

Freezing Injunctions in Commercial Disputes

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In this post, I attempt to differentiate between the approaches taken by the Bombay and Delhi High Courts on freezing injunctions. This subject has not received much certainty in commercial disputes despite its popularity in intellectual property rights infringement cases. I attempt to contextualise freezing injunctions within the framework of section 151 read with order 39 rule 1 and 2 of the Code of Civil Procedure (the “Code”) exploring how it is distinct from attachment before judgment (“ABJ”).

A freezing injunction (“FI”), popularly known as Mareva injunction, is granted “*if it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, wherein the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.*”^[1] Operating as a remedy *in personam*, it restrains a party from disposing off assets that it has within the jurisdiction of the court. Consider a situation where a party is residing outside the territorial jurisdiction of India and has assets situated in India. Without an order of the court, the party is free to alienate the property, ignoring the claim against it in court. In the circumstance, a FI would operate against the party preventing it from disposing off its assets situated in India. The consequence of breaching such an order would be contempt

proceedings against the party. In absence of specific provisions in the Code that cater to FIs, courts have taken recourse to English cases. Needless to say, pleading for this remedy requires establishing the rigours of Order 38 Rule 1 & 2 injunction (*prima facie* case, balance of convenience and irreparable harm).

ABJ has a statutory basis in order 38 rule 5 of the Code. Notably, both FI and ABJ serve the same purpose, i.e., to “*enable the Plaintiff to realise the amount of the decree, if one is eventually passed, from the Defendant’s property.*”^[2] ABJ has a higher threshold than an injunction. The Plaintiff must first establish a *prima facie* case. Thereafter, he is burdened with establishing that the defendant is attempting to remove or dispose of his assets, with an intention to defeat the decree that may be passed against him. Merely pleading that the Defendant was in a ruinous condition is also not enough to obtain an ABJ order^[3]. Notably, the order is made against the property unlike FI, in the sense that it is the property of the Defendant that is attached preventing him from dealing with the same in any manner.

It is it pertinent to note that both the remedies are different, although the object behind them remains the same. Majorly, one is an injunction and the other attaches the defendant’s property before judgment.

Bombay Approach

In *Iridium v. Motorola*^[4] (decided by a single judge of the Bombay High Court), the plaintiff (Iridium) filed for an order in the nature of ABJ. Iridium’s case stems from its allegation that it entered into the contract relying on facts wilfully misrepresented by Motorola. Therefore, a suit was filed for restitution and to declare the contract void.

In an attempt to prevent Motorola from disposing off its assets in India, Iridium filed for ABJ. It pleaded that Motorola resides and operates offshore and that there was a risk of it dissipating its assets in India due to its

financial health. This would have ignored the Iridium's claim against Motorola.

The learned single judge opined that FI can only be granted when ABJ as a remedy does not exist. Further, there has to be an identifiable debt due to the plaintiff and a danger that the debtor may dispose off its assets to defeat the judgment. It is not sufficient to show that the defendant resides abroad. What must be shown is that it should be registered in a country where nothing can be found about its membership or control or its assets and that the judgment cannot be enforced against it owing to an absence of reciprocal arrangement with that jurisdiction.

The judgment distinguishes between both the remedies holding that FI merely requires a risk of dissipation of assets while ABJ demands intention to obstruct or delay combined with an attempt/overt act by the defendant to dispose of its property. Having duly recorded this difference, the judgment falls short of granting an FI since ABJ as a remedy exists in the Code.

Delhi Approach

Rite Approach v. Rosoborne Export^[5] is a case in point. By virtue of a contract of agency between Rite Approach and Kazan Helicopters Ltd. (subsequently taken over by Rosoborne Export), the former was claiming commission from Rosoborne Export for the sale of six helicopters by a third entity to the Government of India. FI was sought against Government to restrain it from making full payment for six helicopters and to prevent the respondent from dealing with it. The respondent being a Russian state-owned company has resources to satisfy any decree in favour of the plaintiff making it difficult to seek an injunction order against it.

Although the bench found no merit in the appeal due to Government of India not being a party to the arbitration agreement between the appellant and the respondent and various other reasons, its observations with regard to FI and ABJ are noteworthy and shape the jurisprudence on this subject matter. The

judgment departs from the Bombay approach holding that although FI is different from ABJ, the former has to satisfy the statutory tests under Order 38 Rule 5. In other words, pleading for FI necessarily requires the party to meet the rigours of Order 38 Rule 5 of the Code. It is respectfully submitted that this approach ignores the difference between a form of injunction and ABJ, both governed by different provisions under the Code.

Equitable Jurisdiction

Section 151 of the Code saves the inherent power of the courts to “*make such orders as may be necessary for the ends of justice*”. The Code is not exhaustive as the legislature is incapable of contemplating all the possible eventualities that may arise in future litigation.^[6] It is only when there is no clear provision in the Code that the inherent jurisdiction can be invoked.^[7]

The Code only provides for ABJ and temporary injunctions. As stated earlier, the Delhi approach of clubbing the evidentiary burden of FI and ABJ together does not justify the difference between attachment and injunction. The Bombay approach is apt, to the extent that it recognises the different standards required of both the remedies. The judgment however falls short of granting the remedy in light of the fact that a remedy similar in nature exists in the Code. It is humbly submitted that even though a ‘similar’ remedy exists, both are mutually exclusive and distinct from each other. The presence of ABJ in the Code must not impede courts from granting FIs under section 151 of the Code if ends of justice demand.

Notably, the Supreme Court has yet not been seized of a matter warranting its attention on this issue. It remains to be seen when and how this issue receives finality.

– Niranjan Sankar Rao

[1] *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213.

[2] [Ganu Singh v. Janji Lal \(1899\) ILR 26 Cal 531, 533; Amulya Ratan v. Prosad Chandra AIR \(1936\) Cal 143.](#)

[3] [Raman Tech & Process Engg Co. v. Solanki Traders \(2008\) 2 SCC 302](#)

[4] [Iridium India Telecom v. Motorola Inc. 2003 \(6\) BomCR 511](#)

[5] [Rite Approach Group Ltd. v. Rosobornexport AIR 2007 Del 145](#)

[6] [Manohar Lal Chopra v. Hiralal AIR 1962 SC 527.](#)

[7] [Commur v. Ratna Verma \(1969\) 2 Mys LI 23; Bhonrey Lal v. Ram Singh AIR 1956 Raj 49.](#)

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