provisions of the SARFAESI Act, 2002 for Rs. 43 Lacs. Vide order dated 12.05.2014, the Court directed the petitioner to deposit Rs. 43 Lacs to show *bona fide* i.e. the sum equivalent to the one deposited by the auction purchaser, which was complied with. Subsequently, vide order dated 11.07.2016, the writ petition was dismissed and the petitioner was directed to file a representation with the respondent - Bank to claim back the amount of Rs. 43 Lacs deposited by the petitioner with the bank and the bank was directed to consider the such request in accordance with law. Pursuant to the same, the petitioner submitted his request for refund which was rejected by the bank on the ground that the same has been appropriated/set-off against the outstanding loan dues of the petitioners, which was now the subject matter of challenge in the writ petition. The petitioner approached the Court, challenging such action of the bank and while allowing the writ petition, the Court in paras 5, 13 and 14 held as under :-

“5. *Mr. R.K. Rath, learned Senior Counsel appearing on behalf of the opposite party-Bank submitted that the amount of Rs 43,00,000/- deposited by the petitioners with the Bank, has been duly adjusted against their outstanding loan dues by way of set-off. It was submitted that even after adjustment of the said deposited amount there is still an outstanding loan dues*

*of about Rs. 83.00 lakhs payable by the petitioners. It was submitted that the Bank has appropriated the deposited amount towards outstanding loan dues in exercise of its right of lien and set-off. It was further submitted that this right of lien has been exercised by the Bank as per the provision of section 171 of the Contract Act. It was submitted that the Bank has the right of security over the general balance of the said amount remaining in deposit in the account when further sum is due to the Bank towards outstanding loan dues and therefore, it has the right to retain the said amount. It was accordingly submitted that the Bank having exercised its right of lien and set-off in accordance with law, the action of the Bank in rejecting the application of the petitioners for refund of the deposited amount cannot be faulted.*

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xxxxx

13. *A careful reading of the above order goes to show that the petitioners were directed to deposit the auction amount of Rs.43,00,000/- as a condition precedent for entertaining the writ petition and issuing notice to the opp. parties therein. The Court having directed deposit of the aforesaid amount so as to compensate the auction purchaser, in case the auction of the mortgaged property is set aside and the petitioner having failed in the writ petition, which was subsequently dismissed, the Bank could not have appropriated the deposited amount towards outstanding loan dues of the petitioners, in purported exercise of its right to general lien and set-off. **The deposit of the amount having come to the hands of the Bank purely because of fortuitous circumstances, pursuant to the interim order of the Court and not in ordinary course of banking transaction, no right of general lien could have been exercised by the Bank over such deposit. The deposited amount was not a secured asset or a secured debt either, since the borrower had not created any security interest on such deposit. In other words, had it not been for the order of Court, the amount could not have come to be deposited with the Bank.** So far as the outstanding loan dues of the petitioners is concerned, there is no dispute that the Bank has*

*the right to recover the same in accordance with law. However, the Bank cannot be permitted to resort to such unfair means of appropriating the amount so deposited towards the outstanding loan dues, especially when there was no such order or direction of the Court.*

14. *Coming to the legal maxim 'Actus Curiae Neminem Gravabit', which means an act of the Court shall prejudice no man, the same is founded upon justice and good sense affording a safe and certain guide for the administration of the law.*

*Lord Cairns in Alexander Rodger vs. The Comptoir D'escompte De Paris (1869-71) LR 3 PC 465 at page 475 observed thus:-*

*'Now their Lordships are of the opinion, that one of the first and highest duties of all Courts is to take care that the act of the court does not injure to any suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.'*

*There is always an inherent jurisdiction to order restitution a fortiori where a party has acted on the faith of an order of the Court. A litigant should not go back with the impression that the judicial process so operated as to weaken his position and whatever it did on the faith of the Court's order operated to its disadvantage. It is the duty of the Court to ensure that no litigant goes back with a feeling that he was prejudiced by an act which he did on the faith of the Court's order. Both on principle and authority it becomes the duty of the Court-as much moral as it is legal- to order refund and*

*restitution of the amount to the petitioner since the question of compensating the auction purchaser had never arisen as the auction had not been set aside.*

***(Emphasis supplied)***

Against the aforesaid decision, the respondent bank in the above cited case, approached the Hon'ble Supreme Court by filing SLP No. 6156 of 2018, which was dismissed on 26.03.2018. We find that the case of the petitioner is squarely supported by the aforesaid judgment, as well. In this view of the matter, the argument of the respondent, that the aforesaid judgment in the case of ***SBS Organics (supra)*** would not apply, only because the amount in the cited case was deposited with the Tribunal and not with the bank, is clearly unsustainable.

[12] The matter can be looked from another angle. Hon'ble Supreme Court in ***Syndicate Bank V/s Vijay Kumar 1992 (2) SCC 330*** held that general lien can be exercised by the bank over such securities received by the banker in the ordinary course of business. Para 6 of the judgment reads as under:-

***“6 ..... The above passages go to show that by mercantile system the Bank has a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customer in the ordinary course of banking business and that the general lien is a valuable right of the banker judicially recognised and in the absence of an agreement to the contrary, a Banker has a general lien over such securities or bills received from a customer in the ordinary course of banking business and has a right to use the proceeds in respect of any balance that may be due from the customer by way of reduction of customer's debit balance. Such a lien is also applicable to negotiable instruments including FDRs which are remitted to the Bank by the customer for the purpose of***

*collection. There is no gainsaying that such a lien extends to FDRs also which are deposited by the customer.”*

***(Emphasis supplied)***

In this view of the matter, it is clear that in the present case, the amounts of deposits received by the bank were definitely not in the ordinary course of business but were only under the interim orders of this Court, and hence the bank did not have the right to exercise general lien upon such deposits.

[13] Conceptually, an argument would be available to the petitioner that since Section 171 permits exercising of general lien only on "goods" bailed to the bank, amounts so deposited by the petitioner would not fall within the definition of "goods". The word "goods" has not been defined under the Indian Contract Act, 1872 but is defined under Section 2(7) of the Sale of Goods Act, 1930, which is as under :-

*(7) goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;*

It is well settled that if an expression or word used in a statute does not contain the definition of the same, it is permissible to refer to the definition of such word appearing in the other statute where it is defined or refer to its dictionary meaning [Refer to Para 9 of ***Kichha Sugar Company Ltd. V/s Tarai Chini Mill Majdoor Union 2014 (4) SCC 37***]. If the definition of goods as defined under Section 2(7) of the Sale of Goods Act, 1930 is examined, it clearly refers to only the moveable property and **excludes money**. Allahabad High Court in ***Punjab National Bank V/s State***

*of UP 2017 (2) BC 524*, while rejecting the claim of general lien raised by the bank under Section 171 of the Act, 1872 on an immoveable property, held in para 14 as under :-

*“14. The lien contemplated under Section is relatable to the goods bailed to Bank. Here in the case in hand, we are concerned with immoveable property of respondent No. 4 which has been attached and auctioned which is challenged in the present writ petition. Section 171, therefore has no application whatsoever , in the case in hand.”*

It would, therefore, be required to be examined that the amounts of money lying / deposited with the bank in other different accounts, whether the same would fall within the ambit of the word “goods” and consequently, whether the same could be a subject matter of general lien at the hands of the bank under Section 171 of the Act, 1872 or NOT. Since, such an argument has not been raised in the present case, we deem it appropriate to leave this issue open to be adjudicated in an appropriate case, which may involve this aspect of the matter.

[14] Further more, the amount deposited under the orders of the Court in the circumstances as in this case is also required to be returned on the principle of equity enshrined in the maxim *actus curiae neminem gravabit*. Hon'ble Supreme Court explained this principle in ***Committee-GFIL v. Libra Buildtech (P) Ltd., (2015) 16 SCC 31*** as under:

*“26. In our considered opinion, while deciding a case of this nature, we have to also bear in mind one maxim of equity, which is well settled, namely, actus curiae neminem gravabit meaning—an act of the court shall prejudice no man. In Broom’s Legal Maxims, 10th Edn., 1939 at p. 73 this maxim is explained saying that it is founded upon justice and good sense and afforded a safe and certain*

*guide for the administration of law. This maxim is also explained in the same words in Jenk. Cent. 118. This principle is fundamental to any system of justice and applies to our jurisprudence. [See Busching Schmitz (P) Ltd. v. P.T. Menghani and Raj Kumar Dey v. Tarapada Dey].*

27. ***It is thus a settled principle of law based on principle of equity that a person cannot be penalised for no fault of his and the act of the court would cause no prejudice to any of his rights. ”***

***(Emphasis Supplied)***

The writ petition having been dismissed as infructuous and the One Time Settlement claim having not been accepted it was imperative that the amount deposited under interim orders of the Court ought to have been ordered to be returned to the applicant- petitioner on the premise of the aforesaid principle. The instant review application seeking such a direction is clearly maintainable.

Hon'ble Supreme Court in ***Food Corpn. of India vs. SEIL Ltd., (2008) 3 SCC 440***, held that any error or omission on the part of the Court to consider a justifiable claim would be subject to review amongst others on the principle of *actus curiae neminem gravabit* .

- “25. *We do not, thus, find any substance in the contention of Mr Sharan that while exercising its review jurisdiction, no interest on the principal sum could have been directed to be granted by the High Court. A writ court exercises its power of review under Article 226 of the Constitution of India itself. While exercising the said jurisdiction, it not only acts as a court of law but also as a court of equity. A clear error or omission on the part of the court to consider a justifiable claim on its part would be subject to review; amongst others on the principle of actus curiae neminem gravabit (an act of the court shall prejudice none). We*

*appreciate the manner in which the learned Judge accepted his mistake and granted relief to the respondents.”*

[15] Accordingly, the present **review application** stands **allowed**.

The respondent-Bank is **directed** to return the amount deposited by the petitioner under the interim orders of this Court amounting to Rs. 2.40 Crore within four (04) weeks from the date of receipt of certified copy of the order, failing which the petitioner shall be entitled to interest @ 9 % p.a. from the date of deposit till the date of refund, and the bank shall be entitled to recover the same from the official concerned, responsible for delay. That apart, the officer concerned of the respondent-Bank shall make himself / herself liable to be hauled up under Contempt of Courts Act, 1971.

It is also made **clear** that the Bank shall be entitled to recover its debt in accordance with law.

( JASWANT SINGH )  
JUDGE

( HARINDER SINGH SIDHU )  
JUDGE

**March 26, 2021**

*'gian / dk kamra'*

|                                  |            |
|----------------------------------|------------|
| <i>Whether Speaking/reasoned</i> | <i>Yes</i> |
| <i>Whether Reportable</i>        | <i>Yes</i> |