

**SUPREME COURT OF INDIA**

Shakti Tubes Ltd.

Vs.

State of Bihar

C.A.No.172 of 2007

(Dr. Mukundakam Sharma and Dr. B.S. Chauhan JJ.)

07.07.2009

**JUDGMENT**

**DR. MUKUNDAKAM SHARMA, J.**

1. This appeal is directed against the judgment and order dated 22.02.2006, passed by the Patna High Court whereby the High Court partly allowed the appeal filed by the State of Bihar and others who are the respondents herein.

2. M/s. Shakti Tubes Ltd.-the appellant as plaintiff filed a suit which was registered as Money Suit No. 153 of 1997 praying for a decree for payment of Rs. 38,13,480/- with pendente lite and future interest compounding at monthly rest at the rate of 24% per annum on the aforesaid decretal amount till realization with costs of the suit. The trial court decreed the said suit with costs in favour of the appellant-plaintiff and ordered for payment of interest compounding at monthly rest at 24% on the decretal amount of Rs. 38,13,480/-.

3. Since the aforesaid decree was reversed by the High Court whereby the High Court while mentioning the decree for payment for Rs. 38,13,480/- reversed it to the extent of directing for payment of 9% interest per annum instead of 24% interest per annum, the present appeal is preferred by the appellant-plaintiff.

4. In order to effectively deal with the rival contentions raised by the parties herein it would be necessary to state a few facts leading to the filing of the aforesaid suit by the appellant-plaintiff before the trial court.

5. In the plaint filed by the appellant-plaintiff it was stated that the plaintiff is a company incorporated under the Indian Companies Act and registered as a Small Scale Industry in the Industries Department, Government of Bihar and that it entered into an agreement with the State of Bihar for supply of pipes at the rate of Rs. 174.95 paise. per metre subject to the terms and conditions mentioned in the tender paper. A supply order was placed by the respondent through Chief Engineer's letter No. 8956 dated 16.07.1992 with the appellant-plaintiff for making supply of the aforesaid pipes. It was mentioned in the said letter that 90% of the total value of the material received was to be paid after receipt of the material and the balance 10% of the value was to be paid within one month of the receipt of the material,

after full verification of the same. It was a stipulation in the said agreement entered into between the parties that the payment would be made at the escalated rate applicable for the quantity of pipes supplied after such escalation come into force and that even in such cases other terms of payment would remain the same. It was alleged in the plaint by the appellant-plaintiff that they supplied the pipes as the per agreement to the concerned consignees, who duly accepted the pipes as per measurement, but the payment was not made. After some time, the payment was made at the rate of Rs. 190.48 paise per metre instead of actual escalated rate of Rs. 199.04 P. per metre. A sum of Rs. 38,13,480/- thus remained payable to the appellant-plaintiff which was withheld illegally by the respondents in respect of the goods supplied.

6. Consequently, the appellant-plaintiff had to file a suit seeking for a decree for payment of the aforesaid amount of Rs. 38,13,480/- with interest compounding at monthly rest at the rate of 24% per annum on the aforesaid decretal amount. The trial court passed a judgment and decree dated 31.05.1999 in terms of the prayer made in the plaint decreeing for a payment of Rs. 38,13,480/- along with interest compounding at monthly rest at the rate of 24% per annum on the aforesaid amount with effect from 01.06.1993 till realization.

7. The respondents herein being aggrieved by the aforesaid judgment and decree dated 31.05.1999 passed by the trial court filled an appeal in the High Court of Patna which was registered as First Appeal No. 8 of 2000. The only issue raised in the appeal before the High Court was with regard to the decree for payment of higher interest than what the plaintiff was actually entitled to. The High Court considered the contentions of the parties and by its judgment and order dated 20.02.2006 directed that instead of compound interest with monthly rest at the rate of 24% per annum, the

appellant-plaintiff would be entitled to simple interest at the rate of 9% per annum with effect from 01.06.1993 till realization.

8. Being aggrieved by the aforesaid judgment and order passed by the High Court, the appellant-plaintiff filed the present appeal before this Court. The only issue that arises for our consideration in the present appeal is as to whether the appellant-plaintiff is entitled to a direction for payment of interest compounding at monthly rest at the rate of 24% per annum. According to the appellant-plaintiff, the said interest has been claimed by the appellant-plaintiff since it is entitled to so claim in terms of the provisions of the Interest on Delayed Payment to Small Scale Industries Act, 1993 (hereinafter referred to as 'the Act').

9. Mr. G.C. Bharuka, learned senior counsel appearing for the appellant- plaintiff drew our attention to the provisions of the Act and to the decision of this Court in Assam Small Scale Industries Development Corporation Ltd. & Ors. v. J.D. Pharmaceuticals & Anr. [2005 (13) SCC 19]. In support of his contention that the transaction in the instant case came to an end with the appellant-plaintiff supplying the goods after coming into force of the Act he has taken us through the relevant sections of the Act as also the Statements of Objects and Reasons of the Act. According to him, the appellant-plaintiff is entitled to be paid in terms of the provisions of the Act. He contended that the earlier supply order which was issued on 16.07.1992 came to be materially altered and substituted by a fresh supply order issued on 18.03.1993 by which date the aforesaid Act had already been enforced and, therefore, the appellant- plaintiff was entitled to claim interest at a higher rate as envisaged in Sections 4 and 5 of the said Act.

10. Mr. Dinesh Dwivedi, learned senior counsel appearing for the respondents strongly refuted the aforesaid submissions made by the learned senior counsel appearing for the appellant-plaintiff on the ground that the supply order was issued in the instant case on 16.07.1992 and, therefore, in terms of and in line with the decision of this Court in Assam Small Scale Industries case (supra) the appellant-plaintiff was entitled to be paid interest only at the rate of 9% per annum and not at a higher rate as contended by the appellant-plaintiff. He submitted that the argument that there was novation of the supply order dated 16.07.1992 having not been

argued before any of the courts below nor any ground in that regard having been taken earlier in this appeal, the same cannot be raised now for the first time, at the time of final hearing. He also submitted that there was neither a new supply order created by the parties nor was there any alteration of the earlier supply order, but in fact, the earlier supply order continued with some variation.

11. Before proceeding to decide the case at hand it would be necessary to deal with the relevant provisions of the Act. The Act came into force on 23<sup>rd</sup> September, 1992. Section 2(b), 3, 4 and 5 are relevant for our purpose to enable us to answer the issue raised herein. Therefore the same are being reproduced hereinbelow :

"2. Definitions.- In this Act, unless the context otherwise requires,-

(a) "ancillary industrial undertaking" has the meaning assigned to it by clause (aa) of section 3 of the Industries (Development and Regulation) Act, 1951 (65 of 1951); (b) "appointed day" means the day following immediately after the expiry of the period of thirty days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier. Explanation.- For the purposes of this clause,- (i) "the day of acceptance" means,- (a) the day of the actual delivery of goods or the rendering of services; or (b) where any objection is made in writing by the buyer regarding acceptance of goods or services within thirty days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier; (ii) "the day of deemed acceptance" means, where no objection is made in writing by the buyer regarding acceptance of goods or services within thirty days from the day of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services; (c) "buyer" means whoever buys any goods or receives any services from a supplier for consideration; (d) "goods" means every kind of movable property other than actionable claims and money; (e) "small scale industrial undertaking" has the meaning assigned to it by clause (j) of section 3 of the Industries (Development and Regulation) Act, 1951 (65 of 1951); (f) "supplier" means an ancillary industrial undertaking or a small scale industrial undertaking holding a permanent registration certificate issued by the Directorate of Industries of a State 1\*[or Union territory and includes,- (i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956); (ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956(1 of 1956)].

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

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

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

to the best borrowers of the bank.

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

12. The appellant-plaintiff, relying on the aforesaid provisions of the Act, sought a decree for payment of interest at the higher rate as mentioned in Section 4 which, according to the appellant-plaintiff, was payable with compound interest as provided for under Section 5 of the Act.

13. The aforesaid provisions of the Act came to be considered and interpreted by this Court in Assam Small Scale Industries case (supra) wherein the Supreme Court not only considered the ambit and scope of Section 34 of the Civil Procedure Code, 1908 (for short 'the CPC') but also the ambit and scope of Sections 1, 3, 4, 5 and 10 of the Act. After discussing the said provisions, the Supreme Court in paragraphs 37 and 38 recorded its findings and conclusions in the following manner: "Applicability of the 1993 Act

37. We have held hereinbefore that clause 8 of the terms and conditions relates to the payments of balance 10%. It is not in dispute that the plaintiff had demanded both the principal amount as also the interest from the Corporation. Section 3 of the 1993 Act imposes a statutory liability upon the buyer to make payment for the supplies of any goods either on or before the agreed date or where there is no agreement before the appointed day. Only when payments are not made in terms of Section 3, Section 4 would apply. The 1993 Act came into effect from 23-9-1992 and will not apply to transactions which took place prior to that date. We find that out of the 71 suit transactions, Sl. Nos. 1 to 26 (referred to in the penultimate para of the trial court judgment), that is supply orders between 5-6-1991 to 28-7-1992, were prior to the date of the 1993 Act coming into force. Only the transactions at Sl. Nos. 27 to 71 (that is supply orders between 22-10-1992 to 19-6-1993), will attract the provisions of the 1993 Act.

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."

14. In order to appreciate the aforesaid findings we may also extract the contents of paragraph 14 of the said judgment wherein this Court referred to the facts of the case leading to recording of the aforesaid findings and conclusions:

"14. It is not in dispute that pursuant to the said agreement, the Corporation placed orders for supply of medicines manufactured by the respondent herein for the period of June 1991 to June 1993. The total price of the medicines supplied by the respondent in pursuance of the supply orders of the Corporation stood at Rs 20,56,654.13 out of which only a sum of Rs 46,512.80 was paid to the respondent."

15. A careful perusal of the aforesaid judgment shows that the decision in the aforesaid case was rendered after clearly recording the fact that the Assam Small Scale Industries Development Corporation Ltd. (for short 'the Corporation') placed orders for the supply of medicines manufactured by the respondents therein for the period June, 1991 to June, 1993. In the light of the said facts, it was recorded in paragraph 37 of the judgment that while the Act came into effect from 23rd September, 1992, the supply orders were placed only in respect of Serial Nos. 1 to 26 immediately and before coming into effect of the Act and rest of the supply orders namely, supply orders at Serial Nos. 27 to 71 were placed between 22.10.1992 to 19.06.1993 which were subsequent to the date when the Act came into force. In that context, it was clearly recorded in the judgment that the Act will have no application to the transactions that took place prior to the commencement of the Act. In the next sentence the Court made it clear as to what is referred to and understood by the expression "transaction" when it clearly stated that out of 71 transactions, Serial Nos. 1 to 26, i.e. supply orders between 05.06.1991 to 28.07.1992 being prior to 23rd September, 1992 when the Act came into force, higher interest as envisaged under Sections 4 and 5 of the Act cannot be paid and demanded in respect of the said supply orders/transactions. It was also made clear that the transactions at Serial Nos. 27 to 71 only i.e. supply orders between 22.10.1992 to 19.06.1993, would attract the provisions of the Act. Therefore, those supply orders which were issued by the Corporation between 22.10.1992 to 19.06.1993 were held to be the transactions which would be entitled to get the benefit of the provisions of the Act.

16. In our considered opinion, the ratio of the aforesaid decision is clearly applicable and would squarely govern the facts of the present case as well. The said decision was rendered by this Court after appreciating the entire facts as also all the relevant laws on the issue and, therefore, we do not find any reason to take a different view than what was taken by this Court in the aforesaid judgment. Thus, we respectfully agree with the aforesaid decision of this Court which is found to be rightly arrived at after appreciating all the facts and circumstances of the case.

17. Now coming to the facts of the present case we find that there is no dispute with regard to the fact that the supply order was placed with the respondents on 16.07.1992 for supply of the pipes which date is admittedly prior to the date on which this Act came into effect.

18. Being faced with the aforesaid situation, the learned senior counsel appearing for the appellant-plaintiff sought to submit before us that the decision of this Court in Assam Small Scale Industries case (supra) refers to the expression "transactions". According to him, the transactions would be

complete only when the appellant-plaintiff made the supply and since the supply was made in the instant case after coming into force of the Act, the appellant-plaintiff would be entitled to the benefit of Section 4 and 5 of the Act.

19. Refuting the aforesaid submission, the learned senior counsel appearing for the respondents submitted that the aforesaid contention is completely misplaced. He pointed out that if such a meaning, as sought to be given by the learned senior counsel appearing for the appellant-plaintiff, is accepted that would lead to giving benefit of the provisions of the Act to unscrupulous suppliers who, in order to get the benefit of the Act, would postpone the delivery of the goods on one pretext or the other.

20. We have considered the aforesaid rival submissions. This Court in Assam Small Scale Industries case (supra) has finally set at rest the issue raised by stating that as to what is to be considered relevant is the date of supply order placed by the respondents and when this Court used the expression "transaction" it only meant a supply order. The Court made it explicitly clear in paragraph 37 of the judgment which we had already extracted above.

21. In our considered opinion there is no ambiguity in the aforesaid judgment passed by this Court. The intent and the purpose of the Act, as made in paragraph 37 of the judgment, are quite clear and apparent. When this Court said "transaction" it meant initiation of the transaction i.e. placing of the supply orders and not the completion of the transactions which would be completed only when the payment is made. Therefore, the submission made by the learned senior counsel appearing for the appellant-plaintiff fails.

22. Consequently, we hold that the supply order having been placed herein prior to the coming into force of the Act, any supply made pursuant to the said supply orders would be governed not by the provisions of the Act but by the provisions of Section 34 of the CPC read with the provisions of the Interest on Delayed Payment to Small Scale Industries Act, 1993.

23. At one stage the learned senior counsel appearing for the appellant- plaintiff submitted that the Act in question is a beneficial legislation and, therefore, a liberal interpretation and wider meaning is to be given to such a beneficial and welfare legislation so as to protect the interest of the supplier who is being kept on a higher pedestal by giving a higher benefit in the Act.

24. Generally, an Act should always be regarded as prospective in nature unless the legislature has clearly intended the provisions of the said Act to be made applicable with retrospective effect. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. The aforesaid rule in general is

applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only -- "nova constitutio futuris formam imponere debet non praeteritis" -- a new law ought to regulate what is to follow, not the past. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004 at p. 438.). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., p. 440). In the case of *Zile Singh v. State of Haryana*, (2004) 8 SCC 1, at page 9, this Court observed as follows:

"15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. A classic illustration is the case of *Attorney General v. Pougett* (Price at p. 392). By a Customs Act of 1873 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s 4d, but the Act omitted to state that it was to be 9s 4d per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s 4d per cwt., but Thomson, C.B., in giving judgment for the Attorney General, said: (ER p. 134)

"The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act: but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act;" (Price at p. 392)"

25. There is no dispute with regard to the fact that the Act in question is a welfare legislation which was enacted to protect the interest of the suppliers especially suppliers of the nature of a

small scale industry. But, at the same time, the intention and the purpose of the Act cannot be lost sight of and the Act in question cannot be given a retrospective effect so long as such an intention is not clearly made out and derived from the Act itself.

26 It was next submitted by the learned senior counsel appearing for the appellant-plaintiff that there was a novation and alteration of the contract giving rise to a new contract between the parties due to alteration of terms and conditions of the contract and, therefore, Section 62 of the Indian Contract Act (for short 'the Contract Act') was applicable to the present case. Section 62 of the Contract Act is reproduced hereinbelow:

"Effect of novation, rescission and alteration of contract.

62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. Illustrations :

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, a new debt from C to B has been contracted.

(b) A owes B 10,000 rupees. A enters into an agreement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B 1,000 rupees under a contract, B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into."

27. Relying on the aforesaid provision of the Contract Act, the learned senior counsel submitted that the original contract was for the supply of 7 lakh metres of pipes which was curtailed and changed to the supply of 4 lakh metres of pipes with change in the date of supply with extension of date of supply till 30.04.1993 and supplies were completed within that extended time. In support of his submission he sought to rely upon a judgment of the Bombay High Court in *Andheri Bridge View Co-op. Hsg. Society Ltd. v. Krishnakant Anandrao Deo and others* reported in 1991 AIR Bombay 129 wherein it was held that a new contract would come in existence in terms of Section 62 of the Contract Act. In the said judgment, the High Court observed as follows in para 13:

"13. Now, even if the parties have referred to an agreement as being not a new one but an old one with certain modifications, that would carry no weight if the law on the point is something contrary to what is understood by the parties. For example, we know that when there is a change in the constitution of a firm then the firm is a new partnership notwithstanding the fact that the parties may refer to it as the old partnership with a changed constitution. So also I would say that where there are material or substantial changes which go to the root of the agreement then this has to be regarded in law as a new agreement. What would be the position if the parties agree to sell property A and at a later stage they agree that not property A but property B should be sold? Clearly this would be a new agreement notwithstanding the fact that all other terms regarding rate for payment etc. may also be similar. So also payment of price or the rate of payment is a material part of the agreement for sale. Both the subject-matter and the rate of payment are material parts of any agreement for sale and change in either of these terms brings about a new agreement. In our case therefore the correspondence of 1983 brought about an entirely new agreement -- between new parties, new property (so far as F.S.I. is concerned), and new rates."

28. In order to appreciate the aforesaid contention, we have looked into the documents available on records and considered the same. On analyzing the same we find that in none of the courts below any such issue was raised by the appellant-plaintiff. Neither any issue was framed by the courts below in respect of such a submission nor any ground to that effect was taken earlier. Even in the memorandum of appeal filed in this Court no such ground has been urged or mentioned. Therefore, the issue is being raised, for the first time, at the time of hearing of the case before us which, according to us, can not be permitted to be raised for the first time for the simple reason that the issue that is being urged now is not only a question of law but is a mixed question of law and facts as to whether there is a novation or alteration of contract. The said facts were required to be urged evidentially before the courts below. Unless such a factual foundation is available it is not possible to decide such a mixed question of law and facts. Therefore, such a mixed question of law and facts should not be allowed to be raised at the time of final hearing of appeal before this Court.

29. Even otherwise, we are of the considered view that there was neither any alteration of the contract nor any novation of the contract in the present case. The correspondence between the parties clearly disclosed that after the respondents issued the supply order, the appellant-plaintiff did not supply the pipes in terms of the supply order and it urged mainly for the increase in the price of the goods. Subsequently, they relied upon the price escalation clause and asked for increase in the price of pipes. The perusal of the records also disclosed that subsequently the Government thought it fit that the appellant-plaintiff may not be able to supply the prescribed quantity of goods which was earlier required by the Government and, therefore, they curtailed the quantity of the goods from 7 lakh metres of pipes to 4 lakh metres of pipes. In the process, the Government kept the contents of the supply order intact except a variation in the quantity to be supplied with extension of date of supply. However, the Government gave effect to the price escalation clause which was a part of the earlier supply order and also of the agreements which were entered into between the parties prior to the coming into force of the Act. Therefore, in our considered opinion the said contention, as raised by the learned senior counsel appearing for the appellant-plaintiff, has no legal and factual basis.

30. In any event, it is not possible to decide the aforesaid issue in this case as full factual foundation for such an argument was not placed before us so as to enable us to know as to why the quantity to be supplied by the appellant- plaintiff was curtailed by the Government and as to why the appellant- plaintiff was not supplying the goods despite the receipt of the supply orders for several months. It is also not clear from the records that whether there was any failure or negligence on the part of the appellant-plaintiff in not supplying the goods for a long period of time without any reasonable basis or whether there were laches on the part of the respondents in sorting out the transaction. These are some of the factual issues which are required to be gone into to answer finally such issue which was raised at the time of hearing of the appeal and which cannot be done in the absence of any evidence in that regard.

31. Therefore, in our considered opinion, the present appeal is held to be without any merit and is dismissed accordingly. However, in the facts and circumstances of the case we leave the parties to bear their own costs.