



# AN ANALYTICAL STUDY OF THE APPLICATION OF MAREVA INJUNCTION AND ANTON PILLER ORDER IN BANKING FRAMEWORK – WITH SPECIAL FOCUS ON ABHEYA REALTORS Pvt. Ltd. Vs. SSIPL RETAIL Ltd., 2010

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**ABSTRACT:** In cases where there has been wrongdoing that has resulted in financial losses, these are two of the most important civil remedies available. An Anton Piller order allows investigators to search a suspect's home and seize evidence without warning, while a Mareva order freezes their assets. Neither is granted lightly, and it is critical to have all of the necessary supporting documents in order before approaching the court.

**KEYWORDS:** Mareva injunction, Anton Piller

## MAREVA INJUNCTION:

A Mareva injunction or a freezing injunction is a form of ad personam interim relief, which is usually sought during the pendency of court or arbitration proceedings or once the proceedings are completed and a verdict is rendered, but before the judgement/award is enforced and executed. Unlike a regular injunction, a freezing injunction covers even those assets which are not necessarily a part of the subject-matter in dispute or those in which the claimant doesn't claim any direct right.<sup>1</sup>

Of it grants the title on the Defendant's frozen assets

1. A lien on Defendant's assets
2. It's not an annexing of assets of defendants
3. It's not an asset forfeiture of any kind
4. it won't grant Plaintiff any priority over other creditors on the defendant assets
5. It does not legally restrict Defendant from actually transferring assets

Although the (Mareva order) is referred to as a "freezing order," it does not freeze (or) restrict Defendant from transferring his assets. The order of the Court can affect the Defendant's assets in the entire world.<sup>2</sup>

<sup>1</sup> The Mareva Injunction and its Story of Expanding Horizons, Mahasweta Muthusubbarayan, <http://arbitrationblog.kluwerarbitration.com/2019/05/20/the-mareva-injunction-and-its-story-of-expanding-horizons/> (last Visited on Dec 7, 2021)

<sup>2</sup> Mareva Injunction: A Powerful Freezing Order Litigants ..., <https://incorporated.zone/mareva-injunction-a-powerful-freezing-order-litigants-must-know-about/> (last visited on Dec 5, 2021)

Initially, a plaintiff could not obtain temporary order given by a court of law relief intended to prevent a defendant from disappearing the assets or taking his support outside the jurisdiction in the face of imminent lawsuit or judgment.

Under civil rules 25\_1(f)

the Court may order

restraining a party from the jurisdiction assets located there.

restraining a party from dealing with any assets whether situated within the jurisdiction.

### steps to obtaining injunction:

\*Usually, a Mareva injunction is 1st obtained on an ex parte basis.

\*Must meet the test for obtaining injunction

\*In general, will need to continue injunction on notice to other the part enjoined to grant of Mareva injunction some standards are applicable

The elaboration of the principles and standards of Mareva injunction is essential ascribable to the judiciary, which has laid down various criteria that must be pleased for the grant of Mareva injunction. Therefore, while appealing for the Mareva injunction, usually the Plaintiff must prove that:<sup>3</sup>

1. it must be a solid *prima facie case* against the Defendant and should also provide full and frank publishing of all material matters when the injunction is sought without notice to the Defendant;
2. they will suffer unrectifiable **harm** if the injunction is not issued;
3. The **balance of convenience** approval the discharge of the injunction;
4. The **cause of action** rests within the jurisdiction of the Court in which the Mareva injunction is sought.
5. It has a "**good arguable case**" on account of the cause of action. Considering that most Mareva injunctions are granted ex-parte and cannot, the common law has not described the concept of a "good arguable case" in terms of percentage. In this essence, a good arguable case means that is based on the material before the Court, Plaintiff seems to have real prospects of success. Therefore, it becomes incumbent for Plaintiff to consider whether can establish a "good arguable case" in respect of its claims.
6. The Defendant's assets lie in the jurisdiction where Mareva injunction is sought. The **absolute risk of the Defendant removing his assets** from the jurisdiction or dissipating or disposing of its assets frustrates the execution of a successful judgment. However, mere suspicion of a likelihood of dissipation is not sufficient, and Plaintiff is required to present authentic evidence establishing the risk of dissolution. In one case, dishonesty or adverse credibility findings against the respondent resulted in a solid basis to the real risk of dissipation.
7. It is **just and convenient** to grant relief.
8. Nature and Scope of Mareva injunction

The principle of the Mareva injunction is not alien to India's legal system, and the same is sometimes seen as an attachment before judgment under Order XXXVIII Rule 5 of Code of Civil Procedure, 1908 ("**CPC**"). The jurisdiction of Indian courts to pass a Mareva injunction was recognized in the case of *Mohit Bhargava Vs. Bharat Bhusan Bhargava*<sup>4</sup>, wherein the Apex Court stated that

*"These two orders are certainly within the jurisdiction of the court which passed the decree since they are only orders of restraint being issued to a person from handing over a property in his possession to the judgment-debtor along with the documents concerned and keeping the documents in safe custody. They are in the nature of a "freezing order" or a "Mareva Injunction" and an order akin to an Anton Piller order, orders that can be issued even if the property or the person concerned is outside the jurisdiction of the court."*<sup>5</sup>

Further, the Calcutta High Court in the case of *Popular Jute Exchange Limited Vs. Murlidhar Ratanlal Exports Ltd. & Anr.*<sup>6</sup>, The Court discussed the criteria for granting a Mareva injunction and concluded that the concept of

<sup>3</sup> Applicability Of Mareva Injunction In India - Litigation ..., <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (last visited on Dec 5, 2021)

<sup>4</sup> Mohit Bhargava v. Bharat Bhusan Bhargava , (2007) 4 SCC 795

<sup>5</sup> Applicability Of Mareva Injunction In India - Litigation ..., <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (last visited on Dec 5, 2021)

<sup>6</sup> Popular Jute Exchange Limited Versus Murlidhar Ratanlal Exports Ltd. & Anr., 2006 (4) CHN 381

granting a Mareva injunction is not dissimilar to the High Court's power to grant an interlocutory or final order of an injunction and to grant an ex parte injunction under its general power of jurisdiction. When it was just and expedient, the English Court developed the idea that the Court had the power to prohibit the defendant from removing assets from the jurisdiction pending the trial of the action. This power was initially used only when the defendant was outside of the jurisdiction, but it has now been expanded to include defendants who are headquartered within the jurisdiction.<sup>7</sup>

The court had an opportunity to explore the nature and extent of the Mareva injunction in depth in the case of *Abheya Realtors Pvt. Ltd. v. SSIPL Retail Ltd.*<sup>8</sup>, and the following principles were established:

1. The essential premise in a Mareva injunction is that the claimant must have a good arguable case and show that the asset or assets within jurisdiction are unlikely to remain at the time of judgement and that the claimant will be unable to satisfy the decree.
2. The concept of "within jurisdiction" and "outside jurisdiction" as it applies to a Mareva injunction in England is substantially different from what "within jurisdiction" means in India qua a Civil Court. When a Mareva order is issued in England, the phrase "beyond jurisdiction" generally means beyond the country's borders. A decree can be transferred or transmitted from one Indian court to another under the Civil Procedure Code in India. The Court that receives the decree for execution is expected to follow the same law, both in content and form, and to be from the same school of jurisprudence as the Court that received the action and issued the verdict.<sup>9</sup>

### **Mareva injunction and Order XXXVIII of the CPC:**

The CPC's Order XXXVIII, Rule 5 allows for the attachment of property prior to the entry of a judgement.

Under Order XXXVIII, Rule 5, the court has broad powers and may exercise them if it believes the defendant is planning to dispose of his assets with the goal of blocking or delaying the implementation of the decision.

Both the Mareva injunction and the attachment before judgement appear to have the same goal, which is to "allow the Plaintiff to realise the amount of the decree, if one is subsequently passed, from the Defendant's property." However, upon closer inspection, it is clear that, despite sharing the same purpose, both legal remedies are distinct. One such distinction is that one remedy is an injunction, which aims to restrain the party, while the other remedy attaches the defendant's property prior to judgement.

*\* Mareva or freezing injunction is passed when there is evidence or material to show that the debtor is acting in a manner or is likely to act in a manner to frustrate subsequent order/decreed of the court or tribunal. The Court Therefore freezes the assets of the debtor to prevent the assets from being dissipated, to prevent irreparable harm to the creditor. It prevents a foreign defendant from removing his assets from the jurisdiction of the court. It is like and akin to "attachment before judgment" and conditions mentioned in the said provision should be satisfied before freezing junction order is passed.*<sup>10</sup>

Because of their mutual goal, the interplay between Mareva injunction and attachment before judgement is unavoidable; yet, this is a nascent field of law that is still subject to judicial interpretation. However, when seeking a Mareva injunction in Indian courts, the plaintiff must ensure that the conditions relating to the appropriate standards are met.

<sup>7</sup> Applicability Of Mareva Injunction In India - Litigation ..., <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (last visited on Dec 5, 2021)

<sup>8</sup> *Abheya Realtors Pvt. Ltd. v. SSIPL Retail Ltd.*, 2010 (2) CHN (Cal) 203.

<sup>9</sup> *Abheya Realtors Private Limited Vs. SSIPL Retail Limited* ..., <https://www.legitquest.com/case/abheya-realtors-private-limited-v-ssipl-retail-limited-another/E637F> (last visited on Dec 5, 2021)

<sup>10</sup> Applicability Of Mareva Injunction In India - Litigation ..., <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (last visited on Dec 5, 2021)

- A. In India, there are judicial precedents that govern the application of the Mareva injunction.
- B. The plaintiff (Iridium) applied for an order in the nature of Attachment Before Judgment in *Iridium v. Motorola*<sup>11</sup>, and the Bombay High Court's findings are summarised below:<sup>12</sup>
1. **Existence of debt/liability:** Before the Court orders a Mareva injunction, which appears to be an order for freezing assets in exercise of the powers bestowed on Indian courts under Order XXXVIII, Rule 5, the petitioner must have a clear liability or debt owed to him.
  2. **Disclosure of material matters by the Plaintiff:** Such an injunction would be sought if the corporation is registered in a country where no information about its members, control, or assets can be identified and judgments cannot be implemented against it, especially if there is no reciprocal enforcement of a judgement. Even there, the plaintiff's obligation to submit an undertaking is taken for granted. Applying the aforementioned principle to the current case, the Court found evidence of a lack of full disclosure of all matters within the plaintiff's knowledge since the plaintiff omitted to disclose the fact that a winding up petition had been filed against it.
  3. **Risk of dissipation of assets:** The plaintiff has provided no evidence that there is a risk of assets being removed in order to thwart the decree that may be issued, according to the Court. The defendants' business, on the other hand, was observed to be expanding.
  4. **Plaintiff's undertaking in damages:** Apart from the fact that it is not necessary to consider the question of attachment before judgement from the perspective of a Mareva injunction, a practise that appears to have been adopted by the English Court at the outset, it was held that an injunction should not be granted in this case even if viewed through the lens of the law relevant to this injunction as developed by Indian courts, because the plaintiff seeks an order that could prevent the defendants from flogging the plaintiff's property. Despite this, the Court might issue an injunction, but that required more than the mere likelihood of a favourable judgement in the plaintiff's favour. The plaintiff's undertaking in damages is critical, the Court remarked, especially since they are seeking an injunction that could prevent the defendants from continuing business. In such a case, the damage undertaking should be adequate. Given the pending winding-up proceedings, the Court observed that "it is difficult to understand how the value of the plaintiff's undertaking in damages, if their claim turns out to be unfounded, could be justified."

#### **ANTON PILLER ORDER:**

\*In the *Anton Piller case*<sup>13</sup>, Plaintiff is a reputable German electric motors and generators producer. Plaintiff designed and was on the edge of giving a new frequency converter is known as "the silent block." Manufacturing Processes Ltd was the Plaintiff's representative and trader in the queen's land, and by that relationship, came into ownership of confidential information relating to "the silent block."

As the story says, two little birds mutter into Plaintiff's ear that Manufacturing Processes Ltd had been covert with certain other German companies to produce a copycat of "the silent block" using Plaintiff's confidential information. If copycat of "the silent block" was allowed to hit the market before or simultaneous with their own, the Plaintiff feared that it would ruin their business. Plaintiff was determined to reclaim possession of its confidential information immediately and prevent any further use or circulation of such information.

Further, Plaintiff was concerned that any documents that appear the Defendant's wrongdoing should be secured and protected for the purposes of the trial. As such, it seeks an injunction from the Court to compel the Defendant's to deliver up the confidential information and other documents.

Plaintiff also feared that the Defendant would destroy the documents or send them out of the jurisdiction, such that no one existed by the time that had discovered in this suit, it applied, *ex-parte*, for an interlocutory injunction and a

<sup>11</sup> *Iridium India Telecom Ltd. Vs. Motorola Inc. & Others*, Bombay High Court (Dec 12, 2003)

<sup>12</sup> Applicability Of Mareva Injunction In India - Litigation ..., <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (last visited on Dec 5, 2021)

<sup>13</sup> *Anton Piller KG Vs. Manufacturing Processes Ltd & Ors.*, England and Wales Court of Appeal (Civil Decision) (Dec 8, 1975)

"search and seizure" order against the Defendants. The first instance of the Court granted the interlocutory injunction but refused to order the "search and seizure." Plaintiff appealed to the Court of Appeal.<sup>14</sup>

Anton Piller issues an order for work by sending a search team to the Defendant's location.

The group will include the applicant's lawyer, an independent lawyer, and any other independent specialists that may be needed (i.e., a computer expert for intellectual property cases). An advocate will be observing the proceedings for the implementation of the order. Upon being served the order, in general defendant is allowed to seized as per the terms that are mentioned in the order. If either party breach the order, they risk being held in contempt of court. Contempt of court can consequence in significant fines and prison sentences. Also, keep in mind that one can constantly challenge the validity of the order's terms or execution afterward. It is said that the only the lawyer of the applicant can appear before the court and no other individual will be allowed in carrying out an order.

Hence, Anton Piller orders are the highest option when it is considered as the tampering of evidence by the defendant may take place. It is obvious that it depends upon the circumstances. Therefore, it is important if one considering or receiving an Anton Piller order.

### **SPECIAL FOCUS ON ABHEYA REALTORS PVT. LTD. V. SSIPL RETAIL LTD.,2010, case:**<sup>15</sup>

The plaintiff owns a 1077-square-foot business on the bottom floor of one of the Astral building complex's units on Gurusaday Road's upmarket Gurusaday Road. The proforma defendant sold the shop to the plaintiff. On August 26, 2008, the proforma defendant signed a lease in favour of the first defendant. A second agreement was also entered into by the pro forma defendant to offer certain amenities to the first defendant. Following the plaintiff's acquisition of the shop, the plaintiff claims to be entitled to the proforma defendant's rights under the agreements.

The lease stipulates a three-year lock-in period from the date of the lease's start. It states that if the first defendant wishes to terminate the lease during the lock-in period, it must pay the monthly rent for the remainder of the lock-in period. Similarly, the lessor was locked in for three years, with no right to terminate the lease during that time unless the lessee violated the lease's terms. The agreement's three most important clauses are as follows:<sup>16</sup>

"4.3. Lock-in: There shall be a lock-in period of the term of 3 (three) years from the date of commencement of this lease and neither party shall be entitled to terminate the lease during such lock in period, except in case of breach by the other party. After expiry of two years and 6 months, the Lessee shall have the option to terminate the lease by giving a six months written notice in advance to the Lessor."

"4.5.4. Notwithstanding the other provisions hereof it is expressly agreed that if the Lessor terminates the lease during the said lock-in period of this lease mentioned in clause 4.3 above, due to non payment of any amounts or any breach of any covenants term and conditions hereof by the Lessee or in case the Lessee is desirous of surrendering or otherwise giving up the lease during the Lock-in period, the Lessee will be liable to pay the monthly rent payable by it for the entire remaining Lock-in period of this lease. Lock-in period shall also include the notice period as mentioned in clause 4.3 above."

"4.8. Stamp Duty etc.: The Stamp Duty and Registration Charges in respect of this Deed shall be borne by the Lessee. Subject as aforesaid, each party shall be liable to bear its own costs for the preparation and execution of this Deed."

The first defendant received the proforma defendant's letter of attornment in favour of the plaintiff without objection. The plaintiff has issued bills to the first defendant for monthly leasing rents, alleging that no payment has been made. The plaintiff points to a letter from the first defendant dated July 15, 2009, requesting that the agreement be terminated with effect from July 31, 2009. The plaintiff has highlighted the third, fourth, fifth, and sixth paragraphs

<sup>14</sup> Skrine - Advocates & Solicitors., <https://www.skrine.com/insights/newsletter/september-2013/the-anton-piller-order-a-search-warrant-in-disguis> (last visited on Dec 5, 2021)

<sup>15</sup> Abheya Realtors Private Limited Vs. SSIPL Retail Limited, 2010 (2) CHN (Cal) 203., <https://www.legitquest.com/case/abheya-realtors-private-limited-v-ssipl-retail-limited-another/E637F> (last visited on Dec 5, 2021)

<sup>16</sup> Abheya Realtors Private Limited Vs. SSIPL Retail Limited, 2010 (2) CHN (Cal) 203.

of the letter: "3. That, pursuant to Clause 4.3 of the Agreement, the Lessee was locked in for a term of three years. However, in light of the current economic slump and worldwide recession, the Lessee has been losing a significant amount of money from the premises. The Lessee will be unable to operate its company from the Premises due to the massive liabilities and poor future prospects, and will be unable to pay the rent/amenities costs for the Premises.

"4. Consequently, we are unable to continue the business from the Premises except at a loss, which is impermissible in sound business practice. On the one hand the visitors to the Complex appear to have reduced, and on the other hand the conversion of "customer per visitor" ratio has drastically reduced. One main reason for our taking up a store in your Complex was an implied assurance of business, which unfortunately has now fizzled out. No special measures seem to have been adopted by you to promote the Complex, and to help the business therein.

"5. That the Lessee vide this letter is exercising its right to terminate the Agreement w.e.f from July 31, 2009 by serving upon you this notice of termination.

"6. Though in terms of clause 4.3 the Agreement is subject to lock in condition, the financial slowdown amounts to a Force Majeure circumstance coupled with your failure to act in taking any measures to promote the Complex. The lock in condition is consequently inapplicable under the present Force Majeure circumstances."

According to the plaintiff, the parties agreed to liquidated damages equal to the unpaid lease rent for the balance of the lock-in period, which was a genuine pre-estimate of the damages suffered or likely to be suffered by the lessor as a result of the first defendant's earlier determination of the lease. The plaintiff claims that the first defendant is impoverished, and that unless the lease rent for the remainder of the lock-in time is secured, the plaintiff may not be able to recover the money even after getting the decision that will almost certainly be entered in its favour. Allowing the first defendant the luxury of waiting until the trial would, according to the plaintiff, put a premium on dishonesty and encourage the breach of an express covenant.

The first defendant claims that no case for attachment before judgement has been made out, and therefore securing a claim in damages and elevating such a claimant to the position of a secured creditor would be improper. According to the first defendant, whatever the parties' agreement was, it is impossible that the shop would remain closed for the balance of the lock-in period if the plaintiff was vigilant. The first defendant claims that the shop is capable of generating significant rent, although at a lesser rate, and that it would be unjust to keep the first defendant's money blocked without compelling the plaintiff to offset the damages.

The first defendant brings up a more important point. The lease deed is unstamped and unregistered, according to the document, and the restrictions of both the Stamp Act of 1899 and the Registration Act of 1908 would prevent its terms from being investigated and the material clause relating to purported liquidated damages from being enforced. Even if the first defendant was required to have the document registered after paying the required stamp fee, the plaintiff was required to have completed the registration if the plaintiff wanted to assert a right under it, according to the first defendant. On the merits, the first defendant claims that the averments in the petition are woefully inadequate for a plaintiff seeking attachment; that the plaintiff has presented no evidence that the first defendant had any asset within jurisdiction that it attempted to remove; and that the plaintiff has presented no evidence that the first defendant had any asset within jurisdiction that it attempted to remove.

The first defendant cited Section 35 of the Stamp Act and its related provisions, as well as Sections 17 and 49 of the Registration Act, as well as Section 107 of the Transfer of Property Act. The arrangement, according to the first defendant, is still in its infancy and cannot be investigated for any reason. It asserts that paragraphs 4.3 and 4.5.4 of the agreement are important to the contract and pertain to the first defendant's right of ownership under it; that such clauses cannot be characterised as incidental matters that would avoid the prohibition under the Stamp Act and the Registration Act. Though the first defendant contends that the suit is a land suit, this point is not evaluated at this time because there is no application for revocation of the leave granted under section 12 of the Letters Patent or dismissal of the suit.

Following the filing of this lawsuit, the first defendant took possession of the shop, which the plaintiff accepted without reservation. The first defendant claims that because the plaintiff is free to exploit the property, it would be inequitable for it to claim the entire lease rent for the remainder of the lock-in period; this would be illegal gain, and the relevant clauses would imply a penalty rather than a pre-estimate of damages. The first defendant has also

volunteered to provide a revolving or adequate bank guarantee to satisfy the claim, in exchange for the unlocking of its frozen bank accounts to the extent of the claim under an existing order.

The underlying principle in a Mareva injunction, as noted in the plaintiff's three cases, is that the claimant must have a good arguable case and must establish that the asset or assets within jurisdiction were unlikely to remain at the time judgement was delivered and that the claimant would have no means to satisfy the decree. The concept of "within jurisdiction" and "outside jurisdiction" as it applies to a Mareva injunction in England is substantially different from what "within jurisdiction" means in this nation qua a civil court. When a Mareva order is issued in England, the phrase "beyond jurisdiction" generally means beyond the country's borders. When a Mareva injunction is granted, the court has substantial questions about the claimant's ability to carry out the decree that will most certainly be issued. However, its applicability where "beyond jurisdiction" implies outside the territorial limitations of a particular civil court, rather than beyond the country's borders, may not be as clear as the plaintiff claims. A decree can be transferred or conveyed from one Indian court to another under the Civil Procedure Code. The court that receives the decree for execution is expected to follow the same law, both in substance and form, and to be from the same school of jurisprudence as the court that received the action and issued the verdict. When an English court uses the word "beyond jurisdiction" to explain a Mareva order, it conjures up images of a bereft decree-holder with the sacred judgement of an English court roaming aimlessly in a faraway country - usually Asia, Africa or Latin America - with strange people, unfamiliar customs and a different system of jurisprudence. Surely, that is not the kind of image that the plaintiff here seeks to invoke.

The first defendant relies on a judgement reported at (2009) 2 SCC 532 for the bar under Section 35 and associated provisions of the Stamp Act (*Avinash Kumar Chauhan v. Vijay Krishna Mishra*<sup>17</sup>). The Supreme Court looked into a case in which the plaintiff had paid the consideration and acquired ownership of a tract of tribal land through an unregistered and improperly stamped sale deed that was afterwards attempted to be registered. The plaintiff also did not wait for the collector's authorization, which is required by the Madhya Pradesh Land Revenue Code before transferring any tribal land. When the collector refused, the plaintiff filed a lawsuit to reclaim the money he had paid. The document was impounded by the district court, and the plaintiff was ordered to pay the unpaid duty as well as the penalty imposed by Section 35 of the Stamp Act. The High Court upheld the ruling after it was challenged under Article 227 of the Constitution. The High Court declined to intervene in the district court's decision. The Supreme Court upheld the High Court's decision.

The deed of lease was unregistered in the judgement recorded at 1969 Unreported Judgments (SC) 21 at page 86 (*Rana Vidya Bhushan Singh v. Ratiram*)<sup>18</sup>, which the first defendant has next cited. The plaintiffs filed an ejectment lawsuit, alleging that the defendant was trespassing on their property. The defendant claimed that he had been a renter for 15 years under a lease granted by the plaintiffs' mother when they were minors. A copy of an unregistered leasing agreement was presented as evidence by the defendant. His claim was accepted by the trial court. The district court agreed with the trial court on the factual issue on appeal. The defendant was deemed to be a tenant under one of the plaintiffs in a second appeal to the Himachal Pradesh court of the judicial commissioner. Following the Supreme Court's grant of special leave, one of the arguments presented in the ensuing appeal was that the leasing agreement was unregistered and so inadmissible in evidence. The plaintiffs' allegation that the original leasing agreement, which was in their possession, was not offered in evidence and that the defendant had merely tendered a copy, was rejected by the Supreme Court. On the point that it could not have been received in evidence because it was an unregistered agreement, the Supreme Court relied on the concurrent view of several High Courts, including this Court, that a document that requires registration under Section 17 of the Registration Act and is not admissible to prove a gift, mortgage, sale, or lease for lack of registration is nevertheless admissible to prove the character of the possession of the person who holds under it.

In response to the first defendant's arguments under the Stamp Act and the Registration Act, the plaintiff cites a decision reported at AIR 2003 Bom 360 (*Volition Investment Pvt. Ltd. v. Madhuri Jitendra Mashroo*)<sup>19</sup>, in which an interlocutory application for the appointment of a receiver in a suit for specific performance of an agreement relating

<sup>17</sup> *Avinash Kumar Chauhan v. Vijay Krishna Mishra*, 2009 (2) SCC 532

<sup>18</sup> *Rana Vidhya Bhushan Singh Vs. Shri Rati Ram*, 1969(1) SCWR 341

<sup>19</sup> *Volition Investment Pvt. Ltd. v. Madhuri Jitendra Mashroo*, AIR 2003 Bom 360

to immovable property was considered. An argument was stated at the conclusion of paragraph 7 of the report that the relied-on memorandum of understanding was not admissible in evidence because it had not been properly stamped. The court granted the interlocutory application, stating that if the memorandum was not properly stamped, it might be done after payment of a penalty at the time of the trial. It was decided that breaking a contract was against the commercial, moral, or mercantile ethic.

In response to the first defendant's arguments under the Stamp Act and the Registration Act, the plaintiff cites a decision reported at AIR 2003 Bom 360 (*Volition Investment Pvt. Ltd. v. Madhuri Jitendra Mashroo*)<sup>20</sup>, in which an interlocutory application for the appointment of a receiver in a suit for specific performance of an agreement relating to immovable property was considered. An argument was stated at the conclusion of paragraph 7 of the report that the relied-on memorandum of understanding was not admissible in evidence because it had not been properly stamped. The court granted the interlocutory application, stating that if the memorandum was not properly stamped, it might be done after payment of a penalty at the time of the trial. It was decided that breaking a contract was against the commercial, moral, or mercantile ethic.

"We, therefore, find that the learned Trial Judge erred in law in holding that there was no prima facie case in favour of the appellants when the defendant admitted execution of such agreement in a suit for specific performance of agreement. Once the execution of the agreement is admitted, in our view, in this type of case, the balance of convenience and inconvenience is in favour of granting injunction restraining the respondent from transferring, alienating and/or encumbering the property till the disposal of the suit; otherwise, the relief claimed in the suit may become inappropriate and the Court may refuse to exercise discretion in favour of the plaintiff at the time of final hearing, even if it is ultimately proved that there was valid agreement."

The plaintiff has cited a Full Bench decision (*Muruga Mudaliar v. Subha Reddiar*, AIR 1951 Mad 12<sup>21</sup>), in which the majority opinion was that a written lease agreement was required to be registered; however, the unregistered document could be used as evidence of the agreement in a suit for damages for its breach.

The plaintiff has cited an Andhra Pradesh High Court Single Bench decision (*Umde Bhojram v. Wadia Gangadhar*)<sup>22</sup>, which stated that while a mortgage could not be executed if the deed was unregistered, the related money claim could still be pursued. Finally, the plaintiff has cited a Single Bench decision from 2002 (2) Cal LJ 449 (*Biswajit Chakraborty v. Mira Sen Ray*)<sup>23</sup>, in which the court held that the mere production of a photocopy of a compulsorily registrable document in conjunction with an application for a temporary injunction or otherwise would not warrant a direction to produce the original document to impound it. The relevant provisions of the Stamp Act may not be attracted at this interlocutory stage because the plaintiff has not brought the lease deed in evidence. The unreported Division Bench judgement (*Sekh Nurmal Ali v. Dhanindra Kumar Sil*) and *Biswajit Chakraborty* support this viewpoint. Section 49 of the Registration Act is less severe in that it includes a caveat that allows for an escape path. The paragraph relating to the payment of liquidated damages under the subject lease deed appears to be a collateral transaction within the meaning of the aforementioned proviso at first glance. The money claimed by the plaintiff in *Avinash Kumar Chauhan* was for the consideration that had been offered for the transfer of the land in dispute. The Supreme Court in *Rana Vidya Bhushan Singh* allowed the defendant to claim the nature of his coming into possession of the land by using an unregistered document as a shield. The plaintiff's right to claim possession upon the breach of an unregistered deed condition relating to the purpose of use of the demised premises was crucial to the plaintiff's right to claim possession in *K.B. Saha & Sons Pvt. Ltd.*

Even if it is presumed that the plaintiff's reliance on the lease deed is not as evidence of a collateral transaction not required to be affected by a registered instrument, there is no reason to believe that the plaintiff would not comply with any directions issued at the trial upon the plaintiff tendering the lease deed in evidence. Indeed, a mandatory injunction on the first defendant to complete and register the deed is one of the reliefs sought in the lawsuit. In any case, because there is no denial of the agreement's execution, it may be inequitable to allow the first defendant to use the Stamp Act and the Registration Act to get out of the deal, especially when the first defendant does not cite such

<sup>20</sup> *Volition Investment Pvt. Ltd. v. Madhuri Jitendra Mashroo*, AIR 2003 Bom 360

<sup>21</sup> *Muruga Mudaliar v. Subha Reddiar*, AIR 1951 Mad 12

<sup>22</sup> *Umde Bhojaram Vs. Wadla Gangadhar*, 2002 (2) ALD 339

<sup>23</sup> *Biswajit Chakraborty v. Mira Sen Ray*, 2002 (2) Cal LJ 449



grounds to retain possession but to deny payment of outstanding lease rent and liquidated damages resulting from the lease's premature termination.

The agreement stated that if the respondent wanted to use the premises for any other purpose, it would have to obtain written permission from the appellant beforehand. The respondent told the appellant that its designated officer had left the premises and that it planned to perform repairs before assigning the space to another employee. The appellant raised an objection. The respondent persisted on completing the repairs and stated that it would not relinquish the suit premises. The appellant filed the first suit seeking a declaration and injunction prohibiting the respondent from assigning the suit premises to any other employee after the original officer had left. The second lawsuit was filed for eviction. According to the written statements, the lease arrangement was illegal and unenforceable since it violated the law. A single decision was used to dismiss the lawsuits. The ensuing appeals were dismissed by the High Court. The agreement was not compulsorily registrable, and even if it was, the condition for letting out the suit premises was a collateral purpose within the meaning of the proviso to Section 49 of the Registration Act, and may be enforced, it was argued in the Supreme Court. The Supreme Court cited an old Calcutta decision (AIR 1932 Cal 83(2)) that held that the terms of a compulsorily registrable instrument were nothing less than a transaction affecting the property contained therein; and that using such an instrument for the purpose of proving a term contained therein would not be using it for a collateral purpose if the relevant term involved the question of who was the tenant and on what terms the tenancy had been created. The Supreme Court further cited an Allahabad decision holding that when a party seeks to extinguish another's claim by relying on a document that is required to be registered, such reliance is not presumed to be for a collateral purpose. The appeals were dismissed by the Supreme Court.

According to a Single Bench judgement reported at (2002) 3 CHN 371 (Dr. Pradip Kr. Biswas v. Sibaji Bhowmik)<sup>24</sup>, there must be subjective satisfaction of the court that the defendant intended to obstruct or delay the execution of the decree and that the defendant was taking steps or proceeding "to dispose of the whole or any part of (the defendant's) property from within the local limits. The first defendant claims that keeping the amount claimed by the plaintiff locked in a bank account would be extraordinarily harsh and inconvenient for it, and that it would amount to suffering the decree because the first defendant would be out of pocket to such an extent.

The plaintiff relies on a judgement reported at AIR 2003 Bom 360 (Volition Investment Pvt. Ltd. v. Madhuri Jitendra Mashroo)<sup>25</sup> where an interlocutory application for the appointment of a receiver in a suit for specific performance of an agreement relating to an immovable property was considered in response to the first defendant's argument under the Stamp Act and the Registration Act. An argument was stated at the conclusion of paragraph 7 of the report that the relied-on memorandum of understanding was not admissible in evidence because it had not been properly stamped. The court granted the interlocutory application, stating that if the memorandum was not properly stamped, it might be done after payment of a penalty at the time of the trial. It was decided that it was against the commercial, moral, or mercantile ethic to break an agreement in order to wrongfully keep a big sum of money.

The plaintiff has relied on an unreported judgement of a Division Bench of this Court in FMA No. 998 of 2006 (Re: CAN 7867 of 2006, CAN 7377 of 2006) (Sekh Nurmal Ali v. Dhanindra Kumar Sil) delivered on January 25, 2008 in FMA No. 998 of 2006 (Re: CAN 7867 of 2006, CAN 7377 of 2006) (Sekh Nurmal Ali v. Dhanindra kumar Sil) The appeal was brought on behalf of a plaintiff who sought particular performance of a contract involving real estate. The trial court denied an interlocutory injunction request based solely on the fact that the agreement sought to be enforced was signed on insufficient stamp paper. The Division Bench decided that if an agreement was written on insufficient stamp paper, the Stamp Act's requirements would apply for the purpose of impounding the document, but that this would not render the claim unmaintainable or prevent the court from forming a prima facie view in the plaintiff's favour. The relevant consideration at the interlocutory stage, according to the Division Bench, is as follows:

"We, therefore, find that the learned Trial Judge erred in law in holding that there was no prima facie case in favour of the appellants when the defendant admitted execution of such agreement in a suit for specific performance of agreement. Once the execution of the agreement is admitted, in our view, in this type of case, the balance of convenience and inconvenience is in favour of granting injunction restraining the respondent from transferring, alienating and/or encumbering the property till the disposal of the suit; otherwise, the relief claimed in the suit may

<sup>24</sup> Dr. Pradip Kr. Biswas v. Sibaji Bhowmik, 2002 (3) CHN 371

<sup>25</sup> Volition Investment Pvt. Ltd. v. Madhuri Jitendra Mashroo, AIR 2003 Bom 360

become inappropriate and the Court may refuse to exercise discretion in favour of the plaintiff at the time of final hearing, even if it is ultimately proved that there was valid agreement."

The relevant provisions of the Stamp Act may not be attracted at this interlocutory stage because the plaintiff has not brought the lease deed in evidence. The unreported Division Bench judgement (Sekh Nurmal Ali v. Dhanindra Kumar Sil) and Biswajit Chakraborty support this viewpoint. Section 49 of the Registration Act is less severe in that it includes a caveat that allows for an escape path. The paragraph relating to the payment of liquidated damages under the subject lease deed appears to be a collateral transaction within the meaning of the aforementioned proviso at first glance. The money claimed by the plaintiff in Avinash Kumar Chauhan was for the consideration that had been offered for the transfer of the land in dispute. The Supreme Court in Rana Vidya Bhushan Singh allowed the defendant to claim the nature of his coming into possession of the land by using an unregistered document as a shield. The plaintiff's right to claim possession upon the breach of an unregistered deed condition relating to the purpose of use of the demised premises was crucial to the plaintiff's right to claim possession in K.B. Saha & Sons Pvt. Ltd.

There are two elements that must be seriously studied. Suits would not take years or decades to be brought to trial at the time the Civil Procedure Code was written, as is the situation today. The strength of the principle that an apparently good claim does not warrant an order for attachment before final judgement must be considered in light of the time and place in which it was established. The second point to consider is that, even if a defendant does not seek to mislead its creditors or the plaintiff, the vicissitudes of the commercial market may leave the defendant with little to offer as a judgment-debtor once the decree is entered. The elapse of time between the filing of an action and its trial, which has now become standard practise, may render the claim irrelevant or even disinterested in the claimant. This would erode public trust in the system and drive suitors to less appealing locations in search of more effective solutions. However, this may not be the best course of action for such factors to be taken into account.

As previously stated, the plaintiff's comparison of a Mareva injunction may be inappropriate in this situation of attachment before judgement. The plaintiff has not tried to prevent the first defendant from taking any of its assets outside of this Court's geographical jurisdiction. According to paragraph 29 of the petition, the attachment it requested and secured at the ad-interim stage refers to a bank account of the first defendant in New Delhi. The plaintiff is right when it contends that Section 136 and Rule 5(1)(a) of Order XXXVIII of the Code contemplate the attachment before judgment of a property beyond the local limits of jurisdiction of a court. Order XXXIX Rule 1(b) also allows a civil court to issue an injunction to restrain a defendant who threatens or intends to remove or dispose of his property with the intent of defrauding his creditors, without regard to territorial jurisdiction.

Because the agreement's execution isn't in question, the first defendant would have to show that the relevant clause, which provides for liquidated damages if the lessee decides to break the lease during the lock-in period, is a penalty that violates the Contract Act. It would also be the first defendant's responsibility to establish what the plaintiff could have done to mitigate its damages and, as a result, the first defendant's liability for liquidated damages would be reduced, if at all. The agreement in question is a commercial one, and a person binding himself to pay lease rent at an agreed rate and covenanting to pay an ascertainable amount for a breach on his part cannot be entirely excused by citing non-compliance with a statutory provision that he was obligated to comply with in the first place. It is the first defendant's conduct that, in the end, tilts the balance in the manner in which the discretion in this case is exercised. Though the first defendant's offer to secure the claim with a bank guarantee was undoubtedly made without prejudice, the first defendant's attempt to avoid its obligation in respect of liquidated damages by exploiting its fault for failing to register the deed lends credence to the plaintiff's allegation of ill motive. In these circumstances, it would be fair to demand the first defendant to provide a bank guarantee to protect the claim.<sup>26</sup>

The first defendant must provide an unconditional bank guarantee in the amount of Rs. 85 lakh in favour of the Registrar, Original Side, within four weeks after the Christmas Vacation, according to GA No. 2029 of 2009. The existing injunction against the first defendant's bank account will be vacated upon receipt of written confirmation from the Registrar, Original Side, of the unconditional bank guarantee to the satisfaction of the Registrar. The costs of the current petition, estimated at 3000 GM, will be determined by the outcome of the case.

<sup>26</sup> Abheya Realtors Private Limited Vs. SSIPL Retail Limited ..., <https://www.legitquest.com/case/abheya-realtors-private-limited-v-ssipl-retail-limited-another/E637F> (last visited on Dec 5, 2021)

Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

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