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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 18th December, 2023

IN THE MATTER OF:

\+ **W.P.(C) 9013/2023 & CM APPLs. 34186/2023, 52696/2023**

RAJENDER KUMAR PAHWA & ORS. ..... Petitioners

Through: Mr. Sumesh Dhawan, Mr. Vatsala Kak, Ms. Ankita Bajpai, Mr. Raghav Dembla, Mr. Sagar Thakkar and Mr. Shaurya Shyam, Advocates.

versus

BUREAU OF IMMIGRATION ANR. ..... Respondents

Through: Mr. Arjun Syal and Mr. Vaibhav Luthra, Advocates for R-2.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The instant writ petition has been filed seeking quashing of the Look Out Circular (LOC) issued against the Petitioners at the instance of Respondent No.2/Bank of Baroda.

2. Reply has been filed on behalf of Respondent No.2. A perusal of the reply shows that the Petitioners herein are the Directors of M/s Goodluck Carbon Pvt. Ltd (*hereinafter referred to as "Company"*) which is engaged in the business of manufacturing carbon black used in rubber industries. A credit facility was extended to the company under a consortium banking arrangement in which Punjab National Bank was the lead bank. The account of the company turned NPA on 30.09.2015 and as on 31.10.2015 there was

an aggregate outstanding balance of Rs.27.43 crores. The account of the company was reported as fraud to RBI on 31.07.2020. However, the said action has been set aside by Order dated 12.05.2023 passed by this Court in W.P.(C) 4249/2020.

3. Material on record indicates that a proposal for One Time Settlement (OTS) has been given by the Petitioners to the banks for Rs.39.50 crores and an amount of Rs.1,97,50,000/- has also been deposited towards One Time Settlement. Material on record also indicates that the action taken by the bank under the SARFAESI Act has been stayed by the High Court of Punjab and Haryana in CWP 21789/2021.

4. The Petitioner has, therefore, approached this Court for quashing the LoC.

5. A Single Bench of this Court *vide* Judgment dated 11.08.2010 in Sumer Singh Salkan vs. Asstt. Director & Ors in **W.P.(Crl) 1315/2008** passed the following directions for the guidance of Government Agencies and Courts to deal with the opening of Look Out Circulars:

> *"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 NBWs and other coercive measures and there was likelihood of the accused leaving the country to evade trial/arrest.*
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> *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 measure 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 NBWs or affirming NBWs."

6. The Ministry of Home Affairs *vide* its Office Memorandum bearing No.25016/31/2010-Imm dated 27.10.2010 brought out the consolidated guidelines for opening of LOCs. The relevant portion of the said Office Memorandum reads as under:

"8. In accordance with the order dated 26.7.2010 of the High Court of Delhi, the matter has been discussed with the concerned agencies and the following guidelines are hereby laid down regarding issuance of LOCs in respect of Indian citizens and foreigners:

a) The request for opening an LOC would be made by the originating agency to the 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 Emigrants or an officer not below the rank of Deputy Secretary of the Government of India; or

(xiii) Designated officer of Interpol

Further, LOCs can also be issued as per directions of any Criminal Court in India.

c) The name and designation of the officer signing the Proforma for requesting the LOC must invariably be mentioned without which the request for issuance of LOC would not be entertained.

d) The contact details of the originator must be provided in column VI of the enclosed Proforma. The contact telephone/mobile number of the respective control room should also be mentioned to endure proper communication for effective follow up action.

7. The aforesaid Office Memorandum was amended in the year 2017 under which authorities were conferred with powers to open LOCs in exceptional circumstances 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 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 to be permitted in the larger public interest at any given point in time.

8. Thereafter, another Office Memorandum bearing No.25016/10/2017-Imm (Pt.) dated 22.02.2021 was issued by Ministry of Home Affairs by which fresh guidelines have been issued for opening of LOCs in respect of the Indian Citizens and Foreigners. The relevant portion of the guidelines reads as under:

"(A) The request for opening an LOC would be made

by the Originating Agency (OA) to the Deputy Director, Bureau of Immigration (BoI), East Block-VIII, R.K. Puram. New Delhi - 110066 (Telefax: 011-26192883, email: boihq@nic.in) in the enclosed Proforma.

(B) The request for opening of LOC must invariably be issued with the approval of an Originating Agency that shall be 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 Indirect Taxes and Customs: or
(viii) Assistant Director of Intelligence Bureau/ Bureau of Immigration (Bol); or
(ix) Deputy Secretary of Research and Analysis Wing (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 Emigrants or an officer not below the rank of Deputy Secretary to the Government of India; or
(xiii) Designated officer of Interpol; or
(xiv) An officer of Serious Fraud Investigation Office (SFIO), Ministry of Corporate Affairs not below the

rank of Additional Director (in the rank of Director in the Government of India); or
(xv) Chairman/ Managing Directors/ Chief Executive of all Public Sector Banks.

(C) LOCs can also be issued as per directions of any Criminal Court in India. In all such cases, request for opening of LOC shall be initiated by the local police or by any other Law Enforcement Agencies concerned so that all parameters for opening LOCs are available.

(D) The name and designation of the officer signing the Proforma for requesting issuance of an LOC must invariably be mentioned without which the request for issuance of LOC would not be entertained.

(E) The contact details of the Originator must be provided in column VI of the enclosed Proforma. The contact telephone/ mobile number of the respective control room should also be mentioned to ensure proper communication for effective follow up action. Originator shall also provide the following additional information in column VI of the enclosed Proforma to ensure proper communication for effective follow up action:-

(i) Two Gov/ NIC email IDS
(ii) Landline number of two officials
(iii) Mobile numbers of at least two officials, one of whom shall be the originator

(F) Care must be taken by the Originating Agency to ensure that complete identifying particulars of the person, in respect of whom the LOC is to be opened, are indicated in the Proforma mentioned above. It should be noted that an LOC cannot be opened unless a minimum of three identifying parameters viz. name & parentage, passport number or Date of Birth are

available. However, LOC can also be issued if name and passport particulars of the person concerned are available. It is the responsibility of the originator to constantly review the LOC requests and proactively provide additional parameters to minimize harassment to genuine passengers. Details of Government identity cards like PAN Card, Driving License, Aadhaar Card, Voter Card etc. may also be included in the request for opening LOC.

(G) The legal liability of the action taken by the immigration authorities in pursuance of the LOC rests with the originating agency.

(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.

(K) On many occasions, persons against whom LOCs are issued, obtain Orders regarding LOC deletion/ quashing/ suspension from Courts and approach ICPs for LOC deletion and seek their departure. Since ICPs have no means of verifying genuineness of the Court Order, in all such cases, orders for deletion/ quashing/ suspension etc. of LOC, must be communicated to the BoI through the same Originator who requested for opening of LOC. Hon'ble Courts may be requested by the Law Enforcement Agency concerned to endorse-/convey orders regarding LOC suspension/ deletion/ quashing etc. to the same law enforcement agency through which LOC was opened.

(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 in time.

(M) The following procedure will be adopted in case statutory bodies like the NCW, the NHRC and the National Commission for Protection of Children's Rights request for preventing any Indian/ foreigner

from leaving India. Such requests along with full necessary facts shall be brought to the notice of law enforcement agencies like the police. The Superintendent of Police (S.P.) concerned will then make the request for issuance of an LOC upon an assessment of the situation, and strictly in terms of the procedure outlined for the purpose. The immigration/emigration authorities will strictly go by the communication received from the officers authorized to open LOCs as detailed in clause (B) above.

(N) For effective and better interception of LOC subjects, following guidelines shall be followed by the Originator:-

(i) Specific action to be taken by the Immigration authorities on detection must be indicated in the filled LOC proforma

(ii) In case of any change in parameters/ actions/ investigating officer/ Originator contact details or if any court order is passed in the ease, the same should be brought to the notice of the Sol immediately by the originating agency concerned for making necessary changes in the LOC.

(iii) For LOCs originated on court orders, the concerned PS/ 10 should send the identifying parameters of the subject to the BoI as court orders contain only name and parentage of the subject.

(iv) In case an LOC is challenged and stayed by the concerned court or a court issues any directive with regard to the LOC, the originator must inform the BoI urgently and accordingly seek amendment/ deletion of the LOC.

(v) Whenever the subject of LOC is arrested or the purpose of the LOC is over, a deletion request shall be sent by the Originator immediately to the BoI.

(vi) The Originator must respond promptly whenever the subject/ likely match is detected at the ICP. The confirmation regarding the identity of the subject and action to be taken must be informed immediately to the ICP.

(vii) The BOI would form a team to coordinate matters regarding the LOC. This team would contact the LOC issuing agencies to get the status of LOC updated.

(viii) Each LOC Originating Agency referred in pars 6 (B) above will appoint a Nodal officer as indicated in Annexure-I for coordination/updation of LOC status with Bol. The said team of BoI [as mentioned in pars 6 (N) (vii)] would remain in constant touch with this Nodal Officer."

9. A Single Bench of this Court in Prateek Chitkara vs. Union of India and Others, **2023 SCC OnLine Del 6104**, after analysing several Judgments has enunciated the factors that have affected the quashing or upholding of LOCs which read as under:

"82. *From the case laws discussed above and the stand of the UOI, it is clear that there are several factors that have affected the quashing or upholding of LOCs, including:*

i) Existence of investigations in respect of cognizable offences under the IPC or other penal laws

ii) Revenue implications due to notices issued by Income Tax Authorities and the categorization of the accused as an anti-national element.

iii) Status of the person in the entity which is under investigation. For example, chairman, managing director, independent director, non-executive director etc.

iv) Existence of a FIR/ECIR by authorities such as the Enforcement Directorate etc. and cooperation rendered by the Petitioner in the said investigation.

v) Proceedings under the Black Money Act, 2015 having been initiated and the facts indicate undisclosed foreign income and assets, as also foreign transactions.

vi) Loan taken from a bank for a family business and its impact on the education of a young person in the family, who is a guarantor in respect of the said loan.

vii) Allegations of commission of offences under the IPC and the Prevention of Corruption Act, 1988 and whether a person is accused in the same.

viii) Subject not accused of any offence on account of being a minor at the time of the commission of the alleged offence.

ix) Proceedings under the Prevention of Money Laundering Act, 2002 and cooperation with the investigation agency.

x) Subject has not evaded arrest or failed to appear before the authorities and has cooperated in the investigation as also in the trial.

xi) The quantum of borrowing from a bank and declaration of wilful defaulter *xii) Whether the person has been named as the accused and involvement in the day-to-day affairs of the company under investigation.*

xiii) Pendency of departmental enquiry/proceedings.

xiv) Suspicion of existence of offshore funds and bank fraud of siphoning off funds to bank accounts in foreign countries.

xv) Right and interest of the investing public and large amount of public funds being at stake.

xvi) Existence of security commensurate to the amounts owed by the Petitioner.

xvii) Effect on bilateral relations with foreign countries if loans in foreign countries are not being repaid.

xviii) Connection with other individuals who have already fled from India with whom the subject may be connected

xix) Legal proceedings in foreign countries having reached the culmination and the financial institution having participated in the proceedings therein.

xx) Non-cooperation by the subject with the directions of the court;

xxi) Nature of offence whether bailable, non-bailable, cognizable, non-cognizable, compoundable non-compoundable

83. *The term 'detrimental to economic interest' used in the OM is not defined. Some cases may require the issuance of a LOC, if it is found that the conduct of the individuals concerned affects public* *interest as a whole or has an adverse impact on the economy. Squandering of public money, siphoning off amounts taken as loans from banks, defrauding depositors, indulging in hawala transactions may have a greater impact as a whole which may justify the issuance of LOCs. However, issuance of LOCs cannot be resorted to in each and every case of bank loan defaults or credit facilities availed for business etc. Citizens ought not to be harassed and deprived of their liberty to travel, merely due to their participation in a business, whether in a professional or a non-executive capacity. The circumstances have to reveal a higher gravity and a larger impact on the country.*

***84.** The various decisions considered above reveal that the issues as to the legality and validity of issuance of LOCs under the OMs, is squarely pending before the Hon'ble Supreme Court and ld. Division Bench of this Court, at least, in the following two cases:—*

(i) Bank of India v. Noor Paul [Special Leave to Appeal (C) 7733/2022]

(ii) Income Tax Dept. v. Vikas Chaudhary [2022 SCC OnLine Del 3376]"

10. 10. Clause 6 of the Office Memorandum of 2021 states that an LOC can be issued at the instance of the Bank if the authorities are of the view that letting the person depart from the country will be detrimental to the economic interests of India. The scope of the term 'detrimental to the economic interest of India' has been dealt with by the various High Courts in various judgments. In Vikas Chaudhary v. Union of India, **(2022) 1 HCC (Del) 124,** this Court has observed as under:

"*37. However, the matter does not end here and the* *crucial issue which needs to be now determined is as to whether the clause "detrimental to the economic interests of India" introduced vide the amendment in 2017, with a specific rider that the same would be used only in exceptional circumstances, could have, in the facts of the present case, been resorted to, for issuing the impugned LOC, as also whether the impugned LOC could be continued for the last almost 3 years without any proceedings under the IPC or any other penal law being initiated against the petitioner. It has to be kept in mind, that the issuance of a LOC necessarily curtails the rights of an individual to travel abroad and therefore, I am of the view, that for invocation of this clause, which, in any event, is meant to be used only in exceptional circumstances, a mandatory pre-condition would be a formation of a reasonable belief by the originating authority that the departure of an individual would be "detrimental to the economic interests of India" to such an extent that it warrants curtailment of an individual's fundamental right to travel abroad. Turning to the facts of the present case, what is emerging is that the entire case of the respondents to believe that the petitioner's departure from the country will be "detrimental to the economic interests of India", hinges on an unsigned draft agreement and some WhatsApp chats, which it is the respondent's own case are not conclusive. The respondents, are therefore, awaiting a response to their FT & TR references to the authorities at Dubai, United Arab Emirates to proceed against the petitioner under the Black Money Act, 2015, Income Tax Act, 1969, and the Prevention of Money-Laundering Act, 2002, which were, in fact, the reasons provided by Respondent 3 itself to Respondent 1, while forwarding its request for issuance of the LOC.*"

11. Similar views have been expressed by the High Court of Punjab and Haryana in Kartik Tayal v. Central Bureau of Investigation, **2020 SCC**

OnLine P&H 1618, wherein the Punjab and Haryana High Court has observed as under:

> *"13. This answer has also been reproduced in office memorandum dated 27.10.2010 issued by the Ministry of Home Affairs. Thus, there can be no doubt that according to the prevailing instructions, an LOC can be opened against an accused person who is (a) deliberately evading arrest, (b) not appearing in the trial Court despite non-bailable warrants and other coercive measures. Coupled with either of these conditions should be a likelihood of the accused leaving the country to evade trial/arrest. Neither of these conditions exist in the instant case. The petitioner is not evading arrest. In fact, he has appeared before the investigating agency whenever required to do so and the investigating agency has not thought it proper to arrest him. Since the investigation is still pending and challan has not been presented, there is no question of any trial Court issuing/adopting coercive steps to ensure the presence of the petitioner. This requirement of law has been recognized by the Bombay High Court in the case of Afzal Jaffer Khan (supra). The fact that the petitioner has travelled abroad on six occasions and has never violated the terms of the permission granted by the CBI Court, shows that the apprehension of the respondent is illusory."*

12. The facts of the case reveals that LoC has been issued only because of the inability of the Petitioner to repay the debts to the bank. No criminal case has been instituted against the Petitioners and action of declaring the account as fraud has already been struck down. There is a stay operating against the Bank in proceedings under Section 13(4) of the SARFAESI Act.

13. Since there is no criminal case against the Petitioners and the facts of the case reveal that it is only a case of recovery of money, the lookout

circular cannot be sustained. The Bank has not been able to show any extraordinary circumstances in this case which would justify the opening of LoC. LoCs cannot be opened for the purpose of recovering money and more so after other remedies have been exhausted by the Bank. LoC is not a measure to recover the amount from the debtors. It is settled law that inability to pay an amount to the banks cannot be a reason to take away the fundamental right of any person under Article 21 of the Constitution of India.

14. In view of the above, this Court is inclined to quash the Look Out Circular (LOC) issued against the Petitioners.

15. The writ petition is disposed of. Pending applications, if any, also stand disposed of.

SUBRAMONIUM PRASAD, J

DECEMBER 18, 2023
S. Zakir