

(2021) 04 DEL CK 0151

In the Delhi High Court

Case No : Civil Writ Petition No. 3374 Of 2021

Brij Bhushan Kathuria

APPELLANT

Vs

Union Of India & Ors.

RESPONDENT

Date of Decision : 12-04-2021

Acts Referred:

Companies Act, 2013 — Section 212(1)(c)

Citation : (2021) 04 DEL CK 0151

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Maninder Acharya, Siddharth Bhatli, Abhishek Choudhary, Abhiyant Singh, Rakesh Kumar, Raghav Nagar, Swasti Aggarwal

Judgement

Prathiba M. Singh, J

1. This hearing has been done through Video Conferencing.

CM APPL. 10253/2021 (for interim stay)

2. The Petitioner in the present petition has challenged the Look Out Circular (hereinafter, "LOC") issued against him by Respondent Nos 3 and

4 i.e., the Ministry of Corporate Affairs (hereinafter, "MCA") and the Serious Fraud Investigation Office (hereinafter, "SFIO") and prays

for the same to be quashed.

3. The brief background of the matter is that the Petitioner is a Chartered Accountant who was inducted in the Board of M/s Techpro Systems

Limited, as a Non-Executive Independent Director, in the Annual General Meeting dated 26th September 2007. The Petitioner is working in Oman

and relocated there on 24th October, 2009. He is stated to have resigned from the post of Independent Director of M/s Techpro Systems Limited on

13th January, 2015 due to his full time employment in Oman and health concerns. In 2017, Corporate Insolvency Resolution Proceedings were initiated against M/s Techpro Systems Limited, and on 5th May 2019, the Resolution Plan was approved by the NCLT.

4. The case of the Petitioner is that he had travelled to India on 2nd February, 2021 and was scheduled to fly back to Oman on 21st February, 2021.

However, he was stopped at the airport and was intimated about the LOC which has been issued against him at the behest of the SFIO. The

Petitioner was thereafter issued summons bearing F. No. SFIO/INV/TSL/1304/2020 by the SFIO on 23rd February 2021, through WhatsApp, to personally appear before the Investigating Officer on 2nd March, 2021.

5. This matter was heard in part on 17th March, 2021. Ms. Maninder Acharya, Id. Sr. Counsel, submits on behalf of the Petitioner that a copy of the

LOC has not been given to the Petitioner. Reliance is placed upon Office Memorandum dated 27th October, 2010 and the amendments carried out

therein vide Office Memorandum dated 5th December, 2017. It is submitted that the settled position in law is that unless and until an FIR is registered

or a cognizable offence is made out, the LOC would be liable to be quashed or set aside, as it curtails the liberty of the Petitioner to travel in and out of

India. Reliance is placed on the following three judgments/orders:

â?¢ Sumer Singh Salkan v. Asst. Director & Ors. [WP(Crl.) No. 1315/2005, decided on 11th August 2010];

â?¢ Nitin Sandesara v. Directorate of Enforcement and Ors. [WP(C) 7559/2017, Order dated 29th August 2018] and;

â?¢ Deept Sarup Aggarwal v. Union of India [WP(C) 5382/2020, decided on 2nd December 2020].

6. It is further submitted that the Petitionerâ??s entire family resides in Delhi/NCR. The wife of the Petitioner is a Senior citizen who lives in

Delhi/NCR. Both his daughters also live in Delhi/NCR. Out of the two daughters, one of the daughters is married. The younger daughter is unmarried

and lives with the Petitioner and his wife. The Petitioner also has several immovable properties in Delhi/NCR. Details of the bank accounts and bank

statements of the Petitioner and his two daughters have already been submitted to the SFIO.

7. It is argued on behalf of the Petitioner that the Petitioner was only a Non-

Executive Independent Director in M/s Techpro Systems Limited from 2007 to 2015 and has no role to play in the day to day management of the company. None of the allegations against the company or its promoters can be saddled upon the Petitioner.

8. On behalf of the Respondents, a note has been handed over in a sealed cover on the status of the investigation. This Court has perused the said note. The overall allegations being confidential in nature, it is merely recorded that the investigation is currently on going. The Petitioner has also appeared before the SFIO on various dates and made detailed statements on oath, which have also been placed on record.

9. The submission of Mr. Rakesh Kumar, Id. counsel appearing for the Respondents, is that the Petitioner is guilty of conniving and conspiring with the Promoters of M/s Techpro Systems Limited. It is submitted that the Petitioner is a Chartered Accountant and was part of the Audit Committee. The fraud in the present case, according to the Respondents, is of several thousands of crores and accordingly, the Petitioner ought not to be permitted to travel abroad. It is further submitted that there are six to seven LOCs which have been issued against the Promoters and Directors of M/s Techpro Systems Limited and the LOC issued against the Petitioner is only one of them. M/s Techpro Systems Limited is a listed company and Independent Directors have a greater obligation in such companies. Thus, it is submitted that the Petitioner ought not to be permitted to travel abroad, outside the jurisdiction of this Court.

10. At this stage, the Court is merely considering the question as to whether the LOC deserves to be stayed i.e., whether the interim relief is to be granted. The pleadings are yet to be completed. The admitted facts, insofar as the Petitioner is concerned, are as under:-

- (i) The Petitioner is employed in Oman. His certificate of employment has been placed on record and he has been working there since 2009.
- (ii) The Petitioner's wife and children reside in Delhi NCR.
- (iii) The Petitioner has several immovable properties in Delhi/NCR, a list of which has been submitted to the SFIO.
- (iv) The Petitioner has been asked by his employer in Oman to immediately join back duty.

11. It is submitted that the Petitioner's travel to India was part of his

employment and he was stopped from travelling back to Oman on 21st

February, 2021. The LOC has admittedly been issued in January, 2021. However, the Petitioner was not given notice of the same. The Petitioner

entered India on his own volition and not in response to any summons by the SFIO.

12. Heard. The MCA, vide order dated 10th August, 2020, commenced investigation against M/s Techpro Systems Limited under Section 212 (1) (c)

of the Companies Act, 2013, pursuant to which the LOC was issued. Issuance of LOCs is currently under the Office Memorandum issued by the

Ministry of Home Affairs i.e., dated 27th October, 2010 along with the amendment dated 5th December, 2017. The legal position in respect of LOCs

is governed by the judgment of this Court in Sumer Singh Salkan (supra), which is relied upon by the Petitioner. The position prior to the issuance of

the two Office Memoranda was that recourse to the LOC can only be taken when there is a cognizable offence under the IPC/other penal law. The

reason for opening the LOC also had to be provided in the said LOC.

13. A perusal of the LOC, which had been placed on record in a sealed cover, shows that in so far as the Petitioner is concerned, no reason has been

specifically mentioned in the LOC.

14. Office Memorandum dated 27th October, 2010 is extremely clear that a reason has to be given for opening the LOC. The fact that there is no

reason provided in the present case is quite telling. Moreover, at this point of time, there is also no FIR lodged against the Petitioner and even the role

of the Petitioner is under investigation. Under such circumstances, the question is whether the Petitioner's everyday life can be put on a standstill.

An LOC has the effect of seriously jeopardising the right to travel of an individual. The settled legal position, as per the judgment in Sumer Singh

Salkan (supra) is that unless and until there is an FIR which is lodged or a criminal case which is pending, an LOC cannot be issued.

15. In Nitin Sandesara (supra), Office Memorandum dated 27th October, 2010 was considered by a learned Single Judge. The Id. Single Judge of this

Court had, in the said case, also observed as under:-

11. Mr Kripal, learned counsel for the petitioner has also drawn the attention of this court to the Office Memorandum (OM) dated

27.10.2010 which refers to the judgement dated 11.08.2010 passed by this

court in Sumer Singh Salkan v. Asst director & Ors: W.P. (Crl)

no. 1315/2008 and sets down the guidelines for issuance of LOC. Paragraph 8(g) and (h) of the said OM are relevant and are set out

below:-

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:

xxxx xxxx xxxx

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 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.

Xxxx xxxx xxxx

12. In the present case, the LOC does not indicate any credible reason for issuing the same. Plainly, recourse to LOC cannot be taken as a

matter of course; restricting the right of a citizen to travel is a serious imposition on his/her fundamental rights and even if it is assumed that

such action is permissible in law, it can be taken only when necessary and for good reason.

13. This Court also finds it difficult to understand the conduct of the officers of the Enforcement Directorate. Admittedly, the petitioner had

joined the investigations and had appeared before the concerned officers as required by them. Notwithstanding the same, a request for

LOC was issued and the petitioner was not even informed of such LOC. Notwithstanding the legality or validity of the LOC, the petitioner

would have taken that into account before making his travel plans. The petitioner became aware of the LOC at 11.00 PM on 22.08.2017,

when he was about to board a flight.â??

16. Recently, in *Deept Sarup Aggarwal (supra)*, the amendment dated 5th December, 2017 to the Office Memorandum dated 27th October, 2010,

which contains the amended clause, was also considered by the Court. The Court held that an LOC cannot be issued in every case by claiming that

the same would affect the economic interest of India.

17. The relevant clauses of the Office Memorandum dated 27th October, 2010, as well as the amended Office Memorandum dated 5th December,

2017 by which clause (j) was amended, are set out herein below:

Office Memorandum dated 27th October, 2010

(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 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.

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.â??

Instead of:

â??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.â??

It is clear from a perusal of clauses (g) (h) and (j) that unless and until the conditions in these clauses are satisfied, prima-facie an LOC cannot be opened.

18. There is no criminal case pending against the Petitioner. His role is also yet to be ascertained by the investigating authorities. Phrases such as

â??economic interestâ?? or â??larger public interestâ?? cannot be expanded in a manner so as to include an Independent Director who was in the

past associated with the company being investigated, without any specific role being attributed to him, as in the present case. The Petitioner poses no

flight risk given the fact that his wife and children are residents of Delhi/NCR. This Court is inclined to suspend the operation of the LOC, subject to

the following conditions:-

(i) The Petitioner shall present himself in the Indian Embassy in Oman on the 1st and 3rd Monday of every month.

(ii) The Petitioner shall file an undertaking in this Court, which would be supported with an undertaking by his wife, that the Petitioner would be present before the authorities upon being issued 15 daysâ?? notice.

(iii) Insofar as the immovable properties are concerned, the immovable properties in the list emailed to the Court Master today i.e. at items 1 to 4, shall not be transferred/alienated by the Petitioner/his family, who may have rights in the same. Copies of the documents relating to the properties shall be filed in Court in a sealed cover within two weeks.

(iv) The Petitionerâ??s wife shall not leave India without seeking leave from the Court.

19. Application is disposed of. This order has been passed in the peculiar facts of this case and shall not be taken as being applicable to any other

Director of M/s Techpro Systems Limited.

W.P.(C) 3374/2021

20. Counter affidavit be filed within six weeks. Rejoinder be filed within four weeks thereafter.

21. Both the sealed envelopes shall be retained in sealed covers and tagged with the physical record. The same shall not be scanned.

22. List on 13th August, 2021.