

(2013) 08 DEL CK 0143
Delhi High Court
Case No: O.M.P. No. 742 of 2013

DSC Limited

APPELLANT

Vs

Rail Vikas Nigam
Limited and Others

RESPONDENT

Date of Decision: Aug. 14, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 9
- Constitution of India, 1950 - Article 226

Citation: (2013) 7 AD 366 : (2013) 3 ARBLR 446 : (2013) 202 DLT 523 : (2013) 138 DRJ 208

Hon'ble Judges: Rajiv Shakdher, J

Bench: Single Bench

Advocate: Neeraj Kishan Kaul and Mr. Abhijat, Mr. Jatin Mongia and Mr. Harsh Hari Haran,
for the Appellant; Anil Seth, for the Respondent

Judgement

Rajiv Shakdher, J.

Shorn of verbiage, the present petition is directed against release of monies which stand deposited with this court. The monies came to be deposited, post encashment of bank guarantees initially furnished by respondent nos. 2 and 3. The attempt is to preserve, by this action preferred u/s 9 of the Arbitration & Conciliation Act, 1996 (in short the Act), the money lying deposited with this court in the form of fixed deposit receipts, pending the petitioner seeking access to arbitration. The purported ground pressed for seeking injunction against release is "special equities". The learned senior counsel for the petitioner wisely steered clear of alleged fraud, which fleetingly though, finds mention in the petition, albeit without any material particulars.

2. Therefore, I am called upon to examine as to whether this is a case fit to invoke the exception of special equities, in the background of the following brief facts: Before I proceed further, I must indicate for the sake of convenience, I would

hereinafter, be referring to, the petitioner as DSCL, and respondent no. 1, i.e., Rail Vikas Nigam Limited, as RVNL.

2.1 On 06.10.2007, RVNL issued a Notice Inviting Tender (NIT) for "construction of Roadbed, Major and Minor Bridges, Track Linking (excluding supply of rails, sleepers, thick web switches & special sleepers), S&T, and OHE and General Electrical work in connection with doubling between Salka Road-Khongsara (25.8 Km) and Khodri - Anuppur (61.6 Km) on Bilaspur Division of South East Central Railway in Chhattisgarh & M.P. State (India)" (hereinafter referred to as the Works).

2.2 DSCL having formed a joint venture (JV) with Best and Crompton Engineers Ltd. submitted its bid, on 29.11.2007. The JV's bid having been accepted, it was issued a letter of acceptance dated 15.04.2008, conveying that the tenure of the contract would be 24 months, with a lag time of 42 days. Thus in effect the tenure of the contract was to commence from 28.05.2008. Having regard to the date of commencement, the contract was to come to an end on 28.05.2010.

2.3 The works, in broad terms, involved double laning of the railway track spread over a length of 87.40 Kms. The works were required to be executed in 11 block sections, with equal number of train stations.

2.4 DSCL's principal grievance pivots around the fact that even as of today RVNL has made available only 63.7 Kms of land, which is, roughly though equivalent to 72.8% of the total site. Thus, the charge is that the obligation to provide unimpeded and unhindered site, is not fulfilled. The failure, on the part of the RVNL to perform its obligation is amplified and emphasized under various sub-heads in the petition. These being:

(i) Failure to obtain permission to cut trees.

(ii) Delay in supplying drawings.

(iii) Change in specifications.

(iv) Non-appointment of engineer.

(v) Imposition of arbitrary and extra contractual conditions by threatening encashment of bank guarantees in issue.

3. In so far as the last aspect is concerned, it is averred by DSCL that vide letter dated 21.09.2009, it sought extension of time for completion of work till 25.01.2011, as RVNL threatened encashment of the bank guarantees furnished by it. It is further averred that vide notice dated 24.09.2009, RVNL issued a notice for termination of the contract; albeit with malafide intentions. It is DSCL's case that vide return communication dated 05.10.2009, it communicated to RVNL that, delay in execution of the work was attributable to it.

4. DSCL avers that the termination notice was withdrawn and extension of time was granted by RVNL subject to certain conditions, one of which apparently included, furnishing of an additional bank guarantee of Rs. 2 crores. Apart from DSCL being asked to furnish a bank guarantee, it was apparently also asked to achieve a target of 80% of monthly projections post November, 2009 and, any breach of such obligation was to empower RVNL to encash the additional bank guarantee to the extent of Rs. 1 crore.

4.1 It is the case of DSCL that, it did furnish the additional bank guarantee under the cover of its letters dated 28.11.2009 and 21.12.2009.

5. DSCL claims that on 03.03.2010, once again, a notice was issued by RVNL alleging slow progress in work. By this notice, encashment of the bank guarantee was threatened and DSCL was called upon to reply to the said letter by 10.03.2010. It is DSCL's case that the notice dated 03.03.2010 was got delivered to it only on 10.03.2010 and that by the time it could reply, RVNL, on 11.03.2010, had encashed the additional bank guarantee to the extent of Rs. 1 crore.

6. DSCL, apparently, protested against this action of RVNL vide letter dated 06.04.2010 and brought to fore the impediments in execution of the work which, as indicated herein above, according to it, pertain principally to non-availability of land and drawings etc. It is DSCL's case that, it is in these circumstances it was compelled to seek extension of time till 25.05.2012, vide its letter dated 29.04.2010. However, RVNL evidently vide letter dated 21.05.2010, granted extension only till 30.06.2011 subject to conditions; which according to DSCL, were arbitrary and beyond the terms of the contract.

6.1 The aspect with regard to RVNL allegedly being responsible for the delay in the contract was communicated by DSCL vide letter dated 03.06.2010. Evidently, on 25.06.2010 RVNL encashed the remaining part of the additional bank guarantee equivalent to the value of Rs. 1 crore.

7. DSCL, vide letter of 06.06.2010, apparently, sought to encash the entire amount of Rs. 2 crores.

8. It is the case of DSCL that yet another notice was issued on 20.07.2010 highlighting DSCL's failure to achieve contractual milestones. DSCL, vide letter dated 29.06.2010 sought extension of time till 25.05.2012, while by yet another letter dated 29.07.2010, it sought to reply to the notice dated 20.07.2010.

9. It is DSCL's case that under extreme coercion and financial constraints, it furnished yet another bank guarantee in the sum of Rs. 5 crores, and that, vide letter dated 30.10.2010, it once again, brought to the notice of RVNL, the hindrance it faced in the execution of the contract.

10. In the background of these facts, DSCL vide letter dated 07.06.2011 sought extension of time, which RVNL vide its return letter dated 26.09.2011 approved;

albeit till 30.09.2012. The extension was, according to DSCL, subject to conditions which were beyond the scope of the contract. DSCL avers that the Project Management Consultant (in short PMC) issued two notices dated 29.11.2011 and 21.12.2011 under clause 15.1 of the General Conditions of the Contract (GCC) (for alleged delay in the execution of the work). Evidently, out of the additional bank guarantee of Rs. 5 crores, RVNL encashed the bank guarantee to the extent of Rs. 2 crores on 22.02.2012. DSCL claims that it thwarted the attempt of RVNL to encash the remaining part of the bank guarantee, though a renewed threat was made by the RVNL vide letter dated 02.07.2012. Finally, it appears, RVNL, on 18.08.2012 encashed the remaining part of the bank guarantee equivalent to Rs. 3 crores.

11. DSCL projected its grievance vide letter dated 17.08.2012. RVNL on its part issued yet another notice on 05.09.2012 under clause 15.1 of the GCC which was replied to apparently by DSCL vide letter of 12.09.2012.

12. Upon RVNL terminating the contract vide its communication dated 15.09.2012, DSCL sought its revocation vide letter of 21.09.2012 with a condition that it would furnish an additional bank guarantee in the sum of Rs. 1.50 crores.

13. Evidently, it is when RVNL sought to invoke the bank guarantees furnished by DSCL, in the sum of Rs. 18.04 crores towards performance security, and the bank guarantees in the sum of Rs. 8,87,49,000/- submitted towards mobilization advance that, DSCL approached this court by way of a petition u/s 9 of the Act. This petition was numbered as OMP 893/2012.

14. DSCL, however, on 01.10.2012 withdrew the petition on the ground that settlement talks were on with RVNL, and that, if they were to fail, it should have the liberty to approach this court. The said petition was, accordingly, dismissed as withdrawn, with liberty as prayed for.

15. Apparently, vide letter dated 05.10.2012, RVNL withdrew its notice of termination of the contract. Evidently on 15.01.2013, RVNL communicated to DSCL that it would evaluate its performance till 31.01.2013, and that, if there was failure it would not only encash the additional bank guarantee in the sum of Rs. 1.50 crores, but would also encash wholly or in part the performance guarantee. At this juncture, DSCL was seeking to have the RVNL, extend the time for execution of the contract till 31.12.2013.

16. Evidently, on 02.02.2013, RVNL issued a show cause notice for encashment of additional bank guarantee for DSCL's alleged failure to meet the targets set forth under the contract and agreed to by it.

17. DSCL avers that, since it received information in the first week of March, 2013 of RVNL's intention to encash a sum of Rs. 50 lacs qua bank guarantee dated 17.10.2012, that it took a decision to approach this court by way of a petition under Article 226 of the Constitution. This writ petition was numbered as: WP (C)

1453/2013.

18. By order dated 04.03.2013, this court restrained RVNL from taking any coercive and precipitative action qua the bank guarantees which were subject matter of the said petition.

19. On 31.05.2013, this court modified its order of 04.03.2013 to the extent that, it directed the concerned banks which had furnished the bank guarantees in issue, to convert the amounts reflected by the said bank guarantees into fixed deposits favouring the Registrar General of this Court. The initial tenure of the fixed deposit was fixed at three months.

20. Evidently, on 19.07.2013, WP (C) No. 1453/2013 was dismissed as withdrawn; at which point in time the learned Single Judge passed the following order.

Mr. Neeraj Kishan Kaul, learned senior counsel for petitioner wishes to withdraw the present petition with liberty to file petition for interim relief u/s 9 of the Arbitration and Conciliation Centre (sic Act), 1996 (for short "Act, 1996").

Mr. Anil Seth, learned counsel for respondent no. 2 states that a petition u/s 9 of Act, 1996 would not be maintainable as the petitioner had earlier filed and withdrawn a similar application.

Keeping in view the aforesaid, present petition is dismissed as withdrawn with liberty to petitioner to file Section 9 petition. However, pleas and defences of respondents are left open. The interim orders passed by this Court stand vacated.

List before the Registrar General on 31st July, 2013 for handing over of an account payee cheque in favour of respondent no. 2 of the amount deposited by the petitioner in this Court in pursuance to the order dated 31st May, 2013.

21. As a result of the aforesaid development, the present petition was filed with the registry of this court on 27.07.2013 and was listed for the first time in court on 29.07.2013. At the said hearing RVNL, was represented by Mr. Anil Seth, Advocate. Arguments were concluded and the judgment was reserved in the matter on 02.08.2013.

22. Mr. Kaul, learned senior counsel appearing for DSCL submitted that since the letter of acceptance was issued on 15.04.2008, which required that the time for commencement of the contract will begin 42 days thereafter, RVNL should have given complete and unhindered access to the entire site within 90 days of 28.05.2008. It was contended that RVNL was thus required to give access to the site by 26.08.2008 and, only if, this obligation, was fulfilled by it, could it demand completion of the work by 28.05.2010; as envisaged in the contract.

22.1 Mr. Kaul submitted that out of 87.4 Kms of land which was to be made available, under the contract, RVNL has given access to 63.7 Kms (sic 68.5 Kms) of land most of which was not contiguous. He submitted that, out of the remaining

land, 13.9 Kms was forest land, while the balance 5 Kms, had not even been acquired.

22.2 In sum and substance, it was his submission, that the site in issue was handed over in a piecemeal manner and in sections in violation of the terms of the contract. More often than not, according to the learned senior counsel for DSCL, the sections of land handed over, apart from not being contiguous, were not free from hindrances. The approval/ permissions which RVNL was supposed to obtain for felling trees, were not obtained, thereby frustrating the due performance of the contract. Emphasis was laid on the fact that even as late as 26.09.2011, the entire site was not available for execution of the contract in issue.

22.3 Mr. Kaul submitted that another major factor impeding the execution of the contract was the delay in supplying drawings by RVNL.

22.4 Mr. Kaul relied upon letters dated 22.10.2009, 19.03.2012, 17.07.2012, 26.09.2011, 19.08.2008 and 28.04.2010, to emphasise his point that there was delay in handing over the site and obtaining requisite permission for felling trees, which RVNL had been obtaining in the past. In so far as the submission qua delay in supplying the drawings or not approving the drawings submitted, was concerned, Mr. Kaul placed reliance on letters dated 20.02.2009, 22.10.2009, 09.11.2009 and 08.01.2010.

22.5 It was Mr. Kaul's submission that the aforesaid circumstances evolved into a situation, where DSCL found it difficult, if not impossible, to execute the contract. In other words, according to Mr. Kaul, the aforesaid circumstances, accompanied with the constant threat of invocation and encashment of the bank guarantees, did transmute the situation into one which brought the case within the ambit of principles of "special equities", which was one of the two exceptions for grant of injunctions by this court, qua encashment of even unconditional bank guarantees. In support of this submission, reliance was placed by the learned senior counsel on the judgment of single Judges of this court in the matter of [Hindustan Construction Co. Ltd. and Another Vs. Satluj Jal Vidyut Nigam Ltd.](#), [Victor Cables Industries Ltd. Vs. Engineering Projects \(I\) Ltd. and Another](#), and [P.D. Alkaram Pvt. Ltd. Vs. Canara Bank and Another](#),

23. As against this Mr. Anil Seth, learned counsel for RVNL, stated that no case was made out for grant of an injunction by DSCL. Mr. Seth submitted that DSCL had first attempted to obtain an injunction when it filed OMP 893/2012. Having failed to secure an ex-parte injunction, it withdrew the said petition on 01.10.2012. According to Mr. Seth, RVNL had no notice of this petition and was consequently not aware of the withdrawal of the petition as well.

23.1 According to Mr. Seth, the second attempt made by DSCL to secure a stay also, did not finally pass muster with this court, when DSCL withdrew the writ petition filed by it, i.e., WP (C) 1453/2013. It was submitted that as a matter of fact, a single

Judge of this court by the very same order, i.e., order dated 19.07.2013 had vacated its earlier interim order passed in favour of DSCL dated 31.05.2013, and directed the registry of this court to hand over the money (in the form of FDRs) to RVNL on 31.07.2013.

23.2 It was Mr. Seth's contention that this court being a co-ordinate Bench could not grant an injunction in the teeth of order dated 19.07.2013.

23.3 Apart from the above, Mr. Seth drew my attention to the fact that the contract in issue had been awarded to the JV comprising of DSCL and Best and Crompton Engineers Limited. Mr. Seth contended that the petition was not maintainable for the reason that Best and Crompton Engineers Ltd. was not arrayed as a petitioner in the present action. It was Mr. Seth's contention that the reason for the same was that Best and Crompton Engineers Ltd. had withdrawn from the site as DSCL was not supplying material, certifying progress and/or releasing payments. In this regard Mr. Seth sought to place reliance on the letter dated 05.04.2013, which was filed in WP (C) 1453/2013.

23.4 On merits, Mr. Seth gave a broad view of the relations between the parties and the contractual obligations obtaining between them. Since notice had not been issued in the present petition, Mr. Seth sought to rely upon the documents filed in the writ petition, of which the petitioner had notice.

23.5 Based on the aforesaid, Mr. Seth submitted that, in so far as RVNL was concerned, DSCL had abandoned the work since March, 2013 and out of the total value of the work amounting to Rs. 177.498 crores it had in 58 months, i.e., till March, 2013 completed work valued at only Rs. 90 crores. Mr. Seth submitted that during this period RVNL had issued ten show cause notices under clause 15.1 of the GCC to DSCL, to correct course.

23.6 Apart from this, termination notices were issued to the JV on two occasions which were recalled on the assurance that DSCL will achieve targets by deploying requisite resources.

23.7 It was Mr. Seth's contention that material worth Rs. 120 crores owned by RVNL, which had been issued to DSCL for executing the work, was lying at site, which remained abandoned since DSCL had decided to withdraw from the site. This material was issued to DSCL in the form of rails and rail sleepers etc.; in addition to certain purchases made by DSCL, for which payments were made by RVNL.

23.8 Mr. Seth contended that the contract involved double lanning of railway track parallel to an existing railway track, which was already in use. The purpose of awarding such a contract was to increase traffic, and thus, supply essentials such as coal etc. to power plants located in the region. The contract as per the stand of the RVNL envisaged execution of 11 block sections, and that, out of the 11 block sections, the JV had been given target of completing 7 block sections.

23.9 It was submitted by Mr. Seth that 7 block sections comprised of land equivalent to 71.28 Kms, which was handed over to the JV in June, 2008. This stretch of 71.28 KMs, according to Mr. Seth, had from day-one permission available from the forest department, for felling trees. It was contended that apart from the above there was no hindrance in the JV executing the work with respect to: building stations, staff quarters and platforms as each station or block section, was independent of each other. It was submitted that, while the JV could have executed work worth Rs. 160 crores, it actually executed work valued at Rs. 90 crores, as indicated above, in 58 months, till March, 2013.

24. Mr. Seth sought to rely upon letter dated 19.03.2012 of the RVNL, which is again subject matter of the writ proceeding, to demonstrate that there were no constraints in 7 block sections, and that, for the last one year, no work had been carried out by the JV in two block sections out of the 7, which remain unimpeded from day one.

24.1 In so far as permission for felling trees was concerned, Mr. Seth submitted that the requisite permission was obtained, as indicated above, for 71.28 Kms of land even prior to the award of the work to the JV. It was emphasized that the PMC had explained to the officials of the JV, the procedure to be adopted for felling trees, and that, ultimately, it was the obligation of the JV to obtain the required permission wherever it was required to be obtained as per terms of the contract.

24.2 In so far as drawings were concerned, which the JV had to submit, he referred me to clause 8.3 of the contract. It was also contended that RVNL has provided complete drawings of civil works for 71.28 Kms of the land and the work required to be executed as per those drawings was not executed even till March, 2013. Reliance in this regard was placed on letter dated 30.03.2013 filed in WP (C) 1453/2013. Mr. Seth submitted that there was also case of inadequate deployment of manpower by the JV. Reference in this regard was placed on letter dated 27.03.2009 in WP (C) 1453/2013. Amongst, various other letters, reliance was placed on letter dated 15.03.2013 issued by the PMC to the JV that it had completely stopped its work from 14.03.2013. Mr. Seth submitted that none of the judgments relied upon were applicable to the facts of this case. DSCL, according to Mr. Seth, had failed to bring out a case of special equities of irretrievable nature.

24.3 In support of his submissions, Mr. Seth placed reliance on the following judgments: [Vinitec Electronics Private Limited Vs. HCL Infosystems Limited](#), ; [Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company](#), ; [Hindustan Steel Works Construction Ltd. Vs. Tarapore and Co. and another](#), and [U.P. Cooperative Federation Ltd. Vs. Singh Consultants and Engineers \(P\) Ltd.](#),

REASONS

25. I have heard the learned counsels for the parties. Given the history of the case, which is that DSCL had filed a petition being: OMP No. 893/2012 followed by a writ

petition no. 1453/2013, I decided to call the latter file to this court. A perusal of the writ petition would show that parties had completed pleadings in the said case. There can be no dispute that as regards facts pleaded, the present petition is only a replication of what was stated before the writ court. Therefore, I did not feel the need to re-invent the wheel so to say. DSCL is thus, in a sense, made wise, to the stand taken by RVNL, with regard to the instant dispute.

26. A perusal of the submissions and the record would show that what the contract required DSCL to do was to lay a parallel railway line alongwith the existing line. The length of the parallel line, as envisaged in the contract, is 87.4 KMs and it was evidently spread over 11 block sections. While, DSCL contends, the contract required RVNL to give a hindrance free access to the entire stretch of 87.4 Kms, RVNL contends to the contrary and has stated before me that, 7 block sections stretching over 71.28 Kms were available to DSCL for execution of work right at the stage of award of the contract itself. Mr. Seth, quite candidly, during the course of arguments stated that RVNL would perhaps have had difficulty if DSCL was able to show that it had executed the entire work over the said 7 block sections, which were completely hindrance free.

27. The fact that DSCL has not been able to execute the work, though time for execution of the contract expired long ago, was not in dispute. What really in dispute is, the attributability of the delay in execution of the work. Both sides have argued their case with vehemence. Submissions made would demonstrate that show cause notices have been issued from time to time by RVNL which have been withdrawn based on assurances given, and as a matter of fact, during the execution of the work, RVNL has encashed bank guarantees worth Rs. 7 crores.

28. Furthermore, the duration of the contract, as it appears, stood extended till January, 2013, whereas DSCL wanted it to be extended to 31.12.2013. DSCL of course has taken the stand that extension of time for execution of contract had to be sought on account of failure on the part of RVNL to supply unhindered and unimpeded access to the work site. In my view, whichever way one looks at it, this is an aspect which pertains to the underlying dispute obtaining between the parties qua the contract in issue. In so far as the two banks are concerned, i.e., respondent nos. 2 and 3, these disputes, cannot interest them.

28.1 The only grounds in law, on the basis of which encashment of an unconditional bank guarantee can be stayed is when: (i) invocation is not in terms of the bank guarantee; (ii) a case of established fraud is made out, which is an "egregious fraud", known to the bank, and is practiced by the beneficiary of the bank guarantee; and, (iii) lastly, where a case of special equities is made out so as to prevent irretrievable injustice between the parties. Save and except for the grounds set out above, an unconditional bank guarantee like an irrevocable letter of credit, ought not to be interfered with.

28.2 In this case, Mr. Kaul, on behalf of DSCL, has not argued the first two exceptions, and has stated right in the beginning that he would confine himself to exception concerning special equities.

28.3 In my view, none of the assertions made by DSCL persuade me to come to a conclusion that it would cause irretrievable injury. The disputes are essentially such which can be compensated by money in a claim, if any, which DSCL may prefer before the arbitrator. There are scores of judgments delivered by the Supreme Court and various High Courts, including this court, on this aspect of the matter. More than two decades ago the Supreme court in U.P. Co-operative Federation Ltd. case said the same thing. Mr. Justice Sabyasachi Mukharji (as he then was), speaking for the court, quoted with approval the dicta of the Court of Appeal in *Edward Owen Engineering Ltd. vs. Barclay's Bank International Ltd* (1978) 1 All E.R. 976; which reads as follows:

19... It was held by a Bench consisting of Lord Denning, M.R., Browne and Geoffrey Lane, L.J. that a performance guarantee was similar to a confirmed letter of credit. Where, therefore, a bank had given a performance guarantee it was required to honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud by one of the parties to the underlying contract had been established and the bank had notice of the fraud...

(emphasis is mine)

28.4 Mr. Justice Sabyasachi Mukharji went on to amplify the two exceptions in paragraph 28 of the said judgment by observing as follows:

28... 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 dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Otherwise the very purpose of bank guarantees would be negated and the fabric of trading operation will get jeopardized...

(emphasis is mine)

28.5 The concurring judgment of Mr. Justice Jagannatha Shetty (as he then was) made an equally forceful assertion of the principle which is encapsulated in paragraphs 53, 54 and 55 of the judgment. The relevant extracts, read as follows:

...53. Whether it is a traditional letter of credit or a new device like performance bond or performance guarantee, the obligation of banks appears to be the same. If the documentary credits are irrevocable and independent, the banks must pay when demand is made. Since the bank pledges its own credit involving its reputation, it has no defence except in the case of fraud. The bank's obligations of course should not be extended to protect the unscrupulous seller, that is, the seller

who is responsible for the fraud. But, the banker must be sure of his ground before declining to pay. The nature of the fraud that the courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused. The bank cannot be compelled to honour the credit in such cases. But it may be very difficult for the bank to take a decision on the alleged fraudulent action. In such cases, it would be proper for the bank to ask the buyer to approach the court for an injunction...

...54. The court, however, should not lightly interfere with the operation of irrevocable documentary credit. I agree with my learned brother that in order to restrain the operation of the irrevocable letter of credit, performance bond or guarantee, there should be serious dispute to be tried and there should be a good prima facie acts of fraud...

...55. From the above discussion, what appears to me is this: The sound banking system may, however require more caution in the issuance of irrevocable documentary credits. It would be for the banks to safeguard themselves by other means and generally not for the court to come to their rescue with injunctions unless there is established fraud...

28.6 Over the years, the position has not changed. I do not wish to burden the judgment with any more precedents as the underlying principle has remained the same, except to recall here, the dicta of the Supreme Court in [Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works \(P\) Ltd., and another](#), where the court was at pains to point out that granting injunctions in cases other than those which fell within the exceptions referred to above amounted to "judicial impropriety". The relevant observations being apposite are culled out below:

...31. It is unfortunate, that notwithstanding the authoritative pronouncements of this Court, the High Courts and the Courts subordinate thereto, still seem intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled...

...32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the of the parties. It is time that this tendency stops...

29. Despite Supreme Court's emphatic view in the matter, courts are flooded with actions seeking injunctions qua unconditional bank guarantees, which clearly do not

fall within the exceptions articulated in the judgments of both the Supreme Court and various High Courts. The result is enormous wastage of judicial time, which is difficult to quantify to exactitude in terms of money. Counsels, somehow, have failed to render advice to their clients in chambers, as to whether an action should at all be filed in the facts of a given case in the background of the case law on the subject. Perhaps the reason is, the diffidence of courts in imposing punitive costs for filing such actions.

30. Before I conclude, I must advert to three judgments cited by the learned senior counsel for the petitioner. In my view, each of these judgments are distinguishable and turn on their own peculiar facts. The distinguishing factor in the case of Hindustan Construction Co. Ltd. was that: the bank guarantee in issue, was sought to be invoked even when the beneficiary of the bank guarantee had issued a certificate of substantial completion of work; there was an award of a Dispute Resolution Board awarding a substantial amount of money in favour of the petitioner/ contractor with regard to its claims for extension of time; and the internal committee deliberations, which included the CMD of the beneficiary company, had returned findings in support of the petitioner. As a matter of fact, the bank guarantee was sought to be invoked, just a day prior, to the expiry of the performance period.

30.1 In Victor Cables Industries Ltd. two bank guarantees were involved. The first bank guarantee was issued against advance extended by the respondent for manufacture of goods. The second bank guarantee was in the nature of a performance/ security guarantee. In so far as the first bank guarantee was concerned, the petitioner was not able to persuade the court to grant an injunction. In so far as the second bank guarantee was concerned, the court granted an injunction as the beneficiary of the bank guarantee had changed the terms of the contract unilaterally. The petitioner, in that case, had quoted rates keeping in view the fact that the price would not include a component of excise duty on finished products. The respondent sought to change the same. It is in these circumstances, the court came to the conclusion that qua the said bank guarantee a case of special equities had been made out.

30.2 In so far as the judgment in the case of P.D. Alkarma Pvt. Ltd. is concerned, injunction was primarily granted qua a bank guarantee which was furnished against mobilization advance given to the plaintiff by the defendant, on the ground that, there was evidence to show that the entire mobilization advance had been utilized by the plaintiff for procuring the material for use in the construction of the defendant's building, as per approved specifications.

30.3 Therefore, in my view, as indicated above, none of the cases apply to the fact situation obtaining in the present case.

31. It would be apposite to note, at this stage, the observations of the Supreme Court in the case of [BSES Ltd. \(Now Reliance Energy Ltd.\) Vs. Fenner India Ltd. and Another](#), wherein it has gone so far as to repel any argument made by an entity which seeks injunction qua a bank guarantee furnished by it on the ground that invocation and/or encashment of bank guarantee is made for: "oblique purpose", is used as a "bargaining chip" or as a "deterrent" or that the invocation is "abusive". The Supreme Court in this case went on to observe that notwithstanding the grounds available for injunction in other foreign jurisdictions, in India, the scope of the exceptions qua encashment of an unconditional bank guarantee, is that, which is enunciated by it, in U.P. Co-operative Federation Ltd. and those which followed and reiterated the said principle. (See paragraphs 13 and 14 at page 735 of BSES Ltd. vs. Fenner India Ltd.)

32. For all these reasons, the petition is dismissed, with costs of Rs. 10,000/-.

33. Consequently, the registry is directed to forthwith handover the following fixed deposit receipts drawn in the name of the Registrar General of this court.

(i) Fixed deposit receipt no. 64217, in the sum of Rs. 18,04,23,143/- issued by the State Bank of Patiala.

(ii) Fixed deposit receipt no. 000710119929, in the sum of Rs. 14,31,23,500/-, issued by ICICI Bank Ltd.

33.1 On the aforementioned fixed deposit receipts being handed over, RVNL would be free to liquidate the same.

Needless to say any observation made hereinabove by me, will not come in the way of a decision being taken on merits, if DSCL were to take recourse to an appropriate proceeding, in accordance with law.