

07.10.2021
Ct. No.8
S/L No.1
SD/KS

(Via Video Conference)

W.P.A. 15407 of 2021

Manoj Pushkar Toshniwal @ Manoj Toshniwal

-Vs.-

Union of India & Ors.

Mr. Sudipta Moitra
Mr. Abhra Mukherjee
Ms. Sutapa Sanyal
Mr. B. P. Chakraborty
Mr. Debrup Bhattacharya
Ms. Saptamita Pramanick
Mr. Suryanil Das

.....For the Petitioner

Mr. S. Bhattacharjee
Mr. Avinash Kankani

.....For the U.O.I.

Ms. Manasi Mukherjee

.....For Respondent Nos.3 & 4

Mr. Srijib Chakraborty

.....For the Respondent No.6

The writ petitioner was apprehended by the Immigration Department at Kolkata Airport on 16th April, 2021 pursuant to a look out circular issued at the instance of the respondent no.3 being Lookout Circular No.2021405597 when he was returning from Dubai where his daughter stays and is now an expectant mother. The petitioner was produced before the Learned A.C.J.M. Barrackpore on 16th April, 2021 in connection with N.S.C.B.I. Airport Police Station G.D.E. No.615 dated 16.04.2021 under Section 41 of the Criminal Procedure and in reference to the said LOC and in connection with the Originators namely the Deputy Director, Directorate General of G.S.T., Intelligence, R. K. Puram, New Delhi. By the order dated 16.04.2021,

the petitioner was admitted on interim bail on condition that he shall appear before the concerned investigating authority or before the learned Court where the case is lying pending in connection with the above referred case and to submit compliance report regarding his appearance in connection with the case before the learned A.C.J.M. by 30.04.2021. The petitioner was enlarged on bail by learned Magistrate having regard to the fact that he had no jurisdiction to adjudicate the matter placed before him, as the compliance of Section 78 of the Criminal Procedure Code read with Section 81 of the Code is necessary and as nothing transpired from the record regarding the substance of information and accusation levelled against the petitioner and further relying on a decision in the case of *Madhusudan Chakraborty Vs. State of West Bengal* reported in *2000 CrLR (Cal)* 305, the learned Magistrate was of the opinion that the petitioner cannot be detained in judicial custody when no substance of accusation was mentioned in the LOC and the prosecuting agency could not intimate the petitioner, grounds for his arrest. It would appear that the case was well within the jurisdiction of learned A.C.J.M. because it was pertaining to a case registered by N.S.C.B.I. Airport Police Station GDE pursuant to his arrest by virtue of look out circular.

It is surprising to take note of the order dated 30.09.2021 that the interim bail granted to the petitioner was not confirmed for non compliance of the condition of interim bail granted to the petitioner on

the returnable date. The date on which the order was passed was not the assigned date in the case record rather case record was put up by way of put up petition on behalf of Senior Intelligence Officer, Directorate General of G.S.T Intelligence, Kolkata Zonal Unit, Kolkata for cancellation of the AI Bail awarded to the petitioner for non-compliance of the direction of the Court. Such put up petition ought to have been well-intimated to the petitioner otherwise the application for cancellation of AI bail should have been considered on the date fixed by the learned Court. The Learned Magistrate by the order dated 30.09.2021 in connection with the said Airport G.D. No.615 dated 16.04.2021 even issued warrant of arrest. This Court does not find justification for issuance of warrant of arrest, particularly in case of GD Entry case under Section 41 of Cr.P.C as no specific case was made out before the Court as per his own finding and observation made in his earlier order while enlarging the petitioner on interim bail.

Be that as it may, the petitioner's case is that due to turbulent faced by way of financial crunch, the accounts of the respondent no.6 became Non-Performing Asset (N.P.A.) and an application came to be filed against the company before the National Company Law Tribunal, Kolkata Bench (in short "N.C.L.T.") under Section 9 of the Insolvency and Bankruptcy Act, 2016 ("IBC") and a specific case being C.P. (IB) No.1237/KB/2018 (Beni Gopal Singhi vs. EMC Limited) was started and a moratorium was declared for the purpose to Section 14

of the IBC and an Insolvency Resolution Professional was appointed over the said company. So, under the provisions of IBC from the date of appointment of Resolution Professional, the management of affairs of the company undergoing insolvency vested in the Resolution Professional and the powers of the erstwhile Board of Directors stood suspended and all the powers are to be exercised by the Resolution Professional and the entire operations of the entity is undertaken in the insolvency.

The petitioner alleges that the respondent no.5 issued summons to the petitioner about an enquiry undertaken under Section 70 of the Central Goods and Services Act, 2017 (in short "CGST Act") for having reasons to believe that the petitioner was in possession of the facts and/or documents which were relevant for the said enquiry.

Mr. Moitra, learned senior counsel for the petitioner has invited my attention to various pages of the writ application contending that several summons were issued to the petitioner and the petitioner replied each and every summon and twice the petitioner attended before the authority for the purpose of enquiry. Accordingly, it is claimed that from the record there is no prima facie case of the petitioner being an accused in connection with any specific case registered against him, though, it is admitted that he was the Managing Director of the respondent no.6 company admittedly under liquidation and Resolution Professional has been appointed by the N.C.L.T. who has taken over the entire

management of the respondent company no.6. It is specifically urged that look out circular stands exhausted as and when the petitioner was taken into custody at the instance of the Migration Officer at the Airport on 16th April, 2021. As I have discussed that despite the fact that the petitioner was granted interim bail on consideration that there was no case made out against him, yet on a put up petition on behalf of the respondent authority, the interim bail was cancelled by the learned Magistrate without due notice to the petitioner. In this context, it is pointed out by Mr. Moitra learned senior counsel for the petitioner that it was because of the prevailing Pandemic situation due to second wave of Covid –19 that the petitioner could not attend.

It is the contention of the petitioner that the petitioner is facing the family issue as his daughter is expecting mother who resides with her husband at Dubai and his daughter is having serious health complication for which he had rushed to Dubai and after the medical condition of his daughter was improved a bit, he returned to Kolkata on 16.04.2021 when he was apprehended and learnt about the look out circular issued against him.

As a matter of fact, the said summons issued to the petitioner are not covered by Section 31 of the IBC, the judgment and order passed by the National Company Law Tribunal, Kolkata Bench dated 21.10.2019 in the said referred case in IB No.

1237/KB/2018 and it is contended in unequivocal term that the documents and other things sought for by the respondent authorities would only be available with the respondent no. 6 company and not with the petitioner. The respondent no. 6 company has itself intimated the same to the respondent authorities. the petitioner by a letter dated 16.10.2019 vide annexure "P 15" to the instant petition had intimated the respondent no. 4 that the company was facing IBC proceedings before the learned NCLT, Kolkata Bench and that consequently the Board of the company has been suspended along with CMD and other Directors are no longer having any operational and administrative powers. So the petitioner requested the respondent authorities to intimate the company directly for any information pertaining to the present case and to allow the company's representative to co-ordinate the submission of date directly to the respondent no. 4. Further it has already been brought to the attention of the respondent authorities that the employees in the knowledge being the employees in the finance/taxation department of the respondent no. 6, company have left the company due to non-payment of salaries. It is pointed out that the summon was issued by senior Intelligence Officer, MZU, under CBIC-DIN-202012DWW0000000276E inter lia directing the petitioner to appear before DGGI, Kolkata Zonal Unit, 14/2, Kareya road, 4th Floor,

Kolkata – 700017 in connection with the ongoing proceedings but nothing to submit further from the end of the petitioner as the petitioner has already submitted all the documents as demanded previously by SIO, MZU. It is further submitted that since the Resolution Plan has been approved by the NCLT waiving and extinguished and settled all tax dues whatever nature by the Central or State or local authority pertaining to any period prior to the effective date. There was no question for any summon being issued for enquiry in terms of Section 17 of DGST. It has been specifically clarified that all the dues pertaining any period prior to the effective date. The relevant clause of the Resolution Plan are set out hereinbelow for the purposes of convenience-

“8(b) The Resolution Plan further states that post approval of this Resolution Plan, the entire dues towards Statutory Dues as on the Effective Date relating to the period upto the Effective Date, whether assessed or pending assessment or in dispute, shall stand waived, settled and extinguished, and no claims whatsoever, of any nature, shall subsist.”

It is further pointed out that the petitioner by a letter dated 16.10.2019 vide annexure “P 15” to the instant petition had intimated the respondent no. 4 that the company was facing IBC proceedings before the learned NCLT, Kolkata Bench and that consequently the Board of the company has been suspended along with CMD and other Directors are no longer having any operational and administrative powers. So the petitioner requested the respondent authorities to intimate the company directly for any

information pertaining to the present case and to allow the company's representative to co-ordinate the submission of debt directly to the respondent no. 4. Further it has already been brought to the attention of the respondent authorities that the employees in the knowledge being the employees in the finance/taxation department of the respondent no. 6, company have left the company due to non-payment of salaries. It is pointed out that the summon was issued by senior Intelligence Officer, MZU, under CBIC-DIN-202012DWW0000000276E, inter alia, directing the petitioner to appear before DGGI, Kolkata Zonal Unit, 14/2, Kareya road, 4th Floor, Kolkata – 700017 in connection with the ongoing proceedings but there was nothing to submit further from the end of the petitioner as the petitioner has already submitted all the documents as demanded previously by SIO, MZU. It is further pointed out that since the Resolution Plan has been approved by the NCLT waiving and extinguishing and settling all tax dues whatever nature by the Central or State or local authority pertaining to any period prior to the effective date, there was no question for any summon being issued for enquiry in terms of Section 70 of GST Act. It has been specifically clarified that all the dues pertaining to any period prior to the effective date under the provisions of Income Tax Act, 1961, VAT, Customs, Central Excise Act, Service Tax, Goods and Service Tax, Commercial Tax, any

amount payable under the Companies Act 2013/1956 etc., including taxes, duty, penalties, interest, fines, cesses, unpaid Tax Deducted at Source/Tax Collected at Source, any other type of tax, whether admitted or not, due or contingent, whether part of above the claims/liabilities or not, whether part of due diligence finding or not, assessed or under assessment or assessed and under dispute, crystallized or uncrystallized, known or unknown, secured or unsecured, disputed or undisputed, shall stand extinguished by virtue of the order of the Adjudicating Authority approving the Resolution Plan and the Company would not be liable to pay any amount against such demand. All notices, demand, assessments/appellate or other proceedings, including criminal proceedings pending in case of the company, on the date of the order of the Adjudicating Authority relating to the period prior to the Effective Date, shall stand terminated and all consequential liabilities, if any, should be treated as waived/written off and should be considered to be not payable by the company by virtue of the order of the Adjudicating Authority. All notices proposing to initiate any proceedings against the company in relation to the period prior to the Effective Date and pending on that date, shall be considered non-est in law/cancelled/recalled and should not be proceeded with. Post the order of the Adjudicating Authority, no assessment/re-assessment/revision or any other proceedings under

the provisions of the Income Tax Act, VAT, Customs, Central Excise Act, Service Tax, GST or any other Statutory Authority should be initiated against the company in relation to period prior to the Effective Date any consequential demand should be considered non-est in law and would not be payable by the Company. Any proceedings which were kept in abeyance in view of process under the Code or otherwise should not be revived post the order of the Adjudicating Authority.

Thus, it is argued on behalf of the petitioner by Mr. Moitra that the petitioner has always cooperated in the enquiry under Section 70 proceeded against the petitioner. Now, so far as the status of Look Out Circular is concerned Mr. Moitra has relied on a decision in case of **Sumer Singh Salkan vs. Assistant Directors and Ors.** reported in (2018) 7 AD (Delhi) 342 being the decision dated 11.8.2010 passed in W.P. (CRL) No. 1315 of 2008 wherein the following questions were raised for their answers dismissed in paragraph 11 thus:-

“11. Look Out Circular has also been issued against the petitioner as the petitioner is an accused before the Court of M.M. and he has not appeared before the Court of M.M. If the petitioner given an undertaking before the Court for his appearance on a particular date, through his counsel, the Look Out Circular issued against the petitioner shall be withdrawn within 24 hours of giving undertaking by the petitioner.

The questions raised in the reference are as under:

“A. What are the categories of cases in which the investigating agency can seek recourse of Look Out Circular and under what circumstances?

B. What procedure is required to be followed by the Investigating agency before opening a Look Out Circular?

C. What is the remedy available to the person against whom such Look Out Circular has been opened?

D. What is the role of the concerned Court when such a case is brought before it and under what circumstances, the subordinate courts can intervene?

The questions are answered as under:

A. Recourse to LOC can be taken by investigating agency in cognizable offences under IPC or other penal laws, where the accused was deliberately evading arrest or not appearing in the trial court despite NBW's and other coercive measures and there was likelihood of the accused leaving the country to evade trial/arrest.

B. The Investigating Officer shall make a Written request for LOC to the officer as notified by the circular of Ministry of Home Affairs, giving details & reasons for seeking LOC. The competent officer alone shall give directions for opening LOC by passing an order in this respect.

C. The person against whom LOC is issued must join investigation by appearing before I.O. or should surrender before the court concerned or should satisfy the court that LOC was wrongly issued against him. He may also approach the officer who ordered issuance of LOC & explain that LOC was wrongly issued against him. LOC can be withdrawn by the authority that issued and can also be rescinded by the trial court where case is pending or having jurisdiction over concerned police station on an application by the person concerned.

D. LOC is a coercive measures to make a person surrender to the investigating agency or Court of law,. The subordinate courts' jurisdiction in affirming or cancelling LOC is commensurate with the jurisdiction of cancellation of NBW's or affirming NBWs."

The said decision was passed taking cue from landmark judgment of the Hon'ble Apex Court in **Maneka Gandhi vs. Union of India** reported in **AIR 1978 SC 597**.

It appears that there is no statutory definition of Look Out Circular. It is only based on the issuance of Circular on the basis of the Ministry of Home Affairs. So, there appears ambiguities in so

afar as the power to exercise for issuance of such Look Out Circular is to be made and that has been examined by the Hon'ble High Court, Delhi in a decision case of **Vikram Singh vs. Union of India** vide decision dated 5th May, 2020 passed in writ petition (CRI) Diary No.10935/2020 where the preliminary question before the Court was whether a statutory body like the National Commission of Women can issue LOC notice; that answer was negated, but the fact remains that the recourse to issue Look Out Circular are undertaken by Investigating Agency in cognizable offence under IPC and under Penal Laws where the accused is deliberately evading arrest or not appearing in the Trial Court and has a flight risk despite non-bailable warrant and other coercive measures. So, the Look Out Circular is issued for the purpose of getting into investigation for the surrender of the accused before the Court. Thus, the LOC is a coercive measure to make a person surrender before a Court or Investigating Agency. Such Circulars are issued as per the office Memorandum of Ministry of Home Affairs even for the purpose of watching arrival and departure of wanted person for the purpose of impounding Passport and can also be issued at the instance of the Court of Interpol. It would appear that by and large, the LOC Circular is used by the Executive Body and there should be a legislation by the parliament to regulate this issuance of Look Out Notice and the cases in which the Look Out

Notice Circular can be issued against a person as the subject of issuing Look Out Circular appears to be highly discretionary and there may be colourable exercise on the part of the Executive.

On behalf of the respondent nos. 3 and 4, Mrs. Manasi Mukherjee, learned counsel for the respondent nos. 3 and 4 submits that Look Out Circular can be even issued without assigning reason. Reference to a decision in case of **Abdul Kadir Najmudin Sathak vs. Union of India & Ors.** passed on 19th March, 2019 in writ petition no.8214 of 2018 by Hon'ble Madras High Court made to submit that in the cited case on a reliable information that the petitioner has arrived from Dubai and is available in India, a Look Out Circular was issued against him to ensure his presence for carrying out further investigation in the matter. It has also been stated in paragraph 5 of the decision that the petitioner was detained by the Immigration Authorities at Delhi Airport while he was trying to board a flight to Nepal. On receipt of information about his detention, the second respondent took him to Mumbai Zonal Office along with the Passport for examining him for his evidence under Section 50 (2) and 50 (3) of PMLA. Admittedly, the Passport was handed over to the petitioner but the said Look Out circular was under challenge in the writ application. The Hon'ble Court observed in its conclusion that Look Out Circular was issued in the year 2016 and was challenged after almost more than a year,

long enquiry. Hence, the impugned Look Out Notice was not quashed.

Taking cue from the observation of the cited decision, Mrs. Mukherjee, learned counsel for the respondent nos.3 and 4 submits that in the present case, the Look Out Circular was issued against the petitioner in March, 2021 for the purpose of further investigation.

In rebuttal Mr. Moitra, learned senior counsel for the petitioner submits that decision is quite distinguishable from the facts and circumstances of the instant case as the cited case was in respect of an offence under Prevention of Money Laundering Act, 2002 and LOC was issued in a specific registered case.

I fully agree with Mr. Moitra, as in the present case, there is no specific case made out against the petitioner by the respondent authorities for the purpose of investigation and in the course of investigation petitioner cooperated in response to several summons issued by the respondent nos. 3 and 4, and they were made to know about the decision taken by the N.C.L.T. that whole of the control of the respondent no.6, company was under liquidation and under the management of Resolution Professional.

Representing respondent no. 6, Mr. Srijib Chakraborty, learned Advocate submits that the respondent nos. 3 and 4, G.S.T. Authority have already raised their claim before the Resolution

Professional. In this regard, this Court finds that there was no specific case registered against the petitioner for undertaking investigation, despite that the petitioner has cooperated with the respondent nos. 3 and 4 by making reply to the summons pointing out that the respondent no.6 company was under liquidation and under complete control of Resolution Professional appointed by the NCLT by virtue of its judgment.

On behalf of the Union of India, Mr. S. Bhattacharya, learned counsel appearing for respondent nos. 1, 2 and 7 submits that they are not the authorities to generate the Look Out Circular rather the originators are respondent nos. 3 and 4. Admittedly as per submission of the respondent nos.3 and 4 offence alleged is under Section 132(f) of the GST Act which offence in itself is a non-cognizable offence and bailable in nature.

Therefore, I am of the view that without giving notice to the petitioner, interim order should not have been cancelled to issue warrant of arrest on the prayer of the respondent nos.3 and 4 merely on the ground of non-appearance made on behalf of the petitioner on the assigned date.

In the context of what is discussed above, it is made hereby clear that the petitioner has a fundamental right of movement and right to life as enshrined in Article 19(1)(b) of the Constitution of India. Therefore, he has a right to travel beyond the territory of

India as held by the Hon'ble Supreme Court in *Maneka Gandhi vs. Union of India* (supra) and in case of *Satwant Singh Sawhney Vs. D. Ramarathnam Assistant* reported in 1976 7 AIR 1836:1967 SCR (2) 525 wherein it has been held by majority decision of the Hon'ble Apex Court that 'the expression personal liberty which occurs in Art. 21 of the Constitution includes the right to travel abroad and that no person can be deprived of that right except according to procedure established by law. The mere prescription of some kind of procedure cannot even meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by law which curtails or takes away the personal liberty guaranteed by Art. 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the provision for a full-dressed hearing as in a court room trial but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with. Secondly, even the fullest compliance with the requirements of Art. 21 is not the journey's end because a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty granted by Art. 21 has still to meet a possible challenge under the other provisions of the Constitution.'

It is to be borne in mind that India is a signatory and part of the Universal Declaration of Human Rights, 1948 and under the provision of Article 13, it guarantees that everyone has the right to freedom of movement and residence within the borders of each State and everyone has right to leave any country including his own, and to return to his country. So, having regard to the principles laid thereunder and bearing in mind the settle principle of law on the fundamental rights of a citizen enshrined in part 3 of Constitution of India as discussed by Hon'ble Supreme court of India in the above cited decisions and further considering that Look Out Notice is issued by executive authorities in arbitrary manner, under the Scheme of Office Memorandum of the Ministry of Home Affairs, it is imperative on that part of the Parliament to legislate and in act complete legislation on the subject of Look Out Circular.

For the reasons stated in the forgoing paragraphs, the Look Out Circular being No. 2021405597 against the passport No. Z526636 issued at the instance of the respondent nos. 3 and 4 dated 12.3.2021 is hereby quashed, however, the petitioner in usual course would cooperate the respondent authorities if so required through video conferencing as the petitioner is non-est at the present in the respondent company no. 6 and if the respondent authority nos. 3 and 4 have any further investigation to be made,

they are at liberty to seek assistance of Resolution Professional because the respondent no. 6 company is controlled by them.

Accordingly, the writ application being W.P.A. 15407 of 2021 is decided and allowed, however, without any order as to cost.

All the parties including the Bureau of Immigration will act on the basis of a copy of this order downloaded from the Official Website of this Hon'ble Court.

(Shivakant Prasad, J.)