

(2013) 01 AHC CK 0452

In the Allahabad High Court

Case No : First Appeal from Order No. 2485 of 2009

Godrej and Boyce Manufacturing Company Ltd.

APPELLANT

Vs

Secur Industries Ltd. and Another

RESPONDENT

Date of Decision : 24-01-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 3, 32(2), 34, 37
Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings
Act, 1993 — Section 2(10), 3, 3, 4, 4

Citation : (2013) 97 ALR 307 : (2013) 3 AWC 2683

Hon'ble Judges : Sunil Ambwani, J; Aditya Nath Mittal, J

Bench : Division Bench

Advocate : Shashi Nandan, Yashwant Verma, S.P. Gupta, M.S. Bhavya Tewari, R.D. Sulakhe and Raghav Nayyar, for the Appellant; R.P. Agrawal, Atul Dayal, Girish Singh and K.N. Tripathi, for the Respondent

Final Decision : Allowed

Judgement

Sunil Ambwani and Aditya Nath Mittal, JJ.—This first appeal from order u/s 37 of the Arbitration and Conciliation Act, 1996 (for short, the Act of 1996) arises out of judgment and order dated 28.7.2009 passed by the District Judge, Kanpur Nagar in Arbitration Case No. 36/70, Godrej and Boyce Manufacturing Company Limited v. Secur Industries Limited, by which he dismissed the application u/s 34 of the Act of 1996, moved by Godrej and Boyce Manufacturing Company Limited to set aside the award dated 19.6.2007 made by the U.P. State Facilitation Council (for short, the old Council) subsequently established under the new Act as U.P. State Micro and Small Enterprises Facilitation Council (for short, the Council). The Council awarded a total amount of Rs. 16,75,24,654.29 including, (i) claims made in various debit notes of Rs. 4,72,88,000 and interest @ one and a half time of the prime lending rate charged by the State Bank of India compounded with monthly rests on the principal amount from 2.10.1999, till the date of the award under Sections 4 and 5 of the Act of 1993 of Rs. 12,02,36,654.29. We have heard Shri Shashi Nandan, senior counsel assisted by

Shri Yashwant Verma for Godrej and Boyce Manufacturing Company Limited-the objector-appellant; and Shri K.N. Tripathi, senior counsel assisted by Shri Atul Dayal for the respondent.

2. M/s. Secur Industries Limited Ghaziabad-the claimant-respondent filed a Claim No. I.F.C. 40 of 2001, before the U.P. State Facilitation Council (old Council) u/s 6(2) of the Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993 (for short, the Act of 1993) with the averments that the parties had entered into an agreement on 12.8.1994 for supply of various items; the terms and conditions of supply, determination of price and other terms and conditions were mentioned in the agreement. The agreement was prematurely terminated on 9.10.1998 before the stipulated period of five years. Some disputes arose between the parties regarding payment of the price of goods supplied under the agreement. A note of demand was sent but that the applicant did not make any payment. The claim was filed in October, 2001.

3. The claim was forwarded by the Council to Godrej and Boyce Manufacturing Co. Ltd., on 27.12.2001, asking it to respond. After seeking extension of time to reply without prejudice to its legal rights and contentions, the Godrej and Boyce Manufacturing Co. Ltd. filed a suit in City Civil Court at Bombay for declaration that reference of the claim to the Council was ultra vires the provisions of the Act and, therefore, illegal, null and void. The City civil court. Bombay granted interim injunction on 5.2.2002 which was ultimately rejected on 28.11.2002, on the ground that in view of Section 5 of the Act of 1996, no Court could interfere in arbitration proceedings. An appeal was filed in Bombay High Court, which stayed the proceedings on 21.1.2003 before the Council, on the ground that no notice was served on the appellant company by Secur Industries Ltd. The application of Secur Industries Ltd. for expediting the proceedings was rejected. Secur Industries Ltd. filed a Civil Appeal No. 1417 of 2004 in the Supreme Court, which was allowed on 26.2.2004. The Supreme Court in the judgment in Secur Industries Ltd. Vs. Godrej and Boyce Mfg. Co. Ltd. and Another , held that the High Court erred in staying proceedings before the Council. It had no jurisdiction to do so. In para 12 of judgment it was held:

12. The arguments which have been raised before us by the learned counsel on behalf of the respondent to a large extent related to the merits of the appellant's claim before the Council. Having regard to the scope of the authority of the Arbitral Tribunal u/s 16, this is not a matter which the Court can adjudicate upon. Indeed it is incumbent on the Court to refer the parties to arbitration u/s 8(1) of the 1996 Act if a suit is filed in a matter which is the subject matter of an arbitration agreement. Furthermore, even while this question is pending decision before a Court, the Arbitral Tribunal may proceed with the arbitration u/s 8(3) and make its award. The High Court could not, therefore, have stayed the proceedings before the Council.

4. During the pendency of the proceedings before the old Council, the Act was repealed, and was replaced by Micro. Small and Medium Enterprises

Development Act of 2006 (for short, the new Act) which came into force on 2.10.2006. The old Council was renamed with the new Council, which made an award in favour of the respondent on 19.6.2007 signed on 25.7.2007. Aggrieved the appellant-objector filed an application u/s 34 of the Act of 1996. The District Judge, Kanpur Nagar dismissed the application with the findings that the draft award was prepared by the General Manager (Law) of the old Council and was submitted on 22.2.2007. The then Chairman of the old Council kept the award with himself for about three months and ultimately returned the draft award on 31.5.2007, with an endorsement that further hearing is required on certain points. Notices were issued to both the parties fixing 19.6.2007 for further hearing. In Writ Petition No. 16862 of 2007 filed by Secur Industries Limited for expeditious delivery of award a statement was given by learned standing counsel appearing for the State respondents that the award is ready and is only the printing and other formalities, which are required to be performed and will be completed at the earliest. In the circumstances, the High Court did not find it necessary to issue any directions and disposed of the writ petition.

5. A second Writ Petition No. 20744 of 2007 was filed by Secur Industries Limited, which was disposed of on 25.4.2007 with the observations that the standing counsel appearing for the State respondents has stated that for some unavoidable reasons the award could not be delivered to the petitioner, and an assurance was given that the award may be delivered very soon. The Court did not find any reason, as to why, if the award was ready as per the statement given by the standing counsel on 4.4.2007, it was not delivered and observed that in case if the award is not delivered, the same may be delivered at the earliest. The new Act of 2006 came into force on 2.10.2006. The award could not be delivered under the old Act of 1993. It was held by the District Judge that the award was in fact printed on the stamp paper after 23.7.2007 and was signed by the Chairman and Members of the new Council on 25.7.2007. The objection, that it was prepared earlier and was signed subsequently without any further hearing, was of technical nature, and that the award passed by the statutory body cannot be thrown away on the basis of a mistake, which was not material and relevant.

6. The District Judge held that in the circumstances, in which there is specific endorsement in the order sheet of the Council dated 19.6.2007, learned counsel for both the parties are present and there is a direction of Hon'ble High Court, that the award be passed expeditiously, no new factual or legal points have been argued on either side before the new Council. The matter was heard by the Council earlier and the award was drafted by the earlier Council. In the circumstances, there was no need of fresh hearing as the draft award was already in existence and the new Council was ready to deliver the same. Section 32(2) of the new Act provides that notwithstanding the repeal of the old Act anything done or any action taken under the Act so repealed under sub-section (1) shall be deemed to have been done or taken under the corresponding provision of the new Act. Since the claim was filed before the old Council, the hearing concluded before the old Council on 21.9.2006 which prepared the draft

award, therefore, if the order has been passed by the new Council, it shall be deemed to have been done or taken under the corresponding provisions of the new Act of 2006.

7. On the question of interest the District Judge held that the imposition of interest is mandatory according to the provisions of both the old Act of 1993 or the new Act of 2006. The calculation of interest has been done according to the provisions of the old Act of 1993. If there is any mistake in calculating the interest, the same is always open to correction, even at the stage of execution proceedings.

8. On the question of objection to the debit notes, which were not shown in the annual return filed by the opposite party and the jurisdiction of the Council to award compensation, the District Judge held that the Council has examined each and every debit notes minutely. The opposite party claimed the loss of profit not only on the cost of locks supplied, but also on the cost of locks short lifted by the Godrej and Boyce Manufacturing Company Limited. The Council did not allow the loss of profit claimed on the costs of locks, not supplied to the Godrej and Boyce Manufacturing Company Limited. The Council was justified in making an award as well as in awarding packaging charges as per the debit notes. The debit notes were sent regularly to the buyer-company. The Council considered all the points including that whatever bills received were paid by the Godrej and Boyce Manufacturing Company Limited and also the letter by which it is alleged that full and filial payment was made. The Council considered this point and also held that payment of Rs. 2,86,997.97 was only by way of a part payment. All the debit notes were considered separately and that some of the debit notes and claims were not found within the ambit of the Act of 1993 and were disallowed.

9. The District Judge also considered the question of limitation and held that the Council has considered the issue as issue No. 3 and found that the claim of the opposite party was denied for the first time on 14.1.1999 and finally again on 25.10.2001 and thus the claim before the Council filed on 10.10.2001 was not barred by limitation.

10. On the objection raised by the Godrej and Boyce Manufacturing Company Limited that the Council had no jurisdiction to pass the award in respect of actionable claims like loss of profit, higher cost, compensation etc. the finding of the Council is that under Clause 10 of the agreement, which is the relevant clause, Godrej and Boyce Manufacturing Company Limited had guaranteed specified minimum quantity and the price of locks were fixed on the basis of such minimum guaranteed quantity.

11. The Clause 10 further provided that in case of failure to lift the minimum guaranteed quantity, the prices will stand enhanced to compensate the supplier higher cost, and, therefore, the Council had jurisdiction to pass award in respect of such higher cost. The Council further found that as per Clause 22 of the agreement, packing of the locks was to be made in special packing for which the

supplier was entitled to claim cost of such packing in addition to the price fixed under Clause 10 of the agreement. The supplier was entitled to additional price to compensate the higher cost. The District Judge held that the Act of 1993 is a beneficial legislation and has been passed to protect the interest of small scale industries. The object and purpose of the Act was to ensure timely payment to the S.S.I./ancillary units by the buyers. The object of the Act is not to ensure payment only for the price of goods charged initially in the bills and to leave the payment of additional price payable as per the terms of the contract on happening of some subsequent events to the whims and fancies of buyer. The provisions of the Act of 1993 have to be taken in correct perspective and in the light of objects and purposes of the Act. It can thus be safely concluded that the obligation of the buyers extend to all the dues of Small Scale Industrial units, which relates to supply of goods. The claims for additional price are not excluded. Section 3 of the Act mandates that the buyers shall make payments for the goods supplied by Small Scale Industrial units. The claim of the opposite party relates to the price of the goods supplied as per Clauses 10 and 22 of the agreement dated 12.8.1994. The Council thus had jurisdiction to entertain and to award claims on such heads.

12. The District Judge held that relying on M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro, , that the Court has no power to substitute its opinion in the conclusions arrived at by the Arbitrator and cannot adjudicate on the decision of the Arbitrator either upon law or on the facts except on the grounds envisaged u/s 34 of the Act of 1996. The award is neither against the public policy, or the principles of natural justice nor is patently illegal. The award has also not been obtained by fraud. It has been passed by a statutory body and thus it cannot be set aside on the grounds of trivial nature on hyper technical grounds.

13. Before considering the arguments raised by Shri Shashi Nandan, challenging the award and the judgment of the District Judge, dismissing the arbitration case u/s 34 of the Act of 1996, it is necessary to mention some facts relating to the interim orders passed by this Court against which a Special Leave to Appeal (Civil) No. 16276 of 2011 was filed by Godrej and Boyce Manufacturing Company Limited.

14. By the orders dated 7.9.2009 and 14.10.2009, the appellant was required to deposit half the amount awarded as a condition of stay of the execution of the award. The appellant deposited Rs. 8,37,62,327.15 with the Registrar General of the High Court by demand draft dated 11.9.2009 of which the receipt dated 19.9.2009 was placed on record. An application was made to withdraw the amount on which on 9.2.2011 an order was passed in which the Court framed a question, "as to whether the appeal is maintainable under the Arbitration and Conciliation Act". Shri S.P. Gupta, senior counsel appearing for the Godrej and Boyce Manufacturing Company Limited-the appellant submitted that the respondents have not raised any objection as to the maintainability of the

appeal. The question has been raised by the Court suo motu, which does not arise in the course of deciding the modification application.

15. In the order dated 18.2.2011 the Court framed the question as to whether the appeal is maintainable and further recorded the objections of the appellant, that the Bench presided by Mr. Justice P.C. Verma on the nomination made by Hon"ble the Chief Justice was restricted to decide the application of the respondent seeking modification of the order dated 7.9.2009 and has jurisdiction to proceed with the merits of the appeal. By the order dated 18.2.2011 the Bench presided over by Hon"ble Mr. Justice P.C. Verma referred the matter to Hon"ble the Chief Justice for appropriate orders. The matter was thereafter nominated to the Bench presided over by Hon"ble Mr. Justice R.K. Agarwal, and then to us.

16. The Godrej and Boyce Manufacturing Company Limited filed the Special Leave to Appeal (Civil) No. 16276 of 2011, in which on 8.7.2011 the Apex Court stayed further proceedings in the appeal. The I.A. No. 1 of 2012 was filed by the respondent/applicant for vacating the interim order on which the Apex Court passed the following order on 24.8.2012:

I.A. No. 1 of 2012, has been filed on behalf of the respondents/applicants, praying that the interim order passed on 8th July, 2011, staying further proceedings in the appeal filed by the petitioner u/s 37 of the Arbitration and Conciliation Act, 1996, be vacated.

During the course of hearing of the said application, it was suggested on behalf of the respondents that in view of the apprehension of the petitioner that the Bench, which may be requested to hear the matter, might be influenced by the observations already made in the impugned judgment and order, the SLP itself could be disposed of with an observation that the Bench hearing the matter, should hear out the question of maintainability of the appeal, without being influenced by such observations. The submissions made on behalf of the respondents for a direction to the High Court to hear out the appeal is justified and is also not opposed on behalf of the petitioner.

Accordingly, we dispose of the special leave petition, alongwith the interlocutory application, by requesting the Acting Chief Justice of the Allahabad High Court, to ensure that the question relating to maintainability of the appeal is decided expeditiously and, if possible, within a period of three months from the date of communication of this order.

In fact, as suggested by the learned counsel for the petitioner, the appeals themselves could be disposed of at the same time alongwith such other applications, as may have been filed by the respondents.

17. On the receipt of the order from the Apex Court the matter was placed before us as the regular Bench hearing first appeals from orders.

18. Shri Shashi Nandan, senior counsel appearing for Godrej and Boyce

Manufacturing Company Limited-the appellant submits that the impugned award is a fraud upon the Court, mala fide against the public policy, of India. No award was rendered by the Council constituted under the Act of 1993 at least till 2.10.2006, when the same was repealed and replaced by the Act of 2006. The newly constituted Council under the Act of 2006, which has rendered the award on 19.6.2007, neither heard parties nor applied its mind to the Issues raised to the principle that one, who hears, must decide. The Competent Authority did not even undertake a finding exercised which was placed for consideration of the decision making authority. The Council, which rendered the award on 19.6.2007, neither applied its independent mind nor discharged the statutory obligation imposed upon the arbitral Tribunal.

19. It is submitted on behalf of the appellant, that the General Manager (Law) of the Council, drew the draft award in February, 2007, which was considered by the erstwhile Chairman of the Council in May, 2007. He returned the award with the comments that further hearing on contentious issues were required. Neither in February, 2007, nor in May, 2007, the earlier Council constituted under the Act of 1993 existed nor was its Chairman competent to make the award. With the repeal of the Act of 1993 on 2.10.2006, the erstwhile Council ceased to exist and did not have any jurisdiction or authority to render an award under the provisions of the Act of 2006. No award final or draft existed on 2.10.2006, and, therefore, the impugned award is liable to be set aside by the Court.

20. It is submitted on behalf of the appellant, that even if it is assumed that an award was rendered on 21.9.2006, when in fact the judgment itself records that the same was drafted by the General Manager (Law) in February, 2007, and forwarded for perusal of the erstwhile Chairman in May, 2007, the order sheet of 21.09.2006 appears to have been signed by the members of the erstwhile Council in May and June, 2007 at a time, when the said Council no longer existed and its Chairman and the members had demitted the office. The papers and proceedings prepared by the Council were fabricated and designed to non-suit the appellant.

21. Shri Shashi Nandan submits that saving clause contained in Section 32(2) of the Act of 2006, is of no avail as the erstwhile Council (old Council) never prepared any award, draft or otherwise before 2.10.2006. The District Judge failed to notice the fundamental flaw in the exercise of jurisdiction of the new Council.

22. Shri Shashi Nandan submits that the claims raised against the appellant were neither covered under Sections 3, 4 and 5 nor could be referred in arbitration u/s 6 of the Act of 1993. These claims did not relate or pertain to the supply of goods. In fact, the whole basis of the claim was the failure on the part of the appellant to lift the minimum quantity prescribed in the agreement. The provisions of the Act of 1993 or Act of 2006 did not confer jurisdiction on the Council to adjudicate or render the award upon contentions and assertions made in any claim petition. The basis of the claim was consequent to an alleged failure

on the part of the appellant to lift the minimum contracted quantity on which it became entitled to a higher cost or higher remuneration. The Council had no jurisdiction to render an award on such actionable claims. The entitlement to a higher cost was not an arbitral issue nor one which could have been subject-matter of reference under the Act. So far as higher cost is concerned, the agreement clearly envisaged and contemplated with the agreement or contentious amongst parties on the escalated rates to be paid. There was no agreement amongst parties for payment on any higher rate. The absence of any agreed higher rate did not raise any issue referable for adjudication under the Act. There was no failure nor there was any violation of the terms of the contract. There is no provision in the Act empowering the Council to award amounts towards higher cost of production, loss of profit, packaging material cost etc. The Council rendered the award on issues, which could not be referred to arbitration.

23. It is further submitted on behalf of the appellant, that various debit notes were filed but there was no evidence to establish that these were ever served on the appellant. No proof of service was ever filed before the arbitral Tribunal and on the undisputed fact the claim was barred by time and beyond the period of limitation. The supplier had accepted all the payments in full and final satisfaction of the claims and having accepted the payments, it was not open to it to seek reference to arbitration nor was it open to the Council to proceed to arbitrate the same. The award even otherwise suffers from manifest error of law.

24. Shri Shashi Nandan has relied upon *The United Commercial Bank Ltd. Vs. Their Workmen*, ; *Faze Three Exports Ltd. Vs. Pankaj Trading Co. and Others*, and further on *European Grain and Shopping Limited v. Richer Johnson* 1982 WK 222167, on the proposition that he, who hears, must decide. He relies on *Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (Intern.) Company Ltd.*, and *Union of India (UOI) and Others Vs. Master Construction Co.*, , in submitting that where the payments have been accepted in full and final of the claims, no further dues or dispute regarding payment can be raised, making the claims arbitral issues.

25. Shri Shashi Nandan placed reliance on *Shakti Tubes Ltd. Vs. State of Bihar and Others*, and *Purbanchal Cables and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and Another*, , to support his submissions that the Act of 2006 is not retrospective in nature and further on *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, : *Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation*, and *Oil and Natural Gas Corporation Vs. Wig Brothers Builders and Engineers Pvt. Ltd.*, , in submitting that the claims raised by the suppliers were contrary to the contract.

26. Shri Shashi Nandan submits that the Act of 2006 is not retrospective in nature. The right to appeal provided in the Act of 2006 is a substantive provision, and a new remedy, which is prospective in nature. He has relied upon *Thirumalai Chemicals Limited Vs. Union of India (UOI) and Others*, , in support of his

submission.

27. Shri Shashi Nandan submits that for the purposes of calculating the limitation, what is relevant is the last date of supply of goods, and not when the goods were received or debit notes were issued. Under Article 14 of the Schedule appended to the Limitation Act, the period prescribed for filing of the suit is three years from the date of delivery of goods. In the present case, the contract was for delivery of goods and thus the residuary Article 113, which provides for three years when the right to sue accrues is not attracted.

28. Shri K.N. Tripathi appearing for Secur Industries Limited (the respondent-company) has defended the award and the judgment of the District Judge, dismissing the application u/s 34 of the Act of 1996. He submits that Section 3 of the Act of 1993, does not exclude actionable claims. The Act of 1993 was enacted as a substantive law so far as the interest is concerned and included the principal amount also where it was due and was not paid. He submits that the old Council as well as the new Council were within their jurisdiction to entertain the claim for additional price for the goods supplied under Clauses 10 and 22 of the agreement dated 12.8.1994. In *Modern Industries Vs. Steel Authority of India Ltd. and Others*, it was held that word "due" has a variety of meanings, in different context it may have different meanings. In its narrowest meaning, the word "due" may import a fixed and other obligation and liability. In a wider context the amount can be said to be "due" which may be recovered by action. The amount, that can be claimed as "due" and recoverable by an action, may sometimes be also covered by the expression "due". The expressions "amount due from a buyer" followed by the expressions "together with the amount of interest" under sub-section (1) of Section 6 of the Act of 1993 must be interpreted keeping the purpose and object of the Act of 1993 and its provisions, particularly Sections 3, 4 and 5. The expression does not deserve to be given a restricted meaning as that would defeat the whole purpose and object of the Act of 1993. Sub-section (1) of Section 6 provides that the amount due from a buyer together with 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 suit or other proceedings under any law for the time being enforced. The Scheme of Section 6 of the Act of 1993 read with Sections 3, 4 and 5 do not envisage multiple proceedings. The whole idea of Section 6, it was held in *Modern Industry's* case, is to provide a single window to the supplier for redressal of his grievance where the buyer has not made payment for goods supplied or services rendered in its entirety or part of it or such payment has not been made within the time prescribed u/s 3 for whatever reason and for recovery of interest as per Sections 4 and 5 for such default.

29. Shri K.N. Tripathi has relied upon the debit notes, the details of which have been given date-wise, with particulars and amount at page 167 of the paper book. By debit notes dated 26.12.1995 (SIL/02/95: dated 3.11.1998 (SIL/02/98): dated 3.11.1998 (SIL/05/98): dated 2.9.1999 (SIL/02/99): dated

2.9.1999 (SIL/05/99): for packaging charges and the debit notes dated 26.12.1995 (SIL/01/95): 3.11.1998 (SIL/01/98): dated 3.11.1998 (SIL/04/98): dated 2.9.1999 (SIL/01/99): dated 2.9.1999 (SIL/04/99): dated 3.11.1998 (SIL/04/98): the debit notes dated 2.9.1999 (SIL/01/99) and dated 2.9.1999 (SIL/04/99) totalling Rs. 66,245,401.60 and interest @ 18% totalling Rs. 37,182,201.67, the respondent-company demanded the additional cost covered by Section 3 of the Act of 1993, and which is within the scope of the expression "amount due" u/s 6(1) of the Act of 1993 which is relatable to the goods supplied.

30. Shri K.N. Tripathi submits that Section 6(2) was amended on 10.8.1998. The agreement was terminated on 3.10.1998, giving the cause of action to make a claim under the Act. He has relied upon *New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult*, in submitting that the availability of forum is not a substantive right and thus the amendment providing for a forum did not affect the substantive right of the respondent to claim the amount. Relying on *Purbanchal Cables and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and Another*, Shri Tripathi submits that the view taken by the Guwahati High Court in *Assam State Electricity Board v. Shanti Conductor (P.) Limited*, (2002) 2 Gau LR 550, was approved in *Modern Industries v. Steel Authority of India Limited* (supra). It was held by the Supreme Court that since a Division Bench of this Court in *Modern Industries v. Steel Authority of India Limited* (supra) has already approved the dictum of the Full Bench of the High Court with regard to the maintainability of a suit only for interest, that question is no longer res integra. The supplier may file a suit for a higher rate of interest on delayed payments made by the supplier from the commencement of the Act. On the question, as to whether the suppliers can get the benefit of the provisions of the Act even if the contract of supply was executed prior to the commencement of the Act, whereas the supplies were made after the commencement of the Act, it was held that the Act of 2006 is not retrospective in nature. A substantive law creating a vested right operates prospectively and that a procedural or declaratory law operates retrospectively, unless expressly provided for otherwise in the Statute itself.

31. Shri K.N. Tripathi submits that the objects and reasons of the new Act of 2006 clearly stipulate that it was enacted to make the Act of 1993 as part of it. The proceedings, which were initiated under the Act of 1993, would be deemed to be continued under the new Act. There is no change in the composition of the Council. The new Council was substituted in place of the old Council with the only change that the Secretary of the old Council became the member of the new Council.

32. Shri K.N. Tripathi submits that the proceedings in the case were closed on 21.9.2006 after detailed hearings and submissions of written arguments by both the parties. Shri Devendra Chaudhari as Director of Industries and Chairman of the old Council heard the matter with the members, when the hearing dated

21.9.2006 was concluded, and kept the award with him upto 31.5.2007. He delayed the proceedings presumably under political pressure, which facts were stated by the respondent in the two Writ Petition Nos. 16682 of 2007 and 20744 of 2007 filed in the High Court for seeking appropriate directions to the Council to make the award. By orders dated 4.4.2007 and 25.4.2007 on the statements given by the standing counsel appearing for the State respondents the High Court directed the Council to make the award expeditiously. When these orders were brought to the notice of Shri Devendra Chaudhari, he inserted the last paragraph in the office note pertaining to the proceedings on 21.9.2006, so as to frustrate the directions of the High Court and give further chance to the appellant to seek some favourable orders from the Bombay High Court. A Writ Petition No. 944 of 2004 was filed in Bombay High Court, which was dismissed on 27.8.2004 against which the appellant filed SLP in the Apex Court, which was disposed of on 15.9.2006 directing the Bombay High Court to reconsider the matter. The Bombay High Court again dismissed the writ petition vide order dated 30.10.2007. This order was again challenged by the appellant in SLP filed in the Apex Court, which was dismissed as withdrawn on 13.12.2007. The appellant, thereafter filed a review application in Bombay High Court, which was also dismissed by order dated 15.2.2008. Against the order in review application the appellant filed another SLP in the Apex Court, which is still pending. There are no interim orders in the said S.L.P.

33. Shri K.N. Tripathi submits that on 19.6.2007 the counsel for Godrej and Boyce Manufacturing Company Limited raised issues pertaining to pending writ petition in Bombay High Court. He also demanded denovo trial on the ground of change in the composition of the Council, after coming into effect the Act of 2006. When the Council asked him whether he wants to submit any fresh documents, he submitted that he would argue only on the basis of documents already on record and further submitted that he had already filed written submissions on 21.9.2006, and has no further legal or factual issues to be argued. He, however, insisted that since there was change in the composition of Council, a denovo trial was mandatory. The counsel for Secur Industries Limited submitted that in view of the dismissal of the writ petition by the Bombay High Court, and the remand by the Apex Court for rehearing, since there was no interim orders, in view of the directions issued by the Allahabad High Court, the arbitration proceedings could not be kept in abeyance, and that it was in the interest of justice that the award be made as early as possible.

34. Shri K.N. Tripathi submits that none of the parties asked for production of any documents or lead any evidence. Both the parties relied upon documentary evidence, which was already on record. The Council made it clear that they had already gone through the draft award prepared after the close of hearing on 21.9.2006, and in view of the fact, that the parties have not made any new legal or factual submissions, they agreed with the draft award and accordingly the claim of Secur Industries was allowed. The final award was signed by the members of the new Council after taking into account the entire documentary

evidence, and submissions of the counsels from both the sides and after going through the draft award, which was already on record. The appellants made their best efforts to delay the proceedings in the Council for about three years by not filing their replies, seeking adjournments and using all kinds of pressure on the Council. Even after the decision was taken by the Council the writ petitions were filed in Bombay High Court and also in Allahabad High Court to stay the award. Secur Industries Limited being a small industry did not have resources to fight the giant like Godrej and is facing severe economic crunch, which will lead to its winding up.

35. Shri K.N. Tripathi submits that the limitation for making a claim for additional price under Clause-10 of the agreement started from the date of last payment made on 14.1.1999. The notice was given on 11.1.2001 within three years of the last payment, and thus the claim cannot be said to be beyond the period of limitation. The limitation in this case will not be covered by Article 14 but by Article 113, which is a residuary Article. He relies upon Gannon Dunkerley and Co., Ltd. Vs. Union of India (UOI), ; Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, and Maharana Bhupal Electric Supply Co. Ltd. Vs. The State of Rajasthan, . He also submits that where negotiations are pending and the disputes are not resolved, the limitation will start when the negotiations fail and has relied upon Bharat Coking Coal Ltd. Vs. Annapurna Construction, ; Asian Techs Ltd. Vs. Union of India (UOI) and Others, ; Jayesh Engineering Works v. New India Assurance Co. Ltd., and Hari Shankar Singhania and Others Vs. Gaur Hari Singhania and Others, and Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd., , in support of his submission.

36. In the end Shri K.N. Tripathi submits that the scope of Section 34 of the Arbitration Act is limited and that the Court cannot go into the merits of the claim. He has relied upon Steel Authority of India Ltd. Vs. Gupta Brother Steel Tubes Ltd., ; Ravindra Kumar Gupta and Company Vs. Union of India (UOI), , in support of his submission.

37. In the rejoinder, Shri Shashi Nandan submits that 75% of the amount under the award has been deposited under the orders of the Court. He submits that the agreed price was paid to Secur Industries Limited. What it is claiming is the higher cost of manufacturing of locks, which is not covered by Section 3 of the Act of 1993. The claim at best is a actionable claim for compensation or damages and not for the price of the goods. The price is defined in the sale of goods u/s 2(10) and which means the money consideration for the sale of goods. In the present case. Clause 10 does not refer to price of goods but of the additional cost incurred in manufacture, for less than minimum quantity ordered and supplied. In such case the higher price was subject to negotiations and not by way of liquidated variation in cost, which could form part of a claim u/s 3 of the Act.

38. Clause 10 of the agreement dated 12.8.1998 relevant for the purpose of understanding the nature of the claim is quoted as below:

10. The arrangement recorded in this Agreement is on the basis that SECUR shall supply and GODREJ shall purchase from SECUR, a minimum quantity of the products set out in Annexure "A". In case of any radical variation in the said minimum order by GODREJ, there will be a corresponding variation in the price for e.g. in case there is a shortfall in the minimum quantity ordered by 25%, the parties have agreed to increase the price to compensate the higher cost and in case the quantity increases beyond the minimum quantity by 40% or more, the parties will negotiate a corresponding reduction of price, which variations in the price will be mutually agreed between the parties from time to time, and such agreed revised price will be separately recorded in writing, duly signed and confirmed by both the parties, which shall form a part of this Agreement. Any minor variation will be ignored, provided the same is adjusted in the orders to be placed in future within 4 month period. In case of variation as aforesaid, in the quantity to be ordered would ultimately depend on the variable factors of the market and/or response for the product to be supplied by SECUR, and if the variation is solely due to such factors, the price would accordingly be varied as may be agreed upon.

39. The details of the demand in the debit notes clearly demonstrate, that these were issued after the termination of contract on 9.10.1998, for packaging charges and for higher cost incurred on account of variation in the quantity short lifted being more than 25% of the agreed minimum quantity in terms of Clause 10 of the agreement. Out of 13 debit notes, 4 debit notes, as mentioned above were for packaging charges as per Clause-22 of the agreement, and 7 for the higher cost incurred on account of variation in the quantity short lifted being more than 25% of the agreed minimum quantity. It is apparent and is also clear from the reasons given on issue No. 4 framed by the Council in the award at pages 21 to 23 that Secur Industries Limited claimed additional price to compensate the higher cost of manufacture under Clause 10 of the agreement. The computation charts of the additional cost and profit margin filed in Part-D of 1st Paper Book, certified by the Chartered Accountant, was accepted by the Council. Further, the Council also admitted the claim for packaging cost under Clause 22 (wrongly mentioned as Section 22), for the reasons that the same was not charged in the original invoices.

40. In the letter dated 14.1.1999 with reference to the letter of the Secur Industries Limited dated 9.1.1999, M/s. Godrej and Boyce Manufacturing Company Limited, referred to minutes of the meeting dated 7.1.1999 held to settle all outstanding disputes. M/s. Godrej and Boyce Manufacturing Company Limited protested to unilateral deletion of the clauses in the settlement, in the minutes sent for confirmation, and stated that though it is not bound even to make the payment at that stage, as a gesture of goodwill a cheque of Rs. 2,86,997.27 was enclosed, where by all outstanding bills were fully paid and settled. It was a clear repudiation of the claims as on 14.1.1999, after which there was no justification for sending the six debit notes dated 2.9.1999 of which two were for packaging charges and four for higher cost incurred by Secur

Industries Limited on account of variation in the alleged quantity short lifted being more than 25% of the agreed minimum quantity.

41. In *Modem Industries v. Steel Authority of India Limited* (supra) the Apex Court interpreted various provisions of the Act of 1993, as amended in 1998, and held that the amount due from a buyer together with the amount of interest calculated in accordance with the provisions of Sections 4 and 5, u/s 6(1) of the Act after its amendment in 1998, which provide for a reference under sub-section (2) to the Industry Facilitation Council for acting as a Arbitrator will include a fixed and settled obligation or liability. In paragraphs 42 to 45 the Supreme Court held as follows:

42. The word "due" has variety of meanings, in different context it may have different meanings. In its narrowest meaning, the word "due" may import a fixed and settled obligation or liability. In a wider context the amount can be said to be "due", which may be recovered by action. The amount that can be claimed as due" and recoverable by an action may sometimes be also covered by the expression "due". The expression "amount due from a buyer" followed by the expression "together with the amount of interest" under subsection (1) of Section 6 of 1993 Act must be interpreted keeping the purpose and object of 1993 Act and its provisions, particularly Sections 3, 4 and 5 in mind. This expression does not deserve to be given a restricted meaning as that would defeat the whole purpose and object of 1993 Act. Subsection (1) of Section 6 provides that the amount due from buyer together with 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 suit or other proceeding under any law for the time being in force.

43. If the argument of senior counsel for the buyer is accepted, that would mean that where the buyer has raised some dispute in respect of goods supplied or services rendered by the supplier or disputed his liability to make payment then the supplier shall have to first pursue his remedy for recovery of amount due towards goods supplied or services rendered under regular procedure and after the amount due is adjudicated, initiate action for recovery of amount of interest which he may be entitled to in accordance with Sections 4 and 5 by pursuing remedy under subsection (2) of Section 6.

44. We are afraid the scheme of Section 6 of 1993 Act read with Sections 3, 4 and 5 does not envisage multiple proceedings as canvassed. Rather, whole idea of Section 6 is to provide single window to the supplier for redressal of his grievance where the buyer has not made payment for goods supplied or services rendered in its entirety or part of it or such payment has not been made within time prescribed in Section 3 for whatever reason and/or for recovery of interest as per Sections 4 and 5 for such default. It is for this reason that sub-section (1) of Section 6 provides that "amount due from the buyer together with the amount of interest calculated in accordance with the provisions of Sections 4 and 5 shall be recoverable by the supplier from buyer by way of a suit or other legal

proceeding. Sub-section (2) of Section 6 talks of a dispute being referred to I.F.C. in respect of the matters referred to in subsection (1), i.e., the dispute concerning amount due from a buyer for goods supplied or services rendered by the supplier to buyer and the amount of interest to which supplier has become entitled under Sections 4 and 5.

45. It is true that word "together" ordinarily means conjointly or simultaneously but this ordinary meaning put upon the said word may not be apt in the context of Section 6. Can it be said that the action contemplated in Section 6 by way of suit or any other legal proceeding under subsection (1) or by making reference to I.F.C. under sub-section (2) is maintainable only if it is for recovery of principal sum alongwith interest as per Sections 4 and 5 and not for interest alone? The answer has to be in negative.

42. The dispute between the same parties before us, namely Secur Industries Limited v. M/s. Godrej and Boyce Manufacturing Company Limited, had travelled upto the Supreme Court. The Supreme Court in a judgment in Secur Industries Ltd. Vs. Godrej and Boyce Mfg. Co. Ltd. and Another , has decided the question as to whether the I.F.C. which acts as an Arbitrator or Conciliator under the provisions of A.C. Act, 1996, can deal with the dispute concerning principal amount due to the supplier for the goods supplied or services rendered. In Modern Industries v. Steel Authority of India Limited (supra) the Apex Court relied upon the judgment and held in paragraphs 47 and 48 as follows:

47. In Secur Industries Ltd. Vs. Godrej and Boyce Mfg. Co. Ltd. and Another , this Court observed that subsection (2) of Section 6 expressly incorporates the provisions of the Arbitration and Conciliation Act, 1996 and it further creates a legal fiction whereby disputes referred to I.F.C. are to be deemed to have been made pursuant to an arbitration agreement as defined in sub-section (1) of Section 7 of that Act. There is, thus, no reason as to why I.F.C., which acts as an Arbitrator or Conciliator under the provisions of Arbitration and Conciliation Act, 1996, cannot deal with the dispute concerning principal amount due to the supplier for the goods supplied or services rendered.

47. The High Court, in the impugned order, however, held that expression "amount due from a buyer" would be amount admitted to be due in its plain and natural meaning and when admitted due amount is not paid by the buyer, the provisions of Sections 3 to 6 alongwith other provisions of 1993 Act would be applicable. In the opinion of High Court since the buyer has alleged breach of contract by the supplier, there was no amount admitted to be due or settled amount and, therefore, there was no question of delayed payment and reference of the dispute to the I.F.C. under sub-section (2) of Section 6 was without jurisdiction.

43. In view of the findings recorded inter-party by the Supreme Court, the questions, as to whether the dispute of the present nature could be referred to the Council, is not opened to be argued and to be decided by this Court.

44. This leaves us with only two questions namely, whether the claim of Secur Industries Limited-the respondent was within limitation and whether a fresh opportunity of hearing was required to be given by the newly established Council under the Act of 2006 before making the award.

45. In *Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Co. Ltd.* (supra), the Supreme Court held in paras 29 to 37 as follows:

29. In *R.L. Kalathia and Co. Vs. State of Gujarat*, , this court considered a similar issue and held:

(i) Merely because the contractor has issued "dues certificate", if there is an acceptable claim, the court cannot reject the same on the ground of Issuance of "no-dues certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "no-claim certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing "no-dues certificate".

30. In view of the above, law on the issue stands crystallised to the effect that, in case, final settlement has been reached amicably between the parties even by making certain adjustments and without any misrepresentation or fraud or coercion, then, acceptance of money as full and final settlement/issuance of receipt or vouchers etc. would conclude the controversy and it is not open to either of the parties to lay any claim/demand against the other party.

31. The applicants have not pleaded that there has been any kind of misrepresentation or fraud or coercion on the part of the respondents. Nor it is their case that payment was sent by the respondents without any settlement/agreement with the applicants, and was a unilateral act on their part. The applicants reached the final settlement with their eyes open and instructed their banker to accept the money as proposed by the respondents. Proposal itself was on the basis of Clause 5 of the Purchase Contract which provided for Price Adjustment. For a period of three months after acceptance of the money under the full and final settlement, applicants did not raise any dispute in respect of the agreement of price adjustment. In such a fact-situation, the plea that instructions were given by the applicants to the banker erroneously, being, afterthought is not worth acceptance.

32. The transaction stood concluded between the parties, not on account of any unintentional error, but after extensive and exhaustive bilateral deliberations with

a clear intention to bring about a quietus to the dispute. These negotiations, therefore, are self-explanatory steps of the intent and conduct of the parties to end the dispute and not to carry it further.

33. In *R.N. Gosain Vs. Yashpal Dhir*, , this Court has observed as under:

10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.

34. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. Vide : (*Nagubai Ammal and Others Vs. B. Shama Rao and Others*, ; *Commissioner of Income Tax, Madras Vs. V. Mr. P. Firm, Muar*, ; *Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others*, ; *P.R. Deshpande Vs. Maruti Balaram Haibatti*, ; *Sri Babu Ram Alias Durga Prasad Vs. Sri Indra Pal Singh (Dead) by Lrs.*, ; *Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors*, ; *Ramesh Chandra Sankla Etc. Vs. Vikram Cement Etc.*, and *Pradeep Oil Corporation Vs. Municipal Corporation of Delhi and Another*,).

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

36. In the facts and circumstances of the case, as the respondents resorted to Clause 5 of the Purchase Agreement dated 28.6.2008, regarding price adjustment and the offer so made by the respondents has been accepted by the applicants and agreed to receive a particular sum offered by the respondents as a full and final settlement, the dispute comes to an end. The applicants cannot take a complete somersault and agitate the issue that the offer made by the respondents had erroneously been accepted.

37. In view of the above, as no dispute survives, the applications are dismissed.

46. In the present case, it is admitted that a meeting was held on 7.1.1999, in which a settlement was arrived at between the parties. The Secur Industries Ltd, on a request to confirm the minutes, deleted certain clauses. As a gesture of goodwill the appellant enclosed a cheque of Rs. 2,86,997.27 which was encashed

by Secur Industries Ltd. It then waited for eight months to send six debit notes to raise a claim before the Council. The appellant was clearly estopped after the settlement to raise such claims.

47. In our view the limitation for the price of goods agreed to be supplied, and for which the agreement dated 12.8.1994 was terminated on 9.10.1998, would start from the day, when the last of the supplies were made and were received by the appellant. The debit notes for packaging charges and for higher cost incurred relate to the period of supplies made upto 26.12.1995, which was the last date on which the supplies were made by Secur Industries Limited and were received by the appellant, will not extend the period of limitation. The receipt of debit notes, subsequent correspondence with regard to additional price, the meetings, if any, between the parties and the repudiation of the claims allegedly made on 14.1.1999, would not extend the period of limitation, nor bring the claim under Article 113 of the Limitation Act.

48. In a case, where the claim is for the price of the goods, by way of unliquidated damages relating to the supplies made, and not under any subsequent agreement resulting out of any negotiation, which in any case did not succeed, the starting point of limitation will be the date of last supplies under Article 14 of the Limitation Act. Article 113 is a residuary article and would cover those cases where the limitation is not specifically provided for in the Schedule. In the present case, since the limitation is specifically provided for the price of the goods supplied under Article 14, the supplier cannot take benefit of Article 113. The claim was thus clearly beyond the limitation prescribed under Article 14 of the Limitation Act, 1963 and could not be entertained by the Council. The District Judge erred in law in relying upon Article 113 for extending the period of limitation.

49. We do not find substance in the contention of Shri K.N. Tripathi that the composition of the new Council was the same as that of the old Council. For the purposes of hearing and deciding the claims, it is the members, who are ex-officio, or nominated to the Council and not their designation, which is relevant. The draft award dated 19.6.2007 was prepared by the General Manager (Law), U.P.S.I.D.C. Shri Devendra Chaudhari, the Chairman of the U.P. Industries Facilitation Council/Commissioner and Director of Industries, U.P.-Principal Secretary, Government of U.P., Lucknow, had signed the draft award dated 21.9.2006 on 31.5.2006. The award was also signed by Shri Promod Bharti, Senior Manager (Tech.) U.P.F.C./Member, U.P.I.F.C.; the Member, U.P.I.F.C., Indian Industries Association Lucknow, and General Manager (Law) U.P.S.I.D.C. as Members of U.P.I.F.C. The newly established and notified Council under the new Act consisted of Shri Balvinder Kumar as its Chairman. U.P. State-Micro and Small Enterprises Facilitation Council/Commissioner and Director of Industries, U.P. : Shri Umesh Kumar, Member U.P. State Micro and Small Enterprises Facilitation Council/G.M. (Law), U.P.S.I.D.C, Kanpur: Shri Pramod Bharti. Member, U.P. State M. and S.E.F.C., Kanpur and Senior Manager (Tech.) U.P.F.C.,

Kanpur; Shri Sanjay Kaul, Member, U.P. State M. and S.E.F.C., Kanpur and Chief Coordinator (W.G.) IIA, Lucknow; and Shri C.P. Tripathi-Member Secretary, U.P. State M. and S.E.F.C., Kanpur. The new Council was constituted with a Chairman and four members. It is admitted, as it is clearly stated in the penultimate paragraph of the award, that the counsel appearing for Godrej and Boyce Manufacturing Company Limited had objected that since the constitution of the Council has changed, fresh hearing is required to be made. The Council appears to be in a hurry for undisclosed reasons to make the award. There was no interim order passed by the Bombay High Court, nor any time bound directions were given by the Allahabad High Court, to make the award. The new Council did not choose to hear the matter. The Chairman and members of the new Council signed on the same award without giving any opportunity to the parties of hearing on contentious matters.

50. We find substance in the contention of the senior counsel appearing for the appellant, that the notification of the new Council was not made up to the date of the award. Section 12 of the new Act of 2006, provides for notification to establish the new Council, and to notify its constitution after the nominations. The new Council provides for the Chairman and two of its members by designation, and two by nomination. The Government order dated 7.3.2007 provided for constitution of new Council by designation of three of its members and called for nomination of the remaining two, who were nominated on 16.8.2007, whereas the award was made and signed on 19.6.2007. We are unable to appreciate as to how the nominated members could foresee that they will be nominated prior to the issuance of the Government order dated 16.8.2007, and could have signed the award on 19.6.2007, almost two months before they were nominated to constitute the new Council.

51. For the aforesaid reasons, we find and hold that the claim of Secur Industries Limited-the respondent was barred by limitation, and further that the new Council had signed the award before it could be constituted and notified, without hearing the arguments. The new Council consisting of two new members did not hear the parties on the issues, which were treated to be contentious by the Council as it was constituted under the old Act, before deciding to sign the award. The award thus suffers from incurable defects and is liable to be set aside. The first appeal from order is allowed. The order of the District Judge, Kanpur Nagar in Arbitration Case No. 36/70, Godrej and Boyce Manufacturing Company Limited v. Secur Industries Limited, dated 28.7.2009 and the award dated 19.6.2007 by the U.P. State Micro, Small and Medium Enterprises Facilitation Council is set aside. The appellant will be entitled to Rs. 5 lacs as cost of the proceedings and is also held entitled to refund of the entire amount deposited by it in terms of the interim order passed by this Court. The entire amount deposited will be returned to the appellant within a month.