

AN UNSUCCESSFUL ATTEMPT: PERUSAL OF THE FUGITIVE ECONOMIC OFFENDERS ACT, 2018

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Introduction

In recent times, India has witnessed an influx of bank de-fraud cases and other economic crimes, in which the offenders escape to foreign jurisdictions, hence making the procedures of prosecution cumbersome and sometimes impossible. This necessitated the Government to expedite the formulation of a specific legislation, in order to deter the economic offenders from fleeing the country. To this effect, the Indian Government introduced The Fugitive Economic Offenders Act of 2018, which aimed at bringing in stringent laws, to protect the disruption in the Indian economy caused by economic crimes. A detailed perusal of the legislation, exposes the various provisions that are flawed, arbitrary and that are in contravention with the principles of natural justice. This subsequently questions its constitutional validity. This article attempts to provide a critical analysis of the intrinsic defects in the said Act which need to be revisited and, it also provides specific recommendations for the effective implementation of the Act.

On February 14, 2018, the Punjab National Bank (PNB), Mumbai reported that it had detected some 'fraudulent and unauthorized transactions'. In response to which, investigations revealed the name of a billionaire jeweler Nirav Modi along with the associated firms and people who were alleged to have caused the economic fraud to the tune of \$1771.7 million (approximately).¹ Nirav Modi fled from India on 1st January 2018 and hasn't returned to India, despite the issuance of multiple notices and non-bailable warrants. Therefore, as per the Act, he is an alleged 'fugitive economic offender'. On July 25, 2018, V.K.Singh, the Union Minister

¹ S. Gayathri & T. Mangaiyarkarasi, *A Critical Analysis of the Punjab National Bank Scam and Its Implications*, 119 IJPAM 14853, 14857 (2018).

of State for External Affairs, submitted a list with the names of 31 Indians living abroad², like Mehul Choksi and Vijay Mallya, who have been charged for causing financial irregularities and criminal offences.

In response to such occurrences, on 12 March 2018, a strict legislation pertaining to this issue was put forth in the form of The Fugitive Economic Offenders Bill, 2018. The budget session speech elucidated upon the objective of the legislation towards ensuring that it avoids people from making a mockery of the Indian judicial system by absconding from its jurisdiction. As this Bill could not be passed in the Parliament in that session, the Union Cabinet, by way of exercising its powers under Article 123(1) of the Indian Constitution decided to promulgate the Fugitive Economic Offenders Ordinance, 2018. Subsequently, the relevant Rules were notified on 24 April 2018. With the presidential assent, subsequently became an Act on 5 August, 2018. Vijay Mallya is the first one to be declared as a 'fugitive economic offender' by way of the Special Court order given on 5 January, 2019.

A Brief Understanding of the Legislation

The prime objective of The Fugitive Economic Offenders Act, 2018 is to deter the actions of the economic offenders who have eluded to other countries and escaped the judicial process in India. The Act has intends to restore the rule of law in relation to the fugitive economic offenders by compelling them to return to India to face prosecution for Scheduled offences. This Act is expected to plug gaps and provide a high deterrent effect on economic offenders and to prevent corruption. Under the Act, the investigating officers have the power to confiscate the properties of the absconding offender. The Act is a first of its kind which permits the Deputy Director, to file an application of fugitive economic offenders for expropriation of their assets.

A fugitive economic offender as defined under Section 2(f) of The Fugitive Economic Offenders Act, 2018, is “ any individual against whom an arrest warrant in relation to a Schedule Offence has been issued by any Court in India; who has left India so as to avoid

² Ministry of External Affairs, *Absconding Businessmen* (2018), <http://164.100.47.190/loksabhaquestions/annex/14/AU3198.pdf>.

criminal prosecution or refuses to return to India to face criminal prosecution.”³ Here, under the Scheduled offences, it seeks to target those fugitives offenders for offences exceeding ₹100 crores. The Scheduled Offences includes forgery, counterfeiting, fraudulent removal of property and cheating under the Indian Penal Code, 1860, dishonouring of cheque as per the Negotiable Instruments Act, 1881; offences under the Reserve Bank of India Act, 1934; fraud as provided under the Companies Act, 2013; accepting bribe from a public servant under the Prevention of Corruption Act, 1988; offence of money laundering under the Prevention of Money Laundering Act, 2002; and defrauding creditors under the Insolvency and Bankruptcy Code, 2016. This Act provides for setting up Special Courts under the Prevention of Money Laundering Act, 2002 (PMLA). Prior to the Court proceedings, the Director may confiscate the assets with sufficient reason to do so. During the trial, the burden of proof is laid upon the Director, to put forth the reasons for such allegations, the whereabouts of the offender, list of assets and proceeds of crime along with its whereabouts, and list of the persons who have any stakes in the assets of the offender. Section 3 implies the retrospective nature of the present Act. The standard of burden of proof is on the grounds of preponderance of probabilities. Notices are issued to such people to appear within 6 weeks, and if not they would be declared as fugitive economic offenders and properties of the offender would be confiscated. If the Court is satisfied that any other person other than the offender has bonafide interest in the property, then the Court may exempt the confiscation of such property. The other features of the Act include the insertion of saving clause that protects the Government and officers from legal action. It disentitles the alleged offenders from defending civil claims, unless they return to India and face prosecution.

Analysis of The Fugitive Economic Offenders Act, 2018 in relation to the Prevention of Money Laundering Act, 2002 reveals that the PML Act only provides for attachment of the proceeds of crime and property only after court issues the order, but the present Act allows the attachment before filing a case and disposal of the same even before the issuance of the order.

³ The Fugitive Economic Offenders Act, 2018.

Severe and stringent measures must be adopted by the Government of India to stop the economic crimes occurring in the country. It is essential to examine the legality of the law from various standpoints, to ensure every individual's right are protected.

Provisions and Issues

1. Right to Fair Trial:

Section 10(3) (b) of the Act states that “failure to appear on the specified place and time shall result in a declaration of the individual as a fugitive economic offender and confiscation of property under this Act”⁴. The Section can be construed in the sense that there is no opportunity for the alleged accused to have a chance for a fair trial. Every human being has a right to fair trial which is considered as a basic human right⁵. This has been emphasized upon under various statutes and legal instruments such as in the United Nations Declaration of Human Rights under Article 10 that reads “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”, Article 14 of the International Covenant on Civil and Political Rights (ICCPR), Article 6(1) of the European Convention on Human Rights, etc. Similarly, in India it is guaranteed implicitly under Article 21 of the Indian Constitution⁶ and Section 243(2) of Code of Criminal Procedure. Right to fair trial is essential to ensure that justice is delivered, the guilty is punished and safety of the innocent is assured. Hence, right to fair trial is a fundamental right as well as a human right, so infringing it will attract violation of a person's right to equality provided for under Article 14 of the Constitution⁷. Thus it can be clearly understood that this particular provision is not in line with the constitutional principles.

2. Presumption of Innocence:

⁴ *Supra* note 4.

⁵ Selvi J.Jayalalithaa & Ors vs State Of Karnataka & Ors, (2014) 2 SCC 401.

⁶ Abdul Rehman Antulay & Ors vs R.S. Nayak & Anr, (1992) 1 SCC 225.

⁷ *Supra* note 6.

Section 10(3) (b) violates another principle of criminal jurisprudence that is popularly known as ‘presumption of innocence’. This particular principle places the burden of proof upon the prosecution to prove the commission of such an offence beyond reasonable doubt, every charge or accusation that is against the accused to get a verdict favouring them. Section 10(3) (b) declares a person to be an economic offender even without a fair trial, this is in contravention with the principle. There are various rules and principles that must be followed for a standard criminal trial to take place. Some of these principles are considered to be pivotal, and the absence of these principles would defeat the sole purpose of any trial that is, to “deliver justice” and the above mentioned principle is considered to be one such principle⁸. Moreover, the principle in its true sense is not just construed as a mere principle to be followed, but is also a bundle of basic human rights that every human being possess. Every human right is conceptually considered to be universal in nature. Article 11 of the United Nations Declaration of Human Rights (UDHR), Article 6(2) of the European Convention of Human Rights (ECHR), Article 14 of the United Nations Covenant of Civil and Political Rights (UNCCPR), have reiterated the same⁹. The presumption of innocence principle can be proven otherwise, only after there is sufficient evidence brought against the accused and the court adjudicates the case and guilt is established against the accused. So, the principle acts as a prerequisite for a criminal trial to take place¹⁰. Any legislation will not hold good if it abridges the human rights and, subsequently invalidating the sole purpose that the Act seeks to achieve. A similar idea has been reiterated in many Indian Supreme Court cases. The apex Court has clearly mentioned that “In a criminal trial, the accused must be presumed to be innocent until he is proved to be guilty”, this is a well-established principle identified under criminal jurisprudence which must be strictly adhered to in every trial that takes place¹¹. Though, it is inevitable that in certain cases the justice system is not completely capable of protecting the people from injustice, but that does not necessarily mean that a state or a judicial system can exist without a commitment to protect the rights of its own people. In exercising its function as a legislative body, the legislature must ensure that there exists clarity while drafting legal instruments in a manner that it does not infringe any individuals’ rights. Thus, it is clear that this provision of the Act is

⁸ PAUL ROBERTS & JILL HUNTER, CRIMINAL EVIDENCE AND HUMAN RIGHTS 260-280 (2012).

⁹ *Id.*

¹⁰ SCHWIKKARD.PJ, PRESUMPTION OF INNOCENCE 165-169 (1999).

¹¹ Rabindra Kumar Dey vs State Of Orissa, 1977 SCR (1) 439.

arbitrary as it does not provide the required scope for the accused to be presumed innocent. Which subsequently takes away the burden on the prosecution to prove beyond reasonable doubt. Thus, leaving the purpose of a criminal trial meaningless.

3. Definition of Scheduled Offences:

Section 2(m) of the Act states that a Scheduled Offence “means that an offence wherein the total value involved in such offence or offences is one hundred crore rupees or more.”¹² Here there arises a question of what if there are offences that are committed but do not meet the Rs.100 crore threshold. The scope of this Act fails to accommodate the wilful fraudsters who might be involved in committing an economic offence of an approximate amount of Rs.99.9 crores. Moreover, this provision has a loophole at the point, wherein people committing multiple smaller amount economic offences, but net amount exceeding Rs.100 crore, escape the jurisdiction of this Act. So how does the Act provide any safeguard against these economic offenders? This exposes the narrow scope of the Act which does not help serve the main purpose of the same.

4. Disallowing civil claims

As per Section 14(a) of the said Act it is stated that “on a declaration of an individual as a fugitive economic offender, any Court or tribunal in India, in any civil proceeding before it, may, disallow such individual from putting forward or defending any civil claim”¹³. Preventing any individual from approaching the Court of justice is unfair. Every citizen of India is guaranteed the ‘right to access justice’ as a fundamental right under Article 14 and Article 21 of the Indian Constitution. The Supreme Court determined that “We have, therefore, no hesitation in holding that access to justice is indeed a facet of right to life guaranteed under Article 21 of the Constitution. We need only add that access to justice may as well be the facet of the right guaranteed under Article 14 of the Constitution”.¹⁴ The right to access justice is essential because it is the right that enables one’s bundle of all the other rights to be asserted on the premise of equality with others.¹⁵ The judicial system’s primary purpose is to ensure

¹² *Supra* note 4.

¹³ *Supra* note 4.

¹⁴ Anita Kushwaha vs. Pushap Sudan, (2016) 8 SCC 509.

¹⁵ T.H. Marshall, *Citizenship and Social Class*, CAMBRIDGE UNIVERSITY PRESS, (1950), at 10, 11.

that there is impartial application of laws to deliver justice. Access to justice is an inherent principle of rule of law and the absence of this right will leave the voices of the people unheard. Further leaving them with no scope to exercise their rights. Moreover, both democracy and rule of law are correlated to each other in a particular manner that they also tend to fortify each other¹⁶. India being a democratic country seeks to protect the rule of law and such provisions of the present legislation tend to jeopardize it.

5. Contracting States:

Under Section 12(5), “Where the Special Court has made an order for confiscation of any property under sub-section (2), and such property is in a contracting State, the Special Court may issue a letter of request to a Court or authority in the contracting State for execution of such order”¹⁷. Herewith, the issuance of the request letter can be taken up by the foreign nations only if the Indian Government has signed reciprocal agreements to seek mutual legal assistance with them as provided under Section 105 of the Code of Criminal Procedure. That includes issuing of summons, requests, warrants and judicial processes. India currently has signed such agreements with only 39 countries¹⁸. This is very less considering the current scenario of rising number of offenders who are evading the Indian jurisdiction. According to the media reports, Mehul Choksi, an economic offender has fled to and is now residing in Antigua. Unfortunately, the Indian Government has not signed a Mutual Legal Assistance Treaty (MLAT) with Antigua¹⁹. Due to which, India is finding it difficult to obtain any information regarding him. Recently, he surrendered his Indian citizenship after acquiring the citizenship of Antigua. Further, he has even challenged the matter of his extradition request by India in the Antiguan Courts. Such an instance indicates that the Act contains lacunae that need to be looked into, in order to ensure that it is effectively implemented towards achieving its objective.

¹⁶ General Assembly of the United Nations, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (2012), <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>.

¹⁷ *Supra* note 4.

¹⁸ Ministry of External Affairs, *Mutual Legal Assistance Requests* (2015), <https://www.mea.gov.in/mlatcriminal.html>.

¹⁹ *Id.*

6. Usage of the sale proceeds from the confiscated property and proceeds of crime

Under Section 12(8), the Act states “All the rights and title in the confiscated property shall, from the date of the confiscation order, vest in the Central Government, free from all encumbrances”²⁰. This should be read along with Section 15, where the Central government is required to dispose the property after 90 days. The Act does not specify as to how the sale proceeds will be utilised by the Government. Whether the Government will distribute the proceeds of the sale amongst the persons to whom the offender is liable to or otherwise, is uncertain. Lack of clear specifications leads to ambiguity and accounts for being a defect in the Act that requires to be addressed. Drawing a parallel to this, it can be compared with Section 178 of the Insolvency and Bankruptcy Code of 2016, where it allows the sale proceeds of the property of the defaulter, towards the persons who have a claim in the property in accordance to the laid down order of priority²¹.

Suggestions

1. Alteration in the Passport Act, 1967:

Part II of the Indian Constitution guarantees that every individual who comes under the ambit of the scope of these provisions can acquire a citizenship in India. The provisions reveal that the single citizenship concept is strictly followed in India and that, if any Indian citizen obtains citizenship from another foreign country, his/her Indian citizenship would cease²². This makes it evident that India is not a provider of dual citizenship. In the case of the absconder, Mehul Choksi, as per media reports, it is revealed that he had obtained legal citizenship of Antigua once he fled from India. So, with respect to the same, it is recommended that the Government take strict measures to look into the matter of passport holders from India who are obtaining dual citizenship. The prime objective of the present Act is to avert the economic offenders from absconding and scrambling from the country, and this could be one of the major steps to ensure it. A committee led by the Secretary of Financial Services, Rajiv Kumar is working upon

²⁰ *Supra* note 4.

²¹ The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016.

²² INDIA CONST. Art. 9.

suggesting viable changes in the Passport Act, 1967, and with respect to the same it is suggested that immediate suitable measures should be taken, to trap such absconding criminals and bar them from leaving the country. Such suggested alterations will put a cap on the amount of loan by any person, exceeding which would authorize the banks to inform the relevant enforcement agencies; will authorize the banks to incorporate passport details of persons seeking loan for an amount exceeding Rs.50 crore, so that people with high amount of financial risk can be barred from leaving the country. All of these amendments must ensure that either of this does not take away the right to movement as provided under Article 21 of the Indian Constitution. Furthermore, the Government of India must take up these recommendations into serious consideration and expedite its implementation process in order to achieve the set objectives of the present legislation.

2. Corporate veil should not be lifted;

With regards to Section 14(b) of the Act, 2018, any Court, “in any civil proceeding before it, may, disallow any company or limited liability partnership from putting forward or defending any civil claim, if an individual filing the claim on behalf of the company or the limited liability partnership, or any promoter or key managerial personnel or majority shareholder of the company or an individual having a controlling interest in the limited liability partnership has been declared as a fugitive economic offender.”²³ A comprehensive understanding of the provided explanation of a company along with this, contradicts an important aspect of a company. The fundamental and unique feature of any registered company is about, it being an artificial separate legal entity, distinguished from the members of the company. Therefore, it is unjustified to deprive any company from such entitlement under any probable circumstances. Implying that the corporate veil cannot be lifted in this manner. Instead, the significant feature of separate legal identity should be upheld and treat the owners and the company individually.

3. Extent of confiscation of property must be equal to the offender’s liabilities

A thorough perusal of the Act reveals that, the entire property and proceeds of crime in relation to the economic offender will be confiscated. Moreover, if the alleged person does not appear in the Court on the said date, it could further be disposed of. The basic principles of criminal

²³ *Supra* note 4.

justice system in India states that the ascertainment of the quantum of monetary liability must be with respect to the nature of the offence, the damage suffered by third parties, the justness of such a claim, the capacity of the accused to pay along with other such factors.²⁴ In this scenario, though each of the economic offenders are liable to pay a large amount of money, the extent to which they are liable differs. So, confiscating all of their properties irrespective of who the offender is, will be unjust. Thus, it is suggested that the extent of confiscation of the property of the economic offenders must be at par with that offender's liability.

4. Widen the scope of Scheduled Offences:

Section 2(m) of the present holds "the Rs.100 crore to be the quantum of money involved in the economic offence"²⁵. It is suggested that the scope of the Act must be widened in order to accommodate the fraudsters who have involved themselves in smaller amount offences, with a net amount exceeding the stated amount. Further, the Government should consider lowering the amount of Rs.100 crore at least to some extent so that maximum of the economic offenders are punished and come under the purview of the said Act. This is in order to ensure that the set objectives of the Act are achieved.

Conclusion

There exists a gap between the intention with which the law is drafted and the letter of the law. Though the intention with which the law is drafted is justified, but if the actual law drafted on the paper proves to be unjust and unlawful, then even a good law might not translate well into the ground. The Fugitive Economic Offenders Act, 2018 is a recent initiative to address the issue pertaining to the economic offenders, but has turned out to be an ad-hoc Act accumulated with flaws and ambiguity that requires to be revisited. The legislators have attempted to introduce certain new provisions, distinct from any other existing legislation. Yet, few of these provisions fail to achieve its intended purpose owing to their contravention with the principles

²⁴ Hari Kishan & Anr vs Sukhbir Singh & Ors, 1988 A.I.R 2127.

²⁵ *Supra* note 4.

of natural justice. In order to ensure the constitutional validity of the Act, the various loopholes and recommendations that are mentioned above must be taken into consideration.

