

Applicability of Legislations Criminalizing Economic Offences to the Cases of Trafficking in Persons for Commercial Sexual Exploitation.

Sunandini

PhD Scholar, Dharmashastra National Law University, Jabalpur

Abstract:

The paper analyses the current legislation regarding Economic Offences in Maharashtra, namely Maharashtra Control of Organized Crime Act, 1999, Prevention of Money Laundering (Amendment) Act, 2012 and the possibility of charging the accused for Commercial Sexual Exploitation of trafficked under economic offences. The paper establishes the scope of applicability of Economic Offences to plug the gap of prosecution and smooth functioning of the Criminal Justice System.

Keywords: Human Trafficking, Commercial Sexual Exploitation, Organised Crime, Economic Offences

INTRODUCTION

Trafficking in Persons is the heinous crime of the 21st century. The covert and multifaceted crime is one of the largest profit soaring industries of the world. Majority of the victims, approximately 70% are women and children. The estimates for the industry is around 150 billion dollars in a year. The systematic conditions which lead to the crime of Human Trafficking majorly include poverty, unemployment and other social conditions. Majority of the victims fall in the trap of the perpetrators with fake promises of better jobs or living conditions. The trafficking is done for multiple purposes which include Commercial Sexual Exploitation, Forced Labour, Bonded Labour etc. In the present terminology it is stated as Modern-Day Slavery. As it is difficult to trace the profits, the estimation says 99 billion is the profit earned by sexual exploitation and the rest is divided between construction workers, agriculture labourers, domestic work etc. The trafficking done for organ trafficking is altogether a different arena. The Global Slavery Index reveals that in the year 2021 approximately 50 million people were engulfed in Modern Day Slavery. "India is a source, destination, and transit country for men, women, and children subjected to forced labor and sex trafficking."¹ It is estimated that around 6 to 8 lakhs of women are subjected to Human Trafficking to foreign country.² The number does not intra country trafficking. One of the prominent writes mentioned,

1. "2016 Trafficking in Persons Report", at 199, Office to monitor and combat trafficking in persons, retrieved from www.state.gov/documents/organization/258879.pdf

2. Retrieved from: https://loksabhadocs.nic.in/Refinput/New_Reference_Notes/English/Human%20trafficking%20in%20india.pdf

“The red light district in Bombay generates at least \$400 million per annum in revenue, with 1,00,000 prostitutes serving 365 days a year, at the average rate of 6 customers per day at \$2 each.”³

As per the NCRB report of 2021, a total of 1714 cases were registered under IPC against Human Trafficking. The crime operates in an organized manner hence the need of the hour is to tackle the same with that lens. Organisation for Security and Co-operation in Europe (OSCE) states that: “[f]inancial investigations should be an integral part of a human trafficking investigation. Huge sums of money generated through the exploitation of trafficked persons can be either reinvested in the trafficking business or in the legitimate economy. Financial investigations will help trace the links and contacts that traffickers have with the underworld, identify which underworld branches are most at risk and which companies collude with traffickers. Financial intelligence units with the necessary expertise should investigate money laundering practices. Following the identification of investments generated through illicit activities, governments should initiate steps to seize and confiscate assets. Measure should be implemented to compensate victims of trafficking and exploitation – a measure which, in addition to others, serves to decrease the profits generated through illicit activities.”⁴

Economic Offences

Malimath Committee defined “Economic Crimes” as, “an illegal act (or set of acts) generally committed through misrepresentation or outright deception by an individual or a group with specialized skills, whether professional or technical with a view to achieve illegal, financial gain, individually or collectively.”⁵ The NCRB has categorised counterfeiting of currency, hawala money transaction, money laundering, counterfeiting of securities and smuggling of narcotics as economic offences⁶ A number of laws enforced by the respective departments dealing with above mentioned crimes have already enforced special laws and there are relevant statutory provisions which are passed on regular basis.⁷

Indian laws have attempted to provide for economic offences under the Indian Penal Code (IPC) which deals with basic offences such as cheating, counterfeiting, breach of trust, fraud.⁸ But the fact that as these crimes were taken to new dimensions led to passing of specific laws, such as the Prevention of Money Laundering (Amendment) Act 2012, & Rules (PMLA). In order to fight organized crime, the Maharashtra State has entered into force the Maharashtra Control of Organized Crime Act, 1999 (MCOCA) was also passed.

3. Robert I. Friedman, “*India’s Shame: Sexual Slavery and Political Corruption leading to an AIDS catastrophe*”, The Nation, 8th April 1996, retrieved from: <https://www.mtholyoke.edu/~singh23a/classweb/wp/page3.html>
4. OSCE, “*Analysing the business model of trafficking in human beings to better prevent the crime*”, retrieved from <http://www.osce.org/cthb/69028?download=true>, at 72
5. “*Committee on Reforms of Criminal Justice System*”, Government of India, Ministry of Home Affairs Report, vol. I, March 2003, at 233
6. Retrieved from : <http://ncrb.nic.in/StatPublications/CII/CII2014/chapters/Chapter%209.pdf>
7. *ibid*
8. Indian Penal Code 1860, Chapter XVII

Prevention of Money Laundering (Amendment) Act, 2012 (PMLA) defines offence of Money-Laundering under Section 3⁹, as any activity connected with the ‘proceeds of crime’¹⁰, which in turn is defined as any property (or value of such property) derived directly or indirectly as a result of criminal activity relating to a ‘scheduled offence’¹¹.

In *State vs. Vipin Sharma*¹², “[i]t was highlighted that the object of MCOCA is fundamentally to curb the organized crime only when it is a serious threat to the society. (...) The illegal wealth accumulated due to these activities has a serious adverse effect on the economic fabric of the country.”¹³ The Court quotes *Ranitsing Brahmajeetsing Sharma vs. State of Maharashtra*¹⁴ in stating that “[t]here are offences and offences under the Indian Penal Code and other penal statutes providing for punishment of three years or more and in relation to such offences more than one chargesheet may be filed.” Furthermore, the Court also quotes *State of Maharashtra & Ors. Vs. Lalit Somdatta Nagpal & Anr*¹⁵ clarifying that “the offence under MCOCA must comprise continuing unlawful activity relating to organized crime undertaken by an individual singly or jointly (...) with the objective of gaining pecuniary benefits or gaining undue economic or other advantage for himself or for any other person (...) [the accused] have been shown to have been involved in several cases of a similar nature which are pending trial or are under investigation.”

9. **Prevention of Money Laundering (Amendment Act) 2012 (PMLA 2012), S.3** “*Offence of money-laundering.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming]* it as untainted property shall be guilty of offence of money-laundering.*”

Subs. by Act 2 of 2013, sec. 3, for “with the proceeds of crime and projecting” (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013)

10. PMLA 2012, S.2(1)(u) “Proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property. Retrieved from: http://www.enforcementdirectorater.gov.in/faqs_on_pmla.pdf, at 9

11. The offences listed in the Schedule to the Prevention of Money Laundering Act, 2002 are scheduled offences in terms of Section 2(1)(y) of the Act. The scheduled offences are divided into two parts - Part A & Part C.

Prior to 15th February, 2013, i.e., the date of notification of the amendments carried out in PMLA, the Schedule also had Part B for scheduled offences where the monetary threshold of rupees thirty lakhs was relevant for initiating investigations for the offence of money laundering. However, all these scheduled offences, hitherto in Part B of the Schedule, have now been included in Part A of Schedule w.e.f 15.02.2013. Consequently, there is no monetary threshold to initiate investigations under PMLA. Retrieved from: http://www.enforcementdirectorater.gov.in/faqs_on_pmla.pdf at 9-10

12. *State vs. Vipin Sharma*, High Court of Delhi, CrI. A. 484/2012, decided on 24/07/2014, MANU/DE/1706/2014

13. *Ibid*, at 2, para. 4

14. *Ranitsing Brahmajeetsing Sharma vs. State of Maharashtra*, MANU/SC/0268/2005: 2005(2) JCC 689, at para. 32

15. *State of Maharashtra & Ors. Vs. Lalit Somdatta Nagpal & Anr.*, MANU/SC/7094/2007: (2007)2 SCC (CrI.) 241, at para. 241

With shifting trends in the nature of crimes, the approach must be reoriented not only with the change in the legislative framework, but also in the broader regulatory framework, which includes processes, classifications, and punitive measures. Amendments to the Penal, Procedural and Evidence Laws would not only suffice. We need to have inculcation of provisions in the proposed bill of Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021 might solve the issue. It is already noted that in the proposed Bhartiya Nyaya Sanhita 2023 categorizes trafficking rackets for prostitution as organized crime.¹⁶ This could be a game changer in the functioning of the trafficking jurisprudence.

Sex Trafficking as an Economic Offence

Human Trafficking is a profit-driven industry that relies significantly on access to financial institutions. According to the United Nations, Trafficking of Human Beings is the fastest growing network for the income for the organized crime groups after drug and arms trafficking.¹⁷ Preventing human traffickers to hold on to this profit would disrupt the flow of finances in their trade and significantly compromise their functioning, hence, in the long-term, reduce the scale of human trafficking operations.

With India at its centre, South Asia is one of the fastest-growing regions for human trafficking in the world.¹⁸ Every year, traffickers lure thousands of people, largely poor, rural women and children to India's towns and cities with good jobs, but later selling them into modern day slavery. Many end up as domestic workers, or in forced labour or brothels.¹⁹

The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering and terrorist financing.²⁰ It published a report on money laundering risks arising from trafficking in human beings and smuggling of migrants based on the surveys received from its member countries. There were some common findings, viz,

- lack of adequate information about the number of persons trafficked;
- absence of accurate data relating to income generated from trafficking and how it is dealt with;
- limited cooperation between agencies investigating trafficking and laundering;
- lack of awareness amongst law enforcement/prosecution authorities etc.²¹

The act of immoral trafficking is addressed by the anti-money laundering legislation of India. Part A, paragraph 7 of the PMLA lists offences covered under the Immoral Traffic (Prevention) Act, 1956 (ITPA). Sections 5 (procuring, inducing, or taking a person for the purpose of prostitution), 6 (detaining a person in premises where prostitution is carried out), 8 (seducing or soliciting for the purpose of prostitution),

16. <https://timesofindia.indiatimes.com/india/proposal-to-classify-trafficking-in-people-as-organised-crime-in-new-bill-could-give-more-teeth-to-probes/articleshow/102810990.cms?from=mdr>

17. Retrieved from: <https://www.un.org/press/en/2012/gashc4039.doc.html>

18. Retrieved from : <https://www.reuters.com/article/us-india-trafficking/almost-20000-women-and-children-trafficked-in-india-in-2016-idUSKBN16G29G>

19. *Ibid*

20. FATF Report on Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants ,July 2011,Pg-2 Retrieved from <http://www.fatf-gafi.org/media/fatf/documents/reports/Trafficking%20in%20Human%20Beings%20and%20Smuggling%20of%20Migrants.pdf>

21. *id.* at 43,44

and 9 (seduction of a person in custody) are the only sections of ITPA that are scheduled offences. PMLA procedures may be used in the event that an infraction is committed in violation of the aforementioned ITPA sections. The Indian Penal Code's provisions pertaining to trafficking are not included in the list of scheduled offences.²² The punishment for same has been defined under Section 4 as “rigorous imprisonment” between three and seven years.²³ Up to date there has been no judgment that convicts ITPA as scheduled offence under the provisions of PMLA.

Notwithstanding the above, interestingly in the case of *Nasir Safi Mir*, reported in *The Hindu*²⁴, the Enforcement Directorate (ED), for the first time, attached and confiscated an amount of Rs 55 lakh seized from him earlier. This was due to the fact that Mr. Mir was out on a bail in 2008 on health grounds from Delhi High Court and later fled to Nepal. The attachment was confirmed by the adjudicating authority after which ED filed a charge sheet against the accused in March 2014, and on ED's request court ordered the confiscation of Rs. 55 lakh.

Such measures of confiscation of property are really helpful in bringing back the absconded accused to face the proceedings. However, there is a gap in the legislation as if the case is pending for the scheduled offences, the Special Court deciding on the PMLA offence cannot adjudicate on the same till the accused is convicted for the predicative crime. On the other hand, parallel proceedings can be initiated and simultaneously proceed as per the procedures laid under PMLA.

Also as reported in *The Hindu*²⁵, the Special Court at Ranchi sentenced former Jharkhand Minister Hari Narayan to seven years imprisonment under the corruption case as per PMLA provisions. A fine of Rs.5 lakh was levied along with attachment of the assets worth Rs. 3 crore. The charges were of misappropriating public funds for personal benefits. This is the first conviction secured by the ED so far. Furthermore, “[i]n *Kamaljeet Singh (in judicial custody) vs. State 148 (2008) Delhi Law Times 170*, this Court dismissed Kamaljeet Singh's appeal to assail order on charge dated 12.10.2006 in FIR No. 96/05, PS Chankya Puri, registered under Sections 4 and 5 of Immoral Traffic (Prevention) Act, 1956, Section 3(1)(ii), 3(4), 3(5) and Section 4 of MCOCA and Section 420 read with Section 120B IPC. It was contended that the appellant and his associated were involved in a common, apparently soft crime which did not involve ‘use of violence or threat of violence or intimidation or coercion. It was also alleged that

22. *Id*, S. 13

23. PMLA, S.4, “Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine 1[***]:

The words “which may extend to five lakh rupees” omitted by Act 2 of 2013, sec. 4 (w.e.f. 15-2-2013, vide S.O. 343(E), dated 8-2-2013). Retrieved from:

<http://fiuindia.gov.in/files/AML%20Legislation/PMLA%202002/Section%204%20-%20Punishment%20for%20Money%20Launderings.html>

24. Pandey K D. (2016, March 07), “Court orders confiscation of assets of terror accused”. *The Hindu*. Retrieved from <http://www.thehindu.com/news/national/court-orders-confiscation-of-assets-of-terror-accused/article8321861.ece>

25. Pandey K D. (2017, January 31), “ED secures first ever conviction under Money Laundering Law”. *The Hindu*. Retrieved from: <http://www.thehindu.com/news/national/ed-secures-first-ever-conviction-under-money-laundering-law/article17118798.ece1>

26. Please note that the order of the Special Court is not available online.

the sanction was cryptic in nature and did not show any application of mind.”²⁶ The decision of the Court was that it was a case of “continuing unlawful activity” by an “organized crime syndicate” with a wide network for illegal trafficking and prostitution hence, it is not possible to hold that the invocation of MCOCA in the present case was unjustified; and that the “words “other unlawful means” are to be so construed, illegal trafficking of persons can be said to involve the use of violence, threat of violence, intimidation or coercion”.²⁷

In India, the focus is on crime of trafficking itself, and not on the proceeds derived from it. However, jurisprudence, viz, *Ranitsing Brahmajeetsing Sharma vs. State of Maharashtra*²⁸ has taken a step towards allowing that different charge sheets would be filed.

It should be the endeavor of the state to combat trafficking. The legal regime must include confiscation orders that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property.²⁹ Applicability of anti-money laundering framework could be helpful in fighting case against sex trafficking³⁰

In *Anosh Ekka vs Enforcement Directorate Throug*³¹, appeal was filed in the High Court of Jharkhand against the quashing of the application stating to stay the proceedings under the PMLA till the accused was convicted for scheduled offences. Court dismissed the same stating that, there is no doubt that unless one is held guilty for scheduled offences, he can be punished under Section 4 of PMLA but it also quoted that there is no embargo on the courts to carry on the proceedings simultaneously. It was stated that the PMLA had a completely distinct investigative process. An officer from the Directorate of Enforcement who has been specially approved under the statute is permitted to begin the inquiry. Police are only able to investigate cases under the scheduled crimes. If the prosecution wishes to pursue a PMLA case, it must file a complaint in accordance with Sections 44 and 45 of the Act. Only the government-constituted special court may consider the case after receiving prior approval from the Director of Enforcement or any other government-appointed official. The court determined that the courts established under the Cr.P.C. will try matters pertaining to scheduled crimes, and that proceedings under the PMLA will be handled under Section 43 read with Section 45 of the act.

If a designated official has grounds to suspect that a person's property is being used for money laundering and that failing to attach it will thwart any Act-related actions, the person's property may be attached under Section 5(1) 2nd Proviso of the PMLA. A person holding property on behalf of another person or a third party who is not a party to the complaint must be included in the adjudication proceedings and have their claim heard by the adjudicating authority, according to Section 8 of the PMLA, which lays out a complex

27. *Supra* Note 16, at 6, para. 9

28. *Ibid* at 6, para. 9, quoting para. 55

29. *Ranitsing Brahmajeetsing Sharma vs. State of Maharashtra*, MANU/SC/0268/2005: 2005(2) JCC 689, at para. 32

30. Retrieved from https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_3-5.pdf

31. *ibid*

32. W.P.(Cr.) No.257 of 2012, High Court of Jharkhand. Retrieved from <https://indiankanoon.org/doc/110589878/>

process for handling complaints under Section 5 of the PMLA. Additionally, this complies with the common law that the European countries have established.³²

Till date there has been no judgment passed regarding the conviction of the third parties under any offence of PMLA.

In cases where there are two or more interconnected transactions and one or more of those transactions is or is proven to be related to money laundering, it will be assumed, unless proven otherwise, that the remaining transactions are part of the interconnected transactions related to money laundering for the purposes of adjudication or confiscation under Section 8 or the money laundering offence trial.

Under Section 24 of the PMLA, in any proceeding involving the proceeds of crime, the authority or court may presume, unless the accused proves otherwise, that the proceeds of crime are involved in money-laundering against any person charged with the crime; in the case of any third party, the authority or court may also presume, using the same analysis as that applied to the accused, that the proceeds of crime are involved in money-laundering.

The burden of proof, in essence, falls on the individual who asserts the proceeds of crime and not the one engaged in Money-Laundering. The presumption against the accused or any third party is sufficient to discharge the authorities' obligations under the PMLA. While the authorities during a survey or search under the provisions of the act have a presumption that the said property or records or signatures or any other written document is by the accused and done in proceeds of the crime, it leads to presumption that the same is authentic and to be proved wrong by the accused by proving innocence.

It is being clearly stated that a person accused of an offence under Section 3 of PMLA, whose property is attached and proceeded against for confiscation, shall discharge the onus of proof (Section 24) vested in him by disclosing the sources of his income, earnings or assets, out of which or means by which he has acquired the property attached, to discharge the burden that the property does not constitute proceeds of crime.

In the case of *B. Rama Raju, S/o B. Ramalinga Raju vs. Union of India (UOI)*³³ court observed the validity of shifting the 'burden of proof' on the accused and said,

“Since camouflage and deceit are strategies inherent and integral to money-laundering operations and may involve successive transactions relating to proceeds of crime and intent to project the layered proceeds as untainted property, effectuation of the legislative purposes is achieved only where the burden is imposed on the accused to establish that proceeds of crime are untainted property. This is the legislative purpose and the justification for Section 24 of the Act.”

Also, under the present proposed Draft Bill 2016, Section 21 clearly states refers to an inverted burden of proof regarding property confiscated under Section 20, whereby it lies on the accused.

33. Council of Europe, Project on criminal asset recovery in Serbia, prepared by Alan Bacarese and Pedro Gomes Pereira, July 2010, available at <https://rm.coe.int/16806ebc7a>, at 8, 11 (for Albania), 20 (for Bulgaria), 24 (for Croatia), 28 (for Germany)

34. *B. Rama Raju, S/o B. Ramalinga Raju vs. Union of India (UOI)*, Ministry of Finance, Department of Revenue, represented by its Secretary, (Revenue) and Ors. (04.03.2011 - APHC), para 125, [2011]164CompCas149(AP), MANU/AP/0125/2011,[2011]108SCL491(AP)

Conclusion

In India, while combatting the crime of trafficking, the focus is on getting hold of the perpetrators and bringing him to justice. There is no focus on nabbing the proceeds of the crime. Only under the provisions of ITPA the seizure of brothel can be announced by the magistrate, other than that no active decision for checking for the money trail is done. However, jurisprudence, viz, *Ranitsing Brahmajeetsing Sharma vs. State of Maharashtra*³⁴ has taken a step towards allowing that different charge sheets would be filed. Under the procedural aspects laid down by the PMLA separate proceedings have to be initiated by a special court. Therefore, besides the charge sheet filed for the violation of ITPA regarding human trafficking offences, one should also file a second charge sheet when an offence is committed under Sections 5, 6, 8 or 9 of ITPA, should be filed under PMLA. However, the court in *Anosh Ekka vs Enforcement Directorate Throug*³⁵ while dealing with the dilemma of having a parallel proceeding under the PMLA, clearly stated that there is no embargo on the court to carry on a proceedings under the PMLA unregard to the proceeding of the scheduled offence under IPC. Furthermore, when all the conditions and requirements for the application of Section 3 and/or Section 4 of MCOCA are met, the Complaint should register a FIR under the relevant Sections of ITPA as well as Section 3 and/or Section 4 of MCOCA and relevant Sections of IPC.

The offence of sex trafficking is driven by profit, so it is important to link it up with that of economic offences in order to challenge its very sustenance. Satish Mathur, Director General of Maharashtra state police in a recent interview said, “*Maharashtra police, in an attempt to break the economic nexus in human trafficking cases, have now classified these crimes as economic offences*”³⁶

Such measures are required to be taken up in order to fight trafficking in a comprehensive manner. Confiscating the proceeds of the crime helps in cutting the fuel of this profit driven industry. Bridging the gap in the legal regime may help in preventing and fighting this heinous crime. The new Bhartiya Nyaya Sanhita Bill 2023 has opened the doors of first considering trafficking by rackets for prostitution as organised crime. This ray of hope might lead to connecting economic offences with Trafficking in future as well.

35. *Ranitsing Brahmajeetsing Sharma vs. State of Maharashtra*, MANU/SC/0268/2005: 2005(2) JCC 689, at para. 32

36. W.P.(Cr.) No.257 of 2012, High Court of Jharkhand. Retrieved from <https://indiankanoon.org/doc/110589878/>

37. Retrieved from: <http://www.dnaindia.com/india/report-maha-to-treat-human-trafficking-as-economic-offence-dgp-2516230>