

## A.S.E.B. and Others Vs M/s. Shanti Conductors (P) Ltd.

**Court:** Gauhati High Court

**Date of Decision:** Nov. 20, 2012

**Acts Referred:** Constitution of India, 1950 " Article 136, 141

Criminal Procedure Code, 1973 (CrPC) " Section 1

Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 " Section 10, 3, 4, 5, 6

Limitation Act, 1963 " Section 14(2), 2(a)

**Citation:** (2013) 2 GLD 578

**Hon'ble Judges:** P.K. Musahary, J; I.A. Ansari, J

**Bench:** Division Bench

**Advocate:** B.D. Das and Mr. H.K. Sharma, for the Appellant; A.K. Sinha, for the Respondent

**Final Decision:** Allowed

### Judgement

I.A. Ansari, J.

This is an appeal against the judgment and decree, dated 02-02-2007, passed, in Money Suit No. 21 of 1997, by the learned Civil Judge (Sr. Division), No. 2, Guwahati, whereby the plaintiffs-respondents" suit was decreed, on contest, against the defendants-

appellants. The case of the respondent, M/s Shanti Conductors (P) Limited, was, in brief, thus:

The respondent, M/s Shanti Conductors (P) Limited, is a private limited company, incorporated under the provisions of the Companies Act and

stands registered as a Small Scale Industrial Unit (SSI Unit) with the Directorate of Industries, Assam. The company aforementioned also stands

registered under the provisions of the Assam Preferential Stores of Purchase Act and the Rules framed thereunder. The appellants, Assam State

Electricity Board (hereinafter referred to as "the Board"), placed two supply orders, with M/s Shanti Conductors (P) Limited, for supply of various

types of conductors, the two supply orders being, dated 31.03.92 and 13.05.92. Under the supply order, dated 31.03.92, supply was to be

completed by January, 1993. The supplies were, however, completed on 23.09.93, because, according to the plaintiffs, the Board delayed in

carrying out inspection of the manufactured product and the supplies could not have been affected without requisite inspection having been carried

out by the Board. As far as the supply order, dated 13.05.92, aforementioned was concerned, the supply was to be completed by February,

1993, but the supplies were completed, on 05.10.93, for the reasons as indicated hereinbefore. The first supply order was for Rs.

1,22,52,568.79/- and the second supply order was for Rs. 32,49,117.27/-. Thus, the total goods supplied were for Rs. 2,37,71,536.32/-. The

last payment was received by the plaintiffs from the Board on 05.03.94.

2. Alleging that the plaintiff had not paid interest on delayed payment of the bills of the plaintiffs, though the plaintiff, M/s Shanti Conductors (P)

Limited, was a SSI unit and the Board ought to have paid interest in terms of the provisions of the Interest on Delayed Payments to Small Scale

and Ancillary Undertakings Act, 1993 (hereinafter referred to as "the 1993 Act"), the plaintiffs instituted the suit, in question, seeking realization of

a sum of Rs. 53,68,492.56/- along with future interest @ 27% per annum.

3. The defendants, headed by the Board, contested the suit by contending, inter alia, that there was no cause of action for the suit, the suit was

barred by limitation and the suit was not maintainable in its present form, the further case of the defendants being that the plaintiffs could not deliver

the goods within the delivery schedule and payment for entire supply of materials could not be made in time. Moreover, the supply orders,

according to the defendants, were given prior to the promulgation of the Interest on Delayed Payment to Small Scale and Ancillary Industrial

Undertaking Ordinance, 1992 (hereinafter referred to as "the 1992 Ordinance"), which came into force on 23.09.92. Thereafter, the Ordinance

was enacted into a legislation, namely, Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakings Act, 1993 (in short, "the

1993 Act"). Though the 1993 Act was enacted on 02.04.93, the 1993 Act, by a legal fiction, is deemed to have come into effect from the date of

promulgation of the 1992 Ordinance on 23.09.92. In other words, the defendants' case was that since the supply orders were placed with the

plaintiff-Company, M/s. Shanti Conductors (P) Ltd., prior to the coming into force of the 1993 Act on 23.09.92, the 1993 Act was not applicable

to the contract in issue and the suit, instituted by the plaintiffs, were, therefore, not sustainable in law. This apart, the defendants denied that the

plaintiff company was entitled to claim interest inasmuch as the goods were, according to the defendants, not supplied within the delivery schedule,

for, the delivery schedule, if maintained, would have made supplies completed on 31-03-1993.

4. The following issues were framed for determination in the suit:

1. Whether there is cause of action for the suit?

2. Whether the suit is barred by limitation?

3. Whether the suit is maintainable in its present form?

4. Whether the plaintiff No. 1 is an SSI Unit?

5. Whether the plaintiffs are entitled to a decree for realizations of the amount as prayed for?

6. To what other relief or reliefs the parties are entitled?

5. The learned trial Court answered the Issue No. 2 in the negative by referring to the provisions of Section 10 of the 1993 Act by taking the view

that Section 10 of the 1993 Act had an overriding effect and, hence, the suit was not barred by limitation. The other issues were also answered by

the learned trial Court in favour of the plaintiffs. As regards applicability of the 1993 Act, the learned trial Court concluded that since payment was

made subsequent to the coming into force of the 1993 Act, interest was liable to be paid by the defendants in terms of the provisions of the 1993

Act, though supply orders might have been placed with the plaintiff-Company before the 1993 Act had come into force. The learned trial Court,

thus, concluded, while dealing with the issue Nos. 5 and 6, that the plaintiffs were entitled to a decree for realization of the amount, which they had

claimed as interest on the delayed payment allegedly made prior to the 1993 Act.

6. The suit of the plaintiffs has accordingly been decreed as indicated above, Aggrieved by the decree, so granted, the defendants have preferred

this appeal.

7. We have heard Mr. B.D. Das, learned Senior counsel, for the appellants, and Mr. A.K. Sinha, learned Senior counsel, for the respondents.

8. Appearing on behalf of the defendants-appellants, Mr. Das, learned Senior counsel, has contended that the respondent, namely, M/s Shanti

Conductors Pvt. Ltd. instituted, as plaintiff, a suit, on 10-01-1997, seeking realization of interest in terms of the provisions of the 1993 Act, the suit

was decreed, on 02-02-2000, by the learned trial Court and against the decree, so granted by the trial Court, the present appeal, namely, RFA

No. 66 of 2000, was preferred by the defendants. It is also pointed out by Mr. Das, learned Senior counsel, that before a Division Bench of this

Court, it was argued, on behalf of the defendants, that a suit for mere recovery of interest under the 1993 Act was not maintainable, because of the

provisions of Section 6 of the 1993 Act, particularly when no principal amount, on the date of institution of the suit, was due from the Board to be

paid to the plaintiffs and, hence, the suit for recovery of interest only was not maintainable under the 1993 Act. Reliance, in support of this

contention, was placed by the Board on Assam State Electricity Board and Another Vs. Trusses and Towers (P) Ltd., . This apart, it was further

contended by the appellants that the contract, in question, stood concluded prior to the commencement of the 1993 Act and, hence, no suit for

interest, in terms of the provisions of the 1993 Act, could have been treated as maintainable, particularly, when the plaintiffs had accepted payment

of the principal amount without any reservation or demur.

9. In short, what was contended before the Division Bench, in RFA 66/2000, was that the suit was not maintainable on two grounds, namely, (i)

the contract, in question, between the parties concerned had been entered into prior to the commencement of the 1993 Act, which came into force

on 23-09-1992, and (ii) since the plaintiffs had accepted the payment of the principal amount without any reservation or demur, the suit for interest

alone was not maintainable under the provisions of the 1993 Act.

10. What may, now, be noted, as correctly pointed out by Mr. Das, learned Senior counsel, is that the Division Bench, while dealing with the

present appeal, doubted the correctness of the conclusions reached and the law laid down, in M/s Trusses & Towers (Pvt.) Ltd. (supra), and the

matter was accordingly referred to a larger Bench. The Full Bench of this Court delivered its judgment, on 05.03.2002, on the questions referred

to it for determination. As observed by the Full Bench, in its judgment and order, dated 05.03.2002, aforementioned, the Full Bench was

constituted to decide the following questions:

(i) Whether the suit for recovery of mere interest under the Interest only on Delayed Payments to Small Scale and Ancillary Industrial Undertakings

Act, 1993 is maintainable?

(ii) Whether in the present case, the suit for recovery of interest under the Delayed Payments to Small Scale and Ancillary Industrial Undertakings

Act, 1993 would not be maintainable as the contract for supply of goods between the parties was entered into prior to enforcement of the Article,

23.09.1992?

(iii) Whether the suit for recovery of interest under the Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 would

not be maintainable if no reservation is made by the supplier retaining to it the right to recovery interest under the Act when the payment(s) of the

Principal sum is/are accepted, though these may be made beyond the prescribed period?

11. Having heard the learned counsel for the parties concerned and upon analyzing the provisions of the 1993 Act, the Full Bench answered the

Question No. 1 in the affirmative by taking the view that a suit for recovery of mere interest is maintainable if the interest is claimed under the 1993

Act.

12. As far as the Question No. 2 was concerned, the Full Bench took the view that the 1993 Act would be applicable even to a contract, which

may have been entered into prior to the enforcement of the 1993 Act on 23-09-1992 if the payment, as envisaged by the contract, are delayed

and/or made after enforcement of the 1993 Act and that on such delayed payment, the buyer would be liable to pay interest under the 1993 Act.

The Full Bench further held that the incidence or the sine qua non for payment of interest, under the 1993 Act, is not the terms of the contract, but

the delayed payment. Sections 4 and 5 of the 1993 Act, as observed by the Full Bench, contain a non obstante clause, i.e., "notwithstanding

anything in the agreement". In other words, even if a buyer and the supplier were to agree that on delayed payments, interest would not be paid as

per the provisions of the 1993 Act, such a term, in the contract, cannot be enforced or come to the rescue of the buyer, because of the provisions

of Sections 4 and 5 of the 1993 Act. However, according to the Full Bench, interest, on the delayed payment, made after the coming into force of

the 1993 Act, would be calculated from the date of the enforcement of the 1993 Act and not from the date of payment prescribed under the

agreement.

13. The Full Bench, eventually, concluded as under:

20. Apart from the above, we are of the view that the Act of 1993 is a beneficial legislation for the small scale and ancillary industrial undertakings.

They must get full benefit of the Act from thereof its enforcement.

21. In view of the above observations, our answer to this question is that the Act of 1993 would be applicable even to the contracts entered into

prior to the enforcement of the Act, i.e., 23-09-1992. However, the interest on the delayed payment would be calculated under Act from 23-09-

1992 till date of payment.

14. As regards Question No. 3, the Full Bench was of the view that waiver is a question of fact, which has to be pleaded and proved and there is

no presumption under the law that if the payment is received without any reservation to claim the balance payment or the interest on the delayed

payments under the 1993 Act, it would be presumed that the seller or the supplier had waived his right to claim the balance payment, the interest

or the interest on the delayed payment under the 1993 Act, as the case may be.

15. Overruling the conclusion, reached in M/s Trusses & Towers (Pvt.) Ltd. (supra), that once the principal amount is received by a person

without any reservation, he cannot, thereafter, make a claim for a further sum either by way of principal or interest, the Full Bench held that the

position of law, as laid down in M/s Trusses & Towers (Pvt.) Ltd. (supra), were too widely stated and was not the correct position of law.

16. In short the conclusion of the Full Bench was:

(i) a suit, claiming mere interest under the 1993 Act, is maintainable;

(ii) a suit for recovery of interest, under the 1993 Act, would be maintainable even in respect of a contract, which had been entered into prior to

the coming into force of the of the 1992 Ordinance and the 1993 Act, though interest, on the delayed payment, would be calculated after the 1992

Ordinance and/or the 1993 Act had come into force till the date of the payment.

17. The correctness of the conclusions, so reached by the Full Bench, were put to challenge by the defendants-appellants, in an appeal, before the

Supreme Court. The appeal, so preferred by the defendants, i.e., the Board, came to be registered as Civil Appeal No. 2351/2003, Assam State

Electricity Board and others v. Shanti Conductors Private Limited and another. This appeal was taken up, for hearing, along with another appeal,

namely, Civil Appeal No. 2348 of 2003, (Purbanchal Cables and Conductors Private Limited v. Assam State Electricity Board and another), and

both the said appeals were disposed of by the Supreme Court, on 10th July, 2012, by dismissing the appeals. The decision stands reported in

Purbanchal Cables and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and Another, ).

18. Appearing on behalf of the appellants, Mr. B.D. Das, learned Senior counsel, has submitted that the conclusions, reached by the Full Bench, in

its decision, on 05-03-2002, were challenged, by way of an appeal, to the Supreme Court and the appeal, so preferred, by the ASEB, gave rise

to Civil Appeal No. 2351 of 2003, Assam State Electricity Board and others v. Shanti Conductors Private Limited and another. It is also pointed

out by Mr. Das, learned Senior counsel, that the appeal, which the ASEB had so preferred, was heard along with another civil appeal, namely,

Civil Appeal No. 2348 of 2003, Purbanchal Cables and Conductors Private Limited v. Assam State Electricity Board and another. Both the

appeals were decided by the Supreme Court, on 10-07-2012, and the decision stands, as already indicated above, reported in Purbanchal Cables

and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and Another, .

19. The decision, in Purbanchal Cables and Conductors Private Limited (supra), clearly shows, contends Mr. Das, that the Supreme Court has

taken the view that while a suit for mere interest is maintainable under the provisions of the 1993 Act, the 1993 Act does not have any

retrospective operation; rather, agreeing with the decision, in Assam Small Scale Ind. Dev. Corp. Ltd. and Others Vs. J.D. Pharmaceuticals and

Another, , which decision already stood approved, in Shakti Tubes Ltd. Vs. State of Bihar and Others, , the Supreme Court has, points out Mr.

Das, concluded, in Purbanchal Cables and Conductors Private Limited (supra), too, that to a contract, which had stood concluded prior to 23-09-

1992, the 1993 Act would not apply. In other words, the Supreme Court, according to Mr. Das, took the view, in Purbanchal Cables and

Conductors Private Limited (supra), that the 1993 Act will not apply to transactions, which had taken place prior to 23.09.92, 23.09.92 being the

date on which 1993 Ordinance had come into effect and its operation has been carried on by the 1993 Act too.

20. In the light of the decision, in Purbanchal Cables and Conductors Private Limited (supra), it is contended, on behalf of the appellants, that in

the case at hand, since the supply orders were placed before the 1993 Act had come into force on 23-09-1992, the decision of the learned trial

Court, granting the impugned decree, in the suit, for payment of interest, is wholly against law and is, therefore, not sustainable.

21. Yet another ground of challenge, advanced at the time of hearing of this appeal, by Mr. Das, learned Senior counsel, is that the learned trial

Court has wrongly held that the suit was not barred by limitation and, in this regard, reference made by the learned trial Court to Section 10 of the

1993 Act is wholly erroneous inasmuch as Section 10 merely lays down that provisions of 1993 Act shall have effect notwithstanding anything

inconsistent therewith contained in any other law for the time being in force.

22. Resisting the appeal, Mr. A.K. Sinha, learned Senior counsel, appearing for the plaintiff-respondent, submits that the Supreme Court, in

Purbanchal Cables and Conductors Private Limited (supra), has clearly taken the view, which even the appellants agree, that a suit, claiming mere

interest, is maintainable under the provisions of the 1993 Act.

23. As regards the question as to whether 1993 Act would apply to the contract at hand and whether the suit was barred by limitation, Mr. A.K.

Sinha, learned Senior counsel, has pointed out that it is not in dispute that the payment of the dues of the plaintiffs-respondents was made by the

ASEB as late as on 05-03-1994 and, in such circumstances, the period of limitation started, in the present case, with effect from 05-03-1994 and

the suit, having been instituted on 10-01-1997, it is clear, submits Mr. A.K. Sinha, that the suit was within the period of limitation of three years

and, hence, the suit deserved to be treated as a suit instituted within the period of limitation. This apart, it is the submission of Mr. Sinha, learned

Senior counsel, that on 06.9.1994, Assam Conductors Manufacturers Association had filed a writ petition, which gave rise to Civil Rule No. 1531

of 1993 on behalf of its five named members of the Association, which included M/s. Shanti Conductors, (i.e. the plaintiff in the present suit), and

the High Court, vide its order, dated 06.09.1994, directed the writ petitioner to move the Civil Court for realization of the dues of its members,

whereupon the Association, immediately, filed Writ Appeal No. 474 of 1994, which was finally dismissed on 28.08.1997.

24. In such a situation, as indicated above, Section 14(2) of the Limitation Act, 1963, is, according to Mr. Sinha, of great relevance inasmuch as

Section 14(2) of the Limitation Act, 1963, provides that in computing the period of limitation for any suit, the time during which the applicant had

been prosecuting with due diligence another civil proceeding, the said period has to be excluded. u/s 2(a) of the Limitation Act, 1963, points out

Mr. Sinha, an applicant includes:

(I) petitioner; and

(II) a person from or through whom an applicant derives his right to apply.

Thus, even assuming that the Limitation Act, 1963, applies, then also, the period during which the writ petition and the writ appeal of the said

Association was pending on behalf of, amongst others, M/s. Shanti Conductors, the said period, contends Mr. Sinha, deserves to be excluded

under the provisions of Section 14(2) of the Limitation Act and, thus, the suit was, reiterates Mr. Sinha, within time.

25. Above all, points out Mr. Sinha, learned Senior counsel, that the appellants, in the present appeal, have not challenged the learned trial Court's

decision on the issue of limitation. In this regard, taking the Court through the memorandum of appeal, which the appellants have preferred, Mr.

Sinha, learned Senior counsel, has pointed out that the memorandum of appeal is wholly silent and does not raise or challenge the learned trial

Court's decision on the issue of limitation. Furthermore, points out Mr. Sinha, the Full Bench, while deciding the reference, has clearly observed, in

its decision that the suit was, admittedly within three years of the last payment made by the appellant Board. The observations of the Full Bench

read as follows:

The suit was admittedly within 3 years of the last payment made by the appellant Board.

26. Lastly, it is submitted by Mr. Sinha that under Article 136 of the Constitution of India, the Supreme Court may reverse, modify or affirm the

judgment, decree or order in appeal, while exercising its appellate jurisdiction, and not while exercising its discretionary jurisdiction under Article

136 by disposing of a petition for Special Leave to appeal at the admission stage. The doctrine of merger can, therefore, be applied, contends Mr.

Sinha, to the former and not to the latter.

27. In the instant case also, points out Mr. Sinha, the Assam State Electricity Board, being aggrieved by the decision of the Full Bench in this

appeal, had preferred the SLP (C) No. 24577 of 2002 against M/s Shanti Conductors challenging the Full Bench judgment, dated 5.3.2002,

whereupon leave was granted and SLP was converted into Civil Appeal No. 2351 of 2003. After hearing the appeal, the Board's appeal, further



points out Mr. Sinha, has been dismissed by the Supreme Court and this can be clearly noticed at para 83 of the judgment, reported in Purbanchal

Cables and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and Another, . Thus, according to Mr. Sinha, the Full Bench's decision,

dated 05.03.2002, merges completely into the order of the Supreme Court and has become a binding precedent for this High Court.

28. In support of his above submissions, reference has been made by Mr. Sinha, learned Senior counsel, to Kunhayammed and Others Vs. State

of Kerala and Another, and Meghmala and Others Vs. G. Narasimha Reddy and Others, .

29. A reference, on the doctrine of merger, has also been made by Mr. Sinha, to the decision, in Official Liquidator Vs. Dayanand and Others, ,

wherein, according to Mr. Sinha, a Bench of three Judges of the Supreme Court, while considering the issue of binding precedent under Article

141 and judgments by Coordinate Benches and Larger Benches, clearly held that a Bench of two Judges, such as, this Bench, is bound to follow

the decision of a Bench of three Judges, i.e., the Full Bench decision aforementioned. The Supreme Court has also held, in Dayanand (supra),

points out Mr. Sinha, that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country. Reliance has also

been placed by Mr. Sinha, learned Senior counsel, on the case of U.P. Power Corporation Ltd. Vs. Rajesh Kumar and Others, .

30. Relying on the authorities cited by him, Mr. Sinha, learned Senior counsel, contends that since the Supreme Court, in Purbanchal Cables and

Conductors Private Limited (supra), has dismissed the appeal of the appellant Board, the decision of the Full Bench has merged into the said

decision of the Supreme Court and (this Bench, being a Divisions Bench, is bound to follow the decision of the Full Bench, which has clearly

recorded that the contract, in question, in the present case, was covered by the 1993 Act inasmuch as the supply orders were made prior to the

coming into force of the 1993 Act, but the transactions continued even after the 1993 Act had come into force, the last payment having been made

by the appellant Board on 05-03-1994 and, hence, in respect of this delayed period of payment, the appellant, ASEB, is liable to pay interest.

31. Further submission of Mr. Sinha is that had the Full Bench decision, arising out of the present appeal, not been applicable to the case at hand,

the Supreme Court would not have dismissed the Board's appeal nor would it have referred the issue of limitation to be decided by this Court.

32. In the light of the rival submissions made before us, let us, now, consider if the suit, in question, was maintainable. If the suit, in the light of the

decision, in Purbanchal Cables and Conductors Private Limited (supra), is found by this Court not maintainable, it would be inappropriate to

decide the question of limitation inasmuch as the question of limitation would arise only when the suit at hand is found to be maintainable.

33. Coming to the merit of the present appeal, there can be no doubt that the Full Bench has taken the view that a suit for mere interest is, in the

light of the provisions of 1993 Act, permissible in law and that the 1993 Act is applicable to even a contract, which might have been entered into

prior to the coming into force of the 1993 Act, but the payment, as envisaged by the contract, was delayed in the sense that the payment was

made after the enforcement of the 1993 Act and, hence, on such delayed payment, the buyer would be liable to pay interest under the 1993 Act.

The relevant observations, made by the Full Bench, read as under

After hearing learned counsel for the parties on this point, we are of the view that the 1993 Act would be applicable even to the contract, which

might have been entered into prior to the enforcement of the Act, i.e., 23.09.92, where the payments as envisaged by the contract are delayed and

made after enforcement of the Act, on such delayed payment the buyer would be liable to pay interest under the Act of 1993. The incidence or the

sine qua non for payment of interest under the Act of 1993 is not the terms of the contract but the delayed payment. Sections 4 and 5 of the Act of

1993 as observed above, contain non-obstante clause i.e. "notwithstanding anything in the agreement". In other words, even if a buyer and the

supplier were to agree that on delayed payments interest would not be paid as per the provisions of the Act of 1993, such a term in the contract

cannot be enforced or come to the rescue of the buyer in view of the provisions of Sections 4 and 5 of the Act, which clearly provide

"Notwithstanding anything in the agreement". However, in such a case, interest on the delayed payment, which is made after the coming into force

of the Act of 1993 would be calculated under the Act and not from the date of payment prescribed under the agreement.

34. The Full Bench has also taken the view that the incidence or the sine qua non for payment of interest, under the 1993 Act, is not the terms of

the contract, but the delayed payment. The Full Bench, however, clarified that while making payment of the interest, the interest would have to be

calculated, in case of delayed payment, from the date of enforcement of 1993 Act and not from the date of payment prescribed under the

agreement.

35. While the decision of the Full Bench that a suit for mere interest is maintainable has, admittedly, been agreed to by the Supreme Court in

Purbanchal Cables and Conductors Private Limited (supra), the controversy really remains whether the Apex Court has, in Purbanchal Cables and

Conductors Private Limited (supra), approved the decision of the Full Bench that the 1993 Act would be applicable to a contract, which might

have been entered into prior to the enforcement of the 1993 Act, but the payment, as envisaged by the contract, had been delayed or had been

made after the 1993 Act had come into effect.

36. In fact, having discussed its earlier decision, in *Modern Industries Vs. Steel Authority of India Ltd. and Others*, , the Supreme Court has

pointed out, in *Purbanchal Cables and Conductors Private Limited (supra)*, that the decision of the Full Bench of the Gauhati High Court has been

approved in *Modern Industries (supra)* and since a Division Bench of the Supreme Court has already approved the dictum of the Full Bench of the

High Court with regard to the maintainability of the suit only for interest, this question is no longer *res integra*. In short, thus, the Supreme Court has

held, in *Purbanchal Cables and Conductors Private Limited (supra)*, that a suit for mere interest is maintainable under the provisions of 1993 Act.

The relevant observations, appearing in this regard, in *Purbanchal Cables and Conductors Private Limited (supra)*, at Para 17, read as under:

The decision of the Full Bench of the Gauhati High Court, which has been approved by this Court in *Modern Industries (supra)*, is impugned

before us in one of the appeals. Since a Division Bench of this Court 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*. Therefore, the suppliers may file a suit only for a higher

rate of interest on delayed payments made by the buyer from the commencement of the Act.

37. The real issue, therefore, which remains to be decided, now, is:

Whether the suppliers can get benefit of the provisions of the 1993 Act even if the contract of supply was concluded or executed prior to the

commencement of the 1993 Act, but the payment was made after the commencement of the 1993 Act?

38. Before coming to the answer, which the Supreme Court gave in *Purbanchal Cables and Conductors Private Limited (supra)*, to the question

posed above, it may be noted that in *Assam Small Scale Ind. Dev. Corp. Ltd. and Others Vs. J.D. Pharmaceuticals and Another*, , the Supreme

Court, while dealing with the 1993 Act, held as under:

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 23-09-1992. 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.

(Emphasis is added)

39. The decision, in Assam Small Scale Industries Development Corpn. Ltd. (supra), fell for consideration in Shakti Tubes Ltd. Vs. State of Bihar

and Others, . The observations of the Supreme Court, in Shakti Tubes Ltd. (supra), go to show that the Supreme Court agreed with its earlier

decision rendered in Assam Small Scale Industries Development Corpn. Ltd. (supra), though it was contended, in Shakti Tubes Ltd. (supra), that

Assam Small Scale Industries Development Corpn. Ltd. (supra) refers to the term "transactions" and that a "transaction" would be complete only

when the supplier makes the supply and, hence, when the supplier made supply after 1993 Act had come into force, the provisions of 1993 Act

would be applicable. However, the Supreme Court, while dealing with this contention, pointed out, in Shakti Tubes Ltd. (supra), that what is

relevant is the date of supply order and when the expression "transaction" was used in Assam Small Scale Industries Development Corpn. Ltd.

(supra), it meant only a supply order. Further clarified the Supreme Court, in Shakti Tubes Ltd. (supra), that the expression "transaction",

appearing in Assam Small Scale Industries Development Corpn. Ltd. (supra), meant initialization of the transaction, i.e., placing of the supply order

and not completion of the transaction, which would, obviously, be completed only when the payment is made. The relevant observations,

appearing in this regard, in Shakti Tubes Ltd. (supra), read as under:

In Shakti Tubes Ltd. Vs. State of Bihar and Others, , this Court approved the ratio in Assam Small Scale Industries, and held:

18. In our considered opinion, the ratio of the aforesaid decision in Assam Small Scale Industries case 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.

19. 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 16-7-1992 for supply of the pipes which date is admittedly prior to the date on which this Act came into effect.

20. 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 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 Sections 4 and 5 of the Act. 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.

21. We have considered the aforesaid rival submissions. 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 by the respondents and when this Court used the expression

transaction"" it only meant a supply order. The Court made it explicitly clear in para 37 of the judgment which we have already extracted above. 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

para 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.

(Emphasis is added)

40. Having referred to its decision Assam Small Scale Industries Development Corpn. Ltd. (supra), which was followed in Rampur Fertilizers

Limited v. Vigyan Chemical Industries, reported in (2009) 12 SCC 324, as well as Modern Industries (supra), the Supreme Court observed, at

Para 55, in Purbanchal Cables and Conductors Private Limited (supra), that it cannot agree with the submission that the Supreme Court, in Assam

Small Scale Industries Development Corpn. Ltd. (supra), had not specifically considered and decided the issue whether the 1993 Act would apply

to a contract, concluded prior to the commencement of the 1993 Act, but supplies were made after the 1993 Act had commenced.

41. Relying upon its decision, in Assam Small Scale Industries Development Corpn. Ltd. (supra), the Supreme Court, in Purbanchal Cables and

Conductors Private Limited (supra), has observed that the answer to the question--as regards the maintainability of the suit, arising out of a

contract, which was concluded prior to the coming into force of the 1993 Act, but supplies were made after the said Act had come into force--is

no longer res integra. The relevant observations, appearing at Para 53, in Purbanchal Cables and Conductors Private Limited (supra), read as

under:

On a careful perusal of the judgment of this Court in Assam Small Scale Industries, we find that even the question regarding the applicability of the

Act to contracts concluded prior to coming into force of the Act is no longer res integra. This question is answered by this Court in the case of

Assam Small Scale Ind. Dev. Corp. Ltd. and Others Vs. J.D. Pharmaceuticals and Another, as under:

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.

42. The Supreme Court points out, at Para 52, in Purbanchal Cables and Conductors Private Limited (supra), that in the absence of any express

legislative intendment of the retrospective application of the 1993 Act, and by virtue of the fact that the 1993 Act creates a new liability of a high

rate of interest against the buyer, the 1993 Act cannot be construed to have retrospective effect. Since the 1993 Act envisages that the supplier

has an accrued right to claim a higher rate of interest in terms of the 1993 Act, the same can only said to accrue for sale agreements after the date

of commencement of the Act, i.e. 23rd September 1992, and not any time prior thereto. The relevant observations, made in para 52, in

Purbanchal Cables and Conductors Private Limited (supra), read as under:

In the absence of any express legislative intendment of the retrospective application of the Act, and by virtue of the fact that the Act creates a new

liability of a high rate of interest against the buyer, the Act cannot be construed to have retrospective effect. Since the Act envisages that the

supplier has an accrued right to claim a higher rate of interest in terms of the Act, the same can only said to accrue for sale agreements after the

date of commencement of the Act, i.e. 23rd September 1992 and not any time prior.

(Emphasis is added)

43. In view of what have been indicated above, there can be no escape from the conclusion that the Full Bench decision of this Court, in the

present appeal, which took the view that the 1993 Act would apply even to a contract, which might have been entered into prior to the

enforcement of the Act, i.e., 23.09.1992, where the payments, as envisaged by the contract, were delayed and made after enforcement of the

1993 Act, the buyer would be liable to pay, on such delayed payment, interest under the 1993 Act, was not approved of, and, in fact, disagreed

with, by the Supreme Court, in Purbanchal Cables and Conductors Private Limited (supra).

44. In the light of what have been concluded above by us and if this conclusion is not incorrect, a suit for recovery of interest, on delayed payment,

would not be maintainable after the 1993 Act had come into force, if the contract for supply had been entered into before coming into force of the

1993 Act and/or supply order was placed before commencement of the 1993 Act.

45. Situated thus, we are, now, required to consider the submission of Mr. A.K. Sinha, learned Senior counsel, that by virtue of the doctrine of

merger, the decision of the Full Bench, dated 05.03.2002, has become binding on this Court inasmuch as the present appellants' appeal, which

had given rise to the decision, in Purbanchal Cables and Conductors Private Limited (supra), stands, eventually, dismissed by the Supreme Court

inasmuch as the Supreme Court, at para 83, in Purbanchal Cables and Conductors Private Limited (supra), concluded thus. ""The result is, the

appeals fail and, accordingly, they are dismissed. No order as to costs.

46. Turning to the question of the doctrine of merger, which Mr. A.K. Sinha, learned Senior counsel, has referred to, there can be no doubt that

when an order is passed by an appellate Court agreeing or disagreeing with the order of the trial Court, the trial Court's order is subsumed by the

appellate Court's order by virtue of the doctrine of merger. Explaining the doctrine of merger, though in the context of a writ appeal, this Court

observed, in the case of State of Arunachal Pradesh and Others Vs. Nefa Udyog and Others, , as under:

22. What emerges from the law laid down in Kunhayammed (supra) is that where an appeal is provided against an order passed by a Court and

the appeal is preferred, then, the decision of the lower Court forum merges into the decision of the appellate Court and it is the latter's decision,

which subsists, remains operative and is capable of enforcement in the eyes of law. The position of the special leave applications made under

Article 136 is, somewhat, different. The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to

the disposal of the prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the SLP

is converted into an appeal. The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction

exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the

applicability of the doctrine of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before

it. Under Article 136 of the Constitution, the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against only

when it exercises appellate jurisdiction (i.e. after the leave to appeal is granted) and not while it exercises the discretionary jurisdiction on the

question as to whether the petition for special leave to appeal shall be granted or not, The doctrine of merger, therefore, in such cases, comes into

play if the special leave to appeal is granted and not when the question as to whether the leave would be granted or not is considered and decided.

An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case, it does not attract the doctrine of merger.

An order refusing special leave to appeal does not stand substituted in place of the order under challenge. What such an order implies is that the



Supreme Court was not inclined to exercise its discretion so as to allow the appeal being filed. If the order refusing leave to appeal is a speaking

order, i.e. when reasons are assigned for refusing the grant of leave, then, the order has two implications. Firstly, the statement of law contained in

such an order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the

declaration of law. Whatever is stated in the order are the findings recorded by the Supreme Court, which would bind the parties thereto and also

the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the

country; but it does not mean that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting

SLP or that the order of the supreme Court is the only order binding as res judicata in subsequent proceedings between the parties. Once leave to

appeal has been granted and the appellate jurisdiction of supreme Court has been invoked, the order passed in appeal would attract the doctrine

of merger. On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme

Court, the jurisdiction of High Court to entertain a review petition is lost there-after as provided by sub-rule (1) of Rule 1 of Order 47 of the CFC.

47. It is correct, as submitted by Mr. A.K. Sinha, learned Senior counsel, that the Supreme Court, at Para 83, has dismissed the present

appellant's appeal, which has come to be reported, as already mentioned above, in Purbanchal Cables and Conductors Private Limited (supra),

and the decision, so rendered, subsumes this Court's decision of the Full Bench. In other words, the decision of the Full Bench of this High Court,

in this appeal, stands merged into the decision rendered in Purbanchal Cables and Conductors Private Limited (supra). It would be, however,

mechanical not to read, in its entirety; the decision Purbanchal Cables and Conductors Private Limited (supra) and apply the decision, in

Purbanchal Cables and Conductors Private Limited (supra), to the present case.

48. When read, and read carefully, it becomes crystal clear that according to the decision of the Supreme Court, in Purbanchal Cables and

Conductors Private Limited (supra), the conclusion of the Full Bench that the 1993 Act would apply even to a contract, which might have been

entered into prior to the enforcement of the 1993 Act, i.e., 23.09.1992, where the payments as envisaged by the contract, were delayed and made

after enforcement of the 1993 Act, on such delayed payment, the buyer would be liable to pay interest in terms of the 1993 Act, had not been

agreed to in Assam Small Scale Industries Development Corpn. Ltd. (supra) and the decision, in Assam Small Scale Industries Development

Corpn. Ltd. (supra), which was followed in Shakti Tubes Ltd. (supra), has observed, in Purbanchal Cables and Conductors Private Limited

(supra), have remained no longer res integra and that the 1993 Act would not apply to a contract, which had been entered into before the 1993

Act had come into force, but the supplies were made or payments were made after the 1993 Act had come into force. Realistically and legally

speaking, with the help of the doctrine of merger, the decision of the Supreme Court, in Purbanchal Cables and Conductors Private Limited

(supra), has to be read, as a whole, and we hold, and we must hold, that to the transactions at hand, the 1993 Act does not apply and the suit, in

the present case, was not maintainable. Consequently, the impugned decree cannot be sustained.

49. In the result and for the reasons discussed above, this appeal succeeds. The impugned judgment and decree are hereby set aside with cost.

Send back the record.