

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

WPA 6670 of 2022

Vishambhar Saran
vs.
Bureau of Immigration &ors

For the petitioner : Mr. Sabyasachi Choudhury, Sr. Adv.,
Mr. Rajarshi Dutta,
Mr. V.V.V. Sastry,
Mr. Tridib Bose,
Mr. Debjyoti Saha.

For the respondent Nos. 2 & 3 : Mr. Jaydip Kar, Sr. Adv.,
Mr. Dwaipayan Basu Mallick,
Mr. Avishek Guha,
Ms. Akansha Chopra,
Mrs. Debarati Das.

Hearing concluded on: 04.11.2022
Judgment on: 31.01.2023

Shampa Sarkar, J.:-

1. The petitioner who was a Director of Visa Power Limited, has challenged the request for issuance of a Look Out Circular (in short LOC) made by the respondent No.2. The petitioner has prayed for quashing of the request originated by the Managing Director and Chief Executive Officer, Bank of Baroda, (in short BOB). Visa Power Limited (hereinafter referred to as the said company) is currently in liquidation in terms of the order dated

October 11, 2018 passed by the National Company Law Tribunal (in short NCLT), Kolkata Bench.

2. When the petitioner was a director of the said company, the said company availed of credit facilities from a consortium of several banks. One such bank was the respondent No.2. A term loan was sanctioned by the said consortium sometime in 2010. The lead bank was the Punjab National Bank (in short PNB). Such loan was for the purpose of setting up a thermal power project in Raigarh.

3. The project viability and the financial closure were based on the captive coal block allocation made in favour of the said company by the Government of India. According to the petitioner, due to the en-mass cancellation of coal block allocations by the Hon'ble Supreme Court by an order dated September 24, 2014, the said company could not commence operations and its account was declared as a Non-Performing Asset (NPA) by the lenders on March 31, 2016.

4. The Bank of Maharashtra filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC') before the NCLT, Kolkata. By an order dated December 22, 2017, the application under Section 7 of the IBC was admitted and Corporate Insolvency Resolution Process (CIRP) was initiated. On October 11, 2018, the NCLT passed the order of liquidation. A liquidator was appointed and a direction to issue a public announcement in terms of Regulation 12 of the IBBI (Liquidation Process) Regulations, 2016 was issued.

5. The liquidator was directed to proceed with the process of liquidation in the manner laid down in Chapter - 3 of the IBC. During the pendency of the proceedings before the NCLT Kolkata, one of the erstwhile directors of the company was refused passage by the officials at Chhatrapati Shivaji Maharaj International Airport, Mumbai. The said director was stopped at the immigration. On query, an immigration official intimated the said director that LOC had been issued against him and other directors of the company which was in liquidation, at the request of the respondent Nos. 2 and 3. The petitioner called upon the respondent No.1, i.e., Bureau of Immigration to recall, revoke and withdraw the LOC on various grounds.

6. On April 5, 2022, the respondent No.2 issued a letter informing the learned Advocate for the petitioner, that the request for LOC was originated by the competent authority of BOB, in reference to the NPA of the said company in liquidation. The bank stated that the respondent No.2 had the authority to make such a request before the competent authority. As the procedure relating to such request and the contents of such request were confidential in nature, the Bank did not disclose further details.

7. PNB, as the lead bank of the consortium of lenders had made a similar request for issuance of LOC. The LOC was issued. The LOC was challenged by the petitioner and some of the directors in WPA 10241(W) of 2020. Similarly, other directors also filed writ petitions with identical challenges.

8. All the writ petitions were heard analogously by a co-ordinate Bench of this Court. The LOC dated February 29, 2020 issued in respect of the

petitioner and others by the immigration authorities at the request of PNB had been quashed by a judgement and order dated December 24, 2021 of the Calcutta High Court.

9. Apprehensive that a similar fate may befall the petitioner and he may be stopped just like the other directors at the immigration during his foreign travels, this writ petition has been filed, *inter alia*, challenging the request made by BOB. The Bureau of Immigration has been impleaded as the respondent No.1. The Union of India, Ministry of Home Affairs (Foreigners Division) as the respondent No.4, each of the members of consortium of banks as respondent Nos. 5 to 9 respectively. The originating bank is represented by the respondent Nos. 2 and 3.

10. Mr. Choudhury, learned Advocate for the petitioner submitted that the company was already in liquidation. The creditors/banks would be at liberty to approach the liquidator as per law for recovery of the dues. The parameters laid down in the office memorandum dated October 27, 2010 issued by the Government of India, Ministry of Home Affairs (Foreigner Division), had not been satisfied before the request was made. There were no grounds for such request. The categories of cases in respect of which an investigating agency or any other agency including a bank could seek recourse to such a harsh and restrictive measure, were entirely different. Neither any cognizable offence under the Indian Penal Code or other penal statutes had been committed by the petitioner, nor had the petitioner deliberately tried to evade arrest and other legal proceedings. Further, learned Advocate contended that in the absence of any input from

intelligence agencies that the petitioner was likely to flee the country without paying the dues of the bank and such departure, would affect the economic interest of the country, the request for LOC was not sustainable in law. Exceptional circumstances did not exist in this case.

11. According to learned Advocate, the thermal power project failed due to the cancellation of the coal block allocations. The petitioner could not be labelled either as a wilful defaulter or as a fraudster. The default in repayment of the loan would not *ipso facto* destabilize the economy of the country. Learned Advocate urged that request for issuance of LOC could not be used as a pressure device for recovery of the loan. The originating bank had other avenues to recover the amount by initiating different proceedings under the relevant laws, but the personal liberty of the petitioner and his right to freedom of movement could not be curtailed in any manner considering the facts of this case.

12. Strong reliance had been placed on the decision of this Court in WPA 10241(W) of 2020. It was submitted that once the LOC issued at the request of the lead bank had been quashed by a competent court of law, another member of the consortium could not make a similar request before the Bureau of Immigration, at a later stage. The attention of the Court was drawn to the various circulars and the Standard Operating Procedure (SOP) dated November 22, 2018 in this regard. Learned Advocate urged that even if the Ministry of Home Affairs by a memorandum dated October 12, 2018 had authorized the Chairmen/Managing Directors/Chief Executive Officers of all Public Sector Banks, to make requests for opening LOC in respect of

Indian citizens and foreigners, the originating banks were required to strictly comply with the instructions of the Ministry of Home Affairs and follow the guidelines incorporated in the memorandum dated October 27, 2010.

13. Mr. Choudhury contended that the petitioner was neither a whole time director nor an entity or a proprietor. As such, the request for issuance of LOC against the petitioner could not have been made as per the standard operating procedure. He submitted that the request was made by the originating bank without ascertaining whether the basis and the circumstances for making such a request at all, existed. The request had to be fact-based and made carefully and judiciously, on objective parameters supported by evidence. Merely by declaring the account of the said company as NPA, the respondent No.2 could not have issued the request for LOC.

14. Referring to the affidavit-in-opposition filed by the Chief Manager, BOB, Stressed Assets Management Branch, the learned Advocate contended that the request of LOC was not in the proper format. Separate reasons for opening of the LOC, was provided as column No.4 of the request under serial nos. 1 to 6 thereof. Actual Column IV of the Proforma enclosed to the memorandum could not been filled in, as there were neither any criminal proceedings nor any judicial proceeding, pending against the petitioner. By incorporating its own reasons, contrary to the format, the bank had tried to provide a legal flavour to such request. Such reasons were based on the forensic audit report and the findings with regard to undervalued transactions, diversion of funds etc. Those allegations had been disbelieved

by the NCLT, Kolkata and the order of the NCLT was upheld by the National Company Law Appellate Tribunal (in short NCLAT). Moreover, the complaint filed by PNB on behalf of the consortium of banks, before the Central Bureau of Investigation (in short CBI) had been returned on the ground of lack of details indicating commission of a cognizable offence by the petitioner and other directors.

15. Learned Advocate submitted that by way of abundant caution, the Union of India, the Bureau of Immigration and the other members of the consortium of banks had been impleaded as party respondents in the proceeding, so that all the lenders and the immigration authorities before whom the request had been made, could contest the proceeding and make their submissions before the Court. None of the said respondents had come up in support of BOB. Learned Advocate prayed that the request for LOC be set aside and all other consequential steps that might have been taken by any of the respondents, more specifically the respondent Nos. 1 and 4, be quashed.

16. Mr. Kar, learned Senior Advocate appeared on behalf of the respondent No.2 and 3, i.e., the originating bank. He drew the attention of the court to paragraph-4 of the office memorandum dated October 27, 2010 which dealt with issuance of LOC in respect of Indian citizens and foreigners. Such memorandum was issued by the Government of India, Ministry of Home Affairs (Foreigners Division). According to Mr. Kar, initially, only the state and the central agencies had the authority to make a request for issuance of LOC. Referring to a decision of the Delhi High Court

passed in WP (Civil) No.10180 of 2009, Mr. Kar submitted that it was for the Government of India to frame a policy as to whether it would vest an authority with the right to originate a request for issuance of LOC.

17. Mr. Kar submitted that originally recourse to LOC could be taken in case of commission of cognizable offences under the Indian Penal Code or other penal laws or by an order of court or when the subject was evading arrest or a legal proceeding. However, an exception was made in the policy of 2010 under sub paragraph (j) of paragraph 8 thereof. The provision stated that LOC could be issued without the satisfaction of all the parameters and/or case details, against CI suspects, terrorists and anti-national elements, etc., in larger national interest.

18. Referring to the office memorandum dated December 5, 2017, Mr. Kar submitted that sub-paragraph (j) was substituted in 2017 to include further circumstances which would be considered as exceptional for issuance of LOC. The said amendment provided that LOCs could be issued even in cases which were not covered by the earlier guidelines of 2010, and departure of a person from India could be declined at the request of any of the authorities mentioned in sub-paragraph (b) of paragraph 8 of the policy of 2010, under the following situations:- (a) if it appeared to the authority based on inputs received, that the departure of such person would be detrimental to the sovereignty or security or integrity of India; (b) that the departure would be detrimental to the bilateral relations with any country; (c) the departure would cause harm to the strategic or economic interest of India; (d) if such person was allowed to leave, he would potentially indulge in

terrorist activities or offences against the state; and (e) the departure of such person could not be permitted in larger public interest.

19. The essence of Mr. Kar's submission was that in view of a series of economic offences which had been committed by businessmen and business houses between 2010 to 2017, the Central Government thought it fit to put further restrictions on the movement of such persons who were economic offenders and who had indulged in illegal business dealings. Such activities were considered to be detrimental to the bilateral relations of India with other countries and also detrimental to the strategic and/or economic interest of India.

20. Further reference was made to the subsequent office memorandum dated October 4, 2018 issued by the Deputy Director, Government of India, Ministry of Finance. By the said office memorandum, the heads of public sector banks were also included in the list of originating agencies. Relying on the objects and reasons for inclusion of the heads of the banks in the list of originating agencies, Mr. Kar submitted that by a letter dated September 24, 2018 the CBI suggested to the Department of Financial Services (DFS) that appropriate officers of the banks must also be empowered to make requests for opening of LOCs against economic offenders/defaulters in order to track down and identify economic offences.

21. According to Mr. Kar, as the CBI was of the opinion that wilful defaulters and money launderers were covered by the amendment of 2017 under sub-paragraph (j), of paragraph 8 of the memorandum of 2010, for proper identification of such economic offenders, the Chairman/Managing

Directors and Executive Officers of all public sector banks were included in the list of originating agencies. It was urged that the CBI, itself, found it difficult to monitor such offenders and was of the view that the guidelines should include senior officers of public sector banks as originating agencies. Such suggestion of the CBI was in the nature of an intelligence input. Referring to the memorandum dated November 22, 2018 and to the consolidated guidelines issued thereafter dated February 22, 2021, learned Senior Advocate submitted that even if no criminal case or judicial proceeding was pending against a defaulter, the Managing Director of the bank had the authority to make a request for issuance of LOC before the appropriate authority. In this case, the outstanding dues of the consortium of banks was over Rs.2099 crores and the banks were justified in apprehending that in order to avoid such liability, the petitioner might leave the country. The fact that the petitioner being the promoter/director had wilfully defaulted in repaying the amounts to the banks, was a matter of record and not open to contradiction. Learned Advocate further submitted that a default of more than 2000 crores was synonymous to misappropriation public money. The entire money could never be recovered through the liquidation proceedings. The amounts were utilized by the petitioner and the co-directors. The company went into liquidation. The amount still remained outstanding. The banking business of the consortium of banks suffered and the losses which were incurred by the public sector banks had affected the economy of the country.

22. Controverting Mr. Choudhuri's argument that the NCLT and NCLAT had categorically found that the corporate debtor/Visa Power Limited had not indulged in any fraudulent, under-valued or preferential transaction, Mr. Kar contended that the scope of the proceedings before the NCLT and the NCLAT were limited to the provisions of Sections 43, 44 and 45 of the 'IBC'. Learned Advocate submitted that the liquidator filed an application before the NCLT for orders upon the corporate debtor to make contributions in terms of Sections 44 and 45 of the IBC. Such prayer was made on the basis of a forensic audit report. The NCLT decided that no order could be passed asking the corporate debtor to make such contributions, solely on the basis of the observation in the forensic audit report. Learned Advocate further contended that such decision was rendered under different set of facts and the adjudication was restricted to the allegation of preferential and under-valued transactions. Whereas, the request for issuance of LOC was based on the specific belief that the petitioner who was the promoter/director had committed an offence detrimental to the economic interest of the country and for which the banking business had suffered greatly. Such loss had affected the bilateral relations of India with other countries. The originating bank also had reason to believe that the petitioner would leave India at any time to avoid the legal consequences of such default.

23. Thus, learned counsel submitted that the decision of the NCLT which was affirmed by the NCLAT could not act as a deterrent to the request made by BOB for issuance of LOC. Referring to the consolidated guidelines issued

on February 22, 2021, Mr. Kar emphasized that the request for issuance of LOC by a bank could be made even if there was no pending criminal case or warrant against the defaulter and even if the defaulter was not wanted in any judicial proceeding. The movement of the petitioner who was the promoter/director of the said company in liquidation and who was at the helm of affairs of the company in liquidation, should be restricted so that recovery of public money could be made more effectively. He urged the Court to consider the request for LOC issued by the respondent No.2 on its own merits and to draw a factual distinction between the case in hand and the issues decided in WPA 10241(W) of 2020.

24. Mr. Kar also submitted that the first request for LOC was originated by PNB. The same did not provide any reasons under Column IV of the format. The co-ordinate Bench found that in the absence of material particulars in support of the contention of PNB that the wilful defaulter had acted prejudicial to the economic interest of the country, the LOC could not be sustained in law. The request for issuance of LOC by the respondent No.2 which had been annexed in the affidavit-in-opposition, would clearly indicate the grounds and the reasons for such request.

25. Relying on paragraph (d) of the office memorandum dated October 4, 2018, issued by DFS, Government of India, Ministry of Finance, Mr. Kar sought to distinguish the judgment of the co-ordinate Bench dated 24th December, 2021. Learned Advocate submitted that the learned single Judge had proceeded on a misconception that mere debt or default or a declaration of the account as an NPA would not be sufficient ingredients to enable the

bank to make a request for issuance of LOC. Paragraph (d) of the said memorandum had not been considered.

26. Pointing out the factual differences in the subject matter of challenge in WPA 10241(W) of 2020 and in the present writ petition, Mr. Kar urged the court to apply the provisions of the amended circular of 2017 and 2018 and the objects and reasons for those amendments, to the facts of the present case. Learned Advocate also submitted that quashing of the LOC issued at the request of the lead bank (PNB), would not limit the authority of BOB to make a further request in respect of its individual claim. Mr. Kar submitted that PNB had made the request in respect of their unpaid loan of about Rs.300 crores and had not made the request on behalf of the members of the consortium.

27. Reliance was placed in the decisions of the Delhi High Court in the matter of **Shri Subrato Trivedi vs. Union of India & Anr.** in **W.P. (C) 6269/2022**¹ and the Karnataka High Court in the matter of **Dr. Bavaguthu Raghuram Shetty vs. Bureau of Immigration and Ors.** in **WP No. 15032 of 2020.**

28. What has fallen for decision is whether the request of BOB for issuance of LOC is sustainable or not.

29. The general objective for issuance of LOC is to control the arrival/departure of persons against whom criminal cases are pending or who are either avoiding judicial proceedings or evading arrest or not co-

operating with the investigating agencies and there are specific inputs that such person(s), would flee the country.

30. The first comprehensive policy was framed and found its release in the office memorandum dated October 27, 2010. The authorities who could issue LOC, the ingredients necessary for issuance of LOCs, the agencies who could make a request for issuance of LOCs and the various parameters required to be fulfilled before such request could be made, was provided therein.

31. Paragraph 8 (a) and (b) of the office memorandum dated October 27, 2010 are quoted below:-

“a) The request for opening an LOC would be made by the originating agency to Deputy Director, Bureau of Immigration (BoI), East Block VIII, R.K. Puram, New Delhi – 66 (Telefax: 011-2619244) in the Proforma enclosed.

b) The request for opening of LOC must invariably be issued with the approval of an officer not below the rank of

- i. Deputy Secretary to the Government of India; or
- ii. Joint Secretary in the State Government; or
- iii. District Magistrate of the District concerned; or
- iv. Superintendent of Police (SP) of the District concerned; or
- v. SP in CBI or an officer of equivalent level working in CBI; or
- vi. Zonal Director in Narcotics Control Bureau (NCB) or an officer of equivalent level (including Assistant Director (Ops.) in Headquarters of NCB); or
- vii. Deputy Commissioner or an officer of equivalent level in the Directorate of Revenue Intelligence or Central Board of Direct Taxes or Central Board of Excise and Customs; or
- viii. Assistant Director of IB/BoI; or
- ix. Deputy secretary of R&AW; or
- x. An officer not below the level of Superintendent of Police in National Investigation Agency; or
- xi. Assistant Director of Enforcement Directorate; or
- xii. Protector of Emigrants in the office of the Protectorate of Emigrant or an officer not below the rank of Deputy Secretary of the Government of India; or

xiii. Designated officer of Interpol.”

Sub-paragraph (b) of paragraph 8 did not include the heads of public sector banks at the relevant point of time.

32. The policy also provided that LOCs could be issued on the direction of a Court in India. Sub-paragraph (c) provided the parameters and the details to be filled up including the reasons in Colum IV of the Proforma enclosed to such policy. Column IV is quoted below:-

“REASON FOR OPENING OF LOC:

a. CRIMINAL CASE: i) FIR NO. ii) DATE
(specify full details)

iii) SECTION OF LAW (Where applicable):

iv) POLICE STATION: v) DISTRICT: vi) STATE:

b. WANTED BY ANY OTHER COURT/JUDICIAL AUTHORITY:

i) NAME OF THE COURT:

ii) ORDER BY WHICH SUBJECT IS WANTED:

c. LOC RETENTION DATE:

(As per MHA guidelines. LOC will remain valid for at most one year)”

33. Sub-paragraph (g) and (h) of the same laid down the conditions under which opening of LOCs could be made. The same are set out below:-

“g. Recourse to LOC is to be taken in cognizable offences under IPC or other penal laws. The details in column IV in the enclosed Proforma regarding ‘reason for opening LOC’ must invariably be provided without which the subject of an LOC will not be arrested/detained.

h. In case where there is no cognizable offence under IPC or other penal laws, the LOC subject cannot be detained/arrested or prevented from leaving the country. The originating agency can only

request that they be informed about the arrival/departure of the subject in such cases.”

34. A combined reading of sub-paragraph (g) and (h) of the said 2010 policy indicates that recourse to LOCs could be taken when the subject was guilty of commission of a cognizable offence under the Indian Penal Code or other penal laws. The details in Column IV of the Proforma enclosed regarding the reasons for opening of LOC were to be provided without which the subject of an LOC could neither be arrested nor detained. If there were no allegations of commission of any cognizable offence, the LOC subject could not be detained or prevented from leaving the country. In such cases, the originating agency could only request that they be informed about the arrival/departure of the subject in such cases.

35. In a general sense, the policy of 2010 restricted the reasons for opening an LOC to cases of pending criminal investigation or proceedings relating to commission of any cognizable offence under the Indian Penal Code or other penal laws. Sub-paragraph (j) of Office Memorandum of 2010 made an exception to such parameters. The same is set out herein below:-

“j. In exceptional cases, LOCs can be issued without complete parameters and/or case against CI suspects, terrorists, anti-national elements, etc. in larger national interest.”

In cases where no criminal investigation with regard to commission of any cognizable offence was pending, a request for LOC could be made if the subject of the LOC was either a CI Suspect or a terrorist or an anti-national.

36. By the amendment in 2017, persons whose actions were detrimental to bilateral relations of India with other countries or detrimental to the strategic and economic interest of the country and were likely to flee the country as per intelligence inputs, were included as subjects of LOCs. Sub-paragraph (j) was substituted. The amendment as notified by office memorandum dated December 5, 2017. The same reads as follows:-

“In exceptional cases, LOCs can be issued even in such cases, as would not be covered by the guidelines above, whereby departure of a person from India may be declined at the request of any of the authorities mentioned in clause (b) of the above-referred OM, if it appears to such authority based on inputs received that the departure of such person is detrimental to the sovereignty or security or integrity of India or that the same is detrimental to the bilateral relations with any country or the strategic and/or economic interest of India or if such person is allowed to leave, he may potentially indulge in an act of terrorism or offences against the State and/or that such departure ought not be permitted in the larger public interest at any given point in time.

Instead of:

‘In exceptional cases LOCs can be issued without complete parameters and/or case details against CI suspects, terrorists, anti-national elements, etc in larger national interest.’ ”

37. The object of such amendment was to prevent persons guilty of offences which were harmful to bilateral relations of India with other countries or detrimental to the strategic and economic interest of the country, from fleeing the country.

38. In the opinion of the Court, the interpretation of the expression ‘bilateral relations between two countries’ would mean the conduct of political, economic or cultural relations between two sovereign states.

‘Strategic and economic interests of the country’ would mean relationship between two countries which would be mutually beneficial and the expression ‘economic interest’ would include in its ambit, growth, development, industrialization, investments, business activities, the strength of the currency, the position of the sensex etc. The expression ‘economic interest’ in the 2017 amendment cannot be given a narrow interpretation to mean individual banking relationship between the borrower and the bank and non payment of the borrowed sum. The expression should be read in the context of bilateral relations and strategic interest of India.

39. At the request of the CBI to DFS in the letter No. 125/3/3/HO2/BS&F2/2018 dated September 24, 2018, public sector banks were empowered to request for opening of LOC. CBI was of the view that economic offenders, wilful defaulters and fraudsters who took loans from the banks and used the same for illegal business activities should be closely monitored. The CBI suggested that the Chairman and/or Managing Directors of Public Sector Banks should be empowered to make requests for opening LOCs against economic offenders/defaulters. By office memorandum dated October 4, 2018 issued by the Deputy Director, BOI, the Ministry of Home Affairs was requested to include sub-paragraph (xiv) to paragraph 8(b) of the memorandum of October 27, 2010.

40. The office memorandum dated October 4, 2018, *inter alia*, stated as follows:-

“(a) Issuance of LOCs in respect of Indian citizens and foreigners is governed by Instructions contained in the Ministry of Home Affairs

(MHA)'s OM dated 27.10.2010, as amended by MHA's OM dated 05.12.2017.

(b) Paragraph 8 (b) of MHA's OM dated 27.10.2010 lists those authorities of minimum rank, with whose approval the request for opening of LOC must be issued. The list does not include officers of banks at present.

(c) As per the amended Paragraph 8(j) (amended through MHA's OM dated 05.12.2017),

'In exceptional cases, LOCs can be issued even in such cases, as would not be covered by the guidelines above, whereby departure of a person from India may be declined at the request of any of the authorities mentioned in clause (b) of the above-referred OM, if it appears to such authority based on inputs received that the departure of such person is detrimental to the sovereignty or security or integrity of India or that the same is detrimental to the bilateral relations with any country or to the strategic and/or **economic interests of India** or if such person is allowed to leave, he may potentially indulged in an act of terrorism or offences against the State and/or that such departure ought not be permitted in the **larger public interest** at any given point in time.'

(d) It is, therefore, clear that the guidelines enable LOCs against persons who are fraudsters/persons who wish to take loans, willfully default/launders money and then escape to foreign jurisdictions, since such actions would not be in the economic interests of India, or in the larger public interest.

2 Therefore, as suggested by CBI, MHA is requested to kindly amend the OM dated 27.10.2010 and include in the list of authorities under Paragraph 8(b) another category, as follows:

'(xiv) Chairman (State Bank of India)/Managing Directors and Chief Executive Officers (MD & CEOs) of all other Public Sector Banks'."

41. The Chairman/Managing Directors/Chief Executive of all Public Sector Banks were included in the list of originating agencies, by office memorandum dated October 12, 2018 issued by the Director (Immigration) under clause-(xv) of sub-paragraph 8(b). The Chairman/Managing Directors/Chief Executive Officers of the banks on receipt of specific inputs that the departure of a person would be detrimental to the sovereignty or

security or integrity of India or detrimental to the bilateral relations of India with any country or harmful to the strategic and/or economic interest of India, could request for opening a LOC.

42. This Court has already observed earlier that the expression ‘economic interest’ cannot be read in isolation but must be read into the context in which it has been used in the policy of 2010 as amended. It cannot be given a narrow interpretation to mean and include the conduct of business between the bank and a defaulter. In the absence of any input that such borrower was likely to flee India and such departure would disrupt or adversely affect the economy of the country or jeopardize the bilateral business relationship and/or the strategic relationship of India with other countries, such request could not be made. Sub-paragraph (j) of paragraph 8 had to be satisfied.

43. The consolidated guidelines for issuance of LOC in respect of Indian citizens and foreigners found its final expression in office memorandum dated February 22, 2021. The guidelines of 2010 which were modified in 2018 were reviewed. Paragraph 6 sub-paragraphs H to L provide the general circumstances under which opening of LOC could be requested by the originating agency which include the Chairman/Managing Director/Chief Executive Officer of all public sector banks. For convenience sub-paragraph H, I, and J are quoted below:-

“(H). Recourse to LOC is to be taken in cognizable offences under IPC or other penal laws. The details in column IV in the enclosed Proforma regarding ‘reason for opening LOC’ must invariably be

provided without which the subject of an LOC will not be arrested/detained.

(I). In cases where there is no cognizable offence under IPC and other penal laws, the LOC subject cannot be detained/arrested or prevented from leaving the country. The originating agency can only request that they be informed about the arrival/departure of the subject in such cases.

(J) The LOC opened shall remain in force until and unless a deletion request is received by BoI from the Originator itself. No LOC shall be deleted automatically. Originating Agency must keep reviewing the LOCs opened at its behest on quarterly and annual basis and submit the proposals to delete the LOC, if any, immediately after such a review. The BOI should contact the LOC Originators through normal channels as well as through the online portal. In all cases where the person against whom LOC has been opened is no longer wanted by the Originating Agency or by Competent Court, the LOC deletion request must be conveyed to BoI immediately so that liberty of the individual is not jeopardized.”

44. Thus, analysing the policy which existed from 2010 and which were amended from time to time and ultimately found its expression in the memorandum dated February 22, 2021, this court is of the view that only in exceptional cases LOCs could be issued even if the parameters quoted hereinabove were not covered. Sub-paragraph (L) of the 2021 policy lays down the exceptions. The same is quoted below:-

“(L) In exceptional cases, LOCs can be issued even in such cases, as may not be covered by the guidelines above, whereby departure of a person from India may be declined at the request of any of the authorities mentioned in clause (B) above, if it appears to such authority based on inputs received that the departure of such person is detrimental to the sovereignty or security or integrity of India or that the same is detrimental to the bilateral relations with any country or to the strategic and/or economic interests of India or if such person is allowed to leave, he may potentially indulge in an act of terrorism or offences against the State and/or that such departure ought not be permitted in the larger public interest at any given point of time.”

45. The bank had to establish that the departure of the petitioner on the basis of intelligence reports would be detrimental to the sovereignty, security and integrity of India, detrimental to the bilateral relation of India with any other country or detrimental to the economic interest of India. Although clause (d) in the office memorandum dated October 4, 2018 issued by DFS, Ministry of Finance, Government of India provided that those persons who were fraudsters or had taken loans, wilfully defaulted in repayment of the same or laundered money and then tried to escape to a foreign jurisdiction should be included in the category of subjects whose departure would be harmful to the economic interest of India, the policy of 2021 did not make a separate category under the exception clause for such persons who were either fraudsters or wilful defaulters and had laundered money and were trying to escape to foreign jurisdiction. Sub-paragraph (L) of paragraph 6 of the policy of 2021 is a verbatim reproduction of sub-paragraph (j) of paragraph 8 of the amended policy of 2010. In the opinion of the court, persons who had taken loan from public sector banks and had laundered money and whose actions had caused disruption to the economic stability, shares and stock market or had affected the current economic growth of the country, would come within the exception clause.

46. This Court finds that the lead bank of the consortium of banks i.e., PNB had already requested for issuance of LOC against the petitioner and others. PNB also had the highest exposure. Such LOC was also issued, but the same was set aside in the matter of Vishambhar Saran vs. Bureau of

Immigration and others, decided in W.P.No. 10241(W) of 2020 by a co-ordinate Bench. His Lordship held as follows:-

“52. In the event the authorities seek to resort to the quantum of alleged default for restricting citizens’ departure outside the country, it is obvious that the quantum is relative and the amount of Rs.350 crores can be exorbitant or meagre, depending merely on the whims of the authorities or the perspective of the judge. As such, in the absence of any stipulation in that regard in the relevant Office Memorandum, no cut-off line can be drawn between an amount which is detrimental to the sovereignty or security or integrity of India or to the economic interests of India and one which is not.

53. In the present case, the respondent-authorities have failed to justify rationally as to why the departure of the petitioners from India would, in any manner, be detrimental to the sovereignty or security or integrity of India or to the bilateral relations with any country or to the strategic and/or economic interests of India as a whole. The mere subsistence of an allegation of default could not trigger the issuance of the LoC at the drop of a hat. As such, the expression “detrimental to the economic interests” of India ought not to be an excuse to restrain citizens of India from leaving the country without any convincing ground being disclosed for such restraint. In the present case, there is no allegation that the CBI has an arrest-warrant against the petitioners and/or the petitioners’ personal participation in the CBI enquiry is of utmost necessity at the present juncture. That apart, even if the petitioners were to leave India, there is nothing on record to indicate that the recovery of any amount of default, if committed at the behest of the petitioners by the borrower-company, would affect such recovery in any manner, detrimental or otherwise.

54. As such, the LoC was unfounded and lacked any cogent contemporaneous or prior act of the petitioners.

55. Rather, in the present cases, the respondent no.2-bank has abused its authority to request for opening a Lookout Circular at the behest of the Chairman/Managing Director/Chief Executive, in the capacity of a Public Sector Bank, thereby substituting a regular proceeding for recovery of the debt in the process. The issuance of LoC cannot be an alternative for initiating recovery proceedings against the borrower itself, let alone a director of the borrower-entity.

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62. As revealed by the LoC and even the affidavits-in-opposition of the respondent no.2, no cogent reason has been shown for the

request of the LoC. Even the respondent-authorities acted in an unlawful manner in blindly issuing the LoC without even ascertaining whether the request by the respondent no.2 revealed any exceptional case as envisaged in the amended Office Memorandum No.25016/31/2010- Imm dated October 27, 2010. It is incumbent upon the issuing authority of the LoC to ascertain at least whether the grounds disclosed in the LoC and/or the request for LoC fall within the four corners of the exceptional cases as defined in the Office Memorandum. Although it would be going too far to extend such logic to the extent that the authorities issuing the LoC shall ascertain the merits/demerits of the allegations made in the request, at least ingredients justifying the issuance of LoC has to be looked into prima facie by the issuing authority.

63. In the present case, no exercise of such sort was resorted to by the respondent no.1.

64. As a matter of fact, no objective parameter is found from the records for the issuance of the LoC against the petitioner. However, no occasion has arisen before this Court to go into the question of validity and lawfulness of the show-cause notice for identification of wilful defaulter issued subsequently against the petitioner. As such, the said question need not be dealt with within the ambit of the present writ petition.

65. In view of the aforesaid observations, the LoC dated February 29, 2020 issued against the petitioner was unlawful and de hors the relevant provisions and the Office Memorandum dated October 27, 2010 (as amended). Thus, the LoC cannot stand judicial scrutiny under Article 226 of the Constitution of India.

66. Hence, W.P.A. No.10241 of 2020, W.P.A. No. 10247 of 2020 and W.P.A. No. 10249 of 2020 are allowed and all the connected applications are hereby disposed of, thereby setting aside the LoC dated February 29, 2020 issued in respect of the petitioners in all the writ petitions by the Immigration Authorities on the request of the respondent no.2-Bank. The crux of this order shall be circulated internally by respondent no.1 among the original recipients of the intimation regarding LoC from the said respondent, including concerned airport authorities, at the earliest, to ensure that the petitioner is not detained or harassed unnecessarily on the basis of the said LoC any further.”

47. It was His Lordships’ specific finding that an exceptional case had not been made out by the lead bank. In this case, the complaint lodged by the lead bank with the CBI, was returned due to lack of particulars indicating

commission of any cognizable offence. Request for issuance of LOC should be fact-based, made carefully, judiciously and on objective parameters supported by evidence. Here, the reasons under Serial No. (1) to (6) of paragraph 4 of the request which was separately mentioned by BOB did not make out an exceptional case. The same are quoted below:-

4. REASON FOR OPENING OF LOC

M/s Visa power Limited, engaged in Greenfield Project on Power Generation availed credit facilities from our India Exchange Branch, Kolkata under Consortium Lead Bank Punjab National Bank. 1) Mr. Subrato Trivedi, 2) Mr. Gummalla Rangarao, 3) Mr. Brajesh Chandra Bhattacharya, 4) Mr. Rajinder Sharma, 5) Mr. Vishambhar Saran, Directors and/or guarantors to the credit facilities availed by Borrower Company.

Grounds for issuing LOC:

- 1) This account turned NPA on 30.09.2015 having balance outstanding Rs. 100.46 Crores with our bank.
- 2) The unit of Borrower Company is closed. The Borrower Company is under Liquidation.
- 3) Auditor has conducted transaction review of Borrower Company and submitted report on 24.08.2018 wherein auditor has made various observations. There is undervalued transaction of Rs. 22.75 Crore which was given as security deposit by Visa Power Limited to Visa International Limited which was approximately 63 times of rent equivalent to 6 months. There are undervalued transactions with regard to sale of vehicle by Company to related parties. Company gave capital advance of Rs. 75.68 Crore to related party Visa Resources Limited for buying equity and preference shares which is not as per the guidelines of SEBI. Company has done devious/undervalued transaction which signifies diversion/siphoning of fund outside the business. The account as declared as Fraud bearing FMR No. BOB2001-0011 dated 16.01.2020.
- 4) FIR was lodged with CBI by lead Bank Punjab National bank on behalf of consortium on 18.08.2020.
- 5) Company is having huge debt in the market as well from Nationalized Banks.
- 6) It is apprehended that directors and/or guarantors is likely to escape from India.

Hence, opening of LOC against Mr. Vishambhar Saran is recommended.

48. The forensic audit report was relied upon as one of the reasons to establish wilful default and fraud. NCLT had refused to pass orders on such report at the request of the liquidator on the ground that merely on the forensic report which had gone beyond a period of two years from the date of such audit, fraudulent, under-valued or preferential transaction could not be established. The allegation of fraudulent transactions against the said company made by the liquidator was disbelieved. Mere pendency of liquidation proceeding for recovery of debts by the secured creditors cannot ipso facto be a reason for issuance of LOC as the same would not fall under the exceptional cases clause.

49. Reference to the complaint filed by the lead bank (PNB) before the CBI, has no merit in view of the fact that the CBI itself returned the complaint asking PNB and asked for better details with regard to commission of a cognizable offence. The affidavit-in-opposition affirmed by BOB on 8th August, 2022 indicates that even on 8th August, 2022 there were no further complaints before the CBI by PNB. BOB did not lodge any separate complaint with any investigating agency. Debt in the market is not a ground. Quantum of default is not relevant. Thus, the reasons as enumerated did not satisfy the ingredients for opening LOC.

50. BOB requested the Bureau of Immigration to issue LOC. It is not on record whether such LOC has been issued or not. The Bureau of Immigration, Ministry of Home Affairs (Foreigners Division) and all the other

members of the consortium of banks, apart from PNB were impleaded as respondents in this proceeding. None of these respondents have come up before the Court in support of the request of BOB. They have not contested the proceedings. Clause 3.1 of the SOP (Annexure P2, Page no. 26 of Writ petition) states that the responsibility for requesting issuance of LOC in respect of a defaulter would be on the leader of the consortium of banks or on the holder of the biggest share or exposure amongst them. In this case, the LOC originated by the lead bank, having the highest exposure has been quashed by a Co-ordinate Bench for the reasons which have already been quoted hereinabove. Default of the borrower cannot be read into the expression “detrimental to the economic interest of the country”. In order to cause injury to the economic interest of the democracy of India, the commission of alleged offence of default must be of high degree so as to shake the growth, financial stability, business transactions, bilateral trade relations, investments, stock markets etc. There is no evidence that on account of the default committed by the Visa Power Limited, the economy of India had been shaken. The bank has not provided any contemporaneous material against the petitioner which would satisfy the exceptions clause. The bank is also silent as to whether any input had been received from any agency that the petitioner was likely to flee the country and his departure would disrupt the economy.

51. Admittedly, in the facts of this case, no investigation is pending before any authority. It is also not a case where the bank had come to a conclusion on the basis of inputs received from an intelligence agency or any other

agency that the petitioner was trying to leave India in order to evade the consequences of the legal actions that may be taken against him, both under the civil and the criminal laws.

52. In the decision of ***E.V. Perumal Samy Reddy v. State***, reported in **2013 SCC OnLine Mad 4092**, the Madras High Court while setting aside an LOC, held as under:-

“9. It is basic that merely because a person is involved in a criminal case, he is not denude of his Fundamental Rights. It is the fundamental of a person to move anywhere he likes including foreign countries. One's such personal freedom and liberty cannot be abridged.[See : Article 21 Constitution of India]. In the celebrated in **MENAKA GANDHI v. UNION OF INDIA** [(1978) 1 SCC 248 : AIR 1978 SC 597], the Hon'ble Supreme Court upheld the constitutional right of persons to go abroad. The phrase no one shall be deprived of his “life and liberty” except procedure established by law employed in Article 21, had deep and pervasive effect on fundamental right and human right. **MENAKA GANTHI** (supra) ushered a new era in the annals of Indian Human Rights Law. It had gone ahead of American concept of ‘Due Process of Law’.

10. But, the fundamental right to move anywhere including foreign countries could be regulated. Where persons involved in criminal cases are wanted for investigation, for court cases, persons, who are anti-social elements their movements can be regulated. Need may arose to apprehend persons, who have ability to fly, flee away the country. So, L.O.C. orders are issued. It is an harmonius way out between a person's fundamental right and interest of the society/state. But, in any case, it must be fair and reasonable. It should not be indiscriminate without any reason or basis.”

53. In the case of ***Soumen Sarkar v. State of Tripura, represented by the Secretary, Home Department &Ors.***, reported in **2021 SCC OnLine Tri 143**, the High Court of Tripura on perusal of MHA's Office memorandum dated 31.08.2010, stated that the reasons for opening LOC must be given categorically. It was held that LOCs could not be issued as a matter of

course, but only when reasons existed and the accused deliberately evaded arrest or did not appear in the trial court.

54. In the case of ***Karti P. Chidambaram vs. Bureau Of Immigration, reported in 2018 SCC OnLine Mad 2229***, the Hon'ble Madras High Court held as follows:-

“73. As observed above, the issuance of Look Out Circulars is governed by executive instructions as contained in the Office Memoranda Nos. 25022/13/78-F1 dated 05.09.1979 and 25022/20/98-FIV dated 27.12.2000, as modified by Office Memorandum dated 27.10.2010. Such LOCs cannot be issued as a matter of course, but when reasons exist, where an accused deliberately evades arrest or does not appear in the trial Court. The argument of the learned Additional Solicitor General that a request for Look Out Circular could have been made in view of the inherent power of the investigating authority to secure attendance and cooperation of an accused is contrary to the aforesaid circulars and thus, not sustainable.

74. It is, in the view of this Court, too late in the day to contend that whether or not to issue an LOC, being a executive decision, the same is not subject to judicial review. It is now well settled that any decision, be it executive or quasi-judicial, is amenable to the power of judicial review of the writ Court under Article 226 of the Constitution of India, when such decision has adverse civil consequences. An LOC, which is a coercive measure to make a person surrender and consequentially interferes with his right of personal liberty and free movement, certainly has adverse civil consequences. This Court, therefore, holds that in exercise of power of judicial review under Article 226 of the Constitution, the writ Court can interfere with an LOC. The question is whether the writ Court should exercise its discretionary jurisdiction to interfere with the impugned LOC.”

55. In the case of ***Rahul Surana vs. The Serious Fraud Investigation Office &Ors., W.P. No. 2477 of 2020***, reported in ***MANU/TN/1605/2022***, the Hon'ble Madras High Court held as follows:-

“28. The investigation, even after the elapse of three years, is stated to reveal only prima facie materials and no concrete evidences are stated to have been found been found to implicate the petitioner or frame charges. Admittedly, however there are no proceedings against the petitioner so as to implicate him before the Criminal Court or in any other fora to justify the restrictions under which he has been placed.

29. Admittedly, there have been no instances when the petitioner has evaded summons/notices calling for his attendance/appearance. The Central Bureau of Investigation (CBI) has confirmed that there are no investigations that are ongoing in the case of the petitioner, though reserving their right to initiate appropriate action at an appropriate juncture in future.

30. No material is placed before the Court in support of the bald assertion that the petitioner is a flight risk and as a consequence there is no tangible material available, admittedly, to deny the petitioner of his Fundamental Right.

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32. In the light of the discussion as aforesaid, I am of the considered view that the petitioner’s challenge to the LOC dated 09.12.2020 is liable to be accepted. Even assuming that the same has been extended for which no materials are placed before the Court, the respondents has not been in a position to establish that the settled parameters justifying the issue of an LOC are satisfied in this case. The mandamus, as sought for, is issued and this writ petition is allowed. MPs are closed with no order as to costs.”

56. The Delhi High Court in the case of **Vikas Chaudhary V. Union of India**, decided in **W.P.(C) 5374/2021 & CRL.M.(BAIL) 605/2021**, quashed the LOC inter alia stating that mere suspicion of opening bank accounts in a foreign country, when such suspicion was based on some unsigned agreements and WhatsApp chats could not be a ground to restrain someone's fundamental right to travel abroad.

57. In the case of **Brij Bhushan Kathuria vs. Union of India &Ors.**, **W.P.(C) 3374/2021**, reported in **MANU/DE/0737/2021** the Delhi High Court

while setting aside the LOC issued against the Petitioner held that the phrases such as '*economic interest*' or '*larger public interest*' could not be expanded in a manner so as to restrict an independent director who was in the past associated with the company being investigated, from travelling abroad, without any specific role being attributed to him.

58. In the case of ***Rana Ayyub vs. Union of India & Anr., W.P.(CRL) 714/2022***, reported in ***2022 SCC OnLine Del 961*** the Delhi High Court held as follows:-

“12. In the particular facts of the case, it becomes evident that the LOC was issued in haste and despite the absence of any precondition necessitating such a measure. An LOC is a coercive measure to make a person surrender and consequentially interferes with petitioner's right of personal liberty and free movement. It is to be issued in cases where the accused is deliberately evading summons/arrest or where such person fails to appear in Court despite a Non-Bailable Warrant. In the instant case, there is no contradiction by the respondent to the submission of the petitioner that she has appeared on each and every date before the Investigating Agency when summoned, and hence, there is no cogent reason for presuming that the Petitioner would not appear before the Investigation Agency and hence, no case is made out for issuing the impugned LOC.

13. The impugned LOC is accordingly liable to be set aside as being devoid of merits as well as for infringing the Human right of the Petitioner to travel abroad and to exercise her freedom of speech and expression. For the reasons discussed above, the impugned LOC is set aside and quashed. However, a balance has to be struck qua the right of the investigation agency to investigate the instant matter as well as the fundamental right of the petitioner of movement and free speech.”

59. In my opinion, personal liberty and the fundamental right of movement guaranteed by the Constitution cannot be curtailed at the behest of BOB when the conditions precedent for making such request for opening an LOC, did not exist in this case. The affidavit-in-opposition does not disclose that the Managing Directors/Executive Officers had applied his mind or had received information or input from any investigating or intelligence agency to come to the conclusion that the petitioner was trying to flee from India in order to evade the legal consequences of such default. It is also a matter of record that the proceeding with regard to wilful default is still pending and the bank has not disclosed any material to show that any other proceeding under any applicable law be it civil or criminal, has been initiated. Non-payment of the loan and the dues of the bank, cannot be equated to an act of destabilizing or affecting the economic interest of the country. The freedom of movement of a citizen of India is a valuable right and cannot be infringed except by imposing reasonable restrictions. The court does not find any reasonableness in the action of BOB. The lead bank, PNB failed in its attempt to restrict the movement of the petitioner. No subsequent development has taken place which would justify a further request by BOB, on the self-same set of facts.

60. Once the action of the lead bank was set aside by this court, BOB took a chance to restrain the freedom of movement of the petitioner by placing reliance upon the liquidation proceedings, the Forensic Audit Report and the complaint lodged by PNB. Such complaint was returned by the CBI. The forensic report was analyzed by the NCLT and thereafter the NCLAT,

leading the fora to arrive at a finding that the forensic report did not show any fraudulent, under-valued and preferential transfer. Thus, even if the CBI proposed an amendment in the policy, to include the Chairman/Managing Director and heads of public sector banks as originating agencies to control and monitor offences of wilful default, fraud and money laundering, the respondents have not been able to convince the court with material evidence that exceptional situation had arisen in this case, which led to such request. In the absence of the pre-existing conditions contained in sub-paragraph (L) of paragraph 6 of the 2021 memorandum, the bank could not have issued the request for LOC. The affidavit-in-opposition does not disclose how the default by the said company could affect the economic interest of the country. No offence has been attributed to the petitioner. Merely because the accounts of the company was NPA and the petitioner was a promoter direction, the petitioner could not be levelled as a fraudster who had indulged in money laundering activities, and disrupted the economy of India. There is no allegation that the activity of the petitioner led to upheavals in the stock market, business activities, investments, trade, growth and development etc. There is no evidence that the petitioner had tried to escape to a foreign jurisdiction to avoid legal consequences of such action. The proceedings before NCLT were initiated in 2016. Since then no evidence could be submitted to implicate the petitioner in any criminal case. The petitioner contested the liquidation proceedings.

61. The decision of the Delhi High Court in ***Subrato Trivedi (supra)*** cited by Mr. Kar, does not apply in this case as the same was an interim order passed by the court.

62. Considering the materials on record, the averments in affidavit-in-opposition and documents annexed thereto, this Court comes to the conclusion that the conditions which must pre-exist as per the existing policy of the government for opening LOC, are absent in this case.

63. A bald assertion that the petitioner's departure would be detrimental to the economic interest of the country and the LOC must be issued in larger public interest, cannot be due satisfaction of the existing pre-conditions required to be fulfilled before the originator can make such a request. The existence of such pre-conditions and the manner in which the action of the petitioner fell within the exceptions or had affected the country's economic interest had to be demonstrated from the records. The apprehension should be well-founded, backed by reasons and also supported by evidence. The decision of Karnataka High Court in ***Dr. Bavaguthu Raghuram Shetty (supra)*** also does not apply in the facts of this case. With due respect, this Court does not agree with the conclusions arrived at in the said judgment, especially with regard to the comparison between the quantum of the loan and the annual budget of a state. Whether the outstanding loan with interest, would be more than the budgetary allocation of a particular state or not, in my opinion, is not one of the parameters to be considered.

64. The bank acted in arbitrary exercise of the power vested in it by making a request for opening LOC which was an attempt to curtail the personal liberty and fundamental right of movement of a citizen guaranteed by the Constitution of India.

65. The request of BOB for issuance of LOC dated 29th November, 2021 and all steps taken thereafter, if any, are set aside and quashed. The bank is at liberty to request the immigration authorities to intimate the entry and exit of the petitioner to and from the country.

66. Accordingly, the writ petition is allowed.

67. There will be no order as to costs.

68. Parties are directed to act on the server copy of this order.

(Shampa Sarkar, J.)