

**Awareness Programme by the Chief Law
Officer for Officers in the KWA on matters of
legal implications pertaining to the Kerala
Water Authority**

(A)

A glance on **Circular No. 6708/LS5/2020/KWA DATED 11-02-2022** regarding instructions to the officials on Court cases.

A glance on **Circular No. 177/SC1GA (SC) 2022 DATED 12-04-2022** on the little scope of the courts' interference in policy matters.

(B)

A. glance on the Judgment dated 21-11-2019 of the Division Bench comprising of the Chief Justice of the HC, Kerala in **WA No. 2357 of 2019, filed by M/s Lakshmi Civil Engineers, Pvt. Ltd** against the KWA pertaining to a bid submitted by a Joint Venture of respondents.

Settled Laws in matters of bids under quotations

1. Tata Cellular Vs Union of India (1994) 6 SCC 651

1. In Paragraph 77 of the judgment, five grounds are significantly observed. In para 94, these points are deduced into six.

2. B.S Joshi & Sons Ltd Vs. Nair Coal Services Ltd and Others (2006) 11 SCC548. In para 66 seven points are laid down by the court.

Settled law in matters of Bank Guarantee

1. U P Cooperation Federation Ltd Vs. Singh Consultants and Engineers (P) Ltd, 1988 1 SCC 174

Para 189-

“That in order to restrain the operation either of irrevocable letter of credit or of confirmed letter of credit or of bank guarantee, there should be serious disputes and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between parties. Otherwise, the very purpose of bank guarantee would be negated and the fabric of trading operations will get jeopardized. It was further observed that bank must honour the bank guarantee free from interferences by the Court. Otherwise trust in commerce internal would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the Court should interfere. If the documentary credits are available and independent, the bank must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defence except in case of fraud. The banks’ obligation of course should not be extended to protect the unscrupulous party, that is the party who is responsible for the fraud. But the banker must be sure of its ground before declining to pay. The nature of fraud that the court talk about is fraud of an egregious nature as to vitiate the entire underlying transaction”

(C)

Clause 8, 14-16 of the NIT

Preparation of fool proof agreements under the NIT.

(b) Necessity of incorporating in the Agreements the stipulations in clause 8 of the NIT regarding the Bill payment to contractors, only upon the availability of funds from the State Government and as per Seniority. If, this being a contractual stipulation, the chances of litigation could be considerably reduced. Agreements must be fool proof to the maximum possible extent leaving no room for ambiguities. It must be specifically provided that the NIT forms part of the agreement. Moreover, there is no provision in the NIT for payment of interest for the delayed payment.

Noscitor a sociis

If there is ambiguity in the usage of any word in the agreement /contract, the applicability of the doctrine or rule of Construction comes. The meaning of the word can be gathered from the company it keeps or from the context it is used.

The KWA is only an implementing Agency of the Schemes of the State Government. The State Government is the major funder or the funding source. Without being released sufficient funds in time, the KWA cannot go ahead with the projects, rather it often becomes Condemner in such cases.

Therefore, while preparing the Statement of Facts in such cases, it has to be peremptorily contended that the writ petition is bad for non-joinder of necessary parties. Therefore, Govt. in the Finance and WR are to be got arrayed as respondents. This will make the Government responsible for releasing funds in time. Absence of necessary party is fatal to the suit. Besides, we can raise

the question of maintainability of the case from the beginning itself without being entered into the merit of the case.

Novation A new contract by which a liability under an existing contract is extinguished and a liability under a new contract is created to replace the former liability.

Meaning of Parties

The term “Party” has not been defined in the Code of Civil Procedure. In England as per section 225 of the judicial Act, party includes every person served with notice of or attending any proceeding although not named in the record. This is followed in India. Hence the expression ‘parties to the suit’ mean the persons whose names appear on record as parties.

Classification of parties. Order 1 Rule 1, CPC

i. Necessary party

A necessary Party is one whose presence on record is enjoyed by law, or in whose absence no effective decision can at all be given. Without such party the action, appeal or proceedings is not properly constituted and is liable to be dismissed. In short, without necessary party no decree can be passed. For example in a suit for partnership accounts, all partners are necessary parties.

ii. Proper parties

A proper party is one whose presence is not essential for the institution of the suit. appeal or proceedings but whom it may nevertheless, be desirable or even necessary, to have before the Court in order to properly or completely adjudicate on the matter involved.

All necessary parties are proper parties but all proper parties are not always necessary parties.

(D) Compliance of the interim orders on Inter locutory applications (IA) within the given time or to seek enlargement of time well in advance if unable to comply the directives within the time. Preliminary orders also are possible to be issued to overcome the question of time limit.

Lite Pendente –a pending suit and

Lis pendens –During the pendency of a suit –

Compliance of Judgment

The directives laid down by the Court in judgments shall be strictly implemented unless appealed against. Such compliance may be partial or full. In order to keep the given time, partial compliance is possible by issuing preliminary orders. In every case, it seems better to hear the parties as part of natural justice even if not directed by the court.

(E) Contempt of Court

Contempt of Court is defined to be a disobedience to the Court, an opposing or a despising the authority, justice, or dignity thereof. It commonly consist in a party doing otherwise than he is enjoined to do or not to do what he is commanded or required by the process , order, or decree of the Court. It signifies willful disregard or disobedience of the Court's Order. In **Amar Bahadur Singh case**, the Supreme Court has laid down the settled law in Contempt proceedings.

There are three different sorts of contempt, namely

1. Scandalizing the court itself
2. Abusing parties who are concerned in cases here and
3. Prejudicing its proceedings against the persons before the cause is heard.

Contempt of Court Act, 1971 deals with both civil and criminal contempt. (Sec. 2)

Civil contempt.(Sections 10-120)

It means willful disobedience to any judgment decree, direction order, writ or other process, of a court or willful breach of an undertaking given to a court.

Criminal contempt

It means the publication of any matter or doing of any act whatsoever which

- i. Scandalize or tends to scandalize or tend to lower the authority of any court or
- ii. Prejudices or interferes or tend to interfere with the due courses of any judicial proceedings or
- iii. Interferes or tends to interfere with or destructs or tends to obstruct the administration of justice in any other manner

Preparation of Counter Affidavit

Affidavit is a solemnly affirmed or sworn statement or a declaration on oath.

If there are more than one deponent, it shall be written likeI am also authorized to swear this affidavit for and on behalf of

Cause title

Name of the Court

Case Number

Details of Parties to the case

Statement of facts filed by the respondents1.....to

All averments in the writ petition/ suit are hereby denied by these respondents/ defendants except those that are specifically admitted hereunder

- iv. Full name of the deponent, age, description and place should be furnished
- v. Each page should be signed
- vi. Should be Precise and short
- vii. Furnish only under direct and personal information
- viii. Polite address shall be made for example; it is kindly, humbly, respectfully, benignfully etc.
- ix. The affidavit must be prepared parawise and chronologically numbered
- x. Affidavit is sworn by the deponent and not by writing petitioner or respondent
- xi. The facts stated above are true to the best of my knowledge, belief and information.
- xii. The language shall be simple and sentences shall be short.
- xiii. Attestation by an advocate.... Solemnly affirmed and signed before me by the deponent who is personally known to me at my office at..... on this the day of.....

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Essential of Counter affidavit

- There must be a specific case/defence based on specific pleadings (Answer parawise) However, same matters need not be repeated. Contentions in morethan one paras can be combined and jointly answered.
- Each statement made in the affidavit or counter affidavit must be focused on that defence
- There must be supportive documents to substantiate the case and to be marked as Exbt. R1... etc.
- No legal jargons/ maxims can be used if situation specifically warranted /required. For example in matters of applicability of rules, the latin legal maixm ***Generalia specialibus Non derogant***. It means that as we know that laws are made to regulate the activities of daily life in a way so that no wrong takes place. However, sometimes a special is required for a specific set of problems arising in a special area of law. This maximum is used for statutory interpretation. ***Generalia stands*** from genral and ***Specialibus stands for special***. When interpreted it means that general laws or rules do not prevail over special laws or general doesn't detract from specifics.

Example in the case of the appointment of Overseers in the KWA. They are governed by Special Rules, 1967 made under Article 309 of the Indian Constitution. Since there are Special Rules for them, the Kerala Service Rules can only apply *Mutatis Munatandis*, i.e. necessary changes being made.

Nemo dat quad non habet

It means that no one can transfer a better title than he himself possess or No gives what he doesn't possess. For Example purchase of land by the KWA in Kumily, Thiruvananthapuram district. One of the sellers has less land in possession than actually he ought to have hold as per his deed.

Per incurium- it means through carelessness

- However, case laws/ settled laws in supportive of the contention can be properly cited. Specific and conclusive findings only can be cited and referred to.
- There must be arrangement of material facts
- The style and language must be simple.
- Reliefs must be commented ...For example whether relief can be allowed or not
- Grounds shall also be answered
- Prayer portion

Execution proceedings under Order 21, Rule 1 to 106 of the Code of Civil Procedure

After a lot of toils, hard work, determination, emptying of pockets one qualifies from being called a '**Plaintiff**' to a '**Decree Holder**', and in the process on an average anything upwards from a decade to more than one decade is consumed. During this journey, the plaintiff who started as an innocent and reluctant litigant metamorphosis's into a half-baked lawyer. It is akin to a nursery toddler who after years of devotion, sacrifices, and dint of hard-work finally has a post-graduate degree in hand, which in our case we shall call '**Decree of Sale**'.

However, fruits of labour shall only mature after the execution of the **‘Decree of Sale’**. The word execution, is not defined but understood to be, *‘a judicial act by which a public officer is empowered to carry judgments or orders into effect’*? In other words, it means the carrying into effect the judgment or order delivered in a court of law. Order 21 along with 106 rules in its kitty is the most extensive of all in the Civil Procedure Code (CPC), 1908, it lays bare the procedure involved along with relevant sections, which we shall have at our command to conquer the ultimate summit.

Decree is defined under section 2(2) of the CPC

It is the formal expression of an adjudication, which so far as regards, the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Judgment follows decree

Essentials of a decree

There must be formal expression of adjudication.

The adjudication must have been given in a suit before the Court.

The adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit.

Such adjudication must be conclusive.

Introduction

Mostly, the decree of sale of immovable property is awarded for enforcing mortgage deed, charge, or for recovery of money or any other kind of encumbrances as deemed fit by the court. The person in whose favor decree is awarded is called the **‘Decree Holder’, (DH)** and the one incumbent to satisfy it is **‘Judgment Debtor’ (JD)**. Decree of sale comes into being upon adjudication by any court exercising original jurisdiction, and the same can be applied for execution after the prescribed period of appeal, provided it is not

preferred by the JD. Per contra, this can go on until the JD gives up or exhausts all his legal remedies.

Limitation & Executing Court

The period of limitation under '*The Limitation Act, 1963*' for filing of execution petition is 12 years from the date that the decree becomes enforceable. The same shall be filed in the very court that exercised original jurisdiction. However, the court may transfer the same for execution to any other court directly, even if it is situated outside the State. This could be for various reasons such as the immovable property to be sold falls under the territorial jurisdiction of that court etc. While transferring the decree for execution, the court shall send all relevant documents viz. copy of the decree, certificate setting forth that due claim remains unsatisfied or any part that remains, etc.

Written Application

DH shall move a written application in the court that originally passed the decree or the court to which it has been transferred for execution. The application shall contain all the essential information viz. suit number, name of parties, date of the decree, any appeal preferred or pending, amount due, name of the person against whom execution is sought, and most importantly the mode in which the assistance of the court is required. Presently, we are discussing for the purposes of attachment and sale of immovable property to the satisfaction of the decreed amount. DH should take care to quote the amount which in his estimate is the true value of the immovable property to be sold.

Show Cause Notice

After the executing court has satisfied itself that all defects if any have been cured in the application and has provisionally evaluated without

prejudice to the right of the parties the correct amount for the execution of the decree vis-à-vis value of the immovable property a show-cause notice is issued to the judgment debtor. It is an opportunity for him to raise his claims or objections against the execution of the decree on the day and date fixed for hearing. Show cause notice is necessary only if the execution petition is filed after 2 years of passing of the decree, or is against a legal representative or assignee or receiver where DH is declared to be insolvent. However, the court may in its wisdom issue process instead of show cause notice if it foresees unreasonable delay or ends of justice are threatened.

Application for Attachment

Once after the court has decided upon the claims or objections if any, raised by the judgment debtor, against the execution of a decree; the DH shall move an application requesting attachment of immovable property preceding sale. Though sale can take place without attachment, this shall further help in protecting the interests of the DH. The application shall contain complete details of the immovable property so as to help in its identification. Also elaborate the extent of JD interest in the said property, as per his information and belief. Whenever possible, the DH holder shall produce extracts from the registrar's office showing various details such as interest of parties if more than one, revenue due to the government, encumbrance's if any in the immovable property, etc.

Properties which shall not be liable to attachment or sale in execution of decree

Provisio to section 60 of the CPC lays down that the following particulars shall not be liable to such attachment or sale

1. The necessary wearing apparel, cooking vessel, beds and bedding of the JD, his wife and children and such personal ornaments as in accordance with religious use cannot be parted with by any woman.
2. Tools of artisan where the JD is an agriculturist, his implements of husbandry and such cattle and seed grain
3. Houses and other buildings (with the material and sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist or a labourer or a domestic servant and occupied by him.
4. Books of account
5. A mere right to sue damages
6. Any right of personal service
7. Stipend and gratuities allowed to of the Govt. or of a local authority or of any other employer or payable out of any service family pension notified in the Official Gazette of the Central or State Govt.
8. The wages of labourers and domestic servants
9. Salary to the extent of the first one thousand rupees and two-thirds of the remainder in execution of any decree other than a decree for maintenance. Salary means the total monthly emoluments excluding any allowance declared exempt from attachment under the provisions of clause (1). derived by a person from his employment whether on duty or on leave

Prohibiting Alienation of Property

After due diligence, the court shall pass an order prohibiting the JD from transferring or charging the property in any manner such as sale, gift, lease, mortgage or otherwise. The same shall apply to all who may be interested to receive it. Such prohibitory order shall safeguard DH's interests. The same shall be drawn in writing and posted at a conspicuous place adjacent to the immovable property in question, and also at collector's office if the said property is land paying revenue to the government. Besides affixing, it shall be

publicly proclaimed with the beating of drums and other means. This order shall also require the presence of the JD debtor in court on date fixed for settling the terms of the proclamation for sale.

Objections to Attachment

All claims or objections regard to the attachment of property on the ground that such property is not liable to be attached shall be filed before the executing court. However, such applications shall not be entertained by the court if the claim or objections is preferred after the attached property has already been sold or is unnecessarily delayed by design. In such circumstances, only remedy available to the applicant is to file a separate suit, and the court shall be bound by such outcome. However, w.r.t. all questions pertaining to *right, title or interest* they shall be adjudicated by the executing court itself.

Preparing Notice of Sale & its Proclamation

The executing court is empowered to attach property, and publicly auction it to pay the person entitled proceeds of the sale in satisfaction of the decretal amount. In this regards, the court shall issue a notice to both DH and JD to present themselves in court on the day and date fixed for drawing proclamation of sale notice. It is prepared in the language of the court and contains all the essentials viz. time and place of sale, specifications and description of property to be sold, revenue assessed if any due, any encumbrance to which the property is liable, decreed amount, estimate value of the property as ascertained by the court, judgment debtor and decree-holder or any other material information necessary that shall aid the purchaser in its evaluation. Care is taken to sell only that part of the property that is necessary to satisfy the decree. The court is also empowered to summon anyone, or demand documents deemed necessary in preparation of this proclamation notice. Henceforth, the court shall order the Nazir of the Court for causing

service of this drawn proclamation of sale. The same shall be published and announced by beat of drums. A copy of the same is affixed on a conspicuous part of the property and the courthouse. After performing all such acts, Nazir shall prepare a report for the information of the executing court.

Warrant of Sale

The court shall issue a warrant of sale order in the name of the bailiff to publicly auction as per the details mentioned in the warrant on the date and place specified and report back to court with an endorsement certifying the manner in which sale has been executed or the reason why it has not been executed.

Adjournment, postponement or stoppage of sale

1. The court may at its discretion adjourn sale to a specified date and hour, and so can an officer conducting the sale but after recording reasons thereto. And if the auction is taking place within the precincts of the courthouse then only after leave of court.
2. Sale can be adjourned when the bid amount is not adequate.
3. Sale can be adjourned if the purchaser fails to pay 25% of the bid amount immediately on closing of bid, and postponed if he does not pay the remaining sum within 15 days of the successful bid.
4. Provided, if the JD is able to satisfy the court that if the given time he shall be able to raise the decreed amount either by way of leasing, mortgaging or selling the property in question or other property the court may postpone the sale on such terms and for such period as it deems fit. The court shall grant a certificate to the JD in this respect. All monies raised by JD shall be paid to the DH.
5. If for any reason purchaser defaults on paying the full bid amount then after defraying the expenses involved in the auction, the remainder

sum may be forfeited in the favor of the government, if the court so decides. And the property shall be resold after issuing a fresh proclamation.

6. The sale could be stopped any time before the lot is knocked down if the JD tenders to the officer conducting the sale the full decreed amount along with costs and expenses or on producing proof of its deposit in executing court.
7. Sale can stay pending adjudication of any claim or objection even if it is received after proclamation of attachment and advertisement for sale. Or conditionally allowed pending adjudication that if property is sold the same shall not be confirmed or pass orders subject to such terms and conditions as to security etc.

Note: If adjournment exceeds 30 days then fresh proclamation is to be issued, published and affixed as mentioned earlier.

Application to set aside the sale on ground of irregularity or fraud (Rules 90 to 92)

1. Any person claiming an interest in the property sold may apply to the court to set it aside subject to payment in court 5% of purchase money and sum equal to that specified in proclamation notice i.e. decreed amount.
2. DH, purchaser or any other person having interest in the distribution of proceeds from the sale may apply for setting aside the sale on grounds of fraud or material irregularity in publishing or conducting the auction, provided injury sustained is substantial. No such application shall be accepted if the applicant had an opportunity to approach the court on an earlier occasion but has failed to do so.
3. Purchaser may apply to set aside the sale on the ground that the JD has no saleable interest in the decreed property.

Pertaining to all of the above cases, notice is issued to the other party to show cause before adjudication.

Successful Sale

If a sale is successful, then the purchaser is required to immediately deposit 25% of the sale amount and the rest within 15 days of successful bid unless DH is the purchaser himself with the prior permission of the court.

Distribution of money realized from sale

After defraying expenses involved in the sale of property, pay to decree-holder his full entitlement, and if any balance remains that shall be given to the JD. If on the contrary money realized from sale is not sufficient to satisfy the decreed amount then the DH can apply to the court for recovery of balance amount provided it is legally recoverable.

Certificate to purchaser

Once the sale has become absolute, and there is no litigation pending in either of the courts i.e. executing court or courts of appeal the court shall issue a certificate in favour of the purchaser containing the details of the property and the day and date he is declared to be the absolute owner of the immovable property. If the property in question is occupied by a tenant the court shall issue a proclamation bringing to his notice the name of the new owner.

Finally, if for any reason the purchaser is being obstructed from gaining possession the court shall intervene on the application, and order the bailiff to put the purchaser in possession of the sold property.

Garnishee Order 21 R 46A, 46D, 46E and 46F of CPC

Garnishee Order an order of the executing Court directing or ordering garnishee not to pay money to Judgment Debtor since the latter is indebted to

the decree holder (DH). In short it is order of attachment of money or goods belonging to the JD in the hands of a third person. After all it is remedy available to any judgment creditor. The Garnishee Order may be made by the Court to the holders of funds who is the third party tha no payments are to be made until the court authorizes them. The third party is called as the Garnishee and the Court order is called Garnishee Order.