

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28/03/2003

CORAM

THE HON'BLE MR.JUSTICE E.PADMANABHAN

WRIT PETITION No.7560 of 1997  
& WMP.NOs.12270/97 and 18483/2000

1. Mohan Murti Shandilya
2. Renu Murti Shandilya ..Petitioner

-Vs-

1. The Union of India,  
rep. by its Secretary of Banking  
Ministry of Finance,  
Parliament St.,  
New Delhi 110 001

2. The Chairman Cum Managing Director  
Indian Bank, 39, Rajaji Salai  
Chennai

3. Tax Recovery Officer,  
Ward NO.13, Ayyaakkar Bhavan  
229, M.K.Road, Bombay 400 020

4. Asst.C.I.T., A.C-3(4)68N  
Mumbai ..Respondents

For petitioner:: Mr.R.Thiagarajan, S.C.,  
for M/s.M.Muthappan  
D.Gurumoorthy

For respondents: Mr.S.Ramasubramaniam S.C.,

Petition filed under Article 226 of The Constitution of India praying  
for the issue of a writ of certiorari as stated therein.

:O R D E R

The petitioners herein have jointly prayed for the issue of a writ of  
mandamus directing the second respondent to refund all the balance sums with  
interest payable under Non resident External Fixed Deposit Receipts bearing  
Nos.84/RIP/565500 dated 1.12.1989 and ES/RIP/591039 dated 19.12.1989 into the  
account of the first petitioner in Standard Chartered Bank, Mylapore, Chennai.

2. The writ petition is at the stage of notice of motion. The respondents have been served. With the consent of counsel for either side the writ petition itself is taken up for final disposal.

3. Heard Mr.R.Thiagarajan, learned senior counsel appearing for Mr. M.Muthappan or the petitioner, Mr.S.Ramasurbamaniam, learned Senior Counsel appearing for the second respondent and none appearing for the third respondent and service on respondents 1 and 4 is not complete.

4. The second petitioner is the wife of the first petitioner. In December 1989, the petitioners made Non Resident External (NRE) Fixed Deposit with the second respondent in two of its branches at Chennai and at New Delhi. During the relevant time, both the petitioners were non resident Indians and they held Non Resident External fixed deposits in their joint names. The Deposit in East Abhiramapuram Branch was for a sum of Rs.5,50,00,000/= in NRE account Reinvestment Plan Scheme for a maturity value of Rs.10,42,69,000/= due for maturity on 1.12.1994. The said deposit carried 13% in interest per annum compounded quarterly. The petitioner invested Rs.3,30,00,000/= with a maturity value of Rs.6,25,68,000/= in their joint names with the second respondent's South Extension Branch at New Delhi which also carried 13 % interest per annum and compounded quarterly. Both these deposits are to be re-paid on or before 19.12.1994. The second respondent had committed to advance certain facilities for certain companies in which either of the petitioners were interested. But certain differences arose and adjudication proceedings are pending before various Forums.

5. At the instance of the second respondent a case was registered by the Central Bureau of Investigation on 28.2.1992 against one B. Natarajan and the first petitioner. The CBI investigated and a final report dated 30.12.1994 was filed under Section 173 of the Criminal Procedure Code and the FIR was closed. Even thereafter, the second respondent and its officers were not willing to settle the matter. The second respondent and its officers caused huge financial loss and loss of reputation to both the petitioners in India and abroad. The Bank has no lien over such deposits and the Bank has no right to unauthorisedly deal with the moneys put in fixed deposits. It is alleged that the second respondent-Bank Officer claims to have transferred the proceeds of one of the Fixed Deposit without the petitioner's authority and permission from Reserve Bank of India.

6. Para 29.14 of the Exchange Control Manual of the RBI prohibits granting of loans and overdrafts facilities based upon such NRI/NRE accounts. So also, no loans or accommodation can be granted based upon Non Resident External Fixed Deposits. It is contended that the second respondent has unauthorisedly withheld proceeds of the fixed deposits for over two and half years after maturity and the second respondent is liable to pay the sum of Rs.26 crores which has been retained illegally. The petitioners require funds and they are facing severe financial loss apart from mental agony. When contacted the second respondent sent a reply to the effect that it is withholding the Fixed Deposit proceeds and it is not bound to honour the demand. It is contended that the action of the respondent is illegal, arbitrary, violative of Foreign Exchange Manual and in violation of the Non

Resident External Fixed Deposit conditions. Hence the present writ petition.

7. Per contra, the second respondent-Bank in its counter contended that the writ petition is an abuse of process of this court and the petitioners are trying to evade their obligation to pay the large amounts lawfully incurred, agreed and due to the second respondent-Bank. It is contended that the petitioner has sought to raise several disputed questions of fact which cannot be adjudicated in a proceedings under Art.226 and the writ petition deserve to be dismissed in limini.

8. It is asserted by the second respondent though the petitioners claim that they are Non Resident Indians orally, they are not non residents but Residents of Delhi as seen from the addresses given by them. They are also the Directors of various Indian Companies in respect of which Memorandum and Articles they have subscribed that the petitioners have started three companies registered in New Delhi and Mumbai and they are the sole shareholders. The said companies have been incorporated during 1985, 1986 and 1989.

9. It is true that the petitioners made a deposit of Rs.5,50,00,000 /= with East Abhiramapuram Branch and the said Deposit was constituted by a remittance from the Vijaya Bank which Bank while making the remittance had appropriated a sum of Rs.1,00,00,000/= by exercise of the lien available in its favour. The said deposit with the East Abhiramapuram Branch and another deposit at New Delhi Branch were claimed by the petitioners as NRE deposits. Those claims are not true since the status of the petitioners as NRI itself is not only questionable but also denied as factually they are carrying on business and they are having permanent residence in India. The petitioners seek to be the Non Residents in terms of Section 2(b)(ii) of Foreign Exchange Regulation Act, 1973. The second respondent referred to the provisions of the FERA 1973 and points out that a citizen of India who ceased to be a resident in India as provided in Clause (i) or (ii) or (ii) but returns to India for taking up employment in India or to carry on business or avocation in India or for any other purpose, which will indicate his intention to settle in India for an uncertain period would again fall under the scope of "persons resident in India". Therefore the petitioners are residents of India or residents in India at the time of availing the loan and execution of guarantee.

10. The petitioners who had started three companies opened Current Account with the various branches of the second respondent-Bank and operated them and they also entered into arrangements with the second respondent Bank for opening of irrevocable letter of credit amounting to Rs.500 lakhs for import of certain machinery by the companies owned by the petitioners during 1990. The letters of credit were opened in the names of the three companies owned by the petitioners at the request of the petitioners. The borrowers apart from hypothecating the machinery as and when delivered also provided security for the advanced money by way of letters of credit by the second respondent bank in the shape of guarantee executed by the petitioners herein and equitable mortgage of immoveable properties located at New Delhi. The petitioners have also agreed specifically that the second respondent bank may mark a lien available to the bank under Law over the two deposits claimed by

the petitioners. Actually the very fixed deposit on the face of it bears the endorsement, viz., lien with the respondent bank.

11. As there was failure and the import transaction did not fructify, the second respondent bank was obliged to enter on the scene and arrange for the import of the machinery one of which has been kept in New Delhi and another was placed at National Hospital in Calicut which again resulted in further litigation. Four of the machinery are still lying in the Customs House at Chennai. On the petitioners and the borrowers, namely the three companies failed to honour their obligation, the second respondent bank has initiated proceedings under the Recovery of Debts Due to the Financial Institutions Act, 1993 by filing three original applications before the Debt Recovery Tribunal, New Delhi Branch and they are pending. The pending proceedings being O.A.Nos.870, 871 and 895 of 1996 on the file of the said Debt Recovery Tribunal.

12. The companies owned by the petitioners as well as the petitioners themselves are the respondents in those proceedings and the proceedings are yet to be concluded. The second respondent Bank has got a lien over the two deposits to set off the sum against the outstanding due from the petitioners and the three companies in which they were directors and in respect of which transaction the petitioners are not only carrying on business but also created a lien in favour of the respondent even the fixed deposit receipts. Though the fixed deposits were marked as NRE, but it was done solely on such representation made by the petitioner. Factually, the two deposits are not convertible into foreign currency at the relevant time.

13. The second respondent bank has only claimed lawful dues and it is incorrect to contend that it cannot claim a lien over the two F.D receipts. In any event the obligation of the petitioners to pay their dues as guarantors and the right of the Bank to enforce its lien are subject matter of adjudication before the Debt Recovery Tribunal and this court will not exercise the writ jurisdiction to decide such disputed questions of fact when a Special Tribunal is seized of the matter. The withholding of the money is under lawful purpose and the rights available to the bank as a Banker having a general lien over amounts due to its constituents. The petitioners are also by their letter given during December, 1993 have confirmed that the Fixed Deposits are under lien with the bank against the various facilities granted to their group of companies and they have specifically requested the Bank to inform the Income-tax Department that the bank has a lien over the amounts. It is not permissible for the petitioners to disown the actual position and threaten the bank that something is illegal or unlawful. The second respondent-Bank is authorised to retain the money and the petitioners cannot

seek the remedy of writ of mandamus on the facts of the case. The various contentions advanced by the learned counsel for the petitioners are devoid of merits and unsustainable.

13. A reply affidavit has been filed by the petitioners where certain details have been set out. The second respondent-bank has also filed an

additional affidavit stating that the proceeds of the two Fixed Deposit Receipts have been appropriated on 11.9.1989 by exercising the right of lien and setoff towards the outstanding dues. In the O.As. pending before the Debt Recovery Tribunal Delhi, this has been detailed and has also set out the amounts appropriated and the relevant portion of the additional affidavit reads thus:-

"4. I submit that the proceeds of the subject FDR has been appropriated on 11.8.1999 by exercising the right fo set off towards outstnaind dues in the suits pending before DRT Delhi. The amounts appropriated are as follows:-

S.No

Account Name

Appropriated

Amt.Appropriated

1

M/s.Gambro Nexim India Medical Ltd.,

O.A.No.871/96

P.B A/C

Rs.4,14,38,000.00

2

M/s.Nexim Exports Pvt.Ltd.,

OA.No.870/96

P.B.A/C

Rs.3,08,00,000.00

3

M/s.Rexima Exports Pvt., Ltd.,

O.A.No:805/96

P.B.A/C

Rs.3,20.32,000.00

5. I submit that the same is being informed to the DRT, Delhi and this additional information has to be brought to the Notice of this Hon'ble Court, in view of the above appropriation, the writ petition has become infructuous and ought to be dismissed,as the prayer sought for in the writ petition is no more in existence as the amounts being appropriate d towards the various accounts."

14. In this writ petition, the following points arise for consideration:-

A) Whether the petitioner is entitled to claim the relief of mandamus prayed for?

B) Whether the respondent in exercise of its lien could setoff the proceeds of NRE fixed deposits?

C) Whether the writ of mandamus prayed for is liable to be denied in view of disputed questions and in view of pending proceedings before Debt Recovery Tribunal ? To What relief, if any ?

15. Mr.R.Thiagarajan, learned senior counsel contended that the

deposits being NRE Deposits, the respondent cannot claim any lien nor it could adjust the proceeds of the two fixed deposits towards amounts claimed to be due to the second respondent bank and a mandamus has to be issued.

16. Per contra, Mr.S.Ramasubramaniam, learned senior counsel appearing for the second respondent contended that the proceeds of the two deposits have been set off by the second respondent-Bank, that the proceedings are pending before the Debt Recovery Tribunal, Delhi and the petitioners have to work out the remedies before the said Forum in respect of the dispute, that the writ petition is not maintainable as it is a civil dispute and this court will decline to issue a writ as there are very many disputed questions of fact, which cannot be decided under Art.226.

17. Mr.R.Thiagarajan, learned senior counsel took the court through the Foreign Exchange Manual in particular para 29A.13 and 29A.14 in support of his contention and contended that in respect of NRE Deposit accounts no loan or overdraft is permissible and such action and deviation is illegal. Per contra, Mr.S.Ramasubramaniam, learned senior counsel contended that the petitioners ceased to be NRIs and therefore in terms of para 29A.15 and 29A.16, it is well open to the second respondent to set off the NRE deposits towards the loan outstanding or other amounts accrued due to the second respondent bank from the petitioners or for the three companies promoted by them and in respect of which dues, the lien has been admittedly created.

18. Chapter 29 of The Exchange Control manual relates to Non Resident (External) Rupee and FCNR Accounts. Part A of the said Chapter contains the conditions as to the repatriation of balance, tax exemptions, opening of accounts, opening of joint accounts, operations by residents under Powers granted by Non residents etc., Para 29A.9 relates to Investment of Non-resident (External) Account Balances. 29A.12 relates to grant of loans/overdrafts in India not exceeding Rs.2 lakhs to the account holders in respect of non-resident (External) deposit.

19. Para 29A.13 provides that authorised dealers should refer to Reserve bank (ECD) applications for grant of loan/overdraft facilities to resident individuals/firms/companies in India against collateral or fixed deposits held in Non-resident (External) accounts. The said facilities, according to the said clause should be granted by authorised dealers only after approval from exchange Control Department of R.B.I has been secured. Therefore it is clear that paragraph 29A.13 is an enabling provision which enables an authorised dealer to refer to RBI and grant accommodation or advances or loan as the case may be and the provision is not mandatory when once the depositors status changes or doubtful. For alleged deviation, if any action if at all could by the Reserve Bank and not by the petitioners.

20. Clauses 29A.14,15 and 16 are relevant clauses. A conjoint reading of the above clause would show that if NRIs turn to be a resident Indians, the accounts could very well be converted into Indian Accounts and thereafter designated as resident account. There is nothing in the said Manual to show that there is no accommodation at all or any lien at all. The

interpretation placed by Mr.R.Thiagarajan, learned senior counsel on the said provisions cannot be sustained at all. Per contra, Mr.S.Ramasubramaniam, learned senior counsel rightly contended that the petitioners ceased to be NRIs and there could always be a lien in respect of such NRE Deposits. In the two deposit receipts there is an endorsement that the second respondent Bank has a lien. There is no dispute that a lien has been created in favour of the Bank with respect to advances made or accommodation made by the second respondent Bank at the instance of the petitioners in favour of the three companies. Practically, there is no dispute about the lien which the second respondent bank has in respect of the two NRE accounts.

21. As rightly pointed out by Mr.S.Ramasubramaniam, there are very many disputed questions of facts which cannot be gone into under Art.2 26 in a writ petition and this court will not be justified in deciding or adjudicating very many disputed questions which may involve examination of documents or witnesses. On this short ground this writ petition is not maintainable.

22. That apart, it is rightly pointed out that the second respondent-bank has already initiated proceedings before the Debt Recovery Tribunal at Delhi and the proceedings are pending not only against the writ petitioner, but also other companies to whom the second respondent has advanced substantial sums on the guarantee furnished by the petitioner and lien over the Fixed Deposit Receipts.

23. Mr.S.Ramasubramaniam, learned senior counsel rightly relied upon the pronouncement of the Supreme Court in Allahabad Bank Vs. Canara Bank and another reported in 2000 (4) SCC 406, wherein it has been held that Section 17 and 18 of The Recovery of Debts Due to Banks and Financial Institutions Act are exclusive so far as the adjudication of the claims and liabilities are concerned. The Apex Court, in the said pronouncement after considering the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1995, held thus:-

"24. There is one more reason as to why it must be held that the jurisdiction of the Recovery Officer is exclusive. The Tiwari Committee which recommended the constitution of a Special Tribunal in 1981 for recovery of debts due to banks and financial institutions stated in its report that the exclusive jurisdiction of the Tribunal must relate not only in regard to the adjudication of the liability but also in regard to the execution proceedings. It stated in Annexure XI of its report that all "execution proceedings" must be taken up only by the Special Tribunal under the Act. In our opinion, in view of the special procedure for recovery prescribed in Chapter V of the Act, and Section 34, execution of the certificate is also within the exclusive jurisdiction of the Recovery Officer.

25. Thus, the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of the Tribunal and the Recovery Officer and no other court or authority much less the civil court or the company court can go into the said questions relating to the liability and the recovery except as provided in the Act."

24. The Apex Court has also laid down that The Recovery of Debts Due to Banks and Financial Institutions Act confers exclusive jurisdiction on the Tribunal. That being the position, in respect of the claim of set off or adjustment or enforcement of lien by the second respondent and the petitioners have to agitate their grievances only before the said Forum namely Debt Recovery Tribunal and not before this Court under Article 226 of The Constitution or any other Forum.

25. In Punjab National Bank Vs. O.C.Krishnan and others, reported in 2001 (6) SCC 569, The Apex Court held that remedy under the Act has to be invoked before the Forum constituted under the said Act and not by way of proceedings under Art.226 and 227 of The Constitution. In this respect the Apex Court held thus:-

"5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

26. In the light of the above two pronouncements of the Supreme Court, this court holds that the petitioners are not entitled to any relief and the writ petition is dismissed. All the points are answered against the petitioner and in favour of the respondent-bank. However, it is made clear that it is open to the petitioners to work out their remedies before the competent forum in respect of their claims against the second respondent bank according to law.

27. Writ Petition is dismissed. Consequently, connected WMPs are closed. No costs.

Internet:yes



Index:yes

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Copy to:-

1. The Union of India,  
rep. by its Secretary of Banking  
Ministry of Finance,  
Parliament St.,  
New Delhi 110 001

2. The Chairman Cum Managing Director  
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