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CONTENTS

	<i>Page</i>
Editor's note.....	1
Forfeiture of proceeds of drug-related crimes: a British Commonwealth perspective by <i>S. K. Chatterjee</i>	119771 3
The seizure and forfeiture of property associated with criminal activity by <i>N. Liverpool</i>	119772 21
Forfeiture of illegally acquired assets of drug traffickers: the position in India by <i>B. B. Gūjral</i>	119773 41
Law enforcement and drug trafficking money: recent developments in Australian law and procedure by <i>M. Moynihan</i>	49
Illicit drugs on ships entering Hong Kong by <i>G. L. Mortimer</i>	119774 57
The profits of organized crime: the illicit drug trade in Canada by <i>R. T. Stamler and R. C. Fahlman</i>	61
Committee on the Forfeiture of Assets in Criminal Offences of the Howard League of Penal Reform by <i>A. Nicol</i>	119775 71
Criminal prosecution of drug traffickers under the continuing criminal enterprise statute in federal courts of the United States of America by <i>W. J. Corcoran and M. C. Carlson</i>	77
Curbing drug abuse in Iowa: one response to a growing problem by <i>K. M. Quinn</i>	119776 95
Egyptian law on the sequestration and confiscation of property acquired through smuggling and trafficking in drugs by <i>M. S. Zaki</i>	119777 103

Forfeiture of illegally acquired assets of drug traffickers: the position in India *

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ABSTRACT

Trafficking in drugs and other related crimes generates huge illicit funds which are used to support other criminal activity, corruption, illicit arms trading, the smuggling of goods and currency, and other economic offences. The traditional enforcement techniques aimed only at carriers and confiscation of the seized contraband no longer provide a sufficient deterrent. The problem is international in scope and requires close co-operation of all the agencies concerned. In 1976, India enacted specific legislation providing for the forfeiture of the property and assets of smugglers, including traffickers and foreign-exchange manipulators. This legislation, known as the "Smugglers and Foreign-Exchange Manipulators (Forfeiture of Property) Act, 1976", enables the enforcement authorities to confiscate all property, both movable and immovable, illegally acquired or accumulated, or for which investment is made from unlawful earnings resulting from smuggling and foreign exchange racketeering. It covers all such property held, not only in the names of smugglers and traffickers themselves, but their relatives and associates as well. The Act provides for principles of natural justice to be followed for all forfeiture proceedings and for appeals to a high tribunal. The legislation has enabled forfeiture action in 2,297 cases, covering properties valued at \$US 40 million, during the last six years.

Introduction

The harm to society caused by illicit trafficking in drugs and other related crimes is a major area of national and international concern. Such trafficking limits the chances of success of law enforcement programmes, however efficiently they may be executed. At the same time, it creates a broad

* The views expressed in this paper, and the selection and interpretation of the facts, are the responsibility of the author and do not necessarily represent the views of the Government of India.

criminal infrastructure that threatens to destabilize the economy and even the security of some of the countries affected. Official and political corruption, illicit arms trading, smuggling of goods, currency trafficking and other similar economic offences are some of the areas where the huge funds generated by illegal drug trafficking have the most devastating effect. Traditional enforcement techniques aimed at the traffickers and the contraband goods in their possession touches only the "tip of the iceberg". The operators, organizers and financiers, who lay hidden well within the iceberg and rarely come into direct contact with the illicit activity, continue to carry on their nefarious activities. The fact is that drug trafficking is a big business, and the wealth and life-style of those who dispose of the vast sums derived from it leads too many others to feel that crime pays.

Historically, the law has dealt with illegal businesses by arresting the traffickers and seizing their illicit wares. The money and property acquired in the illegal activities have, however, been ignored for far too long. As long as these assets remain untouched, the carriers and "small fry" caught by the authorities can quickly be replaced. Despite the imprisonment of financiers and leaders, their confederates carry on the dangerous and deadly business of drug trafficking by using the wealth left behind. The ill-gotten gains of the convicted offenders can be enjoyed both by themselves and their families while they are serving a sentence or after their release. They can invest their illegal fortunes while imprisoned and their assets will be available, increased by interest, upon their release. Clearly, in the public's view, the crime pays even after it has been detected and the offender prosecuted. When this happens, the entire legal system falls into disrepute and the incentive to commit crime increases.

Confiscation of illegally obtained goods or property

There was a time when persons convicted of an offence automatically lost their legal rights. Under common law, persons convicted of a felony were in a state of attainder, which signified the loss of their property. This punishment was, however, mitigated over the years. Forfeiture of any property held by the offender was abolished by statutes in many countries, especially those of the Commonwealth. Confiscation, referring only to the surrender of property illegally obtained or acquired, took its place. Provisions for the confiscation of goods or property involved in the offence were made in the statutes dealing with the offence. These provisions, however, proved to be totally ineffective in depriving traffickers of their illegally acquired assets. Throughout the years, the assets have increased in size and crossed international boundaries. It can no longer be expected that illegally acquired property will always remain within the borders of the country in which offenders are arrested.

International action

The assets acquired in illicit drug trade have received attention by the United Nations Commission on Narcotic Drugs, the Economic and Social Council of the United Nations, the International Narcotics Control Board and the International Criminal Police Organization (Interpol). At its thirty-sixth session, the General Assembly of the United Nations adopted resolution 36/168 entitled "International Drug Abuse Control Strategy", by which the General Assembly approved the International Drug Control Strategy and Policies prepared by the Commission on Narcotic Drugs at its twenty-ninth session held in February 1981 [1]. One of the important facets of this strategy relates to the reduction of illicit drug trafficking by means of several policy measures, which include the identification of financial transactions connected with illicit drug traffic with a view to depriving the traffickers of their illegally gained profits and the proceeds of their crimes. The Commission on Narcotic Drugs, at its seventh special session, approved a study of illegally acquired assets [2], in which the Division of Narcotic Drugs, in close collaboration with Interpol, the Customs Co-operation Council and the concerned national bodies, will prepare a study of progress made on measures to deprive drug traffickers of illegally acquired assets. This project is a part of the five-year plan of action for drug abuse control that has been approved for implementation in 1983, financed under the regular budget of the United Nations.

The position in India

Confiscation of "tainted" property

In India, before 1976, the property and assets of offenders could be confiscated mainly in the following circumstances:

(a) Where property had been acquired by theft, extortion or misappropriation or by criminal breach of trust. This included not only property which was the subject matter of an offence but also any property into or for which the same had been converted or exchanged, or anything acquired by such conversion or exchange, whether immediately or otherwise;

(b) Where property or assets had been acquired by corrupt means, the anti-corruption agencies were empowered to request the suspected persons to account for assets which appeared to be in excess of anything legitimately earned. Similarly, under the income-tax and the wealth-tax laws, the taxing authorities had the power to levy taxes on undisclosed income or wealth [3];

(c) Under the Indian Customs Act, 1962, contraband goods and their proceeds could be confiscated by the customs authorities. Goods used for concealing smuggled goods were also liable to confiscation. Smuggled goods

could be confiscated, notwithstanding any change in their form. Where smuggled goods were mixed with other goods and the two were not separable, all of the goods could be confiscated. Proceeds from the sale of such goods were also liable to confiscation [4].

The above provisions did not, however, provide for confiscation of property and assets acquired with the money earned through contraband trade and could well be nullified if the properties were held in the names of persons who could not be proved to be the real owners. From the enforcement angle, it is difficult to prove that a particular person is a smuggler, racketeer or tax evader, since the organizers and financiers of these activities do not, themselves, actively participate in such crimes. Usually, only carriers and agents are caught by the enforcement agencies. Furthermore, it is difficult to prove that a property has been acquired through such illegal activities. Besides, most assets are held by the offenders in the names of other persons who are close or distant relatives, former employees etc. Experience has shown that it is possible for tax evaders to provide plausible explanations for acquisition of the property. For example, in some instances where property owned by Indian citizens was seized in the reasonable belief that it represented concealed income and wealth, the Department lost the case as a result of an arrangement on paper which merely showed that the money had been loaned or kept in trust by a resident in a neighbouring country. It is also possible to show inflated gains through some paper transactions by showing corresponding losses for another party.

Parallel economy in the 1970s

During the 1970s, illicit trade and other related economic offences assumed vast proportions. A parallel economy, based on black money, became established and grew. The illegal operations, in turn, induced a considerable amount of leakage of foreign exchange through under-invoicing and over-invoicing of foreign trade deals and also through illegal remittances abroad. The problem of black money and tax evasion reached a stage that could be described as a menace to the economy and a threat to the fulfilment of national objectives. The part of the black money that was not utilized in lavish consumption went into the purchase of bullion and other property, which further induced large-scale illicit trading in gold, diamonds and other inessential items, causing considerable strain on the balance of payments. Further, by keeping ill-gotten gains outside the country as deposits in foreign banks or with their own associate concerns outside of India, tax evaders deprived the country of money that could have been put to productive use. One of the worst consequences was the pernicious effect on the general moral fibre of the society, which mocked integrity and placed a premium on the vulgar and ostentatious display of wealth. At a time when the country had embarked upon a gigantic process of social and economic planning, strong measures were required in order to counteract such

offences. With its vastness in size, its magnitude of problems and its long history of poverty and subjugation, the country needed sharp and effective weapons in order to deal with the economic offenders. Threats to the national economy arising from such offences, such as espionage and sabotage, could constitute a serious danger to the survival of the country.

Forfeiture law of 1976: the main features

Because of the dangers described above, certain drastic measures were adopted by the Government of India in 1976. The law of preventive detention of smugglers and traffickers was promulgated, subject to certain judicial safeguards and review by a judicial advisory board [5]. The punishments for smuggling and trafficking were made considerably more severe, and a minimum sentence of imprisonment for major offences was introduced. In accordance with the recommendations of the Law Commission, made in its 47th Report on the trial and punishment of social and economic offences, special tribunals for the effective and speedy prosecution of economic offences were established [6]. These tribunals consisted of specially selected judges appointed by the Central Government for the trial of offences covered by specific acts. It was, however, recognized that these penal sanctions would not be adequate unless an attack was made on the property, assets and illegal gains acquired by smugglers and traffickers. The traffickers would have to be deprived of all their illegally acquired properties. The punishment for the offence had to be more an object of dread than the gain derived from the offence was an object of desire. An important measure towards this end was an act called the Smugglers and Foreign-Exchange Manipulators (Forfeiture of Property) Act, 1976 [5], which provided for the forfeiture of all illegally acquired properties of smugglers (including drug traffickers) and foreign exchange manipulators. The object of this legislation was to provide for the confiscation of all "tainted" property, both movable and immovable, which had been illegally acquired or accumulated, or for which the investment had come from unlawful earnings resulting from smuggling and foreign exchange racketeering. It was recognized that it would be difficult to prove to the satisfaction of the law that property had been acquired either through smuggling or other economic offences. If, however, persons accused of illegal activities were unable to prove that either the whole or a part of funds invested by them in property were earned legally, it would be assumed that such funds had been earned by smuggling or foreign exchange racketeering activities, or from the infraction of other economic laws.

Broadly, the Act provides for the forfeiture of property, both movable and immovable, of smugglers and traffickers, their relatives and associates. Persons covered by the Act are those who have been convicted under the Foreign Exchange Regulations Act and the Customs Act [4], where the

amount involved exceeds Rs 100,000 or even less, depending on whether such persons have been convicted in two or more such cases.

As stated above, even the properties held by “relatives” or “associates” of such persons are liable to forfeiture. The term “relatives”, in relation to persons convicted under the Act, means:

- (a) Spouses;
- (b) Brothers or sisters;
- (c) Brothers or sisters of spouses;
- (d) Any lineal ascendants or descendants;
- (e) Any lineal ascendants or descendants of spouses;
- (f) Spouses of persons referred to in clause (b), (c), (d) or (e);
- (g) Any lineal descendants of persons referred to in clause (b) or (c).

The term “associates” means:

- (a) Any individuals who were or are residing in the residential premises (including outhouses) of such persons;
- (b) Any individuals who were or are managing the affairs or keeping the accounts of such persons;
- (c) Any association of persons, body of individuals, partnership firms, or private companies within the meaning of the Companies Act, 1956, of which such persons were or are members, partners or directors;
- (d) Any individuals who were or are members, partners or directors of an association of persons, body of individuals, partnership firm or private company referred to in clause (c) at any time when such persons had been or are members, partners or directors of such associations, bodies, partnership firms or private companies;
- (e) Any persons who were or are managing the affairs or keeping the accounts of any association of persons, body of individuals, partnership firm or private company referred to in clause (c);
- (f) The trustees of any trusts, where:
 - (i) The trust has been created by such persons; or
 - (ii) The value of the assets contributed by such persons (including the value of the assets, if any, contributed earlier by them) to the trust amounts, on the date on which the contribution is made, to not less than 20 per cent of the value of the assets of the trust on that date;
- (g) Where the competent authority, for reasons to be recorded in writing, considers that any properties of such persons are held on their behalf by any other persons.

The Act is administered by “competent authorities” not below the rank of a joint secretary to the Government of India, appointed by the Act under the Central Government. It provides for principles of natural justice to be

followed by issue of notice for forfeiture in respect of the properties, affording the party a reasonable opportunity of being heard before a forfeiture order is passed. The Act further provides for fines in lieu of forfeiture in certain cases. After the issue of notice, any transfer of properties covered by the notice shall be ignored for the purpose of proceeding under the Act and, if such property is subsequently forfeited under the Act, the transfer of such properties shall be null and void.

According to the provisions of the Act, the burden of proof in respect of such property and assets has been shifted to the persons affected. In other words, smugglers or traffickers must prove that their property or assets have not been illegally acquired.

The Act provides for a provision of appeal to the Appellate Tribunal for Forfeited Property, appointed by the Central Government. The Chairman of the Appellate Tribunal is a person who is qualified to be a judge of the Supreme Court or a High Court. In order to expedite the forfeiture proceedings, it has been further provided that no civil court shall have jurisdiction in respect of any matter which the Appellate Tribunal or any competent authority is empowered by or under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. The competent authorities and the Appellate Tribunal have all the powers of a civil court in respect of summoning and enforcing attendance of any person and examining him under oath, requiring discovery and production of documents, issuing commissions for examination of witnesses or documents and requisitioning of any public record or copy thereof from any court or office etc.

During the course of the last six years, forfeiture action has been initiated in 2,297 cases covering properties valued at about Rs 370 million (\$US 40 million). Out of these, orders for forfeiture have been issued by the competent authorities in 1,337 cases involving property valued at Rs 104 million (\$US 12 million). The Act has provided an effective deterrent to anti-social elements and constitutes an effective weapon against smuggling and related crimes.

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