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# APPLICABILITY OF MAREVA INJUNCTION IN THE INDIAN LEGAL PARLANCE

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## ABSTRACT

It can be seen that most of the evolution of the Mareva Injunction has happened at the hands of the judiciary. Mareva injunction is an interim remedy over the years, which can be considered an excellent outcome of the creative judicial process. It is a very strong weapon in the disputes where there are major monetary questions of fraud. The injunction's current scope has changed significantly from its prior one. It has developed into a wide jurisdiction, which is considerably different from what was originally intended and allows the courts to award interim remedy against the defendant depending on the specifics of the case. Compared to the other injunction, it is different. It will include those assets that aren't necessarily part of the dispute's subject matter. It changed in 1980 as a result of the "The Mareva" case. In this instance, the court implemented a Mareva injunction judgement to stop the Marevas from losing control of their assets. Mareva injunction is a form of "*ad personam*" interim relief, which is usually sought during the pendency of court proceedings or after the completion of proceedings. The Mareva Injunction was granted for restraining the defendant from disposing of assets held in any part of the world. Common law did not recognise this kind of pre-judgment injunction prior to this case. The injunction is typically imposed on third parties, frequently the offender's bank, asking them to seize the offender's property. Mareva injunction was granted for in respect of assets found outside the jurisdiction of the court. If the court refused the particular application, then it must state the reasons for doing so. The author by the means of this research paper would like to delve into practical aspects of Mareva Injunction and under what circumstances it can be issued against a party and what are the similar aspects to be considered for getting an order of Mareva Injunction.

## INTRODUCTION

In 1975, the Mareva Injunction appeared, which was considered as powerful, unique to English law, extreme tools. But now it becomes commonplace, which sought as a matter of procedure in most developed commonwealth countries. It is also known as freezing orders, generally, an interlocutory order that granted an ancillary to a substantive claim that involves money. It prevents the defendant from rendering a decree against him worthless by removing his assets from the court's jurisdiction.<sup>1</sup>

Now the scope of the injunction is changed and evolved vastly from the earlier one. It has grown into a general jurisdiction, enabling the courts to grant interim relief against the defendant according to the circumstances of the case, which is very different from what was envisaged in the beginning.

Mareva injunction is a form of “*ad personam*” interim relief, which is usually sought during the pendency of court proceedings or after the completion of proceedings. Still, it should be enforced and enacted before the judgment. This type of injunction is essential for the claimant against the respondent to prevent the final from spreading his assets in the ordinary business course. So, for ensuring that the respondent does not conquer the enforcement of the judgment, the concerned injunction is necessary.<sup>2</sup>

It is different from the other injunction. It will cover those assets that are not necessarily a part of the subject-matter in the concerned dispute. It evolved in 1980 through the case of “The Mareva”. In the particular case, the court enforced a judgment on the Mareva injunction to prevent dissipating their assets from beyond a court's jurisdiction.

Before this case, common law did not permit this type of pre-judgment injunction. Mostly, the injunction is served on third parties, commonly in many cases the infringer's bank asking them to freeze the infringer's assets. If any person knows the infringer's assets, he would be amount to contempt of court if he does not do this. If the Mareva injunction is granted at the pre-trial stage in en-parts hearings, it is based on affidavit evidence alone.<sup>3</sup>

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<sup>1</sup> By Priyanka Hooda, Indian Law Portal, ‘Analysis of Mareva Injunction’ <https://indianlawportal.co.in/analysis-of-mareva-injunction/> (10<sup>th</sup> September 2022, 1:20 PM)

<sup>2</sup> By Priyanka Hooda, Indian Law Portal, ‘Analysis of Mareva Injunction’ <https://indianlawportal.co.in/analysis-of-mareva-injunction/> (10<sup>th</sup> September 2022, 1:20 PM)

<sup>3</sup> By Priyanka Hooda, Indian Law Portal, ‘Analysis of Mareva Injunction’ <https://indianlawportal.co.in/analysis-of-mareva-injunction/> (10<sup>th</sup> September 2022, 1:20 PM)

Mareva injunction or a freezing injunction finds its basis in the English law, wherein Lord Denning, in the landmark decisions of *Nippon Yusen Kaisha v. Karageorgis* and *Mareva Compania Naviera S.A v. International Ballcarriers S.A* granted this relief for the first time. While doing so, Lord Denning stated that:

*"We are told that an injunction of this kind has never been done before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment, or to restrain the disposal of them. It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this Court should not make an order such as is asked for here."*<sup>4</sup>

Popularly, Mareva injunction is an interlocutory *ad-personam* injunction which restrains the respondent/judgment debtor or the party against whom it is granted, from disposing off its assets otherwise than in the usual course of business, beyond the jurisdiction of the concerned Court, so as to render evade its resultant liability from the subject-judgment. Mareva injunction is not a matter of right and is not granted as a means of compensation to the plaintiff/judgment creditor.

Usually, resort to Mareva injunction is taken while the court or arbitration proceedings are pending or when the proceedings are concluded and a decision has been rendered but the execution of the decision is not yet undertaken. The primary objective of Mareva injunction is to enable the plaintiff/judgment creditor to enforce the decision against the respondent/judgment debtor, so as to prevent the enforcement of the decision from being frustrated and defeated.<sup>5</sup>

## EVOLUTION OF MAREVA INJUNCTION

Until 1975, in English law, the scope of the Mareva Injunction was very restricted. However, on the other hand, other jurisdictions, especially the civil law system, had a wide range of provisional protective measures. Initially, the English law system did not allow freezing of assets before or during the trial. But in between the 20th century, the person could not get an

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<sup>4</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 3:05 PM)

<sup>5</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 3:05 PM)

injunction to restrain another person who is supposed to be a debtor from parting with his property. It created a scope for unrestrained abuse.<sup>6</sup>

Foreign companies try to adverse the judgments and remove their assets from the court's jurisdiction before trial. And due to this plaintiff was left holding nothing except an empty judgment. Same this type of exploitation was seen in several cases in which involving 'one-ship' companies.

To prevent the people from this type of exploitation, the English court in 1975 within two successive cases, the court of appeal granted an injunction that stops the defendant from taking assets out of the court's jurisdiction in the pending trial. The first time Mareva injunction was granted in the case of Mareva Companies SA vs. International Bulk carries, this case gave the injunction its name.

Further, till 1979 Mareva Injunction was applicable only against the non-resident defendants. But this limitation was criticized at a vast level. So, in 1980, in *Rahman v. Abu-Taha*<sup>7</sup>, the court of appeal approved the expansion of jurisdiction to a resident defendant.

The jurisdictional ground of the Mareva Injunction under the English Law is provided through the Parliament under section 37(3) of the Supreme Court Act 1981. However, in India, the jurisdiction of the Mareva injunction provides the courts under Order XXXVIII, Rule 5 of the Civil Procedure Code, 1980, which grants this remedy. Several jurists analyse that the acquisition of the jurisdiction to grant the Mareva injunction is considered very useful.<sup>8</sup>

## **STANDARDS APPLICABLE FOR THE GRANT OF MAREVA INJUNCTION**

The development of the principles and standards of Mareva injunction is primarily attributable to the judiciary which has laid down various standards that must be satisfied for the grant of Mareva injunction. Therefore, while applying for the Mareva injunction, usually the plaintiff

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<sup>6</sup> By Priyanka Hooda, Indian Law Portal, 'Analysis of Mareva Injunction' <https://indianlawportal.co.in/analysis-of-mareva-injunction/> (10<sup>th</sup> September 2022, 5:20 PM)

<sup>7</sup> <https://www.studocu.com/my/document/universiti-teknologi-mara/civil-procedure-2/prince-abdul-rahman-bin-turki-al-sudairy-v-abu-taha-and/21187041>

<sup>8</sup> By Priyanka Hooda, Indian Law Portal, 'Analysis of Mareva Injunction' <https://indianlawportal.co.in/analysis-of-mareva-injunction/> (10<sup>th</sup> September 2022, 1:20 PM)

must establish that<sup>9</sup>:

1. There exists a strong *prima facie case* against the defendant, and should also provide a full and frank disclosure of all material matters when the injunction is sought without notice to the defendant;
2. It will suffer irreparable harm if the injunction is not issued;
3. The balance of convenience favours the issuing of injunction;
4. The cause of action lies within the jurisdiction of the Court which the Mareva injunction is sought.
5. It has a "good arguable case" on the merits of the cause of action. Considering that most of the Mareva injunctions are granted ex-parte and the likelihood of success cannot be quantified, the common law has not really explained the concept of a "good arguable case" in percentage terms. In essence, a good arguable case means that on the basis of the material before the court, the plaintiff seems to have real prospects of success.<sup>4</sup> Therefore, it becomes incumbent for the plaintiff to consider whether a "good arguable case" can be established in respect of its claims.
6. The assets of the defendant lie in the jurisdiction where Mareva injunction is sought and that there is a real risk of the defendant removing its assets from the jurisdiction, or otherwise dissipating or disposing off its assets, with an intention to frustrate the execution of a successful judgment. However, a mere suspicion of a likelihood of dissipation is not sufficient and the plaintiff is required to present reliable evidence establishing the risk of dissipation. In one of the cases, dishonesty or adverse credibility findings against the respondent resulted in a strong basis for real risk of dissipation.<sup>5</sup>
7. It is just and convenient to grant relief
8. A meaningful undertaking as to damages.<sup>10</sup>

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<sup>9</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 5:45 PM)

<sup>10</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 5:50PM)

## NATURE AND SCOPE OF MAREVA INJUNCTION

The principle of 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 recognised in the case of *Mohit Bhargava v. Bharat Bhushan Bhargava* 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>11</sup>

Further, the Calcutta High Court in the case of *Popular Jute Exchange Limited Versus Murlidhar Ratanlal Exports Ltd. & Anr.* discussed the criteria for the grant of Mareva injunction and held that the concept of grant of Mareva injunction is not different from the power of the High Court to grant interlocutory or final order of an injunction and under its general power of jurisdiction to grant an ex parte injunction. The English Court has developed a principle that the Court has power to restrain the defendant from removing assets from the jurisdiction pending the trial of action whenever it was just and convenient to do so. This power was originally exercised when the defendant was out of the jurisdiction but has subsequently been extended so as to be available against a defendant even though he is based within the jurisdiction.<sup>12</sup>

It was in that case of *Abheya Realtors Pvt. Ltd. v. SSIPL Retail Ltd.* that the court had an occasion to consider the nature and scope of Mareva injunction in detail and the following principles were laid down:

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<sup>11</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 5:45 PM)

<sup>12</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 5:45 PM)

1. The underlying principle in a Mareva injunction 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 judgment would be delivered and the claimant would have no means to satisfy the decree;
2. The concept of "within jurisdiction" and "outside jurisdiction" in England that is applicable to a Mareva injunction is quite distinct from what is meant by "within jurisdiction" qua a Civil Court in India. The expression "outside jurisdiction" in connection with a Mareva order made in England invariably implies beyond the shores of that country. In India, it is possible for a decree to be transferred or transmitted under the Civil Procedure Code from one Indian Court to another. The Court receiving the decree for execution thereof is expected to be governed by the same law, both in substance and in form, and it would certainly be from the same school of jurisprudence as the Court that received the action and passed judgment thereon.<sup>13</sup>

## MAREVA INJUNCTION AND ORDER XXXVIII OF THE CPC

Order XXXVIII, Rule 5 of the CPC provides for attachment of property before passing of a judgment.

The court has wide powers under Order XXXVIII, Rule 5 and is empowered to use this power at a time when the Court thinks that the defendant is about to get rid of his assets, with the intention of obstructing or delaying the execution of the decision.<sup>14</sup>

In a broader sense, both Mareva injunction and attachment before judgment appear to be serving 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.*" However, upon a closer examination, it is noted that both the legal recourses are different, even though they share the same object. One such difference is prima facie evident i.e. one remedy is an injunction and seeks to restrain the party and the other remedy attaches the defendant's property before judgment.

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<sup>13</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 5:45 PM)

<sup>14</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 6:15 PM)

In order to gain a better understanding of the relation between the two, it is essential to pay attention to the relevant judicial interpretation of the same. More particularly, the judgment provided in the case of *Uppal Eng. Co. (P) Ltd. vs. Cimmco Birla Ltd.* is of importance, wherein the following was observed:

*"12. ...the relief sought by the plaintiff is in the nature of attachment before judgment or pre-award attachment...In UK, Lord Denning gave this procedure a fashionable name- Mareva injunction. In the parlance of arbitration law, it is usually called 'pre-award attachment.' This remedy has been available in India from the inception of the Code of Civil Procedure 1908. The order of attachment before judgment, is passed to ensure the availability of such property at the time of execution of a decree. The procedure relating to 'attachment before judgment' is contained in Order 38, Rule 5 to 13 in the First Schedule to the Code of Civil Procedure.<sup>15</sup>*

However, the Court noted that the petitioner was not likely to succeed in his claims and the Arbitral Tribunal was yet to adjudicate on those claims, therefore, it was held to be pre-mature for the petitioner to invoke the provisions of Section 9 for relief of far-reaching consequences, when it was difficult to say if the petitioner or the respondent would succeed on their claims or counter claims and if so, to what extent.

*Further, the observations in the case of Rite Approach v. Rosoborne Export<sup>11</sup> with regard to Mareva injunction and attachment before judgment are worth noting as it was held that pleading for Mareva injunction necessarily requires the party to meet the rigours of Order 38 Rule 5 of the Code. Relevant part of the judgment is as follows:*

*"6. 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/decrees 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*

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<sup>15</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 6:24 PM)



*satisfied before freezing junction order is passed.*"<sup>16</sup>

The interplay between Mareva injunction and attachment before judgment is inevitable in light of their common object and the same is a developing area of law and remains open for judicial interpretation. However, the plaintiff while taking recourse of Mareva injunction before Indian courts must ensure that the requirements w.r.t. the standards applicable are being duly met.<sup>17</sup>

## **JUDICIAL PRECEDENTS GOVERNING THE APPLICATION OF MAREVA INJUNCTION IN INDIA**

1. In *Iridium v. Motorola*, the plaintiff (Iridium) filed for an order in the nature of Attachment Before Judgment, and the findings of the Bombay High Court are summarised hereinbelow<sup>18</sup>:
  - a. Existence of debt/liability: A clear liability or a debt owing to the plaintiff is absolutely necessary before the Court grants a Mareva injunction which really seems to be an order for freezing the assets in exercise of the powers conferred on the Indian courts under Order XXXVIII, Rule 5.
  - b. Disclosure of material matters by the Plaintiff: Such an injunction would be attracted where the company is one which is registered in a country where nothing can be found about the membership or its control or its assets and judgment cannot be enforced against it and more over where there is no reciprocal enforcement of a judgment. Even there the fact that the plaintiff must give an undertaking is treated as a matter of course. Applying the aforesaid principle to the present case, the Court held that there was evidence of a lack of a full disclosure of all matters within the plaintiff's knowledge as the plaintiff had failed to make a disclosure of the fact of a winding up petition having been admitted against it.

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<sup>16</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 6:42 PM)

<sup>17</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (10th September 2022, 6:48 PM)

<sup>18</sup> By Priyanka Hooda, Indian Law Portal, 'Analysis of Mareva Injunction' <https://indianlawportal.co.in/analysis-of-mareva-injunction/> (10<sup>th</sup> September 2022, 5:20 PM)

- c. Risk of dissipation of assets: The Court held that the plaintiff has given no material for inferring that there is a risk of assets being removed in order to defeat the decree that may be passed. On the other hand, it was observed that the defendants' business was growing.
  - d. Plaintiff's undertaking in damages: Apart from the fact that it is not necessary to consider the question of attachment before judgment from the point of view of a Mareva injunction, a practice which appears to have been adopted by the English Court initially, it was held that an injunction ought not to be granted in this case even if looked at from the point of view of the law relevant to this injunction as developed by the courts in India, as the plaintiff seeks an order which could stop the defendants from doing business completely in India. However, it was permissible for the Court to grant an injunction despite this consequence but for that to happen, something more than the mere possibility of a decree in the plaintiff's favour was necessary. The Court noted that the plaintiff's undertaking in damages is essential, particularly since they are seeking an order which has the potential of stopping the defendants from doing business. In such a situation, the undertaking in damages should be good. Having regard to the pendency of the winding up proceedings, the Court stated that it was difficult to see that the value of the plaintiff's undertaking in damages, in case their claim turns out to be unjustified."<sup>19</sup>
2. In an application praying for Mareva Injunction, the Court in the case of Dilip Chowdhury v Pratishruti Projects Limited & Ors. held that application prayed for Mareva injunction even after the Division Bench ordered the securing of money payable by the respondent no. 9 in an award suffered by him to be deposited with the Registrar of this Court. The Court may issue Mareva injunction in order to prevent the assets from being removed from the jurisdiction in an attempt to avoid and frustrate the claim. The Division Bench in clear and unequivocal terms had directed the money receivable from the 9<sup>th</sup> respondent to be deposited with the Court within a week

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<sup>19</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (11th September 2022, 6:48 PM)

therefrom and it was not in dispute that in absence of the failure in getting the award set aside, the monetary claim of the petitioner is sufficiently protected and secured.<sup>20</sup>

3. The Court in the case of Indian Oil Corporation Ltd. vs. Iranian Offshore Engineering and Construction Company held that the Arbitral Tribunal in the case had rightly discharged the respondent from the undertaking and allowed it to sail the vessel out of Indian waters as Tribunal was the best judge to see if there was a prima facie case or not since the Tribunal had all facts and circumstances before it. The Tribunal had also considered the financial soundness of the respondent and the fact that the vessel in question was not the subject matter of the contract at any point of time. The Court further stated that "*The order of the nature of detention of the vessel of the respondent would be an order akin to Order 38 Rule 5 CPC. A defendant is not debarred from dealing with his property merely because a suit was filed or about to be filed. The court should be satisfied that there was a reasonable chance of a decree being passed in the suit against the defendant and the Court should be satisfied that plaintiff had a prima facie case and after being satisfied of it, in order to exercise power under Order 38 Rule 5 CPC, a Court should be further satisfied that the defendant was attempting to remove or dispose of his assets with the intention of defeating the decree.*"
4. In the case of Formosa Plastic Corporation Ltd. vs. Ashok Chauhan and Ors., the court while discussing its inherent power under Section 151 of CPC, held that "*there seems to be no legal impediment if in such a case a judgment-debtor is restrained from alienating, disposing of or in any manner encumbering or dissipating his property which may be sold in execution of the decree when the bar against execution of the decree is lifted. Assuming that Order 21, Rules 30, 46 and 54 and Order 39, Rules 1 & 2 and Order 38, Rule 5 are not available in the present case, such an order could be made under the inherent power of the Court u/Sec. 151 of the Code which provides that "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."*<sup>21</sup>

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<sup>20</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (11th September 2022, 6:48 PM)

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## CONCLUSION

Mareva injunction has come a long way since its inception in 1975 and has undoubtedly become a powerful tool to ensure that the judgment passed by the court/tribunal is not rendered worthless. Gradually, the Mareva injunction has evolved from being a simpliciter prohibition to a broader relief which has wider scope of application and covers even those assets which are not necessarily a part of the subject-matter in dispute.

In case of Mareva injunction, the court has power to freeze defendant's assets, in case there exists a probability of the assets being dissipated with an intention to make a judgment against him worthless and un-enforceable. In the Indian context, this remedy appears to be similar to the order to "attach property before judgment" under the CPC. A decision to continue or set aside a Mareva injunction requires a particular consideration of whether there was a real risk of dissipation. In this respect, it has been held that the mere identification of a finding of dishonesty is insufficient; there still had to be a consideration of whether the dishonesty justifies an inference that there is a real risk of dissipation.<sup>22</sup>

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<sup>22</sup> By Waseem I Pangakar, Abhisekh Gupta and Aakansha Luhach, Mondaq, 'Applicability of Mareva Injunction In India' <https://www.mondaq.com/india/civil-law/1123972/applicability-of-mareva-injunction-in-india> (11th September 2022, 6:48 PM)