

ANALYSIS OF THE FUGITIVE ECONOMIC OFFENDERS BILL, 2018

Written by *Ranjitha N R*

4th year BA LLB student, School of law, CHRIST (Deemed to be University)

Abstract:

The term 'Fugitive Economic Offender' plainly refers to a person faced with arrest in regard to certain economic offences, who defers his/her presence at Court, either by fleeing to or refusing to return from a foreign country to avoid criminal prosecution. Such fugitive offenders often complicate the Court proceedings by tampering with the procedural norms, violating the rule of law and wasting precious time of judicial bodies. This mostly results in injustice to the society at large by offenders dodging their financial liability for commission of economic crimes, as seen in the Vijay Mallya case¹, Nirav Modi- PNB scam etc. In order to deter such criminals from evading the legal process of the country and to facilitate the prevention of jurisdictional hassle, the Fugitive Economic Offenders Ordinance, 2018 was promulgated by the President Ramnath Kovind in March 2018². This dynamic Bill has two facets- one, that initiates procedure for prevention of offenders absconding from India and two, where it unfortunately entails multiple lacunae and shortcomings that could be reformed prior to it being enforced efficiently. This paper is a critical comment on the highlights and challenges of the said ordinance, with a view to portray the grey areas which were possibly overlooked or unconsidered.

Keywords:

Fugitive Economic Offender, Fugitive Economic Offenders Bill, 2018, Proceeds of crime, Economic crimes

Objectives of the paper:

This paper is an in-depth analysis of the said Bill and aims to

¹ *Vijay Mallya v. Enforcement Directorate*, (2015) 8 SCC 799: 2015 SCC OnLine SC 617.

² The Fugitive Economic Offenders' Ordinance, 2018, Promulgated by the President in the Sixty-ninth Year of the Republic of India, (No. 1 of 2018), (hereinafter referred to as "the Bill").

- (i) identify the positive strengths and negative shortcomings of the ordinance,
- (ii) arrive at viable solutions to the disadvantages of the Bill and
- (iii) formulate novel ideas towards improvisation of the Bill.

Introduction:

“The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.”³ On elucidation of this quote, a parallel to the current justice system of economic offences and its practical connotation in India could be drawn. A major chunk of the Indian elite class undertake participation in exploitation of public property, that is by non-repayment of loans to banks and other financial institutions, thereby depreciating the general public funds. They indulge in accumulation of public funds for private usage by means of corruption and other financial frauds, hence depriving the masses of their rights.

In spite of the expansive realm of laws on prevention of money laundering and other white-collar crimes under the purview of economic crimes, multiple incidents in India have proved injustice to commoners in the society against such fleers who attempt at preservation of their laundered money, economic status and assets. Even though India has enumerated various international agreements, treaties to interpret extradition laws, such violators of economic laws of the nation escape liability and fasten their ‘money belts’ by settling in foreign nations, amongst whom Vijay Mallya and Nirav Modi are infamous. A progressive step towards prevention of such absconding acts of money launderers is the introduction of ‘Fugitive Economic Offenders Ordinance, 2018’. The Bill adopts the non-conviction-based asset confiscation for corruption-related cases as enabled under provisions of United Nations Convention against Corruption⁴. In view of the above context, a Budget announcement was made by the Government in the Budget 2017-18 that the Government was considering to introduce legislative changes or even a new law to confiscate the assets of such absconders till they submit to the jurisdiction of the appropriate legal forum. However, it was recently promulgated by the President under Art. 123 of the Constitution of India, when the Bill had initially failed to achieve majority in the Lok Sabha and later, the President deemed it necessary

³ Anatole France: *Le Lys Rouge* (The Red Lily), Chapter 7 (1894) 118]; *Vijay Mallya v. Enforcement Directorate*, (2015) 8 SCC 799 : 2015 SCC OnLine SC 617 at pg. 807.

⁴ UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422, available at: <http://www.refworld.org/docid/4374b9524.html> [accessed 29 May 2018]

in public interest, to be passed as an ordinance as the Parliament was not in session. This ordinance is expected to facilitate rightful conduct of criminal prosecution against such offenders and help banks and financial institutions in recovering the amounts stuck in such defaults. It attempts in creation of a special authority for swift confiscation of the proceeds of crime, in India or abroad by compelling the fugitive to return to India to submit to the jurisdiction of Courts in India to face the law in respect of scheduled offences.

Comprehension of the Bill:

The proposed Bill can be considered as an advanced step in the legal arena, yet a rudimentary setup as it contains a few ambiguities due to overlapping legislations, definition of terms, incomplete procedures etc. Certain terms that are defined in the Bill relate to other legislations such as Companies Act, Prevention of Money Laundering Act, 2002 (PMLA) etc. amongst which the definition ‘Fugitive Economic Offender’ is very essential to be interpreted. It has been defined as “*any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who— (i) has left India so as to avoid criminal prosecution; or (ii) being abroad, refuses to return to India to face criminal prosecution.*”⁵ Further, these scheduled offences⁶ as defined in the Bill refer to economic offences such as offences related to counterfeit stamps, dishonour of cheques for insufficiency of funds⁷, money laundering⁸, offences under the RBI Act, 1934⁹ transactions defrauding creditors¹⁰ etc. where the monetary value is 100 crores or above.

Salient features of the Bill:

1. The objective of the Bill is to re-establish the rule of law, compel the fugitive economic offender to return to India and submit to the jurisdictional authority. This would also help the banks and other financial institutions to achieve higher recovery from financial defaults committed by such offenders, improving the financial health of such institutions and preventing the economy from deteriorating due to such offences.

⁵ *Supra* note 2, at § 2(f).

⁶ *Id.* at §2(l) and §2(m).

⁷ § 138, Negotiable Instruments Act, 1881 (26 of 1881)

⁸ § 3 and 4, Prevention of Money Laundering Act, 2002 (15 of 2003)

⁹ §58A, Reserve Bank of India Act, 1934 (2 of 1934)

¹⁰ § 12A r/w § 24, Securities and Exchange Board of India Act, 1992 (15 of 1992)

2. It attempts at seizure of illegal properties and Benami properties obtained as a result of financial defaults which has been enormously utilised under other legislations such as PMLA, 2002.
3. Declaration of a person as a fugitive economic offender- An application is to be filed by the director¹¹ or deputy director¹² before a Special Court¹³ to declare a person as a fugitive economic offender.¹⁴ Upon receiving an application, the Special Court will issue a notice to the individual requiring appearance at a specified place on a date which is six weeks after the issue of notice¹⁵ and also mention that the failure to appear will result being declared a fugitive economic offender. If the person appears at the specified place, the Special Court will terminate its proceedings under the provisions of this Bill.
4. Attachment of the property of a fugitive economic offender¹⁶- Attachment of property described in the application can be made by the Director/Dy. Director on Special Court's order or provisionally attached without the prior permission of the Special Court, provided that they file an application before the court within 30 days. Release of properties is made at the conclusion of proceedings if found not guilty.
5. Issue of a notice by the Special Court and confiscation of property- After hearing the application, the Special Court may declare an individual as a fugitive economic offender and issue notice to confiscate properties. Such properties (i) are proceeds of crime, (ii) are benami properties in India or abroad, and (iii) any other property in India or abroad.¹⁷
6. Appointment of an Administrator to manage and dispose of the confiscated property under the Bill is made so that the authority over the property and its exploitation is vested ultimately with the Central Government.
7. Disentitlement of the fugitive economic offender from defending any civil claim- The Bill allows any civil court or tribunal to disallow a person, who has been declared a fugitive economic offender, from filing or defending any civil claim¹⁸ to avoid the

¹¹ *Supra* note 2, at § 2(1)(e).

¹² *Id.* at § 2(1)(d).

¹³ *Id.* at § 2(1)(n).

¹⁴ *Id.* at § 4.

¹⁵ *Supra* note 2, at § 18.

¹⁶ *Id.* at § 5.

¹⁷ *Id.* at § 4(2)(c) and (d).

¹⁸ *Id.* at § 14.

multiplicity of proceedings and restrain the offender from challenging the provisions of the Bill *per se* prior to the trial occurrence.

8. The entire procedure as prescribed in the Bill is based upon the burden of proof that an accused individual has accumulated properties attached as proceeds of crime. Here, the aspect of Director's 'reason to believe' that an individual is an offender and further, file the application to discharge the burden of proof for establishing that an individual is a 'fugitive economic offender' is vague and ambiguous. The authority merely has to prove the possibility of the individual arrested to have committed one/more of the Scheduled offences. It is an act highly dependent on preponderance of probability i.e. an act which is proved when the court either believes it to exist, or if it considers its existence so probable that a prudent man ought, in the circumstances, to act upon the supposition that it exists.¹⁹This is a standard lower than that of the Evidence Act, 1872, which requires proof beyond reasonable doubt for criminal prosecution.
9. The entire procedure under the Bill is time bound which provides an opportunity for the accused to file an appeal (within 180 days)²⁰ or challenge the order within the specified time.
10. The bill is unclear about its retrospective application. However, it mentions that it is applicable to individuals who are or who become fugitive economic offenders on the enforcement of the ordinance.²¹ This makes the applicability of the bill expansive so as to include offenders who have already fled from Indian jurisdiction and their proceeding is pending.

Shortcomings in the Bill:

1. Primarily, the cap of 100 crores is arbitrary and unjustified as the offenders causing financial losses below this margin easily escape liability and abscond which defeats the purpose of this legislation. It also causes heavy financial losses to banks and other institutions which provide loans, thereby causing net loss to the public as a whole. There must be a reasonable justification for a monetary margin set, above which the jurisdiction entails the offender.

¹⁹ § 3, The Indian Evidence Act, 1872; *State (Delhi Admn.) v. Sanjay Gandhi*, (1978) 2 SCC 411 at page 419.

²⁰ *Supra* note 2, at § 5(3).

²¹ *Id.* at § 3.

2. In provisions of confiscation of property, the Administrator is enabled to dispose the property after 90 days of the order passed and there has been no clarity on the aspect when the confiscated property is disposed of during pendency of appeal under § 15 of the Bill or other circumstances where the statute of limitations do not apply. The provision of selling the property on the mere declaration of a person as a fugitive economic offender and without exhaustion of all judicial remedies violates the right to obtain legal remedy.
3. On elaboration of procedure of confiscation of property under the Bill, it can be observed that it violates the principle of natural justice i.e., *audi alterum partem* (opportunity to be heard) as the Special Court can order for confiscation of properties of the person declared as a fugitive economic offender even before the trial occurs before the jurisdictional Court. The same view was also presented during the discussion of the Bill in the Parliament and has been overlooked. On drawing a parallel regarding this issue with the application under PMLA Act, 2002, it can be found that authorities under PMLA could merely seize the property to restrain activity related to the property without having the power to dispose it. The latter power to dispose of the property is conveniently vested with the Administrator.²²
4. On a simple reading of § 12(2)(b)²³, that is ‘*any other property or benami property in India or abroad, owned by the fugitive economic offender*’, confiscation of properties other than ones obtained from the proceeds of crime can be made and this could be a major deterrent possibly challengeable as it becomes arbitrary and unfair. On drawing a parallel with the Britain’s Proceeds of Crime Act, 2002, it can be determined that a possible solution to this issue is to quantify the outstanding amount and then accordingly confiscate only those properties that have been acquired through proceeds of crime. Moreover, legislations such as Prevention of Money Laundering Act, Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002, Recovery of Debts Due to Banks and Financial Institutions Act, 1993 etc., also specify modes of confiscation of property and procedure of disposal of the same which can be referred to modify the current Bill.
5. Section 11 of the Bill stipulates that any Indian court, including a Tribunal, in any civil proceedings before it, may disentitle an economic offender from putting forward or

²² *Supra* note 2, at § 15(3).

²³ *Id.* at § 12 (2) (b).

defending any civil claim. This provision might have had a purpose to restrain the fugitive economic offender from creating multiple suits in an attempt to escape. This, however restricts access to justice and violates the fundamental right to equality²⁴ that could lead to the Bill getting destructed.

6. It is further unfair for innocent shareholders of a Company who have to prove that the properties of the Company were obtained *bona fide* and not as proceeds of crime related to a fugitive economic offender representing the Company. The Company involved could come to a standstill due to the pendency of proceedings, hence resulting in huge financial losses. There could be wide ramifications, especially in the case of public companies, as individuals unrelated to the crime committed would unnecessarily be harmed.

Conclusion:

Even though PMLA, 2002, is a working legislation to confiscate, seize and dispose of benami properties, the practical application of the bare provisions could not be attained in multiple incidents when the accused started to abscond Indian jurisdiction. As seen in *Vijay Mallya v. Enforcement Directorate*²⁵, the Court could extend justice only to the extent of imposition of a fine of Rs. 10 Lakhs for absence of the accused in the Court after summons were issued. Due to impossibility of tracing the offenders fleeing India, this Bill was formulated. While on one hand, this Bill is a rational step towards prevention of economic offenders from escaping liability; on the other hand, the Bill poses multiple challenges to the Constitutional rights already in place. Along with the ambiguities in the extent of discretionary powers vested with the authorities under this Bill, there is a massive threat of misuse of the same in filing false applications to cause interruptions to prestigious businesses which are *bona fide*. Further, the Bill becomes incomplete in describing the nature of application of law if the confiscation is ordered for under another legislation and the offender flees, after which whether this legislation could facilitate in continuing the procedure. Keeping aside all shortcomings, the purpose and object of this legislation is crucial to the current scenario of Indian economy and requires a steadier draft with modifications to the current legislation in place. In the case of the Bill attaining a majority without being modified on the negatives, various petitions challenging the

²⁴ *Anita Kushwaha v. Pushap Sadan*, (2016) 8 SCC 509.

²⁵ *Supra* note 1, at p.807.

constitutionality of the Bill could preface and result in acting as a detriment rather than an enzyme of curing the present and future hazardous financial conditions of India.

