

Fugitive Economic Offender's Act, 2018: An Analysis

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ABSTRACT:

Over the past few years, India has seen a rise in the number of banking frauds. The reason behind the fraud can be attributed to various factors such as negligence of the authorities, absence of due diligence while giving out loans as well as rampant corruption among the hierarchy of the employees of the banks. Though, the government identified that the cause behind the rise of frauds could be due to the absence of a strict enforcement mechanism in the legal system of the country. Hence, they brought an ordinance before the President and introduced the Fugitive Economic Offenders Bill, which was later passed by the Lok Sabha in the monsoon session of 2018. This paper delves into the background of legislating this law with specific reference to the loan defaults and absconding of Mr. Vijay Mallya. Further, it states the chief highlights of this new piece of legislation followed by the analysis of the same.

I. INTRODUCTION

The preamble to the act states that the act has been formulated to *"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"* and *"to preserve the sanctity of the rule of law in India"*. The first objective has been formulated by making a clear reference to the banking fraud caused by the liquor baron, Vijay Mallya. The liquor baron has owes to a Consortium of banks over 7000 crores. He has been labelled as a *"wilful defaulter"* who has fled India to avoid the payment of the same. The Central Bureau of Investigation as well as the Enforcement Directorate filed cases under various legislations before the judiciary to recover the dues owed by the liquor baron. Due to the failure of the enforcement agencies to get him back to India, the government came up with this aforementioned legislation to deter the FEOs from evading the process of law as well as to keep the rule of law in the Country intact.

Hence, this paper would analyse the various provisions of the act as well as the advantages and disadvantages of the same. It would delve deep into the requirement of this piece of legislation i.e whether the enactment of the same was of such an urgency and necessity or whether making amendments to the currently prevalent legislation to regulate the offenders were enough. Further, it would also answer the question as to whether India is becoming a land brimming with laws whereas lacking in the prevention mechanism. It would also give a detailed description of the bank fraud caused by Vijay Mallya owned Kingfisher Airlines which tipped off the legislators in the very beginning to enact the same.

II. BACKGROUND OF THE LEGISLATION: BANK FRAUD BY KINGFISHER AIRLINES

Kingfisher Airlines, a full service airline was launched by the business tycoon, Vijay Mallya in the year 2005. From the very initial days, due to mismanagement on the part of the authorities of the organisation, the airlines was suffering huge amount of losses. Various wrong decisions were taken such as acquiring of a Deccan Air, a severely loss making company and merging the same into Kingfisher Airlines as well as providing very luxurious services to passengers at a very a standard fares etc. Kingfisher Airlines continually started reporting losses from 2008 onwards till it was grounded in 2012. The losses started to mount when the Deccan Airlines were bought by the airlines.

Inspite of reporting losses since the very inception of the Kingfisher Airlines, the banks when approached in 2010 by Mallya, did not deny him the loan to fund the airlines. The consortium of banks turned a blind eye towards the same and granted him a loan of 1500 crores on personal gurantee. The timeline of the fraud follows¹:

2006

- Kingfisher Airlines approach the IDBI Bank for a loan that would fund its purchase of aircrafts. Due to a Mallya's murky history with the IDBI the bank decided to decline the proposal.

2008

- Air Deccan deal is finalised. UB Ltd paid Rs 550 crore for a 26 per cent stake in the carrier.
- In March 2008 KA owed a debt of Rs. 934 crores – due to a heightened spike in oil prices and the stress of working a high-cost and low-cost airline company together.

2009

- The debt of the airlines increased to Rs. 5,665 crores, which grew into Rs. 7,000 crores. Even though the losses went on, the bank changed its mind and granted them a loan of Rs. 900 crore to the airlines.

2010

- Banks intimate the borrowers that they will be provided a time period of 9 months to pay back the loan. By this time, Mallya became a Member of Parliament.

2011 – 2012

¹ Express Web Desk, 'A timeline showing Vijay Mallya's Bank loan debacles downfall of the Kingfisher Airlines' *The Indian Express* (India, 27 Feb 2017) <<https://indianexpress.com/article/business/business-others/a-timeline-of-vijay-mallyas-bank-loan-debacles-and-downfall-of-kingfisher-airlines-4512983/>> accessed on 29 September 2018

- During these years, Mallya continued withdrew Rs. 33.46 crore as salary.
- Kingfisher Airlines' license to operate is confiscated. As a result, it stops paying its employees salaries.
- As of March 2016, Kingfisher Airlines owes Rs. 3000 crore to 3000 employees in terms of salary. It owes banks such as SBI and IDBI a colossal sum of US \$1 billion as loan.

2014

- Mallya was announced as a "wilful defaulter" by the United Bank of India. Other banks like State Bank of India and Punjab National Bank did the same.

2015

- In November 2015, Arun Jaitley, in his speech, declared that the airlines indebted to the extent of Rs. 9,091.40 crore.
- April 2015 – Mumbai International Airport Private Limited sold the personal aircraft belonging to Mallya worth Rs. 22 Lakhs. He also owed the Service tax department, a debt worth 115 crore.
- The Department approached Bombay High Court to impound Mallya's passport, forcing him to appear in court.

2016

- In a plea to prevent Mallya from absconding, a consortium of banks approached the Supreme Court of India. They were unsuccessful in doing so because by that time Mallaya had already left India.
- As a result, a special magistrate in Hyderabad court issued a non-bailable arrest warrant (NBW) against Mallya for not appearing in court for a slew of pending cases.
- April 2016 –The Enforcement Directorate approaches a special court in Mumbai to issue another non-bailable arrest warrant under the Prevention of Money Laundering Act, 2002. The court goes ahead and does so.

The above incidents led to the enactment of the FEO legislation in order to facilitate the entire process of bringing the economic offenders back to the country.

III. THE FUGITIVE ECONOMIC OFFENDERS ACT, 2018: ANALYSIS OF THE PROVISIONS

Chief Highlights

The fugitive Economic Offenders Act will extend to whole of India without any geographical exceptions and

would be deemed have come into force on 21st April, 2018². The act also covers the acquisition of properties, in India and abroad, which are benami in nature or are covered under the concept of benami transactions.³

The act works in coherence with the PMLA⁴ since the enforcing authorities, namely, the director and the deputy director, as appointed under section 49 of the act of 2002. The act of 2018, defines *fugitive economic offender*. It lays down that a person would be qualified to become an FEO, only when an arrest warrant has been issued with regard to the scheduled offences as mentioned in the act has been issued against the individual. He has to further satisfy by the following to be adjudged as an FEO such as,

- in order to avoid criminal prosecution, the aforesaid individual has left India; or
- he is refusing to return to India to face the criminal prosecution.

The act has been accompanied by a schedule⁵ which provides a list of exhaustive offences under which an FEO can be booked. Further, by virtue of Section 2(m), the FEO must have committed a fraud or a crime who worth must be over a 100 crores to be booked under the act of 2018.

In accordance with section 3 of the act, the provisions of this act would be applicable to any individual who becomes an FEO on or after the act comes into force.

Further, by virtue of Section 4 of the act, when the Director or the Deputy Director believes reasonably that an individual has to be declared as an FEO due to certain materials in his possession, he may make an application before the Special Court to declare that individual to be the same. The section also prescribes certain other procedural requirements to be followed which filing of the application listed in sub section 2 of the same section.

Section 5 provides for provisional attachment of any property which has been enlisted in the application for declaration as an FEO under section 4 with the permission of the Special Court before which the application has been filed. This sections allows the attachment of property while the application under section 4 is pending before the Special Court.

To fulfil the purpose under Section 4, the Director and other officers so empowered, are endowed with the same power as are given to a Civil Court under the Code of Civil Procedure, 1908.⁶

The Director or any other officer, so empowered, has been given the same powers as that given to police officials under the Code of Criminal Procedure to survey⁷, search and seize⁸ and search persons⁹ as well.

² Fugitive Economic Offenders Act, 2018 S 1(b)

³ Fugitive Economic Offenders Act, 2018 S 2(1)(b)

⁴ Prevention of Money Laundering Act 2002

⁵ Fugitive Economic Offenders Act, 2018 S 2(l) and (m)

⁶ Code of Civil Procedure, 1908 S 6

With the help of Section 10, an individual against whom an application under section 4 has been filed would be given a notice of the same by the Special Court. The notice would also be given to any person who has any encumbrance on any of the properties mentioned under the application under Section 4. The notice would clearly provide for

- a time period of 6 weeks within which the alleged offender has to present itself before the authorities and
- failing the above, he shall be declared as a Fugitive Economic Offender.

The section provides for sending the notice to the Central Government so that the same can be intimated to the contracting state.

Section 11 provides the procedure for hearing of the application filed under Section 4. It has been clearly mentioned that if, on the notice provided under section 10, the alleged offender presents itself before the authorities, the proceedings under this act would be stopped. Whereas, if he fails to present himself within the stipulated time of 6 weeks, he shall be declared as an FEO.¹⁰

Section 12 provides the effect of declaration of a person as Fugitive Economic Offender in sub-section 2. The effect of declaration of an individual as an FEO would result into the,

- confiscation of the proceeds of crime from any property, in India or abroad, whether or not the property is owned by the FEO, as well as
- Any other property including any benami property owned by the FEO.

The section also clearly states that the rights of the property so confiscated shall vest in the Central Government free from all encumbrances.¹¹

Section 14, further provides for disallowing the individual who has been declared as an FEO to put forward or file any civil claims by any court or tribunal established in India. A company and a Limited Liability Partnership has also been disallowed from filing a civil claim if *"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."*

The properties which are confiscated by on the order of the Special Court are taken care of by an administrator

⁷ Fugitive Economic Offenders Act, 2018 S 7

⁸ Fugitive Economic Offenders Act, 2018 S 8

⁹ Fugitive Economic Offenders Act, 2018 S 10

¹⁰ Fugitive Economic Offenders Act, 2018 S 10 (3) (a)

¹¹ *ibid*

who is appointed by the Central Government. The person appointed as the Administrator should not below the rank of a Joint Secretary to the Government of India. He has been endowed with the responsibility of receiving and managing the confiscated property.

Section 16 clarifies the parties on whom the burden of proof lies. To prove that

- that the individual is an FEO or
- the property is the result of the proceeds of crime

would be on the Director or the person so authorised by the Director under section 4 of the act of 2018.

The provision of the act also allows for an appeal to be filed from any order or judgment of the Special Court within a period of 30 days by virtue of section 17 of the act.

A bar on the jurisdiction of the civil courts have been imposed on the matters in which the Special Court has jurisdiction.¹²

By virtue of section of section 19, no action can be taken against the Central Government, the Presiding Officer of the Central Government or the Director or Deputy Director for an action taken by them under this act in good faith.

IV. ANALYSIS OF THE PROVISIONS

The Fugitive Economic Offenders Act does provide a method of deterrence for those fraudsters who commit crimes in India and hide in a safe haven in a foreign country. The act has definitely made an improvement in the criminal prosecution scenario since it is very rampant for economic offenders to flee the country and take advantage of the loopholes in the extradition process of the country. This act empowers the authorities to confiscate and sell the properties in question to realise the money in default in the fastest possible method. The act has also included within its ambit, the properties which are situated in abroad as well those which are a part of the benami transactions, thus hastening the process of recovery and realisation.

Further in order to avoid any kind of delays due pendency of cases, the act prevents the FEO from filing any civil claim or defend any claim before the Courts. To balance such prevention, it has been endowed as a discretionary power on the Courts or Tribunals in India. Thus "*any Court or tribunal in India, in any civil proceeding before it, may, disallow such individual from putting forward or defending any civil claim*".

The act also further refers to the creation of a Special Court under the Prevention of Money Laundering Act, 2002 to provide speedy justice to the financial institutions and banks while making their recovery.

¹² Fugitive Economic Offenders Act, 2018 S 18

Though, at the primary instance, the provisions of the act might seem to violate the rules of Natural Justice. Under section 15 of the act, the appointed administrator, can dispose off the property on the order of the Central Government.¹³ It is violative of the rule that one is innocent until proven guilty. If the other party does not submit himself to the jurisdiction of Indian Courts, then he does not get an opportunity to defend himself before the courts. Thus, his inability to submit himself before the court, might lead to a wrongful disposal of the property by the Government, thus also not complying with rule of Audi Alteram Partem.

Further the burden of proof for parties having encumbrances on the properties confiscated lies on the interested parties themselves. Here, looking at the volume of money involved to be declared as an FEO, it would be taxing for the third parties to prove that interest in the property acquired is bona fide and without the knowledge of the fact that such property constitutes from the proceeds of crime. Discharging the burden of proof might become an insurmountable challenge for the third party who unknowingly ends up assisting in the execution of such crime without being aware of the same.¹⁴

Article 21 of the Constitution provides for the Right to access Justice¹⁵. Section 14 is in violation of the aforementioned right. It gives the power to any Indian Court or Tribunal to disallow filing or defending of civil claims. Thus barring these claims may result in the violation of right to access justice, thus further violating the fundamental rights of the FEO¹⁶. Further, the act allows for search and seizure of any questionable material as well as search of persons which is same as the Criminal Procedure Code. Though, in the CrPC, it has been clearly provided by the legislators that in order to arrest someone, an prior arrest warrant has to be obtained¹⁷ as well where a search is being conducted, the presence of witnesses is a must.¹⁸ The same has been provided by the legislators keeping in mind that the entire process of enquiry and investigation should be free, fair and transparent. Such steps keeps the authorities at bay and prevents events such planting of evidence which could change the outcome of the entire investigation. In this act of 2018, such procedural requirements such as presence of witnesses have been done away with the objective of speeding up the entire process of declaration of an individual to be a Fugitive Economic Offender. Thus, it might lead to misuse of power by the concerned authorities as well lead to serious offence of planting evidence.

¹³ ibid

¹⁴ Aseem Chawla, 'India: One can Run, But Can't Hide!:An analysis of the Fugitive Economic Offenders Bill, 2018' Phoenix Legal (2018) < <http://www.phoenixlegal.in/wp-content/uploads/2018/04/Mondaq-India-one-can-run.pdf>> accessed 8 October 2018

¹⁵ Live Law News Network, ' Access to Justice is a fundamental right guaranteed under Article 14 & 21 of Constitution: SC Constitution Bench' (2016) Live Law < <https://www.livelaw.in/access-justice-fundamental-right-guaranteed-article-14-21-constitution-sc-constitution-bench/>> accessed 10 September 2018

¹⁶ PRS, 'Highlights of the Bill and Ordinance' PRS Legislative Research (2018)

< <http://www.prsindia.org/billtrack/the-fugitive-economic-offenders-bill-2018-5166/>> accessed 29 September 2018

¹⁷ Code of Criminal Procedure, 1973 S 46

¹⁸ ibid

V. CONCLUSION

The Fugitive Economic Offenders Act has been enacted to facilitate the functioning of the Prevention of Money Laundering Act, 2002. The proceedings commenced under the former will come to an end as soon as the economic offender submits himself before the jurisdiction of the Indian Courts. Thus, this is an act, to bring back the economic offenders to the country. The act facilitates the recovery of dues from these economic offenders by empowering the investigative agencies to confiscate and sell the properties. It has come as a ray of hope for the banks and financial institutions who are primary victims of such offences.

The Prevention of Money Laundering Act also provides for reciprocal arrangements and agreements with foreign countries to bring back these absconders. The primary setback behind the already existing law is that the same is very cumbersome and slow. As a result, the recovery is delayed and banks are left with Non Performing Assets for years. Whereas, with the enactment of the 2018 act, the same process has been expedited. Moreover in an era where mobility is exceptionally convenient, such slow and ineffective process may not be appreciated.¹⁹

The FEO legislation provides for the confiscation of property which is situated abroad. This piece of legislation would be ineffective unless the Government makes appropriate and suitable arrangement by means of treaties or other formal measures. The Ministry of External Affairs has provided a list of 39 countries with whom India shares Mutual legal assistance treaties used for servicing all kinds of judicial documents. Thus, in order, to expedite the process of confiscation, more of such facilitation is required. Further, special care also requires to be given to the extradition laws and treaties of the country to attain the objective of the act.

To summarize, Government's initiative of introducing measures encapsulated under the FEO, can be regarded as the need of the hour. However, certain amendments/clarifications may be welcomed for effective implementation as it prescribes for a wholesome approach rather than concentrating on recovery from foreign assets. Whether all this could have been achieved by making adequate/suitable amendments to the existing host of laws or aptly another law as proposed is required to efficiently tackle this menace. Time will tell whether multiplicity of laws in this contentious facet of undesirable economic behavior of society end up being effective or once again end up being in a situation of "too many laws but too little justice"²⁰.

¹⁹ Aseem Chawla, 'India: One can Run, But Can't Hide!:An analysis of the Fugitive Economic Offenders Bill, 2018' Phoenix Legal (2018) < <http://www.phoenixlegal.in/wp-content/uploads/2018/04/Mondaq-India-one-can-run.pdf>> accessed 8 October 2018

²⁰ *ibid*