

LITIGATING IN INDIA

The Indian Judicial System

The Supreme Court of India in New Delhi is at the apex of India's judicial system. Its main function is to hear writ applications and appeals from the orders of the High Courts and other judicial and quasi-judicial bodies. Each state in India has a High Court, which is the highest state court. Some High Courts have original as well as appellate jurisdiction. Suits can only be filed in High Courts that have original jurisdiction, namely, Bombay, Delhi, Calcutta and Madras.

The Indian states are divided into districts. In each district, the district courts of senior division are the courts of first instance for claimants. Appeals from the senior division courts lie to the High Court.

Interim Relief

In order to obtain interim relief, an application can be made to a Court that has jurisdiction. For example, if the dispute involves leased assets, the plaintiff may move the court for interim relief, namely, an injunction preventing the defendant from using or alienating the property, and an order seeking the appointment of the Court Receiver as receiver of the leased assets, pending the final disposal of the suit.

Order XXXIX Rule 1 of the CPC, relating to temporary injunctions provides, in material part, as follows:

Where in any suit it is proved by affidavit or otherwise,-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors, [sic]
- (c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the

Court may by order grant a temporary injunction to restrain such act, as the Court thinks fit, until the disposal of the suit or until further orders.

A notice of motion is usually accompanied by an affidavit setting out all the relevant facts. It must be served upon the other party. However, in exigent circumstances, an ex parte application may be made. The court is also empowered to make other interlocutory orders providing for interim sale of perishable property, detention, preservation, inspection, etc., of the subject-matter of the suit, and the deposit of money in court.

Under Order XL, the court can appoint a receiver of the property only if it is “just and convenient” to do so. The words “just and convenient” do not mean that the court is to appoint a receiver simply because the court thinks it convenient – they mean that the court should appoint a receiver for the protection of rights or for the prevention of injury according to legal principles. (*Holmes v Millage* [1893] 1 QB 551, as cited in 3, Mulla, Code of Civil Procedure (14th ed) at p.2166). A court can also appoint a receiver of properties that are within the jurisdiction of another court (*Dhakuria Banking Corporation v Surabala Debi* [1953] AC 610, id at p 2159).

At present, notices of motion from 1999 are still pending in the Bombay High Court. Therefore, when such a motion is filed, it is imperative to plead for ad-interim relief pending the disposal of the motion along with interim relief pending the disposal of the motion and interim relief pending the disposal of the suit. Once the court grants ad-interim relief, the securities are protected. This frequently facilitates an early settlement. The defendant is aware that nothing can be done with the property while the injunction is in operation, i.e., the property is inalienable for the next 15 to 20 years. Thus, the defendant may opt to settle the matter and vindicate the property.

The foregoing is possible if enforceable security is available to the plaintiff. But in most joint ventures, etc, such security is not available. In these circumstances, it is extremely important to provide for and exhaust all available alternate dispute resolution remedies before commencing litigation.

Summary Procedure

Order XXXVII of the CPC, provides a special procedure for trial of certain classes of suits such as suits upon bills of exchange and promissory notes and those in which the plaintiff seeks to recover only a debt or liquidated demand in money payable by the defendant, with or without interest. The claims must arise out of a written contract, an enactment where the sum sought to be recovered is a fixed sum of money or a debt other than a penalty, or a guarantee when the claim against the principal is in respect of a debt or liquidated demand only. Summary suits can only be carried out by High Courts, City Civil Courts and Courts of Small Causes. Other courts can carry out summary suits subject to any restriction that the High Court may, by notification in the Official Gazette, impose. (Rule 1 of Order XXXVII of the CPC)

The essence of the summary suit is that the defendant is not, as in an ordinary suit, entitled to the right to defend the suit (see 3, Mulla, Code of Civil Procedure (14th ed) at p 2105). He must apply for leave to defend within 10 days from the date of service of the writ of summons upon him. Such leave will be granted only if the affidavit filed by the defendant discloses facts that indicate that the defendant has a substantial defence or that the defence is not frivolous or vexatious. If no leave to defend is granted, the plaintiff is entitled to a decree. The object underlying the summary procedure is to prevent unreasonable obstruction by a defendant without a defence (ibid).

For foreign corporations doing business in India, Order XXXVII is very effective for enforcing guarantees. But the Reserve Bank of India does not easily grant permissions to Indian nationals to guarantee payments of money overseas. Where such guarantees are furnished, the foreign companies will be able to avail of the summary procedure.

Alternate Dispute Resolution

The Arbitration & Conciliation Ordinance, 1996, consolidates arbitration laws in India. It also provides for conciliation or mediation. Separate provisions have been made for domestic and foreign awards.

Litigation in India can be endless. Therefore, foreign corporations seeking to do business in India should take adequate precautions at the outset. The agreements

should be negotiated with great care and detailed alternate dispute resolution clauses should be included. A foreign corporation setting up a joint venture with an Indian partner must include a conciliation and an arbitration clause in the contract. In the event of a dispute, the first step would be to conciliate and, if conciliation is unsuccessful, the matter is referred to arbitration.

But, in many cases, arbitration is the first round of the battle. An application can be made for setting aside arbitral awards on many grounds, namely, lack of jurisdiction, improper appointment of arbitrators, *et seq.* Such applications take between six (6) and twelve (12) months to be heard. Further, appellate remedies are also available. Therefore, recovery can be delayed to a certain extent.