

(2021) 12 CAL CK 0081
In the Calcutta High Court

Case No : Writ Petition No. 10241, 10247, 10249(W) Of 2020, IA No: CAN 1 Of 2021

Vishambhar Saran & Ors

APPELLANT

Vs

Bureau Of Immigration And Others

RESPONDENT

Date of Decision : 24-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g), 21, 226

Insolvency And Bankruptcy Code, 2016 — Section 35, 35(1)(n), 43, 45, 66

Citation : (2021) 12 CAL CK 0081

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Rajarshi Dutta, V.V.V. Sastry, Tridib Bose, Debjyoti Saha, Avinash Kankani, Abhishek Banerjee, Parna Roy Chowdhury, Rajendra Tiwari, Partha Ghosh, Avishek Kulkarni

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. Since the arguments advanced by the parties in all the writ petitions are identical, the matters are taken up together for hearing and disposal.

2. The petitioners have challenged a Lookout Circular (LoC) dated February 29, 2020 issued by the Immigration Authorities at the behest of the

Punjab National Bank (respondent no.2) in the present writ petition(s).

3. Under the heading "REASON FOR OPENING OF LOC" in Clause IV, it was stated that the LoC was being issued as an exceptional case as

it appeared to the concerned authority (MD & CEO of respondent no.2), on the inputs received, that departure of the petitioner would be detrimental

to the economic interest of India and larger public interest. The inputs, which were the alleged basis of such opinion, were not disclosed in the LoC

itself. Learned counsel for the petitioners argues that merely parroting the provisions of the statute or the Office Memorandum (OM) dated October

27, 2010, as amended on December 5, 2017, does not amount to giving reasons. As such, it is contended that the LoC, being in contravention of

Articles 14, 19(1)(g) and 21 of the Constitution of India, ought to be set aside inter alia on the ground that the same was devoid of reason.

4. It is argued that mere reference to the account of the Visa Power Limited becoming NPA on March 31, 2016 in view of the balance due on

December 31, 2019 being in excess of Rs.351 crores, does not entitle the respondent no.2 to request for issuance for LoC in respect of the petitioner;

more so, when the petitioner is neither the borrower nor the guarantor. It was the Visa Power Limited which was the borrower-Company and the

alleged basis on which the Bank proceeded, that is, the petitioner being a guarantor, was misconceived and was de hors the records.

5. Learned counsel further submits that no case of fraud or any attempt to flee the country has been made out against the petitioner. There is no

indication in the pleadings of the respondent no.2 in the present writ petition as well regarding how the economic interest of India or larger public

interest could suffer if the petitioners departed from India unless LoC was issued against the petitioners.

6. The account of the borrower-Company became NPA on March 31, 2016 in view of the power project becoming unviable due to de-allocation of

the Coal Block earlier allocated to the Company pursuant to the order of the Supreme Court. Mere debt or default by reason of the account being

NPA does not trigger the ingredients to make a request for LoC, it is argued.

7. No "exceptional case" and/or anything "detrimental to economic interest of India" was established at all from the materials-on-record,

pleadings and/or the LoC itself, it is submitted.

8. Since the petitioner is neither a borrower nor a guarantor, the Circulars dated March 16, 2019 issued by the Indian Banks' Association (IBA)

have not been complied with in the present case.

9. It is submitted by learned counsel for the petitioners that the show-cause notice for identification as a willful defaulter dated June 24, 2020 was

issued by way of an afterthought, subsequent to the request for LoC being made on February 29, 2020. Moreover, such show-cause notice is based on

a Forensic Audit Report dated August 24, 2018 of M/s. Deloitte, which has been successfully challenged in the NCLT. The order of the NCLT on the

Liquidator's application under Section 35(1)(n), 45 and 66 of the Insolvency and Bankruptcy Code, 2016 (IBC), recorded several adverse findings

against the said report. Even the appeal from the said order by the Liquidator, preferred before the NCLAT, has been dismissed.

10. The affidavit-in-opposition of respondent no.2, it is submitted, merely discloses "restrictive measure" as a reason for making the request of

LoC, which is insufficient in law to issue an LoC. No objective parameter, supported by evidence, whatsoever has also been disclosed for issuance of

the LoC, it is argued. As such, learned counsel contends that the LoC itself ought to be quashed. In support of the above proposition, learned counsel

appearing for the petitioner cites certain judgments.

11. The first such judgment was rendered in Mritunjay Singh vs. the Union of India and others, reported at, MANU/D/2186/2020, on the proposition

that the mere mention of power in the counter-affidavit or A.O. cannot take the place of giving reasons for exercising such power by issuing LoC.

12. Learned counsel next cites Karti P. Chidambaram. Vs. Bureau of Immigration and others, reported at 2018 SCC OnLine Mad 2229, in support of

the proposition that LoCs are coercive measures to make a person to surrender to an investigating agency or a court below and would necessarily

have to contain reasons for such request.

13. For the proposition that no exceptional case or any adverse effect on the economic interest of India has been made out either in the original

request for issuance of LoC or even in the affidavit-in-opposition, recourse could not be taken to the higher remedy of issuance of LoC. Merely

because the word "public" is involved does not elevate a mere default to an exceptional plane. No case having been made out that the

departure/travel of the petitioner would adversely impact the share market or the economy of the "country as a whole" which destabilizes the

"entire economy of the country", the LoC is liable to be quashed. For such proposition, learned counsel places reliance in an unreported judgment

passed by this Court in RVW 23 of 2020 arising out of WP No.23412 of 2019 (UCO Bank vs. Dr. Siten Saha Roy and others).

14. Next relying on another unreported judgment of this court in Mritunjay Singh

Vs. Union of India and others, reported at WP No.105 of 2020,

learned counsel submits that, in order to affect the economic interest of the country as well, the case should be of a much higher magnitude, which

shakes the economic stability or finance of the country or is of such nature that the banking system of the country is under threat in the event the

petitioner leaves the country.

15. In Imperial Chemical Industries Limited and another vs. Registrar of Trade Marks, Bombay and another, reported at AIR 1981 Del 190, the Delhi

high Court held that, merely to parrot the language of the empowering statute does not comply with the requirement to give reasons and the cryptic

nature thereof cannot be said to be a well-founded, reasoned decision.

16. It is further submitted that the mere fact that the company was in liquidation, per se, does not create a cause of action under the relevant Circulars

and such apprehension is misconceived and does not fall under the 'exceptional' category.

17. No dispute has been raised with regard to the competency of the Chairman to recommend issuance of LoC. But, in the present case, no cause of

action for the LoCs was disclosed in the request in terms of the relevant Circulars. The IBA Circular, it is argued, provides that the action of the

respondent no.2-Bank has to be based on 'objective parameters supported by evidence' and the request for issuance also has to be fact-based,

which conditions are not complied in the present cases.

18. The petitioners, merely in the capacity of a non-whole time director of the borrower company, not being either the borrower or the guarantor,

cannot attract the grounds for issuance of LoC as contemplated in law.

19. It is reiterated that the Forensic Audit Report, which formed one of the bases of the adverse inferences against the petitioner, was deprecated,

which can be seen from various observations made with regard to the NCLT order under Sections 35, 43, 45 and 66 of the IBC, against which an

appeal, preferred before the NCLAT, met with dismissal.

20. It is submitted by learned counsel for the petitioners that the scope of operation of the said provisions of the IBC and declaration of willful default

under the RBI Master Circular are completely different and cannot be mixed up in the context.

21. As regards the alleged quantum of debt, that is, Rs.350 crores, learned counsel submits that such quantum is not a criterion under the Circular for issuance of LoC.

22. It is further argued by the petitioner that the CBI has already returned the complaint against the Company for want of particulars. The alleged subsequent complaint dated August 18, 2020 as alleged in the notes of arguments, is not a part of the affidavit affirmed by the respondents.

23. As such, the said contention cannot be relied upon by the Court, it is contended.

24. In any event, it is submitted that the Bank did not disclose the subsequent letter to CBI and cannot be permitted to rely on the same by inserting it suddenly in the notes of arguments.

25. The petitioner, as per the obligations mentioned in the Circular, was not required to disclose the reasons of travel to the Bank. Moreover, such apprehension of the petitioner escaping from India is misconceived and not based on facts and evidence in terms of the IBA Circular. It is submitted that the appeal was dismissed by the NCLAT at the threshold, thereby effectively letting the NCLT Order achieve finality.

26. As regards Hemanta Kumar Banka Vs. UCO Bank, relied on by the respondent no.2, the petitioner contends that the facts in the said case were different, since the matter pertained to a defaulter in Singapore, who had left the country and was also trying to leave India for a job in Tanzania in order to evade the Indian bank, which had international ramification.

27. Distinguishing Om Prakash Bhatt, also relied on by the respondent no.2, it is argued that the writ petition was allowed in the said case and the petitioner was allowed to travel abroad on condition that the petitioner would disclose his travel details, including the date of return, to the CBI. Such order was passed in view of the request for LoC being at the instance of CBI and pending proceedings pertaining to Kingfisher Airlines, as the petitioner therein was an ex-Chairman of SBI, who was required to depose with regard to certain loans disbursed to Kingfisher during his tenure as Chairman of SBI.

28. On the above grounds, the petitioner contends that the writ petitions ought to be allowed.

29. Learned counsel appearing for the respondent no.2-Bank contends that the

respondent no.2 is a nationalised bank and a Government of India

Undertaking. Thus, any default made to the respondent no.2, in turn, will affect the economy of the country and the larger public interest. It is argued

that sufficient cause of action was disclosed in the LoC as per the O.M. issued by the Government of India, Ministry of Home Affairs

(Foreignersâ?? Division) dated December 5, 2017 and October 4, 2018.

30. It is further argued that, admittedly, the petitioners were Directors of the borrower-Company, which was declared to be bankrupt and is in

liquidation. This creates sufficient apprehension, since the loan amount is huge, that there is little chance of the loan to be repaid. If the petitioner

travels out of India and flees, the respondent no.2 will have no means to enforce repayment of the loan taken by the Company from the respondent

no.2-Bank, which would create a substantial dent in the economy of the country as well.

31. Respondent no.2 next relies on the O.M. issued by the Government of India, Ministry of Finance dated October 4, 2018, Clause 2 of which

indicates that the Chairman of the respondent no.2-Bank is the competent authority at whose behest a Look-Out Circular could be issued. The IBA

Circular dated March 16, 2019 is based upon the O.M. as discussed above, enunciating how a Public Sector Bank can make a request for issuing an

LoC, it is contended.

32. Clauses 3.3-(A), (B), (C) of the IBA Circular annexed to the affidavit-in-opposition of the respondent no.2 highlights that a person or entity against

whom LoC is issued has to be a borrower or guarantor of a PSB. The petitioners, by virtue of being non-whole time Directors of the borrower-

Company, also fall within the purview of such provision.

33. It is contended on behalf of the respondent no.2 that the Audit Report was never turned down or set aside either by the NCLT or the NCLAT.

The dismissal by NCLT was only due to lack of certain ingredients and documents in the Audit Report; no observations, however, were made with

regard to the report.

34. It is submitted that the willful defaulter proceeding and the proceeding under the relevant provisions of the IBC are different in nature. The willful

defaulter proceeding is guided by the Master Circular dated July 1, 2015, where the scope and ambit of the proceeding is different than that under the

relevant provisions of the IBC.

35. That apart, the quantum of above Rs.350 crores owed by a company in liquidation is sufficient basis for issuance of LoC.

36. It is submitted further by learned counsel for respondent no.2 that the quantum of more than Rs.350 crores of default, the grounds of investigation by the CBI on the basis of the second request for LoC and the on-going willful defaulter proceeding are sufficient to comprise of "exceptional circumstances" detrimental for the country and its socio-economic condition.

37. The Bank, it is contended, is not aware as to whether the petitioner has an evading tendency, but there is sufficient justification for apprehension that the petitioner might escape from India.

38. The "public interest" aspect, it is contended, has been overlooked in the petitioners' arguments.

39. In this context, learned counsel places reliance upon two unreported judgments; one, rendered in WPO No.53 of 2021 (Hemanta Kumar Banka vs. Union of India and others) and the other in Criminal Writ Petition No.111 of 2021 (Om Prakash Bhatt Vs. State of Maharashtra). It is submitted by learned counsel for respondent no.2 that the present case differs on facts from the cases cited by the writ petition.

40. It is thus submitted that the writ petition ought to be dismissed, affirming the LoC issued at the request of respondent no.2.

41. However, it is evident from a factual reconnaissance of the judgments, cited on behalf of the respondent in order to substantiate the allegation of "exceptional case" having been made out for issuance of the present LoC, that the said reports are besides the point vis-à-vis the instant cases and have no direct bearing on the facts of the latter.

42. In the cases at hand, the disclosed reason for issuance of LoC is insufficient and, in any event, does not tally with the allegations made against the petitioner.

43. Apart from the LoC being devoid of any such reason sufficient to bring the petitioners within the purview of the Office Memorandum dated October 27, 2010 (as amended), an exceptional case had to be made out against the petitioners, which has not been done in the present instance.

44. The premise of issuance of the LoC could at best be the prior request of the CBI, which option is negated in view of the CBI having returned the

first complaint dated August 8, 2019 made by the Bank subsequently on December 28, 2020 and the impugned LoC being issued on February 29, 2020. In any event, no such complaint was disclosed in the LoC at all.

45. Moreover, the willful defaulter notice was issued much later, that is, on June 24, 2020. Hence, the said notice to show-cause for identification as willful defaulter antedated the LoC and could not be a ground for issuance of the LoC.

46. As regards the alleged reason sought to be projected by the petitioners for the default committed by the borrower-company, while deciding the present challenge under the LoC, it would be beyond the purview of this Courtâ??s enquiry to examine such ground on the touchstone of factual evidence.

47. Undoubtedly, Rs.351 crores is a substantial amount of money, but the Lookout Circular was silent as to why extraordinary circumstances were alleged by the respondent no.2-bank in its request for the LoC. In fact, both the LoC as well as the request by the bank for issuance of such LoC were cryptic with regard to the ground of issuance.

48. By using affidavits-in-opposition, the respondent-bank have sought to rely upon the show-cause notice for identification as willful defaulter issued inter alia against the petitioners. However, such subsequent notice could not have justified the prior issuance of the LoC.

49. It has merely been alleged in a vague manner that, in the event the petitioners left the boundaries of the country, such departure would be detrimental to the economic interests of India.

50. The limited grounds, as it stands amended, as mentioned in the relevant Office Memorandum are as follows:

â??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 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.â??

51. None of the above criteria are satisfied in the present cases. The mere quantum of alleged default cannot be a basis for the extreme measure of restricting the personal liberty of the petitioners to travel inside or outside India. In the absence of any such ground, the LoC was ex facie vitiated.

52. In the event the authorities seek to resort to the quantum of alleged default for restricting citizensâ?? departure outside the country, it is obvious that the quantum is relative and the amount of Rs.350 crores can be exorbitant or meagre, depending merely on the whims of the authorities or the perspective of the judge. As such, in the absence of any stipulation in that regard in the relevant Office Memorandum, no cut-off line can be drawn

between an amount which is detrimental to the sovereignty or security or integrity of India or to the economic interests of India and one which is not.

53. In the present case, the respondent-authorities have failed to justify rationally as to why the departure of the petitioners from India would, in any manner, be detrimental to the sovereignty or security or integrity of India or to the bilateral relations with any country or to the strategic and/or

economic interests of India as a whole. The mere subsistence of an allegation of default could not trigger the issuance of the LoC at the drop of a hat.

As such, the expression â??detrimental to the economic interestsâ? of India ought not to be an excuse to restrain citizens of India from leaving the

country without any convincing ground being disclosed for such restraint. In the present case, there is no allegation that the CBI has an arrest-warrant

against the petitioners and/or the petitionersâ?? personal participation in the CBI enquiry is of utmost necessity at the present juncture. That apart,

even if the petitioners were to leave India, there is nothing on record to indicate that the recovery of any amount of default, if committed at the behest

of the petitioners by the borrower-company, would affect such recovery in any manner, detrimental or otherwise.

54. As such, the LoC was unfounded and lacked any cogent contemporaneous or prior act of the petitioners.

55. Rather, in the present cases, the respondent no.2-bank has abused its authority to request for opening a Lookout Circular at the behest of the

Chairman/Managing Director/Chief Executive, in the capacity of a Public Sector

Bank, thereby substituting a regular proceeding for recovery of the debt in the process. The issuance of LoC cannot be an alternative for initiating recovery proceedings against the borrower itself, let alone a director of the borrower-entity.

56. As far as the judgments of Hemanta Kumar Banka (supra), Om Prakash Bhatt (supra) and UCO Bank vs. Dr. Siten Saha Roy and others (supra) are concerned, the facts of the said cases were entirely different from the present circumstances. None of the said judgments revealed similar circumstances and paucity of ground as in the present cases.

57. Rather, the ratio laid down in Karti P. Chidambaram (supra) by the Supreme Court is apt to fit the description of the present cases insofar as the proposition of the legality and/or validity of a Lookout Circular being dependent upon the circumstances prevailing on the date of which the request for issuance of the Lookout Circular has been made is concerned.

58. In the present case, the respondent no.2-bank has brought in unwarranted and unsupported comparison of the petitioners to other cases of infamous fraudsters, without there being any semblance between the attending circumstances of the present case with the cases of the said persons.

59. As regards the petitioner's allegation, that the show-cause notice for identification of willful defaulter was based on a Forensic Audit Report dated August 24, 2018 which was substantially disbelieved by the NCLT is concerned, the said consideration is irrelevant for the present purpose. The grounds of issuance of such a show-cause notice are governed by the relevant Master Circular of the RBI, whereas the grounds stipulated in the Office Memoranda issued from time to time, including the one dated October 27, 2020 (as amended till date) are the governing consideration in respect issuance of LoCs. Thus, it is beyond charter of this Court to explore into the veracity of the said Forensic Audit Report within the limited compass of the present writ petition.

60. Even the affidavits-in-opposition which, in any event, have been filed much subsequent to the issuance of the LoC, merely disclose a restrictive measures as a reason for making the request for LoC. As rightly argued on behalf of the petitioner, such a ground is absent from those envisioned as necessary ingredients for the issuance for LoC in the relevant Office Memoranda.

61. As far as the facts of Deept Swarup Agarwal (supra) are concerned, in the said case there were sufficient findings on the elusive and evasive

actions of the petitioner. In the present case, factors of similar nature are absent.

62. As revealed by the LoC and even the affidavits-in-opposition of the respondent no.2, no cogent reason has been shown for the request of the LoC.

Even the respondent-authorities acted in an unlawful manner in blindly issuing the LoC without even ascertaining whether the request by the

respondent no.2 revealed any exceptional case as envisaged in the amended Office Memorandum No.25016/31/2010-Imm dated October 27, 2010. It

is incumbent upon the issuing authority of the LoC to ascertain at least whether the grounds disclosed in the LoC and/or the request for LoC fall within

the four corners of the exceptional cases as defined in the Office Memorandum. Although it would be going too far to extend such logic to the extent

that the authorities issuing the LoC shall ascertain the merits/demerits of the allegations made in the request, at least ingredients justifying the issuance

of LoC has to be looked into prima facie by the issuing authority.

63. In the present case, no exercise of such sort was resorted to by the respondent no.1.

64. As a matter of fact, no objective parameter is found from the records for the issuance of the LoC against the petitioner. However, no occasion

has arisen before this Court to go into the question of validity and lawfulness of the show-cause notice for identification of wilful defaulter issued

subsequently against the petitioner. As such, the said question need not be dealt with within the ambit of the present writ petition.

65. In view of the aforesaid observations, the LoC dated February 29, 2020 issued against the petitioner was unlawful and de hors the relevant

provisions and the Office Memorandum dated October 27, 2010 (as amended). Thus, the LoC cannot stand judicial scrutiny under Article 226 of the

Constitution of India.

66. Hence, W.P.A. No.10241 of 2020, W.P.A. No. 10247 of 2020 and W.P.A. No. 10249 of 2020 are allowed and all the connected applications are

hereby disposed of, thereby setting aside the LoC dated February 29, 2020 issued in respect of the petitioners in all the writ petitions by the

Immigration Authorities on the request of the respondent no.2-Bank. The crux of this order shall be circulated internally by respondent no.1 among the

original recipients of the intimation regarding LoC from the said respondent, including concerned airport authorities, at the earliest, to ensure that the petitioner is not detained or harassed unnecessarily on the basis of the said LoC any further.

67. It is made clear that in the event sufficient reasons for issuance are disclosed and/or exist, this order shall not prevent the respondent-authorities from issuing a fresh LoC against the petitioners and/or the respondent no.2-Bank from making such a request in future.

68. There will be no order as to costs.

69. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.