COMPELLING THE PRESENCE OF AN ACCUSED: HOW TO FIND A NEEDLE IN A HAYSTACK

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INTRODUCTION

The presence of the accused during his trial is of vital importance to ensure that all fairness is ensured to him in his prosecution and a significant portion of the existing discourse in criminology addresses the rights of the accused in such proceedings. This paper however seeks to address an area that needs much focus, especially in the wake of recent developments – the systemic redressal mechanism when an accused deliberately conceals his presence. The phrase 'systemic' is deliberate: a large reason for the delay in disposal of criminal cases in India is the time expended in compelling the presence of an accused. This piece aims to analyze the manner in which chapter VI of the Code of Criminal Procedure, 1973 is implemented in courts in India today and subsequently, suggest possible changes to make them more efficient. On the one hand, this article elaborates upon the specific issues / laches in each of the four parts in the Chapter.

On the other and more significant hand, the article focuses on the possible benefits that the future evolution of this Chapter of the Code could derive by relying upon modern and revolutionary technologies such as the Unique Identification Authority of India Program (UIAI) and the E-courts services. With the aid of some cross-jurisdictional studies, the article concludes that these technological breakthroughs hold the key to reduction of the number of cases pending before courts in India and improve systemic quality, overall.

This piece also contains a brief note on the Fugitive Economic Offenders Ordinance 2018[1] and the impact it is likely to have on the existing machinery to compel the presence of an accused.

[1]Available at http://egazette.nic.in/WriteReadData/2018/184901.pdf.

Importantly, an attempt is made to understand whether the Ordinance was a necessary step in the right direction or is it another unfortunate instance of knee-jerk law making by the executive.

SECTION 205 (2) OF THE CODE AND ARRANGEMENT OF THE CHAPTER

Section 205(2) of the Code of Criminal Procedure, provides that a magistrate inquiring into or trying a case at any stage of the proceedings, may direct the personal attendance of the accused, and if necessary, enforce such attendance in the manner provided. The Supreme Court has held that a balance must be struck, "the order of the Magistrate should be such which does not result in unnecessary harassment to the accused and at the same time does not cause any prejudice to the complainant"[2].

Chapter VI of the Code of Criminal Procedure 1973, (the 'Code') deals with the process to compel appearance. The chapter is broadly divided into four distinct parts; (A) summons (B) warrants of arrest and (C) proclamation and attachment (D) Other rules regarding processes. Each of these parts are in turn analyzed below.

Part A

Part A of chapter VI of the Code comprises nine sections between Section 61 to Section 69. The chapter deals with summons to court.

The manner in which this foundational part to compel appearance of the accused should evolve in the future, requires a review and appropriate revision of Section 61, dealing with the form of the summons, Section 64, dealing with service when the person summoned cannot be found and Section 65, dealing with the procedure when service cannot be effected as before provided. The overall scheme requires urgent reform. The form of the summons needs to be accompanied by photographic proof of attempt at service; with modern technology, such as mobile photography, the implementation of this is easily achievable. Similarly, with respect to the implementation of

[2] (2001) 7 SCC 401 Bhaskar Industries Limited vs. Bhiwani Denim and Apparels Limited and others

Section 65, the summons may be fastened on a conspicuous part of the house or dwelling in which the person summoned ordinarily resides and this can be photographed and returned to the court, providing a permanent record for the case file that summons have been duly served. If the complainant has the email address or mobile number of the accused, summons should be sent through these media as well, making the accused aware that they are being summoned by Court. Several High Courts have accepted service by means of Whatsapp and email as sufficient[3]; recent legislations such as the Insolvency and Bankruptcy Code 2016 have also recognized service via email[4]. The Fugitive Economic Offenders Ordinance, 2018 also provides for the service of notice by the email submitted in connection with an application for allotment of Permanent Account Number and the email submitted in connection with an application for enrolment under Section 3 of the Aadhar Act, 2016 or, any other electronic account as may be prescribed, belonging to the individual which is accessed by him over the internet, subject to the satisfaction of the Special Court that such account has been recently accessed by the individual and constitutes a reasonable method for communication of notice to the individual.[5]

Part B

If the procedure as envisaged under chapter A has been proved to be ineffective, the Code provides for the next best alternative of compelling presence under Part B, that is, sections between Section 70 to Section 81. The chapter deals with warrants of arrest. The chapter begins with the form of warrants and their duration, and the remaining sections deal with the procedure and manner of execution. In India, it is unfortunate that warrants are issued as a matter of ordinary course to compel the presence of the accused. In most cases, these warrants either remain pending or are summarily recalled when the accused appears and files an application under Section 70(2) of the Code. The Supreme Court has noted that the power of issuing non-bailable warrants must be used sparingly, carefully and with great caution and those non-bailable warrants should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired

[3] CS (COMM) 1601/ 2016, In the High Court of Delhi at Delhi, *Tata Sons Limited and Others* Vs. *John Doe(s) and Others.*
[4] Rule 5(2), Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Individuals and Firms) Rules, 2017.
[5] Section 10 of the Fugitive Economic Offenders Ordinance, 2018.

result[6]. The Bombay High Court has gone a step further and has even gone so far as to say that there is no requirement for the accused to be present before the issuing court for the cancellation of a warrant[7]. Such precedent, while protecting the rights of the innocent against frivolous or malicious litigation, emboldens unscrupulous accused. If the procedure for service of summons as recommended earlier by this paper is adopted, a judge will have tangible material on record to substantiate the issuance of warrants, either bailable or non-bailable. Furthermore, in order to ensure that the recalling of warrants is not misused by dishonest litigants, there should be penalties awarded and such penalties must be in consideration of (i) the reason for non-appearance (ii) the seriousness of the offence and (iii) the period for which the warrant remained in effect till it was recalled or executed.

Section 72 empowers anyone in proper circumstance to execute a warrant. The language employed in the section suggests that virtually every citizen of India becomes capable of assisting in the execution of a warrant, specifically public servants at important establishments, security personnel at all ports, bank managers and government hospital personnel. It is recommended that these powers should be linked to a system of public information where citizens are made aware of the warrants pending against accused, such that the potential to compel the presence of an accused is multiplied manifold.

The recommendation to link technology to better achieve the ends of law is not farfetched, given the advancements made in this direction lately. Such systems of public information already exist in the form the Unique Identification Authority of India (UIAI) and the e-courts services[8]. From the moment that a criminal case is registered in India it is already given an identity on the e-courts services portal. This must be extended further by making it mandatory to link the UIAI details of the accused. Furthermore, all the services that are linked to the UIAI can be used as tools to compel the presence of the accused, beginning from their mobile phone number and email address, to passport, and permanent account number (PAN) details. Information regarding any summons and

[6]*Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others*, (2007) 12 SCC 1.
[7]W. P. No. 4429 / 2013, In the High Court of Bombay at Mumbai, *Arun Kumar N. Chaturvedi* Vs. *State of Maharashtra*.
[8] Hosted and maintained by the National Informatics Centre, Ministry of Electronics and Information Technology, Government of India.

/ warrants can even be sent in real time via email and Short Messaging Service. Thus, the accused cannot possibly canvas that they were unaware and they won't hesitate to appear in their proceedings, once found government officials will not hesitate to follow the procedure as envisaged under Sections 74 to 76 and Section 80, 81 to facilitate their delivery to court. In the recent past, there have been instances where people accused of serious offences have managed to leave the jurisdiction of Indian courts. However, with such safeguards in place as recommended above, it would be virtually impossible to leave the country from any official port.

Part C

Part C of chapter VI of the Code, was envisaged as a last resort, in case the mechanisms under Part A and Part B failed to compel the presence of the accused[9]. Part C comprises of five sections between Section 82 to section 86. The chapter deals with proclamation and attachment. In the normal course, the recommendations suggested here should provide sufficient incentive to compel the presence of an accused. If, however, an accused still chooses to conceal himself[10] from a court, given that his bank account and other asset details are already linked to their UIAI the court can proceed to issue a proclamation under Section 82 and then attach their assets under Section 83, subject to Section 84, which provides for reasonable safeguards to such persons whose property is wrongfully attached. If at this stage the accused appears and chooses to seek the release or restoration of his property as provided under Section 85, the court must pass a suitable order taking into consideration (i) the reason for non-appearance, (ii) the seriousness of the offence, and (iii) the period for which the warrant remained in effect.

Part D

Part D of chapter VI of the Code, comprises of nine sections between Section 87 to Section 90. The chapter deals with "other rules regarding process". These are miscellaneous provisions ancillary to the first three parts and designed to improve their efficiency. The efficacy of these

[9] It has been held in ILR 1943 Patna 504, *Bishundhayal Mahton* Vs. *King Emperor*, that first of all there should be a warrant which could not be served because the person against whom it was issued had absconded, then there could be a proclamation and after the proclamation comes the attachment.
[10] *See*, *O. V. Forbes* Vs. *Emperor*, AIR 1943 Oudh 325, "abscond" doesn't mean to leave one place. It's ordinary sense is to hide oneself.

miscellaneous provisions will also be advanced with the improvements suggested to the earlier parts.

LESSONS FROM OTHER JURISDICTIONS

The United States of America in some states has even made the failure to appear before a Court a punishable offence. Failure to appear results in forfeiture of bail bonds and in some cases involves the issuance of a bench warrant[11]. The Code of Criminal Procedure does not distinguish between types of warrants, the insertion of more sections in Part B of the Code could help balance the rights of the complainant and the accused and could help avoid circumstances as in the case of *Inder Mohan Goswami and Another* Vs. *State of Uttaranchal and Others*.[12]The Indian Penal Code does not have a specific offence for avoiding summons and warrants issued and the introduction of such a penal section to Chapter XI of the Indian Penal Code dealing with offences of false evidence and offences against public justice could further enhance the powers of Courts to deal with accused who do not appear before Court when they are required to.

THE FUGITIVE ECONOMIC OFFENDERS ORDINANCE 2018

The preamble to the Fugitive Economic Offenders Ordinance 2018 suggests that it aims to, , provide for measures to deter fugitive economic offenders from evading the process of law in India by staying outside the jurisdiction of Indian courts, to preserve the sanctity of the rule of law in India and for matters connected therewith or incidental thereto. A bare reading of the Ordinance itself indicates that it seeks to provide curative and not preventive reliefs. While the intentions behind the ordinance appears to be well placed with an aim to thwart fugitive economic offenders from evading prosecution in India, it is felt that the Ordinance is really only effective against offenders who have substantial assets in India. The Ordinance also only applies to offences

[11] Brevard County Clerk of the Court Website, if you fail to appear at any scheduled court event the judge can order a bench warrant for your arrest. The judge that signs the bench warrant will decide if a bond amount is to be set, or to specify that you are to be held in jail and prohibited from bonding out. Available at http://brevardclerk.us/faq-s
[12]Supra n. 8.

specified in the schedule, if the total value involved in such offence or offences is one hundred crore rupees or more[13]. This high threshold begs a very fundamental question, what is the rationale of extending the operation of the Ordinance to only cases with such a high value? On the face of it, it is discriminatory against the accused in such cases. The basis for setting such a high threshold is puzzling. Going a step backwards, shouldn't the law aim to prevent people fleeing the jurisdiction of the courts in the first place?

The Ordinance defines a fugitive economic offender as any individual against whom a warrant for arrest in relation to a scheduled offence has been issued by any Court of India, who-

(i) Has left India so as to avoid criminal prosecution; or

(ii) Being abroad, refuses to return India to face criminal prosecution;[14]

A joint reading of the definition of the definition of a fugitive economic offender and Scheduled offence leads one to infer that at the time of writing this paper, there are perhaps two individuals who could possibly be aggrieved by this Ordinance. However, the fate of the remaining millions of warrants pending before other courts in India in the case of less (in) famous people, remains uncertain.

The Ordinance also concentrates all its powers with the Enforcement Directorate, as only the Director and Deputy Director are empowered under it.[15] However, there are no explanations as to why this structure has been adopted, when existing legislation already contains sufficient mechanisms in respect of similar offences.[16]

Another interesting aspect of the Ordinance is the power to disallow civil claims[17]. The intention behind this is clear: to not permit the fugitive economic offender to contest civil disputes if they are unwilling to be tried for their criminal actions. Whether such a bar will stand the test of a constitutional law challenge as violative of the fundamental rights of a fugitive economic offender is yet to be tested.

[13] Section 2 (m) The Fugitive Economic Offenders Ordinance, 2018 No. 1 of 2018.
[14] Section 2 (f) The Fugitive Economic Offenders Ordinance, 2018 No. 1 of 2018.
[15] Section 4 The Fugitive Economic Offenders Ordinance, 2018 No. 1 of 2018.
[16] Make reference to PMLA mechanisms, FEMA etc here if necessary.
[17] Section 14 The Fugitive Economic Offenders Ordinance, 2018 No. 1 of 2018.

An apparent flaw with the Ordinance is that there is no real penal consequence for evading justice. The Ordinance itself does not contemplate any sort of punishment either by fine or by imprisonment: therefore, theoretically speaking, an accused could flee India, if thereafter he is declared as a fugitive economic offender and his properties are seized, he could simply return to the country, appear before Court, have his properties released and then flee India again. The Ordinance doesn't contemplate punishment either by fine or imprisonment for repeat offenders. The procedure currently contemplated seems to cast a cost-time burden on the executive and judicial administrations, without corresponding benefits to either. The recommendations made in this piece earlier with regards to the recall of warrant, in the opinion of the author, would be a far better deterrent than mere attachment and subsequent release of property.

While the aims and intentions of the ordinance are ambitious, it is yet to prove its utility. However, given the current construct, it is doubtful whether this Ordinance will be truly effective at deterring fugitive economic offenders from evading the process of law in the country.

CONCLUSION

The problem of compelling the presence of the accused is not a recent one. A large number of provisions regarding the compelling of the presence of the accused need revisiting. Particularly, provisions regarding bail, summons and warrants require radical updating, with better rules and guidelines to stay ahead of the ingenious and unscrupulous accused. To this end, the advantages of linking the e-courts system with the UIAI on a centrally accessible database as suggested above could prove an invaluable tool in compelling the presence of an accused. It is, admittedly, a tremendous power to be put in the hands of the State. Courts must be circumspect in the usage of these powers and they must be used only to compel presence[18]. There have been instances of the executive wing of the state illegally freezing accounts[19], issuing look out circulars[20] and innocent accused have had to approach courts in their extraordinary writ jurisdiction to set right these

[18]Letters Patent Appeal No. 747 of 1973, *Dayanand* Vs. *State of Haryana*, " the object of attaching property of an absconder is not to punish him but to compel his appearance".
[19]*Smt. Lathifa Abubakkar* Vs. *The State of Karnataka and Others*, 2012 Cri. L. J. 3487.
[20] W. P. (c) 10180 / 2009, *Vikram Singh* Vs. *Union of India and Others.*

wrongs. At the same time, there have been instances of powerful business tycoons having fled the jurisdiction of Indian courts to avoid prosecution– which also makes ones wonder if the Ordinance is not a one-time, knee jerk reaction in the wake of such recent instances.

A public information system coupled with self-contained, detailed guidelines for bail, summons and warrants will not only significantly reduce the workload of the higher judiciary, but will also act as a check on public servants acting beyond reasonable exercise of their power. In turn, not only will this aid in the disposal of cases pending before trial courts, as settled jurisprudence would dictate, when the prerequisites of proclamation have been complied with, even appeals against acquittals can be heard and decided finally.[21]. Ideally, in the future, once all public information has been linked to UIAI systems, the State should develop a system of personal rating that demonstrates the antecedents of individuals. Thus, if a person has a credible rating, some assurance can be derived that they can be relied upon to enter into a transaction with and does not have a prior known history of default, neither has deliberately disobeyed the law nor dishonestly managed to escape liability. In conclusion, prevention is undoubtedly better than cure and a system which prevents the accused fleeing the jurisdiction of the court is preferable to a system which attempts to compel the accused's return. Eventually when a system of safe rating is devised by the State it will ensure fewer people have to approach courts. The author believes that, when courts require, the best way to find a needle in a haystack is to compel its presence before you.

[21]*State of Gujarat* Vs. *Naubhai Amrabhai Chunara Vaghri*, 1997 Cri. L. J. 3479.