

A COURT'S JURISDICTION CAN BE INVOKED IN CASES OF UNCONDITIONAL BANK GUARANTEE ONLY WHEN THERE IS IRRETRIEVABLE INJUSTICE OR NOT THE SLIGHTEST CHANCE OF RECOVERY

INTRODUCTION:

*The Bombay High Court in a recent decision in **SKS Power Generation vs Canara Bank**¹ observed that a court could interfere only when it can be decisively shown to the satisfaction of a court that there was not the slightest possibility to recover an amount under a bank guarantee.*

FACTS:

In 2011, SKS Power Generation (Chhattisgarh) Limited ("Plaintiff") entered into various agreements ("said Agreements") with Cethar Constructions Limited and Cethar Limited (collectively referred to as "Cethar") to set up a power project in Raigarh District, Chhattisgarh.

The said Agreements required Cethar to furnish an advance as well as performance bank guarantees.

On 16th February, 2012 and 17th February, 2012, on requests made by Cethar, Canara Bank ("Canara Bank") issued five bank guarantees in favour of the Plaintiff aggregating to an amount of Rs.121,65,00,000/-. All the bank guarantees were payable on demand and were unconditional.

On 6th March, 2017, Cethar requested the Canara Bank to extend all the bank guarantees.

In the meanwhile, in an unrelated litigation the NCLAT, Chennai, vide its order dated 16th June, 2017, ordered the commencement of Corporate Insolvency Resolution Process against Cethar, thereby resulting in an immediate moratorium.

On 19th July, 2017, the NCLT appointed the Resolution Professional.

On 30th June, 2017, Canara Bank, acting on the earlier request made by Cethar, extended all the bank guarantees until 30th September, 2017.

On 5th September, 2017, the Plaintiff invoked all the Bank Guarantees and requested Canara Bank to remit the amounts covered by the bank guarantees.

In the interim, neither Cethar nor its Resolution Professional considered to institute a suit for an injunction against the invocation or payment to be made under the bank guarantees.

Canara Bank filed a suit before the District Court in Trichy and obtained an *ex parte* injunction on 9th September, 2017, against invocation of the bank guarantees.

The Plaintiff challenged the order dated 9th September, 2017, before the Madras High Court. On 7th November 2019, the Madras High Court allowed Canara Bank to withdraw the suit and permitted it to file a suit before a jurisdictionally competent Court in Mumbai.

On 19th November, 2019, Canara Bank withdrew the suit filed in Trichy which resulted in ending

¹ Summons for Judgment No. 42 of 2021 in Commercial Summary Suit No. 234 of 2020

the *ex parte* injunction that was continuing for two years.

On 19th November, 2019, the Plaintiff called on Canara Bank stating that as there was no injunction, Canara Bank should pay the amounts covered under the bank guarantee. Canara Bank did not concede to this request. The Plaintiff was constrained to issue through its advocate a notice on 4th December, 2019, to Canara Bank. On 16th December, 2019, Canara Bank replied to the Plaintiff stating that it had until 10th December, 2019, to institute a suit in Mumbai and until then status quo was to continue.

On 4th February, 2020, the Plaintiff filed a Commercial Summary Suit before the Bombay High Court for reliefs more particularly contained therein.

ISSUES FOR CONSIDERATION:

The main issue for consideration in the Summons for Judgment before the Hon'ble Court *inter alia* was:

Can Courts interfere in cases involving enforcement of unconditional bank guarantees?

JUDGMENT:

The Bombay High Court observed that the real problem faced by Canara Bank was simply that because Corporate Insolvency Resolution Process had commenced against Cethar, Canara Bank would have great difficulty to recover the amounts covered under the bank guarantees, should Canara Bank be required to make payment under the bank guarantees.

The Bombay High Court remarked that a contention made by Canara Bank that it would be irretrievably prejudiced would make no commercial sense as every bank would strike the

precise bargain every time a bank guarantee would be issued.

The Bombay High Court placed reliance on various case laws, one of them being:

*Hindustan Steelworks Construction Ltd. vs Tarapore & Co. & Anr.*², wherein the Apex Court established that there could be no interference with an unconditional bank guarantee except when fraud is established or an apprehension of irretrievable injustice could be demonstrated.

The Bombay High Court observed that there was no fraud shown in the said Agreements or in the issuance of bank guarantees or in the invocation of bank guarantees.

The Bombay High Court also relied on the judgement of the Apex Court in *UP State Sugar Cooperation vs Sumac International*³, where it was held that an unconditional bank guarantee should be realized irrespective of pending disputes, else its purpose would be vitiated, subject to two exceptions viz. a fraud that would vitiate the very foundation of a bank guarantee or a resultant irretrievable harm or injustice.

The Bombay High Court held that in order for Canara Bank to take advantage of the exceptions laid out in the case laws referred to above, it must be shown decisively to the satisfaction of the Court that there is no possibility, not the slightest possibility at all, of restitution of the amount.

Merely showing that Corporate Insolvency Resolution Process had commenced against Cethar or showing that Cethar is in a precarious financial position was insufficient.

² (1996) 5 SCC 34

³ (1997) 1 SCC 568

In view thereof, the Summons for Judgment was made absolute and the Commercial Summary Suit was decreed in favour of the Plaintiff.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.