

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
SUMMONS FOR JUDGMENT NO. 42 OF 2021
IN
COMMERCIAL SUMMARY SUIT NO. 234 OF 2020**

**SKS POWER GENERATION
(CHATTISGARH) LTD,**

a company incorporated under the provisions of the companies Act 1956 having its registered office at Unit Nos. 201 & 207, 2nd Floor, Centre Point Premises Co-op Soc Ltd, JB Nagar, Andheri Kurla Road, Andheri (E), Mumbai 400059

...Applicant/
Plaintiff

SHEPHALI
SANJAY
MORMARE

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~ VERSUS ~

CANARA BANK

a body corporate constituted under the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970, represented by its Chief Manager having its branch office at 26 Nadhi Koli Street Teppakulam Tiruchirappalli 620002, and also having its branch offices at Mumbai at PB No. 292, Warden House Sir PM Road, Mumbai 400001

...Defendant

APPEARANCES (*Summons For Judgment*)

For the Plaintiff: 'SKS Power'

— **Mr Venkatesh Dhond**, *Senior Advocate*

With Rohaan Cama, Vinodini Srinivasan, Rashna Khan &
Poorva Garg, i/b Mulla & Mulla and Craigie Blunt & Caroe

For the Defendant

— **Mr Prateek Seksaria**

With Nishit Druva, Prakash Shinde, Niyati Merchant & Astha
Thakur, i/b MDP & Partners

WITH
INTERIM APPLICATION (L) NO. 9458 OF 2020
IN
COMMERCIAL SUMMARY SUIT NO. 234 OF 2020

CETHAR LTD

(Full title not given)

...Applicant

IN THE MATTER BETWEEN:

**SKS POWER GENERATION
(CHATTISGARH) LTD,**

a company incorporated under the provisions
of the companies Act 1956 having its registered
office at Unit Nos. 201 & 207, 2nd Floor, Cen-
tre Point Premises Co-op Soc Ltd, JB Nagar,
Andheri Kurla Road, Andheri (E), Mumbai
400059

...Plaintiff

~ **VERSUS** ~

CANARA BANK

a body corporate constituted under the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970, represented by its Chief Manager having its branch office at 26 Nadhi Koli Street Teppakulam Tiruchirappalli 620002, and also having its branch offices at Mumbai at PB No. 292, Warden House Sir PM Road, Mumbai 400001

...Defendant

APPEARANCES (Interim Application)

For the Applicant: 'Cethar Ltd'

— **Mr R Subramanian**

For the Plaintiff: 'SKS Power'

— **Mr Venkatesh Dhond**, Senior Advocate

With Rohaan Cama, Vinodini Srinivasan, Rashna Khan & Poorva Garg, i/b Mulla & Mulla and Craigie Blunt & Caroe

For the Defendant

— **Mr Prateek Seksaria**

With Nishit Druva, Prakash Shinde, Niyati Merchant & Astha Thakur, i/b MDP & Partners

AND
COMMERCIAL SUMMARY SUIT NO. 234 OF 2020

**SKS POWER GENERATION
(CHATTISGARH) LTD,**

a company incorporated under the provisions of the companies Act 1956 having its registered office at Unit Nos. 201 & 207, 2nd Floor, Centre Point Premises Co-op Soc Ltd, JB Nagar, Andheri Kurla Road, Andheri (E), Mumbai 400059

...Plaintiff

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CANARA BANK

a body corporate constituted under the provisions of the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970, represented by its Chief Manager having its branch office at 26 Nadhi Koli Street Teppakulam Tiruchirappalli 620002, and also having its branch offices at Mumbai at PB No. 292, Warden House Sir PM Road, Mumbai 400001

... Defendant

APPEARANCES (Suit)

For the Plaintiff: 'SKS Power'

— **Mr Venkatesh Dhond**, Senior Advocate

With Rohaan Cama, Vinodini Srinivasan, Rashna Khan & Poorva Garg, i/b Mulla & Mulla and Craigie Blunt & Caroe

For the Defendant

— **Mr Prateek Seksaria**

With Nishit Druva, Prakash Shinde, Niyati Merchant & Astha Thakur, i/b MDP & Partners

CORAM : G.S.Patel, J.
DATED : 11th August 2021

ORAL JUDGMENT:

A. PRELIMINARY

1. The Interim Application is not in the correct form. The full title is incomplete: it does not have the full address of the Applicant, Cethar Ltd. This is to be rectified. Leave to amend without need of re verification. Amendment to be effected in two weeks by the Applicant. Fresh service of the amended Interim Application is dispensed with.

**B. OVERVIEW & BACKGROUND FACTS
RELATING TO THE BANK GUARANTEES**

2. There are two separate proceedings before me. Both are in a Commercial Summary Suit filed on a set of unconditional Bank Guarantees. The Interim Application is an impleadment action by the principal debtor (“**Cethar**”), at whose instance the Bank Guarantees in question were issued. The Summons for Judgment is by the beneficiary of the Bank Guarantees, the Plaintiff in the suit (“**SKS Power**”). The issuing bank (“**Canara Bank**”) is the only Defendant to the suit. It issued the Bank Guarantees and periodically renewed them.

3. Cethar's Interim Application for impleadment and Canara Bank's defence to the Summons for Judgment. Both plead fraud; each takes a slightly different approach.

4. SKS Power was once part of the SKS Ispat group. In November 2018, in a one-time settlement deal, Agritrade Resources, a Singapore-based entity acquired SKS Power, which then ceased to be part of the SKS Ispat group. This has relevance to the impleadment Interim Application, not the Summons for Judgment.

5. In 2011, SKS Power entered into various agreements with Cethar Constructions Limited and Cethar Limited to set up a 1200 MW (4x300 MW) power project in Raigarh District, Chhattisgarh. The agreements required Cethar to furnish advance and performance bank guarantees. In November 2013, there were some amendments to the principal contracts. Nothing turns on that, or on the fact that project completion was delayed.

6. At Cethar's request, on 16th February 2012 and 17th February 2012, Canara Bank issued five Bank Guarantees in favour of SKS Power in the aggregate amount of Rs.121,65,00,000/-. BG001/2012 was dated 16th February 2012 for Rs.5.6 crores. BG002/2012 also dated 16th February 2012 was for Rs.9.6 crores. BG003/2012 dated 17th February 2012 was also for Rs.9.6 crores. BG004/2012 dated 17th February 2012 was for Rs.78.20 crores. BG005/2012 of 17th February 2012 was for Rs.18.65 crores. Copies of the individual Bank Guarantees are annexed. Three of these Bank Guarantees are advance Bank Guarantees, in identical terms. The remaining two are

performance Bank Guarantees also in identical terms. All five Bank Guarantees are payable on demand and all five are unconditional.

7. Any one of these bank guarantees will suffice. I will take the one at Exhibit “A1”. That it, like all the others, is unconditional is not in dispute. Its initial period of validity was till 31st January 2014. Of necessity, being an advance Bank Guarantee it was to be on a quarterly reducing basis as the advances were returned. This is the usual form in any contract of construction where advances paid by the client are returned in stages and the advance Bank Guarantee (which guarantees the return of the advances) is progressively reduced. That these Bank Guarantees were extended periodically is also not in dispute. All the bank guarantees have a jurisdiction clause that confer exclusive jurisdiction on courts in Mumbai, where, demonstrably, at least a part of the cause of action arises.

8. On 6th March 2017, Cethar asked Canara Bank to extend the bank guarantees.

9. By an order of 16th June 2017, the NCLAT, Chennai admitted an application against Cethar Limited and ordered the commencement of a Corporate Insolvency Resolution Process or CIRP. This resulted in an immediate moratorium.

10. On 30th June 2017, Canara Bank extended the bank guarantees until 30th September 2017 (on Cethar’s application of 6th March 2017).

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11. On 19th July 2017, the NCLT appointed one Mr V Nagarajan (“**Nagarajan**”) as the Resolution Professional/Interim Resolution Professional (RP/IRP).
 12. On 5th September 2017, SKS Power invoked the Bank Guarantees and requested Canara Bank to remit the full amounts.
 13. This is where matters took an extremely peculiar turn.
 14. Neither Cethar nor Nagarajan brought suit for an injunction against invocation or payment.
 15. Instead, Canara Bank went to the District Court in Trichy invoking that court’s jurisdiction. This was despite an exclusive jurisdiction clause in the suit Guarantees that gave exclusive jurisdiction to courts in Mumbai.
 16. On 9th September 2017, Canara Bank sought and obtained an ex parte injunction against invocation on 9th September 2017. Nagarajan was a defendant to Canara Bank suit.
 17. SKS Power challenged this order before the Madras High Court. On 7th November 2019, that is two years after the invocation, the Madras High Court allowed Canara Bank to withdraw the Trichy suit and permitted it to file a suit before a jurisdictionally competent Court in Mumbai. Canara Bank was to take a return of the plaint from the District Court in Trichy within seven days and to present it before the jurisdictionally competent Court in Mumbai on or before 10th

December 2019. The Madras High Court continued the status quo until the return of the Plaintiff. Nagarajan was a respondent to this High Court action too.

18. Yet Nagarajan did not institute any proceeding of his own.

19. On 19th November 2019, Canara Bank withdrew the Trichy suit. This ended the ex parte injunction that had continued for two years.

20. On 19th November 2019, SKS Power wrote to Canara Bank saying that now that there was no injunction the bank must pay. Canara Bank did not. SKS Power sent an advocate's notice to Canara Bank on 4th December 2019. On 16th December 2019, Canara Bank wrote to SKS Power saying that it had till 10th December 2019 to bring suit in Mumbai and until then the status quo was to continue.

21. On 9th December 2019, Canara Bank did file a suit but it did so in the Bombay City Civil Court at Dindoshi. This is Suit (L) No. 9489 of 2019. It seeks a declaration that the Bank Guarantees are vitiated by fraud and a permanent injunction. The suit said that the reliefs were incapable of valuation — and hence the suit was brought in the City Civil Court. The value of the Bank Guarantees is in excess of Rs. 100 crores. I do not see how it can be said to be incapable of valuation. Mr Seksaria today does not venture down this road; rightly so. He is now says that the Dindoshi City Civil Court Canara Bank suit “is in the process of being presented here”, i.e., in this Court, because it is clearly beyond the pecuniary jurisdiction of the Bombay

City Civil Court. In any case, Canara Bank has never moved the only court of competent jurisdiction, viz., this Court on its Original Side, for relief.

22. On 4th February 2020, SKS Power filed this suit and then took out the Summons for Judgment.

23. It was not until 22nd 2020 that Canara Bank gave SKS Power a copy of the plaint in its suit.

C. THE IMPLEADMENT APPLICATION

24. Nagarajan enters the fray with his Interim Application for impleadment. Mr Subramanian for Nagarajan (as the liquidator of Cethar) says that Cethar (through its liquidator) is, if not a necessary party, at least a proper party. The payment by Canara Bank will, Mr Subramanian insists, be “wrongful”. If so, the Liquidator’s rights against Canara Bank will be constrained by Section 145 of the Contract Act. Nagarajan now claims to be in a position to show that there was “fraud and collusion” between Cethar and SKS Ispat.

25. Now SKS Ispat is SKS Power’s erstwhile parent. The entire case on the alleged fraud is direct against SKS Power’s erstwhile parent and grand-parent (the holding company of the holding company of SKS Power). That case on fraud runs something like this. On 15th March 2011, there was an Agreement between Cethar and one Compact Agencies Private Limited. SKS Power was not a party

to it. Cethar agreed to advance Rs. 250 crores to Compact Agencies. Compact Agencies in turn was to arrange a procurement of 7.5% shares of SKS Ispat, then SKS Power's parent. If Compact Agencies could not do this, it was to repay the advance in three equal annual installments with 12% interest. Cethar advanced Rs.228 crores to Compact Agencies pursuant to that agreement. Cethar and Compact Agencies then entered into a Supplemental Agreement of 6th April 2016. Under this Supplemental Agreement, Compact Agencies was to arrange for some shares of SKS Ispat and also some shares of Ambition Commosales to be allotted to Cethar. But even before this shares could be received, by an agreement 17th June 2016 Cethar sold the shares to one Labheshwari Limited for Rs.4.58 crores. Labheshwari Limited is supposed to have committed a fraud.

26. Nagarajan moved an application before the NCLT Chennai in the IBC proceedings for a stay against SKS Power. The allegation was that amounts due to Cethar were diverted to one Shrikrishna Structure Pvt Ltd. This is the erstwhile grandparent of SKS Power. On 31st December 2019, the NCLT declined all relief to Nagarajan. Nagarajan appealed to the NCLAT, which dismissed his appeal on 13th July 2020. Nagarajan has since appealed to the Supreme Court in Civil Appeal 3327 of 2020. So far, there is no stay or any relief granted by the Supreme Court.

27. According to Nagarajan, this is a fraud by SKS Power.

28. No part of those transactions that are alleged fraud actually relate to SKS Power at all, now a wholly independent company. They

do not even relate to the construction contract of this power plant. The bank guarantees are issued under the agreements for that project.

29. Mr Subramanian's attempts to rely on a number of decisions in various types of proceedings relating to joinder of parties is of little avail. I am invited to hold on the basis of paragraphs 16 and 17 of *Kasturi v Iyyamperumal and Ors*,¹ which was a suit for specific performance, that because Mr Nagarajan claims that he has something to say he must be held to have a direct and legal interest in answer to the controversy involved. This is a misreading of the ambit of the present proceeding. This is a Summary Suit. It is a suit on a Bank Guarantee. The law is well settled. A bank guarantee is an independent contract. In enforcing a guarantee the principal debtor is never a necessary party. The beneficiary of a guarantee may, at his option, join both the principal debtor and the guarantor or may choose proceed only against the guarantor or only against the principal debtor. The passages in *Kasturi* and the other decisions relied on by Mr Subramanian will not assist. In fact the decision in *Ramesh Hirachand Kundanmal v Municipal Corporation of Greater Bombay And Others*² is completely against the proposition that Mr Subramanian canvasses. Mr Subramanian's attempts to have me read portions of NCLT proceedings is equally an exercise in futility.

30. The application for intervention or impleadment at the instance of the Liquidator of the principal debtor is wholly unsustainable. The Liquidator is at liberty to adopt such proceedings

1 (2005) 6 SCC 773.

2 (1992) 2 SCC 524.

as he deems fit in a Court of appropriate jurisdiction. He cannot be allowed to intervene or be impleaded in an action for enforcement of a contract of guarantee.

31. The Interim Application is dismissed.

32. Because he is the Liquidator, and although this is an application in a Commercial Suit, I will make no order of costs against him.

33. Mr Subramanian is correct in saying that this order should not be construed against Nagarajan as a determination of his allegations and the questions of fraud that he has raised against various SKS Ispat entities. He is entirely correct. I have not assessed that case on merits at all. All of Nagarajan's remedies and contentions are kept open for appropriate proceedings, as are the contentions and remedies of Mr Seksaria for Canara Bank and Mr Dhond for SKS Power.

D. THE SUMMONS FOR JUDGMENT

34. As to the Summons for Judgment, I choose to set apart for a moment, Mr Seksaria's attempts on behalf of Canara Bank to bolster Mr Subramanian's arguments. It is not for Canara Bank to espouse the cause of the principal debtor. What Mr Seksaria endeavours valiantly — but fruitlessly — to say is that the NCLT Chennai order 'was never brought to the notice of Canara Bank'. Therefore, the extension that Canara Bank granted on 30th June 2017 (without which the suit would not lie) is 'fraudulent and is a nullity'. He claims

that it was for either Cethar or SKS Power to tell Canara Bank that Cethar was now in a CIRP process, that there was a moratorium and that a RP/IRP had been appointed. Canara Bank acted on Cethar Limited's application for extension dated 6th March 2017 (Exhibit "A" to the Affidavit in Reply in the Summons for Judgment).

35. I cannot agree with Mr Seksaria's submission that Canara Bank's Affidavits in Reply disclose a tenable or bona fide defence. Those Affidavits in Reply take very many defences. Mr Seksaria has confined himself to the one ground I have noted. (I note this because I have found that in later proceedings, Advocates on record complain that this or that point in the Affidavit in Reply was not considered despite Counsel restricting their arguments). Mr Seksaria has wisely chosen not to press any other grounds canvassed in the Affidavits in Reply. He does not interrupt me while I am dictating this order in open court to disagree. For example: one ground in paragraph 5 at page 13 is that the Summary Suit is not based on a written agreement. That is absurd. Another ground is that this is not a commercial dispute within the meaning of Section 2(c) of the Commercial Courts Act. The statute is unambiguous. Then there is a passage at page 16 and 17 which effectively says that since Cethar owes a large amount to a consortium of banks, therefore the amounts of the Bank Guarantees are not 'debts'. It is difficult to understand what, if anything, is to be made of this submission.

36. Cutting through all this, Canara Bank's real problem — as far as I can tell — seems to be simply this: now that Cethar Limited is in liquidation, if Canara Bank is required to make payment under these bank guarantees, it will have great difficulty in recovering the amount.

37. This draws Mr Seksaria into submitting that this is a ground of irretrievable prejudice, one that works in his favour.

38. But that is not the law. That expression has been held to mean that there is no possibility of recovery; as, for instance, when recovery can only be made in a country where no action is possible. Second, the irretrievable prejudice must be one that has to be caused not to the bank but to the principal debtor, usually the plaintiff in an injunction action. I have yet to encounter a case where the *issuing bank* says that by paying under a bank guarantee will irretrievably prejudice it. This makes no commercial sense whatsoever. That was the precise bargain every bank strikes when it issues a Bank Guarantee.

E. THE LAW ON BANK GUARANTEES

39. In *Techno Unique Infratech Pvt Ltd v Gammon Infrastructure Projects Ltd*,³ I had occasion to review the case law — at Mr Dhond's instance there, appearing for the principal debtor seeking an injunction. Portions of that decision appear to me to be apposite to this case.

40. *Hindustan Steelworks Construction Ltd v Tarapore & Co & Anr*⁴ was a case that came up before the Supreme Court against an order granting an injunction. Reviewing the previous law on the subject, the

3 2020 SCC OnLine Bom 42.

4 (1996) 5 SCC 34.

Supreme Court re-stated the applicable principles. There can be no interference with an unconditional bank guarantee except when fraud is established or an apprehension of irretrievable injustice is demonstrated: *UP Cooperative Federation Ltd v Singh Consultants & Engineers (P) Ltd*.⁵ This principle, well-settled in English law, could not be distinguished in Indian law, and, importantly for our present purposes, in the case of a performance bank guarantee.⁶ It was next argued before the *Hindustan Steelworks* court that fraud was not the only ground for interference. Exceptional circumstances creating special equities would also justify an interference. This was countered by relying on the 1988 decision in *UP Cooperative Federation* to say that special equities or exceptional circumstances had to be shown to be a result of that fraud. *Hindustan Steelworks* rejected that submission, and said it was an incorrect reading of *UP Cooperative Federation*. Correctly read, *UP Cooperative Federation* held that interference is warranted only in cases of fraud or irretrievable injustice. Fraud is not the only exception.⁷ *Hindustan Steelworks* explicitly recognized two layers or levels of fraud: a fraud by one of the parties to the underlying contract vitiating it entirely, or a fraudulent demand by the beneficiary unrelated to any fraud at the time of execution but because of subsequent events or circumstances. Neither is true in this case. It is in this background that *Hindustan Steelworks* stated the position in law thus:

23. We are, therefore, of the opinion that the correct position of law is that **commitment of banks must be honoured free from interference by the courts and it is**

5 (1988) 1 SCC 174.

6 *Hindustan Steelworks*, *supra*, paragraph 13.

7 *Hindustan Steelworks*, *supra*, paragraph 18.

only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere.

(Emphasis added)

41. There is no fraud shown in (i) the underlying power plant construction contract; or (ii) the issuance of the bank guarantees; or (iii) the invocation.

42. The next decision is *UP State Sugar Corporation v Sumac International Ltd*,⁸ where the Supreme Court laid out the fundamental principles. 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. Injunctions are not to be readily granted. The law admits of only two exceptions: a fraud vitiating the very foundation of the bank guarantee, or a resultant irretrievable harm or injustice. In this context, the *Sumac International* court explained what irretrievable injustice means, and, more importantly, what it does not: a payout adversely affecting the bank and the customer who furnished the bank guarantee is *not* within the frame. The injustice must be so exceptional and so utterly irretrievable that it would, in the words of the Supreme Court, ‘override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country’. This tells us that while a bank guarantee’s encashment or realization has a localized adverse effect on the bank and its customer (the entity at whose instance the bank guarantee was provided), this

8 (1997) 1 SCC 568.

must be set against, and weighed against, the larger adverse effect on country-wide commerce of the grant of an injunction itself. Therefore, to successfully obtain an injunction, the localized injustice to the bank and its customer must be shown to be so grave, so monumental and so catastrophic, that the ill-effects or wider ramifications of an injunction would pale in comparison. Explaining the two exceptions, on the question of fraud, the *Sumac International* court emphasized that the issuing bank is wholly unconcerned with any contractual disputes or relations between its customer and the customer's contracting opposite party. The bank is bound by the tenor of the bank guarantee it issues. If fraud is invoked, it must be so egregious as to vitiate the entire underlying transaction.⁹ As to the second exception, of irretrievable injustice, *Sumac International* referenced the American decision in *Itek Corporation v First National Bank of Boston*,¹⁰ a case perhaps positioned at an extremity, for the context there was a contractual dispute between an American exporter and the Government of Iran at the time of the Iranian hostage crisis. I do not read *Sumac International* to suggest, as a matter of law, that it is only the legal question of 'impossibility of performance' that falls within the second exception. The reliance on *Itek Corporation* was perhaps to illustrate just how exceptional the circumstances must be, and must be shown to be, to justify or warrant

⁹ For our present purposes, I will take it that this statement of law was positioned at the broader level, but did not address the second level or layer of fraud noticed in *Hindustan Steelworks*, i.e. a fraud in invocation by subsequent events or circumstances.

¹⁰ 566 Fed Supp 1210; a decision of the US District Court for the District of Massachusetts, 28th June 1983.

an injunction.¹¹ But what is important is the following observation in paragraph 14, that:

14. ... To avail of this exception, therefore, **exceptional circumstances which make it impossible for the guarantor to reimburse himself if he ultimately succeeds, will have to be decisively established. Clearly, a mere apprehension that the other party will not be able to pay, is not enough.**

(*Emphasis added*)

As we shall immediately see, these words were reaffirmed by a later decision of the Supreme Court.

43. *Sumac International* is important for another reason: it directly addressed the question of financial incapacity of the party invoking the bank guarantee, and a resultant unlikelihood of the party seeking the injunction (who had got the bank guarantee issued) being unable to recover in restitution. The party invoking the bank guarantee in that case (the appellant) had a reference pending against it before the Board of Industrial and Financial Reconstruction under the then Sick Industrial Companies (Special Provisions) Act, 1985. The precise contention was that even if the respondent succeeded in arbitration, it would not be able to realize its claim. This is what the Supreme Court said:

17. ... The respondent contends that even if it succeeds before the Arbitrator it will not be able to realise its claim from the appellant. **The mere fact that a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 is pending before the Board, is, in our view, not**

11 That is why *Sumac International* says the irretrievable injury has to be ‘*of the nature noticed in the case of Itek Corp*’.

sufficient to bring the case in the ambit of the “irretrievable injustice” exception. ... There can, therefore, be no presumption that the company will, in no circumstance, be able to discharge its obligations.

(Emphasis added)

44. The third decision in sequence is *Dwarikesh Sugar Industries Ltd v Prem Heavy Engineering Works (P) Ltd & Anr.*¹² The Supreme Court noted the previous decisions, including *Hindustan Steelworks* and *Sumac International*, quoting from the latter, and also reaffirming the statement of law in *UP Cooperative Federation*. Then, in paragraph 22, *Dwarikesh Sugar* paraphrased the ratio of *Sumac International* on the question of irretrievable injustice:

22. The second exception to the rule of granting injunction, i.e., the resulting of **irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.**

(Emphasis added)

45. In order to invoke these special equities, that is to say, that the person against whom invocation is made would *never* be able to recover the amount under the bank guarantees, it must be shown *decisively* to the satisfaction of the Court that there is *no* possibility — i.e. not the slightest possibility at all — of restitution in this amount. Again, showing that Cethar is in a precarious financial condition, or

12 (1997) 6 SCC 450.

that it is in liquidation is insufficient for this purpose. What must be demonstrated must be something far more clear than a mere apprehension. That is *Sumac International*. That is *Dwarikesh Sugar*. And that, therefore, is the law.

46. Mr Seksaria insists that his defences not be termed as moonshine. Very well. I will do him that courtesy. I will not describe them as moonshine. But they are nonetheless entirely without substance, whatever appellation one wants to put to them.

47. There is no defence disclosed at all by Canara Bank to the Summons for Judgment and the Summary Suit.

F. FINAL ORDER

48. The Summons for Judgment is thus made absolute.

49. The Summary Suit is decreed in favour of the Plaintiff in the amount of Rs.121.65 lakhs with interest at 6% per annum from the date of the decree till payment or realisation.

50. Mr Dhond does not have instructions to press for costs. In the facts of the case, though this is a matter in the Commercial Division and covered by the Commercial Courts Act, 2015, having regard to the size of the claim and the fact that the Defendant is a public sector bank, I decline to make an order of costs.

51. The Summons for Judgment and the Suit are disposed of in these terms.

52. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of an ordinary copy of this order.

(G.S. PATEL, J.)