AD-13
Ct No.09
06.03.2024
TN

WPA No. 25242 of 2023

Sunil Krishna Khaitan
Vs.
Union of India and others

Mr. Imtiaz Ahmed,
Mr. Ghazala Firdaus,
Mr. S.K. Saidullah,
Mr. Mithun Mondal,
Mr. Md. Arsalan
.... for the petitioner
Mr. S. N. Dutta
.... for the respondent nos. 1 to 3

Mr. Shiv Mangal Singh
.... for the respondent-Indian Bank

1. The petitioner has challenged a Look Out Circular (LOC) issued against the petitioner.

2. It is submitted that the said LOC was based on a request of the respondent-Bank which does not adhere to the guidelines issued by the Central Government in that regard.

3. Learned counsel appearing for the respondent-Bank places reliance on an Office Memorandum dated April 18, 2019 and a communication to the Chief Executive, Indian Banks Association by the Deputy Director (BO.II) of even date as well as a Government Memorandum dated November 22, 2018.

4. Learned counsel for the respondent-Bank contends that in terms of the April 18, 2019 communication and Office Memorandum, request for LOCs may be made even by investigating agencies.

5. In fact, vide Office Memorandum dated April 18, 2019, the Indian Banks Association's request had been recorded, that all investigation agencies may be advised that where a case is already registered with them, such agencies should make, wherever necessary and appropriate, a direct request for issuance of LOC.

6. Learned counsel further submits that the petitioner is an economic offender and there is already a declaration of willful defaulter with regard to the petitioner. Also, the accounts of the concerned company, which underwent a corporate insolvency process, have been classified as fraud.

7. It is argued that if such persons are permitted to leave the country, they may very well evade the law and justice.

8. It is argued that the cumulative effect of letting go of such persons affects the economic interest of the country which is a valid ground for requests being made for issuance of LOCs.

9. Learned counsel for the Bank next contends that the petitioner does not have a Constitutional right to leave the country but only a right to move freely within the confines of the country itself.

10. Hence, there is no scope of the LOC or the request for the same being set aside.

11. On the query of court, learned counsel for the Bank hands over a copy of the Bank's request for opening of LOC, on the basis of which the impugned LOC against the petitioner and some other persons were issued.

12. Upon hearing learned counsel for the parties, the grounds for issuance of LOC acquire relevance. In the original Office Memorandum dated October 27, 2010 issued by the Ministry of Home Affairs, one of the grounds, which is relevant to the present case, is pendency of a criminal proceeding against the person with regard to whom the LOC is to be issued.

13. By subsequent Office Memoranda, including that dated November 22, 2018, the scope of the issuance of LOCs was broadened. If the authority, based on inputs received, finds that the departure of a 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 he may potentially indulge in an act of terrorism or his departure may not be permitted in the larger public interest, LOC can be issued.

14. Insofar as the reasons given by the Bank in the request for issuance of LOC with regard to the petitioner, under sub-head IV, the reason is stated to be that the account of M/s Khaitan Electricals Limited has been declared as Fraud by the respondent-Bank and the petitioner is a Managing Director/Guarantor in the said company. It has been further stated that FIR has been filed against the borrower-company and its Directors/Guarantors vide FIR No. RC0692021E0003 dated March 22, 2021 before Police Station EOB Chennai. Moreover, the petitioner has been named as an accused in the said FIR.

15. A perusal of the grounds, which have been indicated above, for issuance of LOC shows that there is no allegation that any criminal case is pending against the petitioner.

16. It is relevant to note here that the mere registration of an FIR is not equivalent to pendency of a criminal case. An FIR is lodged on the basis of a complaint. Thereafter, the same has to culminate in a charge-sheet when the investigating agency completes its investigation. Only thereafter, upon filing of the charge-sheet, a criminal trial is initiated.

17. The said stage has not come insofar as the petitioner is concerned, since the respondent–Bank quotes the number of an FIR, which has merely been registered at this juncture, where the petitioner has been named as an accused. Hence, the petitioner cannot be said to have a criminal case pending against him within the contemplation of the original Office Memorandum dated October 27, 2010.

18. Next comes the reliance of the respondent-Bank on the Office Memorandum and communication dated April 18, 2019.

19. A close scrutiny of the communication indicates that the same was merely a communication by the Deputy Director (BO.II) to the Chief Executive, Indian Banks Association. It was mentioned there that as requested by the IBA, the Department of Financial Services (DFS) has written to the Ministry of Home Affairs vide Office Memorandum of even date requesting them to advise all investigation agencies. It was further mentioned in the said communication that, however, it is emphasized that this does not imply in any manner that Banks' responsibility ends after registering of a case with an investigating agency.

20. Hence, the Office Memorandum dated April 18, 2019, which was referred to in the above communication itself has been construed in the communication to be a communication by the Department of Financial Services (DFS) by way of a request to the Ministry of Home Affairs. Thus, the said Office Memorandum by the Department of Financial Services (DFS) cannot be construed to be a modification in the original guidelines issued by way of the Office Memoranda issued by the Ministry of Home Affairs (MHA) regarding issuance of LOCs. The MHA is the appropriate authority to issue such guidelines and not the Department of Finance.

21. The Office Memorandum dated April 18, 2019 merely records a request by the IBA that all investigation agencies may be advised that where a case is already registered, the said investigation agencies should make a direct request for issuance of LOC.

22. However, the said request by the IBA *per se* cannot be elevated to the plane of a modification to the Office Memorandum issued by the MHA, which would have the effect of amending the original guidelines for issuance of LOC.

23. Moreover, even such request is circumscribed by the rider "wherever necessary and appropriate", thereby subjecting the said request to the original guidelines issued by the MHA.

24. Insofar as the MHA Office Memoranda containing the guidelines for issuance of LOC is concerned, mere registration of an FIR by any investigating agency has not been made a ground for issuance of LOC. Here, no criminal case is pending against the petitioner.

25. Learned counsel for the Bank has placed heavy reliance on the admission of the petitioner in the writ petition that a willful defaulter declaration has been made against the petitioner. However, a declaration of willful defaulter under the concerned Master Circular of the Reserve Bank of India operates in the economic sphere, to act as a warning to other commercial operators in the field of business and commerce so that they are cautious before having transactions with a person who has been declared to be a willful defaulter. However, such a declaration is not a penalty for an offence under any of the criminal laws of the country but is merely an economic warning issued under the aegis of the RBI.

26. Even the classification of fraud of the account of the borrower-company does not operate *ipso facto* as the pendency of a criminal proceeding. Such a declaration is also in terms of the Master Directions of the RBI in that regard. The RBI is not a source of penal law in the country. It is the monitor and the guide of the economic affairs of the country and the Circulars issued by the RBI merely operate in the economic field, to act as warning with regard to persons having dubious records regarding financial transactions.

27. None of such yardsticks have been included in the MHA guidelines for the issuance of LOC, however. The only case which the Bank could have is the larger public interest or economic interest of India.

However, the default committed by a particular borrower in a single instance can at best be a private cause of action for recovery of dues from such person and not sufficient to affect by itself, in the absence of further evidence or material, the larger public interest of the county or the economic interest of India as a whole. For being taken to be of such a high magnitude, the offence has to affect and shake the economy of the country as a whole. A personal debt of a particular person, whatever may be the magnitude of the same, cannot automatically be used to justify issuance of LOC, thereby interdicting the personal liberty and freedom of a citizen.

28. In any event, in the present case, the Bank has cited as reasons for issuance of LOC to be the registration of an FIR by an investigating agency and that the account of the company, of which the petitioner was a director, having been classified as fraud under the Master Directions of the RBI. The petitioner contends that the company itself is undergoing a corporate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016.

29. However, none of the above grounds qualify as sufficient for a request to issue LOC against the petitioner within the purview of the extant Office Memoranda of the MHA governing the issuance of LOCs.

30. The argument of the respondent-Bank regarding the petitioner not having any Constitutional right to leave the country is, in the least, myopic. The same fails to take a broad view as to the implicit human rights of a citizen of India, and any person for that matter. The right to go in and out of a country is implicit in the right to live of a person. Such freedom of a person is inbuilt in the Constitutional scheme of things in India.

31. Article 19 may speak about the free movement within the country but the rights of an individual are not restricted to Article 19 alone. Article 21 of the Constitution of India, which recognizes the right to life on a person, also includes the right to personal freedom and liberty of a person, which are embedded within the very fabric of the Constitutional philosophy of India.

32. Article 14 also comes into play here, since there cannot be any conceivable reason, without there being any specific legal ground to do so, for restricting the liberty of a person to leave the country and come back. Whereas other equally placed citizens of India do not suffer from such fetter, there cannot be any reason, in the absence of any ground in the LOC guidelines being made out, for the petitioner to suffer the fate and ignominy of being restricted from leaving the country.

33. In view of the above considerations, the request made by the Bank for issuance of LOC against the petitioner is vitiated and *de hors* the MHA guidelines in that regard, as contained in the various Office Memoranda issued by the MHA from time to time.

34. Consequentially, the LOC issued merely on the premise of such request also cannot withstand the scrutiny of judicial review.

35. Hence, WPA No. 25242 of 2023 is allowed on contest, thereby setting aside the request of the respondent-Bank for issuance of an LOC against the petitioner as well as quashing the consequential LOC which has been issued against the petitioner by the Immigration Authorities. Any step which has been taken or communication which has been made pursuant to such issuance of LOC shall be immediately reversed by the Immigration Authorities by acting on a server copy of this order.

36. There will be no order as to costs.

37. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)