

Nabbing Absconders: Fugitive Economic Offenders Bill -An Analysis

Abstract

In recent years India is facing huge financial crisis because of the economic offences across the country. Economic offenders like Vijay Mallya, Lalit Modi flown out of the jurisdiction of Indian courts to evade the legal proceedings against them for being defaulter in repaying loans to the bank. These incidents have again pointing finger on the legal system of country and the working of the government. The most recent Punjab National Bank scam has accelerated the need of strict laws and in order to deal with these frauds cabinet has approved the Fugitive Economic Offender's Bill, 2017 as an Ordinance (2018). This paper is an attempt to analyse the provisions of Bill and its overall impact.

Keywords: Fugitive Economic Offender, Ordinance, Non Performing Assets.

Introduction

In the recent years India is facing high financial crisis because of various causes, some of them are easily visible and identifiable. One of the most common causes of this imbalance is Non-Performing Assets (referred to as "NPA" in short). This is basically caused by the non-payment of loans by the borrowers. Indian government has come across many high-profile cases of economic offences involving huge amount and among them the most popular and devastating are -industrialist Vijay Mallya and businessman Nirav Modi who have flown from the country after defrauding the banks for approximately Rs.21, 000 crores. After many efforts by Indian government these offenders could not be brought back to the country. It has some deleterious consequences which include long and time-wasting investigations by the investigating agencies. It causes waste of significant time of Indian courts and it also affects the rule of law in the country. For these cases government has been several times criticked and pressured for getting the offenders back to the country. If we look for the existing laws for the above-discussed problem, there are civil and criminal provisions.

Objective of The Study

1. To study the various laws for the recovery of NPA in India.
2. To study the new law regarding Fugitive economic offenders.
3. To study the impact of new law in Indian economy.

Review of literature

Literature for this paper is mainly taken from the various articles provided in newspapers, journals and the official website of MCA (ministry of corporate affairs). The extradition treaties with other countries has a big role to bring back such fugitive economic offender. So, a study which gives a insight about the extradition treaty has also been done through various government websites. Arun Kumar Banking industry and non-performing assets gives a insight about the development of laws regarding recovery of NPA.

'Guide to fugitive economic offenders ordinance' (2018) by Srinivasan Anand G. The chapters in this book explains the interpretation to the FEO bill, by incorporating the various definitions, the application of the said ordinance, the penal provisions and process for declaring a person as FEO and other relevant rules.

'Practical Guide To NPA Resolution' (2017) by R.C.Kohli. this book explains the problem relating to NPA and various laws available for the recovery of NPA, the prevalent procedure for the companies, partnership firms and individuals who has declared insolvent for liquidation process. All the laws relating to insolvent companies Partnership firms and individuals are integrated in Insolvency and Bankruptcy code 2016. It exhaustively defines the procedure for resolution and liquidation process of such corporates



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Remedies available in civil and criminal law for recovery of NPA and punishing such fugitive economic offender

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (referred to as "SARFAESI Act" in short) provides mechanism for the enforcement of secured interest by securing possession of secured assets by the lender and taking over the management of the defaulter's business. The Recovery of Debts due to Banks and Financial Institutions Act, 1993 (referred to as "RDDBFI Act" in short) provides for the establishment of Specials Tribunals such as Debt Recovery Tribunals (referred to as "DRTs" in short) and Debt Recovery Appellate Tribunals (referred to as "DRATs" in short) and enforce secured as well as unsecured debts. It also provides that the debt can be recovered by issuing recovery certificate through various modes of recovery including attachment of property, arrest etc. The Insolvency and Bankruptcy Code, 2016 (referred to as "IBC" in short) provides for the insolvency resolution process by the creditor against the defaulter who can be corporate body, an individual or any partnership firm and in case this process doesn't work out and creditors could not get their money back then liquidation process by the courts will get started.

Whereas on the criminal side, the general provision pertaining to "proclaimed offenders" under Section 82 of the Code of Criminal Procedure, 1973 (referred to as "Code" in short) may be used. Under Section 82 of the Code, a procedure for the proclamation of any offender is provided where court has reason to believe that the person in spite of the warrant is preventing himself from attending the court. Such offender will be declared by the courts as proclaimed offender and under section 83 of the said act the property of such escaped offender who has been declared proclaimed shall be attached. The government also enacted The Prevention of Money Laundering Act, 2002 (referred to as "PMLA Act" in short) which provides for confiscation of property derived from or involved in money laundering i.e. the offender is possessing, concealing or acquiring any property which is proceeds of crime of a scheduled offence. The Enforcement Directorate is entitled to provisionally attach the property of the defaulter pending trial subject to confirmation by the adjudicating authority and appeal. These offences are too serious for the country that the Apex Court in *Y.S Jagan Mohn Reddy v. Central Bureau of Investigation* held that "economic offences are having deep-rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as whole and thereby posing a serious threat to the financial health of the country."

But such steps were subject to the processes of criminal prosecution and also some overseas laws. Ultimately the problem with the fugitive (escaped from the Indian jurisdiction) offender could not be dealt properly with the existing laws.

Need of New Law

These major frauds have been a trigger for the present government and in order to deal with these scams recently a bill was introduced in the Parliament namely Fugitive Economic Offenders Bill, 2017, which could not be passed in parliament due to logjam on various issues but on 21 April, 2018 the same has been finally approved by the Cabinet and promulgated by the President of India as "Fugitive Economic Offenders Ordinance, 2018". The preamble of the Ordinance provides its objects as "An Ordinance 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." This ordinance aims to bring back fugitive defrauders to the country for repayment of loan money.

Provisions of the Bill (Ordinance)

The bill defines fugitive as a person against whom a an arrest warrant has been issued for committing an offence as proved in the Schedule annexed to the Bill and also who has escaped from the territorial jurisdiction of India to avoid legal proceedings against him. The value for such fraud must be Rs.100 crore or more.

Clause 4 of the Bill empowers a director (appointed under section 49 of PMLA, 2002) or any person appointed by the director (not below the rank of Deputy Director) to file an application in the Special Court (established under the PMLA, 2002) for declaring any person a fugitive economic offender. The said application will also provide details such as reasons to believe, list of properties procured from the proceeds of crime, list of benami properties, list of persons interested in such properties, information about whereabouts etc.

The authority needs to specify all the properties of the offender which are the proceeds of crime situated in India or abroad for the purpose of confiscation by the court. The catch here is that "benami" properties are also included and also the overseas property of the economic offender.

Clause 10 empowers Court to issue a six weeks' notice to the offender to appear in person before the court at time and place specified in the notice. If the offender appears within the stipulated time than the proceedings under this ordinance will be terminated but In case the person don't appear in time and at the specified place court will declare him a fugitive economic offender and if he appear through his lawyer than court can in its discretion give one week of period to the lawyer for responding on the application submitted by the director in the court. Court has power to confiscate the property of the offender who has been declared Fugitive Economic Offender and also any property which is not in the name of the economic offender but is connected either directly or indirectly with the crime. Here it is important to note that in section 12, "any other property" is used which means any property can be attached by the director which need not to be the proceeds of crime. Director can also provisionally

attach the property of the offender before filing the application in the court if he has reason to believe that property is proceeds of crime i.e. it is obtained or derived in connection to any scheduled offence and provisional attachment will save the property for the future confiscation. The property can be attached for maximum 180 days only while the application is pending in the special court. On conclusion of proceedings, if the person is not found fugitive economic offender, the properties shall be released.

Additionally, the director has certain other powers-like to search for the person and he can detain such person but has to be produced before the gazetted officer or a magistrate who is nearest within 24 hours of such detainment. These powers are similar to the powers of police officer under criminal procedure code. Offenders fundamental rights are also been preserved by the legislature. The bill/ordinance also gives all the powers as vested in civil court under code of civil procedure to the concerned authority such as examining the offender on oath, enforcing the attendance of such person, receiving evidence on affidavits etc.

Where a special court has declared that a person is not fugitive economic offender, it shall order the release of the confiscated properties or seized or record hereunder. Director has power to withhold the property or record of the offender from the date of order of court in spite of the order of special court for such release for a period of 90 days , if the director believes that such property should be prevented for the appeal proceedings.

Once a person is declared fugitive offender by the special court the property shall be confiscated and upon confiscation, all rights and titles of the property will vest in the Central Government and free from any charges on the property. Central Government shall appoint an administrator to sell the confiscated properties of the offender and thereby satisfy all the claims from such sell proceeds.

After a person is declared Fugitive economic offender under the ordinance he will be debarred from filing or defending any civil claim before any civil court except special court. "any claim" means that the offender is even barred from defending any civil claim which is not related to economic offence committed by the fugitive economic offender. For example, if the person is a party to the civil proceeding under any matter related to property or of any inheritance dispute he won't be able to defend the case even if this claim is independent of the economic offence for which he is declared fugitive economic offender. It could help the government to track the offender as it will make a pressure on the offender to surrender to the government

No civil court shall entertain any claim or suit which the special court has power under this ordinance to determine and also no such civil court shall have power to grant injunction in any suit in which special court is empowered to determine under the said ordinance. so no individual can prevent confiscation or attachment one he is declared FEO, only in case he appeals to high court and high court gives an adverse order.

Any company or limited liability partnership (referred to as "LLP" in short) shall be debarred from participating or defending in any civil claim before any civil court or tribunal if any director, or majority shareholder, any promoter, any key managerial personnel or any individual having controlling interest in such company or LLP is declared fugitive economic offender. This provision aims to force the companies to dis entitle such individual from all the rights in the company.

Under section 10 provides that a Special Court has to send notice to the person who is interested in the property and special court can exempt in its discretion any property from confiscation which is proceeds of crime but in which any other individual has interest, on the fact that this interest is acquired by such individual in bonafide manner and it has to be proved by the person who alleges such interest.

Under section 17 any individual may appeal against the order of the special court if he is aggrieved by such order to the high court within 30 days from the date of such order and within 90 days if high court believes that there is sufficient cause for delay in filing the appeal. The provision of bill/ordinance will override over inconsistent provision of any other law for the time being in force. Under schedule 1 of the bill/ordinance the offences are defined under which all the person can be declared fugitive economic offender.

Analysis & suggestions

The ordinance certainly is aiming the object to curb the economic offences but it would have a deterrent effect. The Ordinance provides stringent provisions and punishment. However, it has raised certain controversial issues also. which can be counted as follows:-

1. First and foremost, disputable issue in the ordinance is the threshold limit of economic offence is 100 crores or more for qualifying an economic offender under fugitive economic offender's ordinance. No explanation as such has been given by the legislature for keeping this strict limit except a non-convincing reason that it would decrease the burden of the courts. Any offence which is below 100crores will not be covered in this ordinance and hence any individual can't be declared fugitive economic offender even he has committed economic offence of 90 crores and has evade the territorial jurisdiction of the country.
2. Second disputable issue is that the ordinance is silent about its effect whether it is retrospective as to cover all the frauds of offenders like Vijay mallya and Nirav modi or is it prospective in nature. The ordinance says that "the Act applies to any individual who is, or becomes, a fugitive economic offender on or after the date of coming into force of this Act". But the definition of fugitive economic offenders says that FEO is one against whom warrant of arrest has been issued; it seems that it would cover the cases of Nirav modi and Vijay mallya.

3. The declaration of individual as fugitive economic offender is based on the prima facie evidence and not after conducting trial and according to the procedure of law. If the offender is evading the trial, he will be declared FEO without any proper trial that whether he has committed the offence or not, and the property will be confiscated by the central government there and then. What about the cases if the person found innocent after confiscation, will he get back his property safely? No, he will not be entitled to get back his property. It is a pre-conviction confiscation which ordinance provides and in eyes of law it is not justifiable. It was the only reason that the apex court had upheld the Orissa special courts confiscation scheme in year 2015 as it only provisions for the after-conviction confiscation and once person is acquitted the property would be returned without being sold out. Pre-conviction attachment could be a proper step to prevent the property for releasing the bad loans or any other damages after the individual is proven guilty of such economic crime. It might get confused by the securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) where the property is seized by the banks in favour of unpaid loan, but it is done under a contract between creditor bank and the debtor. But confiscation under this ordinance is independent of any such contract.
4. Right to file any civil claim of such offenders has been infringed by the said ordinance if he is declared FEO, it is an infringement of basic fundamental right, even if his claim is independent of the economic offence, let say in case of defamation the alleged offender has no right to file or even defend the case, which would automatically result into losing the case and hence he could be convicted for offence which he might not have committed. Also, *ubi jus ibi remedium* is a basic principal of rule of law which means where there is a right there is a remedy in case such right gets breached. In case of *Brij Mohan Lal vs Union of India*, the Apex Court had stated that it is the constitutional duty of the state to ensure that every citizen has access to the judicial system. right to access justice is a fundamental right which is covered as a part and parcel under Article 21 and also a right under article 14 of the Indian constitution which ensures equality before law. Under the said ordinance this right is denied in totality, it could have been restricted but denial of such basic right may challenge the constitutionality of the fugitive economic offenders ordinance 2018.
5. Next issue is that company and LLP cannot file any civil suit if any promotor, KMP, or majority shareholders are declared fugitive economic offender, this clause may seem in favour to get the offenders back in the country but is it really practicable for the company to remove such shareholders who have invested capital in the

company, as company's business is dependent on capital of such shareholders. It will affect the company and consequently other shareholders, and it is not justifiable to suppress the rights to minority shareholders for the acts of majority shareholders. So removing shareholders who have declared fugitive economic offender is not solution in the interest of company.

6. Here another issue is which could be a problem for one who is innocent and not involved in such economic offences. These are those individuals who have interest in the property involved in the criminal activity or property which is "proceeds of crime". Burden of proof lies on the individual who alleges under section 16 of the said ordinance that he has acquired such interest without knowledge of any fraud. This clause makes it difficult for the person to prove the same fact and equally it is harsh on the innocent person to prove something for which he has clean hands. It could be the procedure that prosecution may prove that third party had knowledge about the fraud and he acquired such interest after such knowledge, after this third party should be given opportunity to rebut that fact.
7. Under section 20 Central Government has given power to insert and omit any offence mentioned in schedule 1st of the said ordinance. But it is not subject to any scrutiny, it may be done by the government under the corridors of politics and power. It should be done with the sanction of the legislature, the parliament. So the viability of such action could be ensured.

Conclusion

After the above analysis, it can be concluded that the bill is a step towards the alleged economic offenders but it depends upon the extradition process between the countries. It can force the fugitives to return back to the country but doesn't provide any strict procedure for the same. By the above analysis we can also conclude that this ordinance may not pass in the next session of parliament as its constitutionality could be challenged. It could only be possible if India tries to improve its relations with the countries and to work upon the extradition treaties with various countries. This bill seems to be a step taken in hurry to divert the common people of country and making them believe that the government is taking action against such criminals.

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