

Attachment of Property Linked to Proceeds of Crime – Changes introduced under Bharatiya Nagarik Suraksha Sanhita 2023

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Introduction

The enactment of Bharatiya Nagarik Suraksha Sanhita (“**BNSS**”) in 2023 is a landmark legislation that was introduced by the Parliament to overhaul the criminal procedural law in India and to enhance the effectiveness, integrity, speed and responsiveness of the criminal law regime.

From 1 July 2024, BNSS has come into force and the erstwhile Code of Criminal Procedure, 1973 (“**CrPC**”) stands repealed. Some of the key reforms brought about by the BNSS are introduction of technology in conduct of trials, trial *in absentia*, zero FIR, e-FIR, etc.

Amidst various changes introduced under BNSS, one of the significant changes introduced is the incorporation of Section 107 under which a Magistrate or a Criminal Court has been vested with the powers of attachment, forfeiture or restoration of property connected with proceeds of crime.

This article seeks to analyse the scheme of attachment and permanent deprivation of proceeds of crime introduced under Section 107 and the practical challenges that may be faced in implementation of this provision. Further, this article also sheds light on the interplay of Section 107 with similar mechanism of attachment and forfeiture of property provided under various special statutes such as the Prevention of Money Laundering Act, 2002 (“**PMLA**”), Prevention of Corruption Act, 1988 (“**PCA**”), the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (“**SAFEMA**”) and Unlawful Activities (Prevention) Act, 1967 (“**UAPA**”).

Genesis of attachment/forfeiture of a property under criminal law – is it a recovery mechanism or a Punishment?

The concept of attachment and consequent forfeiture under criminal legislation is not novel. Various penal statutes in the past have provided such measures to attach and forfeiture of properties derived from commission of crime.

One of the earliest examples of a law providing for attachment of properties derived from commission of a crime is the Criminal Law Amendment Ordinance, 1944 (“**1944 Ordinance**”), which was introduced to protect government money and also properties believed to have been obtained by embezzling either government money or government property². Attachment under the 1944 Ordinance was provided for as a consequence of commission of specific offences under the Indian Penal Code, 1860 (“**IPC**”) which were identified as scheduled offence.

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² *GL Salwan v Union of India*, AIR 1960 P&H 351.

Interpreting the provisions of 1944 Ordinance, a Constitution Bench of the Supreme Court of India in *State of West Bengal v. S.K. Ghosh*³ held that the primary objective behind such enactment was to introduce attachment and thereafter forfeiture (upon conviction) as a form of civil recovery mechanism such that criminals are deprived of their ill-gotten gains. This was due to the provisions of the 1944 Ordinance which stipulated that attachment proceedings were to be carried out as per the provisions of Code of Civil Procedure 1908 (“CPC”)⁴. The Court further reasoned that the competent authority to conduct attachment proceedings under the 1944 Ordinance is not the criminal court empowered to conduct trial of scheduled offences but is instead the District Judge which is a Principal Court of Civil Jurisdiction⁵. Therefore, such attachment and forfeiture cannot be treated as a Punishment as defined under Section 52 of the IPC⁶.

Similar principles were reiterated by the Supreme Court in *Biswanath Bhattacharya v. Union of India*,⁷ (which was a case of attachment under SAFEMA).

It is important to note that the 1944 Ordinance continues to be in force⁸ and stands incorporated by reference in the PCA to provide for attachment proceedings in respect to offences committed under PCA⁹.

The 1944 Ordinance and its core principle *i.e.*, recovering illegally acquired property through commission of scheduled offences has continued to shape judicial opinions rendered in the context of modern penal laws such as the PMLA. In this regard, the observations of Delhi High Court in *Deputy Director, ED v. Axis Bank*¹⁰ are quite relevant wherein relying upon the judgments in *SK Ghosh*¹¹ and *Biswanath Bhattacharya*¹², the Delhi High Court observed that these attachment provisions under criminal statutes serves two primary objectives:

- *Firstly*, to compel the appearance of the offender before the judicial system in order to hold him/her accountable for the crime and involve him/her in the legal process;
- *Secondly*, to deprive the offender of the benefits and fruits of his/her crime in order to deter the offender from committing the crime and to uphold the principles of justice and fairness.

It is in the context of the aforesaid principles relating to attachment provisions under various criminal statutes, that the newly introduced Section 107 of BNSS is required to be analysed to understand its purpose, scope of its application and most importantly to identify the challenges that may be faced in its application.

Attachment under CrPC

³ AIR 1963 SC 255.

⁴ Section 3(2) and Section 5, Criminal Law Amendment Ordinance, 1944.

⁵ Supra Note 3, para 14.

⁶ Now Section 4 of Bharatiya Nyaya Sanhita 2023.

⁷ (2014) 4 SCC 392, rendered in the context of attachment under SAFEMA Act.

⁸ *Dr. V.K. Rajan v. State of Kerala*, 2007 SCC OnLine Ker 399, paras 8-10, 16, 19.

⁹ Section 18A, Prevention of Corruption Act, 1988.

¹⁰ 2019 SCC OnLine Del 7854, pending before Supreme Court in SLP(C) No. 14713/2020.

¹¹ Supra Note 2.

¹² Supra Note 8.

CrPC provided for attachment and forfeiture of properties primarily for the purpose of ensuring attendance of accused persons/witnesses. The relevant provisions under CrPC which provided for attachment (and which have been retained under BNSS) are as follows:

Sl. No.	Section in CrPC	Provision	Chapter	Corresponding Provision under BNSS
1.	Section 83	Attachment of property for person absconding	Chapter VI <i>Processes to compel appearance</i>	Section 85
2.	Section 84	Claims and objections to attachment		Section 87
3.	Section 85	Release, sale and restoration of attached property		Section 88
4.	Section 86	Appeal from order rejecting application for restoration of attached property		Section 89
5.	Section 105C	Assistance in relation to orders of attachment or forfeiture of property.	Chapter VIIA – <i>Reciprocal Arrangements for assistance in certain matters and procedure for attachment and forfeiture of property</i>	Section 115
6.	Section 105E	Seizure and attachment of property		Section 117

As is evident from the title of Chapter VI of CrPC, the concept of attachment thereunder was introduced for the primary purpose of compelling attendance/appearance.

Similarly, under Chapter VIIA of CrPC, provisions relating to attachment of property were introduced to give effect to an agreement between India and United Kingdom of Great Britain and Northern Ireland aimed at confiscation of proceeds of ‘cross border’ crimes¹³. The Supreme Court in *State of Madhya Pradesh v. Balram Mihani*¹⁴ clarified that provisions of Chapter VIIA were applicable only to such offences which have an international ramification and that “ordinary property earned out of ordinary offenses committed in India” cannot be attached under the said Chapter.

The introduction of Section 107 of BNSS thus seems to take the law forward from the previous regime under CrPC which only provided for attachment under very limited circumstances.

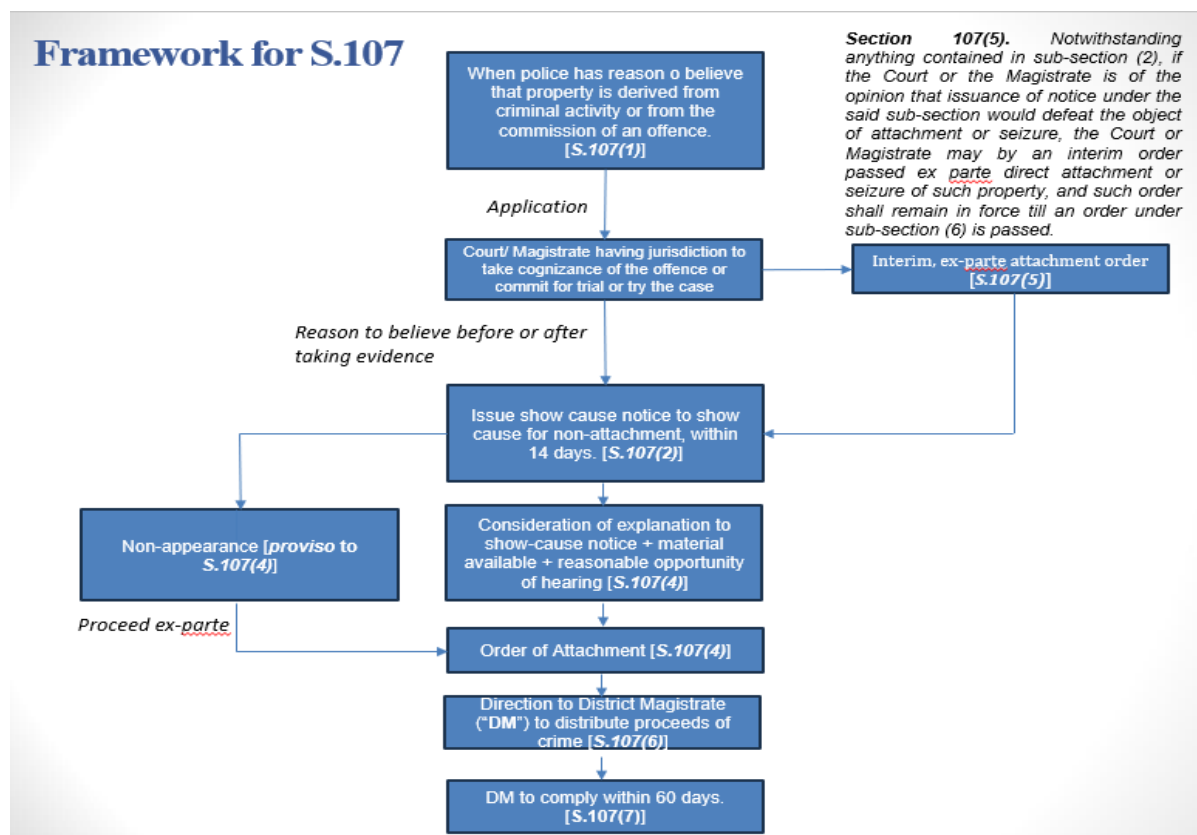
¹³This is evident from the Statement of Objects and Reasons of Amending Act No. 40 of 1993 which states that the amendment was introduced to give effect to “an agreement with the Government of United Kingdom of Great Britain and Northern Ireland for extending assistance in the investigation and prosecution of crime and the tracing, restraint and confiscation of the proceeds of crime (including crimes involving currency transfers) and terrorist funds, with a view to check the terrorist activities in India and the United Kingdom.”

¹⁴(2010) 2 SCC 602.

Section 107 now seeks to provide for attachment of properties derived from commission of any offence under the Bharatiya Nyaya Sanhita, 2023 (“BNS”) and in respect of any property located in India. Pertinently, the Handbook on BNSS issued by Delhi Police Academy (**Delhi Police Handbook**)¹⁵ also acknowledges that Section 107 seeks to fill in a vacuum that previously existed under CrPC. The Delhi Police Handbook states:

*“This new section has been introduced in the Sanhita since it has been learnt from past experience that there was no specific section to deal with issues wherein property was derived/earned directly or indirectly from proceeds of crime.”*¹⁶

Scheme of Section 107 in a flow chart



Analysis of Section 107 of the BNSS

(I) Wide Net of Offences

The use of the phrase “*a criminal activity or from the commission of any offence*” under Section 107 read with the definition of “*proceeds of crime*” given under Section 111(c) of BNSS makes it clear that the power of attachment has been expanded to potentially cover all offences under the BNS.

¹⁵ Bharatiya Nagarik Suraksha Sanhita, Handbook, Delhi Police, Edition – 1, January 2024 published by Delhi Police Academy available at https://bprd.nic.in/uploads/pdf/1715852496_b6723e2c03c135aedacb.pdf

¹⁶ Supra Note 15, Pg. 63.

This is in stark contrast to the scheme followed under previous legislations such as the 1944 Ordinance, PMLA, PCA, SAFEMA, UAPA etc. wherein attachment of properties has been allowed only when they are generated as a result of certain limited category of offences (classified as scheduled offences). This is seemingly done keeping in mind the nature and gravity of such offences.

Expanding the scope of Section 107 of BNSS to all offences under BNS and that too without having any regard to the nature and gravity of such offences has the effect of making the provision overbroad in its application, without any rational basis for the same.

Interestingly, the 247th Report of the Department Related Parliamentary Standing Committee on BNSS¹⁷ also does not contain any discussion on the overbroad nature of Section 107 of BNSS. Further, the lack of various procedural safeguards akin to the ones provided under PMLA is also missing in Section 107. For instance, PMLA stipulates that a provisional attachment order is only valid for a period of 180 days. Absence of such safeguards in Section 107 coupled with the overbroad application of Section 107 makes the provision prone to a constitutional challenge for violation of Article 14 and 21 of the Constitution of India, 1950 (“**Constitution**”).

(II) Ex-parte Interim Attachment under sub-section (5)

One of the most significant feature of Section 107 is the power to issue *ex-parte* attachment orders under sub-section (5) under which the Magistrate/Criminal Court has been empowered to direct attachment of property alleged to be proceeds of crime if it is of the opinion that issuance of notice to the affected persons would defeat the object of attachment or seizure. The sub-section however does not provide any guidance to the Magistrate/Criminal Court as to the circumstances when such an extreme power of *ex-parte* interim attachment can be passed.

Moreover, once such an interim attachment order is passed, the sub-section further states that such interim attachment shall remain in force till such time an order under sub-section (6) is passed. This effectively means that once an interim attachment order is passed, the same cannot potentially be either modified/vacated and an affected person will have to suffer such attachment orders till such time, the Magistrate/Criminal Court finally decides the attachment application under sub-section (4) by returning a finding as to whether the attached property is “*proceeds of crime*”. Since Section 107 nowhere stipulates any outer timeline within which an attachment application is to be decided, an interim attachment order once passed can potentially remain in force for an unduly long period of time, leaving affected persons no remedy to challenge such *ex-parte* interim attachment orders.

(III) Attachment & Liquidation of Property at a pre-trial stage

The most distinct feature of Section 107 is that it only provides for attachment of proceeds of crime but also culminates into an order of liquidation of such proceeds of crime and distribution of the monies realised therefrom amongst victims of the crime. All of this is sought to be done

¹⁷ Available at

https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/15/188/247_2023_11_16.pdf?source=rajyasabha

at a stage prior to conclusion of trial of the alleged crime/offence. This is quite distinct from the scheme followed under 1944 Ordinance or even PMLA wherein, final confiscation/forfeiture of property takes places only after conclusion of trial.

The language of Section 107 makes it clear that it can be invoked even at a pre-trial or at a pre-conviction stage. This is evident from the following:

- (a) The language of Section 107 (1) which uses the phrase “*make an application to the Court or the Magistrate exercising jurisdiction to take cognizance of the offence or commit for trial or try the case, for the attachment of such property*”. The identification of the competent court to be the one which exercises jurisdiction to “*take cognizance*” or “*to commit for trial or try the case*” implies that an attachment application can be filed even before cognizance is taken or the case has been committed for trial.
- (b) The Delhi Police Handbook has clarified that while filing an application seeking attachment, the Investigating Officer (“**IO**”) must have regard to factors such as sources of income, verification of ITR, mode of payment of property etc in order form a “reason to believe” that a property is “*proceeds of crime*”.
- (c) Once such an application is filed, Section 107(2) envisages leading of evidence before the concerned Magistrate/Criminal Court. However, the bare language of Section 107(2) indicates that such evidence is meant to be led only for the purpose of deciding whether or not a show-cause notice is to be issued to the affected person. Pertinently, at this stage, it is only the IO who is present before the Magistrate/Criminal Court.
- (d) Thereafter, the factors on the basis of which an attachment order can be issued under sub-section (4) indicates that the same is independent of acquittal/conviction of the main offence. This follows from the text of sub-section (4) itself which requires the Magistrate/Criminal Court to have regard to the twin factors of explanation provided by the affected person and the “*material fact*” available before it to arrive at a positive finding that the property in question is “*proceeds of crime*”.
- (e) Once such a finding of “*proceeds of crime*” is arrived at, a Magistrate/Criminal Court can proceed to not only attach the said property under sub-section (4) but can also thereafter proceed under sub-section (6) to direct liquidation and disbursement of the attached property in a time bound manner.

The drastic power to provide for permanent deprivation of a property in the form of forfeiture and liquidation at a pre-conviction stage has the effect of turning the cardinal principle of criminal law on its head *i.e.*, presumption of innocence. This is particularly significant because even a legislation like PMLA which operates on a reverse burden of proof¹⁸ does not provide for confiscation before conclusion of trial of the offence of money laundering. Consequently, Section 107 can potentially fall foul of the proportionality requirements under Article 14 and 21 of Constitution, unless the same is read down to restrict its application within the guardrails of Article 14 and 21.

¹⁸ See Section 24 of Prevention of Money Laundering Act, 2002.

(IV) The provision is silent on restoration of an attached property

The marginal note of Section 107 refers to three objectives of the section *i.e.*, “attachment”, “forfeiture” or “restoration”. While Section 107 provides for both “attachment” and “forfeiture”, it is entirely silent on “restoration”. BNSS has thus failed to state when can “restoration” take place or on the procedure and time-period to be followed to restore an attached property in case the Magistrate /Criminal Court eventually returns a finding under sub-section (4) that the property in question is not a “proceeds of crime”. This is a major lacuna of Section 107 and would potentially require an amendment for redressal of the same. In contrast, the 1944 Ordinance contains detailed provisions relating to release or withdrawal of attachment orders.¹⁹ Similarly, even PMLA provided for the same under Section 8(6).²⁰

(V) Section 107 empowers police to attach to untainted property:

The definition of “*proceeds of crime*” as provided under Section 111(c) of BNSS has two parts namely:

- (i) any property derived or obtained directly or indirectly, by any person as a result of criminal activity; or
- (ii) **the value of any such property**

The second part to the aforesaid definition *i.e.*, “*value of any such property*” allows Magistrate/Criminal Court to attach even untainted properties much like it is allowed under the provisions of PMLA. However, the issue as to whether untainted properties acquired prior to the commission of the crime can be attached on the ground that it seeks to attach property equivalent in value is currently pending in Supreme Court in the challenge arising out of Delhi High Court’s judgment in *Axis Bank (supra)*²¹.

(VI) Interplay with special statutes – which will prevail?

As noted above, various special statutes such as PMLA, PCA, UAPA, NDPS allows attachment of properties acquired as a result of commission of scheduled offences identified thereunder. The obvious question that arises is whether attachment carried out under any of the aforesaid special statutes will prevail over attachment sought to be carried out under Section 107 of BNSS.

The answer lies in Section 5 of BNSS²² which gives primacy to special laws existing in force at the time of enactment of BNSS. Although BNSS states that special procedures under special law would prevail over the provisions of BNSS, the overlapping provisions under BNSS are wider and sometimes without the necessary checks and balances which are otherwise provided under special laws.

¹⁹ Section 13(2), Criminal Law Amendment Ordinance, 1944.

²⁰ Section 8(6), Prevention of Money Laundering Act, 2002.

²¹ *Supra* Note 10.

²² Same as Section 5 of Code of Criminal Procedure, 1973.