

# The Indian saga on fugitive economic offenders

Manohar Samal<sup>1</sup>

## Abstract

The legal conundrum adjacent to the deteriorating conditions of apprehending fugitive economic offenders has left a hole in India's banking and financing sector. Serious concerns exist in respect to deficiencies enabling the economic offenders to abscond and escape the judicial arm. The rise of such economic crimes from the past decade has piloted the promulgation of the Fugitive Economic Offenders Ordinance, 2018 coupled with stringent reforms by the Reserve Bank of India and Securities and Exchange Board of India in management, grant and supervision of loans and securities. In spite of this, only pint-size progress has been observed because of feeblegathering of evidence and catastrophe in extradition endeavors. Incorporating preventive measures rather than deterrent measures, solidifying and strengthening claims over absconding economic offenders during extradition process, stern regulation and timely discharge of duties uninfluenced by political and corrupt interests will facilitate efficacious apprehension of the fugitive economic offenders.

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<sup>1</sup>Student, Vivekananda Education Society's College of Law, Mumbai.

## **Introduction**

White collared crimes in India have unceasingly been on the rise ever since the decentralization of State ownership in industrial sectors and encouragement in Foreign Direct Investment. In the recent decade, a significant surge in economic offences by business tycoons, financial agencies and corporations; aided by public officials in many instances have been witnessed. A major chunk of economic offences include defrauding of creditors, money laundering, default in repayment of loans and evasion of taxes which are eating away the Indian economy from its core. In spite of a plethora of laws in this subject such as the Prevention of Money- Laundering Act, 2002, The Insolvency and Bankruptcy Code, 2016 (along with the modifications brought by The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018), The Benami Transactions (Prohibition) Act, 1988, The Indian Companies Act, 2013 (along with modifications brought by The Companies (Amendment) Act, 2017), Foreign Exchange Management Act, 1999 and The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; circumvention by offenders has been possible as they flee from the nation, beyond the jurisdiction of Indian Courts. This article elaborates and discusses the events that have led to such a situation, remedies that have been adopted in the current scenario and attempts to suggest few solutions to the problems.

## **The concept of fugitive economic offender**

The term “fugitive economic offender” has been used in Indian legislation for the first time under Section 2(1)(f) of the Fugitive Economic Offenders Ordinance, 2018 which reads as, ‘fugitive economic offender means any individual against whom a warrant for arrest in relation to a Scheduled Offence has been issued by any Court in India, who-

1. has left India so as to avoid criminal prosecution; or
2. being abroad, refuses to return to India to face criminal prosecution. ’

In the general usage of terms, a fugitive economic offender would be an absconding offender, i.e., a person against whom a warrant has been issued and who has absconded or is concealing himself so that such warrant cannot be executed. The amount of absconding and fugitive economic offenders have deliberately augmented since the past eight years. It is clear from the current scenario that, evading the jurisdiction of the Indian Courts by fleeing has become the customary modus operandi for these white collared criminals to escape liability. A frail standpoint in negotiations and lacunae in furnishing the requisite documents and details by Indian enforcement authorities in extradition process has fuelled the elusion of these

fugitive economic offenders. Such activities of defrauding creditors, non re-payment of loans and embezzlement of funds have slowed down economic growth leading to significant decapitalization in the banking and financing sector. The Insolvency and Bankruptcy Code, 2016 (along with modifications brought by the Insolvency and Bankruptcy Code (Amendment) Ordinance of 2018) has remedied this issue up to some extent. However, adverse challenges still prevail in this aspect as absconders have still managed to avoid the process of law by every nook and corner they could find.

In light of severe criticism of the Government in respect to the policies and measures adopted to extradite and punish the absconding economic offenders, The Fugitive Economic Offenders Bill, 2017 was proposed and laid down in the Parliament. However, due to various objections taken by the opposition parties and the Government's inability to pass the bill, The Fugitive Economic Offenders Ordinance, 2018 was promulgated. This Ordinance is claimed to deter the absconding offenders from avoiding the process of law and to fill the shortcomings of the existing laws.

### **Analysis of the fugitive economic offenders ordinance, 2018**

The Statement of Objects and Reasons of the Fugitive Economic Offenders Ordinance, 2018 asserts that, '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.'

The provisions of this Ordinance would only apply to matters where the impugned offence is above Rs. 100 crores. This is evident by Section 2(m) of the Act which lays down that, 'Scheduled offence means an offence specified in the Schedule, if the total value involved in such offence or offences is one hundred crores rupees or more.' The Schedule appended to the Ordinance covers offences committed under laws like the Indian Penal Code, Negotiable Instruments Act, 1881, Customs Act, 1962 and the Securities and Exchange Board of India Act, 1992. Thereby, the offences above Rs. 100 crores covered under the laws specified in the Schedule would be covered under the ambit of the Ordinance. It was confirmed at a press release by the Finance Minister that, this Ordinance would also apply to the defaulters who've already fled the country. The definition provisions, i.e. Section 2(1) cover a wide range of crucial terms such as, "Administrator", "contracting State", "key managerial personnel", "proceeds of crime" and "Special Court."

Section 4 to Section 15 comprises of the essence of the Ordinance since it deals with the declaration of an absconding offender as a fugitive economic offender under the Ordinance and also contains provisions of attachment, confiscation and handling of property. The Ordinance empowers the authorities appointed under it to attach all the properties within or outside the boundaries of India, including benami property of a declared fugitive economic offender irrespective of whether the property deems to be a part of “proceeds of crime.” If the Special Court declares the alleged absconder as a fugitive economic offender under the Ordinance, then an “Administrator” appointed under Section 2(1)(a) will be handed the charge of receiving, handling, dealing and disposing the property confiscated. Section 17 lays down that an appeal can be preferred to the High Court against the order of the Special Court within a span of thirty days. Section 18 of the Ordinance bars the jurisdiction of civil courts in India to scrutinize or entertain any suit or proceedings which the Special Court is empowered to decide.

One of the Sections of the Ordinance, i.e., Section 14 has sparked tremendous controversy as infringing the Right to access justice that forms part of the Fundamental Rights of an individual. A person’s access to justice is a guaranteed fundamental right under the Constitution and particularly Article 21.<sup>2</sup> Section 14 of the Ordinance reads as, ‘Notwithstanding anything contained in any other law for the time being in force,-

1. on a declaration of any 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 claim; and
2. 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.’

On examination of the lines ut supra, it can be clearly deduced that, Section 14 of the Ordinance disallows all civil claims of the declared fugitive economic offenders. In a layman’s terms, the declared offender’s civil right of contesting before a civil court is extinguished by this provision. Despite the outrage, power granted by way of legislative enactment which disallows civil claims is not new in Indian law. Section 9 of the Civil

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<sup>2</sup>Imtiyaz Ahmad v. State of Uttar Pradesh &Ors., (2012) 2 SCC 688.

Procedure Code, 1908 asserts that, ‘The courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.’ Hon’ble Supreme Court has also held that, ‘[T]he language of Section 9 itself makes it clear that the civil courts have jurisdiction to try all suits of civil nature except the suits of which taking cognizance is either expressly or impliedly barred. In other words, the jurisdiction of the court and the right to a party emerging from Section 9 of the CPC is not an absolute right, but contains inbuilt restrictions<sup>3</sup>.’ However, it cannot be construed that, Section 14 of the Ordinance would not abridge the Right to access justice guaranteed under the scheme of Article 21 when the procedural machinery functions and thus, might become subject matter of judicial scrutiny in the near future.

The Cabinet has released press statements contending that, the Ordinance has been promulgated to bridge the existing gap and loopholes in the allied laws. This has also been reflected under Section 22 of the Ordinance which states that, ‘The provisions of this Ordinance shall be in addition to and not in derogation of any other law for the time being in force.’ Although the Ordinance is a bold and nascent step towards deterring the absconding offenders and in ensuring that they succumb to the jurisdiction of Indian Courts, only simultaneous development of extradition arrangements with other foreign nations coupled with stringent regulation by the Reserve Bank of India and the Securities and Exchange Board of India on banks and other financial institutions’ framework, will pave the road to redemption for India’s economy.

### **Extradition: current scenario and problems**

Extradition is the surrender by one State to another of a person desired to be dealt with, for crimes of which he has been accused or convicted and which are justiciable in the courts of the other State<sup>4</sup>. The process of extraditing criminals is carried out through Multi- Legal Assistance Treaties (MLATs) and Extradition Treaties between India and other foreign nations. Mutual legal assistance in criminal matters is a process by which States seek and provide assistance in gathering evidence for use in criminal cases. Since the Fugitive Economic Offenders Ordinance, 2018 aims to attach and confiscate property also situated in foreign nations, profound focus on MLATs are a need of the hour.

One of the chief reasons why Indian extradition requests are rejected is because of the pitiable conditions of prisons in India which raise serious human rights concerns; especially

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<sup>3</sup>Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification, (2013) 1 SCC 641.

<sup>4</sup>State of West Bengal v. Jugal Kishore More, AIR (1969) SC 1171.

by the European nations and therefore, several economic offenders prefer absconding to European nations. Historical events have unambiguously revealed that, on many occasions, European nations, specifically United Kingdoms, has rejected India's extradition requests on the basis of pathetic conditions of prisons and the manner in which prisoners and convicts are treated in India. An MLAT was signed by India with the United Kingdoms in the year 1992. But, only one absconder has been extradited till today. Article 1 of the Extradition Treaty between India and United Kingdoms obligates the signatories and states that, 'Each Contracting State undertakes to extradite to the other, in the circumstances and subject to the conditions specified in this Treaty, any person who, being accused or convicted of an extradition offence as described in Article 2, committed within the territory of the other State, whether such offence was committed before or after the entry into force of this Treaty.' Article 2 of this Treaty specifies extradition offences which also includes taxation, revenue and purely fiscal offences.

Extradition Treaties do not have a sanctioning and binding nature and merely are obligatory in nature and therefore, economic offenders have been taking advantage and getting away for so long. The Ministry of External Affairs has reported that, 31 economic offenders have fled from India in the current year, i.e., 2018. Usually, the conditions in which extraditing parties can reject the requesting party's application is if the prisoner would be treated unjustly; or if there's a political agenda of the Government behind the extradition application. In the recent past, this argument has been used by the fugitive economic offenders and has led to the rejection of extradition requests. Sans a strong foreign policy, the nascent Fugitive Economic Offenders Ordinance, 2018 will not be able to do much good; leading into the same defective manner of dealing with absconding economic offenders.

### **Measures espoused so far and possible solutions**

The number of economic offences committed from the year 2010 till date have drastically escalated. In the year 2010, 98,266 instances of economic offences relating to criminal breach of trust, cheating and counterfeiting were reported and in 2016, 1,43,524 economic offences were reported (Official reports of 2017 and 2018 have not been released till the date of this article). The Reserve Bank of India has issued guidelines vide Notification No., RBI/2017-18/131 (12th February, 2018), adopting a stringent policy towards all the Scheduled Commercial Banks under the Reserve Bank of India Act, 1934 and to all-India financial institutions against loan defaulters. Some of the prominent guidelines of this Notification include revised framework in early identification and reporting of defaulters, manner in

which the guidelines have to be implemented, process of disclosure, supervision and the timeline to be adhered to for large loan accounts. Similarly, the Government has advised all Public Sector Banks to obtain a certified copy of the passport of the promoters/directors and other authorised signatories of companies availing of loan facilities of Rs. 50 crore and above. The Ministry of Finance has declared that, loan amounts above Rs. 250 crore would be closely regulated by the Government.

A serious concern that has always existed during the course of criminal proceedings is that, delay in justice was caused because of absconding criminals. Previously, the concept of “trial in absentia” wasn’t concretely present in criminal trials and therefore, Hon’ble Supreme Court in an ongoing matter has held that, ‘We have observed that criminal trials remain pending for a long time because of one or more accused absconding. To overcome the situation, in *Hussain and Anr. v. Union of India* (2017) 5 SCC 702, we observed that an amendment be considered at par with Section 339-B of the Cr.P.C. as applicable in Bangladesh providing for trial in absentia of an accused who absents during the trial. We direct Union of India through Ministry of Law and Justice to apprise this Court of the status of such consideration.<sup>5</sup>Section 2(1)(n) of the Fugitive Economic Offenders Ordinance, 2018 defines “Special Court” as, ‘Special Court means a Court of Session designated as a Special Court under sub-section (1) of section 43 of the Prevention of Money- Laundering, Act, 2002.’ Thus, it is evident that Section 2(1)(n) of the Fugitive Economic Offenders Ordinance, 2018 is *pari materia* with Section 43(1) of the Prevention of Money- Laundering Act, 2002 that deals with constituting a Special Court to try the notified, specified and Scheduled offences. Section 46 of the Prevention of Money- Laundering Act, 2002 asserts that, ‘Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bails or bonds), shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the persons conducting the prosecution before the Special Court, shall be deemed to be a Public Prosecutor.’ Therefore, trial in the Special Court would be in accordance with the Criminal Procedure Code, 1973 and Hon’ble Supreme Court’s observation *ut supra* would apply to fugitive economic offenders. But, it is pertinent to note that, the Amendment directed by the Apex Court has to be implemented as rapidly as circumstances permit in order to achieve speedy remedy against the fugitive economic offenders.

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<sup>5</sup>*Bachche Lal Yadav v. Akhand Pratap Singh*, M.A. No. 788/2018 in SLP (Crl.) No. 7951/2016.

A severe lacunae subsists in respect of laws made against economic offenders in India. The legislative intent of the prevailing and proposed laws concentrate on deterrence rather than focusing on prevention. For preventing a breach of the public peace or the invasion of private rights the State has sometimes to impose certain restrictions on individual rights. It therefore becomes the duty of the State not only to punish the offenders against the penal laws of the State but also to take preventive action<sup>6</sup>. Bearing in mind that, instances of economic offenders absconding are recurrent in nature; precautionary and preventive measures will reduce the difficulties in dealing with fugitive economic offenders. Currently, there is shortfall of such preventive measures because the plethora of laws prevailing on this subject are mainly associated with deterrence. However, it is to be noted that, strict emphasis only on formulating preventive measures in this aspect would restrain the development and flourishing of industrial and trade activities. Therefore, a well balanced dose of deterrence and prevention in legislation plus implementation will undo the shortcomings of the present scheme of things.

### **Conclusion**

It is true that, the horizon may hold qualms but nevertheless these initial measures undertaken by the Government and the authorities under it are laudable. However, unpleasant challenges and risks still predominate and therefore, it is imperative that cautious evaluation and implementation, excluding associated political interests should be the devised strategy embraced, in order to escape from this Pandora's box.

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<sup>6</sup>HariKhemuGawali v. The Deputy Commissioner of Police, Bombay &Anr., 1956 AIR 559.