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

\+ W.P.(C) 2049/2021 & CM APPLs. 6003/2021, 11844/2022, 696/2024 8720/2024

AJAY KUMAR GUPTA .....Petitioner

Through: Mr. Vikas Pahwa, Senior Advocate with Ms. Neeha Nagpal, Mr. Malak Bhatt, Ms. Aditi Shrivastava, Ms. Namisha Jain, Ms. Sanskriti Shakuntala Gupta and Ms. Supriya Julka, Advocates.

versus

UNION OF INDIA THROUGH MINISTRY OF HOME AFFAIRS & ORS. .....Respondents

Through: Mr. Anil Soni, CGSC with Mr. Devvrat Yadav, Advocate for UOI.
Mr. Arun Aggarwal, Advocate for R-3.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% **10.09.2024**

1. Through the instant writ petition, the Petitioner lays a challenge to the vires of Office Memorandums dated 27th October, 2010, 5th December 2017, 19th July, 2018 and 12th October, 2018[1] issued by Respondent No. 1 - Ministry of Home Affairs, as well as quashing of a Look Out Circular[2] issued against the Petitioner at the instance of Respondent No. 3 - Bank of

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[1] "Impugned OMs"
[2] "Impugned LOC"

Baroda[3].

2. Mr. Vikas Pahwa, Senior Counsel for the Petitioner puts forth the following case:

2.1. The Petitioner is a Non – Resident Indian[4], and resident of Dubai, UAE. He holds an Indian Passport bearing No. Z5215351, issued in Dubai and valid up to 20th January, 2033. The Petitioner does not have any business activities in India and has been residing abroad for over 25 years. In the year 2020, the Petitioner was diagnosed with COVID-19 and has faced long term post COVID-19 ailments for which he needs to travel to India to consult his doctors at Medanta Medicity Hospital, Gurugram. Additionally, he has to travel to India on account of certain family commitments.

2.2. On 7th March 2012, at the request of BOB, the Petitioner executed a suretyship agreement for an overdraft loan facility of approx. S.A. RAND 81.9 Million (equivalent to approx. INR 40 Crores) obtained by M/s Annex Distribution Pty Ltd., South Africa[5], from the Johannesburg branch of BOB. The account of ADPL is an overseas account of BOB which was held and maintained in South Africa and not in India. ADPL is a subsidiary group of the Sahara Group of companies which is owned and controlled by the family members of the Petitioner, which is the reason why he stood as a surety for the said company.

2.3. Since May 2017, the overdraft loan facility availed by ADPL has been outstanding. In this regard, ADPL has sent representations to the BOB, Johannesburg proposing to repay the outstanding loan amount, however,

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[3] "BOB"

[4] "NRI"

they did not receive a favourable response. In May 2020, BOB initiated liquidation proceedings against ADPL in the High Court in South Africa for repayment of their outstanding dues and even obtained a provisional liquidation order dated 14th May 2020 in the said case.

2.4. Eventually, BOB, Johannesburg and ADPL along with its group companies entered into a Settlement Agreement dated 7th July, 2020, under the laws of South Africa and agreed to set timelines for making good on the outstanding liabilities. As per the terms of the Settlement Agreement, BOB, Johannesburg agreed to withdraw the liquidation proceedings against ADPL in order to enable them to make the loan repayments. However, BOB Johannesburg did not honour the settlement terms by withdrawing the liquidation proceedings initiated by them. Nevertheless, ADPL never denied or refused to repay the outstanding loans and continued to engage in discussions with BOB to amicably settle the loan. Till date, about 1.35 Million S.A. RAND has been paid to BOB under the Settlement Agreement.

2.5. Pertinently, as a surety of the said loan, no claim has been raised against the Petitioner by BOB either in India or South Africa. However, since the loan amount continues to be outstanding, the Petitioner has reasonable apprehension that there may be an LOC issued against him at the behest of BOB. This apprehension was confirmed as an LOC dated 26th September, 2019 has been opened against the Petitioner by Respondent No. 4 – Bureau of Immigration, at the behest of BOB.

2.6. Lastly, it is submitted that ADPL is a South African entity, owned by South African nationals having business restricted to the territorial boundaries of South Africa. Further, the banking relationship between BOB,

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[5] "ADPL"

Johannesburg and ADPL is governed by the laws of South Africa. Moreover, the surety agreement by which the BOB is seeking to impose a liability on the Petitioner, was also executed under the laws of South Africa. Therefore, when the entire cause of action has arisen in South Africa, there is no legal basis for BOB to restrain the movement of the Petitioner, by way of the impugned LOC in India.

2.7. There are no legal processes initiated against the Petitioner as a surety, with respect to the said loan default in South Africa, reliance in this regard is placed on the affidavit of the Petitioner's legal team in South Africa. Furthermore, no criminal complaint, criminal case or FIR is pending against the Petitioner in India or outside India. Therefore, since the principal debtor – ADPL never refused to make the loan repayment and has continued to be in compliance of the Settlement Agreement with BOB Johannesburg, and since so far, the liability of the Petitioner as a surety has not even been invoked by BOB Johannesburg, there is no basis in law or in fact for the issuance of the LOC against the Petitioner by BOB.

3. *Per contra*, Mr. Arun Aggarwal arguing counsel for Respondent No. 3 – BOB, places reliance on their Counter Affidavit and argues as follows:

3.1. The credit facilities were extended by BOB, Johannesburg to the main borrower, M/s Confident Concept Pty. Ltd. along with others, including ADPL. The Petitioner being a surety of ADPL has an obligation to make good on the loan amounts payable by ADPL since they continue to be in default, despite the Settlement Agreement dated 7th July, 2020 executed between the parties.

3.2. The Petitioner has tried to project that there has always been a genuine intention to pay the dues, however he has failed to show *bona fides* for the same, hence disentitling the Petitioner from any relief. It is denied that the terms of the Settlement Agreement executed between the main borrower and BOB have been implemented and rather no payment has been made thereinunder. Therefore, the agreement has elapsed.

3.3. In terms of the Petitioner's liability under the Settlement Agreement, it is important to note that each term of the Settlement Agreement was not only accepted by the main borrower, but also by the Petitioner who, on account of being a surety, assumed the status of a co-borrower at the time of default of payment. As per the South African laws, the personal guarantor, in case of any default, would attain the status of a co-borrower. It is not as if the Petitioner lacks the funds to repay the bank. On the basis of pleadings and documents placed on record, it is apparent that the Petitioner is deliberately avoiding paying the amounts due to BOB.

3.4. The LOC guidelines, under the Impugned OMs have been issued to put some check on defaulting borrowers/guarantors from escaping to countries from where recovery of default amount would be jeopardised. The issuance of the LOC is a last resort when moneys due to BOB are not repaid. Considering the magnitude of the amounts, the attitude of the Petitioner is callous and insincere. Therefore, BOB has rightly insisted on the issuance of an LOC against the Petitioner as per the Impugned OMs.

4. The Court has considered the afore-noted contentions of the parties.

5. During the pendency of the present proceedings, the LOC issued against the Petitioner dated 26th September, 2019 was deleted by Respondent No. 4 – Bureau of Immigration on 13th December, 2021, as recorded in this Court's order dated 6th April, 2023. However, during the hearing on 8th May, 2023, the counsel for BOB strongly contended such a deletion was

improper, urging that no instructions were given by the originator - BOB regarding such deletion. In this regard, fresh instructions were issued by BOB for re-opening the LOC, which was then reinstated on 6th November, 2023.

6. Notwithstanding the reissuance of the LOC, it is pertinent to note that the Petitioner has been permitted to travel to and from India on six different occasions, with each travel being subject to specific conditions imposed by this Court, all of which have been duly complied with by the Petitioner. This compliance underscores that the risk of flight by the Petitioner is significantly mitigated.

7. There are no ongoing criminal proceedings against the Petitioner in India. The only basis for issuing the LOC at the instance of BOB is the apprehension that the Petitioner may attempt to evade repayment of a loan for which he stood as a surety. However, no proceedings have been initiated by BOB to enforce Petitioner's liability as a surety. On this issue, the Petitioner, in his submissions has argued that such liability does not arise since the principal borrower, ADPL, has not defaulted on the repayment of the loan and in fact has already commenced payments under the Settlement Agreement, as evidenced by the payment receipt dated 31st July, 2020 [Annexure A-2 of the Petitioner's rejoinder to BOB's counter-affidavit].

8. Be that as it may, there are currently no proceedings pending against the Petitioner. The rationale behind issuing the present LOC is ostensibly to monitor the Petitioner's entry and exit from the country. However, the Respondents have not provided any material evidence before the Court to demonstrate any criminal culpability on the part of the Petitioner that would suggest an intention to abscond. The mere apprehension that the borrower

company might default on its loan obligations cannot, by itself, justify the issuance of an indefinite LOC against the Petitioner. Such an action effectively restricts the movement of a citizen, infringing upon the right to travel abroad, which has been recognized as an integral part of the fundamental right to personal liberty under Article 21 of the Constitution of India, as observed by the Supreme Court in the landmark judgment of ***Maneka Gandhi v. Union of India***[6] and ***Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport Officer and Ors.***[7]

9. The primary purpose of issuing an LOC is to prevent a person from crossing international borders and moving beyond the jurisdiction of Indian authorities, particularly when there are reasonable and substantial grounds to believe that the person has committed a serious offence and poses a flight risk.

10. The Ministry of Home Affairs[8], which is the nodal ministry responsible for issuing guidelines for international travel, has noted that an LOC can be issued in cases of cognizable offences under the Indian Penal Code and other penal laws and only in exceptional circumstances, can its scope be expanded. At this juncture, it would be apposite to reproduce Clause 'J' of the Office Memorandum dated 27th October, 2010 and the amended Clause in Office Memorandum dated 05th December, 2017, which reads as follows:

> *"**Office Memorandum dated 27th October, 2010***
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> *"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*

[6] (1978) 1 SCC 248
[7] AIR 1967 SC 1836
[8] "MHA"

regarding 'reason for opening LOC' must invariably be provided without which the subject of an LOC will not be arrested/detained.

h) In cases 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.

xx … xx … xx

j) 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."

Office Memorandum dated 27th October, 2010, as amended on 5th December, 2017

"Amendment-

"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 Indian 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.

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."

11. Thereafter, MHA released Office Memorandum bearing No. 25016/10/2017-Imm (Pt.) dated 27th October, 2010 which consolidates the existing LOC guidelines as follows:

"6. The existing guidelines with regard to issuance of Look Out Circulars (LOC) in respect of Indian citizens and foreigners have been reviewed by this Ministry. After due deliberations in consultation with various stakeholders and in suppression of all the existing guidelines issued vide this Ministry's letters/ O.M. referred to in para 1 above, it has been decided with the approval of the competent authority that the following consolidated guidelines shall be followed henceforth by all concerned for the purpose of issuance of Look Out Circulars (LOC) in respect of Indian citizens and foreigners:-

xx … xx … xx

(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."

12. The above makes it clear that only in exceptional cases can a LOC be issued, without fulfilling the parameters. This is because a person's right to

travel freely is an expression of their fundamental right to personal liberty enshrined under Article 21 of the Constitution. Therefore, such a right can only be restricted under strict parameters and in accordance with the procedure established by law.

13. Furthermore, as has been held by the Coordinate Bench of this Court in ***Prateek Chitkara v. Union of India***[9], the scope of the term 'detrimental to the economic interest of India', as mentioned in Clause 'L' of the Office Memorandum dated 22nd February, 2021, must be narrowly construed. The relevant extracts of the judgement are as follows:

> ***82.*** *The term "detrimental to economic interest" used in the Office Memorandum is not defined. Some cases may require the issuance of a look-out circular, 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 look-out circulars. However, issuance of look-out circulars cannot be resorted to in each and every case of bank loan defaults or credit facilities availed of 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."*

14. It is also well settled in law, as held in multiple judgements by this Court, that mere inability to repay dues to a Bank without there being any criminal liability, cannot be a reason to take away the fundament right to travel guaranteed under Article 21 of the Constitution of India. Reliance in this regard is placed on W.P.(C) 14837/2022.[10]

15. To conclude, an LOC has been issued against the Petitioner for the reason that the company for which he stood as a surety was unable to repay

[9] 2023 SCC OnLine Del 6104
[10] *titled* Vikas Goel v. Union of India

its debts. The Petitioner is not an accused in any cognizable offence and there are no criminal proceedings pending against him in India or in South Africa. Therefore, Banks ought not to be permitted to use an LOC as a means to recover debts. In such circumstances, there is no material on record which can justify Respondent No. 3 - BOB to insist that the Petitioner's right to travel should be restricted and he should not be allowed to depart from the country.[11]

16. Thus, having regard to the aforenoted facts and the judgments referred above, in the opinion of the Court, LOC issued against Petitioner at the behest of BOB cannot be sustained. Accordingly, the writ petition is allowed and the LOC issued against the Petitioner is quashed.

17. Since the writ petition is being allowed, the Petitioner's request for return of the fixed deposit receipt, furnished as a security in terms of order dated 22nd March, 2021, as modified on 24th March, 2021, is accepted. The Registry is directed to return the same to the Petitioner.

18. In light of the above, the writ petition is allowed and disposed of, along with pending applications.

SANJEEV NARULA, J

SEPTEMBER 10, 2024

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[11] See also: *Rajesh Kumar Mehta v. Union of India*, 2024:DHC:4548