

THE FUGITIVE ECONOMIC OFFENDERS BILL, 2017: EXPLANATORY NOTE

There have been several instances of economic offenders fleeing the jurisdiction of Indian courts, anticipating the commencement, or during the pendency, of criminal proceedings. The absence of such offenders from Indian courts has several deleterious consequences— first, it hampers investigation in criminal cases; second, it wastes precious time of courts of law, third, it undermines the rule of law in India. Further, several such cases of economic offences involve non-repayment of bank loans thereby causing strain on the banking sector in India.

2. Existing civil and criminal provisions in law are not entirely adequate to deal with the severity of the problem. Civil provisions include the following:

2.1 The RBI Master Circular on Wilful Defaulters, dated July 1, 2015: The Master Circular defines ‘wilful default’ and lays down the mechanism for identification of wilful defaulters. Deterrent measures include debarring a promoter from raising institutional finance from banks, financial institutions and NBFCs for floating a new venture for a period of 5 years.

2.2 The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act"): Section 13 of the SARFAESI Act is used to recover secured assets by the banks and financial institutions without the involvement of a court or tribunal. Following a demand notice providing 60 days’ time period after the default, the lender is entitled to take possession of the secured assets and take over the management of the borrower's business.

2.3 Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("RDDBFI Act"): Under Sections 19 and 25 of the RDDBFI Act, a debt, whether secured or unsecured, may be recovered on the issue of a recovery certificate by the Debt Recovery Tribunal (“DRT”). The recovery officer can recover the debt by attaching and selling the assets, arresting the debtor etc.

2.4 Insolvency and Bankruptcy Code, 2016 (“IBC”): On a default by a debtor (corporate or individual), the debtor or the creditor can trigger the insolvency

resolution process, which involves restructuring of the debts through formulation of a repayment plan. If the plan fails, the liquidation / bankruptcy process is triggered- involves selling of the assets of the debtor to repay the creditors, as per the priority prescribed in the IBC.

3. The civil provisions deal with the issue of non-repayment of debt. While effective in serving this purpose, they make no special provisions to deal either with: (a) high-value offenders; (b) those who might have absconded from India when any criminal case is pending. In case of such absconders, the general provision pertaining to “proclaimed offenders” under Section 82 of the Code of Criminal Procedure, 1973 may be used. Under Section 82 of the Code, a criminal court can publish a proclamation if it has reason to believe that a person against whom a warrant has been issued is absconding. Persons accused of serious offences listed in Section 82 (4),¹ can be declared a ‘proclaimed offender’ after such inquiry as the Court deems fit. Under Section 83, property of the person against whom proclamations is issued within the district may be attached. If the property is outside the district, the concerned district magistrate must endorse the attachment.

4. However this provision has certain key drawbacks when applied to high-value economic offenders. In large defaults, criminal proceedings are likely to be in several criminal courts across the country where assets are located. This multiplicity of proceedings may lead to conflicting orders of attachment by different courts. Second, a court is unlikely to attach property outside its jurisdiction in the first place without the procedure for endorsement being followed. If followed, the same is time-consuming. As a result of such delays, such offenders can continue to remain outside the jurisdiction of Indian courts for a considerable period of time.

5. The Prevention of Money Laundering Act, 2002 (“PMLA Act”) provides for confiscation of property derived from or involved in money laundering of proceeds of

¹ Section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860).

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. On conviction in the trial, the property stands confiscated, free from all encumbrances, to the Central Government. However the provision for confiscation being available consequent to the conclusion of trial can rarely be used expeditiously. Further, the purpose for such confiscation is as punishment for the offence committed and not strictly as a deterrent for any absconding accused to return to India.

6. In order to address these lacunae and lay down measures to deter economic offenders from evading the process of Indian law by remaining outside the jurisdiction of Indian courts, the Fugitive Economic Offenders Bill, 2017 (“the Bill”) is being proposed. The Bill makes provisions for a court of law (‘Special Court’ under PMLA Act) to declare a person a Fugitive Economic Offender. A Fugitive Economic Offender is a person who has an arrest warrant issued in respect of a scheduled offence and who leaves or has left India so as to avoid criminal prosecution, or refuses to return to India to face criminal prosecution. A scheduled offence refers to a list of economic offences contained in the Schedule to this Bill. Further, in order to ensure that courts are not over-burdened with such cases, only those cases where the total value involved in such offences is 100 crore rupees or more, is within the purview of this Bill.

7. On such declaration, two consequences will ensue: First, any property that is a proceed of crime that the person is accused of, as well as any property owned by such person in India shall stand confiscated and vested in the Government of India free from all encumbrances. Second, at the discretion of any Court, such person or any company where he is a promoter or key managerial personnel or majority shareholder, may be disentitled from bringing forward or defending any civil claim. If at any point of time in the course of the proceeding prior to the declaration however, the alleged Fugitive Economic Offender returns to India and submits to the appropriate jurisdictional Court, proceedings under this Act would cease by law.

8. It must also be noted that the provisions of United Nations Convention against Corruption (ratified by India in 2011) recommends non-conviction-based asset confiscation for corruption-related cases. The Bill adopts the same. All necessary constitutional safeguards in terms of providing hearing to the person through counsel, allowing him time to file a reply, serving notice of summons to him, whether in India or abroad and appeal to the High Court have been provided for. Further, provision has been made for appointment of an Administrator to dispose of the property to satisfy creditors' demands. Where such process has already commenced under the IBC, RDDBFI Act or SARFAESI Act, the overlap has been minimised and the procedures harmonised.

9. It is widely felt that the spectre of high-value economic offenders absconding from India to defy the legal process seriously undermines the rule of law in India. It is necessary to provide an effective, expeditious and constitutionally permissible deterrent to ensure that such actions are curbed. To serve these ends, this Bill is being proposed.