

POCKET NOTEBOOK ON CORPORATE CRIMINAL LAWS

PART III

OVERVIEW OF LAW ON LOOK OUT CIRCULARS

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PROLOGUE

“No freeman shall be taken or imprisoned or deceased or outlawed or banished or any ways destroyed, nor will the King pass upon him or commit him to prison unless by the judgment of his peers or the law of the land.” – English Magna Carta, June, 1215.

Black’s Law Dictionary defines ‘Personal Liberty’ as the “*right of freedom of a person to behave as they would like. Though following the conduct code of the society in which a person resides is important.*” In India, the Hon’ble Supreme Court, in the matter of *Kharak Singh vs. State of U.P* [AIR 1963 SC 1295], ascribing meaning to the term ‘personal liberty’, held that mere life without movement would be meaningless and without the exercise of human faculties it would not rise above the levels of animals. Since the right to liberty and free movement arises from the fact that every man contributes something to the good of society, slavery, in any form, is the antithesis of liberty.

Personal liberty is the liberty of an individual to behave as one pleases except for those restraints imposed by laws and codes of conduct of the society in which one lives to safeguard the physical, moral, political, and economic welfare of others. This also includes liberty of an individual which consists in the power of locomotion, of changing situation, or removing his person to whatsoever place his own inclination may direct, without imprisonment or restraint, unless by the process established by law. Although, there is no clause in the Constitution of India which explicitly supports a right to travel abroad, the Hon’ble Supreme Court has recognized the right to travel beyond the territory of India as a fundamental right guaranteed under Article 21 of the Constitution of India. This was most famously stated in the case of *Menaka Gandhi vs. Union of India* [(1978) 1 SCC 248], which had confirmed its earlier judgment in *Satwant Singh Sawhney vs. D. Ramarathnam* [(1967) 3 SCR 525]. Also, as a signatory to the Universal Declaration of Human Rights (1948), India is bound by its Article 13, which guarantees people – (1) the right to freedom of movement and residence within the borders of each state, and (2) the right to leave any country, including their own, and to return to their country. However, no fundamental right is absolute in nature. Reasonable restrictions are enforced by the government through various legislations and executive orders.

Despite the principles of liberty deeply rooted in all major constitutions of the world, the modern nation states have, over time, evolved various informational systems of surveillance to keep a check and, if need be, to restrain individuals from travelling abroad freely. One such measure in India, a nation state governed on the principles of territoriality and by a bureaucratic administrative system, is the power of government to restrict the movement of individuals, by virtue of Look Out Circulars (“**LOC**”).

EVOLUTION OF THE LAW ON LOC

The purpose of LOC is to trace absconding criminals and to monitor effectively the entry or exit of persons who may be required by law enforcement authorities at the international borders, international airports, maritime areas and ports etc. The origin of the current framework of LOC can be traced back to a letter dated 05.09.1979 bearing reference number 25022/13/78-F.I. (“**1979 MHA Letter**”) issued by the Ministry of Home Affairs (“**MHA**”). This was, subsequently, amended by MHA on 27.12.2000 *vide* its Office Memorandum bearing reference number 25022/20/98/F.IV (“**OM dated 27.12.2000**”).

In its 1979 MHA Letter, MHA stated that the LOCs are issued to check the arrival/departure of foreigners and Indians “*whose arrival/departure has been banned by the concerned authorities*”. The 1979 MHA Letter clarifies that apart from the Government of India, the authorities which could issue LOCs include – Ministry of External Affairs, Customs and Income Tax Departments, Directorate of Revenue (“**DRI**”), Central Bureau of Investigation (“**CBI**”), Interpol, Regional Passport Officers and Police Authorities in various states. The OM dated 27.12.2000 specified the steps for issuing a LOC in respect of an Indian citizen i.e. a request for a LOC should be made to all the immigration check posts in India, and should include the accused person’s complete particulars. Such LOC would require the approval of an officer not below the rank of Deputy Secretary to the Government of India/Joint Secretary in the State Government/concerned Superintendent of Police at the district level.

On the issue of enforceability of LOC and on various other aspects, the OM dated 27.12.2000 found itself assailed before the Hon’ble Delhi High Court in two landmark cases – *Shri Vikram Sharma vs.*

Union of India & Ors. [W.P. (C) No. 10180 of 2009] and in *Sumer Singh Salkan vs. Asstt. Director & Ors.* [W.P. (Cr.) No. 1315 of 2008] and [Cr. Ref.1/2006] *Court on its Own Motion Re: State vs. Gurnek Singh*. Both these judgments, amongst others, have been elaborated in greater detail in Part B of this Notebook.

Pursuant to the directions in both these cases above, the MHA released a more exhaustive Office Memorandum dated 27.10.2010 bearing reference number 25016/31/2010-Imm. (“**OM dated 27.10.2010**”) taking into account all previous communications of the MHA, and the aforesaid two orders, to specify the ranks of the officers in each of the central and state governmental agencies and police authorities who could issue LOCs.

The MHA made further amendments to the OM dated 27.10.2010, *vide* Office Memorandum dated 19.09.2018 bearing reference number 25016/10/2017-Imm(Pt) (“**OM dated 19.09.2018**”) empowering officers in the Serious Fraud Investigation Office (“**SFIO**”) to request opening of LOC. Further, in the year 2018 only, *vide* an unpublished amendment to the OM dated 27.10.2010, the MHA has empowered chairmen/managing directors/chief executive officers of public sector banks (“**PSBs**”) to request opening of LOC (“**2018 Amendment**”). The same was affirmed by the Press Release dated 24.07.2019 issued by MHA (“**Press Release dated 24.07.2019**”) which stated:

“The Government issued directions to deal with wilful bank loan defaulters or fugitive economic offenders. For this a Look Out Circular (LOC) can be opened by the Bureau of Immigration in respect of Indian citizens and foreigners on the request of an authorized originator, which includes an officer not below the rank of Deputy Secretary to the Government of India; or an officer not below the rank of Joint Secretary in the State Government; or District Magistrates; or Superintendents of Police; or designated officers of various law enforcing and security agencies; or designated officer of Interpol; or Chairman/Managing Director/Chief Executive of all Public Sector Banks; or as per directions of any Criminal Court in India. The Immigration Authorities can detain as well as prevent any person, including a willful defaulter, from leaving India against whom LOC has been issued.”

EXISTING CONUNDRUM AROUND LEGAL STATUS OF LOC

LOC is an executive instruction or communication circular from authorized government agency with reference to a person who is wanted by that agency for fulfillment of a legal requirement. Considering the absence of legislative codification, LOCs remain creatures of executive circulars. A question does arise as to how an instruction or communication in the nature of an Office Memorandum (such as the OM dated 27.10.2010) without any statutory backing can be used to fulfill a legal requirement. This has led to scrutiny of this issue by courts.

The Supreme Court of India expressed serious concerns about abuse of process in the issuance of LOCs in the case of *Chandran Ratnaswami vs. K.C. Palanisamy & Ors* [(2013) 6 SCC 740]. LOC was found to be pending in the name of the petitioner therein, despite there being no ongoing criminal investigations, or criminal proceedings pending against or involving the Petitioner. The Superintendent of Police, who was acting as the ‘concerned authority’ in this case, had directed a re-investigation in the matter, ostensibly to justify keeping the LOC alive. The Supreme Court stated that “*There is no such thing like unfettered discretion in the realm of powers defined by statutes...*”.

However, even today, despite regulatory requirements for issuance of LOCs set out by the MHA in the aforementioned the 1979 MHA Letter, the OM dated 27.12.2000 and the OM dated 27.10.2010, the issuance of LOC remains highly discretionary and the exercise of power under it remains questionable. As such, even after OM dated 27.10.2010 laying down exhaustive instructions on the contours of the exercise of power with respect to LOCs, State has found itself defending and justifying the exercise of such powers more than often when they have collided with fundamental right to travel abroad. For instance, the power to prevent individuals’ fundamental right to travel are clearly chalked out under Sections 10, 10A and 10B of the Passports Act, 1967. However, in *Priya Parameswaran Pillai vs. Union of India & Ors.*, [2015 SCC OnLine Del 7987], the Hon’ble Delhi High Court observed that there might “*arise certain situations, outside the scope of the said [The*

Passports] Act, which may require, the executive of the day, to take recourse to an LOC, under circumstances which are not covered by a statutory enactment.” The Court simply posits those situations and circumstances where the executive cannot take the route of statutory law, so as to carry out both investigation as well as trial against an offender or suspect who is evading arrest or probe. In *S. Martin vs. The Deputy Commissioner of Police, Central Crime Branch, Egmore, Chennai & Ors.*, [2014 SCC Mad 1651], the Hon’ble Madras High Court clearly held that law permits the concerned authorities to resort to an issuance of LOC in respect of cognizable offences either under Indian Penal Code, 1860 (“IPC”) or other penal laws where he/she is allegedly involved. However, the existing executive orders on LOC, bypassing statutory laws, gives immense space to the State to roughshod an individual’s right to travel. Unlike substantive law, such as Section 41(1) of Criminal Procedure Code, 1973, which gives power to the police to arrest, without an order or warrant from a Magistrate, any person against whom there is credible information or reasonable complaint or reasonable suspicion, the mechanism for issuance of LOCs (which naturally impinges upon fundamental rights) is not premised on, or circumscribed by, such parameters with any statutory backing. The absence of legal definition and statutory backing makes it function vaguely.

In fact, in the case of *Priya Parmeswaran Pillai (Supra)*, the Hon’ble Delhi High Court even raised serious doubts on the operative part of OM dated 27.10.2010 as to whether it even had the status of law. The power to prevent/detain/suspend someone from travelling is an extraordinary power which should be carried out under the ‘law’ only for valid reasons. One of the major aspects to be analyzed here is whether OM dated 27.10.2010 is an enacted law, because Article 13(3)(a) of the Constitution of India states, ‘*law includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law*’. However, various Office Memoranda issued are merely executive instructions or communication circulars from the concerned government authorities, which ought to be used sparingly and in exceptional situations insofar as concerns the fundamental rights of citizens. LOC, being a coercive measure, needs to be exercised in terms of and in consonance with law while remaining within the ambit of ‘exceptional case’ where individual falls under cognizable offences.

LOC is an extraordinary and drastic measure which abridges an individual’s right to travel. It becomes more complicated and vague in the absence of statutory backing which could provide legal definition for its lawful existence. Despite numerous guidelines and instructions, even the courts have admitted that there have been serious cases where LOCs have been misused for extraneous grounds, striking at the constitutional rights and liberties. The case of *Priya Parmeswaran Pillai (Supra)* reflects that it is often wielded as a weapon by the State to curb voices of dissent and to meet its partisan ends. Such intolerance and unacceptability of dissent by the State and issuance of LOC is sheer brutalization under democracy. Therefore, the constitutionality of the MHA communications seeking to regulate the issuance of LOCs, which grant such overreaching powers to the State, begs further judicial and legislative scrutiny. Despite the absence of any legislation, the legality of such circulars, the process of their issuance has never been fully examined or adjudicated upon, leaving its implementation at the discretion of the executive. There could, potentially, be a host of issues that come up time and again before Courts in India in relation to LOCs till such time as the law is codified unambiguously and rationally.

Our analysis of the law on LOC is split into 3 (three) Parts as follows:

- ✓ **Part A** – Summary of the law on LOC; and
- ✓ **Part B** – Summary of Judicial Precedents on various contentious issues emanating from, or linked to, the law on LOC.
- ✓ **Part C** – Analysis of 2018 Amendment in the OM dated 27.10.2010 empowering chairmen/managing directors/chief executive officers to request issuance of LOC.

PART A – SUMMARY OF THE LAW ON LOC

<u>S. No.</u>	<u>Proposition</u>	<u>Paragraph reference in the respective OM/Press Release dated 24.07.2019</u>	<u>Content</u>
1	The law on issuance of LOC		OM dated 27.10.2010 on issuance of LOC in respect of Indian citizens and foreigners, amended further by OM dated 19.09.2018 and secret/undisclosed and allegedly a confidential 2018 Amendment read with Press Release dated 24.07.2019
2	Agencies authorized to issue LOC	Paragraph 2 of the OM dated 27.10.2010	MHA, Ministry of External Affairs, the Customs and Income Tax Departments, DRI, CBI, Interpol, Regional Passport Officers and Police authorities in various states are all authorized to issue LOC. <i>(Apart from MHA and Ministry of External Affairs, it is only the law enforcement agencies which have been empowered to issue LOC.)</i>
3	Authorities (originally identified as) empowered to request for the issuance of LOC to the agencies referred to in S. No. 2 above.	Paragraph 8 of the OM dated 27.10.2010	The request for the issuance of LOC must invariably be issued with the approval of an officer not below the rank of the following authorities: <ul style="list-style-type: none"> ➤ Deputy Secretary to the Government of India; or ➤ Joint Secretary in the State Government; or ➤ District Magistrate of the District concerned; or ➤ Superintendent of Police (SP) of the District concerned; or ➤ SP in CBI or an officer of equivalent level working in CBI; or ➤ Zonal Director in Narcotics Control Bureau (NCB) or an officer of equivalent level (including Assistant Director (Ops.) in Headquarters of NCB); or ➤ Deputy Commissioner or an officer of equivalent level in the DRI or Central Board of Direct Taxes or Central Board of Excise and Customs; or ➤ Assistant Director of IB/BoI; or Deputy Secretary of R&AW; or ➤ An officer not below the level of Superintendent of Police in National Investigation Agency; or ➤ Assistant Director of Enforcement Directorate; or ➤ Protector of Emigrants in the office of the Protectorate of Emigrants or an officer not below the rank of Deputy Secretary of the Government of India; or ➤ Designated officer of Interpol; or

			➤ On directions of any Criminal Court in India.
4	Addition to the list of authorities empowered to request issuance of LOC	➤ OM dated 19.09.2018 ➤ A secret/undisclosed and allegedly a confidential 2018 Amendment	The OM dated 19.09.2018 has added officers of SFIO not below the rank of Additional Director in the list of officers who can make a request for opening a LOC The OM dated 27.10.2010 stands amended by the 2018 Amendment read with Press Release dated 24.07.2019 (directions issued by the Government to deal with fraud, wilful bank loan defaulters or fugitive economic offenders (“ FEOs ”)), issued by MHA and empowers chairmen/managing directors/chief executive officers of the PSBs to request issuance of the LOC against FEOs/wilful defaulters/fraudsters.
5	Whether request for issuance of LOC can be made by all statutory bodies?	Paragraph 4, 5 and 8(k) of the OM dated 27.10.2010	➤ The request for issuance of LOC can only be made by either the Central or the State Government and that too in the prescribed form and only from officers of a certain rank. ➤ There is no power vested with statutory bodies, granted powers of a civil court for a limited purpose, to make a request for the issuance of LOC, which leads to, or is premised on, criminal allegations/implications. ➤ At the most, such bodies can bring necessary facts to the law enforcement agencies like police, which will then, in turn, request for issuance of LOC upon an assessment of the situation, strictly in terms of the procedure outlined for the purposes. [Please refer to Part B(5) of this Notebook for the relevant judicial precedent.]
6	Categories of cases where investigating agencies can seek recourse to LOC	Para 6 & 7 of the OM dated 27.10.2010	Recourse to LOC can be taken by investigating agencies in: ➤ cognizable offences under the IPC or other penal laws, where the accused is: ➤ deliberately evading arrest; or ➤ not appearing in the trial court despite Non-Bailable Warrants (“ NBW ”) and other coercive measures, and ➤ there is likelihood of the accused leaving the country to evade trial/arrest. [Please refer to Part B(1) of this Notebook for the relevant judicial precedent.]
7	Procedure required to be followed by the investigating agency before opening a LOC	Para 6 & 7 of the OM dated 27.10.2010	➤ The investigating officer shall make a written request for LOC to the officer as notified by MHA; ➤ The investigating officer shall provide details & reasons for seeking LOC; ➤ The competent officer alone shall give directions for opening LOC by passing an order in this respect. [Please refer Part B(2) of this Notebook for the relevant judicial precedent.]

8	Proforma <i>vide</i> which request for issuance of LOC can be made	Para 8 (c), 8(d), 8(e), 8(f), 8(g) and 8(j)	<p>The Proforma to be filled for requesting issuance of LOC must contain the following:</p> <ul style="list-style-type: none"> ➤ The name and designation of the officer signing the Proforma for requesting issuance of LOC must invariably be mentioned (without this the request would not be entertained). ➤ The contact details of the originator must be provided in column VI of the Proforma. ➤ The contact number of the respective control room should also be mentioned to ensure proper communication for effective follow-up action. ➤ Complete identification particulars of the person, in respect of whom the LOC is to be opened, to be indicated in the Proforma. Minimum of 3 (three) identifying parameters, apart from sex and nationality, must be provided, else LOC cannot be opened. ➤ In column IV of the Proforma, details of ‘reason for opening LOC’ must be provided without which the any subject of LOC will not be arrested/detained. ➤ In cases where there is no cognizable offence under IPC or any other penal laws, the LOC subject cannot be detained/arrested or prevented from leaving the country. The originating agency can only request information with respect to arrival/departure of such individual. ➤ In exceptional cases, LOCs can be issued without complete parameters and/or case details against CI (counterfeit items) suspects, terrorists, anti-national elements, etc. in larger national interest.
9	Validity/Life of LOC	Para 2, 3 and 8(i)	<p>LOC is valid only for a period of 1 (one) year. It can be extended further before the expiry of the 1 (one) year period. In case no request for extension of LOC is received before the expiry of the 1 (one) year period, LOC will automatically be closed by the immigration officer concerned after expiry of the 1 (one) year period. However, this provision for automatic expiry after 1 (one) year shall not be applicable in the following cases:</p> <ul style="list-style-type: none"> ➤ Ban-entry LOCs issued for watching arrival of wanted persons (which have a specific duration); ➤ Loss of passport LOCs (which ordinarily continue till the validity of the document); ➤ LOCs regarding impounding of passports; and ➤ LOCs issued at behest of Courts and Interpol.

GL Note

Over the years, OM dated 27.12.2000 has come under the scanner of various High Courts in India, which has led to the evolution of the OM dated 27.12.2000. Many of these decisions have been incorporated and a revised OM dated 27.10.2010 has been issued catering to the issues and unanswered questions emanating therein. However, despite the Hon’ble Delhi High Court putting riders in the exercise of this power, there have been many instances of abuse of this power, as has been recorded in the cases of *Priya Parameswaran (Supra)* and *Karti P. Chidambaram vs. Bureau of Immigration*, W.P. No.21305/2017, Madras High Court. The following Part B contains the various landmark judicial decisions in this regard.

PART B – SUMMARY OF JUDICIAL PRECEDENTS ON VARIOUS CONTENTIOUS ISSUES EMANATING FROM, OR LINKED TO, THE LAW ON LOC

<u>S. No.</u>	<u>Case Title</u>	<u>Proposition</u>	<u>Legal Position (Based on Interpretation Judicial Precedents)</u>
1	<i>S. Martin vs. The Deputy Commissioner Of Police</i> , W.A. No. 384 of 2014, Madras High Court	Object of LOC	<ul style="list-style-type: none"> ➤ The object of LOC is to apprehend an accused, who is evading arrest or does not appear in Court despite issuance of NBWs. ➤ In case there is no material to hold that the accused would evade trial, LOC need not be issued.
2	<i>Sumer Singh Salkan vs. Assistant Director and Ors</i> , W.P. (CrI.) No.1315/2008 and <i>Court on its Own Motion Re: State vs. Gurnek Singh, etc.</i> , CrI.Ref.1/2006, Delhi High Court	Nature of LOC and cases where recourse to LOC can be taken	<p>The Hon'ble Delhi High Court laid out certain guidelines to be followed by all concerned agencies requesting for opening of LOC:</p> <ul style="list-style-type: none"> ➤ 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 NBWs and other coercive measures and there was likelihood of the accused leaving the country to evade trial/arrest. ➤ The investigating office shall make a written request for LOC to the officer as notified by the MHA, giving details & reasons for seeking LOC. The competent officer alone shall give directions for opening LOC by passing an order in this respect. ➤ The person against whom LOC is issued must join investigation by appearing before investigating office or should surrender before the Court concerned or should satisfy the Court that LOC was wrongly issued against him. He may also approach the officer who ordered issuance of LOC and explain that LOC was wrongly issued against him. ➤ LOC can be withdrawn by the authority that issued the same and can also be rescinded by the trial Court where case is pending or trial Court having jurisdiction over the concerned police station on an application by the person concerned ➤ LOC is a coercive measure to make a person surrender to the investigating agency or Court of law. The subordinate courts' jurisdiction in affirming or cancelling LOC is commensurate with the jurisdiction of cancellation of NBWs or affirming NBWs.
3	<i>Karti P. Chidambaram vs. Bureau of Immigration</i> , W.P. No.21305/2017, Madras High Court	LOC to not be issued in a routine manner	<ul style="list-style-type: none"> ➤ The legality and/or validity of any LOC has to be adjudged having regard to the circumstances prevailing on the date on which the request for the issuance of the LOC had been made. ➤ LOC should not be issued in 'hot haste' when the conditions precedent for issuance of such

			circular do not exist.
4	<i>Priya Parameshwaram Pillai vs. UOI & Ors.</i> , (W.P. (C) No. 774/2015), Delhi High Court	Status of an Office Memorandum as law in India	<ul style="list-style-type: none"> ➤ An Office Memorandum does not possess any legal sanctity or backing under law. ➤ An Office Memorandum, merely issuing directions for internal consumptions and operations amongst the instrumentalities of the Government, cannot be construed as law for the purposes of Article 13 of the Constitution of India. ➤ The Hon'ble Delhi High Court held: <i>"As an illustration, I may only advert to the provisions of Section 41 of the Cr.P.C., which, inter alia, empowers a police officer to arrest a person, without the order of a Magistrate and arrest warrant, upon receipt of a reasonable complaint or credible information or even reasonable suspicion that he has committed a cognizable offence. Whether an LOC issued to effectuate such a purpose, would require a further support of an enactment would require consideration as it could be argued that it is only in aid of the power contained in the statute, i.e., the Cr.P.C. I would thus leave the discussion on this issue to a better and more evolved wisdom of another court....</i> <i>...As indicated above, even if I were to assume that 2010 O.M. has the status of law, qua which I have a serious doubt, the action of the respondents in issuing an LOC vis-a-vis Ms. Pillai cannot be categorized as a reasonable restriction, as it is not a restriction which falls in any of the limitations articulated in clause (2) of Article 19."</i> ➤ Article 13(3)(a) of the Constitution of India states, 'law includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law'. ➤ To the contrary, various Office Memoranda issued are merely executive instructions or communication circulars from the concerned government authorities, which ought to be used in exceptional situations. ➤ As such, Office Memoranda do not possess status of law under Article 13 of the Constitution of India. ➤ Any coercive measure such as LOC, issued basis an Office Memorandum, which leads to deprivation of the liberty of any individual, without any statutory backing, is liable to be struck down on the vice of Articles 14 and 21 of the Constitution of India.
5	<i>Shri Vikram Sharma vs. Union of India</i> , WP (C) No. 10180 of 2009	Request for issuance of LOC cannot be made by all statutory bodies	<p>The Hon'ble Delhi High Court held:</p> <ul style="list-style-type: none"> ➤ A request for the issuance of LOC cannot emanate from statutory bodies like the National Commission for Women ("NCW"). ➤ It has to come from either the Central or the State Government and that too only in the

			<p>prescribed form and then again only by the officers of a certain rank.</p> <ul style="list-style-type: none"> ➤ While criminal courts dealing with cases of criminal law enforcement can issue directions, which may result in the issuance of LOC, there is no such power vested either under the Criminal Procedure Code, 1973 or the Passports Act, 1967 or under the MHA's circular, in statutory bodies like NCW. ➤ Being granted the powers of a Civil Court for a limited purpose does not vest the NCW with powers of a criminal courts and it has no authority as of today to make a request for the issuance of LOC. ➤ There are a large number of statutory commissions at the level of Centre and the States which perform judicial functions and are vested with, for the purpose of conducting inquiries upon receiving complaints, the powers of a Civil Court like the National Human Rights Commission (NHRC), the NCW, the National Commission of Protection of Children's Rights etc. These statutory bodies, however, have not been vested with the powers of a Criminal Court and do not have powers to enforce criminal law. ➤ It is for the Government of India to take a policy decision on whether it wants to vest such statutory tribunals/commissions with criminal law enforcement powers. ➤ Since as of today, they have no such power, it is imperative that the MHA should issue further clarificatory circulars or Office Memoranda clearly stating that the request for issuance of LOCs cannot 'emanate' from statutory bodies like the NCW. ➤ If at all, such bodies should bring the necessary facts to the notice of law enforcement agencies like the police, which will then make the request for issuance of LOC upon an assessment of the situation, and strictly in terms of the procedure outlined for the purpose. ➤ The power to suspend, even temporarily, the passport of a citizen, the power to issue LOC, the power to 'off-load' a passenger and prevent him or her from travelling are all extraordinary powers, vested in the criminal law enforcement agencies by the statutory law. ➤ These are powers that are required under the law, to be exercised with caution and only by the authorities who are empowered by law to do so and then again only for valid reasons.
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PART C – ANALYSIS OF 2018 AMENDMENT IN THE OM DATED 27.10.2010 EMPOWERING OFFICERS OF PSBs TO REQUEST ISSUANCE OF LOC

- *Vide* 2018 Amendment in the OM dated 27.10.2010 read with Press Release dated 24.07.2019, the chairmen/managing directors/chief executive officers of PSBs have been empowered to request for issuance of LOC, in cases of FEO, wilful defaulters (in accordance with Reserve Bank of India's ("RBI") circular dated 01.07.2015 titled *Master Circular on 'Wilful Defaulters'* ("**Wilful Default Circular**") and in cases of declaration of fraud (as per RBI's *Master Directions on Frauds – Classification and Reporting by commercial banks and select FIs* dated 01.07.2016 (as updated on 03.07.2017) ("**Fraud Circular**").

- The Press Release dated 24.07.2019 states that the ‘*Immigration Authorities can detain as well as prevent any person, including a willful defaulter, from leaving India against whom LOC has been issued*’. The phrase ‘*prevent any person, including a willful defaulter*’ in the Press Release dated 24.07.2019 makes it amply clear that the application of the 2018 Amendment is non-exhaustive in nature to detain any person at the behest of PSBs, including those declared as wilful defaulters or whose accounts have been declared as ‘fraud’.
- It is interesting to note that the Press Release does not explicitly mention either the Fraud Circular or the Wilful Default Circular. However, in respect of fraudsters, the only interplay of law governing frauds in the context of banks is set out in the Fraud Circular, whereas in respect of ‘wilful default’ in the context of banks, it is set out in the Wilful Default Circular.
- Both the Fraud Circular and the Wilful Default Circular have been issued by RBI exercising its powers under the Banking Regulation Act, 1949 (“**BR Act**”). However, no provision of the BR Act authorizes banks, or delegates or confers any power upon the banks to take such coercive measure and effectively act in the capacity of a court or tribunal and issue or request for issuance of LOC.
- Request for LOC is made to all the immigration check posts in India, and include the accused person’s complete particulars. The officials of Bureau of Immigration are then authorized to detain and question the concerned persons on these immigration check posts. The laws under which the arrest/detention and questioning by immigration officials can be made are:

(i) *Customs Act, 1962* –

- Section 100 and 101 of the Customs Act, 1962: Under the Customs Act, 1962, Sections 100 and 101 confer upon the customs authorities powers to search suspected persons entering or leaving India.
- The scope of both these sections is limited to the arrest of a person whom the customs officers suspect to have secreted about his person or any goods liable to be confiscated or any documents relating thereto.

(ii) *Passports Act, 1967* –

- Section 13 of the Passports Act, 1967: Under Section 13 of the Passports Act, 1967, the customs officers have powers to arrest the persons only suspected of committing offences as specified under Section 12 of the Passports Act, 1967.
- Under both the aforesaid acts, the power to arrest/detain is not a function of mere accusation or indicting someone as a ‘wilful defaulter’ fraud under Fraud Circular at the behest of the PSBs, at least not until the criminal law against such individuals has been set in motion by virtue of any FIR/complaint/enquiry/investigation.

2018 Amendment is ultra vires the constitutional guarantees to the individuals –

- In cases of ‘wilful default’ or ‘fraud’, there is no pre-requisite of a pending criminal investigation or enquiry or complaint or FIR and PSBs can request for issuance of LOC against any person accused of ‘wilful default’ or ‘fraud’. Further, in the absence of any show cause notice or requirement of adherence to the rule of *audi alteram partem*, those individuals, against whom the banks have proceeded as per the Fraud Circular, have no way of even knowing that any LOC could be pending against them.

- Legally, in the absence of any criminal case/ investigation/enquiry/FIR, LOC cannot be issued as these contours have been identified by the Hon'ble Delhi High Court and further affirmed in other several judgments of various other Courts as mentioned in Part B above.
- Even under the Customs Act, 1962 and under the Passports Act, 1967, arrests can only be made for limited purposes, none of which include LOC as the sole basis for arrests. Thus, solely on the basis of the LOC having been issued, no arrests can be made under these acts.
- Pendency of FIR or investigation or enquiry as the basic threshold for the issuance of LOC, has been done away with, in cases of PSBs.
- Further, no provision of the BR Act or the RBI Act, 1934 authorizes banks, or delegates or confers any power upon the banks to take such coercive measure and effectively act in the capacity of a court or tribunal and issue or request for issuance of LOC against any person and thereby, subject him/her to criminal consequences and as such, transgress into the domain of criminal laws such as IPC, Indian Evidence Act, 1872 etc.
- Under any law in force in India, any bank, which is essentially a commercial institution, engaged in private commercial transactions, does not have the authority or power to conduct trial or act as an adjudicator and consequently take coercive measures, like causing issuance of LOC, against any person, nor can such power be read inherently *vide* an Office Memorandum.
- Further, even by way of amending the substantive laws, i.e. the BR Act, powers equivalent to 'adjudication' cannot be conferred upon the banks which are merely body corporates engaged in private commercial transactions of lending and borrowing with other body corporates. If so done, banks would be placed in a dominant position over the other body corporates and are likely to abuse such power.
- In the case of *Shri Vikram Sharma (Supra)*, the Hon'ble Delhi High Court categorically provided that powers of issuance of LOC must vest with statutory tribunals/commissions only.
- As such any LOC issued basis an Office Memorandum, which leads to deprivation of the liberty of any individual, without affording such individual fair trial, cannot be held as 'due process of law' and is, therefore, liable to be struck down on the vice of Articles 14 and 21 of the Constitution of India.
- Issuance of the 2018 Amendment to the OM dated 27.10.2010, conferring upon the banks powers to request issuance of LOC, is an example of excessive delegation.
- The chairmen/managing directors/chief executive officers of the PSBs derive their powers either under the BR Act or under the circulars of the RBI, their regulator or under other statutes. Such an implicit authority or power cannot be read into the existing laws and functioning of the banks *vide* an Office Memorandum of any ministry that is not conferred with supervisory jurisdiction over banks or their operating heads.
- It is also in violation of Article 375 of the Constitution of India which provides that the courts, authorities and officers, shall exercise their respective functions subject to the provision of the Constitution of India.
- Basis the aforesaid points in this Notebook, which clearly lay down as under what circumstances the LOC can be opened against any individual, the 2018 Amendment to the OM dated 27.10.2010 authorizing chairmen/managing directors/chief executive officers of PSBs to request for issuance of LOC, is amenable to challenge as being *ultra vires* the Constitution of India.
