
(2012) 02 GAU CK 0075
In the Gauhati High Court
Case No : Regular First Appeal No. 70 of 2006

Bongaigaon Concrete Industries (P.) Ltd.	APPELLANT
Vs	
State of Assam and Ors.	RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Civil Procedure Code, 1908 — Section 100
Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2013) 1 GLR 795

Hon'ble Judges : B.K.Sharma, J and P.K.Saikia, J

Bench : Division Bench

Advocate : Mr. S.P. Roy, Mr. N. Alam, Mr. D. Nandi , Mr. K. Rajbangshi for the appellant.??Mr. P.S. Deka for the respondents., Advocates appearing for Parties

Judgement

P.K. Saikia J.

1. This appeal is directed against the judgment dated 28.9.2005 passed by Smt. A. Devee, learned Civil Judge (Sr. Divn.) No.2, Guwahati in Money Suit No.40/1998 as well as the decree, drawn thereon partly allowing the suit against the defendant Nos. 1, 2 and 7 therein enabling the appellant/ plaintiff to realise from the defendant Nos. 1, 2 and 7 Rs. 33,320 only with pendente lite interest and future interest at the rate at which Nationalised Banks charge interest in relation of commercial transactions while dismissing the suit against the rest of the defendants.

2. Being aggrieved by the aforesaid judgment and decree, drawn thereon, the appellant has preferred this appeal on the grounds stated in the memo of appeal. For convenience of discussion, the appellants herein would be referred to as appellant/plaintiff, whereas the respondent Nos. 1 to 10 would hereinafter be referred to as respondents/ defendant Nos.1 to 10, respectively.

3. The factual matrix of this case, as .stated in the plaint, in brief, is that the plaintiff M/s. Bongaigaon Concrete Industries (P.) Ltd. is a limited company,

incorporated under the Companies Act, 1956 having its Registered Office and principal place of business at Neha Apartment, Sati Jaymati Road, Athagaon, Guwahati¹ and has been engaged in the business manufacturing of RCC Spun Pipes, Septic Tank, PVC Electrical of Railway Sleeper etc. The said company has also been registered as Small Scale Industrial Unit ("SSI Unit") with the Directorate of Industries, Government of Assam. The plaintiff No.2 is the Managing Director of the company, aforementioned.

4. It is stated in the plaint that in compliance of order(s) dated 26.12.1991, 26.6.1992 and 29.4.1992, the plaintiff company had supplied Executive Engineer, Kokrajhar Division (Irrigation), (the defendant No.6) 430 running meters of Hume Pipe through delivery challan and thereafter against such supply order(s), it also submitted the defendant No.6 the bill dated, 20.1.1992 for Rs 51,273, the bill dated 24.7.1992 for Rs. 27,052.70, the bill dated 31.03.1993 for Rs 44,358.52.

5. Further, as against the supply order, dated 29.4.1992 from the defendant No.6, the plaintiff submitted the former another bill dated 31.3.1993 for Rs. 03, 03, 428, 05 only. Through the bills aforesaid, the plaintiff, on different dates, claimed Rs.4,26,113.27 in total from the defendant No.6. But the defendant No.6 paid the plaintiff Rs. 20,000 only on 30.9.1992 as against the bill dated 20.1.1992 for Rs. 51,273, and since then, not a single farthing has been by the defendant No.6 to satisfy his outstanding dues amounting to Rs.4,06,113.27 only.

6. It is further been alleged in the pleading that complying the order dated 20.3.1992 from the defendant No.2, the plaintiff supplied the Executive Engineer, Dhubri Division (Irrigation) Gauripur, Assam, (the defendant No.7) the RCC Hume Pipe through delivery challan and in that connection, it had submitted said authority a bill to the tune of Rs.58,322.20 on 10.08.1992. Out of the aforesaid amount, the defendant No.7 paid the plaintiff Rs. 25,000 only on 26.8.1995. The defendant No.7 too did pay the plaintiff remaining dues although later keeps on demanding the same quite off and on.

7. It is also the case of the plaintiff that in response to the supply order dated 13.2.1992 from the defendant No.5; the plaintiff again supplied the Executive Engineer, Barpeta Division (Irrigation) Sorbhog, (the defendant No.8) the RCC Hume Pipe through delivery challan and submitted a bill in that regard on 29.8.1992 claiming Rs.42,229.80 paise only from the defendant No.8. However, the date not a single farthing has been released against such a bill. Owing to such failure on the part of the defendants the defendant Nos. 6, 7 and 8 in particular to pay his dues, the plaintiff requested them to clear the entire outstanding amount, same being Rs.4,81,663.31 only.

8. However, instead of paying his dues, the defendants keep on pleading that plaintiff's dues could not be cleared owing to paucity of fund. Having found no other way out, the defendants were served with notice under section 80 of the CPC demanding them to clear the arrear amount or to face the consequences.

The defendants received the notice, but did not clear the bills as demanded. In the meantime, on 31.3.1997, the defendant No.6 wrote a letter to the defendant No. 2 acknowledging that the defendant Nos. 1, 2 and 6 owed the plaintiff a debt to the tune of Rs. 3,47,787 only.

9. On 6.3.1997, the defendant No. 7 too wrote a similar letter to the defendant No. 2 admitting that the defendant Nos. 1, 2 and 7 owed the plaintiff a debt amounting to Rs. 33,320 only. Despite all those admission and acknowledgement, the defendants did not clear the dues which they owed to the plaintiff for which the later had instituted the suit in question for realization of entire outstanding amount Rs. 13,78,088 being such amount together with interest thereon at the rate as provided in section 4 of the Interest on Delayed Payment to a Small Scale and Ancillary Undertaking Act, 1993 ("the Act. 1993")

10. Summon of the suit was served upon the defendants and they entered their appearance and contested the suit having filed a joint written statement. Their case, inter alia, was that the suit was not maintainable; the same is barred by law of limitation; the suit is bad for misjoinder of parties inasmuch as the different divisions of the Irrigation Department, Government of Assam at different point of time placed different order(s) with the plaintiff requiring the later to supply the articles indented at places which fall under the jurisdiction of different Irrigation division, Government of Assam. Being so, debt arising out of all those supply order(s) cannot be club together in one suit requiring the court to grant one composite decree against all those claims.

11. It is also the case of the defendants that some of the supply order(s) pertain to one scheme known as the Dulidisha F.I. Scheme and it falls under jurisdiction of the Bodoland Autonomous Council areas ("BAG") for which funds are to be made available by the BAG authority aforesaid. Therefore, unless the said authority is made a party, the defendant Nos.4, 6 and 9, would not be in a position to clear any debts originating from bills submitted under the scheme, aforesaid more so when liabilities, under consideration, were incurred by those defendants long before the BAG came into existence.

12. The defendants have challenged the plaintiff's case also on the count that the plaintiff supplied materials far in excess of order, placed. Value of the materials, so supplied in excess of order, was said to be to the tune of Rs.69,909. What is equally important is that plaintiff also claimed the price of the materials, supplied in excess of the order, made. It was one of the reasons which came in the way of the defendants making payment against the bills, submitted against order dated 29.4,1992.

13. It is also the case of the defendants that the letter dated 6.3.1997 written by the defendant No. 7 and the letter dated 31.3.1997 written by the defendant No. 6 are not the letters containing any promise to pay time a barred debt from the side of the defendant No.6 or for that matter from the side defendant No.7. They are nothing more than mere internal official communications. A party before a

court of law, therefore, cannot utilize those documents they being inadmissible in law to advance his/her case.

13A. As far as part payments are concerned, it has been submitted that such claim too is without any substance, whatsoever, for, the payments made on 30.9.1992 and on 26.8.1995 were made against bill, dated 20.1.1992 and bill, dated 10.8.1992, respectively. In other words, such payments are bill specific and those bill specific payments cannot be treated as part payments as against the debt originating from other bills so as to extend the period of limitation against all the debt due from the defendants.

14. Regarding the interest, claimed, the defendants have pleaded that the plaintiff company was registered with the concerned District Industrial Centre as SSI Unit on and from 19.7.1993 only whereas transactions in question took on or before 1.1.1993. Being so, provisions of the Interest on Delay Payment to Small Scale and Ancillary Undertaking Act, 1993 are not applicable to claims which plaintiff has made in suit in question since on the dates on which those transactions took place, the plaintiff company was not a company registered as SSI, unit with concerned authority. In such a scenario, the plaintiff cannot claim interest on the decretal amount at the rate prescribed by the Act of 1993.

15. On all those counts, the defendants have, therefore, urged the court to dismiss the suit instead. The learned trial court after hearing the parties framed the following issues :

1. Whether there is a cause of action for the suit?
2. Whether the suit is barred by limitation?
3. Whether the suit is maintainable in its present form?
4. Whether the plaintiffs are entitled to realize Rs. 13,78,088 from the defendants.
5. Whether the plaintiffs are entitled for a decree as prayed for?
6. To what other reliefs the parties are entitled?

16. During the course of trial, the appellant/plaintiff had examined four witnesses and produced and proved a number of documents. The defendants did not adduce any evidence of their own but they only chose to cross-examine all the witnesses produced from the side of the plaintiff. After hearing the learned counsel for the parties and after going through the evidence on record, the learned trial court decreed the suit against the defendant Nos. 1, 2 and 7 therein requiring them to pay the plaintiff Rs. 33,320 only with interest at the rate as aforesaid while dismissing the suit against the rest of the defendants. It is that decree which have been assailed in this appeal on grounds, as stated in the memo of appeal.

17. The grounds, so stated in the memo of appeal, are (i) the learned trial court

erred in law and in fact; (ii) the learned trial court based its judgment on surmise and conjecture; (iii) the learned trial court also could not appreciate the fact on record in proper prospective; (iv) the decision of the learned trial court that the plaintiff is not entitled to claim the interest at the rate prescribed by the Act of 1993 is misconceived one both legally and factually; (v) the finding of the learned trial court on issue No.2 is absolutely perverse, bias and beyond pleading and (vi) the learned trial court could not understand the tone and tenor of Exhibit Nos.67 and 69 which are undoubtedly the letters in the terms of the section 25(3) of the Contract Act.

18. The other grounds on which the judgment, impugned, was assailed were (i) the decision of the learned trial court that without BAG being a party in the suit in question, the dispute between the plaintiff and the defendant Nos. 1, 2 and 6 cannot be adjudicated upon properly is also perverse more so when the Government of Assam which is the paramount authority of all other defendants in M.S. No.40/1998 as well as the BAG has already been impleaded as a party in the suit aforesaid and (ii) the learned trial court also could not properly appreciate the ratio enunciated by the hon"ble Apex Court of the country on section 20 CPC, reported in AIR 1993 SC 1681.

19. A bare perusal of the impugned judgment reveals that the learned trial court has decided the disputes before it issuewise and it rendered its decisions on all those issues as well. Thus, learned trial court has decided issue No.1 in favour of the plaintiff. On the other hand, the learned trial court has decided issue No.2 partly in favour of the plaintiff as it has held that the suit is barred against the defendant Nos.8 and 10 while it is maintainable against the other defendants. As regards the issue No.3, the learned trial court concluded that the suit is maintainable only in respect of the defendant Nos.1, 2 and 7. On the Issue Nos. 4, 5 and 6, the learned trial court has, however, rendered decisions some of which favour the plaintiff whereas others favour the defendants.

20. This is because of the fact that while the learned trial court has dismissed the suit against the defendant Nos. 3, 4 5, 6, 8, 9 and 10, it has decreed the suit against the defendant Nos. 1, 2 and 7. However, it has so decreed the suit against the defendant Nos. 1, 2 and 7 only to the extent of Rs.33,320 along with pendente life and the future interest on the decretal amount at the rate at which the Nationalized Banks charge interest in relation to commercial transactions. Above being the position, we find it necessary to discuss and decide the matter before us issue wise. For the sake of convenience of discussion, the Issue No.2 is first taken up for consideration.

21. Issue No.2 relates to the question whether the suit is barred by law of limitation. We have already found that the defendants has quite strenuously argued that suit in question is barred by law of limitation, a plea which was objected tooth and nail by the learned counsel for the plaintiff and such objection has been raised on counts more than one. First, it has been contended that the defendants made part payments against the bills, submitted by the plaintiff from

timetotime. Therefore, the period of limitation stood extended every time a part payment is made against any amount due from the defendants which enables the plaintiff to file the suit before the court of competent jurisdiction as late as 3rd March, 1998.

22. In that connection, it has been pointed out by the plaintiff that on 30.9.1992, the defendant No.6 made part payment against the bill dated 20.1.1992 (Exhibit No.5) which according to the plaintiff extended the period of limitation up to 29.3.1995, and that too against all the amounts, due from the defendants. Then on 26.8.1995, the defendant No.7 paid Rs.20,000 as against the bill dated 10.8.1992. Such payment again extended the period of limitation up to 25.8.1998 to enable the plaintiff to file the suit for realization of entire outstanding debt due from the defendants. Taking advantage of such situation, the plaintiff filed the suit above on 3.3.1998. These are all very fluent testimony of suit in question not being barred by limitation claims by the learned counsel for the plaintiff/appellant.

23. In that connection and also in order to show that a creditor has an indefeasible right to adjust a payment made by the debtor against any of the debt which the later owed to the former, the learned counsel for the plaintiff refers us to the decision of the hon''ble Supreme Court rendered in the case of Prem Nath Kapur and Anr. v. National Fertilizer Corpn. of India Ltd. and Ors., (1996) 2 SCC 71. In the aforesaid case, the hon''ble Supreme Court held as follows :

"11..... Even in general principles of law, section 60 of the Contract Act provides that where the debtor has omitted to intimate and there are no other circumstances indicating as to which debt the payment is to be applied, the creditor may apply it at his discretion, to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being, as to the limitation of suits. It would, therefore, be clear that the debtor may indeed exercise that right and may specify his appropriation expressly or his intention may be implied as shown by other circumstances, indicating that his intention at the time of payment was to appropriate the amount deposited by him to a specific debt or account towards the debt."

14. Equally, the right to make appropriation is indicated by necessary implication, by the award itself as the award or decree clearly mentions each of the items. When the deposit is made towards the specified amounts, the claimant/owner is not entitled to deduct from the amount of compensation towards costs, interest, additional amount under section 23(1A) with interest and then to claim the total balance amount with further interest.

24. The defendants show enormous hostility towards the argument, so advanced from the side of the plaintiff for the defendants have all along maintained that the plaintiff entered into a chain of contracts with different defendants covering

matters different altogether. Those contracts, therefore, cannot be amalgamated into one and same transaction. Quite contrary to it they are all completely independent contracts originating from different independent authorities, and that too, over different periods of time. The fact that the defendant Nos.6, 7 and 8 are all equal in status and the fact that they, being the Head of their respective division, exercised jurisdiction over a definite but different territories at all the material time makes the above conclusion totally inevitable.

25. In such a scenario, the payment made against one of such contracts would extend the period of limitation only against the contract against which such payment is made and not others. In other words, a payment simpliciter against one particular bill will never/ever extend the period of limitation in respect other contracts which the creditor may have against the debtor. The defendants have, therefore, urged this court to reject the contention of the plaintiff that the payments which the defendant Nos.6 and 7 had made on 30.9.1992 and on 26.8.1995 respectively extended the period of limitation in respect of all other debts arising out of bills, submitted to the different defendants at different points of time.

26. We have very carefully perused the materials on record having regard to the rival submissions, advanced by the parties to this appeal. On such a perusal, we have found that the transactions in question took place mainly between the defendant Nos.6, 7 and 8 on one side and the plaintiff on the other side. What is equally important is that all those transactions are quite independent in nature and different altogether from one another as well. The fact that the defendants defendant Nos. 6, 7 and 8 in particular are all equal in status and position and the fact that they, being the principal officer of their respective division, exercised jurisdiction over a definite but different territory make the above conclusion inescapable.

27. On our further perusal of the record, we have again found that the defendant Nos.6, 7 and 8, being the head of their respective division, placed with the plaintiff different supply order(s) over a long period of time and the plaintiff too, on his part, submitted separate bills against each of those supply order(s). The testimony tendered by the plaintiff particularly in his cross-examination makes such position vividly clear. These revelations are one more forceful testimony of contracts in question being totally different, being totally independent from one another. Therefore, unless otherwise arranged between parties, the payment made against any particular bill submitted against a particular supply order, cannot be adjusted against debts in other bills even if those bills were submitted to the same defendant.

28. We have, thus, found that on 3.9.1992, the defendant No.6 paid the plaintiff Rs.20,000. Such payment was made against the bill dated 20.1.1992. Said bill was submitted against the supply order dated 26.12.1991. The payment which was made on 30.9.1992, therefore, renewed the period of limitation up to 29.9.1995, and that too, only in respect of debt arising out of bill dated

20.1.1992. The payment made on 30.9.1992 served the plaintiff only that far and no further. Such payment has no role whatsoever in extending the period of limitation in respect of debts arising out of other bills, so submitted by the plaintiff in respect of the other supply order(s) received from the defendant No.6 leave alone such payments renewing the period of limitation in respect of the debt arising out of other bills, submitted to the defendant Nos. 7 and 8 against the various supply order(s) received from them.

29. Similarly, on 10.8.1992, the plaintiff submitted the defendant No. 7 a bill claiming an amount to the tune of Rs.58,320.20. On 26.8.1995, the defendant No.7 paid the plaintiff Rs.25,000 against the bill dated 10.8.1992. It is, thus, evident that the payment which the defendant made on 26.8.1995 was made well beyond the statutory period of limitation. In other words, such payment was made against a time barred debt. Being so, unless it is shown that such payment is made in compliance of requirement of section 25(3) of the Contract Act, the payment made on 26.8.1995 does not even extend the period of limitation in respect of the debt arising out of bill dated 10.8.1992 beyond 9.8.1995 far too less its extending the period of limitation in respect of debt arising out of other bills, submitted to either the defendant No. 6 or the defendant No. 8.

30. In view of above, we are of the clear opinion that the that payment which the defendant No. 6 had made on 30.9.1992 extended the period of limitation in respect of debt arising out of bill dated 20.1.92 only up to 29.9.1995 and not a day beyond. On the other hand, the payment which the defendant No. 7 made on 26.8.1995 had no role, whatsoever, in extending the period of limitation against any of the debts arising out of the bills, so submitted by the plaintiff to any of defendants aforesaid more so when there is absolutely no evidence on record to show that the payment which the defendant No.7 made on 26.8.1995 was made in satisfaction of the requirement of section 25(3) of the Contract Act.

31. In the face of above disclosures, we cannot peruse ourselves to accept the contention of the plaintiff that the payment which the defendant No. 6 had made on 30.9.1992 against the bill dated 26.12.1991 had extended the period of limitation to file the suit in question up to 29.9.1995 whereas subsequent payment which defendant No.7 had made on 26.8.1995 against the bill dated 10.8.1992 again extended such a period of limitation up to 25.8.1998. Consequently, we are constrained to hold that the payments which were made on 30.9.1992 and on 26.8.1995, no way save the suit in question from being barred by law of limitation.

32. Our conclusion that the payments aforesaid no way save the suit in question from being barred by law of limitation finds support from yet another factor. In matter of adjustment of a sum against very many dues from the same debtor, the hon'ble Supreme Court of India in the case of Prem Nath Kapur (supra) at para 14 has clearly held that when the deposit is made towards the specified amounts, the claimant/owner is not entitled to adjust such deposit towards other dues which debtor may owe to him.

33. Our foregoing discussion has, now, clearly established that the payment which the defendant No.6 made on 30.9.1992 and the payment which the defendant No. 7 made on 26.8.1995 were not in general in nature. Quite contrary to it, such payments are bill specific only. Those bill specific payments, therefore, cannot be allowed to be adjusted against other dues which defendants owed to the plaintiff. This is one more testimony of payments under consideration payment made on 30.9.1992 in particular extending the period of limitation only in respect of debt in bill dated 20.1.1992 up to 29.9.1995 and not a day beyond.

34. The plaintiff further contends that it has at its disposal of two very important documents to show that even if the original claim is found to have been barred by law of limitation yet the communications which the defendants made in response to the request made by the plaintiff in his notice under section 80, CPC clearly revived the cause of action from the date of such communications inasmuch as such communications fulfill all the conditions laid down in section 25(3) of the Contract Act. Now, let us see how far the aforesaid claim is found to be tenable in view of the materials available on record.

35. On our further perusal of the record, we have found that the Exhibit Nos.67 and 69 are those two documents referred to by the plaintiff, which according to the latter has extended the period of limitation up to 2010. As the suit involved in this appeal was filed on 3.3.1998, it can easily be held that aforesaid suit is not barred in view of the operation of the aforesaid provisions of the Contract Act argues the learned counsel for the plaintiff/appellant.

36. It is in this context, it may be stated that the learned trial court too has considered the Exhibit Nos.67 and 69 and came into the conclusion that those two documents are the communications, made in the terms of section 25(3) of the Contract Act and as such, those two documents extended the period of limitation by another three years w.e.f. date of execution of those two documents against all the defendants except the defendant No. 8 and defendant No. 10. In recording such a finding in favor of the defendant Nos. 8 and 10, learned trial court held that those two defendants not being a privy to such communications in any way whatsoever cannot be saddled with the liability arising out of aforesaid communications.

37. Above being the findings of the learned trial court on Exhibit Nos.67 and 69, it needs to be ascertained how far above findings of the trial court stand to reason. However, before we proceed further, we find it necessary to have a look at the provisions of section 25 of the Contract Act, Section 25(3) in particular. For ready reference provisions of section 25(3) is reproduced below :

38. In order to invoke the provisions of section 25(3), the following conditions must be satisfied :

(i) It must refer to a debt which the creditor but for the period of limitation, might have enforced;

(ii) There must be a promise to pay wholly or in part such debt; (iii) The promise must be in writing and (iv) It must be signed by the person or by his duly appointed agent.

39. It is worth noting here that the promise to pay may be explicit or implied. In this context we may profitably peruse the decision of Hon''ble Bombay High Court in the case of *Mis. R. Sureshchandra & Co. v. Vadnere Chemical Works and Ors.*, AIR 1991 Bom. 44. In the case aforesaid, hon''ble Bombay High Court held as follows :

"10.....I understand that after the expiry of the period of limitation nothing short of a clear promise can provide a fresh period of limitation. But such a promise can also be inferred by necessary implication. The Supreme Court in *Hirala v. Badkulal*, AIR 1953 SC 225 quoted with approval a Privy Council decision in *Maniram v. Seth Rupchand*, 33 Ind Appeals 165 (PC) (C), that an unconditional acknowledgement was sufficient to furnish a cause of action for it implied to pay....."

40. It is in those backdrops, let us see whether Exhibit Nos.67 and 69 are the promise made in the terms of section 25(3) of the Contract Act. Once again, we have proposed to consider Exhibit Nos.67 and 69 separately and Exhibit 69 is first to be taken up for consideration. For better appreciation of the matter before us, we proposed to reproduce the relevant part of Exhibit No.69.

"Para No.3 It is admitted that in respect to the order Memo No.5/ XXVI/7743 dated 26.12.1991 the party had supplied R.C.C. Hume Pipe to this Division the value of which comes to Rs.51,273 including other taxes etc. Accordingly bill for Rs.51,273 has been prepared and by charging to Bongaigaon Flow Irrigation Scheme for Rs.51,273 which is lying in Divisional Office by this time an amount of Rs.20,000 had already been paid to the party concerned as part payment on 30.9.92 and the balance amount of Rs.(51,273 20.000) = 31,273 could not be paid till to date for want of fund.

Para No.4 It is admitted that in compliance with the order No. Misc/3/ XXVI/5152 dated 26.6.1992 the firm concerned had supplied R.C.C. Hume Pipe for Rs.27,054 during the month of March 1993, the bill of which has been prepared and recently submitted by the Asstt. Executive Engineer, Kokrajhar to the Divisional Office which is in process to pass for making payment subject to availability of fund. This bill is concerned with Goalpara Salbari Irrigation Scheme.

Para No.5 It is admitted that in pursuance of order No. DIMJ/TS10/7/ 8788/246 dated 29.4.1992 of the Chief Engineer, Irrigation Department (Irri) Assam, Guwahati³, the firm concerned had supplied R.C.C. Hume Pipe for 3,47,787 during the month of February 1994, the materials were taken against the Irrigation Scheme of Improvement of Bhorasora Irrigation Scheme and Khowra. The bill totaling Rs. 3,47,787 has been prepared submitted by the Asstt. Executive Engineer, Kokrajhar SubDivision (Irrigation) Kokrajhar recently to the Divisional Office which is in process to pass for making payment subject to the

availability of fund."

41. A very careful perusal of Exhibit No.69 in the light of section 25(3) of the Act reveals that there is no iota of any promise in the Exhibit No.69 much less a promise to pay a time barred debt. Being so, one of the most fundamental conditions to bring Exhibit No.69 within the bound of section 25(3) is found very conspicuously lacking in Exhibit No.69. In the teeth of such revelation, we have no hesitation at all in holding that Exhibit No.69 can never ever be called to be a promise, made in terms of the provisions of law aforesaid.

42. On yet another account as well, Exhibit No.69 is required to be rejected. It is a settled law that internal official communication cannot be used in propagating or in destroying the claims of the parties before the court. In that regard, we can have reliance on the decision rendered by hon"ble Apex Court of the Country in the case of MD, U.P. Land Development Corporation and Another v. Araar Singh, (2003) 5 SCC 388.

43. In the aforesaid decision, the hon"ble Apex Court held as follows :

"Having perused the impugned order in the light of the documents referred to above and keeping in view the rival contentions urged on either side, we are of the view that the impugned judgment and order of the High Court cannot be sustained for reasons more than one. The internal note and order of the Corporation, which is made the basis for the claim that twenty five posts were available on regular basis, is itself not correct. At this stage we may observe that the internal note and order dated 2111990 was prepared by the Director of the Corporation for his own purpose, but strangely enough a copy of the same was produced by the respondents in the writ petition. We fail to understand how the copy of this internal note and order came into the hands of the respondents."

44. On the perusal of Exhibit No.69 in between the lines, we have found that it is nothing but an internal official communication between the defendant No. 2 (The Chief Engineer, Minor Irrigation, Assam, Chandmari, Guwahati) and defendant No. 6 [The Executive Engineer, Kokrajhar Division (Irrigation) Kokrajhar]. The fact that even a copy of the same was not marked to the plaintiff makes such position more than clear. Being so, in our considered opinion, no reliance can be placed on the aforesaid exhibit in view of decision entered in the case of Amar Singh (supra).

45. So situated, let us focus our attention to Exhibit No.67 in order to know if the same is a promise within the meaning of section 25(3) of the Contract Act. We have very carefully perused the Exhibit No.67 as well. On such a perusal, it is found that in the Exhibit No.67, the defendant No.7 [The Executive Engineer, Dhubri Division (Irrigation) Sorbhog] admitted to have owed the plaintiff an amount to the tune of Rs.33,320 and requested the Chief Engineer, Minor Irrigation, Assam, Chandmari, Guwahati, (defendant No.2) to release necessary fund to make the payment against the aforesaid outstanding liability. More importantly, a copy of the same was also marked to the plaintiff company.

46. When all those things are considered in their totality, it would appear clear that in Exhibit No.67, there is an implied promise to pay a time barred debt which the defendant No.7 owed to the plaintiff. As such, Exhibit No.67 may be treated as a promise within the meaning of provisions of law aforesaid. However, as held by the learned trial court, Exhibit No.67 can be treated as a promise to pay a time barred debt only in respect the defendant No.7 inasmuch as the Contract in question out of which liability as aforesaid has arisen was entered into between the plaintiff and the defendant No.7 and none else.

47. In view of what we have discussed hereinbefore and what have emerged therefrom, we are of the opinion that suit in question is barred against all the defendants except defendant Nos. 1, 2 and 7. But then, it survives only in respect of an amount to the tune of Rs.33,320 only and to that extent only, the decision of the learned trial court on this count is found tenable in law and as such, same stands modified in the terms of our decision aforementioned. This issue stands decided accordingly.

48. Once again, the learned counsel for the plaintiff/appellant has contended that one more factor requires the court to hold that the suit under consideration is not barred by law of limitation and in that context, it has been submitted that in the regular course of business, the plaintiff continues to maintain its books of account where all the transactions which plaintiff made in the course of business are/were recorded. The transactions which the plaintiff had made with the defendants too stood recorded therein.

49. Said transactions which have huge bearing on the matter in dispute in the suit in question have extended the period of limitation every time plaintiff made any record in such books of account in respect of the debts in question. In that connection, the learned counsel for the plaintiff/appellant has referred us to the decision of hon''ble Apex Court in the case of Gordon Woodroffe & Co. v. Sheikh M.A. Majid & Co., AIR 1967 SC 181. However, the decision, so rendered in the case, above, has no application the case under consideration as the facts and circumstances in the case aforesaid are materially different from the facts and circumstances of the case under consideration.

50. The learned counsel for the plaintiff/appellant has again referred us to the decisions of hon''ble Apex Court rendered in the case of Kamala Devi and Ors. v. Pt. Manilal Tewari and Ors., (1976) 4 SCC 818, J.C. Budhraj v. Chairman, Orissa Mining Corporation Ltd. and Anr., AIR 2008 SCW 800 as well as the decision of hon''ble Bombay High Court in the case of the Cadar Construction v. Tar a Tiles, AIR 1984 Bom. 258 to show that the Suit in question has never/ever been barred by the law of limitation. However, the facts and circumstances in the cases aforesaid not being at all identical with the facts and circumstances of the suit, we have been talking about, the ratio laid down therein finds no application to such a case.

50A. This brings us to Issue No.3. Said relates to the question of maintainability

of the suit registered as Money. Suit No. 40/1998. The trial court on considering the materials on record and also after hearing the parties came to the conclusion that the suit is not maintainable in respect of the defendant Nos.4, 6 and 9, for BAG not being made a party in the suit in question for according to the learned the trial court the BAG is a necessary party inasmuch as without BAG being in the suit as a party an effective decree cannot be passed in the aforesaid suit against the defendant Nos.4, 6 and 9. Such a decision of the learned trial court comes under severe criticism from the side of the plaintiff who claims it to be bankrupt both factually and legally.

51. According to the plaintiff when the contracts in question were entered into between the plaintiff and the defendants, the BAG was not in existence at all since it came into being only during the pendency of the aforesaid suit. Being so, the BAG not being a party is not at all fatal to the case instituted by the plaintiff more so when Government of Assam, as well as the Chief Engineer, Minor Irrigation, Assam have already been there as a party in such a suit.

52. The fact that Government of Assam is not only the ultimate authority of defendant No. 2 to defendant No. 10 but of the BAG as well, coupled with the fact that defendant Nos.4, 6 and 9 still continue to exercise jurisdiction over their assigned territories in the BAG area, make such a conclusion inevitable and inescapable. Being so, the decision of the learned trial court that the suit is not maintainable for the BAG not being a party is legally unsustainable contends Id. Counsel for the plaintiff.

53. Disputing such a contention, learned counsel for the defendants has submitted that the argument, so advanced by the learned counsel for the plaintiff, is premised more on conjecture and fiction than on facts for learned trial court has rightly held that without the BAG being a party in the suit in question, no effective decree can be passed against defendant Nos. 4, 6 and 9 for realization of an amount to the tune of Rs.4,06,144 from them since the BAG is a necessary party in the proceeding we are talking about. This is because of the fact that the defendant Nos. 4, 6 and 9, being the authorities subordinate to and working under the BAG, could not release any fund without the approval of such an authority.

54. Now, we need to know whose claim stands to reason in view of materials on record and the law which holds the fields on the matter under consideration. But before we could answer the above query, we need to know as to who is a necessary party. In this context, we can peruse the decision rendered by the hon''ble Supreme Court in the case of Assam Small Scale Industries Development Cooperation Ltd. and Ors. v. J.D. Pharmaceuticals and Anr., (2005) 13 SCC 19. In the case of the J.D. Pharmaceuticals (supra), hon''ble Supreme Court had the occasion to consider as to who are the necessary party/proper party in a particular suit. Hon''ble Supreme Court in the aforesaid case held as follows :

"34. In Balvant N. Viswamitra a distinction has been made between a proper party and a necessary party in the following terms :

25. It was contended by learned counsel for the respondents that the respondents were not made the partydefendants in the suit and hence no decree could have been passed nor could be executed against them. We are afraid we cannot uphold the contention. It is the case of the plaintiffs that the property was let to Papamiya. It is not even the case of the respondents that they were the tenants of the plaintiffs. They are claiming through Papamiya. At the most, therefore, they can be said to be subtenants, i.e., tenants of Papamiya. There was no privity of contract between the landlord and the respondents. In our opinion, therefore, it was not necessary for the plaintiffs to join the respondents as defendants in the suit nor to give notice to them before initiation of the proceedings. The respondents cannot be said to be "necessary party" to the proceedings.

26. As held by this court in Udit Narain Singh Malpaharia v. AMI. Member, Hoard of Revenue, Bihar there is a distinction between "necessary party" and "proper party". In that case, the court said :

The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is onein whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

55. The answer to the question as to who is a necessary party having been found, we need to know whether or not the BAG is also a necessary party in the case in question. Our desire to get an answer to the above query again takes us to the materials on record. On the perusal of the materials on record very carefully, we have also found that at the time, when contracts in question were executed by the parties to Money Suit No.40/1998, the BAG was not in existence. Record further reveals that the BAG came into being during the pendency of such a suit. But then, we must not overlook the fact that defendant No. 4, 6 and 9 are the officers working under the direct control of the BAG and, therefore, they represent the BAG rather than their representing the Government of Assam in the said suit in question.

56. All these facts were brought to the notice of the plaintiff by the defendants through the narration that they have made in their Written Statement. These revelations speak loud and clear that the defendant Nos.4, 6 and 9, being the authorities working under the BAG and also being the authorities totally subordinate to it, cannot release any fund without the approval of such an authority. In that view of the matter, the BAG is undoubtedly a necessary in the suit aforementioned and its not being made a party in the suit in question despite it being so told

by the defendants affects adversely the plaintiff at least in respect of claim

against the defendant Nos. 4, 6 and 9.

57. The schemes of the things, as arranged in the Bodoland Autonomous Council Act, 1993 lend more and more credence to the above conclusion of us. The relevant provisions of which have bearing on the dispute before us can be found in section 24 and section 46 of the aforesaid Act and the same are reproduced below :

"24. Matters to be under the control and administration of the General Council subject to the provisions of this Act and any other law for the time being in force, the General Council shall have executive powers in the area relating to the following subjects, namely :

*** **

5. PWD

46. Council Fund. (1) There shall be a fund to be called the "Council Fund" under the separate SubHead within the State budget to be held for the purpose of this Act and all moneys realised or realisable under this Act and all moneys otherwise received by the General Council shall be credited thereto.

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(6) The money credited to the Council Fund shall be applied for payment of all sums, charges and costs necessary for carrying out the purposes of this Act.

(7) No payment shall be made out of the Council Fund unless such expenditure is covered by a current budget grant:"

58. A perusal of the relevant provisions of the Act unambiguously demonstrates that all the departments which are assigned to the BAG which include P.W.D. as well are to work under the guidance, control, supervision and above all under the authority of the BAC and none else. The defendant Nos.4, 6 and 9 who are the officers from the P.W.D. working under the BAC and who are exercising jurisdiction over the areas which fall within the territory assigned to the BAC would therefore never venture to release a single farthing towards the satisfaction of a decree even if it originates from a court of competent jurisdiction unless they get necessary approval from the BAC.

59. These are, in our considered opinion, very emphatic testimony of the BAC being a necessary party in Money Suit No.40/1998 since no effective decree can be passed against the defendant Nos. 4, 6 and 9 without BAC being a party in such a suit. The presence of the Chief Engineer, Minor Irrigation, Assam or for that matter, the presence of Government of Assam no way, therefore, alter the status of the BAC in the suit in question. In that view of the matter, we cannot find fault with the decision of the trial court that BAG is a necessary party and suit is not maintainable in respect of the defendant Nos. 4, 6 and 9 for such an authority not being impleaded as a party in Money Suit No.40/ 1998.

60. The above conclusion of us finds more and more strength from the decision rendered by this court in the case of V.N. Enterprise and Anr. v. State of Assam and Ors., 2005 (DGLT389 in the aforesaid case, this Hon''ble High Court held as follows :

"17. The learned trial court also held that the suit could not be decreed being bad for nonjoinder of the Karbi Anglong Autonomous Council. There is no dispute that the Karbi Anglong Autonomous Council has not been impleaded as a defendant. The plaint shows that the State of Assam represented by the Secretary of Public Health Engineering Department, the Chief Public Health Engineer and others including Executive Engineers have been impleaded as defendants. The Secretary, the Chief Public Health Engineer and other Engineers of the Department are the officials of the State of Assam. Their services have been placed at the disposal of the Karbi Anglong Autonomous Council and they are to act in terms of the orders passed by the Council from timetotime. For all practical purposes, they function as officers of the council with lien to their present posts. In this connection the Office Memorandum No.HAD.57/95/316 dated 31st December, 1996 may be the modalities incorporated therein clearly indicate that the administrative control of the Council over the officers and staffs at its disposal is final in all matters of intra Council transfer and posting. Annexure 1 to the aforesaid memorandum clearly shows that Public Health is one of the subject over which the Council has executive powers. From different letters written by the respondent authority it is clear that no payment could be made without previous sanction of the Council. That being the situation, the Karbi Anglong Autonomous Council is a necessary party in the absence of which any decree that may be passed cannot be executed. The appellantfirm did not implead the Council as one of the defendants. The suit is, therefore, bad for defect of parties".

61. The facts and circumstances in the case aforesaid, being very akin to one, we have been seized with here, clearly demonstrate that the suit in question is bad in respect of claim against the defendant Nos.4, 6 and 9 for the BAG not being a party in Money Suit No. 40/1998. This issue is accordingly decided affirming the decision of the trial court on this issue.

62. Issue No. 1 : Learned trial court after considering the pros and cons of the matters in dispute and having regard to rival submissions, advanced by the learned counsel of the parties came to the conclusion that the suit in question finds a cause of action for its survival. On going through the materials on record, we have found no reason to differ with the finding of the trial court on this count. This issue is accordingly decided and in favor of the plaintiff.

63. Issue Nos.4, 5 and 6. Here, we are to decide (a) whether the plaintiff is entitled to claim Rs. 13,78,088 from the defendants in Money Suit No.40/ 1998; (b) Whether the plaintiff is entitled to the decree as prayed for, and (c) what relief is entitled to. Before we address and answer aforesaid questions, we need to know whether plaintiff is entitled to claim Interest on the decreetal amount at the rate prescribed under the Interest on Delayed Payment to Small Scale and

Ancillary Industrial Undertakings Act, 1993 ("the Act of 1993"). The learned trial court has held that the plaintiff is entitled to claim interest not at the rate prescribed under the Act of 1993 but at the rate at which Nationalized Bank charged interest in relation to commercial transactions.

64. In coming to aforesaid decision the learned trial court held that plaintiff company registered itself as Small Scale Industrial Unit with the concerned authority on and from 19.7.1993 whereas the parties aforesaid entered into contracts in question prior to 1.1.1993 which clearly comes in the way of aforesaid company claiming the interest at the rate prescribed by the Act of 1993. This decision of the trial court has been put to challenge by the defendants contending that aforesaid decision of the trial court is unfortunately not based on facts on record but on surmise only. We have given our anxious consideration to the aforesaid argument in advanced from the side of the plaintiff keeping in view of the material on record.

65. On such a perusal, we have found that the plaintiff company was registered as SSI Unit with the District Industrial Centre, Kokrajhar w.c.f. 14.10.1982. However, the certificate, so issued by the District Industrial Centre, Kokrajhar was renewed by the Joint Director of Industries, Government of Assam w.e.f. 19.7.1993. Being so, it is well apparent that the plaintiff company has been registered as a SSI Unit with the concerned authority not from 19.7.1993 but from 14.10.1982 instead. The decision of the learned trial court that at the relevant time, the plaintiff company was not a registered SSI Unit is, therefore, found to be not based on facts on record.

66. But then, we need to know if the Act of 1993 has retrospective effect. This question assumes importance because of the reason that the Act of 1993 came into operation on and from 23.9.1992 whereas most of the supply order(s) which are the Subject Matter of the suit aforesaid were executed long before the Act of 1993 came into operation. The learned counsel for the plaintiff, however, contends that the Act of

1993 operates retrospectively as well and in that connection, it has referred us to the decision of hon"ble Gauhati High Court reported in (2002) 1 GLT 547 (FB) rendered in the case of Assam 8KB v. Shanti Conductors (P.) Ltd.

67. However, law on this point has been laid down by a Court no less than the hon"ble Supreme Court of India. Hon"ble Supreme Court of India in the case of J.D. Pharmaceuticals (supra) held as follows :

"38. The 1993 Act, thus will have no application in relation to the transactions entered into between June 1991 and 23.9.1992. The trial court as also the High Court, therefore, committed a manifest error in directing payment of interest at the rate of 23% up to June 1991 and 23.5% thereafter.

39. Mr. Choudhury has placed reliance upon a Full bench decision of the Gauhati High Court in Assam 8KB v. Shanti Conductors (P.) Ltd. which having regard to

the nonobstante clause in sections 4, 5 and 10 of the 1993 Act opined that interest payable thereunder shall embrace within its fold even the contracts which might have been entered into prior to the enforcement of the Act stating :

However, in such a case interest on the delayed payment which is made after the coming into force of the Act 1993 would be calculated under the Act from the date of enforcement of the Act and not from the date of payment prescribed under the agreement.

With respect, we do not subscribe to the said view as payment of interest at an enhanced rate cannot be made in relation to the transactions where section 3 will have no role to play."

68. Applicability of the Act of 1993 to the transactions entered into prior to 23.9.1992 having been ascertained, we are to see if there are any transaction/ transactions which were entered into after 23rd September, 1992 and if so, whether the plaintiff is entitled to claim interest on the amount payable against such transactions) at the rate of interest prescribed by the aforesaid Act. We have, however, already found that all the transactions made by the plaintiff save and except the transaction for Its.33,320 get barred/rejected for one reason or other". The lone and sole claim which survives is found to have based on the bill dated 10.8.1992 for Rs.58,320 out of which Rs.25,000 had been paid by the defendant No.7 on 26.8.1995 leaving an amount to the tune of Rs.33,320 outstanding till date.

69. We have already found that the aforesaid debt too stood barred for necessary litigation not being brought in time. However same gets a fresh lease in view of commitment made in Exhibit No. 67. The commitment made in Exhibit No. 67 clearly takes such a document within the bound of section 25(3) of the Contract Act. But the fact remains that transaction in question took place before the coming into force of the Act into operation on 23.9.1992. Being so, such a transaction is not covered by the Act of 1993 to enable the plaintiff to claim interest over the decretal amount at the rate prescribed by the Act of 1993.

70. Above being the situation, the plaintiff, in view of the decision of the hon''ble Supreme Court of India, rendered in the case of J.D. Pharmaceuticals (supra), is not entitled to claim interest on the decretal amount at the rate prescribed under the Act under reference. But then, when one considers the long delay in making payment against the bills, there cannot be any escape from the conclusion that the plaintiff is entitled to claim interest on decretal amount at the rate at which Nationalized Bank charged interest in relation to commercial transactions.

71. In seeking interest on decretal amount at an enhanced rate, the learned counsel for the plaintiff/appellant has also referred us to the decision of the hon''ble Supreme Court in the case of Syndicate Bank v. R. Veeranna and Ors., AIR 2003 SCW 136. However our foregoing discussion, now, makes it more than clear that the plaintiff is entitled to claim interest on decretal amount only at

the rate at which Nationalized Bank charged interest in relation to commercial transactions. Being so, the decision rendered in the case of R. Veeranna (supra) has no application to our instant case.

72. The learned counsel for the plaintiff has also referred us to the decision of the hon"ble Supreme Court in the case of Union of India v. Ladulal Jain, (1964) 3 SCR (Equivalent citation being AIR 1963 SC 1681), Gordon Woodroffe & Co. v. Sheikh M.A. Majid & Co., AIR 1967 SC 181 and Af/s. Kamal Distillery Co. Ltd. v. Union of India, (1977) 3 SCC 506. However, we have found that law laid down in those cases has no application to our instant case as the facts and circumstances in those cases are materially different from case which is the SubjectMatter of the present appeal.

73. In view of the above, it is decided that the plaintiff is entitled to a decree for recovery of Rs.33,320 from the defendant Nos.1, 2 and 7 jointly and severally along with pendente lite and future interest at the rate at which the Nationalized Banks charge interest in relation to commercial transactions. Issue 4, 5 and 6 are accordingly decided affirming the decisions of the trial court on all these issues subject to the modification as indicated in para No.47.

74. In the result, the appeal is dismissed affirming the judgment and decree of the trial court as indicated above, enabling the plaintiff to realize Rs.33,320 along with pendente lite and future interest on the decretal amount at the rate of interest granted by the learned trial court. However, parties are left to bear their own costs.

75. Let a copy of this Judgment together with LCR be returned to the trial court immediately.