



The Fugitive Economic Offenders Act, 2018: An Introduction

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India has recently seen huge frauds and willful loan defaults by big corporates, with the offenders fleeing from the country like Vijay Mallya, Nirav Modi, Mehul Choksi etc. However, it has been very difficult to bring them back for trial due to issues of extradition and others. This has caused a huge public outcry, demanding justice to the people. In answer to this, The Parliament passed the Fugitive Economic Offenders Act that allows the State to take possession of the properties of the economic offenders even if they are not available for the trial.

The Fugitive Economic Offenders Act, 2018 passed on 25th July 2018. It seeks to confiscate properties and assets of economic offenders that evade prosecution by remaining outside the jurisdiction of Indian courts. Economic offences with a value of more than Rs 100 crores, which are listed in the schedule of the Fugitive Economic Offenders Act, come under the purview of this law. As per the Act, a court (‘Special Court’ under the Prevention of Money Laundering Act, 2002) has to declare a person as a Fugitive Economic Offender.

Meaning of Fugitive economic offender :-A person is declared a fugitive economic offender (FEO) only when an arrest warrant has been issued against him for specified offences over Rs 100 crore and when he has left the country and refuses to return to face prosecution. There are 55 economic offences covered which include tax evasion, money laundering, transactions defrauding creditors, benami transactions, counterfeiting government stamps or currency and dishonouring cheques.

The Act is expected to re-establish the rule of law as the accused will be forced to return to India and face trial for his offences. This would also help the banks and other financial institutions to achieve higher recovery from financial defaults committed by such fugitive economic offenders, improving the financial health of such institutions.

The impact of the Act:

It is expected that the creation of a special forum for a speedy confiscation of the proceeds of crime, in India or abroad, would force the fugitive to return to India to submit to the jurisdiction of courts in India to face the law in respect of scheduled offences.

The Act makes provisions for a court (‘Special Court’ under the Prevention of Money-laundering Act, 2002) to declare a person as a ‘Fugitive Economic Offender.’ A Fugitive Economic Offender is a person against whom an arrest warrant has been issued in respect of a scheduled offence and who has left India so as to avoid criminal prosecution, or being abroad, 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 Act. 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 Act.

Other provisions under the Act:

- (i) making an application before the special court for a declaration that an individual is a fugitive economic offender;
- (ii) attachment of the property of a fugitive economic offender and proceeds of crime;
- (iii) issue of a notice by the special court to the individual alleged to be a fugitive economic offender;
- (iv) confiscation of the property of an individual declared as a fugitive economic offender or even the proceeds of crime;
- (v) disentitlement of the fugitive economic offender from defending any civil claim; and
- (vi) appointment of an administrator to manage and dispose of the confiscated property under the act.

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 the proposed Act would cease by law. 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.

This is the first time that action has been initiated under the ordinance recently promulgated by the Central Government to deal with fugitive bank loan defaulters.

A special Prevention of Money Laundering Act (PMLA) court on Saturday took cognizance of an application by the Enforcement Directorate (ED) under the Fugitive Economic Offender Ordinance and issued notices summoning offender

Special Judge M.S. Azmi issued the notice after taking cognisance of the second ED charge sheet filed against offender recently, and a subsequent application by it seeking the 'fugitive economic offenders' tag.

The ED also sought orders to confiscate all of offenders properties, estimated at about 12,500 crore.

Table 1: Process under the Act and Ordinance to declare a person as a Fugitive Economic Offender (FEO)

Process	Details
Application	<ul style="list-style-type: none"> The authorities appointed under the PMLA may file an application before a Special Court (designated under the PMLA) to declare a person an FEO. The application will contain: (i) reasons to believe that an individual is an FEO, (ii) information about his whereabouts, (iii) list of benami properties, properties believed to be proceeds of a crime, or foreign properties for which confiscation is sought, and (iv) list of persons having an interest in these properties.
Attachment	<ul style="list-style-type: none"> Authorities may attach any property mentioned in the application with the permission of the Special Court. The attachment will continue for 180 days, which may be extended by the Special Court. They may provisionally attach any property without the permission of the Special Court, if they file an application before the court within 30 days.
Notice	<ul style="list-style-type: none"> The Special Court will issue a notice to the individual: (i) requiring him to appear at a specified place on a date which is at least six weeks after the issue of notice, and (ii) stating that a failure to appear will result in him being declared an FEO. Notice may also be served at the individual’s email address recorded in the PAN or Aadhaar databases.
Proceedings	<ul style="list-style-type: none"> If the person appears, the Special Court will terminate proceedings. If the person does not appear in person, but is represented by his counsel, the Special Court may allow the counsel a week to file a reply. If, at the conclusion of proceedings, the person is found not to be an FEO, his attached properties will be released.
Declaration	<ul style="list-style-type: none"> If the person does not appear in person or through his counsel at the stipulated time mentioned in notice, the Special Court will proceed with hearing the application. After hearing the application, the Special Court may declare the person an FEO.
Confiscation	<ul style="list-style-type: none"> The Special Court may confiscate properties of an FEO which are proceeds of crime, benami properties, or any other properties. These properties may be in India or abroad. The Special Court may exempt certain properties from confiscation where any other person has a legitimate interest in them. Upon confiscation, all rights and titles in the property will vest in the central government, free from encumbrances (claims or rights in the property). The central government may dispose these properties after 90 days. Special court has made order of confiscation of any property and such property is in Contracting State, Special Court may issue a request letter to a Court or Authority in the contracting State for execution. Proceeds of crime will include properties (or equivalent value), which have been obtained by committing a scheduled

	offence. The standard of proof shall be “preponderance of probabilities”.
Bar on civil claims	<ul style="list-style-type: none">Any court or tribunal may bar an FEO from filing or defending any civil claim before it. The court may bar a company or a limited liability partnership from filing or defending any civil claim if the promoter, key managerial personnel (such as manager, managing director, or CEO), or majority shareholder has been declared an FEO.
Appeal	<ul style="list-style-type: none">Appeals against the orders of the Special Court will lie before the High Court. Such appeals can only be filed within 30 days of the order (extendable to 90 days if the High Court is satisfied with the reasons for delay).

Drawbacks of Act:

Under the Act, any court or tribunal may bar an FEO or an associated company from filing or defending civil claims before it. Barring these persons from filing or defending civil claims may violate Article 21 of the Constitution i.e. the right to life. Article 21 has been interpreted to include the right to access justice.

Under the Act, an FEO’s property may be confiscated and vested in the central government. The Act allows the Special Court to exempt properties where certain persons may have an interest in such property (e.g., secured creditors). However, it does not specify whether the central government will share sale proceeds with any other claimants who do not have such an interest (e.g., unsecured creditors).

The Act does not require the authorities to obtain a search warrant or ensure the presence of witnesses before a search. This differs from other laws, such as the Code of Criminal Procedure (CrPC), 1973, which contain such safeguards. These safeguards protect against harassment and planting of evidence.

The Act provides for confiscation of property upon a person being declared an FEO. This differs from other laws, such as CrPC, 1973, where confiscation is final two years after proclamation as absconder.

Justifications on Drawbacks:

Barring persons from filing or defending civil claims may violate Article 21

Under Clause 14, any court or tribunal may bar an FEO from filing or defending any civil claim before it. Further, the Act allows courts to bar a company from filing or defending any civil claim before it if the promoter, key managerial personnel (such as manager or CEO), or majority shareholder is an FEO. It may be argued that such a bar could violate Article 21 of the Constitution. Article 21 states that no person (or company) can be deprived of their right to life or personal liberty, except by law. Courts have interpreted this to include the right to access justice, which cannot be taken away. This right includes the availability of a forum which aggrieved persons may approach to seek legal remedy. The question is whether a bar on filing and defending claims would violate this right.

For instance, an individual who is declared an FEO may be involved in a marriage suit or inheritance dispute. Under Clause 14, courts are allowed to bar the individual from exercising his right to file or defend such a claim.



Further, there may be cases where an FEO is the majority shareholder of a company. In such cases, even though the company is a separate legal entity, it may be barred from filing or defending cases. For example, a company may be barred from filing a suit against a supplier of goods or from defending a case where tax dues are imposed on it. There may also be instances where creditors obtain court orders for repayment of loans against the company, without the company having an opportunity to present its defence. In all such cases, the interests of the remaining shareholders will not be protected owing to such a bar on companies.

Use of sale proceeds from confiscated property not specified

The Act specifies that an FEO's properties will be confiscated and vested in the central government, free of encumbrances (claims or rights in the property). The central government may dispose of the properties after 90 days. The Act does not specify how the central government will use the sale proceeds. That is, would the government be obliged to share the sale proceeds with persons who may have a claim against the FEO.

Under the Act, the Special Court may exempt certain properties from confiscation if a person shows his legitimate interest in these properties. For example, this may cover secured creditors who have claims against specific properties of the FEO. The Act does not require the confiscated properties to be used to settle dues of other claimants (for example, unsecured creditors or persons claiming unpaid wages). In contrast, the Insolvency and Bankruptcy Code, 2016 specifies that sale proceeds from the property of the defaulter will be distributed among all claimants according to an order of priority.[8]

Provisions related to search may not contain safeguards

Under the Act, authorities may search a person or premises on the belief that a person may be declared an FEO or has proceeds of crime. The Act allows a search to be conducted without a search warrant or witnesses. This differs from other laws, such as the Code of Criminal of Procedure (CrPC), 1973, which provide certain safeguards.

Section 94 of the CrPC, 1973 permits a search to be conducted only if a warrant has been issued by a Magistrate. Further, Section 100 requires the presence of two or more independent witnesses while authorities search premises. Typically, other laws such as the Prevention of Money-Laundering Act, 2002 and Securities and Exchange Board of India Act, 1992 follow these procedures specified in the CrPC, 1973 in case of a search. These safeguards seek to protect against instances of harassment of persons or cases where evidence may be planted against the accused.

Note that Rules have been notified under the Fugitive Economic Offenders Ordinance, 2018. These specify that the procedure under the CrPC, 1973 will apply in case of a search. It may be argued that procedural safeguards related to search should be specified in the law, instead of being notified by the government through delegated legislation.

Procedures under the Act similar to existing laws

The Act provides for provisional attachment of properties, and subsequent confiscation if a person is declared an FEO. This is similar to the CrPC, 1973, which also allows for attachment and confiscation of properties of absconders. Under the CrPC, 1973, the attached properties may be returned if the absconder appears within two years. This implies that properties will be finally confiscated only after two years of attachment. In contrast, under the Act, confiscation of properties will be final once a person is declared an FEO by the Special Court.

Most of the procedural aspects under the Act (with a few exceptions) are similar to existing laws such as the CrPC, 1973, and the Prevention of Money-Laundering Act (PMLA), 2002 (see Table 2).

Comparison of current laws with the Act

Provision	The Fugitive Economic Offenders Act, 2018	Current Laws
Absconding	A person may be declared an FEO if he leaves the country and refuses to return to face prosecution. He may be asked to appear at a specified place at least six weeks after notice.	CrPC: Section 82 allows a Court to issue a proclamation requiring a person evading a warrant to appear at a specified time and place at least 30 days after notice.
Attachment	A person’s property may be attached for 180 days. Attached properties may include those believed to be proceeds of crime and benami properties.	CrPC: Section 83 allows properties of absconders to be attached. PMLA: Section 8 allows attachment of properties which are proceeds of crime.
Confiscation or recovery	An FEO’s property may be confiscated and vested in the central government, free of encumbrances. The central government may dispose this property only after 90 days. The Special Court may exempt certain properties from confiscation where any other person has a genuine interest.	CrPC: Section 85 allows attached property to be sold by the state government after six months. It will have to return the property or proceeds if the absconder returns within two years. PMLA: Section 8 allows a person’s property to be confiscated upon conviction, or if trial cannot be concluded. Such property will be vested in the central government, free of encumbrances. SARFAESI: Under SARFAESI, creditors can take possession of collateral without court intervention.
Search and seizure	Authorities may search premises and persons on the belief that a person may be an FEO, or has proceeds of crime, among others. They may also seize documents. While searching a person, if the person requires, authorities may take him to a gazetted officer or a Magistrate, within 24 hours.	CrPC: Under Section 100, authorities may conduct a search. The search will have to be conducted in the presence of two witnesses, upon issuance of a search warrant. Provisions related to search under CrPC followed in other laws such as: (i) the PMLA, (ii) the Securities and Exchange Board of India Act, 1992, (iii) the Central Excise Act, 1944, (iv) the Companies Act, 2013, and (v) the Central Goods and Services Tax Act, 2017. PMLA: While searching a person, if he so requires, authorities may take him to a gazetted officer or a Magistrate, within 24 hours.

Contracting state	The Special Court may request a court or authority in a contracting state (countries with whom an agreement has been signed to enforce provisions of the law) to execute its confiscation order.	CrPC: Under Chapter VIIA, courts may request contracting states to execute their orders (where central government has entered into agreements with such countries). PMLA: Provisions under Chapter IX similar to CrPC. Extradition Act, 1962: Chapter IV allows for the extradition of an offender (accused or convicted) from a foreign country.
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Conclusion:

The Act is expected to re-establish the rule of law with respect to the fugitive economic offenders as they would be forced to return to India to face trial for scheduled offences (meaning list of economic offences appearing in the schedule to the Fugitive Economic Offenders Act). This would also help the banks and other financial institutions to achieve higher recovery from financial defaults committed by such fugitive economic offenders, improving the financial health of such institutions.

Court also declined to stay the proceeding against the offender under this particular Act. Of course there are certain defect in this act as already discuss above but there are similar problems in other Acts also.

In the Act there is provision for confiscation of property from abroad but how that confiscation is executed is not mention it was only stated that, if the property is in contracting State the Special Court issue the request to a Court or authority for execution. So there may be chance for offender that they will purchase the property in that country which is not Contracting State of Government of India. Since Central Government has power to the confiscated the property of within the territory of India, lots of property can be utilize.

India is Developing Country the economy of India is not very large so to the 100 crores amount is huge amount for India. Hence in the public interest it is necessary to instead of 100 crores there shall be 50 crores.

Regarding the procedure for attachment of property Act provides that in the interest of justice prior to declaration property can be confiscated so that the offender should not get chance to take away the property.

It is expected that the special forum to be created for expeditious confiscation of the proceeds of crime, in India or abroad, would coerce the fugitive to return to India to submit to the jurisdiction of Courts in India to face the law in respect of scheduled offences.

Suggestions:

1. A person is declared a fugitive economic offender (FEO) only when an arrest warrant has been issued against him for specified offences over Rs 50 crore and when he has left the country and refuses to return to face prosecution.
2. Central Government should make arrangement with large number of country so that maximum number of Country can be Contracting State so that maximum property can be confiscated from abroad also.
3. Since the offence is Socio-Economic offence so at International Level also, there shall be certain provision to prevent such practice. And for that purpose Government

of India should make an attempt to pass certain agreement at United Nation Organization so that all Country of world can make reciprocal arrangement for confiscation of property in anywhere in the World.

4. Extradition Treaty should be made with large number of State by Government of India.
5. Dispose the case with speedy trial so that object of Act should be fulfilled.
6. Special forum to be created for expeditious confiscation of the proceeds of crime, in India or abroad, would coerce the fugitive to return to India to submit to the jurisdiction of Courts in India to face the law in respect of scheduled offences.
7. Banking law should be made Coercive. And responsibility of executive should be made more stringent.

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