IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	06.02.2023
Pronounced on	02.06.2023

CORAM

THE HONOURABLE **MR.JUSTICE C.SARAVANAN**

C.S.No.416 of 2019
(Comm. Suit)

M/s.Rarefield Shipping Pvt. Ltd.,
104, East Matha Church Street,
Rayapuram, Chennai-600 012. ... Plaintiff

Vs.

1.M/s.ICICI Bank Ltd.,
SCG Department, Harihant Insight,
IV Floor, East Wing, Plot No.24,
South Phase, Ambattur Industrial Estate,
Chennai – 600 058.

2.M/s.ICICI Bank Ltd.,
No.1, Cenatoph Road, Teynampet,
Chennai – 600 018.

3.M/s.ICICI Bank Ltd., Registered Office,
“Land Mark”, Race Course Circle,
Vadodara – 390 007. ... Defendants

Civil Suit filed under Order IV, Rule 1 of Original Side Rules r/w. Order VII, Rule 1 of Code of Civil Procedure, to pass a Judgment and Decree:

a) for Rs.1,82,91,181/- with further interest on Rs.84,27,002/- at 18% per annum from the date of plaint till full payment against the defendants;
b) for cost of the suit; and
c) to pass such other orders as may be deemed necessary and thus render justice.

For Plaintiff : Mr.T.V.Badrinarayanan

For Defendants : Mr.Jayesh B Dolia, Senior Counsel
Asst. by Mr.M.S.Shanmuga Sundaram
for M/s.Aiyar & Dolia

JUDGMENT

The present Civil Suit has been filed by the plaintiff M/s.Rarefield Shipping Pvt. Ltd. against the defendant M/s.ICICI Bank Ltd. to recover a sum of Rs.1,75,28,162/- together with further interest on Rs.84,27,002/- at 18% per annum from the date of plaint till full payment and cost of the suits.

2. The following issues were framed by this Court for being considered:-

i. Whether the Term Loan Account Statement (in Ex.P10/11) was available or accessible to plaintiff or its Promoter/Managing Director prior to June 2016 or September 2017 when authenticated Statement of Term No.R143601001, Draw Down No.1 and 2 was furnished for the first time as alleged in Plaint?

ii. Is the suit claim time-barred?

iii. Did the defendant lawfully invoke and enforce the Pre-closure premium clause to charge a sum of Rs.84,27,002/-?

iv. Did Plaintiff or anyone representing it otherwise have the knowledge of charging and appropriation of the alleged Pre-closure charge of Rs.84,27,002/- so as to estop Plaintiff from claiming it?

v. Is the Plaintiff entitled to a decree for a sum of Rs1,75,28,162/- as on the date of Plaint?

vi. To what other relief is Plaintiff entitled?

3. The plaintiff was incorporated in 2010. It was earlier a shipping division of M/s.Rarefield Engineers Pvt. Ltd. For acquiring capital assets namely sea-going vessels, the plaintiff availed a Term Loan in May 2011 from the defendant for an amount of Rs.29.5 Crores repayable with interest at 12.5% per annum in 51 EMIs with a moratorium period of 9 months.

4. The plaintiff was also sanctioned a cash facility of Rs.50 lakh by the defendant bank. Thus, the total exposure of the plaintiff to the defendant bank was Rs.30,00,00,000/-.

5. Incidentally, the said M/s.Rarefield Engineers Pvt. Ltd. was sanctioned a cash credit facility of a limit of Rs.3.5 Crores in November 2011 repayable at 13.75% interest p.a.

6. These loans were jointly secured by several high-value assets. Both the plaintiff and its sister company M/s.Rarefield Engineers Private Limited were however unable to carry on the business after availing the above loan facilities from the defendant bank. Therefore, they opted for the foreclosure of their respective loans.

7. The plaintiff and its promoters had offered the following assets situated at various places as securities by creating an Equitable Mortgage of Property in favour of the defendant bank as detailed in the following table:-

Table No.1:

Sl. No	Description	Location	Standing in the name of /owned by	Approx. Area/ Size	Approx. market value (Rs. in Millions)
1	Residential property	Saidapet, Chennai	Mr.Russel Raj	Land 750 sq.ft. Building 2500 sq.ft.	8.0
2	Residential property	Kodambakkam, Chennai	Mr.Russel Raj	Land 3500 sq.ft. Building 6700 sq.ft.	50.0
3	Commercial land	Muthialpet, Chennai	Rarefield Engineers Pvt Ltd.,	Land – 7500 Sq.ft.	120.0
4	Land	Nagercoil City, Nagercoil	Mr.Russel Raj	Land 15,000 sq.f.t	30.0
5	Residential cum commercial property	Mekkamandapam	Mr.Russel Raj	Land 5400 Sq.ft. Building – 16,000 Sq.ft.	20.0
Total					228.0

8. *Vide* Ex.P4 Credit Agreement Letter dated 10.05.2011, the defendant sanctioned a Term Loan of Rs.29,50,00,000/- and Rs.50,00,000/- cash credit facility to the plaintiff. The terms & conditions of Ex P4.Credit Agreement Letter dated 10.05.2011 were also duly accepted by the plaintiff

for a Term Loan and Cash Facility for a total sum of Rs.30,00,00,000 (Rs.29,50,00,000 + Rs.50,00,000).

9. Ex.P4 Credit Agreement Letter dated 10.05.2011 contemplated a 9 months moratorium period. During the aforesaid moratorium period of 9 months, the plaintiff was required to pay only the interest components of the Term Loan. After the moratorium period, the plaintiff was to commence repayment of the loan in 51 Equated Monthly Installments. Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011 was also signed between the plaintiff and defendant Bank.

10. Due to several factors which affected the shipping industry in general and the plaintiff and its sister company Rarefield Engineers Private Ltd. in particular, both these companies incurred heavy losses. Therefore, the promoter of the plaintiff and its sister company Rarefield Engineers Private Ltd opted to pre-close the Term Loan and the Cash Credit facilities.

11. Pursuant to negotiations and with the consent of the Defendant Bank, the Plaintiff's promoters were also allowed to sell both movable and

immovables offered as securities. The plaintiff's promoters raised and deposited a sum of Rs.33,35,01,158/- in three lump-sum as detailed below:-

Table No.2:

Date	Account No.	Amount credited (Rs)	Remark	Exhibit No.
18.05.12	951000238	9,89,10,405	Plaintiff	P8
31.05.12	905023936	5,00,00,000	Plaintiff	P8
23.08.12	905024406	18,45,90,753	Plaintiff's sister company (Rarefield Engineers Pvt. Ltd.)	P9
Total		33,35,01,158		

12. This Suit is concerned with recovery of Rs.84,27,002/- and interest which was allegedly wrongly retained by the defendant bank for Term Loan No.R143601001 and not transferred to the plaintiff's sister company M/s.Rarefield Engineers Private Ltd. Advance Account No.951000249 by the defendant bank out of the above amounts that were generated by the plaintiff, its sister company and its promoters from the sale of the two ships and the above mentioned secured assets. The above amount of Rs.84,27,002/- varies in the submissions and calculations as Rs.84,27,000/- and Rs.84,27,001/-. For uniformity, Rs.84,27,000/- is referred to hereinafter.

13. The crediting of the amounts are reflected in Ex.P8 (Advance

Account No.951000238 and Current Account No.905023936) of the plaintiff and in Current Account No.905024406 of M/s. Rarefield Engineers Private Ltd in Ex.9 Statement dated 05.06.2012.

14. The sale of assets by the promoters of the plaintiff and its sister company M/s.Rarefield Engineers Pvt. Ltd. would have been with the definite intention and understanding of extinguishing all the liabilities of the plaintiff and its sister company M/s.Rarefield Engineers Pvt. Ltd. Appropriation of the amounts would have been in accordance of Ex.P4 Credit Agreement Letter dated 10.5.2011 and Ex.P5 Rupee Loan Agreement dated 12.05.2011.

15. The case of plaintiff is that a sum of Rs.18,45,90,753/- credited into Current Account No.905024406 of the plaintiff's sister company (Rarefield Engineers Pvt. Ltd) was adjusted against the plaintiff's outsanding in Term Loan No.R143601001 in Ex.P10/11 after Rs.9,89,10,405/- adjusted against the outstanding dues in the said Term Loan.

16. After crediting the aforesaid sum of Rs.18,45,90,753 into Term Loan No.R143601001 as reflected in Ex P.10/11 Statement of the Term Loan of the plaintiff and adjusting the outstanding dues of the plaintiff, only a sum of Rs.1,59,93,936/- was transferred into plaintiff's sister company's (M/s.Rarefield Engineers Pvt. Ltd.) Advance Account No.951000249. It is submitted that the balance amount of Rs.84,27,002/- was illegally retained by the defendant bank in the aforesaid Term Loan No.R143601001.

17. As a part of appropriation, the first defendant made a transfer entry for a sum of Rs.1,59,93,936.89 only on 10.09.2012 into Advance Account No.951000249 of the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. as against a sum of Rs.2,44,20,939/- [1,59,93,936.89 + 84,27,002] from Term Loan No.R143601001 in Ex.P10/11.

18. It is therefore the case of the plaintiff that the plaintiff is entitled to recover the aforesaid amount of Rs.84,27,002/- which was short credited into the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. Advance Account No.951000249 from the plaintiff's Term Loan No.R143601001 as reflected in Ex.P10/11.

19. On the other hand, the defence of the defendants is that the aforesaid amount was the amount retained and appropriated by the defendant bank towards premature pre-closure of the Term Loan No.R143601001 in Ex.P10/11 in term of relevant Clauses in Ex.P4 Credit Agreement Letter dated 10.05.2011 and Ex.P5 Rupee Term Loan Agreement dated 12.05.2011.

20. The plaintiff has relied on Ex.P12 Report dated 01.09.2017 of M/s.T.A.P Varadakutty & Co, the Chartered Accountant, to state that the first defendant has made appropriations towards the plaintiff's Term Loan from time to time and there is nothing to show that the huge amounts were given interest benefits from 18.05.2012 to 28.08.2012 amounting to Rs.49,27,675/-.

21. The categorical case of the plaintiff is that the plaintiff had access to only to Ex.P8 Current Account No.905023936 and Advance Account No.951000238 and Ex.P9 Current account No.905024406 of the plaintiff's sister M/s.Rarefield Engineers Pvt. Ltd and that the plaintiff had no access to Ex.10/11 Term Loan No.R143601001 prior to 2016/2017.

22. It is only after Statement of Account of Term Loan No.R143601001 dated 06.06.2016 was furnished in 2016/2017, the plaintiff came to know that there was a short credit of Rs.84,27,002/-. It is further case of the plaintiff that spite of specific demands made by the plaintiff *vide* Ex.P20 E-mail dated 03.09.2012 and Ex.P21 E-mail and 07.09.2012 respectively, the plaintiff was not given the Statement.

23. The said omissions on the part of the defendants left the plaintiff concerned with a lingering sense of confusion and dissatisfaction regarding the particulars of appropriations made by the defendants while closing Term Loan No. R143601001.

24. The plaintiff states that valuable personal properties were sold to raise amounts to pay a outstanding and was forced to disadvantageous and oppressive terms and conditions of sale.

25. It is further case of the plaintiff that prior to lump sum deposit, the plaintiff and its sister company M/s. Rarefield Engineers Pvt. Ltd. had

made various deposits into the respective loan accounts totaling Rs.4,14,89,878/- towards the repayment of loans, including exorbitant processing charges of Rs.1,16,52,259/- which was unjustly appropriated by the defendant bank. The total remittance, including the lump sum deposit, amounted to Rs.37,49,91,036/-.

26. It is further stated that the defendant bank proceeded to obtain consent for converting the Cash Credit Facility of M/s.Rarefield Engineers Pvt. Ltd. into an Overdraft Facility for a sum of Rs.2.5 Crores from 2013 to 2015 by obtaining the signature of Mrs.Russel Raj, Director taking advantage of the in the absence of Mr.R.Russel Raj from India and thereby continued to unilaterally debit amount towards interest on the plaintiff sister company M/s.Rarefield Engineers Pvt. Ltd.

27. Later on, the defendant bank initiated proceedings against M/s.Rarefield Engineers Pvt. Ltd in respect of the said overdraft facility default in Ex.P13 O.A.No.500 of 2016 dated 21.03.2018 in DRT-II, Chennai. It is during the course of the said proceeding after Mr.R.Russel Raj returned to India when the defendants furnished the Statement of

Account pertaining Term Loan No.R143601001 *vide* Ex.P10 dated 06.06.2016 based on which Ex.P12 Chartered Accountant's Report dated 01.09.2017 was obtained to understand the nature appropriations made by the defendants. According to the plaintiff, it is from Ex.P12 Chartered Accountant's Report, the plaintiff realized and discovered that there was a short credit of Rs.84,27,000/- from the Term Loan No.R143601001.

28. In pursuance of the said discovery, Ex.P14 Legal Notice dated 27.3.2018 was issued by the plaintiff detailing the allegations regarding the defendant's various omissions and commissions pertaining to the process of appropriation of funds in Ex.P10/11 Term Loan No.R143601001. The defendants issued reply *vide* Ex.P15 Reply dated 01.05.2018.

29. Hence, the suit has been filed for refund of the short credit amount of Rs.84,27,000/- and an interest amount of Rs.91,01,160/- at 18% per annum from 10.9.2012 till the filing of the suit with future interest at 18% p.a.

30. It is the case of the plaintiff that there was fraudulent retention of

Rs.84,27,000/- and the suit was not time barred as the suit was filed within three years of date of the knowledge of the aforesaid fraud.

31. On behalf of the plaintiff, the proof affidavits were filed by the plaintiff's Director Mr. R. Russel Raj, and T.A.P Varadakutty Chartered Accountant of M/s T.A.P Varadakutty & Co. Mr. R. Russel Raj deposed evidence as PW1. Mr. R. Russel Raj was also cross-examined. Mr.T.A.P Varadakutty was examined as PW2. PW2 was also cross-examined. The plaintiff has marked Ex.P1 to ExP22 as detailed below:-

Table No.3

Sl. No.	Date	Ex. No.	Description
1.	01.12.2009	P 1	Memorandum of Association of plaintiff
2.	08.12.2009	P2	Article of association
3.	14.12.2009	P3	Certificate of Incorporation
4.	10.05.2011	P4	Credit Agreement
5.	12.05.2011	P5	Rupee Loan Facility Agreement
6.	13.05.2011	P6	Credit Arrangement Letter
7.	27.07.2012	P7	Letter from Plaintiff to Defendant
8.	05.06.2016	P8	Statement of the current account of the plaintiff
9.	05.06.2016	P9	Statement of the current account of Rarefield Engineers Pvt Ltd
10.	06.06.2016	P10	Statement of loan account of the plaintiff without signature
11.	13.09.2017	P11	Statement of loan account of the plaintiff with signature
12.	01.09.2017	P12	Chartered accountant's report

13.	21.03.2018	P13	Order in OA 500 of 2016
14.	27.03.2018	P14	Lawyer's notice
15.	01.05.2018	P15	Reply by defendant to P 14
16.	22.03.2016	P16	Sale notice to Rarefield Engineers Pvt Ltd
17.	05.06.2016	P17	Reply notice to P 16 by Rarefield Engineers Pvt Ltd
18.	22.08.2012	P18	E-mail from plaintiff to defendant.
19.	25.08.2012	P19	E-mail from plaintiff to defendant.
20.	03.09.2012	P20	E-mail from plaintiff to defendant.
21.	07.09.2012	P21	E-mail from plaintiff to defendant.

32. The learned counsel for the plaintiff relied on the following cases:-

i. **Nagubai Ammal & others** Vs **B. Shama Rao & others**, AIR 1956 SC 593
ii. **M.Manoharan Chetti & Ors** Vs **M/s.C.Coomaraswamy Naidu & Sons**, AIR 1980 Mad 212
iii. **Pallav Sheth** Vs. **Custodian & others**, 2001(7) SCC 549)
iv. **V.Rajeshwari** Vs. **T.C.Saravanabava**, 2004(1) SCC 551
v. **Geo Group Communications Inc** Vs **IOL Broadband Ltd**, 2010 (1) SCC 562
vi. **Ajay Kumar D. Amin** Vs **Air France**, 2016 (12) SCC 566
vii. **Syed Shah Gulam Ghouse Mohiuddin and others** Vs **Syed Shah Ahmad Mohuiddin Kamisul Qadri (dead) represented by his legal representatives and others**, AIR 1971 SC 2184

33. The learned counsel for the plaintiff submitted that the fact remains that the defendant has not filed any documents to show and establish that Ex.P10 Statement for the Term Loan No.R.143601001 was furnished prior to the June, 2016 that was when the plaintiff has categorically asserted that Ex.P10 Statement for the Term Loan No.R.143601001 was furnished for the first time. In this connection, a reference was made to the following part of P.W.1, P.W2 and D.W.1's cross examination:-

i. P.W.1 – Question Nos.51 to 57.
ii. P.W.2 – Question Nos.2 to 6.
iii. D.W.1 – Question Nos.25, 26, 87 to 95, 101 to 106, 108 and 109

34. The learned counsel for the plaintiff further submitted that from the above portions of cross examination the defendant maintains that even without Ex.P10 Statement for the Term Loan No.R.143601001, from the forensic scrutiny of Ex.P8 Advance A/c. No.951000238 of the plaintiff and Ex.P9 Over Draft Account of the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd., the amount of repayment relating to the Term Loan can be estimated.

35. It is therefore submitted that while such a stand cannot be countenanced as the defendant owes a duty of furnishing the loan closure account even if for the sake of argument once accepts defendant's above position, then only from Ex.P10 Statement for the Term Loan No.R.143601001, it can be found that there is a short credit of Rs.84,27,002/- which is the central issue.

36. That is because the alleged charging of pre-payment levy is not shown in Ex.P10 Statement for the Term Loan No.R.143601001 also to understand the claim of the defendant.

37. The learned counsel for the plaintiff further submits that the amount of Rs.84,27,002/- is disclosed to be towards pre-payment charge for the first time in the Written Statement. It is submitted that the admitted case of the defendant is that the claim of pre-payment charge has not been recorded anywhere except that it has been made known to the plaintiff or that plaintiff is aware of it.

38. It is further submitted that this assertion is advanced on the basis of the averment in the Written Statement and Ex.P17 Reply Notice to Ex.P16 by the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd.

39. The learned counsel for the plaintiff submitted that the plaintiff has dispelled the theory of claim and charging and even the alleged appropriation of the pre-payment charges. It is submitted that there is no material to show that as per Clause 3.5 of Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011, there was an exercise undertaken by making a demand and there is no basis for the quantification of the said amount of Rs.84,27,002/-. He relies on the following materials:-

i. As regards Ex.P17 Reply Notice to Ex.P16 by the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. the plaintiff has categorically stated by way of Reply Statement specifically at paragraph No.8 as well as the entirety of the pleading in Reply Statement;

> The defendant has not cross examined P.W.1 on Ex.P17 Reply Notice to Ex.P16 by the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. or the assertions in Reply Statement of the plaintiff. Therefore, the ground of Ex.P17 Reply Notice to Ex.P16 by the plaintiff's sister company M/s.Rarefield

Engineers Pvt. Ltd. being an admission of knowledge is not a positive demonstration of proof but relying on an inadvertent mistake on the part of the plaintiff.

ii. Secondly the following cross examination of the D.W.1 would reveal that there has been no process of making claim, quantification and charging pre-payment premium of the exact amount of Rs.84,27,002.

Question Nos.30 to 34, 36 to 48, 49 to 54, 59 to 67, 68, 86, 87 and 110 to 113.

40. The learned counsel for the plaintiff submits that pre-closure charge was not even raised for discussion. It is submitted that knowledge of the plaintiff as to any levy of pre-payment charge should be actual and not constructive or by way imputations based on circumstances as the relationship between the plaintiff and the defendant in this case is not some informal character.

41. It is also having the character of the parties with an unequal bargaining position where banker has definite say in its decisions. It is therefore submitted that the plaintiff would have known by his acts in operating other account or that promoter bargained for waiver of certain other charges cannot hold good for the defendant to establish that the

defendant proceeded to claim, quantify and charge the alleged sum of Rs.84,27,002/-.

42. The learned counsel for the plaintiff submitted that D.W.1 has in cross examination *vide* Question Nos.3 to 5, 22 to 26, 42 and 43 evaded and stated that the defendant is not ready to produce Mr.R.Ganesh who was personally acquainted with facts which are not borne out by records.

43. It is submitted that therefore, Ex.P17 Reply Notice to Ex.P16 by the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. cannot be said to be an admission as admittedly there is nothing to show for the defendant that there was claim, quantification and charging by way of proper accounting entries in any of the material before this Court.

44. It is submitted that Ex.P17 Reply Notice to Ex.P16 by the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. *simpliciter* cannot come to the rescue of the defendant to absolve its burden of proof of charging, quantification and appropriation.

45. It is further submitted that if the admitted fact itself is demonstrated to be incorrect or not made out from materials, then such admission is not of consequence to non-suit the plaintiff. Admission should be unequivocal and comprehensive. A reference is made to the decision of this Court in **M.ManoharanChetti** Vs. **C.Coomaraswamy Naidu and Sons**, Madras, AIR 1980 Madras 212.

46. The learned counsel for the plaintiff submitted that from the line of cross examination of P.W.2 and Re-examination of D.W.1, the defendant seeks to establish that even though Ex.D4 to D6, Balance Sheets, prepared in 2017, for the years 2015, 2014 and 2013 were drawn up by P.W.2, it does not reflect short credit aspect and show that no amount due to banker is an admission of charging pre-payment premium of Rs.84,27,002/- without demur.

47. It is submitted that whether an amount is appropriately charged to the knowledge of the borrower or has been suppressed and secretively dealt with by the defendant so that the suit claim is refundable or cannot be decided by how financial statements are made for statutory purposes.

48. It is submitted that in this case especially the balance sheets were made and filed beyond statutory time and without the benefit of Ex.P10 Statement for the Term Loan No.R.143601001. It is submitted that moreover the discovery of short credit is made shortly thereafter so that simultaneity of timeline does not imply that the plaintiff has prior knowledge and admission of the pre-payment charge separately apart from what is all charged. The learned Senior Counsel for the plaintiff relied on the decision of the Hon'ble Supreme Court in **Pallav Sheth** Vs. **Custodian and others**, 2001 (7) SCC 549 for the scope of Section 17(d) of the Limitation Act.

49. As to whether the plaintiff was aware of levy of pre-closure charge and correspondingly and whether the defendant has established claim and charging of pre-payment charge, it is submitted that if the defendant has not even proved that a sum of **Rs.84,27,000**/- has been appropriated, leave alone claimed and quantified, during the relevant time i.e. September, 2012 towards pre-payment charge, then limitation does not start even when Ex.P10 Statement for the Term Loan No.R.143601001 was

furnished in June, 2016 but only when it was averred in Written Statement. It is therefore submitted that it would also then render the defendant's claim of charging pre-payment premium false to entitle the plaintiff a refund as claimed in the suit.

50. The learned counsel for the plaintiff submitted that Clause 3.5 of Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011 is the contractual material. The case of the plaintiff is that it is a claim that is contingent upon pre-closure and is at the option of the defendant can be waived and that this charge was never raised and discussed at the time of pre-closure negotiations. It is not fixed in terms of quantum or rate or ratio. It is submitted that as a corollary levying pre-closure charge entails invoking the clause by claiming, quantifying and then appropriating.

51. It is further submitted that for the entire process of appropriation of **Rs.84,27,000**/-, except for the first time adverting to it in the Written Statement, there is no other material to show invoking, quantifying, intimating and charging this amount and that all other charges are contractually specified and already known to parties and given accounting

entries.

52. The material relied on by the defendant is Ex.P17 Reply Notice to Ex.P16 by the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd., for that, it is submitted that the probative merit of the same to the advantage of the defendant has not been made out especially in the light of the plaintiff's Reply Statement to the Written Statement and complete absence of cross examination of P.W.1 on this particular document.

53. The learned counsel for the plaintiff relied on the fact that under Ex.P17 Reply Notice to Ex.P16 by the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd., they sought for waiver of all charges except pre-closure charge as it was not known to them and would not have hesitated to seek for waiver of it had they known.

54. The learned counsel for the plaintiff submitted hat certain surround circumstances such the promoter of the plaintiff continuing operation of cash credit and subsequent over draft facilities of the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. and seeking for waiver of

penal rates of interest etc. are relied on to make out a case that the plaintiff was informed of pre-closure charge and that the plaintiff has consistently denied any knowledge.

55. The learned counsel for the plaintiff further submitted that firstly the defendants have not established what is the basis of Rs.84,27,000/- claimed as pre-closure charge. It is submitted that there is no answer to what is the calculation or formula for arriving at the quantum and the defendants have no answer as to where the charging is reflected in the mutually shared documents especially in the form of statements of account in Ex.P8 to Ex.P10. It is submitted that the D.W.1 in his cross examination stated that the pertinent account cannot be produced.

56. It is further submitted that the defendant did not examine Mr.R.Ganesh as witness to enable the plaintiff to confront him with regard to matters for which no record bears material evidence amount to withholding relevant materials which amounts to suppression and attracts adverse inference of Rs.84,27,000/- not being accounted for either in terms of the contract or any other manner known to law.

57. As far as res judicata & non joinder of necessary party, the learned counsel for the plaintiff submitted that the plea of res judicata needs to be pleaded as it is a mixed question of facts and law. It is submitted that there is no sufficiency of pleading in Written Statement as to how on facts suit is barred by Rule of res judicata.

58. It is submitted that nor are there requisite documents such as pleadings, issue on the point and finding thereto in the earlier proceedings in O.A.No.500 of 2016. It is submitted that there are cross examinations of P.W.1 dated 10.08.2022 and of D.W.1 dated 12.09.2022. A reference was made to Question Nos.33 to 37 in Cross Examination of P.W.1 and to Question Nos.97 to 100 in Cross Examination of D.W.1. It is submitted that these are without the benefit of the referred materials and hence are not proof by themselves to establish this ground. In this connection, a reference was made to the decision of the Hon'ble Supreme Court in **V.Rajeshwari (smt)** Vs. **T.C.Saravanabava**, 2004 (1) SCC 551.

59. The learned counsel for the plaintiff submitted that the plaintiff in

this suit is not hit by res judicata for the following reasons:-

i. The plaintiff is a different entity and the entity in O.A.No.500 of 2016 was the plaintiff's sister company M/s.Rarefiled Engineers Pvt. Ltd. Both the loans are separate liabilities.
ii. What was mentioned in O.A. Proceeding by the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. was that the defendant herein failed to give due credit to the amounts deposited towards loan repayment of both the loans and illusorily kept loan of M/s.Rarefield Engineers Pvt. Ltd. alive and wrongly converted into over draft facility.
iii. No plea of set off or counterclaim was made as the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. could not have rightfully made. The amount transferred to the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. account was from the plaintiff's account which defendant represented as the credit balance. So, if there is any short credit in Ex.P10 Statement for the Term Loan No.R.143601001, it is claimable only by the plaintiff and not by the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd.
iv. No issue framed on the point of any short credit or amount that should have been transferred to the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. account and in fact, the Debt Recovery Tribunal-II in Ex.P13 Chartered Accountant's Certificate dated 01.09.2017 has found that the plaintiff is not a party and both the accounts cannot be clubbed.

60. It is therefore submitted that the plaintiff not being a party, there being no dispute of the nature raised herein and no issue having been

framed and argued, there can be no rendering of any finding on the matter and therefore, rule of res judicate does not apply to the suit.

61. As regards non-joinder of necessary party, implied by that the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. should have been impleaded, it is submitted that it is not a necessary party insofar as there is nothing that cannot be decided without its presence in this suit and that the suit claim is lawfully and properly of the plaintiff's refund claim.

62. It is submitted that the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. cannot demand transfer credit without consent of debtor and creditor and if there is any short credit in the plaintiff's account and resultant short transfer to the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd.'s account, then the primary aggrieved party is the plaintiff alone. It is therefore prayed for a decree

63. The defendants deny the contents and averments therein and saved those which were specifically admitted. As regards the nature of the loan and amount disbursed defendants do not differ. The Plaintiff availed

loan facilities of Cash Credit Facility of Rs.50 lakhs and Term Loan Facility of Rs.29.50 crores with the specific purpose of purchase of Two Vessels. Interest on the Term loan of the plaintiff on the date of sanctioning was 12.50% and for the Cash credit facility of M/s.Rarefield Engineers Pvt. Ltd. was 13.75% on the date of sanction same has been shown in Ex D8 Original Credit Arrangement Letter dated 10.05.2011. It is alleged that the Plaintiff was mismanaged and the promoter made false projections of experience and prospects.

64. Further, an amendment to the Ex D-11 Credit Arrangement Letter dated 13.05.2011 was duly accepted by Plaintiff. As per the sanction, the tenor of repayment for the term loan was five years and the principal amount was to be repaid in 51 equal monthly installments, after a moratorium period of 9 months from the date of the first disbursement of the Loan.

65. It is submitted that at the end of the 9-month moratorium period, as soon as repayment was supposed to commence, the positive projections made by Plaintiff whilst availing loan from Defendant Bank suddenly

changed negative. The alleged rich experience of the Promoter of Plaintiff, on the basis of which the facilities were advanced became unrecoverable due to mismanagement of the Plaintiff Company immediately after the Moratorium period ended and the Plaintiff failed to honor Principal instalments.

66.The plaintiff defaulted in repayment of installments to the Defendant Bank in accordance with the terms and conditions stipulated in the agreed documents.

67. The processing charges to be paid by the Plaintiff were as per the terms and conditions captured in Clause3 of Ex5 Letter of Amendment dated 13.05.2011 agreed at the time of sanction of loan.

68. It was stated by the defendant that since the plaintiff was unable to repay the dues as promised to the defendant Bank, the plaintiff requested the defendant Bank for allowing sale of vessels. The defendant Bank agreed to accommodate the request made by the plaintiff to pre pay the dues by selling the Vessels funded by the Bank.

69. The plaintiff had made payments on various dates from May 2012 to August 2012, which is totaling to **Rs.33,35,01,158/-** towards prepayment/pre-closure of term loan dues. It is denied by the defendant.

70. The defendant Bank states that there was no Settlement arrived at for the closure of both the plaintiff's Loan Account and the Loan Account of the sister company of the plaintiff namely, M/s. Rarefield Engineers Pvt. Ltd. defendant Bank with the aforesaid amount deposited by the plaintiff. The defendant Bank had also not agreed to a waiver of Interest or other charges including prepayment charges. The said amount was adjusted as follows:-

Towards outstanding dues in Term Loan availed by the Plaintiff	- Rs. 30,90,80,221.11
Towards prepayment charges.	- Rs. 84,27,000.00
Total	- Rs. 31,75,07,221.11

71. According to the defendant, for any unexpected inflow of funds takes time to utilize and would be a loss of interest hence prepayment charge is an industrial practice. Since the plaintiff chose to prepay immediately after the moratorium prepayment charge was levied in accordance with the terms and conditions of the sanction.

72. Since the plaintiff liquidated the assets which were created with the term loan availed from this defendant and prepaid immediately on commencement of principal repayment. Hence as per General Conditions GC-P-08, Section 3.5 to Facility Agreement, defendant charged prepayment charges and the plaintiff is well aware of the same.

73. The submission made by the plaintiff that the payments were made after negotiation of a settlement with the Bank is false and the defendant Bank has not agreed to a waiver of interest, charges, or settlement to the plaintiff upon Pre-closure of the said Term Loan.

74. It was also stated by the defendant bank that the Prepayment charges debited do not form part of the loan statement and are credited to a separate account maintained for accounting profit and loss accounts which is why **Rs.84,27,000/-** short credit as alleged in the Chartered accountant's report but is a pre-payment charge which does not get reflected in the statement of account. The allegation of not processing lump-sum deposits **of Rs.33,35,01,158/-** from 18.05.2012 to 28.08.2012 was also denied.

75. The balance amount of **Rs.1,59,93,936.89** was transferred to the Advance Account of M/s.Rarefield Engineers Pvt. Ltd. on 10.09.2012 as requested by the plaintiff.

76. The plaintiff did not raise any issue till the filing of the Original Application for recovery of dues before the Debts Recovery Tribunal-II, Chennai in O.A.No. 500 of 2016. Even in the reply letter vide Ex P17 dated 05.04.2016 issued by plaintiff to defendant, plaintiff has clearly admitted the prepayment charges.

77. Further, it is submitted that after adjustment of this amount, a sum of Rs.1,94,18,272.78 was payable by the said M/s.Rarefield Engineers Pvt Ltd. In fact, the promoter of the plaintiff Mr. Russel Raj has been operating the Advance Account of M/s.Rarefield Engineers Pvt. Ltd, after the adjustment of the aforesaid amount and the said Cash Credit Facility was converted to Over Draft facility in December 2013.

78. Waiver of various loan components as requested by the plaintiff

could not be accommodated by the defendants. Such an act of the plaintiff indicates access to the accounts and the plaintiff also had internet banking facility. That the promoter plaintiff through E-mail sought for waiver penal charges of 6% p.a. in respect of Cash credit of M/s.Rarefield Engineers Pvt. Ltd. almost a year later and the promoter of the plaintiff continued to operate a cash credit facility of M/s.Rarefield Engineers Pvt. Ltd. proves that plaintiff was provided with a statement of account as requested.

79. The promoter of the plaintiff also issued a Reply letter dated 05.04.2016 for M/s.Rarefield Engineers Pvt. Ltd. in which he has accepted pre-closure charges.

80. It is further submitted that after adjustments, the plaintiff did not raise any issue with regard to the same. Further sister company is run by the same promoter. M/s. Rarefield Engineers Pvt. Ltd. availed the loan in the form of an overdraft facility even after 2013. M/s.Rarefield Engineers Pvt. Ltd. enjoyed the same and further approached the Bank to release the mortgaged properties for sale to pay the dues post the account became NPA with the defendant Bank.

81. It is pertinent to mention that during the pendency of proceedings in the Original Application filed against M/s. Rarefield Engineers Pvt Ltd, the managing director Mr.Russel Raj had approached the defendant Bank for the release of one of the mortgaged properties and paid a sum of Rs.1.95 Crores by selling the same. The plaintiff had paid an amount totaling to Rs. 2.07 Crores during the pendency of the Original Application.

82. When the allegation of plaintiff is that they are not liable to pay any amount, it is prudent to question what made the plaintiff to pay a sum of Rs.2.07 Crores to the defendant Bank at such time. This further proves that the allegations made by the plaintiff are false.

83. The continuing default had forced the defendant Bank to initiate recovery proceedings against the promoter of the plaintiff and M/s. Rarefield Engineers Pvt Ltd by Original Application No.500 of 2016 before the Hon'ble Debt Recovery Tribunal, Chennai. Pending the proceedings, at the request of the promoter of the plaintiff, the defendant Bank had once again provided a statement of account of the plaintiff Company.

84. It was denied by the defendant that the plaintiff Company was not provided with the account statements at earlier times. With regard to the allegation that a sum of Rs.84,27,000/- remained short credited or unaccounted, the defendant stated that the amount was reiterated towards the pre-payment charges which do not get reflected in the statement of account.

85. Balance in payment made by the plaintiff has been transferred to the Advance Account of M/s.Rarefield Engineers Pvt. Ltd which the plaintiff Mr. Russel Raj was well aware of and which is evident from the fact that he was operating the loan account of M/s Rarefield Engineers Pvt Ltd and had also executed Master Facility agreement for conversion of Cash Credit Facility to an Overdraft facility in December 2013.

86. According to the defendant Bank, the Ex.P13 Chartered Accountant's Certificate dated 01.09.2017 and Ex.P14 Lawyer's Notice dated 27.03.2018 is an attempt to maintain the suit which is clearly time-

barred. The averment in the plaint that the plaintiff discovered transaction details only in October 2017 is an afterthought made with *mala fide* intentions to stall recovery from M/s.Rarefield Engineers Pvt. Ltd. Prepayment charges were agreed to and levied with the knowledge of the plaintiff.

87. Thus, the suit is not maintainable in law and facts after the defendant has got a recovery certificate from DRT against M/s.Rarefield Engineers Pvt. Ltd.On behalf of the defendant, proof affidavit was filed by one Mr.Shankar Balasubramanium, Assistant General Manager of the defendant bank. Mr. Shankar Balasubramanium deposed evidence on behalf of the defendant as DW1. DW1 was also cross-examined.

88. The defendant Bank has marked Ex.D1 to Ex.D11 as detailed below:-

Table No.4:

Sl. No	Date	Ex.	Description
1	09.08.2022	D1	Board Resolution of the plaintiff company
2	19.12.2013	D2	Photocopy of Credit Arrangement Letter

3	19.12.2013	D3	Photocopy of Master Facility Agreement between M/s.Rarefield Engineers Pvt. Ltd. and defendant
4	03.03.2017	D4	Auditor Report 2014- 2015
5	03.03.2017	D5	Auditor Report 2013- 2014
6	03.03.2017	D6	Auditor Report 2012- 2013
7	22.03.2012	D7	Power of Attorney
8	10.05.2011	D8	Original Credit Arrangement Letter
9	12.05.2011	D9	Original of Master Facility Agreement
10	12.05.2011	D10	Original Rupee Loan Facility Agreement
11	13.05.2011	D11	Original Amendment in credit arrangement letter

89. The learned Senior Counsel for the defendants relied on the following cases:-

i. **S.M. Ghobhai** Vs **Schedulers Logistics India Pvt. Ltd.**, dated in 23.05.2022, by the National Company Law Appellate Tribunal in Company Appeal (AT) Insolvency No 281 of 2022;
ii. **Shakti Bhog Food Industries Ltd** Vs **Central Bank of India and Others**, (2020) 17 SCC 260;
iii. **C.P.Kapur**Vs **The Chairman &Ors**, 2012 SCC OnLine Del 5465: (2013) 198 DLT 56: (2013): (2013) 2BC 243.

90. The learned Senior Counsel for the defendants submitted that the plaintiff has made payments on various dates from May 2012 to August 2012, which is totaling to Rs.33,35,01,158/- towards pre-payment/pre-closure of term loan dues. It is submitted that there was no settlement arrived at for closure of both the plaintiff loan account and the loan account

of the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. with the defendant Bank. It is submitted that the defendant Bank had also not agreed for waiver of interest or other charges including prepayment charges. The said amount was adjusted as follows:-

i. Rs. 30,90,80,221.11 towards outstanding dues in Term Loan availed by the Plaintiff.
ii. Rs.84,27,00,000/- towards prepayment charges.

91. It is submitted that after adjusting the aforesaid outstanding, the balance amount of Rs.1,59,93,936.89 was transferred to Cash Credit Account of the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. Further, it is submitted that after adjustment of this amount, a sum of Rs.1,94,18,272.78 was payable by the said M/s.Rarefield Engineers Pvt. Ltd. In fact, promoter of the plaintiff has been operating the Cash Credit Account of M/s.Rarefield Engineers Pvt. Ltd., after the adjustment of the aforesaid amount and the said Cash Credit Facility was converted to Over Draft Facility in December 2013 and further necessary loan documents were executed on 19.12.2013. It is submitted that the allegation made by the plaintiff that the conversion was made without the knowledge of the

plaintiff is false and baseless.

92. It is further submitted that the Over Draft Account was being operated by the Company from 2013 onwards, which clearly shows that the allegation of the plaintiff that on payment of the above said amount of Rs.33,35,01,158/- both the loans were cleared is false and untrue and is totally denied. It is submitted that neither the promoter of the plaintiff nor the sister concern M/s.Rarefield Engineers Pvt. Ltd. had raised any concern about excess or short credit while operating the Over Draft Account till 2015, when they defaulted and allowed the Over Draft Account to become NPA with the defendant Bank.

93. The learned Senior Counsel for the defendants submitted that the defendant Bank had given interest benefit in the way of credit notes which is evident in the Term Loan Statement of the plaintiff and therefore, the plaintiff representation that the defendant Bank has not processed the payments made by the plaintiff on time is false. It is submitted that though the plaintiff had made payments on various dates till August, 2012, the defendant Bank has waived the excess interest for the period at the time of

pre-closure of the account and the allegation of excess interest charged for the aforesaid period is false and baseless.

94. The learned Senior Counsel for the defendants further submitted that the plaintiff had consented for the processing charges and other terms of the Loan Agreement. It is submitted that the Banks lend Term Loan with a definite period of instalments and any pre-payment made, will affect the asset liability management of the Bank. It is further submitted that any unexpected inflow of funds takes time for its utilization and would be a loss of interest on such surplus funds. It is submitted that in the present case, the plaintiff availed the Loan Facilities and repayment tenor was 5 years with a moratorium period of 9 months.

95. The learned Senior Counsel for the defendants further submitted that the plaintiff liquidated the assets which were created with the Term Loan availed from the defendant and prepaid immediately on commencement of principal repayment. It is therefore submitted that as per General Conditions GC-P-08, Section 3.5 to Facility Agreement, the defendant charged prepayment charges and the plaintiff is well aware of the

same. It is further submitted that the submission made by the plaintiff that the payments were made after negotiation of a settlement with the Bank is false and the defendant Bank has not agreed for waiver of interest, charges or settlement to the plaintiff upon pre-closure of the said Term Loan.

96. The learned Senior Counsel for the defendants further submitted that after payment in the plaintiff company, the promoter of the plaintiff had been using the Cash Credit / Over Draft Account of the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd., and defaulted in repayment which forced the defendant Bank to declare the account of the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd., as Non performing asset and the defendant Bank was forced to initiate action for recovery of dues before Debt Recovery Tribunal, Chennai.

97. It is submitted that the plaintiff was well aware about the levy of processing charges, prepayment charges and other charges as per the terms and conditions of the sanction and the plaintiff was also aware that after adjustment of the entire amount outstanding in Term Loan Account of the plaintiff company including the prepayment charges and the balance amount

was given credit to the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd. It is submitted that the allegation made by the plaintiff that the plaintiff was not issued with the Statement of Account despite requests is false and baseless. In fact, post the E-mail dated 07.09.2012 the plaintiff had never requested for any statement for the Term Loan Account since the plaintiff was provided with the Statement of Account and was well aware of charges, interest, pre-closure, charges levied at the time of closure the said Term Loan Account and had explicitly agreed to the levy of all such charges at the time of execution of transaction documents.

98. It is submitted that the allegation that the plaintiff has been requesting for the Statement of Account from 2013 to 2015 is false and the plaintiff has not submitted any communication by E-mail or Letter issued to the Bank in this period asking for Statement of Account pertaining the Term Loan Account availed by the plaintiff. It is further submitted that the plaintiff did not raise any issue till the filing of the Original Application for recovery of dues before the Debts Recovery Tribunal-II, Chennai in O.A.No.500 of 2016. It is also submitted that even in the Reply Letter dated 05.04.2016 issued by the plaintiff to the defendant which is filed as

one of the supporting documents by the plaintiff in the present suit, the plaintiff has clearly admitted as under:-

> "…. In order to fulfill ICICI in good view our Primary Collaterals 2 Ships was scrapped for Rs.18.00 Crores approximately and secondary collateral my office building was sold for Rs.18.00 Crores. The total amount of this collateral was deducted along with service amount, pre-closure, sanctioned service amount, was deducted from this transaction. For your satisfaction, I accepted all these above transactions and deductions made by ICICI."

99. It is further submitted that the plaintiff in their letter dated 27.07.2012 sought for waiver or reduction of only the following charges:-

i. Monthly debit of addl. Interest – 1% for Non creation of DSRA – (14.75 – 13.75%)
ii. Charges for Yellow
iii. Overdue charges
iv. Penalty
v. Charges for non creation of hypothecation
vi. Reduction in Loan Processing fee,
vii. Waiver of interest after settling loan by selling primary collateral

100. It is submitted that the defendant Bank had not issued any confirmation or communication or acceptance of any waiver in the aforesaid charges, interest, loan processing fee etc. and the loan account

was closed in September 2012, upon receipt of the entire dues levied in accordance with the terms and conditions agreed by the plaintiff.

101. The learned Senior Counsel for the plaintiff submitted that after adjustment, the plaintiff did not raise any issue with regard to the same and the sister concern M/s.Rarefield Engineers Pvt. Ltd. run by the same promoter availed the loan in the form of Over Draft Facility even after 2013. It is submitted that M/s.RarefiledEngineers Pvt. Ltd. enjoyed the same and further approached the Bank to release the mortgaged properties for sale to pay the dues post the account becoming NPA with the defendant Bank.

102. It is submitted that even at that point of time also, the plaintiff is aware about the adjustments made and it was only upon this faith and understanding that the Bank released one of the property at Vadaseri Village, Agasthiswaram Taluk, Nagercoil measuring an extent of 35 Cents secured to the defendant Bank upon request.

103. It is further submitted that the plaintiff company has appointed

the Auditor who has audited and prepared the Balance Sheet for financial year 2013 (period ending 31.03.2013) wherein the finance cost has been admitted and recorded by the plaintiff to be Rs.1.83 Crores, which includes interest and prepayment charges charged by the defendant Bank upon closure of the loan of the plaintiff company. It is further submitted that the plaintiff was well aware of the total amount repaid by them in the Term Loan Account and had access to the Statement of Account of the said Term Loan Account.

104. It is submitted that having recognized the said amount as interest and charges in their balance sheet which was approved by its Board and filed with relevant statutory authorities as per law and the stand taken by the plaintiff in the present suit is blatantly false, vexatious and has been raised as an afterthought. It is further submitted that the balance sheet of the plaintiff company was duly endorsed by Mr.Russel Raj who is the Managing Director of the plaintiff company and also the promoter of M/s.Rarefield Engineers Limited and the statutory auditor had signed and finalized financial statement of the plaintiff company for the year ending with 31.03.2013 on 04.03.2017 and he has recognized and endorsed the

finance cost i.e. interest, charges and prepayment premium levied by the defendant Bank.

105. It is submitted that the plaintiff having accepted and having knowledge of the dues had later obtained a blatantly false certificate from the same Auditor on 01.09.2017, as if they got information about the adjustments towards the prepayment charges only on that date and have filed the present suit as an after though much beyond the period of limitation, and the same deserves to be dismissed with exemplary costs.

106. It is further submitted that even in the counter filed by the Managing Director of the plaintiff in the capacity as Managing Director of M/s.Rarefield Engineers Pvt. Ltd. in the year 2016 in the Original Application No.500 of 2016, it has been noted that the Bank levied pre-closure charges and that he had requested for an one time settlement which was not accepted by the defendant Bank. It is further submitted that this clearly shows that the plaintiff company and its Managing Director Mr.Russel Raj was well aware of the pre-payment charges beforehand. It is also pertinent to note that the plea raised that there was excess payment and the defendant Bank made excess appropriation, and further that they were

made to pay more than Rs.2.00 Crores has already been rejected by the Debts Recovery Tribunal-II, Chennai by Final Order dated 21.03.2018.

107. It is submitted that before passing of the final order, during pendency of proceedings in the Original Application filed against the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd., the Managing Director Mr.Russel Raj had approached the defendant bank for release of one of the mortgaged properties, and paid a sum of Rs.1.95 Crores by selling the same. It is submitted that the plaintiff had paid an amount totaling to Rs.2.07 Crores during the pendency of the Original Application. It is submitted that when the allegation of the plaintiff is that they are not liable to pay any amount, it is prudent to question what made the plaintiff to pay a sum of Rs.2.07 Crores to the defendant bank at such time. It is further submitted that this proves that the allegations made by the plaintiff are false.

108. The learned Senior Counsel for the defendants submitted that as stated earlier, the plaintiff accepted the adjustment towards Processing Charges, Pre-payment Charges and other Charges, and after the disposal of

the Original Application by the Debt Recovery Tribunal-II, Chennai and the Appeal filed before the Debt Recovery Appellate Tribunal, Chennai has filed this Suit as an afterthought on the ground that they came to know about the same only after getting the Auditor's Report on 01.09.2017, whilst the plaintiff company was well aware of the pre-payment charges and interest levied at the time of availing the loan and during closure the account, which is evident from the finance cost of Rs.1.83 Crores admitted and endorsed by them in the Balance Sheet for year ended 31.03.2013 filed by them on 04.03.2017.

109. It is further submitted that the plaintiff has offered no explanation whatsoever before this Court as to what made them to file the Returns for the years 2012-13, 2013-14 and 2014-15 only in the year 2017. It is therefore prayed for dismissal of this suit.

110. I have considered the arguments advanced by the learned Senior Counsel for the plaintiff and the learned Senior Counsel for the defendants. I have perused the Plaint, Written Statement filed by the Defendants, issues framed by this Court, and the Proof Affidavits filed by the P.W.1 and

P.W.2 and D.W.1.

111. I have also perused the documents that were marked as Exhibits on behalf of the plaintiff and the defendants during Chief and Cross Examination of the parties. I have also perused and considered the deposition of the respective parties.

112. The dispute in the present case arises out of the alleged short credit of **Rs.84,27,001/-** by the defendant Banks towards credit towards adjustment of loan outstanding of the plaintiff's sister company M/s.Rarefield Engineers Private Limited in 2012 from the amount that were credited earlier into plaintiff's Term Loan No.R143601001 from sale of secured assets.

113. From a reading of the documents marked by the plaintiff and the defendants, it emerges that the plaintiff was sanctioned a Term Loan of **Rs.29.5 Crores** and Cash Credit Facility of **Rs.50 Lakhs** on 10.05.2011 *vide* Ex.P4 Credit Arrangement Letter dated 10.05.2011.

114. As per the terms and conditions of the Ex.P4 Credit Arrangement Letter dated 10.05.2011, the plaintiff was entitled for a Term Loan for purchasing two sea going vessels. After Ex.P4 Credit Arrangement Letter dated 10.05.2011 was issued, the plaintiff and defendants have signed Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011.Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011 was sent to the plaintiff along with a covering letter dated 13.05.2011. The principal borrowed under the Term Loan No.R.143601001 was **Rs.29.50 Crores.**

115. The principal amount of **Rs.29.5 Crores** under the Term Loan No.R143601001 was to be re-paid in 51 Equal Monthly Installments after a moratorium period of 9 months from the date of the first disbursement.

116. Ex.P10 and Ex.P11 Statement of Account for Term Loan No.R.143601001 give the particulars of amounts drawn in two parcels of Rs.14,84,58,750/- and Rs.14,65,41,250/- as detailed below:-

Table No.5:

Account No – R143601001

Draw down No	1	2	Total
Start date	17.05.2011	19.07.2011	-
Opening Balance	Rs.14,84,58,750.00	Rs.14,65,41,250.00	Rs.29,50,00,000.00
Interest paid	Rs.3,00,90,916.29	Rs.2,39,05,411.52	Rs.5,39,96,327.81
Total liability towards Principal and Interest			Rs.34,89,96,327.81

117. All through the period, the amounts were debited in Term Loan No.R.143601001 as is evident from a cursory glance of Ex.P10/P11 Statement for the Term Loan No.R.143601001. After moratorium period, the debits were also towards principal amounts and towards interest. The interest amount that was debited varied from **Rs.17,99,808/-** p.m. to **Rs.18,59,801/-** p.m. The principal amount that was debited on 16.03.2012 was at **Rs.29,10,956/-**.

118. However, even before the expiry of the moratorium period of nine months from the date of sanction as Ex.P4 Credit Arrangement Letter dated 10.05.2011 and Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011, the plaintiff realized that it will be unable to service the Term

Loan owing to various factors.

119. Thus, the defendant bank allowed the plaintiff to liquidate the liability by sale of the secured assets i.e., two ships and collateral security offered under Ex.P4 Credit Letter Agreement dated 10.05.2011 and Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011.

120. Collateral security given for the Term Loan No.R143601001 and the Cash Credit of **Rs.50 Lakhs** were two sea going vessels and prime locality properties at Parrys Corner, Chennai. They were sold and amounts that were generated were credited into the following accounts as detailed below:-

Table No.6:

Date	Account No.	Amount	Remarks	Ex. No.
18.05.2012	951000238	Rs. 9,89,10,405.00	Plaintiff	P8
21.05.2012	905023936	Rs. 5,00,00,000.00	Plaintiff	P8
23.08.2012	905024406	Rs.18,45,90,753.00	Plaintiff's sister company [M/s.Rarefield Engineers Pvt. Ltd.]	P9
Total		Rs.33,35,01,158.00		

121. From the amounts generated from the sale of collateral/secured assets, a sum of **Rs.14,89,10,405**/- [Rs.9,89,10,405 + 5,00,00,000] was generated and credited into Ex.P8 Accounts of the plaintiff namely Advance A/c. No. 951000238 on 18.05.2012 and the plaintiff's Credit A/c. No. 905023936 on 31.05.2012. The aforesaid sum of **Rs.14,89,10,405**/-.

122. A further sum of **Rs.18,45,90753/-** generated from the sale of collateral security was credited into Ex.P9 Current A/c.No.905024406 of the plaintiff's sister company and was also transferred by the defendant bank for being adjusted towards balance amount in Term Loan No.R143601001 of the plaintiff.

123. Ex.P10/P11 Statement of Account for Term Loan No.R143601001 of the plaintiff shows that out of **Rs.33,35,01,158/-** generated from the sale of the secured assets by the promoters of the plaintiff with the consent of the defendants, a sum of **Rs 27,76,47,058.00** was appropriated towards the outstanding dues of plaintiff as detailed

below:-

Table No.7:

Drawdown No.1		Drawdown No.2	
Event date	Credit	Event date	Credit
28.08.2012	Rs. 29,10,956.00	05.09.2012	Rs. 28,73,358.00
28.08.2012	Rs. 29,10,956.00	05.09.2012	Rs. 28,73,358.00
28.08.2012	Rs. 6,12,67,132.00	05.09.2012	Rs.12,93,01,102.00
28.08.2012	Rs. 29,10,956.00	05.09.2012	Rs. 28,73,358.00
28.08.2012	Rs. 5,00,00,000.00		
05.09.2012	Rs. 1,97,25,882.00		
Total	Rs.13,97,25,882.00 (A)		Rs.13,79,21,176.00 (B)
Total Credits (A + B)	**Rs 27,76,47,058.00**		

124. Particulars of Statements in Ex.P11 are as under:-

Table No.8:

Signed	Yes	Yes
Page No.	207 - 210	211 - 214
Exhibit date	13.09.2017	13.09.2017
Transaction period	From 01.01.2011 to 10.10.2017	From 01.01.2011 to 10.10.2017

125. Although, amount of **Rs.33,35,01,158/-** were generated during May and August, 2012, their appropriation were staggard to the dates as mentioned above and thereby exposing the plaintiff to unnecessary interests. Thus, sum of **Rs.27,76,47,058.00** out of **Rs.33,35,01,158.00** generated was adjusted towards the loan outstanding of the plaintiff against

Term Loan No.R143601001, although in the Written Statement the defendant has also admitted that a sum of **Rs.30,90,80,221.11** was appropriated for discharging the outstanding dues of the plaintiff towards Term Loan No.R143601001.

126. Thus, it emerges that out of **Rs.33,35,01,158/-** generated, a total sum of **Rs.30,90,80,221.11** was adjusted towards Term Loan No.R143601001 of the plaintiff. After adjusting a sum of **Rs.30,90,80,221.11** from **Rs.33,35,01,158**, only a sum of **Rs.2,44,20,937/-** [Rs.33,35,01,158 - Rs.30,90,80,221.11] would have remained in excess in the Term Loan No.R.143601001 of the plaintiff. However, only a sum of **Rs.1,59,93,936/-** was transferred to the plaintiff's sister company's Account out of **Rs.2,44,20,936.89**. Thus, a sum of **Rs.84,27,001/-** [2,44,20,936.89 - 1,59,93,936] was either short credited as is claimed by the plaintiff or adjusted towards pre-payment charges as claimed by the defendant bank.

127. It is the case of the plaintiff that as sum of **Rs.2,44,20,936.89** [1,59,93,936.89 + Rs.84,27,000.00] ought to have been credited into the plaintiff's sister company's Advance Account No.951000249 instead of

Rs.1,59,93,936.89 after adjusting a sum of **Rs.30,90,80,221.11** towards outstanding principal and interest amounts payable by the plaintiff in Term Loan No.R143601001.

128. It is the case of the plaintiff that a sum of **Rs.84,27,001/-** was short credited from the plaintiff's Term Loan No.R143601001 while crediting only a sum of **Rs.1,59,93,936.89** into the Advance Account No.951000249 of the said company.

129. It is case of the plaintiff that Ex.P10/11 Statement of Account for Term Loan No.R143601001 were never given to the plaintiff by the defendant. It came to the knowledge of the plaintiff during the pendency of O.A.No.500 of 2016 against the plaintiff's sister company's account.

130. The balance of **Rs.84,27,000/-** [Rs.2,44,20,937 – Rs.1,59,93,936] after adjusting the outstanding of **Rs.30,90,80,221.11** has been stated to have been appropriated by the defendant towards prepayment charges though there are no records to substantiate the same.

131. If the balance amount of **Rs.84,27,001/-** (31,75,07,222.00 -

30,90,80,221.00) was appropriated towards pre-payment charges as has been stated by the defendant bank, there should have been a communication from the defendant bank to the plaintiff regarding the appropriation of the amount towards pre-payment charges. Such appropriation is also neither reflected in Ex.P10 & P11 Statement of Account nor in any other Statements mentioned above.

132. A further reading of Exhibits marked by the plaintiff and the defendants indicates that the Director of the plaintiff had sent Ex.P20 Email dated 03.09.2012 to the defendants regarding the closure of the plaintiff and its sister company M/s.Rarefield Engineering Private Limited loan and had requested the defendant bank to furnish copy of the Statement of Account for Term Loan No.R143601001. However, Statement of account for Term Loan No.R143601001 was not sent. There are no documents to show that Term Loan Statement in Ex.P10 & P11 were made available to the plaintiff earlier and it was accessible through internet.

133. In Ex.P20 Email dated 03.09.2012, the Director of the plaintiff requested for waiver of charges as mentioned in the previous Emails.

Ex.P20 Email dated 03.09.2012 of the plaintiff's Director is long after the deposit of a sum of **Rs.33,35,01,158/-** into two accounts of the plaintiff and one account of its sister company M/s.Rarefield Engineering Private Limited on 18.05.2012, 21.05.2012 & 23.08.2012 as above respectively.

134. Ex.P21 is yet another reminder dated 07.09.2012 pursuant to a discussion purportedly held between the Director of the plaintiff and one R.Ganesh of the defendants on 06.09.2012 regarding the final account statement of Term Loan No.R143601001.

135. Both Ex.P10 and Ex.P11 Statement of Account do not fulfill the requirements of the Bankers Book Evidence Act, 1891 as they are not certified. However, both the plaintiff and the defendants do not dispute the amounts reflected in Ex.P10 and Ex.P11 Statement of Accounts.

136. Ex.P10 is the Statement of Account for the Term Loan No.R143601001 for the period between **01.09.2011 and 01.06.2016**. Ex.P10 Statement of Account has been generated on 06.06.2016 and is not signed. Ex.P11 is also the Statement of Account for the same Term Loan No.R143601001 for the period between **01.09.2011 and 30.09.2016**.

137. However, the defendant admits that a sum of **Rs.30,90,80,221.11** was adjusted towards outstanding of liability of the plaintiff against Term Loan No.R143601001 availed for Rs.29.50 Crores.

138. It is not clear whether after Ex.P21 Email dated 07.09.2012, the defendant Bank had sent any Statement of Account to the plaintiff for the Term Loan No.R.143601001. It is also not clear whether any other communications were sent from the plaintiff or its sister company M/s.Rarefield Engineering Pvt. Ltd. seeking for final account statement of Term Loan No.R143601001.

139. The plaintiff's sister company M/s.Rarefield Engineers Private Limited was later subjected to a recovery proceeding in O.A.No.500 of 2016 under the provisions of the Debt Recovery Tribunal Act, 1993 before the Debts Recovery Tribunal II, Chennai. The said proceedings culminated in Ex.P13 Final Order dated 21.03.2018 in O.A.No.500 of 2016.

140. Ex.P13 Final Order dated 21.03.2018 in O.A.No.500 of 2016a

Demand Notice dated 07.09.2015 issued to the plaintiff's sister company M/s.Rarefield Engineering Private Limited under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [SARFAESI Act, 2002].

141. The aforesaid Demand Notice dated 07.09.2015 was followed by a Possession Notice dated 23.11.2015 issued under Section 13(4) of the SARFAESI Act, 2002 to the plaintiff's sister company M/s.Rarefield Engineering Private Limited. Thereafter, Ex.P16 Sale Notice dated 22.03.2016 issued under [SARFAESI Act, 2002to the plaintiff's sister company M/s.Rarefield Engineering Private Limited.

142. In Ex.P22 Email dated 11.09.2013, the Director of the plaintiff Mr.Russel Raj has informed the defendant Bank that there was one side settlement for loans of the plaintiff and that certain amounts have been transferred to the plaintiff's sister company M/s.Rarefield Engineering Private Limited. The amount has not been specified in Ex.P22 Email dated 11.09.2013.

143. Relevant portion of Ex.P22 Email dated 11.09.2013 reads as under:-

> You know we have taken loan for two accounts and we had sufficient funds in both of our accounts (Rarefield Shipping and Rarefield Engineers), but you had done only **one side settlement for Rarefield shipping and only certain amount had been transferred to Rarefield Engineers Pvt. Ltd**.

144. Thus, it is evident that *vide* Ex.P22 dated 11.09.2013, the plaintiff and its promoters was aware of the transfer of **Rs.1,59,93,936/-**into Advance Account No.951000249 of the plaintiff's sister company M/s.Rarefield Engineering Private Limited after adjustment of loan liability.

145. However, there are no communications from the defendant Bank to the effect that a sum of **Rs.84,27,001/-** was being retained towards pre-payment of Term Loan No.R143601001 of **Rs. 29.50 Crores**.

146. Therefore, it cannot be stated that the plaintiff was unaware of the amounts that were transferred from the aforesaid Term Loan Account to Advance Account No.951000249 after settling the outstanding dues of the plaintiff's sister company M/s.Rarefield Engineering Private Limited.

147. Whether the aforesaid amount of **Rs.84,27,000/-** was being retained by the defendant Bank towards pre-payment charges of Term Loan No.R143601001 of **Rs.29.50** Crores would have been made known to the plaintiff. Only if there was communication to that effect from the defendant Bank to the plaintiff in accordance of Ex.P4 Credit Agreement dated 10.05.2011 and Ex.P5 Rupee Loan Agreement dated 12.5.2011 and corresponding entry in Ex. P10/11 Statement of Account of Term Loan No.R143601001, such appropriation can be justified.

148. Neither there are any correspondence from the defendants to the plaintiff that a sum of towards **Rs.84,27,001/-** was being debited towards pre-payment charges nor any debit entry either in Ex. P10/11 Statement of Account of Term Loan No.R143601001 for the aforesaid sum of **Rs.84,27,000/-** towards prepayment charges or in any other account.

149. What is discernible from Ex.P10/11 Statement of Account for Term Loan No.R143601001 is that only a sum of **Rs.1,59,93,936/-** was credited into Advance Account No. 951000249 of the plaintiff's sister company M/s.Rarefield Engineering Private Limited from the amount of

Rs.33,35,01,158/- credited into plaintiff's Term Loan No.R143601001 after appropriating a sum of **Rs.30,90,80,221**/- towards the outstanding principle in the Term Loan No.R143601001 of the plaintiff.

150. In Ex.P10/11 Statement of Account for the plaintiff's Term Loan No.R.143601001, there are no entries that an amount of **Rs.84,27,001/-** has been appropriated by the defendant Bank towards pre-payment charges in terms of Ex.P4 Credit Agreement dated 10.05.2011 and Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011.

151. As per Section 3.5 of Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011, the plaintiff cannot pre-pay the principal amount of outstanding in full or in part, before the "Due Dates"without approval for such pre-payment by the defendant bank and such pre-payment was to be subjected to such terms and conditions as may be stipulated by the defendant Bank.

152. Clauses 3.5 and 6.3 of Ex.P5 dated 12.05.2011 and Clause 20 (Special Conditions) and Clause 17 (Prepayment) of Ex.P4 dated

10.05.2011, read as under:-

Table No.9:

Extracts from Ex.P5 dated 12.05.2011.	Extracts from Ex.P4 dated 10.05.2011.
Section	Clause
3.5: The borrower shall not without the approval of ICICI Bank which approval may be given subject to such terms and conditions as may be stipulated by ICICI Bank including payment of prepayment (premium), prepay the outstanding principal amounts of the Facility in full or in part, before the Due Dates.	17. Prepayment : the borrower may pay any of the outstanding tranches (in part or full) on the date of the interest reset without any prepayment premium
6.3: The borrower hereby covenants and agrees that until all the monies due and payable by the borrower under the Facility Agreement are fully paid off to the satisfaction of ICICI Bank, without the approval of ICICI Bank the Borrower shall not: (a) ……… (b) ………. (c)………… (d)PREMATURE REPAYMENT: Prepay any indebtedness incurred by the Borrower. If ICICI Bank permits the Borrower to prepay any such Indebtedness the Borrower shall if so required by ICICI Bank, make proportionate prepayment to ICICI Bank subject to such conditions (including payment of prepayment premia) as	20. Special Conditions : If the lender finds that the profitability and the cash flow and other circumstances so warrant, the lender may, on previous intimation to the borrower require the borrower to repay the loan on dates earlier than the dates set out in the repayment schedule and also to increase the amount of the installment of the repayment. For such prepayment, a prepayment penalty shall not be applicable.

may be stipulated by ICICI Bank.	

153. As per Clause 17 (Prepayment) of Ex.P4 Credit Agreement, the borrower may pay any of the outstanding tranches (in part or full) on the date of the interest reset without any prepayment premium. Sub Clause 6 in Clause 20 (Special Condition) of Ex.P4 Credit Agreement reads as under:-

> If the lender finds that the profitability and the cash flow and other circumstances so warrant, **the lender may, on previous intimation to the borrower require the borrower to repay the loan on dates earlier than the dates set out in the repayment schedule and also to increase the amount of the installment of the repayment. For such prepayment, a prepayment penalty shall not be applicable.**

154. As per Clause 6.3 of Ex.P4 Credit Arrangement Letter dated 10.05.2011, the defendant has to permit the borrower to prepay any Indebtedness and such prepayment shall be subject to such condition as may be stipulated by the defendant bank. Ex.P4 Credit Arrangement Letter dated 10.05.2011 does not contemplate any other Clause for pre-payment of loan.

155. Section 11.2 of Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011 deals with Evidence of Debt. Section 11.2 of Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011 reads as under:-

Section 11.2 -EVIDENCE OF DEBT:

a) ICICI Bank shall maintain, in accordance with its usual practice, accounts evidencing the amounts from time to time lent by and/or owing to it under the Facility Agreement and the Transaction Documents.
b) In any legal action or proceedings arising out of or in connection with the Facility Agreement, the entries made in the accounts maintained pursuant to Sub-clause (a) above shall be prima-facie and conclusive evidence of the existence and amount of obligations of the Borrower as therein recorded.

156. As per Section 11.2 of Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011, the defendant bank was required to maintain all accounting evidence of amounts from time to time lent by it and owing to it under the aforesaid agreement etc.

157. No documents filed by the defendant bank to show that there was an approval for pre-payment as is contemplated in accordance with

Section 3.5 of Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011.

158. Similarly, there are also no documents to substantiate that the defendant bank had allowed pre-payment of the amounts. However, the fact remains that Term Loan No.R.143601001 was allowed to be prepaid by adjusting a sum of Rs.30,90,80,221.11 out of Rs.33,35,01,158.00. Such pre-payment of amounts would not have been possible without an internal decision of the defendant Bank and a formal communication of such decision.

159. If any pre-payment was to be charged or waived, there would have been a proper decision by the defendant bank. However, the defendant bank has not given details of such decision. Only in the Written Statement, the defendants have stated that the aforesaid amount of **Rs.84,27,000/-** was appropriated towards pre-payment charges.

160. The presumption has been drawn that there was an internal resolution either to waive pre-payment charges or to appropriate amount towards pre-payment charges.

161. If the amount of **Rs.84,27,000/- (**as stated in the Written Statement) was appropriated towards prepayment charges or waived thereon, appropriation of the aforesaid amount by the defendant towards pre-payment charges should have been communicated to the plaintiff in accordance with the rules of their business and in accordance of Ex.P4 Credit Arrangement Letter dated 10.05.2011 and Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011.

162. Appropriation, of any amount also could not have been made unilaterally by the defendant bank without disclosing the details of the decision taken to the plaintiff.

163. As per Section 103 of the Indian Evidence Act, 1872, the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

164. The defendant bank has failed to discharge the burden of proof cast on it. The burden of proving that a sum of **Rs.84,27,000/-** was appropriated towards pre-payment charges and that same was communicated has not been discharged by the defendants. Therefore, the Court is inclined to draw an adverse inference against the defendants.

165. I do not find reason to believe that there was a decision to appropriate a sum of **Rs.84,27,000/-** towards pre-payment of charges was communicated to the plaintiff.

166. The preponderance of probability is that the defendant wanted to plaintiff and plaintiff's sister company to settle the respective outstanding. However, the amount of **Rs.33,35,01,158/-** credited into plaintiff's Term Loan No.R143601001 during May, 2012 and August, 2012 was not sufficient to settle the outstanding due of the plaintiff's sister company M/s.Rarefiled Engineering Pvt. Ltd. Therefore, only a sum of Rs.159,93,936 alone was transferred and appropriated by the defendant bank towards the interest and principal due of the plaintiff's sister company

M/s.Rarefiled Engineering Pvt. Ltd.

167. The amount of **Rs.84,27,001/-** was wrongly retained by the defendant contrary to the terms and conditions of Ex.P4 Credit Agreement Letter dated 10.05.2011 and Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011 signed between the plaintiff and the defendants.

168. To recover the aforesaid sum of **Rs.84,27,000/-** the plaintiff was required to have initiated proceedings within the period of limitation prescribed in Article 113 of the Limitation Act, 1963, i.e. three years from 10.09.2012.

169. However, that would have been possible only if Ex.P10/P11 Statement of Account for Term Loan No.R143601001 was furnished by the defendants to the plaintiff in 2012 or thereafter.

170. Only, if the amount of **Rs.84,27,000/-** was also appropriated towards the principal or interest outstanding of the plaintiff in Term Loan

No.R143601001, the plaintiff cannot ask for such refund.

171. The plaintiff is entitled to refund of the amount as there are no records to show that the plaintiff was made aware of such a decision to charge the plaintiff towards the pre-payment charges.

172. In Ex.P22 Email dated 11.09.2013, the plaintiff has merely admitted that there was one side settlement of Term Loan No.R143601001 covered by Ex.P10/P11 Statement of Account for Term Loan No.R143601001. It was incumbent on the part of the defendant to have informed the plaintiff as to the manner in which it was appropriating the amount of **Rs.33,35,01,158/-**.

173. It is clear that the plaintiff was under the impression that the amounts were appropriated towards principle and interest outstanding of the plaintiff against Term Loan No.R143601001.

174. The plaintiff was not made aware that the amount was retained by the defendants purportedly towards liability alleged pre-payment charges

of the plaintiff under Ex.P4 Credit Agreement Letter dated 10.05.2011 and Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011.

175. Therefore, although the plaintiff was unaware of the crediting of only **Rs.1,59,93,936/-** into the Advance Account No.951000249 of the plaintiff's sister company M/s.Rarefield Engineers Pvt.Ltd.'s account, the plaintiff was not given the details of **Rs.84,27,000/-**.

176. The limitation under Section 17 of the Limitation Act, 1963 would commence only from the date of receipt of Ex.P10/P11 Statement of Account for Term Loan No.R143601001 in 2017. There are no records to substantiate that Ex.P10/P11 Statement of Account for Term Loan No.R143601001 was furnished to the plaintiff earlier.

177. Even if the plaintiff had prior knowledge of the crediting of the amount of **Rs.1,59,93,936/-** to the plaintiff's sister company M/s.Rarefield Engineering Private Limited from Term Loan No.R14360100 of the plaintiff, unless Ex.P10/11 Statement reflects appropriation of

Rs.84,27,000/- towards prepayment charges, it cannot be stated that the plaintiff's claim is barred by law.

178. The fact that emerges is that the aforesaid amount of **Rs.87,27,000/-** was retained by the defendant bank without any proper communications to the plaintiff.

179. Considering the fact that no details have been furnished by the defendant bank, it has to be construed that there was a complete waiver of prepayment charges.

180. The amount of **Rs.84,27,000/-** was retained by the defendant bank in the year 2012 after amounts were appropriated from the aforesaid sum of **Rs.33,35,01,158/-** was raised by selling the secured assets.

181. Both the plaintiff and the defendant did not talk about retention of **Rs.84,27,000/-** as amounts were outstanding in the plaintiff's sister company M/s.Rarefield Engineering Private Limited.

182. Later the promoters of the plaintiff and its sister company M/s.Rarefield Engineering Private Limited were busy defending themselves in the parallel proceedings initiated by the defendants under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [SARFAESI Act, 2002] and in the proceedings initiated under Section 19 of the Recovery Of Debts And Bankruptcy Act, 1993 in O.A.No.500 of 2016 which eventually culminated in an adverse order in Ex.P3 Final Order dated 21.03.2018.

183. Chartered Account Certificate which has been marked as Ex.P12 in this suit was also marked as Ex.B1 by the plaintiff's sister company M/s.Rarefield Engineering Private Limited in O.A.No.500 of 2016.

184. Similarly, Ex.P10/P11 Statement of Account for Term Loan No.R143601001 were also marked as Exs.B5 & B6 before the Debt Recovery Tribunal in O.A.No.500 of 2016. It is only the course of the proceeding, the plaintiff realized that the defendants had waived the pre-payment charges but had retained the amount.

185. The parallel recovery proceedings initiated against the plaintiff's sister company M/s.Rarefield Engineering Private Limited to recover a sum of Rs.3,09,64,416.36 under Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 culminated in Ex.P13 Final Order dated 21.03.2018 in O.A.No.500 of 2016.

186. Relevant portion of the Ex.P13 Final Order dated 21.03.2018 in O.A.No.500 of 2016 of the Debts Recovery Tribunal against the plaintiff's sister company M/s.Rarefield Engineers Private Limited reads as:-

> 10. On careful reading of the reply statement & proof affidavit of defendants and Ex.B1 to D20, it is seen that the 1st defendant company and Rarefield Shipping Pvt Ltd are complementary to each other. Both companies availed credit facilities from the applicant bank. In the year 2012, due to sudden and unexpected depressed international market conditions in general and especially for the shipping business, Rarefield Shipping Pvt Ltd suffered a heavy operational loss due to market prices and also due to a high rate of interest. There was a loss of Rs.30 crore within a year to Rarefield Shipping Put Ltd. Towards settling the loan account and reducing the debt burden, in 2012, the 2nd defendant negotiated with the applicant bank for settling the loans of both the companies i.e., 1st defendant company and the Rarefield Shipping Pvt Ltd. For settling the loans, 2nd defendant sold primary collateral securities in the two vessels

owned by Rare Field Shipping Pvt Ltd and brought a sum of Rs.14,89,10,405/- during May 2012 and further sold secondary collaterals-immovable properties owned by 1st Defendant company Rs.18,45,90,753) in August 2012 which were deposited into the Term Loan Account of Rarefield Shipping Pvt Ltd in May 2012 and August 2012 respectively. After adjusting all these amounts in the Term Loan account, the applicant's bank simply locked it up unilaterally. Therefore, 1st defendant suffered the loss of Rs.1,33,54,677)- as of 10.09.2012. Further, without intimation or notice to defendants, applicant bank transferred Rs.1,59,00,000/-. Without Board Resolution, applicant bank converted the Cash Credit facility into Overdraft facility. The Term Loan of Rarefield Shipping Pvt Ltd and the present loan in the OA are complementary loans and not separate. As per the Defendant's Audited Statement as on 10.09.2012, there was an amount of Rs.1,33,54,677/- and Rs.1,08,25,009/- (purportedly towards other charges) totaling 2,41,79,686/- which should have been credited to Cash Credit account in addition to the sum of Rs. 1,59,93,936.89 which was admittedly transferred on 10.09.2012 is excess deposit after settlement appropriation from the fund of Rs.37,49,91,036/- deposited in the Term Loan account. But the applicant bank credited only the above said Rs.1,59,93,936.89p. When the 2nd defendant was abroad, the applicant bank got the signatures of the 3rd Defendant and transferred the cash credit account into Overdraft account. Therefore, the 1st defendant is not liable to pay the applicant bank**. After the OA was filed, Rs.2.07 crore was remitted by 2nd defendant by selling his properties**. The applicant bank has to pay the loss of Rs.2,41,79,686/- as on 10.09.2012 plus Rs.3.5 crore as damages. Thus, the defendants prayed for the dismissal of the OA with costs.

11. Though the defendants stated in their reply statement that the applicant bank has to pay the loss and damages to the defendants, they have not filed any counter claim. Further, the above said claim was not proved by defendants. Ex.B1 to B20 are the documents relating to both Rarefield Shipping Pvt Ltd and the 1st Defendant company. The defendants failed to file exclusive statement of 1st Defendant's account. The defendants clubbed the accounts of Rarefield Shipping Pvt Ltd and the 1st Defendant company. If really the applicant bank has to pay the above said amount as loss and damage, defendants would not have to pay the amount of Rs.2.07 crore after the filing of OA. Therefore, the defendants' allegations against the applicant bank regarding loss and damage are not acceptable. The documents Ex.B1 to B20 are not the documents to reject the OA claim. To the contra, the applicant bank's statement of account clearly shows the payments made by defendants, availing of facilities from applicant bank and the outstanding balance due amount. Further, on perusal of statement of account, the applicant bank charged the rate of interest as agreed to by the defendants and also as per the Reserve Bank of India guidelines. I find that the claim amount is proper.

12. Defendants stated that the applicant bank unilaterally converted the Cash Credit facility to Overdraft facility without Board Resolution. But the defendants admitted that the 3rd Defendant signed the letter for transferring facilities on behalf of 1st Defendant. The 2nd and 3rd defendants are the husband and wife. If really the 2nd defendant is aggrieved, complaint should have been made against the applicant bank before the concerned authority. like Ombudsman, Reserve Bank of India etc. But no complaint seems to have been made. Defendants availed the facilities. Therefore, the objection raised by defendants regarding

this is not acceptable. Further, the defendants failed to prove how much amount was paid towards the 1st defendant loan alone. Defendants clubbed both the accounts i.e., 1st Defendant and Rarefield Shipping Pvt Ltd, which is not acceptable. M/s.Rarefield Shipping Pvt Ltd is not a party to this OA and clubbing the accounts of the said company to the present claim is not correct. Hence, I find that the defendants failed to prove their case with proper documents. Ex.B1 to B20 are not the documents to reject the OA claim or to reduce the OA claim amount. Hence, the objections and allegations of the defendants are not acceptable.

13. **On going through the evidence of applicant bank, it is clearly seen that the 1st Defendant availed credit facilities from applicant bank for which the 1st defendant hypothecated movable goods, 2nd defendant mortgaged the immovable properties mentioned in the Schedule to the OA, Item No.3 of Schedule B property was sold with the permission of defendants for a sum of Rs.1.95 crore and it has to be adjusted towards the loan account of 1st defendant. Thus, the applicant bank proved its claim through its evidence and documents against the defendants.** Therefore, the Defendants 1 to 3 are jointly and severally liable to pay the claim amount. Point No.(i) is answered accordingly.

Point No.(ii):

14. Applicant bank has claimed interest @ 19.35% p.a. with monthly rests. Defendants submitted that, due to loss in the shipping business, they are not able to settle the dues in time. Considering the facts and circumstances of the case and the fact that one of the mortgage property i.e., **Item No.3 of Schedule B' to the OA has been sold and part satisfaction of Rs.1.95**

crore recorded, if the contractual rate of interest is ordered to continue even after the filing of the suit, it would not meet the ends of justice. Therefore, this Tribunal inclines to reduce interest u/s 19(20) of the RDDB & FI Act. Point No.(ii) is answered accordingly.

15. For the foregoing reasons, the applicant is entitled to recover the dues from the defendants in terms of this order.

16. In the result, the application (OA) is allowed as under:-

a) the applicant bank to recover the sum of Rs.3,09,64,416.36 (Rupees three crore nine lakh sixty four thousand four hundred and sixteen and paise thirty six only) with interest @ 12% p.a.(simple) from the date of institution of the OA till realization and also costs of the OA from the defendants 1 to 3 jointly and severally and in case of default, by sale of the schedule mentioned mortgaged /hypothecated properties (except Item No.3 of Schedule 'B' to the OA);

b) Applicant bank is directed to give credit to the amount of Rs.1.95 crore realized by sale of Item No.3 property mentioned in Schedule B' to the OA on the appropriate date and the balance be recovered;

c) Issue Recovery Certificate in favour of the applicant bank in terms of this final order;

d) Applicant is directed to file costs memo within two weeks of receipt of this order and

e) Communicate a copy of this order to the parties concerned.

187. A reading of Ex.P.13 Order in O.A.No.500 of 2016 dated 20.03.2018 shows that O.A.No.500 of 2016 was filed by the defendant Bank against the plaintiff's sister company to recover an amount of Rs.3,09,64,416.36 as on 06.07.2016 together with interest at 19.35% p.a.

188. O.A.No.500 of 2016 was initiated against the plaintiff's sister company M/s.Rarefield Engineers Pvt.Ltd. in respect of the Cash Credit Facility of Rs.3.5 Crores loan given to it which was later converted into Over Draft Facility. The amounts credited into the said account were appropriated by the defendant bank towards the outstanding dues of the plaintiff's sister company.

189. A reading of Ex.P13 Order in O.A.No.500 of 2016 dated 20.03.2018 indicates that during the pendency of O.A.No.500 of 2016 before the Debts Recovery Tribunal-II, Chennai, the promoters of the plaintiff company paid a further sum of **Rs.2.07 Crorers** from sale of some of the other assets in a bid to liquidate the outstanding dues of the plaintiff's sister company M/s.Rarefield Engineers Pvt. Ltd.

190. Ex.P13 Final Order dated 21.03.2018 in O.A.No.500 of 2016

also records that an amount of **Rs.1.95 Crores** was also realized by the defendant bank from sale of Item No.3 Property mentioned in Schedule 'B' to O.A.No.500 of 2016 which was also allowed to be appropriated towards the balance that was to be recovered.

191. Over and the aforesaid amount, earlier, a sum of **Rs.1,59,93,936.89** was also credited into the Advance Account No.951000249 of the said company from and out of a sum of **Rs.33,35,01,158/-** that was credited into the plaintiff's Term Loan No.R143601001 from the sale of assets in 2012.

192. Thus, in all, a sum of **Rs.5.61Crores [1.59 + 1.95 + 2.07]** was paid by the said company against principal amount of **Rs.3.5 Crores** and interest thereon. On the date of filing of O.A., after adjusting the amount paid by the said company, a sum of **Rs.3,09,64,416/-** allegedly from the plaintiff's sister's company.

193. The retention of amount of **Rs.84,27,000/-** by the defendants is contrary to Ex.P4 Credit Agreement Letter dated 10.05.2011 and Ex.P5

Rupee Loan Facility Agreement dated 12.05.2011. The plaintiff at best had an impression that the aforesaid amount **Rs.84,27,000/-** was appropriated towards full and final settlement of dues of the plaintiff against Term Loan No.R.143601001. It cannot be assumed that the plaintiff had a knowledge of that the aforesaid amount **Rs.84,27,000/-** was appropriated towards pre-payment charges.

194. Although, the present suit was filed only on 01.04.2019 long after the transfer of **Rs.1,59,93,936/-** during September, 2012 into the Advance Account No.951000249 of the plaintiff sister company, it cannot be said that the suit is either time barred or that the plaintiff is not entitled to the relief.

195. Over and above the amount appropriated towards interest before appropriating a sum of **Rs.30,90,80,221/ -** from and out of **Rs.33,35,01,158/-** towards the outstanding due of the plaintiff in the Term Loan No.R.14360100, a sum of **Rs.5.61Crores [1.59 + 1.95 + 2.07]** was paid by the plaintiff's company against principal amount of **Rs.3.5 Crores** and interest thereon.

196. The defendant bank being banking company licensed to do banking business by the Reserve Bank of India cannot be seen to be making profit out of the loss suffered by its customer and suppressing facts.

197. The defendant bank has suffered no real loss barring, a loss of opportunity to earn interest for all the 51 months from the plaintiff which arrangement had run into a rough weather within few months of taking the loan. It is also not as if the plaintiff or its sister company have not paid the amounts borrowed from the defendant. In fact, there has been a delayed adjustment which has resulted in the plaintiff getting exposed to interest as well though amounts were credited into the accounts of the plaintiff.

198. In view of the above discussion, the issues framed by this Court are answered as follows:-

Issue No.(i) : Whether the Term Loan Account Statement (in Ex.P10/11) was available or accessible to plaintiff or its Promoter/Managing Director prior to June 2016 or September 2017 when authenticated Statement of Term No.R143601001, Draw Down No.1 and 2 was furnished for the first time as alleged in Plaint?

Answer : No. Term Loan Account Statement (in Ex.P10/11) was not made available or accessible to plaintiff or its Promoter/Managing Director prior to June 2016 or September 2017.

Issue No.(ii) : Is the suit claim time-barred?

Answer : In the light of the above conclusion, it cannot be said that the suit was time barred.

Issue No.(iii) : Did the defendant lawfully invoke and enforce the Pre-closure premium clause to charge a sum of Rs.84,27,002/-?

Answer : No. Although the defendants were entitled to levy pre-closure premium as per Ex.P4 Credit Agreement dated 10.05.2011 and Ex.P5 Rupee Loan Facility Agreement dated 12.05.2011, there are no records to substantiate that the defendants have communicated their decision to charge a sum of Rs.84,27,002/- on the plaintiff towards pre-closure of Term Loan No.R143601001.

Issue No.(iv) : Did Plaintiff or anyone representing it otherwise have the knowledge of charging and appropriation of the alleged Pre-closure charge of Rs.84,27,002/- so as to estop Plaintiff from claiming it?

Answer : In the light of the answer to Issue No.(i), this issue is answered against the defendants.

Issue No.(v) : Is the Plaintiff entitled to a decree for a sum of Rs1,75,28,162/- as on the date of Plaint?

Answer : In view of the answer to Issue No.(iii), the plaintiff is entitled to recover a sum of Rs.84,27,001/- together with interest which the defendants would have charged the plaintiff if the defendants had lent the aforesaid sum of Rs.84,27,001/- to the plaintiff. Therefore, there has to be a proper restitution of Rs.84,27,001/- to the plaintiff together with interest at 13.75% per annum on the aforesaid amount from 10.09.2019, i.e. the date of transfer of Rs.1,59,93,936.89 from and out of Rs.2,44,20,397/- [Rs.84,27,001/- + Rs.1,59,93,936.89] to the plaintiff's sister company M/s.Rarefiled Engineering Pvt. Ltd. till the date of realization.

Issue No.(vi) : To what other relief is Plaintiff entitled?

Answer : No other reliefs.

199. In view of the above discussion, this Suit is decreed for a sum of Rs.84,27,001/- together with interest at 13.75% per annum from 10.09.2019 till the date of realization. Parties shall bear their own cost.

02.06.2023

NCC : Yes/No
Internet : Yes/No
Index: Yes/ No
jen

Plaintiff's witness:

Mr. R. Russel Raj : P.W.1

Mr.T.A.P.Varadakutty : P.W.2

First Defendant's witness:

Mr.Shankar Balasubramanium : D.W.1

Documents exhibited by the Plaintiff:

Sl. No	*Date*	*Ex. No.*	*Nature of the documents*
1.	01.12.2009	P 1	Memorandum of Association of plaintiff
2.	08.12.2009	P2	Article of association
3.	14.12.2009	P3	Certificate of Incorporation
4.	10.05.2011	P4	Credit Agreement
5.	12.05.2011	P5	Rupee Loan Facility Agreement
6.	13.05.2011	P6	Credit Arrangement Letter
7.	27.07.2012	P7	Letter from Plaintiff to Defendant
8.	05.06.2016	P8	Statement of the current account of the plaintiff
9.	05.06.2016	P9	Statement of the current account of Rarefield Engineers Pvt Ltd
10.	06.06.2016	P10	Statement of loan account of the plaintiff without signature
11.	13.09.2017	P11	Statement of loan account of the plaintiff with signature
12.	01.09.2017	P12	Chartered accountant’s report
13.	21.03.2018	P13	Order in OA 500 of 2016

14.	27.03.2018	P14	Lawyer's notice
15.	01.05.2018	P15	Reply by defendant to P 14
16.	22.03.2016	P16	Sale notice to Rarefield Engineers Pvt Ltd
17.	05.06.2016	P17	Reply notice to P 16 by Rarefield Engineers Pvt Ltd
18.	22.08.2012	P18	E-mail from plaintiff to defendant.
19.	25.08.2012	P19	E-mail from plaintiff to defendant.
20.	03.09.2012	P20	E-mail from plaintiff to defendant.
21.	07.09.2012	P21	E-mail from plaintiff to defendant.

***Documents exhibited by the First Defendant*:**

Sl. No	*Date*	*Ex.*	*Nature of the documents*
1	09.08.2022	D1	Board Resolution of the plaintiff company
2	19.12.2013	D2	Photocopy of Credit Arrangement Letter
3	19.12.2013	D3	Photocopy of Master Facility Agreement between M/s.Rarefield Engineers Pvt. Ltd. and defendant
4	03.03.2017	D4	Auditor Report 2014- 2015
5	03.03.2017	D5	Auditor Report 2013- 2014
6	03.03.2017	D6	Auditor Report 2012- 2013
7	22.03.2012	D7	Power of Attorney
8	10.05.2011	D8	Original Credit Arrangement Letter
9	12.05.2011	D9	Original of Master Facility Agreement
10	12.05.2011	D10	Original Rupee Loan Facility Agreement
11	13.05.2011	D11	Original Amendment in credit arrangement letter

C.S.N., J.
02.06.2023

C.SARAVANAN, J.

Jen

Pre-Delivery Judgment made
in
C.S.No.416 of 2019
(Comm. Suit)

02.06.2023