

kps

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.626 OF 2014

Dattatray s/o Shankarrao Borgaonkar,
 Then Proprietor Shree Industries, Aurangabad,
 A Small Scale Industrial Unit, registered with
 the Directorate of Industries, Maharashtra State,
 Age : 86 years, Occ : At present Nil.
 R/o Parijat Building, Bhagyanagar,
 Aurangabad.

..APPELLANT
 (Original Plaintiff)

-VERSUS-

- 1 Maharashtra Small Scale Industries
 Development Corporation Ltd.,
 incorporated and registered under the
 provisions of Companies Act, 1956.
 Having its registered office at
 "Krupanidhi", 9, Walchand Hirachand Marg,
 Ballard Estate, Mumbai.
 Through its Managing Director.
- 2 Maharashtra Small Scale Industries
 Development Corporation Limited.
 Represented by its Divisional Manager,
 Aurangabad Division Office.
- 3 Maharashtra Small Scale Industries
 Development Corporation Ltd.,
 represented by its Divisional Manager,
 Nashik Division Office.

..RESPONDENTS
 (Original Defendants)

.....

Mr.A.D.Kasliwal, Advocate for the Appellant.
 Mr.A.R.Borulkar, Advocate for the Respondents.

.....

**WITH
SECOND APPEAL NO.631 OF 2014**

Dattatray s/o Shankarrao Borgaonkar,
Then Proprietor Shree Industries, Aurangabad,
A Small Scale Industrial Unit, registered with
the Directorate of Industries, Maharashtra State,
Age : 86 years, Occ : At present Nil.
R/o Parijat Building, Bhagyanagar,
Aurangabad.

..APPELLANT
(Original Plaintiff)

-VERSUS-

- 1 Maharashtra Small Scale Industries
Development Corporation Ltd.,
incorporated and registered under the
provisions of Companies Act, 1956.
Having its registered office at
“Krupanidhi”, 9, Walchand Hirachand Marg,
Ballard Estate, Mumbai.
Through its Managing Director.
- 2 Maharashtra Small Scale Industries
Development Corporation Limited.
Represented by its Divisional Manager,
Aurangabad Division Office.
- 3 Maharashtra Small Scale Industries
Development Corporation Ltd.,
represented by its Divisional Manager,
Nashik Division Office.
- 4 Maharashtra Small Scale Industries
Development Corporation Ltd.,
represented by its Branch Manager,
Branch Office, Ahmednagar.

..RESPONDENTS
(Original Defendants)

.....

Mr.A.D.Kasliwal, Advocate for the Appellant.

Mr.A.R.Borulkar, Advocate for the Respondents.

.....

**WITH
SECOND APPEAL NO.151 OF 2015**

Maharashtra Small Scale Industries
Development Corporation Limited.
Represented by its Divisional Manager,
Aurangabad Division Office.

..APPELLANT

-VERSUS-

- 1 Dattatray s/o Shankarrao Borgaonkar,
Proprietor Shree Industries, Aurangabad,
A Small Scale Industrial Unit, registered with
the Directorate of Industries, Maharashtra State,
Age : 39 years, Occ : Business.
R/o Parijat Building, Bhagyanagar,
Aurangabad.
- 2 Maharashtra Small Scale Industries
Development Corporation Ltd.,
incorporated and registered under the
provisions of Companies Act, 1956.
Having its registered office at
“Krupanidhi”, 9, Walchand Hirachand Marg,
Ballard Estate, Mumbai.
Through its Managing Director.
- 3 Maharashtra Small Scale Industries
Development Corporation Ltd.,
represented by its Divisional Manager,
Nashik Division Office.
- 4 Maharashtra Small Scale Industries
Development Corporation Ltd.,
represented by its Branch Manager,
Branch Office, Ahmednagar.

..RESPONDENTS

.....
Mr.A.R.Borulkar, Advocate for the Appellant.
Mr.A.D.Kasliwal, Advocate for the Respondent No.1.
.....

**WITH
SECOND APPEAL NO.152 OF 2015**

Maharashtra Small Scale Industries
Development Corporation Limited.
Represented by its Divisional Manager,
Aurangabad Division Office.

..APPELLANT

-VERSUS-

- 1 Dattatray s/o Shankarrao Borgaonkar,
Proprietor Shree Industries, Aurangabad,
A Small Scale Industrial Unit, registered with
the Directorate of Industries, Maharashtra State,
Age : 39 years, Occ : Business.
R/o Parijat Building, Bhagyanagar,
Aurangabad.
- 2 Maharashtra Small Scale Industries
Development Corporation Ltd.,
incorporated and registered under the
provisions of Companies Act, 1956.
Having its registered office at
“Krupanidhi”, 9, Walchand Hirachand Marg,
Ballard Estate, Mumbai.
Through its Managing Director.
- 3 Maharashtra Small Scale Industries
Development Corporation Ltd.,
represented by its Divisional Manager,
Nashik Division Office.

..RESPONDENTS

.....
Mr.A.R.Borulkar, Advocate for the Appellant.
Mr.A.D.Kasliwal, Advocate for the Respondent No.1.

.....

CORAM: RAVINDRA V. GHUGE, J.

Reserved on :- 06th May, 2015.

Pronounced on : 08th May, 2015.

JUDGMENT:

1 The Appellant in the first two Appeals is the original Plaintiff, who preferred Special Civil Suit Nos.252 of 2002 and 253 of 2002 before the Trial Court. The Respondents in the first two Appeals are the original Defendants. These two parties shall henceforth be referred to as the Plaintiff and Defendants or Defendant, respectively.

2 The Defendants have preferred the third and the fourth Second Appeals referred above. The Plaintiff is the Respondent in the said Appeals.

3 In Special Civil Suit No.252/2002, the Plaintiff had sought recovery of Rs.03,21,590/- with interest. In Special Civil Suit No.253/2002, the Plaintiff had sought recovery of Rs.04,72,737/- with interest. Needless to state, these recoveries through both these Suits were directed against the Defendants.

4 The prayer set out in SCS No.252 of 2002 is as under:-

“Suit of the plaintiff be decreed with costs along with future interest @ 22% P.A. monthly compounded against the defendants jointly & severally for Rs.3,21,590/- and oblige.”

5 The prayer set out in SCS No.253 of 2002 is as under:-

“Suit of the plaintiff be decreed with costs along with future interest @ 22% P.A. monthly compounded against the defendants jointly & severally for Rs.4,72,737/- and oblige.”

6 By the judgment and order dated 16.08.2010, both the Suits were decreed with costs and the Plaintiff was held entitled for recovery of an amount of Rs.3,21,590/- and Rs.4,72,737/-, from the Defendants with future interest at the rate of 6% per annum from the date of the Suit i.e. 10.10.2002 till it's realization.

7 The Defendants preferred RCA Nos.376/2012 and 389/2012 on 23.12.2010. Both of them were registered on 14.06.2012 and 12.09.2012, respectively. In both these Appeals, the Plaintiff filed the cross objections. By the judgment and order dated 15.07.2014, the Appeals as well as the Cross Objections were also dismissed. As such, the Plaintiff as well as the Defendants have preferred the above mentioned four Second Appeals before this Court.

8 In the first two Appeals herein, the claim of the Plaintiff is for enhancement of future interest as he is aggrieved by the grant of future interest @ 6% per annum instead of the claim for future interest at the rate of 22% per annum.

9 In the two Appeals herein preferred by the Defendants, the contention of the Defendants is that no amount of interest should have been granted by the Trial Court as well as the first Appeal Court since “The Interest on Delayed Payments to Small Scale & Ancillary Industrial Undertakings Act, 1993” (herein after referred to as “the 1993 Act”) is not applicable to the Defendants.

10 While hearing these four Appeals on admission, both the learned Advocates Shri A.D.Kasliwal for the Plaintiff and Shri A.R.Borulkar for the Defendants, graciously agreed to address the Court on the merits of the Second Appeals. It is in these circumstances that I have heard both the learned Advocates extensively on 07.04.2015, 18.04.2015 and 06.05.2015.

11 On 06.05.2015, I have framed the following substantial question of law in the first two Second Appeals filed by the Plaintiff:-

“Whether, the learned Trial Court as well as the learned first Appeal Court were justified in granting only 6% interest on the delayed payment and towards future interest as against the interest @ 22% provided under the Interest on Delayed Payments to Small Scale & Ancillary Industrial Undertakings Act, 1993?”

12 In the third and the fourth Appeal preferred by the Defendants, I have framed the following substantial questions of law:-

- (1) *Whether, Special Civil Suit Nos.252/2002 and 253/2002 were maintainable against the Defendants without impleading the buyer/ consignee/ purchaser as a Defendant?*
- (2) *Whether, the terms and conditions between the Defendants and the Plaintiff, make the Defendants liable to pay the interest on the delayed payment and/or future interest till the realization of the outstanding amount?*

13 I have heard the respective Counsel on final disposal of these Second Appeals.

14 The contentions of the Defendants can be summarized in brief

as follows:-

- (a) The 1993 Act is not applicable to the Defendants.
- (b) Section 2(c) of the 1993 Act defines a “buyer”.
- (c) Section 2(f) of the 1993 Act defines a “supplier”.
- (d) The Defendants are neither manufacturers/ suppliers nor buyers.
- (e) The Defendant, namely, Maharashtra State Small Scale Industries Development Corporation Limited, is a company registered and incorporated under the provisions of the Companies Act, 1956.
- (f) The Defendant is established by the Government of Maharashtra for the development of small scale industrial units (SSI) in the State.
- (g) The aim and object of the Defendants is to procure orders for the manufacturers and promote the sale of products manufactured by SSI Units to be supplied only to the Government Agencies, who are buyers.
- (h) The Defendants are only a conduit or channel for marketing the products of SSI Units to the Government Agencies, unlike the case of the Corporation referred to in the judgment cited by the Plaintiff before this Court.
- (i) Those Government Agencies who placed orders for such

products are the actual buyers and SSI Units like the Plaintiff's firm were the manufacturers/ suppliers.

- (j) The Defendants are in the form of an agency which operates as a conduit and earns commission at the rate of 3% on the quantum of amount involved in each transaction.
- (k) When an order by a buyer was conveyed to the supplier, the buyer was required to make a payment upto 80% of the total amount involved in the transaction.
- (l) In the event of any outstanding payments, the claim of the supplier/ manufacturer was conveyed to the buyer.
- (m) The Defendant was not under any obligation to pay any amount to the manufacturer/ supplier and there was no such contract between the Plaintiff and the Defendants.
- (n) The commission taken by the Defendants was merely towards service charges on the transaction.
- (o) The Defendants were never required to make any payment to the Plaintiff supplier.
- (p) It is not in dispute that all these four Appeals are in relation to the future interest on the outstanding amounts.
- (q) The Plaintiff was not the proprietor of Shree Industries which, infact, was already sold out in 1999.
- (r) There was no agreement between the Plaintiff and the

Defendants which would mandate payment of future interest by the Defendants to the Plaintiff.

- (s) Proved document at Exhibit-128 indicates the terms and conditions of the transactions between the Plaintiff and the Defendants.
- (t) Clause Nos.25 and 34 of Exhibit-128 clearly indicate that the price of the goods received from the buyer would be transferred/ paid to the supplier by the Corporation.
- (u) Clause No.34 clearly indicates that as the Corporation (Defendant) is the State Government promotional agency and is not the ultimate consumer of the goods purchased vide the supply orders, the Corporation shall not be held liable under the Government of India Act 1993 for the payment of interest on the delayed payments to the SSI Units by the Purchasers.
- (v) Interest granted by the Trial Court as well as the first Appeal Court against the Defendants, is unsustainable.
- (w) The buyer was not arrayed as a Defendant despite objections raised by the Defendants, thereby rendering both the suits untenable.

15 The submissions of Shri Kasliwal for the Plaintiff can be summarized as follows:-

- (a) The Plaintiff admits the establishment of the Defendant Corporation and its area of operation.
- (b) The Defendant secures orders from the State/ Central Government/ Municipal Corporations/ Councils/ Zilla Parishads/ Telecom Department, etc. and distributes the orders to the various SSI Units depending upon the requirement of the buyer and the nature of manufacturing activity of the manufacturer.
- (c) The Defendant places the orders and the Plaintiff is unaware about the buyer.
- (d) The Plaintiff delivers the articles and sends the bills along with delivery challans to the Defendants, who verify the bills and submit the same to the purchaser/ consignee.
- (e) The Defendant makes payment to the SSI Units after receiving the amounts from the purchaser.
- (f) In case of delayed payment by the buyer, the Defendant used to make payment of 80% of the total bill as advance amount to the SSI Units by charging an interest of about 19.5% to 22% from the buyer.
- (g) The amounts claimed in both the suits were towards interest on account of delayed payments.
- (h) The interest was calculated at the rate of 22% as per the 1993

Act.

- (i) The Appeals filed by the Defendants are against concurrent findings.
- (j) The Plaintiff is the sole proprietor of M/s Shree Industries.
- (k) The entire billing is done by the Defendants.
- (l) The bill for interest is also raised by the Defendants upon the buyer on behalf of the SSI Units under the 1993 Act.
- (m) The Maharashtra Government has introduced a Government Resolution dated 06.08.1997 by which interest for delayed payments can be claimed to the extent of 5% over and above the normal rate of interest.
- (n) The Appeals filed by the Plaintiff for claiming interest at the rate of 22%, therefore, deserve to be allowed.

16 The Plaintiff has heavily relied upon the judgment of the Honourable Supreme Court in the case of *Assam Small Scale Industrial Development Corporation Limited and others v/s M/s J.D.Pharmaceuticals and another*, **AIR 2006 SC 131**. The contention is that the buyer/purchaser need not be arrayed as a Defendant in a suit for recovery of amount or for interest on delayed payment.

17 Having considered the judgment of the Apex Court in the case

of Assam Corporation (supra), it would be apposite to reproduce paragraphs 2, 3, 8, 10, 13, 14, 15, 18, 19, 23, 26, 28, 34, 35, 36 and 45 as under:-

- “2. *The Legislature of State of Assam and the Parliament took legislative measures to allay the difficulties faced by the small scale industries. The State of Assam made rules known as The Assam Preferential Stores Purchase Rules in the year 1972. The said rules having not served its purpose, the Assam Preferential Stores Purchase Act, 1989 (for short "the 1989 Act") was enacted which received the assent of the Governor on 14th July, 1989. The said Act was enacted for encouraging growth of industries in the State of Assam specially small scale and cottage industries and for taking measures ancillary thereto. The State intended to patronize the products of the small scale and cottage industries on preferential basis and to rationalize the procedure for purchase of stores required by the State Government Institutions, Government companies and State Government undertakings, as would appear from the preamble thereof.*
3. *Section 2(d) of the 1989 Act defines "State Board" to mean the Assam State Stores Purchase Board constituted under Section 3 of the 1989 Act. "Small Scale Industry" has been defined in Section 2(f) to mean 'an industrial unit in which the capital investment for plant and machinery does not exceed thirty five lakhs of rupees or any other amount as may be decided by the Central Government from time to time and located in the State of Assam'. "Registered Industry" has been defined in Section 2(l) to mean an industrial unit registered under the Directorate of Industries in accordance with provisions thereof. "Requiring Authority" has been defined in Section 2(r) to mean the State Governments Departments and their subordinate authorities, State Government*

Undertaking/ Corporation/ Statutory Bodies/ Autonomous Bodies. Section 2(s) defines "ASIDC" to mean the Assam Small Industries Development Corporation Limited (for short "the Corporation", the Appellant herein).

8. *An office memorandum dated 28th March, 1988 referred to in Section 7(1)(c) of the 1989 Act is based on a cabinet decision and issued in the name of the Governor of Assam laid down guidelines for strict adherence thereof by all government departments, their subordinate authorities, governments organizations and public sector undertakings while making their purchases of any SSI products which are dealt in or manufactured by the Corporation. The said office memorandum satisfies the requirements of Article 166 of the Constitution of India and has been made a part of the 1989 Act. In terms of the said guidelines, the Corporation is required to publish a list of items/ materials/products to be dealt in or manufactured by it as detailed in Annexure-1 thereof. The price of such SSI products is to be fixed by any Technical Committee constituted by the Corporation with members from neutral organization and concerned departments. As per the said OM, purchasing authorities shall pay to the Corporation upto 5% as commission over the price fixed by the Corporation. The purchasing authorities shall pay advance to the extent of 90% of the value of the orders placed with the Corporation. Annexure -A to the said guidelines is the marketing assistance scheme wherein 'drugs and pharmaceuticals and clinical equipments' had been identified as one of the items, supply of which to the Government departments is to be taken over by the Corporation. The said scheme provides for quality control, pricing, registration of units as also indenting by the Corporation. The clause relating to indenting of the goods reads as under:-*

"The purchasing authorities will issue indent to the Corporation for the required products with 90% advance. The Corporation will immediately allot the work to the most suitable unit or units to complete

supply within stipulated time. If the supply could not be completed in due to time by the Corporation, the purchasing authorities will deduct 1 ½ p.m. from bills.

The stores will be dispatched by the units only after they are given dispatch instruction by the ASIDC. Normally the dispatch will have to commence within the third day from the date of dispatch instruction, failing which the unit may be penalized the extent of bank interest on the amount. The stores will be received by the purchasing authority and the acceptance or rejection notes will be issued on the challans.

The Corporation will release payment upto 90% of the bills to the units on completion of supply. Any advance or advances will be deducted fully. The remaining 10% will be released on receipt of full payment of the bills from the purchasing authority."

10. *It is not in dispute that the plaintiff is a SSI unit registered with the Corporation and fulfills all the criteria laid down in the 1989 Act and the Scheme framed thereunder. It entered into an agreement with the Corporation on or about 19th October, 1990 wherein the plaintiff (Respondent herein) was termed as a principal and the Corporation as an agent. The said agreement was entered into in terms of the marketing support scheme formulated by the Corporation under the 1989 Act. Para 3 of the preamble and Clauses 1, 4, 6, 7 and 8 of the said agreement read as under:-*

"And whereas the Corporation has agreed to act as an Agent to market the goods manufactured by the Principal as specified in the schedule appended to this agreement, under the marketing support scheme formulated by the Corporation under the AP SP Act, 1989..... The principal hereby covenants with the Corporation as hereinafter provided :

"1. The Principal shall quote lowest rates in respect of "Scheduled Goods" to the Corporation and

shall not quote to any party mentioned above directly or indirectly, rate lower than those quoted to the Corporation in respect of the goods for which competitive rates are being quoted by them. The rates so quoted to the Corporation by the Principal shall be valid for a period of one year from the date of submission of the quotation.

4. The Principal shall, when advised to do so, supply the goods wherever required within the stipulated time at his cost. In event of failure to comply with aforesaid clause, if any penalty is imposed by the actual buyer of the goods in the event of the Principal failing to comply the above provision of conditions, or if any losses are otherwise incurred, the said penalty or loss is to be borne by the Principal by reimbursing the said amount to the Corporation within 15 days from the date of demand. The Principal shall also be responsible for losses by way of breakages, theft or pilferage etc. during the transit of goods.

6. The Principal authorizes the Corporation to raise bills of sale on their behalf, disclosing or without disclosing the name of the principal, and to collect payment thereon from the buyer(s). On collection of payment from the buyer(s). Payment to the principal will be effected by the Corporation deduction the service charges. Penalty due to delayed supplies, or other dues/advance, if any. The Corporation may release 90% value of the materials on delivery and acceptance of the material by the buyer after deduction of dues/advance payment if any subject to receipt of payment from buyer(s). The balance 10% less penalty due to the delayed supplies etc. or any other dues will be paid to the Principal on receipt of full payment from the Purchasing Department.

7. The Principal hereby agrees to the terms and condition in the Marketing Support Scheme of the Corporation as amended from time to time and agrees to comply with general specific instructions as might be issued by the Corporation regarding the Marketing of "Scheduled goods".

8. That in case of any shortage, leakage, damage, breakage, late supplies, late submission of R/R/Motor Transport Receipt, delivery challans, inadequate packing etc. or any losses in transit for whatever circumstance or reasons, it shall be on the account of the principal and the amount thus involved, shall be deducted from his bills."
13. The Parliament also enacted 'Interest on Delayed payments to Small Scale and Ancillary Industrial Undertakings Act, 1993' (for short "the 1993 Act") being Act No. 32 of 1993 which came into force with effect from 23rd September, 1992. "Appointed day" has been defined in Section 2(b) to mean the day following immediately after the expiry of the period of thirty days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier. Section 3 provides for the liability of buyer to make payment. Sections 4 and 5 thereof read as under:
- "4. Date from which and rate at which interest is payable. – Where any buyer fails to make payment of the amount to the supplier, as required under section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at such rate which is five per cent points above the floor rate for comparable lending.
5. Liability of buyer to pay compound interest. – Notwithstanding anything contained in any agreement between a supplier and a buyer or in any law for the time being in force, the buyer shall be liable to pay compound interest (with monthly rests) at the rate mentioned in section 4 on the amount due to the supplier."
14. It is not in dispute that pursuant to the said agreement, the Corporation placed orders for supply of medicines manufactured by the Respondent herein

for the period June, 1991 to June, 1993. The total price of the medicines supplied by the Respondent in pursuance of the supply orders of the Corporation stood at Rs. 20,56,654.13 out of which only a sum of Rs.46,512.80 was paid to the Respondent.

15. *It stands admitted that the payments have not been made in relation to the supplies made for the said indents. A suit was filed by the Respondent herein on 7.9.1993 claiming the aforementioned amount (Rs.20,56,654.13) together with the interest payable thereon in terms of the 1993 Act (Rs.675,881/45). In the said suit, the Corporation in its written statement inter alia raised the following plea:-*

"4. That the suit is bad for non-joinder of necessary party and on the score alone the suit is liable to be dismissed.

10. That with regard the statements made in Para 16 to 46 of the plaint, the defendants do not admit anything contrary to the relevant records of the case. The defendants submit that the supply order placed by the defendants does not relate to a single transaction and as such, the plaintiffs cannot claim for recovery of its dues, if any, in one suit. The defendants have placed orders with the plaintiff firm as per the APSP Act, 1989 and as per the indent of the Govt. department. It was agreed in the terms and conditions of the order that the payment of the bills would be released to the plaintiffs on receipt of payment by the defendants from the concerned Government Department. This condition of payment has also been agreed to by the plaintiff and as per the terms and conditions of the agreement executed by the parties. The defendants submit that it has not received payment against the value of the medicines supplied by the plaintiff to the Government department and as such, the bill amount could not be released due to the aforesaid factor. The Drug Association, Assam where the plaintiff firm is also a Member, has informed the defendants by letter that the firm registered under them, are agreeable to accept orders without 90 percent advance payment at the time of placement of

the order and accordingly orders were placed and as per the terms and conditions of the agreement, the defendants were to release payment on receipt of the same from the concerned Government department. As stated earlier since the defendants has not received any payment from the Government Department against the value of the medicines supplied by the plaintiff firm, the required payment could not be released to the plaintiff firm."

18. *Mr. R.F. Nariman, learned senior counsel appearing on behalf of the Corporation would raise the following contentions in support of the said appeal:-*

(i) Having regard to the terms and conditions of supply, the Corporation was to pay unto the Respondent the price for the goods supplied only as and when the same was received from the respective departments of the State Government. The Corporation is an agent of the Respondent and not the buyer of the goods; and as per clause 6 of the agreement until payments are received from the buyers (Departments of the State), no liability could have been fastened upon the Corporation to pay the said amount. Clause 8 of the terms and conditions of the orders for supply also make it clear that payment will be made subject only to receipt of funds from the indenting department.

(ii) The different departments of the State and other government corporations and undertakings being the buyers and the beneficiaries of the supplies only, they were liable to pay the price of the goods supplied over which the Corporation had no control and in that view of the matter the State of Assam was a necessary party. In any event, the recipient of goods, namely, the buyer being disclosed principal of the Corporation, the Respondent as a principal of the Corporation could maintain a suit as against the actual buyer only.

(iii) The provisions of the 1993 Act for payment of interest, are not applicable in view of the fact that the same applies only to a buyer of any goods or recipient of a service from a supplier for a consideration.

Further clause 8 of the terms and conditions of the orders for supply provide that no interest can be claimed for delay in payment.

(iv) In the entire plaint, the Respondent has admitted that it is bound by the terms and conditions of supply and in particular clause 8 thereof and, thus, it does not lie in its mouth now to contend, as has been done in the counter-affidavit filed before this Court, that the said clause is illegal and of no effect being opposed to public policy.

19. *Mr. Pravir Choudhary, learned counsel appearing on behalf of the Respondent, on the other hand, would submit that both the 1989 Act and the 1993 Act are beneficial legislations. The 1989 Act having been enacted by the State of Assam for granting certain reliefs to the SSI units as a part of its industrial policy, the terms and conditions of the agreement as also the conditions of supply shall be subservient thereto and, thus, to the extent the same is inconsistent with the Scheme, the later will prevail. In view of the provisions contained in the 1989 Act and the scheme, it will appear that the Corporation exercises a total control - from quality to pricing to indenting and, thus, the expressions used in the agreement as principal and agent will have no bearing. An agent as is commonly understood cannot have a control over the principal. As its agreement was with the Corporation, and the orders were all placed by the Corporation and as it had no privity with the departments of the State who received delivery of the goods, the Corporation is liable to pay the price with interest.*
23. *It is not disputed that the Respondent did not commit any breach or any irregularity in regard to the supplies. Once the supply of the goods was completed, having regard to the clause aforementioned, the Corporation was bound to release the payment upto 90% in view of the fact that the purchasing authorities were also obligated to issue indent to the Corporation with 90% advance. If such advance had*

not been given, the Corporation in terms of the scheme should not have issued the indent. It may be true that the terms and conditions appended with each order of supply stipulate that payment would be made subject to receipt of the fund from the indenting department. But, the scheme, guidelines, the agreement as also the terms and conditions for supply of stores, if read as a whole, the only meaning which can be attributed thereto would be in relation to the 10% of the amount which the Corporation was to realize from the supplying authorities upon submission of bill by the manufacturer. The said term has nothing to do with payment of 90% advance in accordance with the provision of the Scheme.

26. The expressions 'principal' and 'agent' used in a document are not decisive. The nature of transaction is required to be determined on the basis of the substance there and not by the nomenclature used. Documents are to be construed having regard to the contexts thereof wherefor 'labels' may not be of much relevance. The 1989 Act, the scheme and the guidelines postulate constitution of a State Board for the purpose of monitoring supplies to various departments of the State, the government corporations and the companies. The Managing Director of the Corporation is a member of the board in terms of the provisions of the 1989 Act. The Corporation was created for the purpose of giving effect to the provisions of the Act and the scheme framed thereunder. It is a statutory body and is a 'State' within the meaning of Article 12 of the Constitution of India. The contract by and between the parties being a statutory one, the Corporation was required to act fairly and reasonably. The principal purpose of the Act was to give encouragement to the growth of industries in the State of Assam and patronizing the products of small scale and cottage industries on preferential basis. The 1989 Act contemplates acts which would be for the betterment of the SSI units and not acts which would be detrimental to their interest. The terms used in the

agreement must, therefore, be understood in that perspective.

28. *It is no longer in doubt or dispute that while interpreting the terms of agreement, it is necessary to look to the substance of the matter rather than its form. Use of a terminology may not be sufficient to lead to a conclusion that the parties to the contract in fact intended that the said status would be conferred.*
34. *As a statutory agency came into being by and between the purchasing authorities and the Corporation in terms whereof the Corporation not only exercised the control in relation to the entire supply of materials, as a part of the statutory scheme, it also undertook to collect the price of the goods supplied from the purchasing authorities and pay the same to the manufacturers subject, of course, to the payment of its commission which would be a substantial amount. Under the scheme, the purchasing authorities had a duty to pay 90% of the price before the Corporation makes an indent and, thus, the latter had a statutory duty to realize the same before an indent is made, as also the remaining 10% when supplies are completed. If the payment was to be made by the Corporation to the Respondent both under the contract as also in terms of the statutory provision, it cannot now turn round and contend that it was not part of its duty and leave the matter at that. It was obligated having regard to the statutory scheme on the part of the Corporation to realize the price for the consideration of the goods supplied. It was not constituted merely to act as a conduit pipe. It was bound to perform its statutory duties envisaged under the 1989 Act.*
35. *Furthermore, it is one thing to say that the Respondent delivered goods without receiving 90% of the indented amount but it is another thing to say that it has waived its right. No case of waiver of statutory duty has been made out. Nothing has been pointed before us that the Respondent gave up its claim to receive the amount directly from the*

Corporation. Its conduct suggests contra. The Respondent for a period of about two years made those supplies and had been asking the Corporation to make its payment and, as noticed hereinbefore, the Respondent filed a suit at the earliest possible opportunity. Even during last 12 years, the Corporation made no effort to realize the amount from the State and pay the same to a small scale industry for whose benefit the 1989 Act was enacted. It had shown utter despondency and behaved in a cavalier manner taking umbrage under specious plea that the State was a necessary party. There was no privity of contract between the Corporation and the purchasing authorities. All payment of the purchasing authorities were to be channelised through the Corporation. Having regard to the transactions between the parties as also the Scheme and the Act, we are of the opinion that the State of Assam was not a necessary party.

36. In terms of the agreement between the parties hereto, the State of Assam would not be a necessary party but merely be a proper party.
45. We, therefore, are of the opinion that in relation to the transactions made prior to coming into force of the said Act, simple interest at the rate of 9% per annum, which was the bank rate at the relevant time, shall be payable both prior to date of filing of the suit and pendente lite and as future interest in terms of Section 34 of the Code of Civil Procedure. Interest, however, will be payable in terms of the provisions of the 1993 Act (compound interest at the rate of 23.5% per annum) in relation to the transactions made after coming into force of the Act, both in respect of interest payable upto the date of institution of the suit and pendente lite and till realisation. The judgment and decree to that extent requires to be modified. It is directed accordingly.” (Emphasis supplied).

18 The contention of the Defendants is that the facts set out in the judgment of the Apex Court in the Assam Corporation (supra), are distinguishable from the facts recorded in the instant case. It is submitted that in the Assam case (supra), the basis of the claim of the Plaintiff was under the Assam Preferential Stores Purchase Act (19 of 1989) (herein after referred to as the “Assam Act”). In the instant case, there is no such act applicable. It is further submitted that even the facts appearing in the Assam case (supra) are quite distinct and different from the facts appearing in the instant case.

19 I find from the judgment of the Apex Court in the Assam case (supra) that the facts/ factors considered by the Apex Court are as under:-

- (a) A specific scheme was framed under the Assam Act, which led to the creation of the Corporation.
- (b) The scheme framed under the Assam Act enabled the Corporation to provide for quality control, pricing, registration of Units as also indenting by the Corporation.
- (c) The Plaintiff SSI Unit was registered with the Corporation under the Assam Act and the scheme framed thereunder.
- (d) The manufacturer (principal) authorized the Corporation to raise bills of sale on their behalf disclosing or without disclosing the name of the Principal and to collect the

payment thereon from the buyers.

- (e) Marketing Support Scheme was floated/framed by the Corporation under the Assam Act.
- (f) In view of the Assam Act and the scheme framed thereunder, the Corporation exercised total control from quality to pricing to indenting and even supplying raw material.

It was after considering the above factors/ facts that the Apex Court concluded that the State of Assam which was the buyer, was not a necessary party, but was a proper party.

20 In the instant case, I do not find from the record any such Act applicable, similar to the Assam Act referred above under which any scheme could be said to have been formulated/ floated. There is no material placed before me to indicate that the Defendant/ Corporation had any control similar to the one exercised by the Corporation in the Assam case (supra) whereby, that Corporation had exercised control even in relation to the entire supply of raw material as a part of the statutory scheme, it undertook to collect the price of goods and it had total control over the quality of the product, etc..

21 In contra-distinction to the facts in the Assam Case (supra), a document was proved before the Trial Court in this case at Exhibit 128,

which is a specimen purchase order issued by the Defendant Corporation to the supplier/ Plaintiff. Though it is the case of the Plaintiff that his signature does not appear on the document exhibit 128, it was indisputable that the Defendant Corporation had issued such purchase orders to the supplier Shree Industries which the Plaintiff claims to represent. The Plaintiff had acted upon such purchase orders.

22 In Exhibit-128, the terms and conditions governing the supply order are mentioned. None amongst the parties, has placed before me any such agreement between the supplier Plaintiff and the Corporation Defendant, similar to the one as was signed by the supplier and the Corporation in the Assam Case (supra). Clause-25 which is the part of the terms and conditions mentioned in Exhibit-128, reads as under:-

“The price of the goods delivered and accepted by the consignee and when received from the consignee will be paid to the supplier by the Corporation subject to the deductions of advances, if any, paid by the Corporation and the service charges and other monies payable to the Corporation by the supplier. No advance payment will be made for any supply of the goods unless otherwise agreed to by the Corporation.”

Similarly, clause No.29 reads as under:-

“The Corporation and/or consignee may inspect the goods at various stages from time to time at their discretion. However, approval of the goods by the consignee shall be final and binding on the supplier.”

Clause-32 reads as under:-

“Corporation at its discretion may consider the request of the supplier and release appropriate amount against this order as an advance against the bank guarantee in the prescribed format as also release of 90% payment of the invoice value against submission of receipted delivery challan in the prescribed format.”

Clause-34 reads as under:-

“It is agreed by the supplier that since the Corporation is a State Government promotional agency and is not the ultimate consumer of the goods purchased vide this supply order, Corporation shall not be held liable under the Government of India Act 1993 for payment of interest on the delayed payments to the Units by the purchasers.” (emphasis supplied).

23 I have considered the submissions of the Plaintiff that the signature of the Plaintiff purportedly representing Shree Industries does not appear below the said terms and conditions set out in Exhibit-128. I, however, find that this is a dishonest contention and does not deserve any consideration as the Plaintiff has acted on the basis of the said purchase orders and has supplied the goods to the buyers on innumerable occasions. Even otherwise, if the said terms are held not applicable to the Plaintiff, then it means that there was no jural relationship existing between the Plaintiff and the Defendant.

24 The document at Exhibit-79 is a letter dated 9.1.2002 written

by the Defendants to the buyer and copy of which is forwarded to the supplier M/s Shree Industries. Vide the said letter, the Defendant/Corporation has pursued the bills raised by the Plaintiff and has also brought it to the notice of the buyer that the supplier is claiming interest on the outstanding amounts. Similar documents placed on record indicate that the Defendant had pursued the claim for interest by the supplier with the buyer.

25 Sections 3, 4, 5 and 6 of the 1993 Act read as under:-

“Section 3. Liability of buyer to make payment:-

Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed one hundred and twenty days from the day of acceptance or the day of deemed acceptance.”

“Section 4. Date from which and rate at which interest is payable:-

Where any buyer fails to make payment of the amount to the supplier, as required under section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at one-and-half time of Prime Lending Rate charged by the State Bank of India.

Explanation:- For the purposes of this section, “Prime Lending Rate” means the Prime Lending Rate of the State Bank of India which is available to the best borrowers of the bank.”

“Section 5. Liability of buyer to pay compound interest:-

Notwithstanding anything contained in any agreement between a supplier and a buyer or in any law for the time being in force, the buyer shall be liable to pay compound interest (with monthly interest) at the rate mentioned in section 4 on the amount due to the supplier.”

“Section 6. Recovery of amount due:-

- (1) The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force.*
- (2) Notwithstanding anything contained in sub-section (1), any party to a dispute may make a reference to the Industry Facilitation Council for acting as an arbitrator or conciliator in respect of the matters referred to in that sub-section and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such disputes as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub-section (1) of section 7 of that Act.”*

26 The contentions of the Plaintiff before this Court appear to be wholly based upon the observations of the Apex Court in the Assam Case (supra). These submissions made by the Plaintiff before this Court in view of the said observations in the Assam Case (supra), were neither canvassed before the Trial Court, nor before the first Appeal Court. Section 6 was not cited or relied upon.

27 In fact, a specific objection was raised by the Defendants that the Plaintiff is not the authorized representative or proprietor of the supplier M/s Shree Industries, inasmuch as, Sections 3, 4, 5 and 6 of the 1993 Act specifically make the buyer responsible for payment of amounts due to the supplier as well as interest and compound interest. Section 6 of the 1993 Act mandates that the amount due from the buyer together with the amount of interest calculated in accordance with the provisions of Sections 4 and 5, “shall be recoverable by the supplier from the buyer by way of a suit or other proceedings under any law for the time being in force”.

28 It is strenuously contended by the Defendants that Section 6 of the 1993 Act which mandates the buyer to recover the outstanding amounts with interest from the supplier by filing a civil suit, was not brought to the notice of the Honourable Supreme Court in the Assam Case (supra). So also, the Assam Act of 1989, the scheme framed thereunder and the agreement between the supplier and the Corporation (in the Assam Case), established supervision, control and direction of the Corporation as regards quality control, pricing and supply of raw material. All these aspects are missing in the instant case.

29 I find from the facts before the Honourable Supreme Court in the Assam case (supra) that the Apex Court had considered all factors in their totality while coming to a conclusion that the buyer was only a proper party and was not a necessary party. In the instant case, an Act similar to the 1989 Assam Act or a scheme framed thereunder or an agreement between the Plaintiff and the Defendants, are missing. Section 6 was not cited before the Apex Court. The only document indicating the terms and conditions governing the supply order in the instant case is at Exhibit-128. It is in the light of these distinguishable facts that I find that the Apex Court judgment (supra) is not applicable in this case. Clause Nos.25, 29, 32 and 34 below Exhibit-128 read with Section 6 of the 1993 Act, entitled the Plaintiff to file a civil suit for recovery of remainder amounts or interest thereon or future interest, from the buyer.

30 In both the suits before the Trial Court, issue No.4 was “*whether, the suit as such is maintainable?*” and issue No.5 was “*whether, the suit is bad for misjoinder or non-joinder of necessary party?*”. Insofar as answers to issue Nos.4 and 5 are concerned, the Trial Court, without considering the effect and meaning of Section 6 of the 1993 Act, has concluded in paragraphs 32 and 33 as under:-

“32. As far as maintainability of suit is concerned, the defendants could not show that, the jurisdiction of Civil Court is barred. Secondly, the contract was

executed at Aurangabad. This fact is admitted by witness of defendant. The work order was placed by the defendants at Aurangabad. In such circumstances, the suit is maintainable in this Court. Hence, I answer this issue accordingly.

33. *As far as mis-joinder and non-joinder of necessary party is concerned, the defendant has admitted that, the work order was placed by the defendants with the plaintiff. The plaintiff was supposed to raise the bills against the supply of goods and lodge them with defendants. It is also admitted by defendant that there was no direct contract between plaintiff and the consignees. In such circumstances, I find that, consignees are not necessary parties to the suit. Thus, the suit is maintainable in present form. I therefore answer this issue accordingly..”*

31 It is apparent from the above observations of the Trial Court that it has totally misdirected itself by not considering the scope and ambit of Section 6 of the 1993 Act. Merely because the work order as received by the Defendant from the buyer was forwarded to the Plaintiff by placing a purchase order (Exhibit-128), would not mean that the Defendant stepped into the shoes of the buyer. As observed herein above, in the absence of an Act, Scheme and an Agreement between the supplier and the Corporation, as was the case before the Apex Court in the Assam Case (supra), Section 6 will have to be strictly followed.

32 The Trial Court lost sight of the fact that the terms and conditions mentioned in the purchase order (Exhibit-128) r/w Section 6 of

the 1993 Act, mandated that the supplier should initiate a civil suit for recovery against the buyer. Ultimately, the outstanding monies as well as interest will have to be recovered from the buyer in view of the fact that the Defendant Corporation was in effect an agency which endeavoured to promote the cause and business of the Plaintiff. So also, the phraseology used in Section 6 is “*the amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of Section 4 and Section 5, shall be recoverable by the supplier from the buyer by way of a suit.....*”, thereby mandating that the supplier shall recover the amount from the buyer.

33 The first Appeal Court while dealing with the Appeals preferred by the Defendants had framed issue No.4 as “*whether, the suit as such is maintainable?*” and issue No.5 as “*whether, the suit is bad for misjoinder or non-joinder of necessary parties?*”. While answering these issues, the first Appeal Court has concluded as under:-

“As to point No.4:-

40. *Learned counsel for the appellants submitted that agreement came to be executed at Mumbai and therefore, court at Aurangabad has no jurisdiction to entertain the suit. This submission is also not acceptable since it has come on record that contract was executed at Aurangabad. This fact is admitted by the witness of the defendants. Even the work order is placed by the defendants at Aurangabad and agreement to that effect is unambiguous. Thus, the*

court at Aurangabad is having jurisdiction to entertain the suit. Such agreement between the parties is not hit by section 23 and 28 of the Contract Act.

41. *In this context reliance can be placed on the decision in case of M/s Angile Insulations Vs. M/s Davy Ashmore India Ltd. and another, AIR 1995 SC 1766. Thus, suit is maintainable and therefore, this point is answered accordingly in the affirmative.*

As to point No.5:-

42. *As per own agreement of the defendants, the work order was placed by the defendants with the plaintiff. Plaintiff was pleased to raise bills against the supply of goods and it is also admitted by the defendants that there was no direct contract between the plaintiff and the consignee. In such circumstances I find that consignees are not necessary parties to the suit. The suit is not bad for non-joinder of necessary party. Thus, this point is also answered accordingly.”*

34 I find that the first Appeal Court has committed the same error as has been committed by the Trial Court. There is no reference of Section 6 of the 1993 Act while answering issue No.5 by the Trial Court as well as the first Appeal Court. It is not in dispute that the Defendant had raised an objection to the maintainability of the suit on the ground of non-joinder or misjoinder of necessary parties. Both the Courts below appear to have got carried away by the fact that the Defendant was a channel through whom the work orders were being placed with the supplier.

35 The contentions of the Defendant as regards recovery of

amount by the supplier from the buyer as provided in Section 6, should have been considered in the light of the scope and ambit of Section 6. Nevertheless, I am not inclined to remand the matter to the Trial Court for this purpose since this appears to be a question of law and facts and this Court can deal with the said aspect on account of the evidence available on record. In this fact situation, I conclude that the Defendants cannot be held liable to pay interest on the delayed payment and/or future interest to the Plaintiff.

36 In the light of the above, Section 6 of the 1993 Act and in view of the prayers put forth in the plaints, I am of the view that the suits filed by the Plaintiff are not tenable against the Defendants. For the said reasons, the Defendants cannot be directed to pay interest on the delayed payments and/or future interest as has been erroneously directed by the Trial Court and the first Appeal Court. I, therefore, answer the substantial questions of law framed in the third and the fourth appeal.

37 Insofar as the substantial question of law framed in the first two appeals is concerned, since I have concluded that the suits preferred by the Plaintiff suffer from non-joinder of necessary parties and that the Defendants cannot be held liable to pay interest and/or future interest on delayed payments, the said substantial question of law stands answered

accordingly.

38 In the result, the first two Appeals i.e. Second Appeal Nos.626/2014 and 631/2014 filed by the Plaintiff stand dismissed. Consequentially, Second Appeal Nos.151/2015 and 152/2015 stand allowed. The impugned judgment and order dated 16.10.2010 delivered by the Trial Court in Special Civil Suit Nos.252 and 253 of 2002 stands quashed and set aside and both the said Suits stand dismissed. So also, the judgment and order of the first Appeal Court dated 15.07.2014 delivered in RCA Nos.376/2012 and 389/2012 stands quashed and set aside.

39 All pending Civil Applications stand disposed off. No order as to costs.

(RAVINDRA V. GHUGE, J.)

...