

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 25668 of 2022

**Prashant Bothra and another
Vs.
Bureau of Immigrations
and others**

For the petitioners	:	Mr. Sabyasachi Chowdhury, Ms. Rajashree Dutta, Mr. Sanjib Dawn
For the Union of India	:	Mr. Billwadal Bhattacharyya, Mr. Narendra Prasad Gupta
For the respondent no.2	:	Mr. Avishek Guha, Ms. Akansha Chopra
For the respondent no.3	:	Mr. Victor Dutta
Hearing concluded on	:	24.08.2023
Judgment on	:	05.09.2023

Sabyasachi Bhattacharyya, J:-

1. The petitioners have challenged Look-Out Circulars (LOC) issued against them by the Immigration Authorities. The originators of the two requests on the basis of which the same was issued were respondent no.2, the Bank of Baroda (BoB) and respondent no.6, the Serious Fraud Investigation Office (SFIO).
2. Learned counsel for the petitioners argues that the issuance of LOCs against the petitioners was palpably *de hors* the law and

beyond the authority vested by the concerned Office Memorandum dated February 22, 2021. It is argued that the petitioners are neither threats to the economic interests of the country nor, if the petitioners leave the country, there will be any detriment to public interest.

3. It is argued that the petitioners' personal liberty is restrained wrongfully and the petitioners are not being permitted to carry on business abroad by travelling outside the country.
4. It is contended that the petitioner no.1 tried to visit Nepal on June 9, 2022 for prospective business opportunities; however, he was stopped from boarding the plane in the last minute by the immigration authorities at the international airport at Kolkata without any reason being assigned. On repeated demands, the senior officer of the immigration office of the airport intimated the petitioners that the restraint was on the basis of information provided by the BoB and/or SFIO.
5. However, no LOC was furnished for the petitioners' perusal. On the petitioners' sending letters dated August 13, 2022 to the respondents, BoB replied on August 19 that the documents-in-question were purely confidential.
6. It is contended that the criteria for requesting issuance of LOC under ordinary circumstances are not met in the present case. With regard to the request made by the BoB for issuance of LOC, no cognizable offence under the Indian Penal Code (IPC) or other penal laws has been cited. The petitioners place reliance on

paragraph 6(H) of the concerned Office Memorandum of 2021 which provides that in case of any such cognizable offence, the LOC subject cannot be detained/arrested or prevented from leaving the country.

- 7.** The issuance of LOC would result in immediately curtailing a person's fundamental right to travel under Article 21, it is argued, which is a very high restriction, particularly as no criminal offences have been disclosed against the petitioners.
- 8.** The SFIO merely cites ongoing investigations against the petitioners pertaining to Avoidance Transaction under the Insolvency and Bankruptcy Code, 2016 (for short, "the IBC"). The SFIO, for the first time in its affidavit-in-opposition dated July 30, 2023 has made out a case of defrauding creditors. The investigation process of the SFIO commenced in 2020 but almost three years have elapsed without any finding being arrived at against the petitioners by the SFIO or its investigation team. It is argued that even an ongoing investigation within the contemplation of Section 212 of the Companies Act, 2013 (hereinafter referred to as, "the 2013 Act") does not entitle the SFIO to issue a request for LOC, since such pendency does not qualify as a pending criminal proceeding apropos any cognizable offence.
- 9.** The SFIO has disclosed in its affidavit that the entire web of transactions involving the Company-in-question can be unearthed and the complete picture of fraud and siphoning of

funds will come out. However, the proceedings of SFIO are still at the stage of investigation under Section 212(4) of the 2013 Act. Section 212 envisages that after investigation is completed, a concrete finding is submitted to the Central Government in the form of an investigation report as per sub-section (12) of Section 212, on receipt of which the Central Government may, after examination of the same, direct the SFIO to initiate prosecution against, *inter alia*, the Company and its officers or employees under sub-section (14), following which the SFIO can file the said investigation report before the Special Court established under Section 435 for framing of charges under Section 212(15). Thus, it is contended that the question of any cognizable offence can only arise after the entire procedure laid down in Section 212 is sequentially followed and the Special Court frames charges upon examining the investigation report.

- 10.** On August 22, 2023, for the first time, the SFIO produced an interim order dated February 7, 2023 passed by the National Company Law Tribunal (NCLT), Kolkata Bench which carries a *prima facie ex parte* finding that fraud has been established beyond doubt and passes directions against the petitioners. It is argued by learned counsel for the petitioners that, even assuming but not admitting such *prima facie* finding is there, an *ad interim* order pursuant to Section 241(2) dealing with cases of oppression, etc. and not Section 212 of the 2013 Act, cannot be

construed as 'pending criminal proceedings' apropos a cognizable offence.

11. It is argued that no exceptional circumstances like detriment to the economic interest of India or larger public interest is also met in the present case and, as such, the LOCs, being *de hors* the law, should be set aside.

12. Learned counsel for the SFIO seriously opposes the writ petition. Several allegations are made against the petitioners including that they are suspended Directors of one Kohinoor Power Private Limited (KPPL) which is in liquidation before the NCLT, Kolkata. During the Corporate Insolvency Regulation Proceeding (CIRP) of KPPL, the Resolution Professional appointed a forensic auditor who filed a report based on which an avoidance application has been filed praying for an order on the respondent (petitioners herein) for payment of Rs.3.5Cr. along with interest under Section 43 of the IBC. Allegations of serious fraud are there against the petitioners, which are at present being investigated, and give rise to a detriment to the public interest, it is argued. Learned counsel places reliance on Section 212(1)(c), highlighting that where the Central Government is of the opinion that it is necessary to investigate into the affairs of the Company by the SFIO, in the public interest, such investigation shall be directed. Hence, public interest is involved.

13. Learned counsel places reliance on Sections 212(8) and 217(6)(i) of the 2013 Act, highlighting the procedure and powers of

Inspectors under Section 212. If any Director or Officer of the Company disobeys the direction issued by the Registrar or the Inspector under Section 217, the said Director or Officer shall be punishable with imprisonment which may extend to one year or with fine which shall not be less than Rs.25,000/-, extending to Rs.1,00,000/-. The Companies Act, 2013 is a special statute and has an overriding effect on the Code of Criminal Procedure, 1973 and the SFIO is a specialized agency to investigate into frauds committed under the 2013 Act.

- 14.** It is also argued that the Supreme Court has laid down that there is no mandatory timeline to complete investigation by SFIO in the matter of *Serious Fraud Investigation Office and others Vs. Sahara Housing Investment Corporation Limited and others*, reported at (2022) 9 SCC 794.
- 15.** A reading of the decision, it is argued, bolsters the contention of SFIO that when an investigation is ongoing, the same ought not to be interfered with.
- 16.** The SFIO has already obtained orders from the NCLT on February 7, 2023 which demonstrates that clear fraud is committed by the Company including the petitioners, attracting Section 447 of the 2013 Act. Thus, there is a *prima facie* case of commission of cognizable offences by the petitioners and the issuance of request by the SFIO was justified.
- 17.** Heard learned counsel for the parties. On the direction of Court, both the SFIO and BoB have handed over copies of their requests

for issuance of LOCs against the petitioners. Since those do not disclose the identity of any source or something discreet which is detrimental to the security or interest of the country, the relevant portions of the same are discussed hereinbelow.

- 18.** Insofar as BoB is concerned, under the head “Reason for opening of LOC”, it discloses that KPPL, of which the petitioners were Directors, had availed credit facilities from the BoB. The petitioners were Directors of the borrower-Company and also guarantors.
- 19.** Due to non-receipt of resolution plan in a CIRP initiated against the borrower, the NCLT, Kolkata ordered liquidation of the borrower on June 28, 2019. During CIRP, forensic audit was assigned to a Company which pointed out certain alleged irregularities in their forensic audit report.
- 20.** Out of the said alleged irregularities, related party transactions worth Rs. 10.11Cr. were allegedly identified, interest free deposit of Rs.3.50Cr. was given by the borrower-Company for outright purchase of land where the project was to be set up but it was observed that the Company had taken the land on lease for annual rent of Rs. 6 Lakh and thus, allegedly, cheated the Bank. Several such alleged irregularities on the part of the Company and its Directors have been insinuated in the report, substantial portions of which have been quoted in the request for opening of LOC. That apart, based on the observations in the forensic audit report, the account was allegedly declared as fraud on November

5, 2020 and also reported as such. In the report, it is disclosed that the Bank has also filed CBI complaint in January, 2021 and that it is apprehended that the Directors/guarantors are likely to escape the country to avoid legal prosecution and recovery measures and opening/issuance of LOC against the Director/guarantor in particular, the petitioners no.2, was recommended.

- 21.** The very premise of the request was a forensic audit report allegedly authored by a particular concern. The said report, at best, is a piece of evidence in the liquidation proceeding and is in no manner conclusive proof of evidence of any illegality committed by any entity. In fact, it is common experience that each and every such forensic audit report contains several disclaimers, restricting the operation of the same to the proceeding in which they are filed, as well as confined to the impression of the authors thereof on the basis of the documents which are available to them.
- 22.** Under no stretch of imagination can such a report be conclusive proof of the allegations against the petitioners.
- 23.** Classification of an account as fraud is an entirely different proceeding from a criminal action or a recovery proceeding, contemplated under the relevant Circulars of the Reserve Bank of Indian (RBI) and do not tantamount to a cognizable offence at all.
- 24.** Admittedly, the Bank filed a CBI complaint in January, 2021 but there is not an iota of evidence or indication that the CBI

complaint has yielded any fruitful result against the petitioners till date. Thus, the grounds shown by BoB do not disclose any cognizable offence against the petitioners and/or anything to indicate that the impact of the petitioners leaving the country would be to adversely affect the economic interest of the country as a whole or the public interest at large.

- 25.** The SFIO has sought to assume an aura of sanctity which the law does not confer on it. The premise of the submissions of the SFIO is that mere subsistence of investigation at the behest of the SFIO, on the direction of the Central Government, is unflinching proof of the petitioners' guilt for some offence. Let us consider the relevant provisions of the 2013 Act, which are relied on by both parties, in the backdrop of such claims of the SFIO.
- 26.** Section 447 of the 2013 Act provides punishment for fraud. However, the punishment for fraud is only meted out if and when a person is found guilty of fraud beyond reasonable doubt. In cases of fraud involving public interest, the term of imprisonment shall not be less than three years.
- 27.** However, to arrive at a verdict that fraud has been committed by the petitioners beyond doubt, several paraphernalia are to precede, which are not found in the present case.
- 28.** Much reliance has been placed on Section 217 of the 2013 Act by the SFIO. The said Section merely provides a road map for functioning of Inspectors. The procedure and powers, etc. of the Inspectors have been laid down in Section 217. For example, it

shall be the duty of all officers and employees and agents of a Company which is under investigation in accordance with the provisions contained in the said Chapter, where the affairs of any body-corporate or a person are investigated under Section 219, of all officers and other employees and agents, etc. to preserve and to produce to an Inspector all books and papers related to the Company or other concerned body-corporate and otherwise to give to the Inspector all assistance in connection with the investigation which they are reasonably able to give.

- 29.** Under sub-section (2) of Section 217 the Inspector may require any body-corporate to furnish such information as he may consider necessary. Certain other powers are also conferred on the Inspectors.
- 30.** Notably, in the instant case there is not a single allegation that the petitioners have ever refused to cooperate with the Inspectors in any manner at any instance. Rather, the petitioners reiterate that they have all along been cooperating with the Inspectors.
- 31.** During arguments, an insinuation has been made by learned counsel for the SFIO that one of the Directors of the Company has escaped to Nepal and has gone in hiding.
- 32.** The said argument, however, is only of prejudicial value, since the petitioners have pointed out that the said Director has his home in Nepal. Moreover, the isolated incident of a Director, who is a resident of Nepal, going to the said country, does not in any manner operate as a deterrent to the petitioners going abroad.

- 33.** Importantly, Section 212 of the 2013 Act comes under the scanner in the context of the present case.
- 34.** The SFIO has repeatedly argued that it is still at the stage of conducting investigations. Thus, as rightly pointed out by learned counsel for the petitioners, the investigation has apparently not crossed the stage of Section 212(4). Sub-section (1) of the Section 217 provides that where the Central Government is of the opinion that it is necessary to investigate into the affairs of a Company by the SFIO, for any of the reasons as stipulated therein, including in the public interest, the Central Government may, by order, assign the investigation into the affairs of the Company to the SFIO.
- 35.** At the outset, a misconception of the SFIO is required to be cleared on such aspect. SFIO has cited the expression in Clause (c) of sub-section (1) of Section 212, “in the public interest”, on an equal footing as ‘public interest’ as used in the concerned Office Memorandum of 2021 for issuance of LOCs. Clause (c) in sub-section (1) merely contemplates the stage of formation of an opinion by the Union which, if it were to be conclusive, would not require any further investigation at all. It is not the law that the mere opinion of the Central Government will operate as a final and conclusive verdict of guilt against the concerned persons or company. Such opinion is a mere stimulus for an investigation which is being undertaken in the present case.

- 36.** The subsequent provisions provide the modalities of such investigation. Sub-section (4) provides that the Director, SFIO shall cause the affairs of the Company to be investigated by an Investigating Officer who shall have the power of the Inspector under Section 217. We have already discussed Section 217 and the connotations thereof.
- 37.** Sub-section (6) of Section 212 provides that notwithstanding anything contained in the Code of Criminal Procedure, an offence covered under section 447 of the 2013 Act (which we have also discussed above) shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity to oppose the application for such release and where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
- 38.** Detailed paraphernalia of the subsequent actions in case of arrest of a person have also been provided in Section 212.
- 39.** In the present case, as rightly pointed by learned counsel for the petitioners, the stage of investigation within the contemplation of Section 212(1) – (4) of the 2013 Act is not yet over. Thus, as of today, whatever may the allegations against the petitioners or the Company of which they were Directors and guarantors, the same cannot tantamount to a cognizable offence against the petitioners.

40. Insofar as classification of an account as fraud is concerned, the same was disclosed only subsequently and does not find place in the SFIO request to the Immigration Authority for issuance of LOC.
41. Even if the allegations of the SFIO are taken at the highest, although those were disclosed *post facto* issuance of the request, no ground as contemplated in the concerned Office Memorandum of 2021 can be found to have disclosed till date.
42. An *ad interim* order by the NCLT in an oppression and mismanagement proceeding cannot by any stretch of imagination prove “guilt” against the petitioners on any count whatsoever. The entire context of such observation is different from a proceeding under Section 212 of the 2013 Act and, as such, a stray observation in such an *ad interim* order, that too *ex parte*, cannot be a valid reason for issuance of an LOC.
43. So long we have considered the alleged offences of the petitioners disclosed by the SFIO in its opposition and arguments. Let us now see whether the high ground of issuance of LOC has been made out at all by the SFIO in its request for issuance of LOC.
44. Surprisingly, precious nothing is disclosed in the said request to qualify as a ground for issuance of LOC. The only Section of law mentioned in the proforma for issuance of an LOC is Section 212(1)(c) of the 2013 Act which provision mentions, among other factors, “public interest”, merely in the context of opinion-formation by the Central Government as a prelude to initiate an

investigation. Hence, the entire edifice of the SFIO's case, built on the premise of a cognizable offence having been committed by the petitioners, is proved to be bloated, subject to be pierced by a mere perusal of the Section itself. Initiation of an investigation under Section 212 of the 2013 Act cannot be equated with a person being guilty of a cognizable offence or any offence for that matter.

- 45.** In the absence of a single allegation in the records that the petitioners are not cooperating in the investigation or a single instance that the petitioners did not comply with any request or direction of the Investigating Officers, there is nothing on record to justify the arbitrary curtailment of the petitioners' personal liberty.
- 46.** Clause (4)(a) of the concerned Office Memorandum dated February 22, 2021, which has been cited by the SFIO, is merely a part of an order of the Delhi High Court in a particular matter. The question formulated by the Delhi High Court was – what are the categories of cases in which the Investigating Agency can seek recourse of Look Out Circular and under what circumstances. The answer given by the said High Court to the said question in the judgment dated August 11, 2010 was that the recourse to LOC can be taken by Investigating Agency in cognizable offences under IPC or other penal laws, where the accused was deliberately evading arrest or not appearing in the trial court despite Non Bailable Warrant (NBW) and other coercive measures

and there was likelihood of the accused leaving the country to evade trial/arrest.

- 47.** The said citation by the SFIO is not relevant in the present case. In the present case, no “trial” has started and/or any arrest has been made or sought to be made. There is no issuance of NBW at all in the present case or even warrant, for that matter. Clause 4(a) of the Office Memorandum, quoting the Delhi High Court, clearly envisages that there has to be a cognizable offence where the accused was deliberately evading arrest or not appearing in a Trial Court despite NBW and other coercive measures and there was likelihood of the accused leaving the country to evade trial/arrest. None of the said criteria are met in the present case. On the contrary, Clause 6 of the Office Memorandum dated February 22, 2021 provides that the existing guidelines with regard to issuance of LOC were being superseded and it was decided as provided thereafter. The said consolidated guidelines, thus, are spelt out in Clause 6.
- 48.** Clause B of the same provides that the request for opening of LOC must invariably be issued with the approval of an Originating Agency that shall be “an Officer not below the rank of ...”, including an officer of SFIO not below the rank of Additional Director. The said Clause, however, does not provide the grounds for issuance of LOC but merely speaks about the authority of particular officers for the issuance of a request for LOC. It is nobody’s case that the issuance of such request by the SFIO was

without authority. The question which arises here is whether under the governing guidelines/Office Memorandum, the LOC could be issued at all or any ground was made out for such issuance.

- 49.** Clause 6(H) of the Office Memorandum provides that recourse to LOC is to be taken in cognizable offences under IPS or other penal laws. The said provision is not met in the present case. Clause 6(L) envisages that in exceptional cases, LOCs can be issued in certain cases, including where it appears to the Originating Authority, based on inputs received, that the departure of the 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.
- 50.** Here, none of the said grounds are fulfilled at all. Also, nothing has been disclosed in the request or in the arguments of the Originating Agencies concerned, that is, BoB and SFIO, that they had received any inputs justifying the request, which is also a mandate under Clause 6(L). The said Originating Agencies in the present case merely acted on a knee-jerk reaction, thereby seeking to use a request for issuance LOC as an alternative procedure to recovery of debts.

- 51.** Several High Courts as well as the Supreme Court, time and again, have deprecated the practice of Originating Agencies resorting to the serious measure of issuance of LOC as a mere alternative to recovery proceeding.
- 52.** However, such observations have apparently fallen on deaf ears every time.
- 53.** It has to be kept in mind that the high grounds which are required to be made out for restraining the personal liberty of a person as guaranteed under Article 21 of the Constitution and the right of a person to move within the country under Article 19, a necessary corollary of which is the right to travel abroad, have to be on a much elevated footing than mere pendency of an investigation or allegations of financial frauds against the concerned person.
- 54.** The mere paranoia of the authorities whenever a person against whom allegations are levelled seeks to leave the country cannot be sufficient for issuance of LOCs and curtailing the person's personal liberty to travel abroad.
- 55.** In fact, Clause 6(I) of the Office Memorandum dated February 22, 2021, relied on by both parties, in no uncertain terms provides that 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 original agency can only request that they be informed about the arrival/departure of the subject in such cases. Hence, even if an LOC is issued but no

cognizable offence under any penal law of the country is made out, the LOC-subject cannot be detained/arrested or prevented from leaving the country.

56. Such rider ought to be instilled in the mind of the Originating Agencies, including the BoB and the SFIO in the present case.
57. Hence, no ground has been made out for issuance of LOC against the petitioners and/or restricting them from travelling abroad.
58. Accordingly, WPA No.25668 of 2022 is allowed, setting aside the Look Out Circular(s) issued against the petitioners and restraining the respondent-Authorities from preventing the petitioners from travelling abroad in any manner on the strength of the said quashed LOC(s). The respondent-Authorities shall immediately arrange for communication of this order and the fact of the LOCs having been quashed, by causing necessary publication of the same and intimating about the same to all authorities who were intimated about the LOCs in the first place, to ensure that the petitioners are not restrained unduly from leaving the country on the basis of the quashed LOCs.
59. There will be no order as to costs.
60. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

Later

At this juncture, an order of stay is prayed for.

In view of the nature of the order, stay of operation of the same is granted for a fortnight to enable the SFIO to prefer a challenge against this order.

(Sabyasachi Bhattacharyya, J.)