

Documentary Credit

WORLD

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■ ORIGINALITY OF DOCUMENTS

The importance of original documents in trade finance, particularly for commercial LCs, is difficult to overstate. In an expansive study on the topic of originality of paper documents, Pavel Andrle confronts a host of pertinent questions including: What is the role of an original paper document?; Is the presented paper document an original?; How is an original paper document to be signed and what constitutes a signature?; What are the electronic methods of authentication of paper documents?; What is the meaning of “authenticated” versus “signed”?; and Can an original paper document be created from an electronic document? To address these matters, Andrle examines the approaches taken in UCP600, ISP98, and URDG758. He also considers relevant standard practices contained in ISBP and ISDGP as well as ICC Opinions which have answered queries relating to originality.

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LITIGATION DIGEST

ARSS – SIPS (JV) v. Union of India 2021 SCC Online Chh 3737 [India]

Case Summary by Ajay MONGA*

Topics: Performance Guarantee; Injunction; Fraud; Irretrievable Injustice; Special Equity

Note: *ARSS – SIPS (JV) v. Union of India* involving the seeking of an injunction on payment under a performance guarantee was heard by the Honourable Shri Sanjay K. Agrawal and Shri Arvind Singh Chandel of the High Court of Chhattisgarh at Bilaspur.



The High Court, quoting various judgments of the Supreme Court of India on the subject, denied the injunction. In its judgment issued 20 December 2021, the High Court held that: “If the terms of the bank guarantee are unconditional and absolute, the bank has to pay the amount of bank guarantee, without demur. The payment of the bank guarantee cannot be made subject to the claims and counter-claims arising out of the main contract between the parties.”

The dispute related to a construction contract awarded by the South East Central Railways to ARSS – SIPS. As per the requirement under the contract, ARSS – SIPS provided a performance bank guarantee in favour of Railways. The performance guarantee was invoked by Railways which led to ARSS – SIPS seeking an interim measure of injunction against honour of the performance guarantee by filing an application to the District Court under Section 9 of the Arbitration & Conciliation Act, 1996.

* Ajay Monga is a Partner with SNG Partners based in New Delhi, India. He is experienced in handling litigation pertaining to commercial contracts relating to commercial letters of credit, bank guarantees, and standby LCs. He regularly advises clients on various aspects of these products and UCP and URDG rules.

The facts of the matter were that South East Central Railways issued a notice inviting tender for work in the Lajkura-Raigarh Section for construction of a rail line between Jharsuguda and Bilaspur. ARSS – SIPS was the successful bidder and a letter of acceptance (LOA) was issued by the South East Central Railways on 21 September 2016. The parties subsequently reached an agreement whereby work was to be completed within 24 months from the date of the LOA. Under terms of the contract, ARSS – SIPS (Applicant) submitted a performance guarantee worth INR 67,726,553 in favour of South East Central Railways (Beneficiary). A dispute arose resulting in Beneficiary terminating the contract on 2 January 2020. The contract contained an arbitration clause and ARSS thus filed a petition under Section 9 of the Arbitration & Conciliation Act, before the District Court.

Applicant sought interim injunction from the District Judge on invocation of the bank guarantee by the Beneficiary. The District Judge declined to give relief, holding that a bank guarantee cannot ordinarily be restrained, except on one of three grounds: (i) fraud; (ii) irretrievable injustice; or (iii) special equities. Since no such ground in the Section 9 petition was made out, relief was denied.

Challenging refusal of the interim injunction, Applicant filed an appeal before the High Court of Chhattisgarh, Bilaspur and sought to argue that honour of the bank guarantee is “unjust, illegal and bad in law”.

Initially, the High Court granted an interim order and restrained the honouring of the bank guarantee. However, at the final hearing, after discussing case law, the court reiterated that a bank guarantee is “an independent and distinct contract between the bank and the beneficiary and is not qualified by the terms of the underlying transaction, or the primary contract between the person at whose instance the bank guarantee is given and the beneficiary. The nature of obligation of the bank is absolute and not dependent upon the inter se dispute or proceedings The bank is liable to pay as soon as the demand is made by the [Beneficiary].”

Initially, the High Court granted an interim order and restrained the honouring of the bank guarantee.

guarantee is “an independent and distinct contract between the bank and the beneficiary and is not qualified by the terms of the underlying transaction, or the primary contract between the person at

The High Court quoted Supreme Court observations from cases that “in the matter of invocation of a bank guarantee or letter of credit, a bank guarantee is an independent and a separate contract and is absolute in nature. The existence of disputes between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of a bank guarantee, or letter of credit.” It is also observed that: “For a party to claim that the case falls under the exception of fraud or special equities, proper pleadings must be made out” The High Court quoted a passage from the Supreme Court’s 1996 judgment in *State of Maharashtra v. National Construction Co. Bombay* that: “The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order, the bank giving the guarantee must honour the same and make payment. ...”

In this case, the argument was that the contract period was extended by the Beneficiary, however, before its expiry, the contract was terminated illegally and the bank guarantee invoked.

Citing the 2006 Delhi High Court decision, *Intertoll ICS Cecons O&M Company P. Ltd. v. National Highways Authority of India*, the law was reiterated as follows:

- (a) The bank guarantee is an independent contract between the bank and the beneficiary.
- (b) When there is an unconditional bank guarantee and the bank has agreed to make payment without demur or protest, on beneficiary invoking the said bank guarantee, the bank is under obligation to honour the said demand. It is based on the rationale that otherwise trust in commerce, national and international, would be irreparably damaged.
- (c) The bank ... will not go into the pending disputes or nature thereof between the contractor and the employer/beneficiary. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are found to be in order, the bank has to honour the same.
- (d) The courts cannot even go into the question as to whether the beneficiary has suffered any damages or not. ...
- (e) The court is also precluded from embarking on the enquiry in encashment of bank guarantee the beneficiary is trying to take undue enrichment.
- (f) In so far as dispute between the parties to the underlying contract is concerned, that has to be settled by resorting to litigation or arbitration, as the case may be.
- (g) The courts should, therefore, be slow in granting the injunction to restrain the realization of such a bank guarantee.

The court in *Intertoll* went on to identify three exceptions to this rule: 1) Fraud of egregious nature; 2) Irretrievable harm or injustice; 3) Special equities in favour of the person seeking injunction.

Accordingly, the High Court Judges concurred with the District Judge and observed that “we hold that the Commercial Court (District Level) has rightly held that the [Applicants] have failed to plead and establish the grounds of ‘fraud’, ‘special equity’ and ‘irretrievable injustice’ ... for seeking interim injunction against the enforcement of bank guarantee.”

This judgment reinforces the reluctance of Indian courts to interfere in the banking obligations under bank guarantees or letters of credit. ■