

Court No. 9
(265711)

05.09.2024

(A 51)

(S. Banerjee)

WPA 11680 of 2024

Anil Kumar Kedia

Vs.

Union of India & Ors.

Ms. N. Banerjee
Mr. Dipak Dey
Mr. Dipanjan Dey
Mr. Aniket Ojha
Ms. Sucheta Mitra

...for the petitioner

Mr. Kumar Jyoti Tiwari
Ms. Sarada Sha

...for the UOI

1. Let the affidavit of service filed in Court today be kept with the record.

2. The petitioner is aggrieved by the lookout circular ('LOC', for short) issued by the Bureau of Immigration. The originating authority was the State Bank of India. The petitioner claims to be an employee of the borrower company, namely, Concast Steel and Power Limited (in liquidation) (hereinafter referred to as the 'said company').

3. The petitioner's specific contention is that the petitioner was neither a director nor a promoter at any point of time and was not connected with the day to day operations and management of the company. He was the personal guarantor. The loan

account became an NPA and SARFAESI proceedings had been initiated by the bank.

4. An application was also filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) by an operational creditor. The company went into liquidation by order dated September 26, 2018.

5. It is contended by the petitioner that the bank can recover the loans against the company and also take steps against the personal assets of the borrowers/guarantors etc. but, a LOC cannot be originated by the bank to realize such dues. The law provides the mechanism by which the secured creditor can recover the dues. Curtailment of personal liberty of the petitioner, by restraining foreign travel, is violative of Article 21 of the Constitution of India. It is further clarified by the petitioner that the allegation of fraudulent transfer which was made against the borrower company and its officers, had been rejected by the NCLT, inter alia, holding that there was no fraudulent transfer whatsoever. The other contention of the petitioner is that the Directors and Promoters against whom FIRs had been lodged, had also suffered similar LOC. Such LOCs were set aside by a co-ordinate Bench, inter alia, on the ground that unless the parameters laid down in the memorandum of 2021 was satisfied in each and every

case, on the facts thereof, LOC could not be originated.

6. The facts which have been pleaded are not in dispute. The respondents have not been able to satisfy the Court that parameters of the memorandum of 2021 were satisfied in this case, requiring origination of the LOC by the bank and issuance of the same by the Bureau of Immigration ('the Bureau', for short). The Bureau complied with the request of the bank and did not enter into the determination of the issues involved.

7. Under such circumstances it is prayed that the LOC be quashed.

8. Learned advocate for the bank submits that originally, recourse to LOC could be taken either in case of commission of a cognizable offence under the Indian Penal Code or other penal laws or by order of Court, when the subject of LOC was either evading arrest or a legal proceeding. An exception was made in the policy. In the case of threat to the security of the country and for larger interest of the country, the originating banks and other authorities could take recourse to such measure by requesting issuance of LOCs by the Bureau. Sub-paragraph (j) of the policy of 2010 was substituted accordingly in 2017 to

include certain situations which were considered to be exceptional circumstances.

9. According to the bank, departure of the petitioner would be detrimental, not only to the bilateral trade relations, but also to the economic interest of the country.

10. Learned advocate for the Bureau submits that the authority had acted on the request of the bank. Some of the directors and guarantors of the borrower company challenged the LOCs issued against them. The coordinate Bench held that the designated grounds for originating the request by the bank were missing. Such observation in WPA 2002 of 2024, *Ajay Sureka -Vs.- Union of India and Ors.*, are quoted below:-

“2. It transpires from the documents handed over in court today that there is no specific caption designated as grounds for the request. However, Row Nos. 16 and 17 of the said purported request are relied on by learned counsel for the Bank. Row No. 16 is captioned to be brief particulars of the fraud committed by the borrower etc. It is indicated that “Sundry Debtors (including related parties) have been adjusted with other parties without receipt of amount. Submission of inflated stock statements to avail higher drawing power/credit facilities. Inconsistency in stock statement viz-a-viz actual

stock/inventories and book debt levels.”
 Thirdly, “preferential transactions with related parties which are not at arm’s length leading to losses”.

3. In Row No. 17 is captioned to be whether the fraud alleged to have been committed/perpetrated against the bank by the borrower has been prima facie established during the investigation conducted by the bank. Against the same, it is stated that commission of fraud established through Forensic Audit/Special Audit Report provided by M/s. M. C. Bhandari and Company during CIRP under IBC, 2016.”

11. In the opinion of this Court, the general objective behind issuance of LOC is to control the departure and arrival of persons against whom criminal cases are pending or who are either avoiding arrest or a legal proceeding, apart from cases of terrorists, CI suspects and persons whose offences affect the economy of the country and bilateral trade relations.

12. The first comprehensive policy was framed and found its release in the office memorandum dated October 27, 2010. The ingredients necessary for issuance of LOC, agencies who could make a request for issuance of LOCs and the parameters required to be fulfilled before such request could be made, were laid down. The policy also provided that an LOC could be

issued on the direction of a Court of law. A combined reading of sub paragraphs (g) and (h) of the policy of 2010 indicate that recourse to LOCs could be taken when the subject was guilty of commission of cognizable offences under the Indian Penal Code or other penal laws. Column IV of the proforma enclosed indicate that reasons should be provided. Without any reason, the request for issuance of the LOC could not be made. The policy of 2010 (pg 5) restricted the reasons for opening an LOC to instances of pending criminal investigation or proceedings relating to commission of any cognizable offence under the Indian Penal Code or other penal laws or by order of Court. Sub paragraph (j) made an exception to such parameters. The same is quoted 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.”

13. Even where no criminal case was pending with regard to commission of any cognizable offence, 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.

14. By the amendment of 2017, larger public interest was incorporated as one of the grounds for issuance of an LOC. The amendment was brought in by

a memorandum dated December 5, 2017, which is quoted below:-

“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 to 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.’ ”

15. The object of such amendment was to prevent a person guilty of commission of offences which were harmful to the bilateral relations of India or detrimental to the strategic and economic interest of the country, from fleeing the country.

16. By the office memorandum dated October 4, 2018, the Ministry of Home Affairs was requested to amend the office memorandum of 2010. The said communication is quoted below:-

“(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 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.’

(a) It is, therefore, clear that the guidelines enables LOCs against persons who are fraudsters/persons who wish to take loans, willfully default/launder 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’.”

17. The Chairman/Managing Directors/Chief Executive Officer of all Public Sector Banks were included in the list of originating agencies, by an office memorandum dated October 12, 2018, issued by the Director (Immigration) under clause (xv) of sub-paragraph 8(b).

18. The consolidated guidelines found its release in the office memorandum dated February 22, 2021. The guidelines of 2010 which was modified/amended subsequently, was reviewed. Paragraph 6 sub-paragraphs H to L provided the general circumstances under which LOCs could be requested by the originating agency which included Chairman/Managing Director/Chief Executive Officer of all public sector banks. For convenience sub-paragraphs 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 reading ‘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.”

19. This Court has already held in WPA 6670 of 2022, that the expressions ‘bilateral relations’, ‘strategic relations’ could not be given a narrow interpretation to mean a relationship between the borrower and lender and non-payment of the borrowed sum. The expression ‘economic interest’ should be read in the context of bilateral relations and strategic interest of India. The relevant portions of the decision are quoted below:-

“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.

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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 preconditions 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."

20. Thus, upon analyzing the policies which existed from 2010 onwards, the Court is of the view that only in exceptional cases, LOCs can be issued even if the parameters quoted above are 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 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.”

21. The bank is required to establish that based on the intelligence report and inputs, the departure of the petitioner from India, will be either detrimental to the sovereignty, security or integrity of India or detrimental to the bilateral relations of India with other countries, which will have a cascading effect in the downfall of the economy. Although, the memorandum of 2018 talks about fraudsters and wilful defaulters to be treated as a subject for issuance of LOC, the policy of 2021 does not include such category of persons.

22. The quantum of the money due or unpaid, cannot be a ground for issuance of LOC. Some relevant decisions are discussed herein below.

23. 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 case 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 arise to apprehend persons, who have ability to fly, flee away the country. So, L.O.C. orders are issued. It is a harmonious 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.

24. 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.

25. 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 an 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.

26. In the case of *Rahul Surana vs. The Serious Fraud Investigation Office & Ors.*, 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 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.

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.

27. 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.

28. 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.

29. 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.”

30. Request for LOC has to be fact based,, made carefully, judiciously and on objective parameters. A mere apprehension that the petitioner will flee India and no steps can be taken to recover the money, is not enough. The law provides for other mechanisms to recover money from a borrower whose loan account had become a NPA. The company is already in liquidation. As of now, it is not clear whether any criminal investigation is pending against the petitioner. Default of a borrower cannot be read into the

expression 'detrimental to the economic interest of the country'. The commission of the financial offence should be of high degree which is likely to shake the stability, growth and business dealings of the country. The bank has not provided any contemporaneous material against the petitioner which will satisfy the exception clause in the policy, requiring the restriction of the movement of the petitioner.

31. The constant plea of the bank that a huge amount is recoverable from the company in liquidation, is not considered to be a relevant factor. In the policies dealing with initiation of LOC, no financial threshold has been provided. An LOC cannot be triggered because the amount of default is enormous. Similar LOCs against other Directors and Guarantors of the borrower company have already been set aside.

32. Economic interest of the country cannot be read synonymously with the financial health of a bank. Under such circumstances, this Court does not find any reason to restrain the petitioner from travelling abroad. The request for LOC originated by the State Bank of India the issuance thereof and all consequential steps are set aside.

33. Accordingly, the writ petition is allowed and disposed of.

34. The State Bank of India and the petitioner are directed to intimate this order to the Bureau of

Immigration and all other authorities, that the LOC has been quashed by this Court.

35. All parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)