



APAC NEWSLETTER
Legal, Compliance and ESG

18, July 2022

Dear Readers, We bring to your reading and attention following topics:

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A. ATTACHMENT OF PROPERTY

~ Yogesh Babar, Assistant Manager- Legal

Introduction:-

For the recovery of the unpaid dues, the financial institutions (“Lenders”) initiate recovery proceedings against the defaulted borrowers and get final decree / arbitration award from the court/arbitrator against the defaulted borrower for the payment of the defaulted amount along with applicable interest. Therefore, in order to recover the money on basis of the decree / arbitration award, by selling the properties of the judgment debtor (“JD”), the Lenders need to file execution petition before the appropriate civil court (“Execution Court” or “EP Court”) where the borrower’s property is located, for the attachment and sale of the property of the JD.

1. Property that can be attached.

Sections 60-64 and rules 41-57 of order 21 of Civil Procedure Code, 1908, (“CPC”) deal with matter of attachment of property.

Section 60 of CPC provides the details regarding the properties that can be attached and cannot be attached.

All saleable property including lands, houses or other buildings, goods, money, bank notes, cheques, bills of exchange, hundis, promissory notes, government securities, bonds or other securities for money, debts, shares in a corporation, which belongs to JD maybe attached and sold in execution of a decree against him.

2. Modes/Procedure of Attachment

The mode of procedure for attachment of immovable property starts with issuing a prohibitory order by EP Court to JD and to the public generally, this order will stop the JD from transferring/alienating the property or encumbering it to any third party.

In order to make the attachment valid, the details given in the schedule attached with the prohibitory order should be matched to be strictly same with the details given in the schedules of the property given in warrant of attachment issued by the EP Court.

The court officer who carries the warrant of attachment will see if the JD makes any payment or not after the issuance of warrant and return it within specified time before the EP Court with necessary remarks.

If the JD, against whom the attachment warrant is issued, is absconding, then the court may carry out proclamation through newspaper publication or public notice asking the JD to remain present before the EP Court. The copy of it will be affixed on the conspicuous part of the property as well as in the EP Court. The EP Court is expected to make sure that all the requirements or formalities for a legal attachment have been complied to prevent any sort of material irregularity as it might cause serious trouble and loss to the parties. The EP Courts are also expected apply proper care and caution in the process of service of warrants of attachment before they take any action with respect to the property.

No property can be declared to be attached, unless first the order for attachment has been issued, and secondly in execution of that order, the other requirements prescribed by the rules in the CPC have been done. Therefore, firstly there must be an order of attachment and secondly, in execution of that order formalities prescribed therein have to be complied with, that is, there should be a prohibitory order restraining the person from in any alienating the property sought to be attached.

When the property to be attached is movable property which is not an agricultural produce, then the attaching officer can seize the property and keep it in his custody. But if the property seized is of perishable nature or the cost of keeping it is likely to exceed its value the attaching officer can sell it immediately. If the attachment officer fails to sell such property, he can at the instance of judgment-debtor or decree-holder or anyone interested in such property leave it in the custody of a respectable person in the village or place where it has been attached. The custodian will later be liable for the inability to produce such property before the court, or for any loss or damage caused to it.

In case of a money decree the decree-holder can apply to the court to orally examine the judgment-debtor or officer or any other person, as to what means he has to satisfy the decree, and also direct him to make an affidavit stating the particulars of his assets, if the debts have been unpaid for a period exceeding 30 days. In case of a decree for rent or mesne profits or any other matter which is to be determined subsequently, the property of the judgment-debtor can be attached before even ascertaining the amount as done in the case of ordinary money decrees

B. CASE LAW ON RIGHT OF ILLEGITIMATE CHILD IN PROPERTY

~ Vivek Ugale, Senior Officer- Legal

Illegitimate kids born out of live in relationship to get share in property too.

The Hon'ble supreme court in the case of Kattukandi Edathil Krishan & Anr. V/S. Kattukandi Edathil Valsan & Ors. In CIVIL APPEAL NO(S). 6406-6407 OF 2010 has held that illegitimate child of couple cohabiting for long without marriage will be entitled to have a share in father's property.

Facts of the case: In this case the Plaintiffs i.e., Kattukandi Edathil Krishan & Anr. (Hereinafter referred to as 'Plaintiffs') filed a partition suit contended that the suit property belonged to Kattukandi Edathil Kanaran Vaidyar who had 4 sons viz. Damodaran, Achuthan, Sekharan and Narayanan. The first Plaintiff Mr. Kattukandi Edathil Krishnan is the son of Damodaran, born in the wedlock with one Chiruthakutty (Mother of Kattukandi Edathil Krishan) and the second plaintiff is the son of the first plaintiff.

The defendants i.e., Kattukandi Edathil Valsan & Ors. (Hereinafter referred to as 'Defendants') contended that all the children except Achuthan died as bachelors and Karunakaran is the only son of Achuthan. The defendants denied the contention of the Plaintiffs that the Damodaran had married Chiruthakutty and that the first plaintiff was the son born to them in the said wedlock.

Issues: The Plaintiffs before the Hon'ble supreme court contended that the voluminous documents produced by them would show that Damodaran was the father of the first Plaintiff and Chiruthakutty was the wife of Damodaran. Whereas the Defendants on the other hand contended that there is no proof whatsoever either of the marriage or of the long cohabitation.

The issue therefore considered by Hon'ble supreme court was whether there is sufficient evidence to prove the long cohabitation to establish the relationship of husband wife between Damodaran and Chiruthakutty?

Analysis of the Hon'ble supreme court:

The hon'ble supreme court, on examining the documents and evidence on record, observed that the plaintiffs have proved long duration of cohabitation between Damodaran and Chiruthakutty as husband and wife. The hon'ble supreme court has further held that the defendants have failed to rebut the presumption in favour of a marriage between Damodaran and Chiruthakutty on account of their long co-habitation.

Referring the various judgments on the issue, the hon'ble supreme court while allowing the appeal held that:

"It is well settled that if a man and a women live together for long years as husband and wife, there would be a presumption in favour of wedlock. Such a presumption could be drawn under section 114 of the Evidence Act. Although the presumption is rebuttable, a heavy burden lies on him who seek to deprive the relationship of legal origin to prove that no marriage took place."

C. CASE LAW ON SECTION 9 OF ARBITRATION & CONCILIATION ACT AND UPDATES ON EMPLOYEES PROVIDENT FUND

~ Jayesh Gupta, Manager- Legal

COURT CAN PASS AN ORDER OF INTERIM MEASURES UNDER SECTION 9 OF THE ARBITRATION & CONCILIATION ACT, 1996 AGAINST A THIRD PARTY

The Bombay High Court in the case of Choice Developers versus Pantnagar Pearl CHS Ltd. & Ors. (ARBITRATION PETITION (L) NO. 7966 OF 2022), has reiterated that the scope of section 9 of Arbitration and Conciliation Act, 1996, does not prevent the court to pass an order against a third party who is impleaded in the petition. Following the law as pronounced in by the division bench in Girish Mulchand Mehta & Anr. vs. Mahesh S. Mehta (2010(2) Mh. L.J), the Single Judge Bench comprising of Hon'ble Justice Mr. G. S. Kulkarni held that even though the jurisdiction of section 9 of the Arbitration and Conciliation Act, 1996 can only be invoked by the party to the arbitration agreement, but the Court is free to exercise the power under section 9 of the Arbitration and Conciliation Act, 1996, power for making appropriate order against a third party impleaded in a petition. The Hon'ble Court further held that Section 9 does not limit the jurisdiction of the Court to pass an order only against a party to the arbitration agreement or arbitral proceedings but also empowers it to pass orders even against persons who are not a party to the agreement but have been impleaded in the petition.

DECLARATION OF RATE OF INTEREST FOR EMPLOYEES' PROVIDENT FUND ACCOUNT

The Employees Provident Fund Organisation, vide its notification dated June 3, 2022, has conveyed the approval of the Ministry of Labour and Employment pertaining to the rate of interest for the Employees' Provident Fund Members Account for the financial year 2021-22 at the rate of 8.10% (Eight-point Ten Percent) for the financial year 2021-22 to the account of each member of the Employees' Provident Fund Scheme, 1952.

THANK YOU !