

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) NO. 944 OF 2001**

% **Date of Decision : 21st October, 2008.**

M/S. T.T. LIMITED Plaintiff.
Through Mr. Rajiv Bansal, Mr.Harshit
Agarwal, Mr.Prashant Mehra, Advocates.

VERSUS

INDUSTRIAL FINANCE CORPORATION
OF INDIA LTD. Defendants.
Through Mr. Sandeep Sethi, Sr.Advocate with
Mr.Abhishek Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J:

1. Industrial Finance Corporation of India Limited (hereinafter referred to as IFCI, or defendant for short)- had extended loan facility to M/s. T.T. Ltd.-plaintiff vide four separate “term” loan agreements for setting up of a new spinning unit. The said four loan agreements are as under:-

<i>Loan Scheme</i>	<i>Agreement date</i>	<i>Amount sanctioned</i>	<i>Rate of interest (p.a.)</i>	<i>Loan Disbursed</i>
Project Finance	30.10.92	Rs.269.00	19.12%	Rs.242.00

Scheme		lakhs		Lakhs
Equipment Finance Scheme	10.09.92	Rs.350.00 lakhs	19.61%	Rs.266.34 lakhs
Equipment Credit Scheme	14.01.93	Rs.500.00 lakhs	22.00%	Rs.469.00 lakhs
Foreign Currency Loan under Project Finance Scheme (in Deutsche Mark)	10.09.92	DM1303,500 (Equivalent to Rs.231 lakhs)	9.5%	DM 1,234,115.45

2. Plaintiff by letter dated 11th December, 1996 (Exhibit P-2) expressed concern at the high interest rate being charged and gave three proposals to the defendant including proposal for pre payment with a request that pre payment charges may be waived. This was followed by letters dated 11th February, 1997 (Exhibit P-3), 24th May, 1997 (Exhibit P-4), 14th June, 1997 (Exhibit P-5&6) and 24th July, 1997 (Exhibit P-7) written by plaintiff to the defendant. In the letter dated 24th July, 1997 (Exhibit P-7) the defendant was asked to inform the plaintiff the total amount payable towards principal and interest so that pre payment of the loans could be made. Similar request was again made by the plaintiff by letter dated 31st July, 1997 (Exhibit P-8), wherein it was also stated that necessary arrangement for pre payment with Oriental Bank of Commerce required a letter from the defendant.

3. Defendant by letter dated 8th August, 1997 (Exhibit P-9) informed the plaintiff that they were agreeable to their proposal for pre payment of outstanding term loans and the plaintiff would be

liable to pay pre interest and other charges and premium calculated upto the cut of date as per prevailing standard norms set by financial institutions. The total amount would be advised separately. The charge of the defendant on the assets of the plaintiff would be released after realization of the entire amount.

4. By four separate letters dated 11th September, 1997 (exhibit P.10-13), the plaintiff made specific reference to letter dated 8th August, 1997 (Exhibit P-9) and paid amount of Rs.1,22,75,276/- towards Equipment Credit Scheme, Rs.1,77,59,857/- towards Project Finance Scheme, Rs.1,93,55,646/- towards Foreign Currency Loan under Project Finance Scheme and Rs.1,94,54,896/- towards Equipment Finance Scheme. Along with the said letters the plaintiff had enclosed copy of calculations made by them for payment of the said amount. Thereafter, the plaintiff wrote letter dated 15th September, 1999 (Exhibit P-14) informing the defendant about payments made by them and received by the defendant in their office on 12th September, 1997. The cheque/payments were received and encashed by the defendant.

5. By letter dated 15th September, 1997 (Exhibit P-15) the defendant informed the plaintiff that as per their calculations, the total pre payment amount up to 12th September, 1997, i.e. the date of payment, was Rs. 7,39,06,561/- and the total payment made by the plaintiff was short by Rs.50,60,864/-. Along with this letter, calculation

sheets were enclosed.

6. Plaintiff by their letter dated 18th September, 1997 (Exhibit P-16) replied stating, inter alia, that the defendant had claimed Rs. 53,75,350/- towards pre-payment premium for the four loans. It was also stated that interest calculations had been made by defendant upto 31st August, 1997 whereas payment had been made by them on 12th September, 1997 and therefore revised calculation charts were required to be prepared. Comments were also made on calculation of pre-payment premium under Project Finance Scheme, Equipment Finance Scheme and Foreign Currency Loan under Project Finance Scheme. With regard to Indian rupee loans under Project Finance Scheme and Equipment Finance Scheme, it was stated that spread of 2.5% was added for the purpose of calculations of the loan rate mentioned in the document, therefore 2.5 % should be also added to the Prime Lending Rate (PLR) to arrive at net loss. With regard to Foreign Currency Loan, it was stated that the document rate and the current lending rate of foreign currency loans in Deutsche Mark (DM) was the same and the current PLR was higher and therefore nothing was payable. If at all the plaintiff was entitled to refund in view of the higher PLR. These aspects have been considered later in the judgment.

7. Plaintiff along with the letter dated 18th September, 2008 (Exhibit P-16), enclosed a cheque of Rs.4,04,265/- as the net pre payment premium payable by them and the defendant was requested

to issue No Due Certificate. Similar request for issue of No Due Certificate was again made by letters dated 3rd October, 1997 (Exhibit P-17), 17th October, 1997 (Exhibit P-18), 3rd November, 1997 (Exhibit P-19), and further communications.

8. Defendant by their letter dated 3rd November, 1997 (Exhibit P-20) referred to letter dated 18th September, 1997 written by the plaintiff and informed them that plaintiff's request for spread over of 2.5% above the PLR for the purpose of calculation of differential loss cannot be accepted and accordingly the plaintiff was asked to make payment of Rs.53,03,252/-.

9. By another communication dated 20th March, 1998 (Exhibit P-21), the defendant informed the plaintiff that the revised calculation of pre-payment premium works out to Rs.51,49,392/-. It was further stated that the difference between DM rate of Rs.20.58 as on 12th September, 1997 and the actual rate prevailing on the date of realization of the cheque would be payable by the plaintiff. Again by letter dated 20th April, 1997 (Exhibit P-24) the defendant submitted that the prepayment premium charges were based upon standard norms set by financial institutions and policies and therefore cannot be changed. It was further stated as under:-

"Please note that the payment as informed to you on the basis of cut off date i.e. 12.9.97 has not been received in full inspite of our repeated requests. Since the said offer of prepayment has not been concluded, which may be treated as withdrawn and the said contract of

prepayment become null and void. Kindly further note that the amount received is lying pending "on account" for adjustment to the respective loan facility."

10. Plaintiff thereafter filed Civil Writ Petition No. 2497/1998. On the interim application, plaintiff was asked to furnish bank guarantee to the tune of Rs.52 lakhs and thereupon the defendant was asked to issue No Due Certificate. However, the said Writ Petition itself was dismissed by judgment dated 25th January, 2000, inter alia, holding that the jurisdiction of the Court under Article 226 in contractual matters was circumscribed and limited and the defendant had raised their demand as per discretionary terms mentioned in the loan agreements. Operation of the judgment was however stayed by learned Judge to enable the plaintiff to file an appeal.

11. Letters Patent Appeal No. 68/2000 filed by the plaintiff was disposed of by Order dated 31st August, 2000 recording, inter alia, that the plaintiff herein was "withdrawing the writ petition" and would approach the defendant herein by means of a representation for grant of benefit including waiver of interest and prepayment premium. Consequently, the writ petition was dismissed as withdrawn and the appeal, it was held, "did not survive" and "was disposed of as such". Plaintiff had stated that they would deposit Rs.40 lakhs with the defendant herein within 24 hours and Rs.12 lakhs in the Court and the deposit made would be subject to the decision taken by the Board of the defendant. In case representation of the plaintiff was rejected,

Rs. 12 lakhs deposited in the Court shall be handed over to the defendant.

12. On 19th September, 2000, the defendant rejected the representation of the plaintiff for waiver of interest and prepayment premium. Thereafter, an application was filed before the Division Bench, which was disposed of on 30th October, 2000 issuing direction to the defendant to furnish Form Nos. 13 and 17 of the Companies (Central Government General Rules & Forms) simultaneously with receipt of Rs.12 lakhs from the Court. Defendant was also directed to furnish copy of the statement of accounts.

13. Thereupon, the plaintiff has filed the present Suit for recovery of Rs.14,17,000/-, Rs.11,56,000/-, Rs.22,19,000/- and Rs.1,60,000/- (total Rs.49,52,000/-) on account of excess payment made under Equipment Finance Scheme, Equipment Credit Scheme and Foreign Currency Loans respectively and Rs.1,60,000/-, it is claimed is excess amount lying with the defendant-IFCI.

14. Defendant in their written statement has raised the plea of estoppel and has also pointed out that the prepayment premiums had been calculated on the basis of interest loss i.e. difference between the document rate of interest and the prevailing prime interest lending rate (PLR) and the amount so calculated had been discounted at the prevailing interest lending rate(PLR). Similarly, with regard to the Foreign Currency Loan, six months LIBOR rate has been taken for calculating loss of interest. It is also stated that loss of interest was

caused when loans were prepaid. A prepayment loss was caused due to parting of funds and as defendant was liable to pay interest on their borrowings. Defendant had made their own arrangement and therefore prepayment premium was justified.

15. On the basis of the pleadings of the parties, by Order dated 8th July, 2004, issues were framed. But these were subsequently modified on 9th July, 2004 with additional four issues. The modified issues read as under:-

- “1. Whether any cause of action to file the present suit exists in favour of the plaintiff and against the defendant? (OPD).
2. Whether the plaintiff has repaid the entire liability under the Loan agreements entered into between the parties? (OPP)
3. Whether the plaintiff is stopped from challenging the terms and conditions of a concluded contract which has been acted upon and under which benefits have been availed of by the plaintiff? (OPD)
4. Whether the defendant could adopt different criteria for charging prepayment premium in respect of Rupees Loans disbursed all most contemporaneously under different schemes of financing to the same industrial unit? (OPD)
5. Whether the premium charged by the defendant on prepayment of loan availed by the plaintiff under the Project Finance Scheme Equipment Finance Scheme and Foreign Currency Loan of the defendant is legal being in terms of the contract between the parties? (OPD)
6. Whether the plaintiff is entitled to a sum of Rs.55,46,000/- as detailed in paragraph 52 of the plaint? (OPP)
7. Whether the plaintiff is entitled to any interest on the amount of Rs.55,46,000/- if so at what rate and for what period? (OPP)
8. Relief.”

16. Plaintiff has adduced oral evidence of PW-1 Mr.Sunil Bhanot, Company Secretary of the plaintiff and on behalf of the defendant, Mr. S.K. Mazumdar, Deputy Legal Manager (Law)/PW-1 has given oral evidence. Both the witnesses have been cross examined.

ISSUE NO. 1

17. Issue no.1 as framed is rather vague and not specific. Defendant in the written statement has raised preliminary objection to maintainability of the suit on the ground of estoppel. However, on that aspect a separate issue being issue no.3 stands framed.

18. During the course of arguments, learned counsel for the defendant had submitted that the orders passed in the writ petition and the Letters Patent Appeal being judgment dated 25th January, 2000 and Order dated 31st August, 2000 operate as *res judicata*. Plea of *res judicata* has not been specifically raised in the written statement. Plea of *res judicata* requires reference to earlier proceedings including pleadings and orders passed in the earlier proceedings. In most cases plea of *res judicata* is one of law as well as facts. Normally, therefore, a party should not be permitted to raise a plea of *res judicata* without specific contention in the pleadings, as the other side may be well taken by surprise and denied opportunity of a fair trial. Moreover, for judgment dated 25th January, 2000 passed in Writ Petition No. 2497/1998 to apply as *res judicata*, the

same should have attained finality. By Order dated 31st August, 2000 passed in LPA No. 68/2000, the Writ Petition was itself dismissed as withdrawn and therefore it was observed that the appeal does not survive and was disposed of. The appellate court did not go into the merits but had allowed the plaintiff herein to withdraw the writ petition as if the same was never filed. The plea of *res judicata* therefore even on merits has no force and is liable to be rejected. Issue no.1 is accordingly decided in favour of the plaintiff and against the defendant.

ISSUE NOS. 2, 4-6

19. Clause 2.5 of Equipment Credit Scheme (Exhibit D-39) is a specific clause relating to premature payment. The said Clause reads as under :-

"2.5 Premature repayment

If, at the request of the Company, IFCI agrees to accept premature repayment of the Cost of the Equipment, the Company shall, immediately upon such acceptance, pay/repay:

- (a) the Cost of the Equipment;
- (b) Interest on the Cost of the Equipment at the rate of @ 22% per annum calculated from the due date of last instalment paid till the date of payment of the Cost of the Equipment;
- (c) Premium at the following percentage of the Cost of the Equipment:
 - i) In the event of premature repayment is made by the Company before the expiry of the period of one year from the date of payment of the Cost of the Equipment by IFCI, at 5%;
 - ii) In the event the premature repayment is made by the Company after the expiry of the period of one year but before the expiry of two years from the date of payment of the Cost of the Equipment by

- IFCI, at 3%;
- iii) In the event the premature repayment is made by the Company after the expiry of two years from the date of payment of the Cost of the Equipment by IFCI, at 1%;
- (d) All other monies due and payable under or pursuant to this Agreement.
- (e) Disbursements made pending creation of final security as stipulated in clause 3 hereof shall from the date of first disbursement carry further interest at a rate of 1% p.a. till creation of final security.”

20. There is no dispute between the plaintiff and the defendant that as far as Equipment Credit Scheme Agreement is concerned, the said Clause will apply and accordingly the plaintiff is liable to pay premature prepayment premium in terms thereof i.e. @ 1% of the cost of the equipment as per Clause 2.5(c) and (d). Payment of premium under the Equipment Credit Scheme Agreement is not subject matter of the present Suit.

21. Similar clause does not exist in the other three loan agreements. The dispute between the parties relates to the other three agreements.

22. Relevant clauses in the Equipment Finance Scheme (Exhibit D-5) being Clause no.4.8 and Project Finance Scheme (Exhibit D-24) being Clause no. 2.2A, read as under:-

“Equipment Finance Scheme :

Section 4.8 **PREMATURE REPAYMENT**

The Borrower shall not prepay the outstanding principal amounts of the Loan in full or in part, before the due dates except (after the conversion right is exercised in full, or has lapsed and*) to be

deleted if conversion clause not applicable after obtaining the prior approval of IFCI (which may be granted conditionally).

Project Finance Scheme :

2.2 A The Borrower shall not repay the loan or any part thereof before the due date except with the prior written approval of the Lenders on such terms and conditions as may be stipulated by the Lenders.”

23. In other words, the two Clauses stipulate that the plaintiff shall not repay the loan or part thereof before the due date except with the prior approval of the defendant and would be subject to terms and conditions stipulated by the defendant. It is the case of the plaintiff that the above Clauses are uncertain and therefore hit by Section 29 of the Contract Act, 1872 (hereinafter referred to as the Act, for short). The contention of the defendant is that the above clauses are not uncertain or vague and are to be interpreted in harmony with other provisions of the contract.

24. Two Clauses quoted above are in the nature of an option. It gives liberty, to the borrower, to make a request for prepayment of loan. The Clauses do not specify the amount of premium payable or conditions which can be imposed by the defendant when a request for prepayment is made. It gives wide discretion to the defendant to unilaterally fix terms and conditions of the pre-payment. The Clauses do not even stipulate that the terms and conditions would be reasonable, fair and as per common practice. It does not provide for machinery for ascertainment of the amount paid. The two Clauses

merely permit the plaintiff to make a request for prepayment and thereupon the defendant has right to fix terms and communicate their proposal or offer to the plaintiff. The plaintiff may accept or reject the offer or terms of prepayment. When a request is made, the plaintiff or the borrower invites an offer from the lender, i.e.; the borrower. Clauses quoted above permit the plaintiff to make a request and invite the defendant to make an offer.

25. The two Clauses, therefore, do not create an enforceable contract, but, provide that the defendant can examine request for prepayment of loan but on terms and conditions to be fixed by them. A concluded contract will come into existence once the defendant makes an offer with pre-payment terms and the same is accepted by the plaintiff. The Clauses give liberty to the plaintiff to make a request to the defendant to make a proposal or offer as defined in Section 2(a) of the Act. After examining the request, the defendant has a right to make a proposal under Section 2(a) of the Act and the plaintiff has option to accept the said proposal as provided under Section 2(b) of the Act and upon acceptance thereof a binding agreement would come into existence as defined in Section 2(j) of the Act. In view of the above discussion, reference to Section 29 of the Act in connection with the two Clauses mentioned above by both the parties is entirely misplaced and irrelevant. Clauses by themselves do not create a binding contract or agreement under Section 2(j) of the Act for prepayment of premium. Both sides have misconstrued the two

Clauses. The two Clauses create no absolute or legal obligation for prepayment of premium. A chance, possibility or potentiality of an obligation is distinct from an absolute obligation, which is not conditional and immediately legally enforceable. The question whether it was mandatory for the defendant to make an offer on the request of the plaintiff under the two clauses is not required to be examined, for the request was accepted and offer was made by the defendant to the plaintiff. For purpose of record, law recognizes undertaking to make an offer as in cases of pre-emption.

26. In view of the above facts, we have to now examine whether the conduct of the parties and exchange of letters has resulted in formation of a concluded and enforceable contract for pre payment and prepayment premium.

27. Plaintiff by their letters marked Exhibit P-2 to P-8 had requested the defendant to examine their request for prepayment of the loan. The request was considered and proposal was sent by the defendant to the plaintiff by their letter dated 8th August, 1997 (Exhibit P-9). Relevant portion of the said letter reads as under:-

"In this connection, we are agreeable to your proposal of prepayment of our outstanding term loans. Accordingly, you are requested to arrange funds for payment which includes principal, interest, other charges and premium, which has been calculated upto the cut-off date i.e. 14th August, 1997 as per our prevailing standard norms, set by the

financial institutions. The total amount payable will be advised separately. We further inform that any delay in repayment of outstanding term loans shall lead to revised calculations of premium etc.”

(emphasis supplied)

28. The letter (Exhibit P-9) stipulated that the plaintiff would be liable to pay principal, interest, other charges and premium as per the prevailing standard norms, set by the financial institutions. The said letter constitutes a ‘proposal’ as defined in Section 2(a) of the Act.

29. The proposal was accepted by the plaintiff by their four letters dated 11th September, 1997 (Exhibits P-10 to P-13) and the same resulted in an enforceable contract as defined in Section 2(j) of the Act. In letters dated Exhibits P-10 to P-13, it is stated as under:-

“SUB : PRE-PAYMENT OF IFCI TERM LOAN (. . . .)

Please refer to your letter ref. no.DRO/GROUP-V/Proj./97-6923 dated August 8, 1997 regarding our proposal to pre-pay all our outstanding loans.

Accordingly, we enclosed herewith our Pay Order No. Dt. for Rs..... (Rupees.....) drawn on towards payment of outstanding loan amount including interest payable thereon as per details attached.

You are requested to acknowledge receipt of the above payments and let us know, if any balance amount is still payable by us. You are also requested to provide us the details of the balance amount payable, if any. “

Thus both parties have entered into an enforceable agreement to

pay principal, interest, other charges and premium as per standard norms set up by the financial institutions.

30. It is not the case of the parties that there was any difficulty or uncertainty with regard to the principal amount and interest due thereon upto the cut of date. To this extent there is no dispute. It is the contention of the plaintiff that the stipulation with regard to the payment of premium and other charges as per prevailing standard norms set up by the financial institutions is indefinite and uncertain and therefore violates Section 29 of the Act.

31. A contract is bad for uncertainty if it is incapable of being made certain. Where a criteria or mechanism has been fixed by the parties and it is possible to ascertain and determine the amount payable as per the criteria/mechanism fixed by the parties, an agreement is not void for lack of uncertainty. An agreement which lacks clarity but is capable of definite and precise meaning attributable to the parties is not bad for uncertainty. Maxim ***id certum est quod certum reddi potest*** that which is sufficiently certain can be made certain, is applicable. If on a fair reading of a term of an agreement, the intention of the parties can be ascertained, courts will be reluctant to declare the contract to be void on the ground of uncertainty.

32. Illustration 'e' to Section 29 of the Act provides that even when two parties to the contract have not fixed the price and the same is to be fixed by a third party, the agreement is not void for

uncertainty as the third party has the right to fix the price. The said illustration will apply to the facts of the present case as letter dated 8th August, 1997 (Exhibit P-9) and the acceptance letters dated 11th September, 1997 (Exhibits P-10 to P-13) make reference to the prepayment premium which is chargeable as per the prevailing standard norms set up by financial institutions. The prepayment premium can be ascertained with reference to the prevailing standard norms set up by financial institutions, the basis mentioned in the letter dated 8th August, 1997 (Exhibit P-9).

33. Courts are normally reluctant to strike down commercial contracts on the ground of uncertainty unless the terms cannot be ascertained. In commercial contracts a narrow pedantic approach is not warranted and a fair and a broad approach is adopted. The contract and the terms thereof have to be interpreted in a reasonable manner. Difficulties in ascertaining the term does not make the contract fatal and is not synonymous with uncertainty. Even when, there are gaps these can be bridged and filled up with reference to previous course of dealings between the parties, usual customs and practice and what is considered to be reasonable unless contractual terms are to the contrary or the exercise shall result in formation of a new contract or bar under Section 93 of the Evidence Act applies. Courts normally protect bargains and do not destroy them. It will be appropriate to refer to the decision of the Madhya Pradesh High Court in **M/s. Uttam Singh Duggal and Company versus Hindustan Steel Ltd.**

reported in AIR 1982 MP 206, wherein it has been stated :-

“10. Solemn contracts entered into between the parties are not to be readily declared invalid for uncertainty as to certain terms, at any rate in those cases where the parties have acted upon the contracts which have been fully executed. In construing a contract the object of the Court is to do justice between the parties and the Court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. (See Scammel v. Ouston 1941 (1) All. ER 14 at p.25). As observed by a Full Bench of this Court: “Documents embodying a business agreement should be construed fairly and broadly and there must be implied in such documents a term which will give such business efficacy to the transaction as must have been intended by the parties. No doubt, one cannot add to a contract an implied term inconsistent with or which contradicts the express terms of the contract. But in a suitable case one can imply a term if it is necessary to give it business efficacy.” (Gulab Chand v. Kudilal, AIR 1959 Madh Pra 151) (at p.162) (FB). Lord Denning has expressed or imposed a term whenever it is reasonable to do so in order to do what is fair and just between the parties (see, The Discipline of Law, page 37). He expressed this view in the case of Liverpool City Council v. Irwin, (1975) 3 All ER 658. In appeal, however, the House of Lords though agreeing with the conclusion of Lord Denning did not accept the broad proposition that the Court is entitled to read in by implication all reasonable terms. The House of Lords observed that terms may be implied on the basis of established usage or for giving business efficacy to the contracts or on the ground of necessity. ((1976) 2 All ER 39 (HL) at pp.43,44). A reference in this connection may also be made to Section 29 of the Contract Act which says that agreements, the meaning of which is not certain, or capable of being made

certain, are void. A contract can become void under the section only when its terms cannot be made certain. Mere vagueness or uncertainty which can be removed by proper interpretation cannot make a contract void. In dealing with commercial and business contracts which have been acted upon by the parties, the Court should be very slow in finding defects and to reject them as meaningless. This should be done only in extreme cases.”

Supreme Court in ***M/s. D.Gobind Ram versus M/s. Shayma K. & Company*** reported in AIR 1961 SC 1285 had held that the words “*force majeure*” are very wide, ambiguous and therefore uncertain, but when prefixed with the word “usual” are capable of definite meaning and this ensues certainty to the contract. Clause stipulating that the parties will be governed by “*usual force majeure*” is specific and capable of being made certain and not hit by Section 29 of the Act.

34. Conduct of the parties in form of exchange of correspondence specially letter dated 8th August, 1997 (Exhibit P-9) and letters dated 11th September, 1997 (Exhibits P-10 to P-13) show that the parties wanted to enter into a binding legal relationship. There was no dispute that pre-payment premium would be payable. There was also no dispute that the premium payable would be as per standard norms set up by financial institutions. There was no indefiniteness of the nature which would make the contract vague and indefinite. It cannot be said that the terms settled between the parties cannot be ascertained.

35. I may also note that the parties have acted on the basis of the two letters, exhibit P-9 and exhibits P-10 to P-14 and the

contract was performed with principal and interest amount being paid. In fact as per the defendant, the entire contract has been performed and therefore there is no question of refund. The terms set out in the letter dated 8th August, 1997 (Exhibit P-9) was acted upon. In these circumstances, it would be unfair and inequitable to set at naught the entire bargain. This is not in the interest of the plaintiff also. To use a popular expression "eggs cannot be unscrambled". Far greater latitude and assistance to uphold commercial bargain is given by the courts where agreements have been executed. In some cases of executed contracts, even principles of fairness and reasonableness or *quantum meruit* have been applied to determine and decide consideration payable. Court has to approach the agreement in question to effectuate the same and uphold the bargain and not to interpret the terms with astuteness to find faults and defects. The parties were ad idem on the terms of the contract including the question of payment of prepayment premium. The consideration mentioned in the contract in terms of the letter is ascertainable and therefore the plaintiff is liable to pay prepayment premium as per the prevailing standard norms set up by the financial institutions.

36. The above reasoning will equally apply to the Foreign Currency Loan Agreement and the question that there was no stipulation or a clause in the original contract for payment of prepayment premium is rendered irrelevant and inconsequential in view of the subsequent letters and correspondence exchanged

between the parties i.e. letter dated 8th August, 1997 (Exhibit P-9) and letters dated 11th September, 1997 (Exhibits P-10 to P-13), as per which the plaintiff had agreed to pay prepayment premium as per the prevailing standard norms set up by the financial institutions.

37. Learned counsel for the parties had drawn my attention to Clauses 4.4, 4.8A of Article IV and Section 7.3A(iii) of Article VII of Foreign Currency Loan Agreement. These Clauses, read as under:

“Section 4.4 REPAYMENT

- (i) The Lenders may, in suitable circumstances, revise, vary or postpone the repayment of the principal amounts of the Loans or the balance outstanding for the time being or any instalment(s) of the said principal amounts of the Loans or any part thereof upon such terms and conditions as may be decided by the Lenders.

“Section 4.8 APPROPRIATION OF PAYMENTS

- (a) Unless otherwise agreed to by the Lenders any payment due and payable under the Loan Agreement and made by the Borrower shall be appropriated towards such dues in the following order viz.-
 - (i) Premium on prepayment;”

“Section 7.3 GENERAL COVENANTS

- (A) Without the prior approval of the Lead Institution, the Borrower shall not

- (i) NEW PROJECT

Undertake any new project, diversification, modernization or substantial expansion of Project described herein. The word substantial shall have the same meaning as under the Industries (Development and Regulation) Act, 1951.

- (ii) LOANS AND DEBENTURES

Issue any debentures, raise any loans, accept deposits

from public, issue equity or preference capital, change its capital structure or create any charge on its assets or give any guarantees. This provision shall not apply to normal trade guarantees or temporary loans and advances granted to staff or contractors or suppliers in the ordinary course of business or to raising of unsecured loans, overdrafts, cash credit or other facilities from banks in the ordinary course of business.

(iii) **PREMATURE REPAYMENT**

Prepay any loan availed of by it from any other party.”

38. Section/clause 4.4 gives power to the lender i.e. the defendant to revise, vary or postpone the payment of the loan amount upon terms and conditions as would be decided by the lender. Section 4.8 gives power to the lender to decide prepayment premium and appropriate the amount towards the same. The lender, i.e. the defendant had exercised the said right in terms of letter dated 8th August, 1997 (Exhibit P-9). Clause 7.3A(iii) has no application to the facts of the present case. It imposes an embargo on the plaintiff to prepay any loan availed of by it from any third party. This is clear from the use of the words “other party” in the said Section. The intention behind the Section being that the plaintiff should not repay any loan taken from any third party as it would or may have implication or adverse effect on the payment of the loan taken by the plaintiff from the defendant.

39. The contention raised by the defendant in the written statement that the plaintiff had on his own accord deposited payments vide four separate letters dated 11th September, 1997

(Exhibits P-10 to P-13) is not correct. Exhibit P-11 has an endorsement of the officer on behalf of the defendant who had received the said letter that the pay orders were accepted subject to approval and the balance amount due. This obviously had reference to payment of the prepayment premium in terms of letter dated 8th August, 1997 (Exhibit P-9). Letter dated 8th August, 1997 (Exhibit P-9) constitutes an 'offer', under the Act. In law, the promisor while making an offer is not required to compute and calculate total consideration. Terms of the contract including the consideration should be certain and it is not necessary that the same should be quantified. Therefore, letter dated 8th August, 1997 (Exhibit P-9) and thereafter payments made in terms of the said letter by letters dated 11th September, 1997 (Exhibits P-10 to P-13) have resulted in a concluded contract. It is thus not possible to accept the contention of the defendant that these two letters had not concluded the contract for payment of the prepayment of the loans and these got concluded subsequently when the defendant by their letter dated 17th September, 1997 (Exhibit P-15) had computed and calculated the total amount payable towards prepayment premium. Calculation and quantification of prepayment premium is subsequent to the conclusion of the contract. The said prepayment premium could be calculated only in terms of letter dated 8th August, 1997 (Exhibit P-9) i.e. as per the prevailing standard norms as set out by the financial institutions. Quantification of the prepayment premium could be

done only in terms thereof and not on any other terms and conditions.

40. Similarly, the contention of the plaintiff that the conditional acceptance of payment was only in respect of one of the loans, namely, term loan under Project Finance Scheme as conditional endorsement was made only in the letter dated 11th September, 1997 (Exhibit P-11) and not on letters of even date, namely, Exhibits P-10, P-12 to P-13 has to be rejected. The plaintiff in the plaint in para 15 has stated that the representative of the plaintiff who had handed over the pay orders towards prepayment of the loans was asked by the defendant to deposit further amount on charges for prepayment of loans. The plaintiff and the defendant always understood that the conditions mentioned in Exhibit P-11 would be equally applicable to Exhibits P-10, P12 and P-13.

41. The defendant has failed to produce and file copy of the prevailing standard norms set out by the financial institutions as stipulated in the letter dated 8th August, 1997 (Exhibit P-9). The prevailing standard norms were set out by the financial institutions were within the knowledge of the defendant, a financial institution and the lender. Onus was squarely on the defendant to establish and show the prevailing standard norms set out by the financial institutions as on 8th August, 1997. DW-1, Mr. S.K. Mazumdar, Deputy General Manager (Law) when cross examined on the question of prevailing standard norms and whether the relevant circular had been placed on record had stated as under:-

“Q. Mr. Majumdar, in your affidavit by way of evidence, you have referred to circular dated February 20, 1995 issued by IFCI regarding premature repayment of rupee loans. This was obviously after the rupee term loans have been availed by Plaintiff.

Ans. Yes.

Q. Mr. Majumdar, can you please show me from the record of the Hon'ble Court before you, any communication of the circular to the Plaintiff?

Ans. No. There is no such practice of communicating internal circulars to our borrowers.”

42. The aforesaid cross examination of the defendant's witness was with reference to paragraph 3(x) of the preliminary submission of the defendant wherein reference was made to Circular dated 20th February, 1995 regarding premature prepayment. It was, inter alia, stated that interest loss i.e. difference between document rate (excluding interest tax) and the prevailing floor rate (excluding interest tax) thus calculated was discounted at the prevailing lending rate to arrive at the net payable value of interest lost. I deem it appropriate to reproduce relevant paragraphs of the written statement and replication:

WRITTEN STATEMENT

“(x) The policy for charging the premium prevalent on the Rupee Term Loan at the relevant point in time was/is contained in Operational Circular No. 6(1205)/95 dated February 20, 1995 issued by the Defendant. As per the said Circular No. 6/95 dated 20.2.1995 regarding premature repayment, the interest loss i.e. difference between the document rate (excluding interest tax) and the Prevailing Floor Rate (excluding interest tax), thus calculated shall be discounted at the Prevailing Lending

Rate (PLR) to arrive at NPV of interest loss. The interest tax on premium would be recovered @2% on the premium amount.

(xi) Premium on Foreign Currency Loan, as per Defendant's Circular dated 4.3.1998 is calculated on the basis of the following formula:

NPV discounted at prevailing six month LIBOR, and interest differential by applying = lending rate LESS prevailing six month LIBOR.

NPV1

Discounting factor $(1 + (r/100) \wedge n$

n = Cumulative nos. of days reckoned from the date of realization.

365

r = applicable discount rate.

In case of Foreign Currency Loan (FCL), the days would be 360.

(xii) Thus, in Rupee Term Loan cases, calculations are based on difference between the document rate i.e. 19.12% LESS prevailing floor rate (PLR) i.e. 14.5% and discounted at prevailing floor rate to arrive at NPV, and in case of FCL, document rate i.e. 9.50% LESS LIBOR i.e. 3.44 (as on 12.9.1997)"

REPLICATION

Reply to para (x) & (xii) in replication

"(x) to (xii) The contents of paras (x) to (xii) of the "Preliminary Submissions" are incorrect, misconceived, misleading hence denied. The alleged operational circular 6(1205)/95 dated 20th February, 1995 issued by the Defendant is not binding on the Plaintiff. The alleged circular was issued subsequent to the entering of the Loan Agreements by the parties. The alleged formulae for the calculation of pre-payment premium are not applicable to the loan agreements between the Plaintiff and the Defendant herein."

43. A reading of the above paragraphs show that the plaintiff has not disputed contents of Circular dated 20th February, 1995 as reproduced in para 3(x) of the written statement. Therefore, I feel the defendant will be entitled to claim prepayment premium as mentioned in para 3 (x) i.e. difference between the document rate and the prevailing floor rate after excluding interest tax from both and discount interest at the prevailing PLR to arrive at the net payable value of the interest loss. I may note here that the interest is being discounted because it was to be paid over a period of time in future, but in view of one time premature payment, this interest though payable in future was being paid immediately. While arriving at the above finding/conclusion, I have also relied upon the principle that averments made in the pleadings but not specifically denied by the other side is deemed to be admitted. (See, Order VI of the Code of Civil Procedure, 1908).

44. With regard to the Foreign Currency Loan, the circular relied upon and quoted in para 3(xi) of the written statement by the defendant is dated 4th March, 1998. The said circular was not prevailing on the date when letter dated 8th August, 1997 (Exhibit P-9) was issued and in terms of which payment of the principal amount with interest was made on 11th September, 1997 (Exhibits P-10 to P-13). Circular dated 4th March, 1998 cannot be the basis for payment of premium. This will be contrary to the concluded contract between the plaintiff and the defendant. The defendant cannot rely upon a

subsequent circular dated 4th March, 1998 for a concluded contract based upon prevailing policy of prepayment as it existed when letter dated 8th August, 1997 (Exhibit P-9) was issued and offer was made in terms thereof. The said formulae therefore, as mentioned in para 3(xi) of the written statement, cannot be applied. As already observed above, the defendant has failed to discharge the onus and place on record the relevant prevailing standard norms for payment of prepayment premium on Foreign Currency Loan. Onus on the defendant in terms of Issue No. 5 has not been discharged by the defendant. The defendant has also withheld the relevant document and therefore has to face consequences. It is not the case of the defendant that the relevant standard norms as on that date are on record or were known to the plaintiff. Witness of the plaintiff was also not cross examined by the defendant on this aspect.

45. The aforesaid view taken by me is fortified and corroborated by the subsequent letters and correspondence exchanged between the parties. The defendant by their letter dated 17th September, 1997 (Exhibit P-15) had calculated prepayment premium with reference to Net Payable Value of the interest loss as calculated in terms of Circular dated 20th February, 1995 in form of a chart for both rupee loans and the Foreign Currency Loan. In the case of rupee loan the document rate of interest was reduced from PLR as on the relevant date and the difference was then discounted with a reference to the prevalent lending rate (PLR) + 1%. The net

effect was that the plaintiff was liable to pay the difference between document rate of interest, which was higher and the PLR on the date when payments were made, which was lower. The resultant figure, i.e. net loss of interest was then discounted to arrive at the sum payable in case of rupee loans.

46. In response to this letter, the plaintiff wrote letter dated 18th September, 1997 (Exhibit P-16) making reference to the calculations for Net Payable Value. The only objection raised by the plaintiff was that the defendant had charged premium of 2.5% over prevailing lending rate when documents of loan were executed and therefore the same 2.5% premium should be added to the current prevailing PLR to calculate and the difference between the current prevailing PLR + 2.5% should be treated as interest loss. In other words, the plaintiff accepted the calculations in terms of Circular dated 20th February, 1995 except that 2.5% premium was charged on the lending rate at the time of execution of the document should also be added to the current prevalent PLR. It was also stated that the discounting should be done at the prevalent PLR + 2.5% instead of prevalent PLR + 1% as made by the defendant.

47. As far as Foreign Currency Loan was concerned, the tabulation enclosed with the letter dated 17th September, 1997 (Exhibit P-15) had made reference to the rate of interest mentioned in the document i.e. 9.5% and the prevalent LIBOR rate of interest at 3.06% in respect of DM. However, for calculating the discounted Net Payable Value, calculations was done by the defendant with a reference to

prime lending rate (PLR) + 1%. The plaintiffs in their letter dated 18th September, 1997 (Exhibit P-16) disputed the entire calculation of prepayment premium on Foreign Currency Loan. It was specifically stated that no prepayment premium should be charged since the lending rate mentioned in the document was 9.5% p.a. and the current lending rate for Foreign Currency Loan in DM is not less than 9.5% p.a. Thus, no loss was being caused to the defendant on prepayment and in case prepayment premium was to be discounted, the defendant would be liable to make payment to the plaintiff.

47. Defendant replied to this letter on 3rd November, 1997 (Exhibit P-20) rejecting the claim of the plaintiff, both in respect of Rupee loans and foreign currency loan stating that the same cannot be accepted as prime lending rate concept was not in existence at the time when the loans were sanctioned. However, the defendant did not specifically deny and give reply to the contention of the plaintiff that the interest rate of 9.5% mentioned in the Foreign Currency Loan document and the current lending rate of Foreign Currency Loan in DM was not less than 9.50 i.e. same as mentioned in the document or the loan agreement. If the current lending rate and the document rate were the same, no loss of interest was caused to the defendant. The defendant has not lead any evidence to show loss on account of prepayment of foreign currency loan. PLR on 8th August, 1997 was much higher than the document rate of interest mentioned in Foreign Currency Agreement.

48. In view of the findings given above, it is held that as far as Indian rupee loans are concerned, the plaintiff is liable to pay

prepayment premium in terms of para 3(x) of the preliminary submissions as mentioned in the written statement and in terms of circular dated 20th February, 1995 as calculated by the defendant as per chart enclosed with letter dated 17th September, 1997 (Exhibit P-15). However, with regard to the Foreign Currency Loan the defendant has failed to produce and prove the existing settlement norms as on 8th August, 1997 and the fact that there was a difference between the document lending rate and the current lending rate for Foreign Currency Loan in DM as on 8th August, 1997 in terms of their letter of even date marked Exhibit P-9. The defendant is, therefore, not entitled to claim any prepayment premium in respect of Foreign Currency Loan over and above 1% for which the plaintiff was/is agreeable and to which extent no claim has been made in the plaint also. It is accordingly held that the plaintiff is entitled to refund of prepayment charge of Rs.22,19,000/- as claimed in para 52 of the plaint.

49. With reference to claim of Rs.1,60,000/- on excess payment made by the plaintiff to the defendant, no evidence has been led to justify the claim. The said claim is accordingly rejected.

ISSUE NO.3

50. Defendant in their written statement has submitted that the plaintiff in making the prayer for refund wants to go behind and challenge the terms and conditions of the loan agreements. Having taken the benefit of the loan agreements, the plaintiff is estopped from raising this plea now. It is also submitted that the plaintiff is estopped from challenging the premium charged as the plaintiff has accepted the defendant's discretionary right to charge prepayment

premium and the parties have acted on this basis. The plaintiff cannot challenge the quantum of prepayment premium. In the written submission filed by the defendant, it is submitted that the suit is barred on the principle of “issue estoppel” and “action estoppel”.

51. On the question of “issue estoppel”, principle of *res judicata* has been examined above and answered in the negative i.e. in favour of the plaintiff and against the defendant. As already stated above, the decision of the writ court dated 25th January, 2000 is not binding and stands obliterated in view of order passed by the Division bench permitting the plaintiff to withdraw the writ petition itself. In these circumstances, it cannot be said that decision on any issue had attained finality to be binding on the plaintiff.

52. On the question of “action estoppel”, virtually nothing is pleaded in the written statement. However, I have referred to the contentions raised by the defendant in their written statement and the contemporaneous correspondence exchanged between the parties and the basis on which prepayment of loans were made. I have already quoted above, the relevant portion of letter dated 8th August, 1997 (Exhibit P-9) written by the defendant company making an offer on the plaintiffs’ request for prepayment of the entire loan amount with interest. In the letter dated 8th August, 1997 (Exhibit P-9) it was specifically stipulated that the plaintiff would be liable to pay principal amount, interest and other charges and premium which would be calculated as per the prevailing standard norms set up by financial

institutions, but the said calculations would be made separately. After receiving letter dated 8th August, 1997 (Exhibit P-9) the plaintiff made prepayment of the principal amount along with interest by their letters dated 11th September, 1997 (Exhibits P-10-13). The said letters make specific reference to letter dated 8th August, 1997 (Exhibit P-9) and the terms and conditions mentioned therein.

53. In these circumstances, plaintiff will be bound by the terms and conditions mentioned in the letter dated 8th August, 1997 (Exhibit P-9). The quantum of premium would be as per prevailing standard norms set by financial institutions. The plea of estoppel will apply but only to that extent and not beyond the terms and conditions mentioned in the letter dated 8th August, 1997 (Exhibit P-9). Issue no.3 is accordingly decided holding, inter alia, that the plaintiff in view of letter dated 8th August, 1997 (Exhibit P-9) and the payment made thereafter by letters dated 11th September, 1997 is bound by the principle of estoppel to pay prepayment premium as per prevailing standard norms set up by financial institutions. The defendant is also bound on the same basis. This issue is accordingly decided.

ISSUE NO.7

54. The plaintiff has also not led any evidence to show that any notice was issued to the defendant under the Interest Act. Accordingly, claim for pre-suit interest is rejected. The plaintiff will be entitled to pendente lite and future interest on Rs.22,19,000/- @ 12% p.a.

ADDITIONAL PLEA

55. Learned counsel for the defendant had submitted with reference to prayer 'a' in the plaint that the suit was barred by limitation. The said prayer reads as under:

“(a) pass a decree of declaration to the effect that the amount of pre-payment premium charged by the defendant from the plaintiff in respect of loan advanced under Project Finance Scheme is beyond the terms of contract between the parties and illegal besides being arbitrary, unconscionable and not enforceable and that the defendant is liable to refund the same.”

56. I have already rejected the said prayer of the plaintiff in view of the finding given with reference to issue nos.2, 4 to 6. On the question of limitation, I do not find any pleadings or evidence on record. It is not only the date of the contract which is relevant for deciding question of limitation for a prayer of declaration. The date on which dispute arose is also relevant. A party need not seek declaration when there is no dispute or difference about the term of the contract. Cause of action to sue or make a prayer for declaration shall accrue only after disputes have arisen. Till disputes arise, the plaintiff had no cause of action. Plea of limitation with reference to prayer clause (a) in the present case cannot be decided without evidence being on record to show and establish when the cause of action had first arisen. I may also notice here that if this plea had been raised, several defences were available to the plaintiff. The said plea is therefore rejected. However, as pointed out above, I have

held that no decree of declaration is to be passed.

RELIEF

57. Decree of Rs.22,19,000/- is passed in favour of the plaintiff and against the defendant along with pendente lite and future interest @ 12% p.a.. The plaintiff will be entitled to proportionate cost. Decree sheet will be prepared accordingly.

58. Suit is disposed of.

(SANJIV KHANNA)
JUDGE

OCTOBER 21ST, 2008.
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