

Potential of Fugitive Economic Offenders Act, 2018 to Withstand Judicial Scrutiny

Manish Kumar Sharma
Symbiosis Law School, Noida
Uttar Pradesh, India

ABSTRACT:

The history of India with respect to economic offences is sufficient enough to show the helplessness of government in tackling situations wherein the offender leaves the country for avoiding his confrontation with the prosecution for the same. Fugitive Economic Offenders Act, 2018 is a newly promulgated Act that aims to assist the government in effective mechanism of confiscation and attachment of property belonging to such fugitive economic offender who is avoiding Indian legal system. The past of economic offences where accused turns out to be an escapee is not archaic and offences for the same includes fraud, counterfeiting, tax-evasion, money-laundering, benami transactions, transactions defrauding creditors and other such offences. The law has attempted to cure the paralysis which prosecuting agencies were inevitably compelled to suffer because of absence of offender, however the Act goes much beyond the principles of natural justice and basics of criminology. The paper attempts to discuss such transgression of the Act against Article 21 of Indian Constitution and its silence on crucial facets that it intended to accommodate and serve but being overlooked.

I. INTRODUCTION

The Fugitive Economic Offenders Act, 2018 (hereinafter “the Act”) was introduced as Bill on March 12, 2018 in Lok Sabha whereby passed on July 19, 2018 and by Rajya Sabha on July 25, 2018¹. The Bill got assent of the President on July 31, 2018 thus became the one of its kind for expeditious confiscation of proceeds of crime, both in India and abroad, to compel the fugitive to surrender to the jurisdiction of Courts in India to face the prosecution under scheduled law. The Act could also be seen flowing from Budget Announcement, 2017-18 which mentioned “*In the recent past, there have been instances of big time offenders, including economic offenders, fleeing the country to escape the reach of law. We have to ensure that the law is allowed to take its own course. Government is therefore considering introduction of legislative changes, or even a new law, to confiscate the assets of such persons located within the country, till they submit to the jurisdiction of the appropriate legal forum. Needless to say that all necessary constitutional safeguards will be followed in such cases*”². Besides, the Act in itself a stark step towards achieving the commitments made to United Nations Convention against Corruption (UNCAC). India being a party to the said Convention since 2011 had ratified to undertake and take measures towards gathering international co-operation in criminalizing offences related to corruption. Moreover, the intention for the same could be seen reinforced through India’s attempt by suggesting

¹Team PRS Legislative Research, The Fugitive Economic Offenders Bill, 2018, PRS LEGISLATIVE RESEARCH, (last visited Jan 20, 2019, 13:44 IST), <http://www.prsindia.org/billtrack/fugitive-economic-offenders-bill-2018>.

²Status of Implementation Of Budget Announcements 2017-18, INDIABUDGET, GOVERNMENT OF INDIA (last visited Jan 11, 2019, 08:50 IST), <https://www.indiabudget.gov.in/ub2018-19/impbud/impbud.pdf>.

nine point agenda to G-20 for action against fugitive economic offences and asset recovery³.

Further, it however wouldn't be incorrect to state that the history of India in extraditing offenders to India has been very dismal, which *prima facie* reveals that subsisting Indian laws somewhere weren't sufficient enough in dealing with such situations and specifically with the economic offences⁴. The Act, hence not only ensures rule of law by forcing the fugitive to return back to India for facing the scheduled law, in light of which they have been declared a fugitive economic offender, but also re-establishes and reinforces the chance of higher recovery to financial institutions from economic defaults and irregularities committed by such offender⁵.

II. APPLICATION OF THE ACT

The section 2 (f) of the Act⁶ goes on to define a fugitive economic offender as “*any individual against whom a warrant for arrest 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”*

The schedule of the Act provides for the description of offence under various substantive Acts *inter alia* including offences under Indian Penal Code, 1860, Negotiable Instruments Act, 1881, Prohibition of Benami Property Transactions Act, 1988, Prevention of Corruption Act, 1988, Securities and Exchange Board of India Act, 1992, Prevention of Money Laundering Act, 2002, Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 etc. for which an individual could be declared as a Fugitive Economic Offender under the Act.

It is pertinent to mention here that the procedure for declaration of an individual to be an offender under Act could only be invoked if the total value of the offence under the scheduled offences involves or exceeds a total of one hundred crore. For the purpose of declaration an application by Director (“Director” as specified in the Prevention of Money-laundering Act, 2002) shall be moved in a designated Special Court (“Special Court” as defined under sub-section (1) of section 43 of Prevention of Money-laundering Act, 2002) under section 2 of the Act with reason to believe that an individual is a fugitive economic offender (in writing), with information

³Nine Point Agenda Suggested By India to G-20 for Action Against Fugitive Economic Offences And Asset Recovery, PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA, (last visited Jan 18, 2019, 14:20 IST), <http://pib.nic.in/PressReleaseDetail.aspx?PRID=1554381>.

⁴Question No.1129 Extradition of People Involved in Financial Irregularities, MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA,(last visited Jan 18, 2019, 15:20 IST),<https://www.mea.gov.in/rajya-sabha.htm?dtl/30801/question+no1129+extradition+of+people+involved+in+financial+irregularities>.

⁵Cabinet approves Fugitive Economic Offenders Bill, 2018,PRESS INFORMATION BUREAU, GOVERNMENT OF INDIA, (last visited Jan 18, 2019, 15:20 IST), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=176920>.

⁶Fugitive Economic Offender Act, 2018 (17 of 2018)

available as to the whereabouts of such offender, and with list of properties believed to be the proceeds of crime, including any such property outside India for which confiscation is sought.

The Act authorizes the Authorities appointed for the purpose of the Prevention of Money-laundering Act, 2002 to be the Authorities under this Act i.e. Directorate of Enforcement has got broad spectrum of power with respect to search, seizure, attachment and confiscation of proceeds of crime.

The Act provides that the Authorities may attach any property mentioned in the application made by them and such attachment shall continue for one hundred eighty days further extendible with the permission of the Special Court. The Act further goes on to give power to Authorities to attach the property without permission from the Special Court, provided they file an application within a period of thirty days. In the next stage, the Special Court shall issue a notice to the individual requiring him to appear at the specified date and place which is at least six weeks after the issue of notice, stating that failure to appear shall result in him being declared as a fugitive economic offender. Subsequent to such notice, if the individual appears then the Court shall terminate the proceedings, and if he wishes to appear through counsel then Court may give one week's time to file a reply, whereas performance in contravention of the same shall result into him being declared as a fugitive economic offender. The Court shall then allow confiscation the proceeds of crime, benami properties, or other properties of the declared fugitive economic offender, be the properties in India or abroad. Nonetheless, the Court has power to exempt properties from such confiscation if any other person has vested legitimate interest in them. Thereupon confiscation, all rights and titles in the property shall vest in the Central Government free from encumbrances. The Central Government may dispose the properties after expiry of ninety days and no appeal shall be maintainable after disposition of such property.

III. ISSUES

The intent of the legislature by enacting such law is to create an effective and expeditious mechanism to ensure rule of law as the Act coerces the escapee i.e. offender to return back to India and submit to jurisdictions of Indian Courts, furthering the chances of effective and prompt recovery by financial intuitions in case of economic defaults. However, while ensuring the same the constitutional aspects and the very principles of criminology cannot be overlooked. The issues that arise out of the Act emerge from the very remedial aspects of the Act. The issues that make the Act difficult to survive the judicial scrutiny are.⁷

A. PRE-TRIAL CONFISCATION OF PROPERTY

The verbatim of section 12 of the Act states that after hearing the application made by the Director, if the

⁷Malcolm Katrak, Fugitive Economic Offenders Bill: A Viable Project or a Doomed Battle?, INDIACORPLAW, (last visited Jan 18, 2019, 17:54 IST) <https://indiacorplaw.in/2017/12/fugitive-economic-offenders-bill-viable-project-doomed-battle.html>.

Special Court is satisfied that an individual is a fugitive economic offender, thereupon declaration to the same, the property shall stand confiscated and belong to the Central Government. At this juncture it is pertinent to mention here that such confiscation is not limited only to property belonging to the proceeds of the crime but to “any other property” as stated in clause (b) sub-section (2) of section 12 of the Act. Now, herein one can easily understand the amount of uncontrolled spectrum that has been made available in respect of confiscation of properties.

It is also crucial to understand that the confiscation herein doesn't mean the kind of attachment that has been mentioned under section 83 of Criminal Procedure Code, 1860 because effective result by attachment of property of proclaimed offender under the Cr.P.C. is that, the offender is obstructed from disposing-off the property during investigation unless allowed by Court during trial. However, the term “confiscation” in the Act means that the property shall now vest with the Central Government free from encumbrances and that the Central Government or Administrator (as defined in the Act) could dispose-off the property in absence of the fugitive. The only bar that remains here is of ninety days duration for which neither the Central Government nor the Administrator could dispose-off the property. One could easily argue for nothing being incorrect in disposing-off the property belonging to declared fugitive economic offender who himself doesn't want to be represented in Court and want to stay away from persecution of law. Firstly, it is necessary to understand that the property that could be confiscated is not only proceeds of crime of the offender but is also any other property that has nothing to do with the economic offence. Further, there have been no clarifications to the fact that how the property shall be attached for confiscation if there are joint owners wherein one of them or several of them not being fugitive economic offenders. However, section 4 of the Act provides that nothing shall stop an interested person from enjoyment of immovable property having claim to any interest in the property. This secondly leads to deduction that the joint owners need to be vigilant with their property to show their claims and entitlement over the property after confiscation within ninety days, otherwise if the same gets disposed-off then they might end up counting their losses.

B. MANNER OF PRESERVATION OF PROPERTY

The major issue that arises after the confiscation of property is that the Act nowhere provides the manner in which the Central Government shall use the proceeds of the sale after disposing-off the property⁸. To what extent the Special Court may exempt the confiscation of property looking at the interested claimant in light of section 4 has not been specified. As the Act also doesn't incorporate any provision as to settlement of dues of other persons (secured creditors, unsecured creditors and others) after disposing-off the property, which alone

⁸PRS Legislative Research, *supra*, note 1.

could be the very reason leading to declaration of such person being fugitive economic offender⁹. However, the Act manifests the position of Administrator who shall assist the Central Government in dealing with the property and yet the power of the same has not been discussed. The question again remains unsettled to the instances where people have legitimate claim against the offender but not the property, then in that case would the government shell out any assistance to them.

C. BAR ON FUGITIVE ECONOMIC OFFENDER FROM DEFENDING OR FILING ANY CIVIL SUIT

The substantial and direct infringement that lies with the Act is of violation of one's fundamental right to have recourse to legal remedies. Having access to justice is a fundamental right within the meaning of Article 14 and Article 21 of the Indian Constitution¹⁰. The verbatim of section 14 of the Act provides that:

“Notwithstanding anything contained in any other law for the time being in force, -

(a) 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; and

(b) any Court or tribunal in India 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.”

In respect of one's right of access to justice, the Hon'ble Supreme Court of India has interpreted the same to be fundamental right within the meaning of Article 14 and Article 21¹¹. In *Anita Kushwaha v. Pushap Sudan*¹², Supreme Court has held that *“Given the fact that pronouncements mentioned above have interpreted and understood the word “life” appearing in Article 21 of the Constitution on a broad spectrum of rights considered incidental and/or integral to the right to life, there is no real reason why access to justice should be considered to be falling outside the class and category of the said rights, which already stands recognised as being a part and parcel of Article 21 of the Constitution of India”*.

The provision not only bars the fugitive economic offender from bringing any civil suit but also prohibits the same from defending any suit of civil nature. This particular provision essentially has not only given scope to

⁹Malcolm, *supra*, note 7.

¹⁰Constitutional vision to access to Justice in India - Legal Articles in India, LEGAL ARTICLES IN INDIA, (May 3, 2018, 00:58), <http://www.legalservicesindia.com/law/article/937/10/Constitutional-vision-to-access-to-Justice-in-India>.

¹¹Anita Kushwaha v. Pushap Sudan, (2016) 8 SCC 509

¹²*Ibid*

all levels of judges and tribunals¹³ from denying the declarant in taking any recourse to civil law. This is not something which seems to be satiny for the Act to survive judicial scrutiny.

IV. CONCLUSION

Considering the intent of the Legislature in passing the Act having stringent provision for prevention and expeditious recovery in economic offences wherein the offenders escapes the jurisdiction of Indian courts and doesn't want to face for his deeds, the Act would become significantly indispensable. However, the provisions which make this Act distinguishable one in manner of providing efficacious remedy also makes the same to ephemeral in withstanding the judicial scrutiny. In a nutshell the Act seems to be in nascent form as the same fails to soundly respond to pre-trial confiscation of property, mannerism for preservation of property and bar on fugitive economic offenders from filing or defending any suit of civil nature as this not only violates the very principles of natural justice but also the fundamental right of the same from access to justice, thus the potential of the Act seems to be very scathing in terms of it's withstanding the test of judicial scrutiny.

¹³Supra, note 7.