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NON-CONVICTION BASED ASSET FORFEITURE LAWS: An Appraisal of the Magic Bullet

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'NON-CONVICTION BASED ASSET FORFEITURE LAWS:

An Appraisal of the Magic Bullet

Sezal Rathore* & Saurabh Tiwari*

[Abstract: There have been growing concerns among the policy makers and regulators about the problem of exploitation of the corporate structure for certain illegal purposes like money laundering, illegal tax practice, market fraud, etc. This reflects upon the need to have a robust legal mechanism to obviate such acts by forfeiting the assets which are sometimes instruments or rewards of illegal acts. Due to the indispensable reliance of the existing legal mechanism on the conviction or at least trial and identification of an accused in order to proceed against the property, the existing mechanism turns toothless. Thus, the authors would dissect into the question concerning the need to have such a legislation which envisages the enactment of in rem asset forfeiture laws and how non-conviction-based asset forfeiture would augment the States capacity to retrieve the proceeds of crimes.]

I

Introduction

Criminal activity has increased manifold in recent years and along with it has grown the sophistication of the modus operandi, specifically, in cases of financial crimes.¹ The criminal forfeiture regime due to its innate inhibitions has so far proved ineffective to fight the new challenges. This paper would provide an insight into civil forfeiture and its need in the Indian milieu to counter the growing instances of crime. Civil forfeiture can be used to specifically target the financial gains from the crime, consequently depriving the criminals of the financial lifeblood of the crime and removing the incentives from crime, which in most cases propels the minds of the perpetrators.

Asset forfeiture means divesting a person of his illegally obtained assets by the State without providing any compensation. It is by no means a recent phenomenon and its roots can be traced back to the ancient civilisations. The

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¹ National Crime Records Bureau, *Crime in India 2018 Statistics Volume II*, available at - <https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%202.pdf> (last visited Feb. 20, 2020).

concept of asset forfeiture was initially brought in to help the victims family and dependants and at the same time, cast a punishment on the perpetrator.

In Greek, Roman law and the Old Testament, special forfeiture laws were enacted in order to exact a penalty against a property which was derived by unlawful means. Asset forfeiture branches out into two types, one is extensively pursued criminal forfeiture and the second branch is civil forfeiture. Criminal forfeiture is *in personam* in nature i.e. against the person. Civil forfeiture is an *in rem* proceeding i.e. action against the property itself. Civil forfeiture might look like a new-fangled anomaly but its genesis can be traced to the biblical Old Testament and medieval history. (Verse 28 of the 21st Chapter of Exodus requires that the owner of an ox be deprived of his rights of ownership where the ox gores someone to death.)

The second part of the paper defines criminal forfeiture, its features and analyses the existing Indian laws which though provide for forfeiture of a property, the same is dependent upon the conviction of the holder of the property. The analysis would cut through the specific provisions of the laws and would bring forth the inability of existing mechanism to deal with the ever-evolving crimes. In the third part the authors proffer an insight into the civil forfeiture regime and its benefit over traditional criminal forfeiture. The subsequent parts of the paper explore the possible challenges that the civil forfeiture faces in the Indian milieu and covers the authors' suggestions to resolve these issues. The final part will provide an issues list for policy makers and legislators to help them design a potent civil forfeiture regime in India.

II

Criminal Asset Forfeiture: Scrutiny of Indian Law

It is an *in personam* action against the defendant and constitutes the part of criminal charge.² It is based on the concept that once conviction is obtained then the illegally obtained proceeds of crime and the instrumentalities for the commission of crime are to be forfeited³. The precondition in order to criminally forfeit a property is that there has to be a conviction of the accused. It is imposed as a part of the sentence in a criminal case.⁴ Criminal forfeiture can be both object-based and value-based. Object based forfeiture denotes a concept in which the

² UNCAC Conference Edition, *Stolen Asset Recovery: Towards a Global Architecture for Asset Recovery*, available at: <http://star.worldbank.org/sites/star/files/GlobalArchitectureFinalwithCover.pdf> (last visited Jun. 24, 2020).

³ *Id.*

⁴ *Id.*

authority has to show that the property being forfeited is necessarily the proceed or instrumentality of crime while the value-based forfeiture implies a mechanism wherein the offender is required to forfeit the value of benefit accruing from the crime without proof of connection between the crime and the assets so being forfeited.⁵ The following section of the paper will enlist the existing laws in India and the reasons for their inefficiency in proceeding against illegally obtained property.

Prevention of Corruption Act, 1988: Section 29 of this Act discusses the amendment in Criminal Law Amendment Ordinance, 1944⁶ which deals with the punishment of forfeiture. This section provides that a person convicted for corruption shall be liable for punishment along with forfeiture of property derived from the misconduct of accepting illegal gratification. Forfeiture of property under this ordinance is dependent on the conviction of the person, hence is *in personam* in nature.

Criminal Law Amendment Ordinance, 1944: Section 13⁷ of the ordinance provides that the attached property could only be confiscated on the termination of the criminal proceeding where the accused has been convicted. It provides for a cumbersome process as the forfeiture is linked to the person and not the illegally acquired property, and the authorities have to discharge the burden of proof beyond reasonable doubt to proceed for forfeiture. These shortcomings and necessity of better forfeiture laws was discussed in the case of *Delhi Development Authority v. Skipper Construction Co. Ltd*⁸ pursuant to which various amendments were suggested by the 166th Law commission report,⁹ but these amendments have not seen the light of the day.

Lokpal and Lokayuktas Act, 2013: Under this act the Special Court can order confiscation of proceeds, assets, benefits and receipts, if on the basis of prima facie evidence the court is satisfied that the assets have been procured by corrupt activities. Nevertheless, the confiscation is subject to the final decision of conviction or acquittal of the accused.¹⁰

⁵ *Id*, page 30.

⁶ Clause(c), Sub-section(iii), Section 29 of the Prevention of Corruption Act, 1988 (No. 49 of 1988).

⁷ Section 13, Criminal Law Amendment Ordinance, 1944.

⁸ *Delhi Development Authority v. Skipper Construction* A.I.R. 1996 S.C. 2005, para 31.

⁹ Justice Jeevan Reddy, 166th Report on *The Corrupt Public Servants (Forfeiture of Property) Bill*, Law Commission of India, February 1999, D.O. No. 6(3) (52)/98-LC(LS).

¹⁰ Section 30(4), Lokpal and Lokayuktas Act, 2013 (No. 01 of 2014).

Smugglers and Foreign Exchange Manipulators Act, 1976: This Act has certain reflections of non-conviction based civil forfeiture as here the forfeiture is not dependant on the conviction of the accused. Herein, accusation of an illegally obtained property is an offence in itself and the burden of proving that the property is not acquired by illegal means is on the person accused. In *Delhi Development Authority v. Skipper Construction Co. Ltd.*,¹¹ it was held that this law provides deterrence to white collar crimes, and the author suggests enactment of similar effective laws for improvement of the forfeiture process in India.

Prevention of Money Laundering Act, 2002: Forfeiture of property under this act show cases a reflection of non-conviction-based asset forfeiture and has developed analogous to the international trend of illegal asset forfeiture. This act criminalizes acquisition of illegal assets and provides for independent attachment of asset without conviction, although the scope is limited to the scheduled offences under this act.¹² PMLA has the following shortcomings –

- There is no difference between the monies generated through serious and non-serious offences;
- The application of PMLA is limited to the 156 offences arising out of 28 acts that have been listed in the schedule attached to the Act.
- As per provisions of the Act, the confiscation of the attached property shall be contingent upon conviction of the accused. Thus, the predicate offence conviction requirement generates rudimentary problems when trying to forfeit the proceeds in absence of conviction, especially in the standalone cases of money laundering. This consequently acts as a roadblock in the international co-operation affecting capability to retrieve the illegal assets where the predicate offence has occurred outside the jurisdiction of India and the proceeds are accordingly laundered in India.
- Moreover, the attachment of properties of persons who cannot be prosecuted due to death, elopement or immunity is nothing but a mirage as the attachment would turn into confiscation only when the directorate would be able to satisfy the special court by placing relevant records to prove that the property was acquired as a result of proceeds of money laundering.

The existing legal mechanism in India is centred around criminal forfeiture and is battles therefore, with a number of shortcomings which are as follows –

- The higher standard of proof for conviction in criminal cases proves to be fatal in tracking and forfeiting the illegally obtained assets.

¹¹ *Supra* note 8, para 31.

¹² Section 8, Prevention of Money Laundering Act, 2002 (Act No. 15 of 2003).

- The forfeiture could be declared null or void if the illegal property is owned or acquired by a *bona fide* third party.¹³
- It is impossible where the defendant has eloped, is dead or is immune from prosecution.
- The criminal forfeiture regime provides for the action against the property only when the person with whom the property is connected is convicted.

But it is pertinent for us to understand that it is often impossible to track the leaders of the organized crimes and bring them to courts because the crimes are designed and mechanized keeping in view that only the foot soldiers come into picture whereas the real players stay away from the overt dimension of the crime. The criminal acts are innately designed in such a manner that the people who are in the grey area are replaceable foot soldiers. So what follows from the conviction of these replaceable foot soldiers is that the property which is attributable to their conviction miniscule and grossly dis-proportional to the gravity of the actual offense. Thus, what happens is that the smaller fish in the existing legal mechanism facilitates escape of the bigger fishes (the real perpetrators).

III

Civil Forfeiture

Civil forfeiture or non-conviction-based asset forfeiture is a recuperative statutory hack which is contrived to address the growing menace of crime and combat the increasing technological sophistication and advancement made by the perpetrators aiming to hide the trail of crimes and legitimize the proceeds. It has been devised to recover the proceeds of unlawful activities and the property used to facilitate the criminal act. Civil forfeiture denotes an *in rem* action, i.e. an action against the property in contrast with *in personam* actions which are actions against individuals. The nature of civil forfeiture being *in rem* is evident from the case nomenclature used in United States like *State v. the property*, e.g.; *State v. One Million USD*.

Civil forfeiture is completely distinct from criminal proceedings and can be initiated either prior to or during a criminal proceeding or post the culmination of the same, and accordingly it can be deduced that they are not dependent on conviction. The standard of proof on the state in civil forfeiture is of *preponderance*

¹³ UNCAC Conference Edition, *Stolen Asset Recovery: Towards a Global Architecture for Asset Recovery*, available at – <http://star.worldbank.org/sites/star/files/GlobalArchitectureFinalwithCover.pdf>, page 15.

(*balance*) of probabilities which is much easier to dispense.¹⁴ Moreover, the burden of proof is on the defendant. The defendant will have to come to the Court and prove that his property is untainted, thus, relieving the prosecution from the herculean task of proving the guilt beyond reasonable doubt.

In case where the provenance of the property lies in unlawful activities or the property has been used as an instrumentality and the court is satisfied of the same, the property is confiscated. Property law professes the rule that the property should never go in abeyance and civil forfeiture takes care of this perspective by transferring the title to the state, as confiscation itself denotes the transfer of title of property to the state.

Civil forfeiture takes the illegally obtained property out of the possession of the perpetrators and combats criminal activities on multiple fronts:

- Preventing the use of such property as a working capital for the future crimes.
- Helping the state to disrupt the criminal networks and break the backbone of financing of such criminal acts by confiscating the financial lifeblood of the acts.
- Taking away the trophies of the crimes from the perpetrators of the act and ensuring that the gains from illegal activity do not devolve in the hands of those who commit the same.
- Establishing confidence in fair and effective legal system.
- Putting up a message in the society that crime does not pay, and removing the negative role models from the community.
- Disrupting criminal networks and markets, impacting thereby, the volume of crimes.
- Using the proceeds to compensate the victims and use the sum for the betterment of the society.
- Dispensing with the need of catching the big fish in order to forfeit a major chunk of the proceeds of crime,

In the case of *Biswanath Bhattacharya v. Union of India*¹⁵ the concept of civil forfeiture was discussed in the following words:

'Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime.'

¹⁴ UNCAC Conference Edition, *Stolen Asset Recovery: Towards a Global Architecture for Asset Recovery*, available at – <http://star.worldbank.org/sites/star/files/GlobalArchitectureFinalwithCover.pdf> page 14 (last visited Feb. 20, 2020).

¹⁵ *Biswanath Bhattacharya v. Union of India*, (2014 (301) ELT 593 S.C.), para 42.

Thus, the civil forfeiture laws are both reparative and preventive and provide the state with a new equipage to tackle the assets which are currently beyond the reach of law.

IV

Feature of Civil Forfeiture in Comparison with Criminal Asset Forfeiture

Action *in rem*: Civil forfeiture encompasses an *in rem* action i.e. it is not against the person but against the property. The cause can arise before, during or after conviction or even where there is no conviction or a criminal charge against the person.¹⁶ The state only has to demonstrate that the asset in demurral is tainted which in comparison to criminal forfeiture requires a lower standard of proof like preponderance of evidence or balance of probabilities.¹⁷

Charge against property: It imparts a separate personality and guilt in wrong to the property.¹⁸ For instance in the case of *US v. One 6.5mm Mainlicher-Carcano Military Rifle*¹⁹, charge was brought against the rifle which was used for the assassination of President John. F. Kennedy, as a result of which the rifle was forfeited by the State. Moreover, the burden of proving the 'innocence' of the property shifts to the person claiming the property.

Inability to prosecute: Civil forfeiture comes to the rescue in situations where prosecution is not expedient, for instance cases where the defendant cannot be prosecuted because of death, immunity from prosecution, or fleeing the country. By civil forfeiture, this inability to prosecute would not hinder the legal mechanisms aimed at recovering the proceeds of crimes like corruption, money laundering etc.

Weapon against Kleptocracy: Official or diplomatic immunity does not provide a shield against the assets liable to civil forfeiture. In the same vein, official or diplomatic immunity, though generally recognised as a shield from criminal prosecution, should not constitute a shield from recovery of corruptly-acquired assets. Thus, civil forfeiture law rules out immunity for assets liable to forfeiture. Civil forfeiture should also be available where prosecution is unsuccessful. Such

¹⁶ T.S. Greenberg et. al., *STOLEN ASSET RECOVERY: A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE* (2009).

¹⁷ S.D. Cassella, *An Overview of Asset Forfeiture in the United States* in *CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME* 23-51 (S.M.N. Young ed., 2009).

¹⁸ *US v. One 6.5mm Mainlicher-Carcano Military Rifle*, 250 F.Supp.410 (N.D Tx.1966).

as cases where the defendant has been acquitted or cannot be prosecuted due to insufficient evidence to sustain a conviction.

Wider scope: Civil forfeiture is not constrained to a particular transaction as actions could be brought against any property which is derived from a scheme of criminal activity.

Retrospective application: As civil forfeiture actions are civil in nature, there could be retrospective application of the same.

	Criminal Forfeiture	Civil Forfeiture
Type of action	As a part of the criminal charge <i>in personam</i> (against the person)	Government files a judicial action against the thing (<i>in rem</i>)
Proof of an unlawful conduct	There must be a criminal conviction and the unlawful conduct must be established beyond reasonable doubt.	No requirement of criminal conviction; the unlawful conduct must be established on the basis of balance of probabilities.
Situations where it can be done	It is imposed as part of a sentence	It can be imposed before, during, and after a criminal trial or even where there is no criminal charge against the person.
Forfeiture	The interest of the owner in the property is forfeited	The thing is forfeited subject to innocent owners
Link between the unlawful proceeds and the unlawful conduct.	Value-based, Object-based	Object-based

V

Possible Areas of Conflict for Civil Forfeiture in Indian Regime

Civil forfeiture is a relatively, new concept in India, and introducing it in India could cause numerous clashes between the existing laws and principles. In this section the authors aim to discuss the predictable clashes which civil forfeiture could face in India and their possible remedies.

Civil Forfeiture and the Constitution

Acts of corruption, money laundering, drug trafficking, for the most part, constitute matters to which criminal laws apply. The laws prescribe compliances of due process in judicial proceedings to shield the accused person from the retributive scourge of criminal penalty until determination of guilt. By the interpretation of Article 14 and 21 of the Indian Constitution, the Supreme Court has also incorporated the principle of due process in the Constitution of India.²⁰ The underlying rationale behind importing the due process into Indian jurisprudence by the apex court stems from the fact that in justice administration, society places upon itself the entire risk of error, thus the state is required to prove its case against the accused beyond a reasonable doubt.²¹ The rights which are often impugned in civil forfeiture proceedings include the right to be presumed innocent, and the right to property (Article 300 A).

Presumption of Innocence

Problem: Civil forfeiture is based on the premise that a property is guilty unless proven otherwise by the claimant, such an approach is contradictory to the right to be presumed innocent²² which is considered to be a human right and finds mention in various international declarations.²³ Civil forfeiture which is ludicrously referred by some as 'criminal forfeiture dressed up in sheep's clothing'²⁴ is an anomalous process which applies the standard of proof of a civil proceeding to the matters which are criminal in nature. It goes a step further and

²⁰ T.R. Andhyarujina, *The Evolution of Due Process of Law by the Supreme Court* in B. N Kripal et.al. (eds.), *SUPREME BUT NOT INFALLIBLE* 193 (2011).

²¹ *State Of U.P v. Krishna Gopal & Anr.*, 1988 AIR 2154, para –26.

²² S.N.M. Young, *CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME* 4 (2009).

²³ Article 11 of the Universal Declaration of Human Rights (1948); Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

²⁴ *Supra* note 22.

whittles down the standard of proof to balance of probabilities, which is less onerous from the proof beyond reasonable doubt adopted in criminal proceedings.²⁵ It also reverses the burden of proof because in order to lay claim on the tainted asset the person has to prove the innocence of the property i.e. that the property is not acquired by criminal proceeds.

Solution: The presumption deployed by the civil forfeiture regime is a rebuttable one and the claimant must be permitted to offer a reasonable or credible explanation to rebut the presumption.²⁶ Moreover, if the enacting state opts for a restrictively worded, rebuttable, and reasonable presumption, then there is not necessarily a violation.²⁷ However, with the increasing rate at which corruption and other transnational offences are executed and with the proliferating adroitness of techniques adopted to conceal criminally acquired funds and discourage attempts at criminal proceedings, it is indispensable to render laws enforceable by relying on circumstantial evidence.²⁸ Thus, the Indian legislators should endeavour to strike a balance between the defendant's right to fair trial which includes right to fair hearing and States aim to combat illegal practices.

Property Rights under Article 31(a) and 300 A.

Problem: It is argued that civil forfeiture puts the claimant in a lamentable situation in relation to his or her property rights. The property of the claimant is forfeited even without giving him a proper hearing coupled with the fact that the forfeiture only requires probable cause to believe that the property is derived from illegal activities. Moreover, the forfeiture of the property is at times egregiously disproportionate to the crime that might be proved. Consequently, civil forfeiture imposes an indirect punishment on the claimant which is often inordinate with respect to the act. Civil forfeiture also takes into its ambit owners of the property who are in no way involved in the illegal activity. A factual scenario has been discussed herein under to elaborate the abovementioned points.

Solution: Innocent Owner Defence could be incorporated to provide a solution. This defence allows the owner of the property to block the forfeiture of his assets,

²⁵ A Kennedy, *Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators* 13(2) J. OF FIN. CRIM. 139 (2009).

²⁶ UNCAC Conference Edition, *Stolen Asset Recovery: Towards a Global Architecture for Asset Recovery*, available at: <http://star.worldbank.org/sites/star/files/GlobalArchitectureFinalwithCover.pdf>, pages 60-61 (last visited Feb. 20, 2020).

²⁷ *Salabiaku v. France* (1998) 13 EHRR 379, para: 27.

²⁸ Jayawickrama, N., *Legal provisions to facilitate the gathering of evidence in corruption cases: Easing the burden of proof* (2002), available at: http://www.unodc.org/pdf/crime/publications/legal_provisions.pdf. (last visited May 11, 2020).

if he can show that his property was used without his consent and knowledge. Herein, the owner bears the burden of proof to claim his property as untainted. The defence is to be specifically allowed by the enacting state in its legislation for asset forfeiture. It is pertinent to note here that the authors have proffered that in the proposed legislation in India, the innocent owner defence is to be set at a higher degree of threshold in which both knowledge and consent are conjunctive. This approach is in line with the idea of moulding the forfeiture laws to invigorate property owners to take greater care in how they allow their property to be used by others and has considerable appeal to the public policy of the State. Further, the authors propose a preventive provision for the person affected by the order of forfeiture and the Court should be given discretion to exclude certain interest in property, where with the help of balance of probabilities the court is convinced that the person did not know or had a reasonable ground to know that the property is acquired illegally or is an instrumentality of unlawful activity. Consequently, giving the courts the requisite discretionary space to do justice with owners who though are innocent, do not fulfil the conjunctive test.

Relationship between Proceedings in Criminal and Civil Forfeiture

There are various instances where civil forfeiture may coincide with criminal forfeiture proceedings; in such situations it is up to the state to decide the relationship between the two.²⁹ The law might prescribe criminal forfeiture proceeding as the standard response, with civil forfeiture initiated only where it is impossible to proceed with criminal forfeiture.³⁰ As an alternative, the law may prescribe for parallel or simultaneous application of both procedures.³¹

There are pros and cons of all of these approaches³² in circumstances where;

Criminal proceedings are concluded first: In such a situation no civil remedies could be obtained until the criminal case is concluded. Further, no protection on ground of self-incrimination could be claimed by the defendant in respect of the evidence which has already been disclosed during the criminal proceeding. However, considering the long average litigation period in criminal cases in India, there is a likelihood that the cases which extend for long would deprive the claimant of his property and he has to either wait for the criminal proceedings to conclude to claim it back or take up the possibility of self-incrimination.

Civil proceedings are concluded first: Since a lower standard of proof is required during proceedings for civil forfeiture, the defendant could waive his right of self-

²⁹ T.S. Greenberg, *STOLEN ASSET RECOVERY: A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE* 62 (2009).

³⁰ *Id.*

³¹ D.R. Edgeworth, *ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS* 168-170 (2004).

³² *Id.*

incrimination in a bid to defend himself in the civil proceeding. Also, because the information derived from the civil proceeding can be used in subsequent criminal proceeding.

Conducting both proceedings concurrently: This process adversely affects the defendant's right against self-incrimination.³³ The defendant is discouraged from vigorously pursuing the civil proceeding as the information could be used in parallel criminal proceeding against him.

The detailed analysis of the problems arising from the two different proceedings is as follows:

Self-incrimination

Problem: Article 20(3) of the Constitution of India deals with the protection against self-incrimination in India. There have been various instances where the NCB (non-conviction based) asset forfeiture procedure has been challenged as being violative of a person's right against self-incrimination. These situations arise in parallel proceedings where 'absent some protections, there is a risk that an accused asset owner may be precluded from challenging the NCB asset forfeiture action for fear of incriminating himself, or would use discovery in the NCB asset forfeiture case to obtain information that would then be used to prejudice the criminal prosecution'.³⁴

Solution: To strike a balance between the rights of the claimant and that of the prosecution the authors suggest that the proceedings should be run simultaneously and if either the government or the claimant feels that the simultaneous proceedings would adversely affect their case or their witnesses then they can raise their concern before the Court. The Court on being satisfied that the simultaneous proceedings would be detrimental to either of the parties, may stay the civil proceedings.

Double Jeopardy

Problem: Article 20(2) of the Constitution of India provides for protection against double jeopardy, in NCB asset forfeiture. This problem arises due to concurrent civil and criminal proceedings arising from the same cause. If the government initiates a civil forfeiture proceeding and later forfeits the illegal property by winning the case, then the double jeopardy law may bar any subsequent criminal proceeding. Again, if the criminal proceeding is initiated then the civil proceeding will be barred by law, making it impossible to recover the property in cases where the person is acquitted.

³³ R. McDougall, *The Privilege against Self-incrimination: A Time for Re-assessment*, available at <http://www.lawlink/.../ll.../mcdougall181008.pdf>. (last visited Feb. 20, 2020).

³⁴ T.S. Greenberg, *STOLEN ASSET RECOVERY: A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE* 62 (2009).

Solution: According to *United States v. Ursery* which reviews civil forfeiture in the light of double jeopardy law, *in rem* forfeiture are remedial civil sanctions, which are distinct from punitive *in personam* penalties such as fines, etc and do not constitute as punishment.³⁵ Further, according to *Walsh v. Director of the Assets Recovery Agency*,³⁶ the Northern Ireland Court of Appeal, 'the primary purpose is to recover proceeds of crime; it is not to punish the appellant in the sense normally entailed in a criminal sanction. 'Moreover, if both the proceedings are pursued concurrently then it could also be termed as a 'single, coordinated proceeding'.³⁷

VI

International Cooperation and Civil Forfeiture

International cooperation is facilitated through multilateral conventions or agreements, bilateral treaties, and domestic legislations. However, in many jurisdictions where civil asset recovery is not practiced, international co-operation becomes a tedious and lengthy process as higher standard of proof is required and there are no international treaties providing assistance for such civil investigations. International cooperation is indispensable in civil forfeiture cases where a victim country desires to recover the illegal assets found outside its territory. In such circumstances instead of bringing a private civil proceeding in another State,³⁸ mutual legal assistance could be adopted which provides for investigation, restraint and enforcement of confiscation orders obtained in the victim country.³⁹

In recent years, a number of multilateral and bilateral treaties have been concluded which provide for obligation on the states to grant mutual legal assistance, asset sharing, forfeiture and opening of unified front for international fight against crime. Some of which are; United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; United Nations Convention against Transnational Organized Crime (2000); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005); Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention) (1990). The only international instrument which contains

³⁵ *United States v. Ursery*, 518 U.S. 267, 278 (1996), para – 518.

³⁶ *Walsh v. Director of the Assets Recovery Agency*, [2005] N.I.C.A. 6 (Northern Ireland Court of Appeal) at para. 39.

³⁷ *United States v. Millan*, 2 F.3d 17, 18 (2d Cir. 1993), para – 20.

³⁸ K. Chamberlain, *Recovering the Proceeds of Corruption*, 6(2) JOURNAL OF MONEY LAUNDERING CONTROL 158, (2002).

³⁹ *Id.*

specific provision for non-conviction based asset forfeiture is the United Nations Convention against Corruption (UNCAC). It provides unprecedented obligations on the state to provide international coactions and financial assistance in criminal matters. UNCAC in Article 54(1)(c) provides:

‘Each state party...in accordance with its domestic laws...Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases’.⁴⁰

Thus, this UN instrument casts an obligation on the state parties to provide broad manoeuvring space and encompass in the broadly worded provision of article 54 the monetary forfeiture judgments and NCB orders. Quoted here in after, is the relevant paragraph of the *travaux préparatoires* providing for the wide ambit of interpretation- ‘this article may be interpreted broadly, as including monetary confiscation judgements, but should not be read as requiring enforcement of an order issued by a court that does not have criminal jurisdiction’.⁴¹

Enacting a domestic law providing for civil forfeiture would also be in line with the StAR (Stolen Asset Recovery) initiative, a joint programme of World Bank in collaboration with the United Nations Office on Drugs and Crime (UNODC). The StAR initiative exhorts the nations across the globe to ratify the UNCAC and implement the framework and idea provided for in UNCAC, in particular on international asset recovery, building the technical capacity of a state to facilitate recovery of assets by the victim state and cause deterrence by demolishing the havens of corruption.

VII

Conclusion and Recommendations

Justice P. Santharam has rightly said that, ‘in the last few years, the country has been seeing an alarming rise in white-collar crimes, which has affected the fibre of the countrys economic structure. Incontrovertibly, economic offences have serious repercussions on the development of the country as a whole’.⁴² Recovery of assets has become a pre-eminent tool in the battle against financial crimes. It helps in meliorating the effects of such crimes. These recovered assets could succour in various development projects which might improve the living conditions of the people of India. Moreover, a sure-fire

⁴⁰ Article 54, *United Nations Convention against Corruption*, UNGA Res. 58/4 (31 Oct., 2003).

⁴¹ *Id.*, para 57.

⁴² *Nimmagadda Prasad v. C.B.I.*, (2013) 7 S.C.C. 466, para 25.

asset recovery procedure might act as a deterrent and will demonstrate that no one, no matter how privileged or powerful he or she is, will benefit from his or her crime.

Modern times have observed a conspicuous increase in the count of jurisdictions that have been legislating to permit civil forfeiture for illegally-acquired assets. These legislations have benefited the jurisdictions in strengthening their asset recovery regime. Civil forfeiture should not replace criminal forfeiture but it could be considered as a suitable response to issues where criminal forfeiture is not possible or is not fruitful. India should take advantage of the experience of various countries like UK, US and South Africa to accelerate its efforts in fighting financial crimes. The following are the lessons from various jurisdictions and recommendations which could help in smooth functioning of legislation which could be enacted in India.

Recommendations: Designing a Non-Conviction Based Forfeiture System

Post the enactment of civil forfeiture laws in a country the arena for its misuse by the law enforcement agencies for their personal use and to harass innocent people increases and hence, we need to devise sufficient safeguards to prevent such misuse in India. The following suggestions are provided by the author for the proper functioning of the civil forfeiture legislation.

Allocation of property: One of the primary problems is that if the law enforcement agencies are allowed to use the property forfeited for their own use, then this gives them an incentive to pick and choose as per their needs and using the wide ambit provided can cause great damage. A leading example of such scenario is the US Comprehensive Forfeiture Act of 1984. Section 881 of this Code allows the law enforcement agencies to forfeit objects and retain them for their own use.⁴³ A forfeited lorry, for example, can be used by concerned officers. This eccentric provision provided the police officers a *douceur* and resulted in an outburst of civil forfeiture actions. India, in order to counter such misuse, can put up procedural safeguards such as the confiscating authority would have to satisfy a nearest magistrate that he has reasonable grounds to forfeit the property within a specified time period of forfeiting the asset. Additionally, to prevent such a scenario from developing in India, the legislature can provide for the allocation of the property so forfeited to be provided to the custody of a judicial authority unlike in the custody of law enforcement agency and the property is to be used only for the purposes which the judicial authority proscribes.

⁴³ Section 881, the US Comprehensive Forfeiture Act of 1984.

Special Body: The proposed legislation for civil forfeiture needs to specify the authority that is to be responsible for conducting investigation, forfeiture and legal proceedings to defend the forfeiture. There are two options available for the Indian legislature- either to give the asset forfeiture function to an existing authority which already has existing functions or to create a special agency with civil forfeiture as its primary function. Taking cue from the approach of the UK⁴⁴ and Ireland⁴⁵ governments which have formed special agencies which are solely related to asset recovery, India can establish such an agency which would not only allow the existing law enforcement agencies to focus on existing responsibilities but would also streamline the process of asset recovery, provide for accountability and consequently reduce misuse of the regime.

Threshold Limit: Minimum threshold should be incorporated in civil forfeiture proceedings, as the aim of civil forfeiture is to curtail crime by attacking the profit motive and obstructing the organised crime network, hence the provision should be designed to target cases where large sums of money are involved and not be engulfed into the caseload of trivial issues. Such a procedure is followed in various jurisdictions like the UK⁴⁶ and Ireland⁴⁷, where a minimum threshold value of £10,000 should be attained in order to bring any civil forfeiture proceeding against the property. Similar threshold can be provided in the Indian milieu.

Judicial discretion: The amount of judicial discretion in civil forfeiture proceedings may have a significant impact on the application of the legislation. The Courts could be given power to refuse the forfeiture order if it finds that the order is against the interest of justice (British Columbian Model⁴⁸ and Ontarian Model⁴⁹) or there is a serious risk of injustice (Irish Model⁵⁰). Moreover, certain guidelines could be laid down for the courts, for instance in the UK model⁵¹, the forfeiture could be disallowed by the courts if it is found that firstly, the property was acquired in good faith. Secondly, that the person took certain steps after acquiring it which he or she would not otherwise have taken. Thirdly, when he

⁴⁴ See, Section 1, the Proceeds of Crime Act, 2002.

⁴⁵ See, Section 3, Criminal Assets Bureau Act, 1996.

⁴⁶ See, Section 287, Proceeds of Crime Act 2002; (Financial Threshold for Civil Recovery) Order 2003 (SI2003/175).

⁴⁷ See, Sections 2 & 3, Proceeds of Crime Act 1996 (Ireland).

⁴⁸ See, section 6, Civil Forfeiture Act, Bill 13 - 2M) 5 (British Columbia).

⁴⁹ See, section 8(1), Remedies for Organized Crime and Other Unlawful Activities Act 2001, (Ontario) .

⁵⁰ See, section 4(8), Proceeds of Crime Act 1996 (Ireland).

⁵¹ See, section 266, Proceeds of Crime Act 2002 (UK).

did so, he had no knowledge of the fact that the property was recoverable. Fourthly, the steps that he or she took made the recovery order detrimental.

Retrospective Application: The model may depend on what forfeiture laws provide about the proceedings instituted in respect of the property obtained before the legislation came into force, and whether there is a statute of limitation on civil proceedings. The author suggests that there should be provisions for retrospective application of the civil forfeiture laws. There are several models (Manitoba model⁵², Irish model,⁵³ Australian model,⁵⁴ Saskatchewan model,⁵⁵ etc.) that provide for retrospective application and some of these models focus on the time when the certain illegal activity gave rise to the attainment of the impugned property while some are more concerned about when the property was obtained. The retrospective application will not be violative of Article 20(1) of the Indian Constitution and Article 11(b) of the Universal Declaration of Human Rights as the forfeiture can be compared to the civil law restitution of unjust enrichment.⁵⁶ In many cases the courts have held that it is not violative of the rule as it is not penal or criminal but 'a civil law consequence of the fact that a perpetrator or other beneficiaries had obtained assets from an unlawful act'.⁵⁷ Further, the claimant never had vested right in the property as his or her conduct was always criminal in nature⁵⁸ and the person should not be allowed to benefit from his illegal act.⁵⁹

Tracing, Following, and Linking

The authors suggest that the legislation should be competent of dealing with the illegal proceeds which have been transferred, changed in form or have been mixed with other assets by the process of money laundering.⁶⁰ The legislation could be similar to the Commonwealth model which provides that a property is liable for forfeiture if it is directly or indirectly derived from an offence and is later opportunely intermingled, converted or transformed or is an economic gain,

⁵² See, section 2, Criminal Property Forfeiture Act 2004 (Manitoba).

⁵³ See, supra note 47.

⁵⁴ See, section 15, Proceeds of Crime Act 2002 (Australia).

⁵⁵ See, section 2, Seizure of Criminal Property Act 2005 (Saskatchewan).

⁵⁶ *Dassa Foundation v. Liechtenstein*, E.C.H.R. Appl. no. 696/05 (2007).

⁵⁷ T.S. Greenberg, *STOLEN ASSET RECOVERY: A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE*, Washington D.C: The International Bank for Reconstruction and Development World Bank.

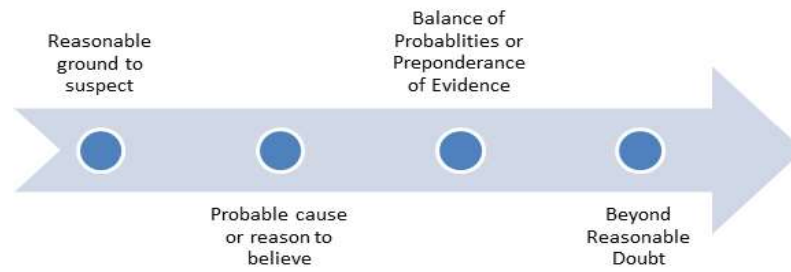
⁵⁸ *United States v. Certain Funds Located at the Hong Kong and Shanghai Banking Corp.*, 96 E. 3d.20, 25-27 (2nd Cir. 1996), para -25-27.

⁵⁹ T.S. Greenberg, *STOLEN ASSET RECOVERY: A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE* (2009).

⁶⁰ A. Kennedy, *Designing a Civil Forfeiture System: An Issues List for Policymakers and Legislators* 13(2) JOURNAL OF FINANCIAL CRIME 132-163 (2006).

capital or income derived from such property at any instance since the unlawful activity.⁶¹

Standard of proof



The standard of proof for forfeiture differs from one country to another. It is suggested that India should follow the trail of various jurisdictions which provide for standard of proof of probable cause or reasonable grounds to believe in cases of initial restraint and asset seizure (the same standard used in issuance of search and arrest warrant) and higher standard of balance of probabilities in case of actual forfeiture. The authors suggest the application of balance of probabilities in order to ease the burden of proof for the government. Also, as such forfeiture is civil and not criminal in nature, hence, the standard of proof of civil proceedings should be applied.

⁶¹ See, Section 3, Commonwealth Model Legislative Provisions on the Civil Recovery of Criminal Assets Including Terrorist Property, 2016.