(2002) 03 GAU CK 0027

In the Gauhati High Court

Case No : Regular First Appeal No. 66 of 2000

Assam State Electricity Board and Others APPELLANT

Vs

M/s. Shanti Conductors (P) Ltd. and Another RESPONDENT

Date of Decision : 05-03-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Criminal Procedure Code, 1973 (CrPC) — Section 428
Interest Act, 1839 — Section 1
Interest Act, 1978 — Section 3
Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 — Section 10, 2, 3, 4, 5
Poor Removal Act, 1846 — Section 2

Citation : (2002) 1 GLT 547

Hon'ble Judges : R.S. Mongia, C.J;A.K. Patnaik, J;A.H. Saikia, J

Bench : Full Bench

Advocate : D.K. Mishra, H. Roy, B.D. Das, H.K. Sarma and Imti Longjem, for the Appellant; S.P. Roy, N. Alam, C. Barua, B. Das and K. Rajbongshi, for the Respondent

Judgement

R.S. Mongia, C.J.—Few facts which necessitated constitution of this Full Bench may be noticed.

Respondent M/s. Shanti Conductors (P) Ltd. (Plaintiff) had filed a suit against the Assam State Electricity Board, (hereinafter called "the Board) on 10.01.97 in the Court of Civil Judge Senior Division No. 1, Guwahati, for recovery of interest on delayed payment under the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (hereinafter called ''the Act''). The suit was decreed on 02.02.2000 by the trial Court. It is not necessary here to notice as to what was the amount of the decree or how calculations of interest on delayed payments were made by the trial Court. The Plaintiff had entered into a contract with the Board for supply of Aluminium Electrical Conductor to the Board. The contract had been entered into between the parties prior to 23.09.1992 which is the date of enforcement of the Act. Some payments towards the supply were made by the Board to the Plaintiff supplier prior to coming into force of the Act and payments were made thereafter. According to the Plaintiff the payments had not been made within the stipulated period.

2. Against the judgment and decree of the trial Court the Board filed the present appeal (RFA No. 66/2000). When the matter had come up for hearing before a Division Bench (Myself and A.H. Saikia, J.) it was argued on behalf of the Appellant that in fact the suit for mere recovery of interest under the Act was not maintainable in view of the provisions of Section 6 of the Act. According to the learned Counsel for the Appellant, on the date of filing of the suit no principal amount was due from the Board to the Plaintiff and consequently the suit for recovery or for realisation of mere interest only under the Act of 1993 was not maintainable. Reliance was placed on the observations in para 15 the judgment of Division Bench of this Court in Assam State Electricity Board and Another Vs. Trusses and Towers (P) Ltd., which are to the following effect-

15. A bare reading of the Section itself will show that there must be some amount due from a buyer and along with that amount a claim for interest may be made. No amount being due from the buyer, mere suit only for interest is not maintainable in view of Section 6(1) of the Act quoted above.

3. It was further submitted before the Division Bench hearing this appeal that the suit was not maintainable on two other grounds - (i) The contract between the parties had been entered into between the parties prior to the commencement of the Act i.e. 23.09.92, and (ii) Since the Plaintiff (now Respondents) had accepted payments of the principal amount without any reservation regarding the claim of interest under the Act, the suit was not maintainable. Reliance was again placed on the observations made in the same judgment of the Division Bench referred to above, which are to the following effect:

23. Accordingly, we hold as follows:

i) Once the principal amount is received by a person without any reservation, thereafter he cannot make a claim for a further sum either by way of principal or interest;

ii) The Act in question did not revive the claims which were satisfied earlier and on account that also the suit is not maintainable.

The Division Bench hearing the appeal had reservations about the correctness regarding the observations made in the aforesaid judgment of the Division Bench which have been referred to above, and considered it appropriate to refer the matter to a larger Bench and that is how the Full Bench is seized of the matter.

4. The Full Bench is called upon to answer the following questions:

(i) Whether the suit for recovery of mere interest under the interest only on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 is maintainable?

(ii) Whether in the present case the suit for recovery of interest under the Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 would not be maintainable as the contract for supply of goods between the parties was entered into prior to enforcement of the Act i.e. 23.09.1992?

(iii) Whether the suit for recovery of interest under the Delayed Payments to Small Scale and Ancillary. Industrial Undertakings Act, 1993 would not be maintainable if no reservation is made by the supplier retaining to it the right to recover interest under the Act when the payment(s) of the principal, sum is/are accepted, though these may be made beyond the prescribed period?

5. During the course of arguments before the Full Bench, we had asked the counsel for the parties to address us on an ancillary question i.e. whether the supplier can at all waive of in writing or otherwise his right to recover the interest under the Act in view of the provisions of Section 4 and 5 of the Act?

6. Before we proceed further, certain provisions of the Act may be noticed. Section 2(b) of the Act defines the ''appointed day'', Section 3 provides for the liability of the buyer to make payment, whereas Section 4 provides for the date from which and rate at which interest is payable. Section 5 provides for as to how interest is calculated. It provides that compound interest is payable on the delayed payment by the buyer to the seller. Section 6 provides for the recovery of the amount due together with interest. Section 10 states that the Act would have overriding affect. Sections 2(b), 3 to 6 and 10 of the Act may be reproduced:

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 therefore on or before the date agreed upon between him and the supplier in willing 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.

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 u/s 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-a-half-time, Prime Lending rate charged by the State Bank of India.

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.

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 matter 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 the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub-section (1) of Section 7 of the Act.

10. Over-riding effect-The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

7. Before proceeding further, the statement of objects and reasons for enacting the Act, which earlier came in the shape of Ordinance, may be noticed:

A policy statement on small scale industries was made by the Government of Parliament. It was stated at that time that suitable legislation would be brought to ensure prompt payment of money by buyers to the small industrial units.

2. Inadequate working capital in a small scale or an ancillary industrial undertaking causes serious and endemic problems affecting the health of such undertaking. Industries in this sector have also been demanding that adequate measures be taken in this regard. The Small scale Industries Board, which is an apex advisory body on policies relating to small scale industrial units with representatives from all the states, governmental bodies and the industrial sector, also expressed this view. It was, therefore, felt that prompt payments of money by buyers should be statutorily ensured and mandatory provisions for payment of interest on the outstanding money, in case of default, should be made. The buyers, if required under law to pay interest, would refrain from withholding payments to small scale and ancillary industrial undertakings.

8. As a matter of fact it may be noticed that in the present case some payments towards the supply had been made by Board to the Plaintiff supplier prior to coming into force of the Act (i.e. 22.09.92) and some payments had been made thereafter. Whereas in the case of M/s. Trusses &Towers. (supra) decided by the Division Bench all payments had been made prior to enforcement of the Act and no principal sum was due from the Board to the supplier on the date of the enactment of the Act.

First Question:

9. Learned Counsel for the Appellant while arguing that no suit merely for the recovery of interest under the Act of 1993 is maintainable referred to the provisions of Section 6 of the Act. He specifically drew our attention to the opening words of Section 6(1) of the Act (supra) which are to the following effect

- "Amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of Section.... "From these words, the learned Counsel emphasized that under the Act the suit would only be maintainable if any principal sum is due and also there should be some delayed payments on which interest is calculated as per the provisions of Sections 4 and 5 of the Act. Learned Counsel emphasized that both principal sum and the interest on delayed payment must simultaneously coexist for maintaining a suit under the Act. It was argued that the observations made in paragraph 15 of the Division Bench in M/s. Trusses & Towers (supra) are correct. Learned Counsel also referred to the provisions of Section 3 of the Interest Act of 1978 to contend that wherever the legislature wanted to give a right for filing a suit merely for recovery of interest, it had so provided. Section 3 of the Interest Act, 1978 is in the following terms:

Section 3. Power of Court to allow interest - (1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the Court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say -

(a) if the proceedings relates to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings ;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings;

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings interest shall not be allowed under this Section for the period after such repayment.

(2) Where, in any such proceedings as are mentioned in Sub-section (1) -

(a) judgment, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and

(b) the sum represents or inch des damages in respect of personal injuries to the Plaintiff or any other person, or in respect of a person''s death, then, the power conferred by that sub-section shall be exercised so as to include in that sum interest on those damages or on such part of them as the Court considers appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the Court is satisfied that there arc special reasons why no interest should be given in respect of those damages.

(3) Nothing in this Section -

(a) shall apply in relation to -

(i) any debt or damages upon which interest is payable as or right, by virtue of any agreement, or

(ii) any debt or damages upon which payment or interest is barred, by virtue of an express agreement;

(b) Shall affect -

(i) the compensation recoverable for the dishonour of bill of exchange, promissory note or cheque, as defined in the Negotiable Instruments Act, 1881 (26 of 1881), or

(ii) the provisions of Rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908).

(C) shall empower the Court to award interest upon interest.

(Emphasis supplied)

10. Learned Counsel also referred to the provisions of the Interest Act, 1839 to submit that prior to the Interest Act of 1978 suit for mere recovery of interest was not maintainable Section 1 of the Interest Act of 1839 is in the following terms:

1. It is, therefore, hereby enacted that, upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time ; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand give notice to the debtor that interest will be claimed from the date of such demand until the term of payment, provided that interest shall be payable in all cases in which it is now payable by law.

11. Learned Counsel for the Respondent Plaintiff (decree holder), however, argued that the suit is in fact not filed u/s 6 of the Act of 1993. The Act only provides for the liability of the buyer to pay certain rate of interest on delayed payment and Section 6 of the Act only creates a right in the supplier to recover the principal sum as well as the interest on delayed payments. Similar was the argument pertaining to the provisions of Section 3 of the Interest Act of 1978 as well as Section 1 of the Interest Act of 1839.

12. After hearing the learned Counsel for the parties on this point, we are of the view that the suit itself is not filed u/s 6 of the Act. It only says that the amount due from the buyer together with the amount of interest calculated in accordance with Sections 4 and 5 of the Act are recoverable by the supplier by way of suit or other proceedings. The suit is filed under the provisions of the CPC to realise the

recoverable amount as envisaged u/s 6 of the Act. The opening words of Section 6(1) "the amount due from the buyer, together with the amount of interest..." can only mean that the principal sum due from the buyer as well as or along with the amount of interest calculated under the provisions of the Act, are recoverable. The word ''together'' here would mean ''as well as'' or ''alongwith''. This cannot mean that the principal sum must be due on the date of the filing of the suits. The suits are maintainable for recovery of the outstanding principal amount, if any, along with the amount of interest on the delayed payments as calculated under Sections 4 and 5 of the Act. We are unable to agree with that if the principal sum is not due, no suit would lie for the recovery of the interest on the delayed payments, which might have already accrued. If such an interpretation is given the very object of enacting the Act would be frustrated. The Act had been enforced to see that small scale industries get the payment regarding supply made by them within the prescribed period and in case of delay in payments the interest would be at a much higher rate (1 1/2 times of lending rate charged by the State Bank of India). The obligation of payment of higher interest under the Act is mandatory. Sections 4 and 5 of the Act of 1993 contain a non-obstinate clause i.e. "Notwithstanding anything contained in any agreement between the buyer and the supplier". In other words, the parties to the contract cannot even contract out of the provisions of the 1993 Act. Even if such provision that interest under the Act on delay meant would not be chargeable is incorporated in the contract, Sections 4 and 5 of the Act of 1993 would still prevail as the very wording of these Sections indicates. Take for instance that the buyer has not paid the outstanding amount of the supply by the due date. After much delay he offers the outstanding amount of the supply to the supplier. If the argument of the learned Counsel for the Appellant is to be accepted, then, if the supplier accepts entire amount he would be losing his right to recover the amount of interest on the delayed payment under the Act. Therefore, he would have to refuse to accept the amount of payment and then file a suit for recovery of the principal amount and the interest on the delayed payment under the Act. The Act does not create any embargo against supplier not to accept principal amount at any stage and thereafter file a suit for the recovery or realization of the interest only on the delayed payments under the Act.

13. So far as the provisions u/s 3 of the Interest Act, 1978 are concerned, that would rather go to show that mere suit for interest is maintainable and the Court can grant interest on the amount of interest already accrued which is sought to be recovered through a suit. The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 is a special provision for the benefit of the small scale and ancillary industrial undertakings and in a suit for recovery of interest under the Act of 1978, the provisions of the Interest Act would not apply, but the provisions of the interest on Delayed Payments to Small Scale and Ancilliary Industrial Undertakings Act, 1993 would apply. The Interest Act, 1978 itself does not create any right to file a suit. It only envisages payment

of interest on the amount sought to be recovered by filing a suit. The recovery may be for debt, damages or claim of interest in respect of any debt or damages already paid. The provisions of Section 1 of the Interest Act of 1839 also do not create any right of filing a suit. Even if it is taken that this Act does not provide for awarding any interest by the Court on the suit for recovery of mere interest, it cannot be said that suit for mere recovery of interest would not lie. In normal suits for the recovery of any sum or interest only which may have accrued further can be awarded by the Court under the Interest Act of 1978. However, in view of the overriding affect of the 1993 Act in any suit for the recovery of the amount mentioned in Section 6 of the Act would be payable under the Act of 1993.

14. For the foregoing reasons, our answer to the first question is that a suit for recovery of mere interest only on delayed payments under the Act of 1993 is maintainable. As observed above, in M/s. Trusses & Towers case (supra) since on the date of the enforcement of the Act of 1993 i.e. 23 .09.92 no principal sum was due and all payments had been received by the supplier prior to that date, the question of enforcement of any right under the Act on any alleged delayed payment could not have arisen. We are of the view that the observations in para 15 of the said judgment (supra) were made under those peculiar facts and circumstances and it was not meant to lay down that suit for recovery for mere interest as calculated under the Act of 1993 would not lie. However, as a matter of abundant caution we may observe that if the aforesaid observations are to be read that mere suit for recovery of the amount of the interest only on delayed payments as calculated under the Act of 1993 would not lie, these observations and findings are hereby overruled.

Question No. 2

15. Learned Counsel for the Appellant submitted that the Act of 1993 cannot be made applicable to the contracts which had been entered into prior to enforcement of the Act i.e. 23.09.92. According to him if the said Act is applied to the contract which was entered into prior to the date of enforcement of the Act of 1993, it will amount to retrospective application of the Act to the transactions or contract which were made prior to 23.09.92. The parties could not visualise or foresee that such an Act was likely to be enforced at the time when the contract was entered into prior to 23.09.92. On the other hand, learned Counsel for the Respondent argued that if delayed payment is after enforcement of the Act though the contract may be earlier naturally it would entail applicability of penal clause of interest under the Act of 1993.

16. After hearing the learned Counsel for the parties on this point we are of the view that the 1993 Act would be applicable even to the contract which may have been entered into prior to the enforcement of the Act i.e. 23.09.92 where the payments as envisaged by the contract are delayed and made after enforcement of the Act, on such delayed payment the buyer would be liable to pay interest under the Act of 1993. The incidence or the sine qua non for payment of interest

under the Act of 1993 is not the terms of the contract but the delayed payment. Sections 4 and 5 of the Act of 1993 as observed above, contain non-obstante clause i.e. ''notwithstanding anything in the agreement. In other words, even if a buyer and the supplier were to agree that on delayed payments interest would not be paid as per the provisions of the Act of 1993 such a term in the contract cannot be enforced or come to the rescue of the buyer in view of provisions of Sections 4 and 5 of the Act which clearly provide ''Notwithstanding anything in the agreement''. However, in such a case interest on the delayed payment which is made after the coining into force of the Act of 1993 would be calculated under the Act from the date of the enforcement of the Act and not from the date of payment prescribed under the agreement. To illustrate, supposing the payment under the contract was to be made by 1st of January 1992, however, the payment is made on 1st of January, 1994. The interest under the Act of 1993 on the delayed payment will be calculated in accordance with the provisions of Section 5 of the Act from 23.9.92 to 1st January 1994 and not from 01.01.92. In support of what we have observed above, some case law may be cited. In Queen v. Inhabitants of St. Marry Whitechapel reported in (1848) 12 QB 120, the question related to the construction of Section 2 of the Poor Removal Act, 1846, which provided that ''no woman residing in any perish with her husband at the time of his death shall be removed from such perish, for 12 calendar month next after his death, if she so long continues a widow. In this case, a widow was sought to be removed within 12 months from the date of death of her husband who had died prior to the coining into force of the Poor Removal Act. It was argued by the official Respondents in that case that to apply the Act to such a case was to construe it retrospectively. It was the case of the official Respondent that the Act would be applicable to a woman who might become widow after the coining into force of the Act. In rejecting this contention Lord Denman CJ observed : "It was said that the operation of the statute was confined to persons who had become widows after the Act was passed, and that the presumption against a retrospective statute being intended supported this construction, but we have shown before that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing." In this case the words "shall be removed" thus found appropriate to cover all cases of future removal irrespective of whether the husband had died prior to the Act. However, their Lordships did not go to the extent that those widows who might have been removed from the perish less than one year before the enforcement of the Poor Removal Act to be given back the possession.

17. The aforesaid observations and the judgment was cited with the approval by the Apex Court in The State of Maharashtra Vs. Vishnu Ramchandra, In the said Supreme Court case the question was of interpretation of Section 57 of the Bombay Police Act, 1951 which was in the following terms -

Removal of persons convicted of certain offences -

If a person has been convicted -

(a) of an offence under Chapter XII, XVI or XVII of the Indian Penal Code (XI, V of 1860), or

(b) twice of an offence u/s 9 or 23 of the Bombay Beggars Act, 1945 (Bom. XXIII of 1945), or under the Bombay Prevention of Prostitution Act, 1923 (Bom. XI of 1923), or

(c) thrice of an offence within a period of three years u/s 4 or 12A of the Bombay Prevention of Gambling Act, 1887 (Bom. IV of 1887), or under the Bombay Prohibition Act, 1949 (Bom. XXV of 1949) the Commissioner, the district Magistrate or the Sub-Divisional Magistrate specially empowered by the State Government in the behalf, if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted, may direct such person to remove himself outside the area within the local limits of his jurisdiction, by such route and within such time as the said officer may prescribe and not to enter or return to the area from which he was directed to remove himself.

18. It was argued that the said Section would only be applicable if the convictions are after the coming into the force of Section 57 of the Bombay Police Act, 1951. No person could be removed u/s 57 if the convictions were prior to the coming into force of Section 57 of the Bombay Police Act. The argument was that if action is taken on the basis of the past convictions then the Act would be deemed to have been applied retrospectively. Negativing this argument the Apex Court observed as under -

12. Now, Section 57 of the Bombay Police Act, 1951, does not create a new offence nor makes punishable that which was not an offence. It is designed to protect the public from activities of undesirable persons to have been convicted of offences of a particular kind. The Section only enables authorities to take note of their convictions and to put them outside the area of their activities, so that the public may be protected against a repetition of such activities, as observed by Philimore, J. In Rex v. Austin 1913-1 KB 551 at p. 556.

No man has such a vested right in his past crimes and their consequences as would entitle, him to insist that in no future legislation shall any regard whatever he had to his previous history.

An offender who has been punished may be restrained in his Acts and conduct by some legislation, which takes note of his antecedents ; but so long as the action taken against him is after the Act comes into force, the statute cannot be said to be applied retrospectively. The Act in question was thus not applied retrospectively but prospectively."

19. Another authority of the Apex Court which may be cited with advantage is Boucher, Boucher Pierre Andre Vs. Superintendent, Central Jail, Tihar, New Delhi and Another, In this case question was of interpretation of Section 428 of Code of

Criminal Procedure which came into force with effect from 1st April, 1974. Section 428 Code of Criminal Procedure provided the benefit of set-off of pre-conviction detention period to an accused who was convicted and sentenced to some period of imprisonment. The question arose whether the said Section would be applicable to the conviction and sentence ordered after enforcement of Section 428 Code of Criminal Procedure or would be applicable also to those accused persons who might have been convicted and sentenced earlier to 1st April 1974 and are undergoing the sentence. The argument that if Section 428 Code of Criminal Procedure was applied to conviction and sentence already recorded prior to 1st April 1974 that would make the Section applicable retrospectively was repelled and it was observed as under:

Section 428 embraces cases where a person has been convicted before the coming into force of the new Code of Criminal Procedure but his sentence is still running at the date when the new Code of Criminal Procedure came into force. Section 428 on a plain natural construction of its language, posits for its applicability a factual situation which is described by the clause "where an accused person has, on conviction, been sentenced to imprisonment for a term". There is nothing in this clause which suggests, either expressly or by necessary implication, that the conviction and sentence must be after the coming into force of the new Code of Criminal Procedure. Hence, even where an accused person has been convicted prior to the corning into the force of the new Code but his sentence is still running, it would not be inappropriate to say that the "accused person has, on conviction, been sentenced to imprisonment for a term", and he would be entitled to claim u/s 428 that the period of detention undergone by him during the investigation, inquiry or trial of the case should be set off against the term of imprisonment imposed on him and he should be, required to undergo only the remainder of the term.

20. Apart from the above, we are of the view that the Act of 1993 is a beneficial legislation for the small scale and ancillary industrial undertakings. They must get full benefit of the Act from the date of its enforcement.

21. In view of the above observations, our answer to this question is that the Act of 1993 would be applicable even to the contracts entered into prior to the enforcement of the Act i.e. 23.09.92. However, the interest on the delayed payment would be calculated under the Act from 23.09.92 till date of payment.

Ancillary Question:

Before answering to Question No. 3, we deem it proper to answer the ancillary question first.

22. On the first brush when we read Section 4 and 5 of the Act it comes to mind that both the Sections start with non-obstante clause i.e. "Notwithstanding anything in the agreement" and, therefore, parties cannot contract out of the provisions of the Act. Even if such a provision is there in the contract that the buyer shall not be liable to pay interest under the Act of 1993 on the delayed

payment such a term would be a nullity and otiose and would not come to the rescue of the buyer. On the same parity of reasoning the question is, can the seller waive of his right to claim the interest under the Act of 1993 on the delayed payments? On due consideration of the matter we are of the view that the provisions under the Act of 1993 create a statutory liability against the buyer to pay the interest under the Act on the delayed payments. Simultaneously, it vests a right in the supplier to recover the interest on the delayed payments as calculated under the provisions of Sections 4 an 5 of the Act (see Section 6 of the Act). Under the Act, the liability cannot be waived by the buyer. However, there is no bar against the supplier to waive of his right to recover the interest on the delayed payments under the Act. A statutory right can always be waived. Seervai in his Treatise on Constitutional Law of India, 3rd Edition, Page 262 at para 8.44 has mentioned on the question of waiver as under:

8.44 What is the nature of waiver? Waiver (sic) proceeds on the basis that a man not under legal disability is the best judge of his own interest and if, with knowledge of a right or privilege conferred on him by statute, contract or otherwise for his benefit, he intentionally gives up the right or privilege, or chooses not to exercise the right or privilege to its full extent, he has a right to do so. In order to establish waiver it is necessary to establish that the person waiving his right had full knowledge or the right or privilege, and that the right of privilege was conferred principally for his benefit and not principally for the benefit of the public, for in the latter case it would be against the policy of the law to allow him to waive it.

It is only the fundamental right which cannot be waived by a citizen, but there cannot be any bar to a person to waive or give up his statutory right. Consequently, our answer to the ancillary question is that a seller can waive of his right of recovery of the interest on the delayed payments under the Act of 1993.

Question No. 3:

23. WE had heard learned Counsel for the parties on this point. We are of the view that the waiver is always a question of fact and in each case the waiver has to be proved as a fact on the basis of evidence (oral, documentary or circumstantial) as to whether the supplier has, waived of his right to recover the interest on the alleged delayed payments under the Act. Waiver is a question of fact which has to be pleaded and proved and there is no presumption under the law that if the payment is received without any reservation to claim the balance payment or the interest or the interest on the delayed payments under the Act of 1993, it would be presumed that the seller or the supplier had waived of his right to claim the balance payment, the interest or the interest on the delayed payment under the Act, as the case may be. In Kapur Chand Godha Vs. Mir Nawab Himayatalikhan Azamjah, it was observed as under:

(a) When a statute clearly covets a case, it is hardly necessary to refer to decisions. In deference, however, to the arguments advanced on behalf of the Appellants we refer to the two decisions on which learned Counsel for the Appellants has relied. One is the decision in Day v. Melea (1889) 22 QBD 610. In that case the Plaintiffs made a claim against the Defendants for a sum of money as damages for breach of contract, the Defendants sent a cheque for a less amount stating that it was in full payment of all demands. The Plaintiffs kept the cheque stating they did so on account and brought an action for the balance of their claim. It was held that keeping the cheque was not as a matter of law conclusive that there was an accord and satisfaction of the claim, but that it was a question of fact on what terms the cheque was kept. We do not think that decision is of any help to the Appellants. As Lord Justice Bowen said in (1889) 22 QBD 610 -

If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim, and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. It accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to Act upon that view. In either case, it is a question of fact.

(b) In Hirachand Punamchand v. Temple (1911) 2 KB 330 to father of a Doctor wrote to the creditor offering an amount less than that of the debt in full settlement of the debt and enclosing a draft for that amount. The creditor cashed and retained the proceeds of the draft and afterwards brought ah action against the debtor for the balance of the debt. It was held that the creditor must be taken to have accepted the amount received by him on the terms upon which it was offered and therefore he could not maintain the action. The case was considered under the English law and it was observed that assuming that there was no accord and satisfaction in the strict sense of the law in English, it could still be held that the creditor had ceased really to be holder of the negotiable instrument on which he sued. With the niceties of English law in the matter of accord and satisfaction we are not concerned. The position in the present case is that the Appellants must have known that they could receive the second instalment and retain the first instalment by accepting the condition on which the sum of Rs. 20 lacs was offered to them namely, that they must record a full satisfaction of their claim.

24. In our view the enunciation of law by the Division Bench in paragraph 23 of Trusses & Towers (supra), where the observations are to the effect that "once the principal amount is received by a person without any reservation, thereafter he cannot make a claim for a further sum either by way of principal or interest" are too widely stated and do not have our approval and hereby overruled. In D&C Builders Ltd. v. Rees reported in 1965 (3) AER 837, the contractor had even given a receipt after receiving less payment than due that he had received the

same in full and final settlement. Yet, it was held that he could prove that such a writing was given by the supplier under some compulsion and coercion or on the threat of receiving no amount at all. In other words, the waiver or satisfaction of the bill was allowed to be disproved by the supplier.

25. In view of the above discussions, our answer to this question is that it will depend on facts and circumstances of each case whether a particular right of recovery has been waived or not. The waiver will have to be proved as a fact as any other fact is proved under the Evidence Act by documentary, oral or circumstantial evidence.

Having answered the questions as aforesaid, let the case be placed before the Division Bench for decision in accordance with law.