

[2009] 10 S.C.R. 739

M/S. SHAKTI TUBES LTD.

v.

STATE OF BIHAR & ORS.  
(Civil Appeal No. 172 of 2007)

JULY 7, 2009

[DR. MUKUNDAKAM SHARMA AND DR. B.S.  
CHAUHAN, JJ.]

*Interest on Delayed Payment to Small Scale Industries Act, 1993 – ss.4 and 5 – Contract for supply of pipes – Pipes supplied – But certain amount remained payable to appellant-supplier – Money suit filed by appellant decreed by Trial Court with interest compounding at monthly rest @ 24% p.a. – High Court reduced the rate to simple interest @ 9% p.a. – Challenge to – Appellant sought payment of interest at higher rate and compoundable interest in terms of ss.4 and 5 of the 1993 Act – Held : Since the supply order was placed prior to coming into force of the Act, appellant not entitled to benefit under ss.4 & 5 of the 1993 Act – Though the 1993 Act is a welfare legislation enacted to protect the interest of suppliers, especially suppliers of the nature of a small scale industry, but the Act cannot be given retrospective effect when such intention was not clearly made out and derived from the Act itself – Contention raised by appellant regarding alteration & novation of contract giving rise to a new contract after coming into force of the 1993 Act, had no legal and factual basis – Code of Civil Procedure, 1908 – s.34 – Contract Act, 1872 – s.62.*

*Interpretation of Statutes – Presumption against retrospectivity – Held : Every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation – However it is not necessary that an express provision be made to make a statute*

- A *retrospective – 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 benefit of the community as a whole – Maxims – Maxim “nova constitutio futuris formam imponere debet non praeteritis”.*
- B *Constitution of India, 1950 – Art. 136 – Pleadings – New plea – Mixed question of law and facts, not urged before the courts below or even in memorandum of appeal filed in Supreme Court – Held : Cannot be raised for the first time at the time of final hearing of appeal before Supreme Court.*
- C **Appellant is a company incorporated under the Indian Companies Act and registered as a Small Scale Industry in the Industries Department, Government of Bihar. It entered into an agreement with the State of Bihar**
- D **for supply of pipes. Appellant supplied pipes as per the agreement, but a sum of Rs. 38,13,480/- remained payable which was allegedly withheld by the respondents. Appellant filed suit seeking decree for payment of the aforesaid amount of Rs. 38,13,480/- with interest**
- E **compounding at monthly rest at the rate of 24% per annum on the aforesaid decretal amount. The trial court passed decree for payment of Rs.38,13,480/- alongwith interest compounding at monthly rest at the rate of 24% per annum on the aforesaid amount. The respondents**
- F **filed appeal challenging the payment of interest on the ground that it was higher than what the appellant was actually entitled to. The High Court directed that the appellant would be entitled to simple interest at the rate of 9% per annum.**
- G **In appeal to this Court, the appellant contended that it was entitled to claim interest in terms of the provisions of the Interest on Delayed Payment to Small Scale Industries Act, 1993 since transaction in the instant case came to an end after coming into force of the Act. It**
- H **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 was entitled to claim interest at a higher rate as envisaged in Section 4 of the Act payable with compound interest as provided for under Section 5 of the Act. A B

The only issue that thus arose for consideration in the present appeal was as to whether the appellant was entitled to a direction for payment of interest compounding at monthly rest at the rate of 24% per annum. C

Dismissing the appeal, the Court

HELD :1.1. In facts of the present case, 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 Interest on Delayed Payment to Small Scale Industries Act, 1993 came into effect. [Para 17] [753-G-H; 754-A] D E

1.2. As regards the contention raised by the appellant that the transactions became complete only when it made the supply and since the supply was made in after coming into force of the Act, the appellant would be entitled to the benefit of Section 4 and 5 of the Act, this Court in *Assam Small Scale Industries* case 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. The expression "transaction" means 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. Consequently, the supply order having been placed F G H

A 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 CPC. [Paras 18, 20, 21 and 22] [754-B-C, E-F, G-H; 755-A-B]

B *Assam Small Scale Industries Development Corporation Ltd. & Ors. v. J.D. Pharmaceuticals & Anr.* 2005 (13) SCC 19, relied on.

C 2.1. 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. It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity  
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F 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. [Para 24] [755-D-H; 756-A]

G 2.2. Though 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  
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question cannot be given a retrospective effect so long as such an intention is not clearly made out and derived from the Act itself. [Para 25] [757-C-E]

*Zile Singh v. State of Haryana* (2004) 8 SCC 1, relied on.

*Principles of Statutory Interpretation by Justice G.P. Singh*, 9th Edn., 2004 at p.438 – referred to

3.1. As regards the contention raised by the appellant 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 was applicable, it is found, on analysis of the documents available on record, that in none of the courts below any such issue was raised by the appellant. 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 this Court, which cannot 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. [Paras 26 and 28] [757-E-F, 759-E-H; 760-A]

3.1. Even otherwise, this Court is of the considered

A 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 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 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, the said contention, as raised by the  
appellant, has no legal and factual basis. [Para 29] [760-  
A-E]

3.3. 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 so as to enable this  
Court to know as to why the quantity to be supplied by  
the appellant was curtailed by the Government and as to  
why the appellant 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 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. [Para 30] [760-F-H; 761-A]

*Andheri Bridge View Co-op. Hsg. Society Ltd. v. Krishnakant Anandrao Deo and others* 1991 AIR Bombay 129, referred to.

**Case Law Reference:**

2005 (13) SCC 19	relied on	Para 9
(2004) 8 SCC 1	relied on	Para 24
1991 AIR Bombay 129	referred to	Para 27

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 172 of 2007.

From the Judgment & Order dated 20.2.2006 of the High Court of Judicature at Patna in First Appeal No. 8/2000.

G.C. Bharuka, Devashish Bharuka, Jaya Bharuka, Anjani Kumar Singh for the Appellants.

Dinesh Dwivedi, Mohit Shah and Chandan Kumar (for Gopal Singh) for the Respondents.

The Judgment of the Court was delivered by

**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

A 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  
B 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  
C 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  
D 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  
E 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  
F 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  
G 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  
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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 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 filed 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

A 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  
 B 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*  
 C *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  
 D 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  
 E 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.

F 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  
 G 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  
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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 23rd 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

A 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  
 B (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)  
 C 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,  
 D 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  
 E 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.]

F 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  
 G 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  
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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. A

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" B

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. C

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: D

*"Applicability of the 1993 Act* E F

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. G H

A 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  
B 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.

C **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.”

D **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:

E “**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  
F 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.”

G **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  
H 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

A 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.

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

A 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:

B “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.  
 C 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  
 D 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  
 E 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)

F 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  
 G 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  
 H 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.

A 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

(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

(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."

D

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:

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"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

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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

A 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

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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.

B.B.B.

Appeal dismissed.