

Bombay High Court

The Maharashtra Small Scale ... vs Snehadeep Structures Pvt. Ltd.23 on 3 May, 2013

Bench: N.M. Jamdar

Final ARBP499-03.sxw

JP CHAVAN

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 499 OF 2003

The Maharashtra Small Scale Industries ... Development Corporation Limited Krupanidhi, 9, Walchand Hirachand Marg, Ballard Estate, Mumbai 400 001	Petitioner
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Versus

Snehadeep Structures Pvt. Ltd.23, Pushpakunj, Commercial Complex, 3rd Floor, Ramdaspath, Central Bazar Road, Nagpur 400 010	Respondent
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Mr. M. P. S. Rao, Senior Advocate i/by A. C. Mahimkar for the

Petitioner
Mr. Vineet Naik, Senior Advocate i/by Ms. Chandana Salgaonkar
Radia for the Respondent

CORAM : N. M. JAMDAR, J.

Reserved for Judgment on : 11 February 2013

Judgment pronounced on : 3 May 2013

JUDGEMENT

1. By this Arbitration Petition, the Petitioner seeks 1/50 :: Downloaded on - 09/06/2013 13:26:05 :: Final ARBP499-03.sxw challenge the Award of the sole Arbitrator dated 30 June, 2003. By the impugned Award, the Arbitrator has directed the Petitioner to pay an amount of Rs.78,19,540.13 along with interest.
2. The Petitioner- the Maharashtra Small Scale Industrial Development Corporation is a Corporation set up for the purpose of promoting small scale industries in the State of Maharashtra. The Respondent is a private limited company engaged in the business of manufacturing MS Pipes and related products. It is a small scale industrial unit.
3. The dispute between the parties, which was referred to arbitration, is regarding the interest on delayed payment made by the Respondent to the Petitioner.
4. Before proceeding with narration of the facts of the present case, it will be useful to advert to the developments as regards statutory provisions that govern the dispute. The relevant statute is "The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (32 of 1993)" On 23 September 1992, the President of India promulgated an Ordinance viz. The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Ordinance 1992. Thereafter, on 2 April 1993 "The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (32 of 1993)" (hereinafter referred to as the Interest Act), was enacted. The statement of object and reasons which was appended to the Bill read as:

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Final ARBP499-03.sxw " Inadequate working capital in a small scale or an ancillary industrial undertaking causes serious and endemic problems affecting the health of such undertaking. Industries in this Sector have also been demanding that adequate measures betaken in this regard. The small Scale Industries Board, which is an apex

advisory body on policies relating to small scale industrial units with representatives from all the States, governmental bodies and the industrial sector, also expressed this view. It was, therefore, felt that prompt payments of money by buyers should be statutorily ensured and mandatory provisions for payment of interest on the outstanding money, in case of default, should be made. The buyers, if required under law to pay any interest, would refrain from withholding payments to small scale and ancillary industrial undertakings."

5. The Act was enacted to provide for compulsory interest on delayed payments to small scale and ancillary undertakings as a means of protection against their exploitation.

The legislature noted that inadequate working capital caused serious and endemic problems affecting the health of the small scale undertakings. It was noticed that whenever the units had commercial dealings with the Government or Governmental bodies, payments were not being made on time, which pushed such small scale units towards brink of bankruptcy. The legislature therefore thought it fit that to encourage speedy payment to such units by Government and Governmental bodies, a provision for compulsory statutory interest to be paid on delayed payment, needs be made.

6. The Interest Act is a beneficial legislation and is enacted for protection of small scale units. The Interest Act places 3/50 :: Downloaded on - 09/06/2013 13:26:05 :: Final ARBP499-03.sxw liability on the Government and Governmental bodies to pay interest on delayed payment. Section 2 deals with the definitions. 'Buyer' is defined in Section 2(c) as whoever buys any goods or receives any services from a Supplier for consideration. Clause 2(d) defines 'Goods' as every kind of movable property other than actionable claims and money; Clause 2 (f) as amended, defines 'Supplier' which includes the Respondent and after the amendment, includes Small Scale Industries Cooperation such as the Petitioner. Section 3 casts liability on the Buyer to make timely payment by providing that 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, or where there is no agreement in that behalf, before the appointed day defined in Section 2(b) of the Interest Act.

7. Section 4 of the Interest Act, as amended, states that where any Buyer fails to make payment of the amount to the Supplier as required under section 3, the Buyer is, notwithstanding any agreement to the contrary, liable to pay interest at the rate of one and half times the prime lending rate charged by the State Bank of India. Section 4 thus casts liability on the Buyer to pay interest if the payment is delayed. Section 5 lays down that the Buyer will pay compound interest notwithstanding any agreement or any law in force. Section 6 lays down modalities for recovery of the amount due and provides that the amount due from a Buyer, together with the amount of interest calculated in accordance with the provisions of sections 4 and 5, shall be 4/50 :: Downloaded on - 09/06/2013 13:26:05 :: Final ARBP499-03.sxw recoverable by the Supplier from the Buyer by way of a suit or other proceeding under any law for the time being in force. Section 7 states that no appeal against any decree, award or other order shall be entertained by any Court or other authority unless the appellant (not being a Supplier) has deposited with it seventy-five per cent of the amount. Section 10 declares that the provisions of the Act will have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

8. The Office of Development Commissioner (Industrial Department and Rural Ministry of Government of India) forwarded a letter to the Secretary, Government of Maharashtra and intimated that the Interest Act should be given effect to and implementation should be done as efficaciously as possible. The Industry, Energy and Labour Department of Government of Maharashtra wrote to all the concerned Departments and undertakings including the Petitioner and MSEB that the Interest Act should be given effect to and the provisions should be scrupulously followed.

9. In the year 1998 amendments were made to the Interest Act. The amendments were brought in to cure certain defects in the functioning of the Act and to make it more stringent. The Statement of Object and Reasons of the Amendment Act No. 23 of 1998 reads as under:

"2. The existing Act is not applicable to the Central or State public sector undertakings, such as, the National Small Industrial Corporation (NSIC) and the State Small Industries Development Corporations (SSIDC). Since both the aforesaid 5/50 :: Downloaded on - 09/06/2013 13:26:05 :: Final ARBP499-03.sxw corporations have been playing an important role in marketing of SSI products, it is proposed to amend the definition of "Supplier" so as to bring within the scope , the aforesaid Corporations.

3. Section 3 of the Act stipulates that a Buyer is required to make payment on or before the agreed date to small scale Supplier of goods or services. Where the credit period is not specified in the agreement, the payment is to be made within 30 days from the date of the acceptance of the goods or services. It has been noticed that buyers tend to prescribe a credit period of 240-360 days. This defeats the purpose of the Act. It is , therefore, proposed to amend Section 3 of the Act by specifying a period of 120 days as the maximum period of credit.

4. Section 4 of the Act states that buyers shall be liable to pay interest to the suppliers on outstanding dues beyond the appointed day at a rate which is five percent points above the floor rate. The Reserve Bank of India, in the new Credit policy, has changed the system of prescribing floor rates for the purpose of lending by banks for the loans exceeding Rs.2 lakhs. The banks are not free to fix the Prime Lending Rate for loans. This change in interest rate policy has necessitated a change in determining the penal rate of interest in the Act. It is proposed to fix the penal rate of interest at one and half times of the Prime Lending Rate of the State Bank of India.

5. Under Section 6 of the Act, the outstanding amount together with the interest is recoverable (in case of dispute) by way of a civil suit. It is proposed to provide an alternative mechanism of arbitration and conciliation apart from section 6 to resolve the dispute under the Act. For this purpose, State government are proposed to be authorized to set up one or more "industry Facilitation councils" for the purpose of arbitration and conciliation. These councils shall act as arbitrators or conciliators for settling disputes between SSI suppliers and buyers. This aims at facilitating resolution of disputes between the two 6/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw parties amicably."

Thus by the amendment, inter alia, Corporations such as the Petitioner have also brought within the ambit of 'Supplier'.

10. Now, advertent to the facts of the present case, on 27th March, 1995, the Maharashtra State Electricity Board (MSEB) placed a work order with the Respondent Corporation for supply of pipelines, bends and fixtures for laying a slurry pipeline at its Thermal Power Station at Chandrapur. The subject matter of the work order was " Chandrapur T. P. S.- Unit-7- Supply, transportation, providing laying and testing and 3nos. 400 NB 9.5 mm thick M.S. Ash Disposal pipelines for Part 'B' (From Ch.7500 Mtrs. to 18965 Mtrs. at Chandrapur T.P. Station, Chandrapur)". There was a schedule annexed to the said work order, which laid down particulars of the work to be carried out. Clause 9.0.2 of the work order provided for a certain schedule of payment.

11. Thermal Power Station at Chandrapur, produced slurry which had to be discharged to a distant site in the valley.

Several tonnes of slurry was being generated every day at the Power Station. The slurry contained ash mixed with water and was to be transported through the proposed pipeline, to be dumped in the valley. The pipeline was to be assembled at the spot, above the ground, by erecting small pillars. Once the slurry was discharged to the limit at one site, the pipeline would be then shifted to another site where the discharge of slurry would continue.

12. Pursuant to the work order, the Petitioner Corporation 7/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw issued a supply order to the Respondent on 30 March 1998. The supply order specified the goods to be supplied with the same description as the work order. The supply order stated that it was being placed by the Petitioner Corporation under its marketing assistance scheme.

13. Pursuant to the supply order, the products/goods ordered were supplied by the Respondent and they were of prescribed quality. The delivery work was accepted by the Petitioner. The Respondent Company submitted running bills in respect of the goods supplied and the work undertaken, as per the terms of the work order and supply order. According to the Respondent, it was entitled to receive full payment of the bills within 10 days of the submission and the Petitioner failed to pay the bills within the prescribed time and delayed the payment without any justifiable cause.

14. The final bill was prepared on 12 November 1999. The Respondent on 7 December 1999 issued notice to the Petitioner. The Respondent stated that it had completed the work 31 January 1998 to the satisfaction of the Petitioner. The Respondent stated that it was supposed to get 75% payment within 7 days and balance 25% within 20 days. The Respondent called upon the Petitioner to pay interest on the delayed payment under the provisions of the Interest Act.

15. This letter was replied to by the Petitioner on 24 April, 2000. The Petitioner drew attention of the Respondent to Clause 8/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw 25 of the Supply Order which stated that the money was to be paid after it was received from the MSEB. Thus, according to the Petitioner, since the claim was governed by Clause

25, there was no question of Petitioner making any payment towards the claim.

16. On 21 December, 2001, the Respondent sent an Advocate's notice calling upon the Petitioner for appointment of an Arbitrator. The Respondent reiterated that the Respondent was entitled to interest on delayed payment as per provisions of the statute and since the amount is not paid a dispute has arisen upon the between the parties referable to Arbitration. The Respondent called Petitioner to refer the dispute to the Chairman or Managing Director, failing which the Respondent would be constrained to take appropriate proceedings for appointment of Arbitrator. The Petitioner replied to the Advocate's Notice on 5 February 2002. The Respondent stated that as per the terms of the supply order, any payment due will be released to the Supplier unit upon receipt of bill from the Consignee (MSEB). As regards appointment of Arbitrator, the Petitioner stated that the matter is being consulted with the legal department. It was stated that as per the terms of the payment, the Respondent had agreed to receive payment after receipt of payment to the Petitioner from the MSEB.

The reply categorically stated that the Respondent will get the outstanding dues immediately after receipt of the same from the MSEB. It was informed that in view of the same, the arbitration proceedings were not warranted and the notice was premature.

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17. Thereafter, the Respondent filed Application in this Court under Section 11 of the Arbitration And Conciliation Act, 1996, being Arbitration Application No. 69 of 2002. In the said application, Mr. Justice S. V. Puranik (Retired) was appointed as the sole Arbitrator.

18. The Respondent filed statement of claim before the sole Arbitrator on 13 August 2002. The Respondent submitted that in consonance with the supply order the Respondent had supplied goods to the Petitioner which were duly accepted and the Respondent was entitled to receive full payment of the bills within 10 days of submission and since the bills were not paid on time, the Respondent was entitled to statutory interest as provided under the Interest Act. The Respondent urged that the claim is within limitation as the final bill in respect of the supply order was submitted on 12 November 1999. The Respondent further contended that vide letter dated 5 February 2002, Petitioner - Corporation specifically acknowledged that interest is liable to be paid to the Respondent. Accordingly, the Respondent prayed for the sum of Rs.7819540.13 along with further interest @ 24%.

19. The Petitioner filed its reply and opposed the claim of the Respondent. The Petitioner contended that as per the terms of the contract the Respondent was to be paid only after the payment was received from the MSEB. The Petitioner contended that the contract between the Petitioner and the Respondent was a works contract and the provisions of Interest Act were not applicable to such a works contract. The Petitioner contended that it is the statutory duty of the Petitioner to assist the small scale industries,

and such works are undertaken as a part of a policy.

There was a specific agreement between the parties that the amount would be paid only after it was received from MSEB, therefore the Respondent could not have asked for interest on payment which was paid late by the MSEB. Furthermore, the MSEB was a necessary party to the proceedings. The Petitioner also contended that the claim was barred by law of limitation. On these and other grounds, the Petitioner sought for dismissal of the claim of the Respondent.

20. The Respondent filed an affidavit-in-rejoinder and placed on record that what was executed was not a works contract but a contract for supply of goods and services. The Respondent contended that the Petitioner was a Buyer as per definition under the provisions of the Interest Act, and therefore, was liable to pay interest. The Petitioner, relied upon the decision of this Court in the case of R. P. Souza & Co. Vs. Chief Engineer, P.W.D.

reported in 2000(1) Mh. L.J. 558 to contend that limitation will start from the preparation of final bill. The Petitioner thereafter filed sur-rejoinder.

21. The learned Arbitrator considered the pleadings of the parties and the arguments of the learned counsel. The learned Arbitrator found that MSEB was not a necessary party. The MSEB had taken a categorical stand in the other proceedings between the 11/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw parties that the MSEB has no privity of contract between it and Respondent, the MSEB was not a necessary party. The learned Arbitrator held that the Petitioner is a Buyer within the meaning of the Interest Act and therefore the Petitioner was liable to pay interest. The learned Arbitrator held that the contract was for supply of goods and services and therefore it was governed by the provisions of the Interest Act. The learned Arbitrator found that since the claim was made within time after preparation of the final bill, the claim was within limitation. The learned Arbitrator held that the argument of the Petitioner that the Petitioner was required to pay the Respondent only after receipt of payment from the MSEB, and therefore is not liable to pay interest, cannot be accepted. The learned Arbitrator came to the conclusion that the Respondent was entitled to the benefit of the Interest Act and accordingly granted Rs.78,19,540.73 as per the statement of claim and simple interest @ 10% per annum from the date of statement of claim till the date of Award and future interest at the same rate from the date of Award till the payment and/or realization. It was further directed that if the Petitioner failed to pay the amount within 3 months, the Petitioner would be liable to pay compound interest with monthly rest at 1½ times of prime lending rate charged by the State Bank of India from the date of the claim until the payment and/or realization. The learned Arbitrator pronounced his Award on 30 June 2003.

22. The Petitioner has filed the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 challenging 12/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw the Award dated 30 June 2003.

23. When the arbitration petition came up for admission, the Respondent raised an objection that the petition ought not to be entertained as the Petitioner had not complied with the provisions of Section 7 read with Section 10 of the Interest Act. According to the Respondent, the said sections

mandated deposit of the amount before the petition could be entertained. The Petitioner contended such deposit is not necessary as the said provisions applied only to appeals and not to the petitions. The learned Single Judge, by order dated 25 January, 2005 came to the conclusion that for the purpose of Section 7 of the Interest Act, the petition will have to be treated as an Appeal and since the Petitioner did not deposit the amount required to be deposited, the petition was dismissed. The Petitioner, thereafter, filed an Appeal bearing No.488 of 2006 before the Division Bench. The Division Bench, by order dated 5 February 2008, allowed the Appeal and set aside the order passed by the learned Single Judge and directed that the petition be disposed of on merits. Thereafter, the Respondent filed Special Leave Petition in the Apex Court. The Apex Court, after considering the provisions of the Act and construing the Interest Act as a beneficial legislation, set aside the order passed by the Division Bench and held that the term 'Appeal' appearing in Section 7 of the Interest Act will include petition under Section 34 of the Arbitration Act and the Petitioner was directed to deposit 75% of the amount awarded by the learned Arbitrator. Thereafter there were certain proceedings regarding quantum of the amount, 13/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw which also stood concluded and the petition was placed for hearing.

24. I have heard Mr. M.P.S. Rao, learned Senior Advocate for the Petitioner with Mr. A. C. Mahimkar and Mr. Vineet Naik, learned Senior Advocate with Ms. Chandana Salgaonkar Radia for the respondents. The learned counsel have also submitted their written submissions.

25. Since the learned counsel argued the matter on the basis of the issues framed by the learned Arbitrator, it will be useful to deal with the submissions as per these issues. The issues framed by the learned Arbitrator, with suitable modifications, are as under:

(1) Whether MSEB is a necessary party and the claim is bad for non-joinder of MSEB to the arbitration proceedings as alleged by the Petitioner ?

(2) Whether the Petitioner is not a "Buyer" within the meaning of definition of the term under the Interest Act and, hence, the Petitioner is not liable to pay interest on delayed payment ?

(3) Since the part of the work comprises of execution of civil work, whether the provisions of the Interest Act do not apply to the present case as the said Act is applicable only to supply contracts ?

(4) Whether the claim of the Respondent is barred by time as 14/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw the work was executed between 1995 and 1998 and the notice for arbitration was issued only on 21 December 2001, which is beyond the period of three years ?

(5) Whether it was a condition of supply that the payment shall be made to the Respondent by the Respondent only as and when it receives payment from MSEB and, hence, no interest is payable on delayed payment ?

(6) Whether the Respondent has established its claim for interest on delayed payment in accordance with the provisions of the Interest Act and, if so, what amount ?

(7) Whether the Respondent is entitled to interest pendente lite and future interest on the amount found due ?

27. Before the arguments on the above issues are considered, the relevant clauses from works orders and Supply order need to be reproduced.

Clause 9.0.2 of the work order:

- " (i) 95% of the value of items, less advance paid, to the extent of the material used in the work;
- (ii) 3% of the value of the items on successful completion of the Hydrostatic testing of the entire pipeline after erection.
- (iii) 1% on handing over of the entire work; and
- (iv) 1% along with the Final Bill."

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Final ARBP499-03.sxw Clause 23.0(vi) of the work order:

23.0 This work order is issued subject to the following confirmation made by you vide your letter No. MRK/MSEB/AND/94-95 2917 dated 4.1.1995 that:

(vi) You have agreed not to bring any dispute concerning sub units and MSSIDC to the Board.

Clause 23 of the supply order:

23. All liability by way of loss or damages incurred in the course of manufacture and supply of delivery of the goods by way of any labour claims accident, etc. will be on the suppliers account and the consignee or the Corporation will not be responsible for the same and supplier shall indemnify and keep them indemnified against such liability.

Clause 25 of the supply order:

(25) The price of the goods delivered and accepted by the consignee and when received from the consignee will be paid to the supplier by the Corporation subject to deductions of advances, if any, paid by the Corporation and the service charges and other moneys payable to the Corporation by the supplier. No advance payment will be made for any supply of goods unless otherwise agreed to by the Corporation.

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Final ARBP499-03.sxw Clause 27 of the supply order.

(27) In case of any dispute or difference arising out of or in relation to this contract or order, the same shall be referred to the Sole Arbitration of the Chairman of the Corporation or any other person Nominated by him and the Arbitration shall be governed by the Arbitration Act, 1940. Provided that in the event of any dispute or difference arising out of or in relation to the contract between the Corporation and the consignee and such dispute or difference being referred to Arbitration under the provisions of such contract, the supplier shall be deemed to be a party to such arbitration through the Corporation and any final award in such Arbitration the Corporation will allow the supplier to participate and if necessary to plead the case on behalf of the Corporation.

Clause 30 of the supply order.

(30) The supplier will not be entitled to make any claim under the this order for price or for damages against the consignee.

Clause 33 of the supply order.

(33) It is agreed by the supplier that since the Corporation is a State Government promotional agency and is not the ultimate consumer of the goods purchased vide. This supply order Corporation shall not 17/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw be held liable under the Government of India Act, 1993 on payment of interest on the delayed payment to the units by the purchaser."

28. Whether MSEB is a necessary party and the claim is bad for non-joinder of MSEB to the arbitration proceedings as alleged by the Petitioner ?

(a) It is submitted by the learned counsel for the Petitioner that the two agreements i.e. one between MSEB and the Petitioner and another between Petitioner and the Respondent would show that the Petitioner was only a facilitating agency acting in the interest of small scale industries and the entire responsibility of payment was on MSEB. It was submitted that as per Clause 25 of the supply order it was agreed that the Petitioner would make payment to the Respondent only upon receipt of moneys from the MSEB and clause 26 stated that Petitioner would deduct service charges. The learned senior counsel for the Petitioner submitted that clause 27 of the supply order contained arbitration clause and the arbitration clause provided that if there was dispute between the Petitioner and the MSEB, then such dispute would be referred to arbitration to which the Respondent would be deemed to be a party and if any final award was to be passed, the Respondent was allowed to participate and defend any claims against the MSEB. It was submitted that the combined reading of the both work order dated 27 March 18/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw 1999 and supply order dated 30 March 1999, would show that the entire work was undertaken for the benefit of MSEB and the MSEB was to pay the amount of interest, if any, and the Petitioner was not liable. It was submitted that in the circumstances, the

MSEB was necessary party and the learned Arbitrator erred in coming to the conclusion that MSEB was not necessary party. It was further submitted that the stand taken by the MSEB in the affidavit which has been relied upon by the learned Arbitrator was in respect of some other proceedings and the learned Arbitrator did not consider the facts of the present case before concluding that the MSEB was not a necessary party.

(b) On the other hand, the learned senior counsel appearing for the Respondent submitted that for the purpose of the Interest Act, the Petitioner was a 'Buyer' and the Respondent was a 'Supplier'. It was contended that from the work order it was apparent that the MSEB preferred to deal with the Petitioner- Corporation. It was contended that the supply order and the work order are two independent contracts and there is no privity of contract between the MSEB and the Respondent. It was contended that the MSEB had taken a stand in Arbitration Petition No. 88 of 1999 that there was no privity of contract between the MSEB and the claimant, in identical circumstances, which stand was not challenged by the Petitioner-Corporation, and therefore, there was no need to make MSEB as party in the arbitration proceedings. The 19/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw learned senior counsel submitted that the learned Arbitrator has rightly considered clause 23 (vi) of the work order and Clause 30 of the supply order which made it clear that the Respondent will not be entitled to make any claim against the MSEB; he submitted that the learned Arbitrator has come to the conclusion that the claim made by the Respondent was not bad for non joinder of MSEB.

(c) Conjoint reading of the works order and the supply order demonstrates that there is no privity of contract between the Respondent and the MSEB. In identical situation in respect of the very same parties, the MSEB had taken a stand that the MSEB is not a necessary party. In those proceedings the Petitioner had accepted the position by not challenging the stand taken by the MSEB. As far as the provisions of Interest Act are concerned, the Petitioner falls within the definition of 'Buyer' and the Respondent falls within the definition of 'Supplier'. By way of amendment to Section 2

(f), the Petitioner is included in the definition of 'Supplier' and the Petitioner could raise a claim against the MSEB on the ground that the MSEB is a Buyer under Section 2(c) of the Interest Act. In spite of repeated queries from the Court as to why the Petitioner cannot agitate its claim under the interest Act as a 'Supplier' of the goods against MSEB, no satisfactory explanation has come forth.

(d) The Respondent is a 'Supplier' and the Petitioner is 'Buyer' 20/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw within the meaning of the Act, as held in further part of this judgment. This being the position there is no impediment in the Respondent prosecuting its claim against the Petitioner alone. Once it is found that the Respondent could prosecute its claim directly against the Petitioner and the contract between the Petitioner and the MSEB was an independent one and that in identical circumstances, the MSEB had made its stand clear that it is not connected with the arbitration between the Petitioner and the Respondent, it was not necessary to join MSEB as a party Respondent. Under the provisions of the Interest Act, the Petitioner, right from the date it was enacted, was always included in the definition of ' Buyer' and and by way of amendment in the year 1998 the Petitioner was included in the definition of 'Supplier' so as to enable to pursue its claim against its buyers such as MSEB.

In view of this factual and legal position, the findings of the learned Arbitrator that the proceedings were not bad for not joining MSEB, cannot be faulted with.

28. Whether the Petitioner is not a "Buyer" within the meaning of definition of the term under the Interest Act and, hence, the Petitioner is not liable to pay interest on delayed payment ?

(a) On this aspect three fold submissions have been made by the learned counsel for the Petitioner. It is firstly contended that the contract between the Petitioner and the Respondent is not a contract for supply of goods but it is a works contract which is not covered in the ambit of the Interest Act. Secondly, it is submitted that the Petitioner who is established for protection of small scale industries is only a facilitating agency and cannot be termed as a Buyer under the definition of the Interest Act. Thirdly, since no goods or services were received by the Petitioner for itself, there was no question of treating the Petitioner as a Buyer.

(b) On the other hand, the learned counsel for the Respondent submitted that Section 2(c) of the Interest Act clearly states that whosoever buys or receives goods or services from the Supplier is deemed to be a Buyer. The learned counsel submitted that the object of the Interest Act will have to be considered while construing the definition of 'Buyer' under the Act. The learned counsel for the Respondent submitted that the Arbitrator has relied on two resolutions dated 5 May 1993 and 6 August 1997 issued by the Government of Maharashtra and Union of India which further clarify the position that the Petitioner is a Buyer under the Act. The learned counsel submitted that the supply order was for laying of a pipeline. The supply of pipeline itself was 'Goods' within the meaning of goods under the Interest Act. He submitted that work to be undertaken on the spot was only to connect the pieces of pipelines to make it operational. The learned counsel for the Respondent submitted that the work entrusted was of supply of goods, and in any case even the services are also included within the ambit of the Interest Act. The learned counsel submitted that there was no privity of contract between the Respondent and the MSEB and the Petitioner and the Petitioner will have to pay interest under the Act.

(c) The section 2(c) of the Act defines that whosoever buys or receives services as Buyer and in the present case, under the supply order, the Respondent had supplied the goods and the Petitioner had received them. Once it is held that the Petitioner is a Buyer and the contract fell within the ambit of the Interest Act, then the Petitioner will be liable to pay interest.

(d) As noticed earlier, the Interest Act is a beneficial legislation and was enacted to curtail the exploitation of the small scale industries for whom liquidity is a matter of survival. It is in this context, the argument of the learned counsel for the Petitioner as regards interpretation of definitions under the Interest Act, as well as the interpretation of the terms of contract, will have to be examined.

(e) As regards the Act being a beneficial legislation, the Apex Court in the very same dispute, by a decision in the case of Snehadeep Structures Pvt. Limited Vs. Maharashtra Small Scale Industries

Development Corporation Limited, reported in (2010) 3 SCC 34 has 23/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw held to be so. The Apex Court, held that the Interest Act was a beneficial legislation, intended to expedite timely payments of money owed to small scale industries. While construing the phrases appearing in a statutory enactment, the interpretation that harmonizes the purpose and object of the statute should be adopted, rather than the one which frustrates its object.

(f) Turning to definition of Section 2(c) of the Interest Act, a Buyer has been defined as one who buys goods or receives any services from a Supplier, for consideration. Therefore, on the face of it, one who receives either goods or services will be considered as Buyer, who will be liable to pay interest under the provisions of the Interest Act.

(g) The language of Section 2(c) is clear and unambiguous. The Interest Act being enacted for the purpose of protection of small scale industries, the Act will have to be viewed from the perspective of the small scale industries, for it is the small scale industries who needed intervention of the legislation to expedite timely payment from the Buyer. Therefore, in the eyes of such small scale industries, the person/body who receives goods and services from them and who in turn makes the payment would be the one liable to pay interest to them for delayed payment. It is not the concern of the small scale industries, for the purposes of this Act, what arrangement Buyer has with any third party, with 24/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw whom such small scale industries have no privity of contract.

The goods are supplied by such small scale industries to a Buyer and if such such small scale industries do not get their payment in time, the Buyer will have to pay interest. The Petitioner was always a Buyer under the Interest Act. By way of an amendment in the year 1998, the Petitioner was merely included in the ambit of Supplier so as to empower the Petitioner to lay its claim against the parties such as MSEB. Therefore, there is nothing perverse or illegal in the approach of the learned Arbitrator in considering that as per the interpretation of section 2(c) the Petitioner will have to be treated as a Buyer.

(h) In this context the resolution dated 5 May 1993 issued by the Government of India, Ministry of Industry needs to be noted. Paragraphs 3 and 5 of the said resolution reads as under:

"3. It must be emphasized, however, that the Act does not envisage pitting the small scale sector against the large or medium sector of industry. The Act should be seen as a small step towards introducing discipline in commercial transaction which, in the ultimate analysis, benefits both sides. Therefore, a statutory obligation has been introduced so as to act as a deterrent and also to serve as an incentive to make timely payments. The provisions of higher rate of interest as well as other deterrents should make it some what more uneconomic for buyers to hold outstanding payments of small units.

4.

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5. Directors of all SISIs and Directors of Industries of all States/UTs are requested to give wide spread publicity to the provisions of the Act and to act as promoters so that the intent of the law is sustained."

(i) The provision was further made clear in the resolution issued by the Government of Maharashtra on 6 August 1997, in respect of the Ordinance issued by the Central Government dealing with the claims of the Small Scale Industries Development Corporations, such as the Petitioner. In the preface of the Resolution, it was stated that:

" The central government has a Rule by its Rules dated 5th May 1998 If the payment towards goods supplied to them is not made within the prescribed time limit. Therefore, the small scale industrialists are free to charge interest at the rate of 5% to usual rate of interest if the bills towards goods supplied by them are not paid within the prescribed time limit. But since the said rule was not applicable to the Maharashtra Small Scale Industries Development Corporation, the Small Scale Industries can recover interest from the Corporation but the Corporation cannot charge interest on pending bills to the government Department. Therefore, for proper implementation of the said rule, it is essential to presume that the said rule it is essential to presume that the said rule is also applicable to the Corporation."

The Resolution thereafter stated that the Small Scale Industries Development Corporation will be entitled to charge interest and submit bills to the purchasers such as MSEB. It was made clear 26/50 :::: Downloaded on - 09/06/2013 13:26:06 :::: Final ARBP499-03.sxw that the Small Scale Industries Development Corporation shall be liable to pay interest on delayed payment to the small scale industries. The learned Arbitrator has rightly held that this Government resolution was binding on the Petitioner and the Petitioner could not have taken a different stand. Even otherwise, the provisions of the Act are very clear that the Petitioner would be liable to pay interest.

29. Since the part of the work comprises of execution of civil work, whether the provisions of the Interest Act do not apply to the present case as the said Act is applicable only to supply contracts ?

(a) It is argued by the learned counsel for the Petitioner that the contract was not for supply of goods but was a work contract and being so it was outside the purview of the Interest Act. The learned counsel for the Petitioner submitted that the supply order is in a printed format and therefore the word 'goods' has been used every where.

(b) It was submitted by the learned counsel for the Respondent that the pipeline was to be erected for transportation of slurry ash from the thermal power station.

The main work was of supplying the pipeline, which was to be brought on the site and erected. The pipeline was the 'goods' that were to be supplied. The civil work that was to be undertaken was only for the purpose of making the pipelines functional. The learned counsel for the Respondent 27/50 :::: Downloaded on - 09/06/2013 13:26:06 :::: Final ARBP499-03.sxw asserted that the said pipeline

was over the ground pipeline.

(c) The supply order may be in printed format, but the fact remains that the supply order refers to word 'goods'. The description of the product in the supply order is as under:

" Chandrapur T. P. S.- Unit-7- Supply, transportation, providing laying and testing and 3nos. 400 NB 9.5 mm thick M.S. Ash Disposal pipelines for Part 'B' (From Ch.7500 Mtrs. to 18965 Mtrs. at Chandrapur T.P.

Station, Chandrapur".

A conjoint reading of the supply order as well as work order shows that the work was regarding laying of a pipeline. Thus what was primary entrusted to the Respondent was work of supply of pipeline. Thus finding of fact of the learned Arbitrator that the civil work was an ancillary and of a very little percentage of the entire work, on perusal of the supply order and the schedule annexed to it, does not appear to be perverse.

(d) In any case Section 2(c) of the Interest Act covers both 'goods' as well as 'services'. The learned counsel for the Petitioner relied upon the decision of the Apex Court in the case of Vanguard Rolling Shutters Vs. The Commissioner of Sales Tax reported in AIR 1997 SC 1507 to advance submission as regards the definition of 'goods'. The said decision was rendered in the context of a taxing statute. The term 'goods' would have a different meanings under different 28/50 :::: Downloaded on - 09/06/2013 13:26:06 :::: Final ARBP499-03.sxw enactments. The definition of 'goods' appearing in section 2(c) of the Interest Act will have to be construed in the light of the dicta of the Apex Court in the case of Snehadeep Constructions (Supra) so as to further the object of the Act. The Work Order as well as Supply Order clearly show that the work was for supply of a pipeline. The Petitioner manufactured the pipeline and transported it in separate parts to the site and assembled the same to make it operational. In this context, the entire pipeline will have to be considered as 'goods' and civil work to make it operational will have to be considered as ancillary to the supply of goods. The Arbitrator has taken this approach after analyzing the Work and Supply orders, and has given the term 'goods', a wider meaning. The finding of the learned Arbitrator is in consonance with the object of the Interest Act and cannot be faulted with.

(e) The learned counsel for the Petitioner relied on the decision of the Apex Court Shamsunder and others Vs. Ramkumar and others, (2001) 8 SCC 24, more particularly on para 35 thereof to contend that rules of interpretation are only meant to assist the Court in advancing the justice and even while construing the beneficial legislations, care should be taken that the interpretation should not result in injustice. In the present case, the argument of the Petitioner that the entire contract is a work contract and therefore the interest is not payable to the Respondent, if accepted, will result in injustice. Firstly, the Act includes the terms both, 'goods' and 29/50 :::: Downloaded on - 09/06/2013 13:26:06 :::: Final ARBP499-03.sxw 'services' and secondly, on facts, it can be seen that what was supplied was pipeline and civil work was only ancillary work thereto. The finding of the learned Arbitrator to that effect cannot be termed as perverse or oppose to common sense. The learned Arbitrator held what was supplied was pipeline which he has considered to be a 'goods'.

There is nothing illegal in this approach.

30. Whether the claim of the Respondent is barred by time as the work was executed between 1995 and 1998 and the notice for arbitration was issued only on 21 December 2001, which is beyond the period of three years ?

(a) Learned senior counsel for the Petitioner submitted that the claim filed by the Respondent is barred by limitation. It is submitted that the work order was placed by the MSEB on 27 March 1995 and work was to be completed in 20 months i.e. on 25 September 1996. During the entire period of contract, there was no claim made for delay in payment and for first time the claim towards interest on payment of running bills was raised by the Respondent on 7 December, 1999, which was replied to by the Petitioner that the Petitioner would pay money only upon receipt of the same from MSEB. The learned senior counsel submitted that it is only on 21 December, 2000, that the arbitration clause was invoked and demand for arbitration was made by the Respondent. The learned counsel submitted that as per 30/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw Article 25 of the Limitation Act, period of limitation for interest upon money due is three years and if the claim of the Respondent was as regards the interest due on running bills, it should have been made within three years. The learned counsel submitted that each running bill constituted a separate cause of action. The last bill being of 10 August 1998, the last claim should have been made on or before 10 August 2001. Therefore, arbitration invoked as on 21 December, 2001 was barred by limitation. The learned counsel submitted that the final bill of 12 September 1999 taken starting point of limitation by the Arbitrator is wrong in law and the decision of this Court in the case of R. P. Souza & Co. vs. Chief Engineer, PWD reported in 2000(1) Mh. L.J. 558, relied for that purpose is not correct. The learned counsel for the Petitioner submitted that the finding of the Arbitrator that the Respondent was entitled to 100% of the bill within 10 days of its submission, was erroneous. The learned counsel submitted that the Arbitrator has not considered Clauses 25 and 26 of the Supply Order which states that the amount has to be adjusted, 'if possible', within 10 days. The learned counsel submitted that as per Section 3 of the Interest Act, the Buyer shall make payment on the date agreed between Buyer and Supplier and if there is no agreement, then the amounts have to be paid immediately after a period of 30 days from the acceptance of goods. These factors have also not been considered by the Arbitrator.

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(b) On the other hand, the learned counsel for the Respondent submitted that the entire work was completed on 31 January 1998. The Respondent wrote to the Petitioner on 7 December 1999 raising a claim under the Interest Act. Reply is given by the Petitioner that having regard to clause 25 of the supply order, the claim of the Respondent as regard interest does not arise and therefore, immediately on 21 December, 2001, the Petitioner invoked the arbitration clause. The learned counsel submitted that the reply was received from the Petitioner that any payment due will be made upon receipt of the amount from the MSEB. The learned counsel submitted that therefore the Petitioner had admitted that the interest on delayed payment was payable but had only stated that it

will be paid only after the same was received from the MSEB. Learned counsel submitted that the claim for interest became crystallized upon submission of final bill on 12 November, 1999. Reliance placed by the Arbitrator on the decision of this Court in R. P. Souza & Co.'s case (Supra) is correct. He submitted that in that case, the Court had considered the preparation of final bill as a starting point for limitation. The learned counsel submitted that the contention that for each of the running bill separate claim had to be filed is contrary to the language and object of the Interest Act. The learned counsel for the Respondent submitted that the in affidavit in reply filed by the Petitioner before the Arbitrator, the computation of the claim, date of running bills, 32/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw and interest rate, have not been denied or disputed and there is only a bald assertion that the claim is not within limitation.

(c) The learned Arbitrator noted that the final bill was prepared on 12 November, 1999 and it is upon the preparation of final bill, that all part payments against the running bill are adjusted, and therefore, the final bill was starting point for limitation. The Arbitrator has also considered the admission of the Petitioner that the interest was payable. The Arbitrator found that clause 9.0.2 of the work order stated that 95% of the payment had to be made within 10 days, 3% of the payment had to be made after testing, 1 % of the payment had to be made after handing over and commissioning the works and rest 1% of the payment after the final bill. The Arbitrator held that thus it is upon the final bill, that the accounts are reconciled, and therefore, the final bill was the starting point of limitation.

(d) The submission of the learned counsel for the Petitioner thus broadly is that each running bill will have to be taken a starting point of limitation for each of the claims; that there was no agreement between the parties as regards the time limit of payment and therefore under section 4 of the Interest Act the statutory period of 30 days will apply; and that the preparation of final bill has no relevance to the starting point of limitation.

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(e) The argument that each running bill will constitute separate cause of action is completely contrary to the scheme of the Interest Act. The Act is enacted for the purpose of giving protection to small scale units and to expedite the process of payment since the financial position of small scale industries is precarious. The Act is enacted to minimise impediments in the process of payments and not to create multiple litigations. It would be inconceivable that for the claim for interest for each running bill, the units will have to file arbitration proceedings and in a case such as present one, where there are 33 running bills, the units will have to file 33 arbitration proceedings over a period of five years. Such interpretation will completely defeat the object of the Act. Apart from this position clause 9.0.2 makes it clear that 95% of the amount is to be paid within 10 days of submission of running bill and final adjustment has to be made at the time of submission of final bill.

(f) Once it is established that 95% of the running bill had to be paid within 10 days, then the provision of the Interest Act would apply. It is only when all such claims are reconciled at the time of preparation of final bill, that the cause of action for the Respondent will start and limitation of three years as specified in Article 25 of the Limitation Act would commence. The Arbitrator has relied on the decision in the case of R. P. Souza & Co. (Supra), wherein the Court has considered the question of limitation in the context of 34/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw Arbitration and Conciliation Act.

(g) In the case of R. P. Souza & Co. an application was moved for appointment of Arbitrator under Section 11 (6) of the Arbitration and Conciliation Act, 1996. The Respondent opposed the application on the ground that the application for appointment of Arbitrator is barred by law of limitation. It was argued by the Respondent therein that work order was issued on 7 January 1992 and work was to be completed by 16 January 1993, however, the claim was made for the first time on 8 October 1998, being barred by the law of limitation, there was no question of appointment of Arbitrator. The learned counsel for the applicant therein had argued that the cause of action for filing application would arise within three years from the date of finalization of final bill. It is in that context that the learned Single Judge, relying on the decision of the Apex Court in the case of State of Orissa Vs. Sri Damodar Das, reported in AIR 1996 SC 1942, held that final bill would be a starting point of limitation and accordingly proceeded to appoint an arbitrator. This decision thus has been rightly relied upon by the learned Arbitrator.

(h) Apart from the above position, the correspondence between the parties also needs to be noticed. On 7 December 1999 the Respondent issued a letter to the Petitioner calling upon the Respondent to pay interest. This letter was replied to by the Petitioner on 24 April 2000, wherein the attention 35/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw of the Respondent was drawn to Clause 25 of the supply order and it was stated that the claim cannot be entertained. Thereupon, on 21 December 2001, an Advocate's notice was given by the Respondent calling upon the Respondent to appoint an arbitrator. Reply given by the Petitioner is as under:

"We have received your notice dated 21.12.2001 on behalf of your client M/s Snehadeep Structures Pvt. Ltd., Nagpur, on 27.12.2001. as per the terms of the supply order placed on M/s Snehadeep Structures Pvt. Ltd., any payment due will be released to the Supplier unit on receipt of the same from the consignee. Accordingly, MSSIDC has released payment to M/s Snehadeep Structures Pvt. Ltd.

As regards appointment of arbitrators, we are referring this matter to our Chief (Secretarial & legal) Mumbai. On hearing from him we will communicate you accordingly."

This letter did not contest the claim of the Respondent on merits nor on the ground of limitation was raised but it only stated that any payment due will be released upon receipt of the same from the consignee. That was followed by the another reply of 5 February 2002, wherein it was it was specifically asserted asunder:

"..... The provisions of interest on the delayed payment is also not disputed but the same is liable to be paid by the consignee, i.e. the M.S.E.B. Similarly as per the term of the payment, your client has also agreed to receive the payment after the receipt of the same from consignee, by my client."

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Final ARBP499-03.sxw Thus there was no objection raised as regards the merits of the claim nor that the claim was not within limitation. Even in the affidavit in reply filed before the Arbitrator by the Respondent, except making some general averments that the claim was beyond the period of limitation, the argument which is sought to be made now by the learned counsel for Petitioner was not pleaded. In the affidavit in sur-rejoinder also apart from stating that each bill is a separate cause of action, there is no denial about the liability to pay the interest on delayed payment and the other factual aspects which are sought to be argued by the learned counsel for the Petitioner were not urged. Considering the above position, finding of the Arbitrator that the claim was within limitation, cannot be faulted with.

31. Whether it was a condition of supply that the payment shall be made to the Respondent by the Respondent only as and when it receives payment from MSEB and, hence, no interest is payable on delayed payment ?

(a) The learned counsel for the Petitioner submitted that firstly since the contract in question does not fall within the ambit of the Interest Act and the Petitioner not being a Buyer, interest was not payable. In the preceding paragraphs, I have approved the reasoning of the learned Arbitrator, holding that the Interest Act is applicable and the Petitioner is Buyer. The 37/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw learned counsel then submitted that as per clause 33 of the supply order, the Respondent was not entitled to raise any claim towards the interest against the Petitioner.

(b) The learned counsel for the Petitioner submitted that the Respondent had accepted this position and entered into contract and executed the same, and therefore is now precluded from contending that clause 33 will not apply. The learned counsel further submitted that non obstante clause appearing in Section 4 of the interest Act which overrides any agreement to the contrary, is regarding the question of payment, not regarding the methodology of payment. The learned counsel for the Petitioner has submitted that though the Apex Court in the case of Assam Small Scale Industries Development Corporation Ltd.

And others Vs. J. D. Pharmaceuticals and another, reported in (2005) Supreme Court Cases 19, considered the effect of a clause identical to clause 25 of the supply order, the said judgment distinguishable on facts. In that case the Corporation itself was guilty of not securing 90% of the advance which was mandatory. The learned counsel submitted that the Arbitrator failed to consider conditions contained in clause 25 of the supply order.

(c) The learned counsel for the Respondent on the other hand submitted that the judgment of the Apex Court in the case of Assam Small Scale Industries Development 38/50 :: Downloaded on -

09/06/2013 13:26:06 ::: Final ARBP499-03.sxw Corporation Ltd. And others (Supra) is squarely applicable to the present case and it is held by the Apex Court that notwithstanding any agreement to the contrary, a Buyer will have to pay interest on delayed payment. The learned counsel submitted that there is no waiver of this right by the Respondent and merely because Respondent executed the contract does not mean the right of the Respondent is lost. The learned counsel further submitted that Petitioner being a Buyer is liable to pay interest since the Respondent is not concerned with the arrangement of the Petitioner with the MSEB. As far as the payment of interest is concerned, the learned counsel submitted that it may or may not be open to the Petitioner to pursue its claim against the MSEB but it will not absolve the Petitioner from paying interest as due.

(d) The learned Arbitrator considered the provisions of the Interest Act as well as terms of the work order and supply order. The learned Arbitrator found that section 4 of the Interest Act is a mandatory provision and no agreement to the contrary can be enforced. The learned Arbitrator also negated the contention of the Petitioner that clause 9.0.2 speaks only adjustment and not payment holding that as per the definition contained in Black's Law Dictionary word "adjusted" also means "to be paid" or "paid" or "payment to be made. The Arbitrator found that provisions of 9.0.2 are applicable by incorporation and therefore expression used in 39/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw clause 24 would only mean that payment will be made within 10 days. The contention that there is no time stipulated regarding payment was held to be not correct in terms of clause 9.0.2.

(e) As far as the argument of the Petitioner based on clause 33 and 25 to the effect that the Respondent was not liable to raise any claim under the Interest Act and that the amount was to be paid only after the same was received from the MSEB is concerned, the learned counsel for the Respondent has rightly relied on the decision of the Apex Court in Assam Small Scale Industries Development Corporation Ltd. And others (Supra). In the said decision, fact were that the Assam Preferential Stores Purchase Act, 1989 was enacted to encourage growth of small scale and cottage industries in the State of Assam. The Act contemplated that the State would patronise the products of small scale industries and purchase the same as per stores required by the State authorities, Government companies and State government undertakings. A State Board was constituted for the purpose of methodology for securing the goods from small scale industries was laid down and accordingly orders were placed. In the meanwhile the parliament also incorporated the Interest Act which came into force on 23 September 1992. Since the payments were not made by the Assam Small Scale Industries Development Corporation, the Respondent therein filed a suit for 40/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw recovery of the amount along with interest. The suit was decreed by the trial Court and the Assam Corporation was directed to pay the amount along with interest at monthly rest on the decretal amount. The challenge to the decree in the High Court failed and the Corporation filed a Special Leave Petition in the Apex Court. Before the Apex Court, it was argued on behalf of the Corporation that the Corporation was to pay to Respondent only when the money was received from the respective departments of the State Government and the Corporation was acting as an agent of the Respondent and was not a buyer of the goods. A clause, similar to Clause 25 in the present case was relied on to contend that no liability could have been fastened on the Corporation to pay the amount before it received from the Government. It was also contended that provisions of the Interest Act will apply only to the buyer or

the actual recipient of the goods and that the Respondent was bound by the terms of contract particularly clause 8 thereof and it was not open for them to complain that the clause has no effect.

(f) The Apex Court considered that clause 8 therein which is similar to clause 25 of the present case and held that said clause cannot be interpreted to defeat the purpose of the Act. The Apex Court held that Section 3 of the Interest Act imposes statutory liability on the Buyer to make payment for the supply of goods and clauses such as 8 41/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw therein, will not be an impediment. The Apex Court held that the status of the parties must not be determined as to how they described themselves but should be determined having regard to the substance of the transaction and the legislative policy. The Apex Court held that law itself contemplates different types of agencies and the agreement will have to be construed in the context of statutory provisions governing transactions between the parties. The Apex Court, accordingly negated the contention that the Corporation would not have been liable to pay interest since the amount was not given to it by the State Government. The decision squarely applies to the facts of the present case and considering the fact that the Interest Act fixes statutory liability for payment of interest, reliance cannot be placed by the Petitioner on Clause 25 of the Agreement.

(g) The argument advanced by the learned counsel for the Petitioner that decision of the Apex Court in the case of Assam Small Scale Industries Development Corporation Ltd. And others (Supra) is distinguishable on facts as in that case the Corporation had not secured any advance from the State Government and therefore it was made liable to pay. Decision of the Apex Court cannot be distinguished only on that fact alone. Specific argument was raised that the Corporation was not liable to pay interest as it was not Buyer and the amount was to be paid only upon receipt of the same from the State Government and it was expressly 42/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw negated. The Apex Court held that the whatever may be the phraseology used in such agreements, the transaction had to be considered in the backdrop of the statutory provision governing it. It was upon interpretation of both, Interest Act as well as the Assam Act that the Apex Court came to the conclusion that such argument was not legally tenable. The fact that the Assam Corporation had not adhered to its obligation to secure advance was only an additional factor while deciding against the Assam Corporation.

(h) Thus, the argument of the petitioner based on clause 33 is concerned, in view of the express provision of Section 4 of the Interest Act, cannot be considered. Section 4 clearly states that that the Interest will be payable notwithstanding anything contained in the agreement between the Buyer and the Supplier. The argument that section 4 refers to liability of payment and not methodology is not correct. Once the Petitioner is held to be a Buyer and the Respondent a Supplier, no agreement that deprives the claim of the Respondent against the Petitioner for interest due can be enforced against the Respondent.

(i) The work order between the M.S.E.B. and the Petitioner has to be read along with the supply order executed between the Petitioner and the Respondent. Clause 9.0.2 was applicable for execution of contract between the Petitioner and the Respondent. The clause that the amount 43/50 ::: Downloaded on - 09/06/2013 13:26:06 ::: Final ARBP499-03.sxw will be paid only after it is received from the consignee, will not bind the Respondent is in consonance with the dicta of the

Apex Court in the above case. Clause 9.0.2 of the work order was made applicable to the supply order and under that clause amount was to be paid within 10 days. Since the Works order was to be read in the supply order and the amount was to be paid within 10 days, that there was no stipulation for payment of amount cannot be accepted. The finding of the Arbitrator on this count thus also is a possible view of the matter and cannot be interfered with.

32. Whether the Respondent has established its claim for interest on delayed payment in accordance with the provisions of the Interest Act and, if so, what amount ?

(a) The learned counsel for the Petitioner submitted that the Respondent failed to establish its claim for interest on delayed payment even on facts of the case. It was submitted that the Respondent only relied on the statement annexed to the claim and did not produce any evidence in support. The learned counsel submitted that Section 4 of the interest Act states that the interest be paid at one and half of the prime lending rate charged by SBI and there is no evidence produced as to what was the prime lending rate at given point of time of rate of interest which is awarded by the Arbitrator, and therefore, the interest which is calculated for the relevant period varying from 22.75% to 24.25% is without 44/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw any basis. The learned counsel submitted that the rules of evidence mandates the party who makes a claim to prove the correctness of the claim.

(b) The learned counsel for the Respondent submitted that the fact that the running bills were not paid on time and the chart which was produced on record by the Respondent have not been denied by the Petitioner either in the correspondence or in their pleadings. The learned counsel submitted that in fact both the parties had filed a joint purshis that they do not wish to lead evidence. The learned counsel submitted that the Arbitratral Tribunal is not governed by the strict laws of evidence. The learned counsel submitted that the rate of interest calculated by the Respondent is based on the certificate of SBI which has been rightly considered by the Arbitrator.

(c) It is an admitted position that the parties filed a purshis that they did not wish to lead any evidence. It is the contention of the learned counsel for the Petitioner that this does not mean that the claim of the Respondent was admitted and the Respondent had to prove its claim as per the provisions of the Evidence Act. The Petitioner was a Buyer, and the goods were supplied. The terms of the contract mandated that the amount of running bills had to be paid within 10 days. The fact that the amount not paid within 10 days was not disputed. In the circumstances the statutory 45/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw provisions of the Interest Act were applicable and a prima facie case for claim of interest was made out and the Respondent discharged initial burden for making a claim. It was open to the Respondent to dispute the amounts calculated by the Petitioner and demonstrate the otherwise.

(d) In spite of the fact that the chart giving the calculations and the amounts claimed, was filed before the Arbitrator, the Petitioner which is a statutory authority has took a stand that it will not produce any evidence and will merely contradict the claim of the Respondent Small Scale Unit and that the Small Scale Unit must prove all its claims.

This conduct of the Petitioner- a statutory Corporation enacted to promote the small scale industries, bound by the provisions of the Interest Act and policies of the Government, to use the expression of the Apex Court, is cavalier. The Act places a duty on the Buyer to make timely payment so as to save the small scale industries from financial ruin and it is not expected that the statutory body, especially the one enacted to protect the small scale units, to take all sorts of technical pleas to avoid discharging its duties. In this context the learned Arbitrator has rightly relied on the observation of the Apex Court in Madras Port Trust Vs. Hymanshu International, reported in AIR 1979 SC 1144 wherein the Apex Court reprimanded the authorities of such attitude and stated that it is high time that the Government and public authorities adopt the practice of 46/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw not relying on technical pleas for the purpose of defeating legitimate claims of the citizen and do what is fair and just to the citizens.

(e) So far as the rate of interest is concerned, the Petitioner has calculated interest varying from 22.75% to 24.25%. The Arbitrator noted that the Respondent submitted a certificate of State Bank of India. The question is whether the rate of interest calculated by the Respondent and granted by the Arbitrator can be considered as exorbitant. The Petitioner has also not produced what was the prime lending rate of State Bank of India during the relevant period. The Respondent has asserted that the rate was as mentioned above.

(f) Thus the question is, in absence of cogent evidence as regards the rate of interest from both the sides, whether the rate of interest which was granted by the learned Arbitrator by allowing the claim of the Petitioner is perverse or shockingly disproportionate, and should be set aside.

(g) In the judgment of Assam Small Scale Industries (Supra), the Apex Court upheld the decree passed by the learned trial Judge, wherein the trial Judge concluded that the interest payable to the Respondent no.2 was under the provisions of the Interest Act was at 23.5%. The Apex Court came to the conclusion that as regards the transaction prior to the coming into force of the Act simple interest was 47/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw payable and the interest after coming into force the provisions of the Act was to be @ 23.5% per annum. It is relevant to note that the Apex Court was considering the time period between 22.12.1992 to 19.6.1993 for grant of interest @ 23.5% per annum while the time period in the present case is between 1995 to 1998. Considering that rate of interest as yardstick, the rate of interest claimed by the Petitioner i.e. varying between 22.75 % to 23.25% up to 1998 and thereafter at 19.50 % cannot be said to be completely off the mark. Though as per the argument of the Petitioner, the Respondent has not produced what was the exact rate of interest as per the SBI prime lending rate for the relevant period, if it is found that the rate of interest awarded while allowing the claim is more or less in tune with the rate of interest granted for the relevant period by the Apex Court, in similar case then such claim awarded cannot be termed as perverse and set aside. The rate of interest awarded was in fact in tune with the rate awarded in the decision of the Apex Court. Thus in the final analysis the rate granted is not perverse or exorbitant .

33. Whether the Respondent is entitled to interest pendente lite and further interest on the amount found due ?

(a) The Arbitrator granted 10% interest from the date of statement of claim till the date of award and future interest at the same rate till the payment or realization and in case the 48/50 :: Downloaded on - 09/06/2013 13:26:06 :: Final ARBP499-03.sxw Petitioner failed to pay the amount awarded within three months, the Petitioner was directed to pay compound at monthly rest of one and half times of the prime lending rate charged by the State Bank of India, from the date of claim until the payment or realization. Once it is held that the Respondent was liable to receive the amount of claim, finding of the Arbitrator on this count to grant interest cannot be interfered with. The learned counsel for the Petitioner also has not made any independent submissions on this issue except challenging the award on merits.

34. It is settled position of law in catena of decisions that the scope of Section 34 of the Arbitration Act is limited and the Court does not sit in appeal over the decision of the Arbitrator. It will be fruitful to reproduce the observation of the Apex Court in the case of Sumitomo Heavy Industries Ltd. Vs. Oil And Natural Gas Corporation Ltd., reported in (2010) 11 SCC 296. In paragraphs 42 and 43 of the said judgment, the Apex Court observed as under:

"42. Can the findings and the award in the present case be described as perverse? This Court has already laid down as to which finding would be called perverse. It is a finding which is not only against the weight of evidence but altogether against the evidence. This Court has held in Triveni Rubber & Plastics vs. CCE that a perverse finding is one which is based on no evidence or one that no reasonable person would have arrived at. Unless it is found that some relevant evidence has not been considered or that certain inadmissible material has been taken into consideration the finding cannot be said to be perverse.

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Final ARBP499-03.sxw The legal position in this behalf has been recently reiterated in Arulvelu v. State.

43. In the present case, the findings and award of the umpire are rendered after considering the material on record and giving due weightage to all the terms of the contract. Calling the same to be perverse is highly unfair to the umpire. The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwaliti Mfg. Corp'n. v. Central Warehousing Corp'n. the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire

has to be accepted as final and binding."

35. Taking overall view of the mater and the limited jurisdiction under Section 34 of the Arbitration and Conciliation Act, there is no warrant to interfere with the Award. The Arbitration Petition is accordingly dismissed.

(N. M. JAMDAR, J.) 50/50 ::: Downloaded on - 09/06/2013 13:26:06 :::