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International Fraud & Asset Tracing

India

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Law and Practice

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

Under Indian law, “fraud” is a nebulous concept comprising a plethora of prohibited activities which may result (without limitation) in civil liability, regulatory action and/or criminal proceedings.

A broad overview of the categories of claims is set out below.

Claims under Contract

The Indian Contract Act, 1872 (ICA) defines “fraud” as covering all acts carried out with “intent to deceive” another party or to “induce” them to enter into a contract. In support of this general description, the ICA has set out an indicative list of actions amounting to “fraud” including:

- a false statement (made knowingly);
- active concealment of a fact; or
- a promise made without any intention of performing it.

Similarly, “misrepresentation” is understood to include, without reference to the intention of the party concerned:

- making a positive assertion of an untrue statement;
- causing a party to make a mistake as to the substance of the thing that is the subject of the agreement; and
- any breach of duty, without intent to deceive, by which an undue advantage is gained by misleading another to their prejudice.

Acts of conspiracy, corruption or misappropriation are generally interpreted to be subsumed within the broad conception of “fraud” set out above. Parties aggrieved by the commission of

fraudulent acts may take advantage of contractual remedies at the following stages.

Formation of contracts

As with contract law in other common law jurisdictions, a contract that is not entered into with the “free consent” of parties would have no legal enforceability. Under the ICA, the following circumstances are deemed to impair the “free consent” of contractual parties, rendering the contract voidable at the instance of the aggrieved party:

- coercion;
- undue influence;
- fraud;
- misrepresentation; or
- mistake.

The aggrieved party cannot be held liable to perform such contracts and will be entitled to damages or restitution, as the case may be, for any detriment suffered on account of such contracts.

Similarly, conspiracy, corruption and/or misappropriation proscribed under other statutes (discussed below) and contracts, the object or consideration of which is unlawful under another legislation, would be considered void contracts within the framework of the ICA.

Performance or termination of contracts

Any act of fraud, misrepresentation, misappropriation, corruption etc would amount to a “breach” of contract. Such a breach would usually permit the aggrieved party to terminate the contract without incurring liability and pursue injunctive relief and/or damages. Such claims are made before a civil court of competent jurisdiction or before an arbitral tribunal, as the case may be.

Claims before Regulatory Authorities

The Companies Act, 2013 (CA) contains several provisions penalising the company as well as its key managerial personnel for fraudulent acts. Some of the acts so penalised are:

- furnishing false information or suppressing material information at the time of incorporation of a company;
- issuing false statements in the prospectus; and
- fraudulently inducing persons to invest in a company.

The CA also contains separate provisions penalising an individual found guilty of fraud or making false statements in any report, certificate, financial statement, prospectus, etc. In these situations, aggrieved parties may approach the concerned company tribunal or the Ministry of Commerce or other such authority for institution of regulatory proceedings.

Additionally, there are several statutory bodies which may take up cases of fraud and misrepresentation, including the Consumer Disputes Redressal Forums, the Competition Commission of India, the Securities and Exchange Board of India, the Regional Customs Authority and the Serious Frauds Investigations Office. The proceedings before such bodies and the role of the aggrieved party in such proceedings vary from case to case.

Criminal Proceedings***Indian Penal Code***

The Indian Penal Code, 1860 (IPC) is the primary legislation setting out criminal offences in India. Offences relevant to the above-mentioned categories may be broadly said to fall into one or both of two categories:

- “criminal breach of trust” – when entrusted monies or properties, as the case may be, are

fraudulently converted in a manner contrary to the terms of entrustment; and

- “cheating” – fraudulently inducing the delivery of monies or properties, as the case may be, to the detriment of the person delivering the properties.

Within these broad categories, various offences with differing punishments are set out in the IPC. The categorisation of offences is usually based on the nature of the relationship between the injured party and the party committing the offence (ie, the relationship of the complainant with their agent, trustee, employee, banker or government servant). Conspiring to commit any of the said offences, attempting the same or abetting the same are separately penalised.

In initiating such actions, however, the complainant plays the role of an “informant” and the proceedings are usually prosecuted by the state through the police. The ability to seek recoveries or compensation is rare in such proceedings.

Special legislation

In the context of misappropriation and corruption, the following special penal statutes may also apply.

- The Prevention of Corruption Act, 1988 (PCA) broadly covers “corrupt” acts committed by “public servants”. The term “public servant” enjoys a wide definition under the PCA, including all types of government/public officials, even bankers and those in key managerial positions in government-owned companies. The PCA also penalises intermediaries and bribe-givers, and includes provisions to penalise commercial organisations.
- The Prevention of Money Laundering Act, 2002 (PMLA) aims to control, criminalise and prevent money laundering⁷. The central offence under the PMLA relates to knowingly dealing with the “proceeds of crime” –

defined as any property or value of property, derived directly or indirectly by any person as a result of criminal activity pertaining to certain predicated or scheduled offences.

- A special system has been set up to recover sums due under a dishonoured bank cheque (although the dishonouring of the cheque need not be directly relatable to an act of fraud) under the Negotiable Instruments Act, 1881 (NI Act), which is in the nature of a quasi-civil and quasi-criminal proceeding.
- The Benami Transactions (Prohibition) Amendment Act, 2016 prohibits the transfer of property for fraudulent purposes in the name of another person or nominee.

1.2 Causes of Action after Receipt of a Bribe

As noted in **1.1 General Characteristics of Fraud Claims**, the PCA, which specifically criminalises the receipt of a bribe is usually applied only when the recipient of the bribe is a government servant.

Exceptions to this rule are made when the individual concerned performs what may be considered to fall within the realm of a public function, such as a banker (dealing with public deposits) or an executive of a government company. In all other cases, there is no specific law which may be used to seek remedies in the context of bribes received by an agent or representative.

Where bribes are taken by private individuals, recourse may be achieved through contractual claims or by way of instituting criminal proceedings, as described below.

Claims under Contract

Particularly with respect to an “agent”, the ICA provides for the following:

- an agent has a “duty of care” in dealing on behalf of their principal, including the duty not

to make personal profits or render accounts, and to act with good faith and diligence; and

- if the agent exceeds their authority, acts unlawfully or beyond the scope of agency, the principal will not be bound by their actions.

Where any private profit is made, including the receipt of a bribe, the principal would be able to maintain a civil claim against their agent who would be responsible to compensate all direct losses flowing from their dereliction of duty.

As regards other relationships, which do not specifically fall within the definition of “agency” under the ICA, receipt of a bribe would usually be considered a breach of contract – entitling the aggrieved party to claim damages and to terminate the relationship. By way of abundant caution, it is common for parties to include “anti-bribery” and “anti-profiteering” provisions in their contracts.

Criminal Proceedings

There are no specific laws constituting bribery as a distinct penal offence in the private sector.

However, offences under the IPC, such as “criminal breach of trust” and “cheating”, are often broad enough to subsume the unscrupulous actions of agents or employees, including the receipt of a bribe. These offences are discussed in greater detail in **1.1 General Characteristics of Fraud Claims**.

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Claims against individuals for assisting or facilitating fraudulent acts rarely result in the institution of civil proceedings, particularly when the concerned individual/ entity does not have a contractual relationship with the aggrieved party.

Though such claims may be framed as a “tort” they are not commonly resorted to in India.

The most common method of seeking redress for facilitation of fraudulent acts is found in the realm of criminal law.

Abetment to Commit an Offence

Where a party assists or facilitates the fraudulent acts of another, they are liable to be prosecuted for “abetment”. Under the IPC, abetment is defined as:

- instigating a person to commit a fraudulent act;
- engaging with one or more persons in any conspiracy to commit such fraudulent act; and/or
- intentionally aiding any person in committing such fraudulent act.

The “abettor” is liable to be punished with the punishment of the offence so committed because of such abetment. The punishment would differ, however, if the act was performed with an intention different from that of an abettor.

Conspiracy to Commit an Offence

It is common in Indian law for co-conspirators to have differing levels of involvement in the commission of an offence. Any person that participates in the planning of an offence and takes any tangible action (or omits to act) in furtherance of a “common object” may be liable to be prosecuted as a co-conspirator.

Dealing with the “Proceeds of Crime”

As discussed in **1.1 General Characteristics of Fraud Claims**, the PMLA is a special legislation targeting the manner in which the proceeds of crime are concealed or projected as untainted. Under the PMLA, whoever “directly or indirectly” attempts or knowingly assists “in any process or activity connected with the proceeds of crime” shall be liable to be prosecuted.

1.4 Limitation Periods

Civil Proceedings

The Limitation Act, 1963 (Limitation Act) provides for the period within which a claim can be brought before the courts for adjudication. Any suits filed beyond the limitation period will be dismissed irrespective of any claim on the merits. In certain exceptional circumstances, a party may seek to sustain a claim by demonstrating bona fide reasons for delay. The Schedule under the Limitation Act provides for specific limitation periods depending upon the type of suit to be filed.

In the case of fraud, the Limitation Act provides that the limitation period is computed from the time a party discovers the fraud or from the period when the party theoretically, with due diligence, could have discovered the fraud.

For continuing actions of fraud, the period of limitation will not lapse during the continuation of the fraud and only begins from the date of last occurrence.

Criminal Proceedings

Generally, there is no limitation period for criminal offences. The following limitation periods are, however, applied in what are considered minor offences:

- for offences punishable with only a fine – the limitation period is six months from date of commission of the offence;
- for offences punishable with under one year of imprisonment – the limitation period is one year from the date of commission of the offence; and
- for offences punishable with imprisonment of up to three years, the limitation period is three years from the date of commission of the offence.

There is no limitation for initiation of criminal action for offences which are punishable with over three years of imprisonment. However, the courts may draw a negative inference from an undue delay in initiating criminal proceedings and the complainant may have to explain that the delay was in good faith.

1.5 Proprietary Claims against Property **Recovery of Property in Civil Proceedings**

Where property was transferred or entrusted through fraud or misrepresentation, such contracts/transactions are void in law and no right of title or possession of such properties may vest in the defaulting party. As discussed in **1.1 General Characteristics of Fraud Claims**, an aggrieved party would be able to make a civil claim for restitution of the property or payment of damages.

The defaulting party would also be expected to account for any profits made on the basis of sums received through fraudulent means and the Court may order the respondent to render accounts relating to this. At present, there are no rules to guide the identification of misappropriated properties forming part of a larger corpus of funds, and for seeking recovery of the same, along with the proceeds earned. Such claims are decided on a case-by-case basis.

It is also relevant to note that a civil claim for recovery would not supersede the right of secured financial creditors in insolvency proceedings initiated under the Insolvency and Bankruptcy Code, 2016 (IBC).

Recovery of Property in Criminal Proceedings

Unlike in civil actions as described above, restitution claims are rarely made in criminal proceedings. Rather, the focus of criminal proceedings is to identify and freeze/attach fraudulently gained properties and punish the perpetrators.

Recovery claims are effectively pursued only in certain situations covered by special legislation such as in the case of fraudulent transactions in dealing with securities or in the case of deposits collected by fly-by-night schemes from the public at large. Only in these cases do restitution or recovery claims form part of criminal proceedings. Usually a party seeking to recover properties would prosecute a civil claim in parallel and rely on criminal proceedings to identify the scope of the properties to be recovered.

IPC

In criminal proceedings initiated under the IPC for fraud or misappropriation, the properties which directly relate to said offence may be attached by the police authorities, after expiry of their use as evidence, and (if need be) they may be returned to the victim of said crime. If, however, such assets are not recovered or are dissipated by the accused person, no direct redress is provided under the IPC.

In practice, however, it often happens that the accused person seeks to settle the matter with the complainant in order to avoid penal consequences, usually by entering into an agreement to return the disputed properties or to make payments in lieu thereof. In such cases, criminal proceedings against the individual concerned may be “compounded” by the magistrate (in cases where offences are compoundable) or quashed by a competent High Court.

PMLA

In more complicated cases where the proceeds of crime are dissipated in a sophisticated fashion, provisions of the PMLA are invoked. Under the PMLA, the Directorate of Enforcement (ED) has the power to free and seize all assets relating to the proceeds of crime. Notably, the “proceeds of crime” under the PMLA relates not only to the property directly arising from the crime (eg, the bribe) but also includes any property that

may be derived from such proceeds (eg, a residential property bought by the accused person's associate from the bribe money) or where the proceeds are outside the jurisdiction of India, any property of the same value dealt with by the said individual.

For ease of prosecution, the PMLA also provides for the following:

- where one transaction is proved to be involved in money laundering, all related transactions are presumed also to be tainted; and
- where any “proceeds of crime” are identified, it is the burden of the person in possession of the assets/property to show that they were not involved in an offence of money laundering.

The PMLA does not, however, provide any mechanism for defrauded persons to claim the attached or seized properties.

It is also pertinent to note that pending insolvency proceedings would not limit the right of the ED to attach or freeze assets/property that are the proceeds of crime. This issue has not been resolved in Indian law and has recently been subject to conflicting decisions across various high courts.

1.6 Rules of Pre-action Conduct

There are no general pre-action procedures applicable to all cases. Pre-action conduct applies only in cases where a statute specifically requires it or where the relevant contract expressly requires it.

Civil Proceedings

For civil claims, several statutes prescribe that a legal/demand notice be sent to the other party prior to any further legal action. A couple of examples are:

- the IBC requires that a demand notice be served demanding payment of the debt within 10 days' time, failing which, action may be initiated; and
- under the Code of Civil Procedure, 1908 (CPC) no action may be taken for any act done by a government/public officer in their official capacity without serving a written notice two months in advance.

Apart from legal/demand notices, certain statutes also require that the parties approach alternative dispute resolution forums prior to litigating before a competent court. For example, Section 12A of the Commercial Courts Act, 2015 mandates that the plaintiff must exhaust the remedy of pre-institution mediation prior to instituting a suit. The said requirement only applies in cases where no urgent interim reliefs are sought.

Most contracts containing a dispute resolution clause also have a pre-action step requiring the parties to enter negotiations for a fixed period of time with a view to obtaining an amicable settlement, only after which may any action be initiated. In the case of such a clause, it must be followed, as the action is otherwise susceptible to fail at a later stage.

Criminal Proceedings

No specific pre-action conduct is stipulated in relation to initiating criminal proceedings. A notable exception is made in the case of initiating criminal proceedings relating to dishonoured bank cheques under the NI Act, where the complainant/claimant must serve notice to the defaulting party within 30 days of the dishonouring of the cheque and proceedings can only be initiated if the defaulting party fails to make the requisite payment within 15 days of receipt of said notice.

For other criminal proceedings, the Supreme Court of India has held that if a complaint alleges

criminality in relation to civil transactions, a preliminary inquiry would have to be conducted by the police station concerned to establish that the grievance is genuine before registering a criminal case and initiating investigations.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Injunctive Relief

Both during the pendency of or on completion of civil proceedings, claimants may approach a civil court or an arbitral tribunal, as the case may be, to seek injunctive relief against the alienation or destruction of any property or for securitising any claimed sums.

The power of a court to entertain such proceedings and pass such injunctions is explicitly recognised under the CPC. All such orders act as in rem orders and a third party aggrieved by such an order may approach the court concerned and seek modification of such orders after showing cause.

Court Fees for Injunctions

The Court Fees Act, 1870 (CFA) states the amount of court fees to be paid for various types of action before the court. The value of court fees would depend upon the valuation of the suit, which the claimant is at liberty to determine, constituting 1% to 2% of said value.

Where injunction is sought along with other reliefs (ie, money decree, possession of property etc), there is usually no requirement for the payment of any additional court fees in relation to the injunction, and at best, a nominal fee may be paid. If an injunction is sought in relation to an ongoing arbitration proceeding, the court fees payable would only be a nominal fee unrelated to the property in question.

In suits seeking only injunction without other consequential relief, the valuation of the suit

may be independent of the value of the property in relation to which the injunction is being sought – as long as the same is not wholly arbitrary. Usually, courts in India tend to accept 50% of the value of the property to be a reasonable valuation for the purpose of seeking an injunction, however, deviations from this rule may be permitted in special cases.

Consequences of Non-compliance

Non-compliance with such orders of a civil court would result in the commencement of proceedings under the Contempt of Courts Act, 1971. This may lead to coercive proceedings, resulting in attachment of the properties of the non-compliant party by administrative authorities and even in short periods of imprisonment.

Cross-Undertaking in Damages

While cross-undertakings were previously inconsistently sought across courts in India, in a 2010 judgment, the Supreme Court of India clarified that no provision under the CPC permits a demand for a party to file a cross-undertaking in damages, and in the absence of such a requirement under the contract between the parties (if any), the plaintiff cannot be asked to furnish such undertaking.

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

Procedures for Disclosure

In any civil proceeding, there is an obligation on both parties to disclose all relevant information and documents in their knowledge or possession and to identify such information and documents not in their possession, informing the court of the person/entity in possession of the same.

To aid such disclosure obligations, parties may rely on discovery requests and inquisitories

addressed to each other in order to obtain a full disclosure. In the event of any suppression, the court may order disclosure.

It is relevant to note that parties often seek orders directing the defendant to provide security for or deposit of the claim amount, apprehending that the award-debtor would not have the financial capacity to honour the claim when eventually awarded. In such proceedings, plaintiffs/claimants often seek directions from the court that the respondent should provide a list of all its assets and liabilities in the form of an affidavit.

Assets of Third Parties

Usually the orders discussed above are not passed in relation to assets or liabilities of third parties. However, in cases where it is shown that in the usual course of business, assets are held on behalf of the respondent by a third party, then such orders may also be passed against third party nominees. There have also been instances where assets held by other entities have been sought to be disclosed when the same are shown to be connected to the transactions in dispute.

Scope of Disclosure in Criminal Proceedings

Under the Code of Criminal Procedure, 1973 (CrPC), the court or any officer in charge of a police station may issue a summons to any person in possession of documents or evidence necessary for the investigation or trial, to produce such evidence or documents at a certain time and place. Unless the said information amounts to self-crimination, parties are obliged to disclose the same. Similar powers to summon are also specified under the criminal statutes highlighted in **1.1 General Characteristics of Fraud Claims**.

Sanctions for Non-compliance of Disclosure

In addition to initiation of contempt action as discussed in **1.7 Prevention of Defendants Dis-**

sipating or Secreting Assets, a party which does not comply with an order for discovery is also liable to have its defence struck out. The courts are, however, reluctant to invoke this power lightly. Suppression of documents and wilful non-disclosure may also amount to distinct criminal offences in themselves.

Cross-Undertaking for Damages

While cross-undertakings for damages are generally not required in Indian courts (as discussed in **1.7 Prevention of Defendants Dissipating or Secreting Assets**), the courts may impose costs on parties making vexatious or frivolous requests.

2.2 Preserving Evidence

Procedures for Preserving Evidence on Apprehension of Destruction

Under civil law

Under the CPC there is a specific remedy for the preservation of assets where there is an apprehension of destruction of the evidence. An injunction restraining the defendant from disposing, alienating or damaging the assets in any way may be granted under this provision if the following conditions are satisfied:

- there is a prima facie case in favour of the plaintiff;
- the balance of convenience is in favour of the plaintiff; and
- irreparable injury would be caused to the plaintiff if the injunction was not granted.

Despite the absence of an explicit power to apply such rules extra-territorially, courts in India have also recognised the power to grant a *mareva* injunction (freezing injunction) of the defendant's assets in India and elsewhere where there is apprehension that the evidence may be disposed of.

Under criminal law

Under the CrPC, the appropriate authority (usually the district or sub-divisional magistrate) may grant a warrant to the investigating authority to search premises without notice, if there is reason to believe that fraudulently obtained property may be found there. If any relevant evidence is discovered, the same may be seized, attached or frozen, with related persons being deprived of the right to access such properties for the pendency of investigations. Such right of search and seizure also exists in relation to books of accounts and electronic records.

Under the PMLA, if an offence mentioned in the Schedule to the PMLA is suspected to have been committed, and the accused has obtained property as a result of the crime, then all such property and assets are termed the proceeds of crime and are liable to be provisionally attached by the ED. This is subject to confirmation of attachment, within a period of 180 days, by the concerned adjudicating authority.

Party Conducting a Search

In India, search and seizures are usually conducted by the state investigative agencies or by commissioners appointed by the court. While the plaintiff may seek special permission to accompany such officers, it is not common for a private party to participate in searches.

Cross-Undertaking in Damages

There is no requirement for a cross-undertaking in damages as discussed in **1.7 Prevention of Defendants Dissipating or Secreting Assets** and **2.1 Disclosure of Defendants' Assets**.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

Disclosure of Documents by Third Parties

Under civil law

As discussed in **2.1 Disclosure of Defendants' Assets**, both a civil court and criminal authorities

are empowered to demand disclosure from third parties of documents or evidence.

Under criminal law

In addition to the investigative powers discussed in **2.1 Disclosure of Defendants' Assets** and **2.2 Preserving Evidence**, the PMLA imposes a specific obligation to report financial transactions upon "reporting entities". Reporting entities are defined broadly and include banks, financial institutions, or persons dealing in precious metals or cash and liquid securities.

Such entities have additional record-keeping obligations and the investigating authorities are empowered to call for such records. Following an amendment to the PMLA in 2013, such entities are obliged not only to collect the usual particulars from clients, but are also required to monitor clients if the reporting entity feels that some transactions by clients are suspicious or could include the proceeds of crime.

Disclosure before Commencement of Proceedings

Under civil law

Under the CPC, applications for discovery and interrogatories cannot precede the commencement of proceedings. The filing of a civil suit is a pre-requisite to being able to file these applications before the court.

Under criminal law

The CrPC provides that summons for documents or information may be issued at the time of the investigation or inquiry. In India, the trial begins when charges are framed, and production can be mandated before the commencement of proceedings.

Restrictions on Using Such Evidence

Documents collected in the processes described above would be admissible as evidence, provided they are independently proved in trial. Simi-

larly, if any information in this regard is tendered as a statement made by an individual before a police officer or other authority (other than in the form of an affidavit or before a duly empowered judicial magistrate), this would also have to be separately proved. Such evidence, if relevant to the issue pending judicial consideration, is usually admissible if it is procured by a valid exercise of power.

2.4 Procedural Orders

Ex Parte Procedural Orders

Under civil law

The CPC allows the granting of ex parte ad interim injunctions before notice is issued to the defendant. Such orders are only granted if there is a need for exceptional urgency, in addition to the grounds discussed in **2.2 Preserving Evidence**. Usually the urgency is determined in terms of whether irreversible harm, which may not be monetarily recompensed, would be caused to the plaintiff if the court granted the respondent time to reply to the plaintiff's averments.

Depending on the nature of the facts, the courts may grant such orders to be in effect:

- until the respondent makes an appearance in the proceeding;
- until the interim application of the plaintiff is finally decided; or
- until the entire proceedings are finally disposed of.

No additional burden is placed on the plaintiff in such cases.

Under criminal law

As discussed in **2.2 Preserving Evidence**, the ED may seize assets relating to the proceeds of crime without affording the affected party any opportunity of a hearing. However, such attach-

ment cannot be confirmed by the adjudicating authority without hearing the affected persons.

2.5 Criminal Redress

In several situations, the civil process may not yield speedy results due to encumbrances on the assets in question or due to the difficulty in tracing assets if they have been dissipated. It is also commonly noticed that the defendant in such cases may be able to further delay the ability of the court to consider the charge on merit by raising preliminary issues of jurisdiction, admissibility or limitation.

For this reason, in cases where an offence has been committed under the IPC or any other penal statute, victims of fraud are often advised to file a criminal complaint while pursuing civil remedies in parallel. Receipt of notices from the competent police or investigative authorities may also ensure that the grievances are treated with appropriate seriousness.

Under Indian law, criminal proceedings and civil proceedings can be prosecuted simultaneously. Although the conclusion in both cases is independent in law, a conviction in a criminal proceedings (which requires the establishment of guilt "beyond reasonable doubt") may be pressed to receive a favourable decision in a civil proceedings (which only requires the claimant to prove their case on a "preponderance of probabilities").

2.6 Judgment without Trial

Non-appearance of Defendant

Under civil law

Under the CPC, the competent court is empowered to pass a decree ex parte, ie, without the defendant being present, provided that a summons was duly served upon the defendant, who failed to appear despite sufficient opportunity being provided to them. In such cases, the defendant may later approach the competent

court to set aside the ex parte decree if they can show sufficient cause for non-appearance, including that the summons was improperly served.

Furthermore, a plaintiff may file a “summary suit”, particularly, in the present context, in relation to admitted sums. In such cases, the defendant must first seek “leave” of the court to participate in the proceedings before the defendant is permitted to place its defences on record.

Under criminal law

There is no specified procedure under the CrPC to permit trials to be held in absentia, especially when the accused person is absconding or is untraceable. However, the CrPC permits the recording of evidence in the absence of the accused person if said person wilfully fails to appear. Similarly, the absence of co-accused persons shall not impede the trial of a person.

In certain recent judgments, the Supreme Court of India has called upon the Indian parliament to amend the law to allow for in absentia proceedings due to the high pendency of such cases. Certain high courts have also issued directions to lower courts to proceed with the trial and pass appropriate judgments despite the absence of the accused persons.

2.7 Rules for Pleading Fraud

Particularly in the context of civil proceedings, the CPC prescribes that in all cases where the party pleading fraud relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, particulars of the same (dates and items) need to be included in the pleading and affirmed through an affidavit. No such special rules of procedure or evidence are set out in relation to criminal processes in India.

2.8 Claims against “Unknown” Fraudsters

It is possible to bring claims against an unknown fraudster. When the identity of the fraudster is unknown, a suit is filed with the defendant being a “John Doe”. In such cases, a summons is served to the address/email address available to the court and an ex parte decree may be passed.

Such cases are usually seen in the context of intellectual property-related claims in which the actual perpetrator of the offence is untraceable or indiscernible. In such cases, the court may proceed with a John Doe suit and later pass the necessary directions to obtain the identity of the fraudster, seize properties or take down content available on the internet.

2.9 Compelling Witnesses to Give Evidence

The Indian Evidence Act, 1872 (Evidence Act) contains provisions to compel a witness to give evidence. The Evidence Act expressly provides that a witness is bound to answer questions relevant to the suit or proceeding. Notably, such duty shall persist regardless of whether the answers may incriminate such witness or expose such witness to any penalty.

Such statements made by a witness will not be admissible in any other proceeding in which the witness is being prosecuted, except for the offence of giving false or fabricated evidence.

However, the court is equipped with discretionary powers to decide when questions shall be asked and when the witness shall be compelled to answer, and the Evidence Act itself establishes a standard of reasonableness of questions posed.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

The actions of an employee/executive/agent may be attributed to a company when (a) the actions of the employee or agent were within their course of employment; or (b) when the company was “wilfully blind” of the actions of its agents/employees.

Under Civil Law

In civil claims, the actions of employees/agents which are reasonably within their scope of engagement are directly attributable to a company, subject to exceptions discussed in **1.2 Causes of Action after Receipt of a Bribe**. Notably, most civil claims are brought specifically against the company and not the erring agent/employee.

Courts in India also apply the doctrine of “indoor management”, under which, third parties who are not privy to the internal workings of a company shall not suffer detriment on account of the unauthorised acts of agents/employees of such companies which were reasonably made out to be on behalf of the company. As a corollary to said principle, the company may have a separate cause of action against their employees/agents.

Under Criminal Law

The erstwhile position under Indian law was that a company cannot be held liable for criminal offences since a company, being a legal fiction, does not possess the necessary intent (or mens rea) for the commission of a crime, or suffer imprisonment.

This position, while still applicable in classes of offence necessarily involving personal injury (eg,

theft or assault), is no longer applicable in the context of economic offences relating to property (eg, criminal breach of trust or misappropriation).

In fact, it is now a mandatory requirement for the company in question to be included as a co-accused for any actions committed by its agent/employee/executive on its behalf and the company is liable to pay fines for transgressions. Such companies may also be blacklisted and prohibited from participating in government tenders, import-export activities, etc. The defences available to a company in such a situation are essentially similar to those discussed in the subsection above.

3.2 Claims against Ultimate Beneficial Owners

As a general rule, a company is a separate legal entity, due to which the liability of the owners, shareholders or directors, as the case may be, is limited. However, in certain cases, Indian courts apply the common law doctrine of lifting the corporate veil in order to impose penalties on the persons controlling the actions of the company.

General Principles Governing Lifting of the Corporate Veil

From various judicial precedents, Indian courts have defined a few key principles that serve as a guide in lifting the corporate veil. Broadly, the corporate veil may be lifted:

- when a statutory provision empowers one to do so;
- to prevent fraud or misconduct;
- when the actions of a company are to evade a taxing statute or a beneficial statute; or
- where associated companies are indiscernible and closely connected so as to be part of one concern.

Statutory Provisions for Lifting the Corporate Veil of a Company

The CA contains provisions that provide for imputing liability upon the controlling persons under various circumstances as listed below.

Mis-statements in the prospectus

Misrepresentation in the prospectus would entail the personal liability of the directors, promoters or any other person who authorised the issuance of such prospectus. They shall be liable to compensate such persons who suffered a loss on the faith of the untrue statement.

Failure to return the application money

Where a company has opted for the public issue of shares and the minimum subscription as stated in the prospectus is not received within 30 days of such issue, the company shall return the application money. If such amount is not returned to the subscribers, the directors of the company shall be liable to incur a penalty.

Fraudulent conduct

In the course of winding-up of a company, if it appears that the business of the company has been continued with an intent to defraud creditors or any other persons, the key managerial personnel or any other persons who were knowingly party to such fraudulent conduct shall be liable as may be directed by the National Company Law Tribunal.

Special statutes

Other statutes such as the NI Act and the Income Tax Act, 1961 also provide for the personal liability of persons in control. There are also provisions under various labour legislations, such as the Employees Provident Funds and Miscellaneous Provisions Act, 1952 and the Factories Act, 1948, which attribute liability to persons in charge of carrying out the business of the company.

The broad parameters set out above are rarely applied in civil proceedings brought against a company unless the nature of the relief sought in such proceedings is such that it can only be enforced by proceedings against such executive or beneficial owner.

Reverse-vicarious liability of an executive

A more contentious issue in Indian law is the manner in which individuals at the helm of companies can be prosecuted for crimes committed by a company that require a mental element.

In the last few decades, in response to mounting allegations of corruption cases in India, the Supreme Court of India has clarified that:

- executives of a company cannot be presumptively prosecuted for the wrongful actions of a company in the absence of a specific statutory provision imposing such liability; and
- if, in the absence of such statutory provision, an executive is to be prosecuted for transgressions of companies, it would have to be established that such person was in control of the affairs of the company, was specifically aware of such actions and participated in the commission of said offence.

In this respect, it is noteworthy that the IPC does not statutorily provide for holding individuals responsible for the actions of a company. However, under the PMLA and the PCA, where it is determined that a company has committed the offence of money laundering or corruption, those in charge of the company (particularly as regards the actions resulting in the offence) are “deemed to be guilty of the transgression”.

In this regard, statutes such as the PMLA and the PCA are unique in that they reverse the burden of proof, requiring executives/directors of companies to show that they possessed no

knowledge of the alleged contraventions and exercised due diligence to prevent the same.

3.3 Shareholders' Claims against Fraudulent Directors

Derivative Suits

In the event that the conduct or business of a company is being run in a manner prejudicial to the interests of the company, the company, being an artificial legal person, would be entitled to sue for redress of such wrong. However, since the company cannot take action on its own behalf, a shareholder or a group of shareholders may sue on behalf of the company.

Although there is no statutory provision expressly allowing for derivative action suits, several courts in India have allowed for the same and have granted consequent reliefs.

Class Action Suits

Class action or representative action in a general sense, is where a group of individuals bring forth a collective claim against a defendant. In the present context, the CA enables shareholders to approach the National Company Law Tribunal (NCLT) if they are of the opinion that the business of the company is being conducted in a manner prejudicial to the interests of the company and its shareholders. Notably, oppression and mismanagement claims may also be brought on this basis.

The following requirements are, however, relevant to mention.

- In the case of a company having share capital, the CA requires the class action to be brought by at least 100 members or 5% of the total members (whichever is lesser) holding at least 2% of the total shareholding in the case of a listed company or 5% of the total shareholding in the case of an unlisted company.

- In the case of a company without share capital, the CA requires the class action to be brought by 100 depositors or 5% of the total depositors (whichever is lesser) holding at least 5% of the total deposits owed.

The CA provides a broad list of reliefs that can be sought from the NCLT, including claims for damages or compensation from its directors and also temporary and permanent injunctions.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

Under Civil Law

Under the CPC several parties may be joint defendants in a single suit where:

- there is a common right to relief alleged to exist between the parties, arising out of the same act or transaction or series of acts or transactions; and
- if separate suits were brought against such persons, any common question of law or fact would arise.

The CPC does not create a distinction between a domestic party and an overseas party in this regard and the courts may be entitled to proceed ex parte should such foreign parties fail to appear.

Judgments passed by an Indian court, having effect in relation to properties or persons outside the territory of India, will have to be specifically enforced in the relevant jurisdiction. India is party to various bilateral and multilateral treaties ensuring the enforceability of judgments from Indian courts in foreign jurisdictions – subject to limited grounds of challenge.

Under Criminal Law

Offences committed outside India which by law may be tried in India, shall be treated, for the purpose of the IPC, as having been committed in India if committed by:

- any citizen of India residing beyond India; and
- any person on a ship or aircraft registered in India wherever it may be.

Insofar as foreign entities are concerned, any offence committed by them which is punishable under Indian law shall vest jurisdiction upon the courts in India. Notably, if an offence is relatable to an offence in India, it is immaterial if parts of the said offence were committed outside the jurisdiction of India.

As regards commission transactions having an international element, India has entered into various knowledge-sharing, mutual-assistance and extradition treaties enabling investigation, recovery, seizure, arrest and production of accused persons in India.

5. ENFORCEMENT

5.1 Methods of Enforcement

A party in whose favour a decree has been passed, may approach the court that passed the decree or the officer (if any) appointed in this behalf, or another court of competent jurisdiction, with an application (written or oral) to enforce the said decree.

The process is not particularly complicated and, if the decree sought to be enforced is passed by another Indian court, the scope to interfere with the same is very limited. The CPC provides for attachment of properties in various scenarios, which is an option that the courts may opt to use to enforce a decree against a non-compliant judgment-debtor.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

Article 20(3) of the Constitution of India, 1950 (“the Constitution”) grants individuals a fundamental right against self-incrimination. There are also provisions under the CrPC that grant the right to silence during police interrogations or during trials.

Notably, no such right is available in the context of civil proceedings and negative inferences may be drawn from the refusal to answer questions.

Principles Guarding the Right against Self-Incrimination

Right to silence

The CrPC states that an individual need not answer questions posed by a police officer which could expose them to a criminal charge. This right is further protected in the trial stage where an accused person is not liable to answer questions which would incriminate them.

Such rights are, however, limited in cases under special statutes, such as the PMLA, where the burden of proof often lies on the accused person to show that the identified monies or properties, or transactions alleged to be tainted are not involved in the offence of money laundering.

In a recent judgment of the Supreme Court of India, such provisions governing the granting of bail were held to be “manifestly arbitrary”. The effect of the said judgment has, however, been nullified by a subsequent amendment to the PMLA.

Refusal to produce documents

In trials where a company is accused, its representative could refuse to provide documents that could potentially incriminate the company. However, the right would not extend to refusing to provide access to the premises where such

documents are stored or the suppression of such information by destroying said documents.

The right against self-incrimination is, however, diluted by the fact that such right is only exercisable by an individual who is “accused” of an offence. In view of the same, in practice, investigation agencies and police authorities demand documents from individuals in their position as “witnesses” and thereafter rely on such documents to proceed against said persons. Although the courts frown upon this practice, it continues to be widely employed in India.

Inadmissibility of statements to police officers

Under the CrPC, statements made by an accused person in police custody, including confessions, are inadmissible at trial and would have to be independently proved. It is, however, relevant to note that any discoveries made on the basis of such statements are admissible.

Once again, under the PMLA, such statements may be relied upon, since the investigative authorities under the PMLA are said to exercise their right to investigate in the stead of a judicial officer.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

The communications between a lawyer and their client are protected under the Evidence Act, the Advocates Act, 1961 (“Advocates Act”) and the Bar Council of India Rules (“BCI Rules”).

Indian Evidence Act

The Evidence Act states that no lawyer shall at any time be permitted to disclose any communication made to them or the contents or condition of any document with which they become acquainted in the course of their professional employment. This extends to interpreters, clerks or servants of lawyers as well. Such protection extends even after engagement of the lawyer has ceased.

Said protection may be limited only in cases where:

- such privilege has been expressly waived by the client; or
- where the client provides evidence as to such privileged discussions and, in the opinion of the court, such communication is necessary in order to explain any evidence already before the court.

The Advocates Act and the BCI Rules

The Advocates Act empowers the Bar Council of India to make rules on the professional standards that a lawyer needs to maintain. Broadly, such rules state that any breach of the client-counsel confidentiality described above shall result in disciplinary proceedings against the counsel.

Exceptions to the Privilege

The following information/documents are not protected from disclosure:

- any communication made in furtherance of any illegal purpose; and
- any fact observed by any lawyer, in the course of their employment, showing that any crime or fraud is to be committed.

It is clarified that defence of a person known to be guilty is not a criminal purpose and would be protected from disclosure, however, communicating the intent to commit an illegal act in furtherance of a criminal purpose would not be protected from disclosure.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

The ICA renders contractual terms setting out punitive or exemplary damages unenforceable

in civil claims. Broadly, where parties agree on liquidated damages, it should represent a “genuine pre-estimate” of the reasonable loss directly arising therefrom. Similarly, claims for unliquidated damages before the courts are to be limited to losses which directly arise due to the breach, and not consequential losses.

In this context, Indian courts are only inclined to grant punitive or exemplary damages in cases of violence, oppression, malice or fraud, usually having a public element. Similarly, claims for mental agony, loss of employment, injury and so on may also permit the granting of punitive or exemplary damages.

7.2 Laws to Protect “Banking Secrecy”

Relevant Statutory Rules

The Payment and Settlement Systems Act, 2007 (PSSA) imposes obligations of secrecy on those who manage online payment portals including RTGS (real-time gross settlement) and NEFT (national electronic funds transfer) systems. Specifically, the PSSA states that a “system provider” may not disclose the contents of any document or information given by a “system participant” except where:

- such disclosures are made with the express or implied consent of the “system participant”;
- such disclosures are in obedience to the orders passed by a court of competent jurisdiction; or
- such disclosures are in obedience to a statutory authority exercising its statutory powers.

Similar provisions exist inter alia in Section 13 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 and Section 3 of the Public Financial Institutions Act, 1983 which also state the obligation of secrecy in identical terms.

Separately, the Information Technology Act, 2000 contains provisions through which customers can receive compensatory relief for losses arising out of data leakages and unauthorised disclosures.

Relevant Circulars and Rules

The Reserve Bank of India (RBI) has from time to time issued circulars imposing norms upon banks to maintain the confidentiality and privacy of customers.

In 2006, the RBI along with several banks of the Indian Banks Association established the Banking Codes and Standards Board of India (BCSBI) which was to evolve voluntary norms that would be enforced by the banks. Among several guidelines, the BCSBI evolved the “Code of Banks’ Commitment to Customers” (“the Code”).

Enforced through internal redress mechanisms, one of the “key commitments” of the Code is providing customers the right to privacy. Similarly, in its master circular dated 1 July 2010, the RBI forbade banks from disclosing customer data to any third party without specific consent.

Exceptions or Methods of Circumvention

It is relevant to note that apart from the statutory rules and the circulars mentioned above, there is at present no data protection legislation in India. Therefore, any statutory investigative body would be able to summon relevant bank records in India. In fact, as noted in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**, banks now have a proactive duty to monitor banking activity and report suspicious transactions. Similarly, a court may also demand production of such documents if they are germane to the dispute before it.

Trilegal is one of India's leading law firms, with offices in four of India's major cities – Mumbai, New Delhi, Bangalore and Gurgaon. It is a full-service top-tier law firm with over 300 lawyers led by more than 50 partners. Areas of expertise include mergers and acquisitions, private equity and venture capital, banking and finance, media and technology, dispute resolution, regulatory, real estate, and taxation. The team represents clients in very high-profile white-collar crime matters. They are market leaders in statutory

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