



INDIAN INSTITUTE OF INSOLVENCY PROFESSIONALS OF ICAI

(Company formed by ICAI under Section 8 of the Companies Act 2013)

IBC Case Law Capsule

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**SKS POWER GENERATION (CHATTISGARH) LTD VS. CANARA BANK
COMMERCIAL SUMMARY SUIT NO. 234 OF 2020
DATE OF JUDGMENT: AUGUST 11, 2021 (BOMBAY HIGH COURT)**

In order to invoke court's jurisdiction in "Unconditional Bank Guarantee", it must be shown decisively to the satisfaction of the Court that there is no possibility of restitution in this amount.

Facts of the Case: -

This Commercial Summary Suit was filed by *SKS Power Ltd.* (SKS) against Canara Bank after it refused to pay the amount guaranteed vide unconditional bank guarantees for amount of Rs.121.65 lakhs. These bank guarantees were issued to *SKS Power Ltd.* in 2012 on request of *Cethar Constructions* (Cethar) as part of their agreement to build a power plant in Chhattisgarh. This was in the form of five bank guarantees, all of which were unconditional and payable on demand. In 2017, Cethar was admitted for CIRP resulting in an immediate moratorium. SKS Power invoked their bank guarantees and demanded Canara Bank to remit the whole amount. Canara Bank declined the payment, claiming that recovering the amount would be difficult because Cethar was in liquidation. As a result, it is a cause of irretrievable prejudice. At this time, Nagarajan (Cethar's Resolution Professional and Liquidator) filed an interim motion for impleadment (right to sue), alleging that Cethar is, if not a necessary party, at least a proper party. Nagarajan claims that there was "fraud and collusion" between Cethar and SKS Iapat, the erstwhile parent company of SKS. The major questions before the court were whether principal debtor (Cethar Ltd.) can file 'impleadment' application and whether courts should get involved when it comes to enforcing unconditional bank guarantees?



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Bombay High Court's Observations: -

Bombay High Court relied on the Supreme Court's ruling in the matter *Hindustan Steelworks Construction Ltd vs. Tarapore & Co & Anr (1996)* that in the matter of unconditional bank guarantee court should interfere only “*in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed*”. The court concluded that there was no fraud in none of the three matters i.e., (i) the underlying power plant construction contract; or (ii) the issuance of the bank guarantees; or (iii) the invocation.

Referring to the case of *UP State Sugar Corporation Vs. Sumac International Ltd* as precedent, the court stated that “*in commercial dealings, an unconditional bank guarantee will be realized irrespective of any pending disputes. The bank must honour it according to its terms; else its purpose is lost*”. The Court also cited the Supreme Court judgement in the matter of *Dwarikesh Sugar Industries Ltd v Prem Heavy Engineering Works (P) Ltd & Anr (1997)*, to derive the point that “*irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds*”.

Additionally, the court dismissed the interim motion on the grounds that a bank guarantee is an independent contract, and the primary debtor (Cethar) is never a required party while executing it. While denying relief to the Canara Bank, the Court said they are nonetheless entirely without substance.

Order: -

The summons for judgement was made absolute, and the suit was decreed in plaintiff's favour. No costs.

Case Review: - *Case Disposed of.*