CASE NO.:
Appeal (civil) 6324 of 2005

PETITIONER:
Assam Small Scale Ind. Dev. Corp. Ltd. & Ors.

RESPONDENT:
M/s. J.D. Pharmaceuticals & Anr.

DATE OF JUDGMENT: 07/10/2005

BENCH:
S.B. Sinha & R.V. Raveendran

JUDGMENT:
JUDGMENT
[Arising out of S.L.P. (C) No. 3950 of 2005]

S.B. Sinha, J :

Leave granted.

The Legislature of State of Assam and the Parliament took legislative measures to allay the difficulties faced by the small scale industries. The State of Assam made rules known as The Assam Preferential Stores Purchase Rules in the year 1972. The said rules having not served its purpose, the Assam Preferential Stores Purchase Act, 1989 (for short "the 1989 Act") was enacted which received the assent of the Governor on 14th July, 1989. The said Act was enacted for encouraging growth of industries in the State of Assam specially small scale and cottage industries and for taking measures ancillary thereto. The State intended to patronize the products of the small scale and cottage industries on preferential basis and to rationalize the procedure for purchase of stores required by the State Government Institutions, Government companies and State Government undertakings, as would appear from the preamble thereof.

Section 2(d) of the 1989 Act defines "State Board" to mean the Assam State Stores Purchase Board constituted under Section 3 of the 1989 Act. "Small Scale Industry" has been defined in Section 2(f) to mean 'an industrial unit in which the capital investment for plant and machinery does not exceed thirty five lakhs of rupees or any other amount as may be decided by the Central Government from time to time and located in the State of Assam'. "Registered Industry" has been defined in Section 2(l) to mean an industrial unit registered under the Directorate of Industries in accordance with provisions thereof. "Requiring Authority" has been defined in Section 2(r) to mean the State Governments Departments and their subordinate authorities, State Government Undertaking/ Corporation/ Statutory Bodies/ Autonomous Bodies. Section 2(s) defines "ASIDC" to mean the Assam Small Industries Development Corporation Limited (for short "the Corporation", the Appellant herein).

Section 3 of the 1989 Act provides for constitution of the State Store Purchase Board on such term as may be specified in Schedule \026 1. Preference to the small scale industries is provided in Section 7. Clause (c) of sub-section (1) of Section 7 reads as under:

"(c) Items of stores mentioned in Schedule III shall be purchased by requiring authorities from ASIDC, ASIDC shall follow the guideline regarding fixation of price, commission, etc. as laid down in office memorandum issued by Notification No. PE-61/88/1, dated 28th March, 1988 as in Schedule IV."

The Purchase Committee is required to be constituted in terms of Section 8 of the 1989 Act consisting of the Head of Department, Director of Industries, a representative of the Department not below the rank of Under Secretary, Financial Adviser of the Department and Finance and Accounts Officer of the concerned Directorate.

Section 9 postulates that the Purchase Committee shall include two representatives from the State Government, one of which shall be the Director of Industries or his representative not below the rank of Deputy Director and the other representative of the Finance Department in respect of each Government Corporation, Government Undertaking, Assam Electricity Board.

In the State Board, amongst others, the Managing Director of the Appellant Corporation is a member. Schedule \026 III provides for the preferences to be given as required under Section 7(c). Item 4 of the said Schedule is 'drugs and pharmaceuticals and clinical equipments'.

An office memorandum dated 28th March, 1988 referred to in Section 7(1)(c) of the 1989 Act is based on a cabinet decision and issued in the name of the Governor of Assam laid down guidelines for strict adherence thereof by all government departments, their subordinate authorities, governments organizations and public sector undertakings while making their purchases of any SSI products which are dealt in or manufactured by the Corporation. The said office memorandum satisfies the requirements of Article 166 of the Constitution of India and has been made a part of the 1989 Act. In terms of the said guidelines, the Corporation is required to publish a list of items/ materials/products to be dealt in or manufactured by it as detailed in Annexure \026 1 thereof. The price of such SSI products is to be fixed by any Technical Committee constituted by the Corporation with members from neutral organization and concerned departments. As per the said OM, purchasing authorities shall pay to the Corporation upto 5% as commission over the price fixed by the Corporation. The purchasing authorities shall pay advance to the extent of 90% of the value of the orders placed with the Corporation. Annexure \026 A to the said guidelines is the marketing assistance scheme wherein 'drugs and pharmaceuticals and clinical equipments' had been identified as one of the items, supply of which to the Government departments is to be taken over by the Corporation. The said scheme provides for quality control, pricing, registration of units as also indenting by the Corporation. The clause relating to indenting of the goods reads as under:

"The purchasing authorities will issue indent to the Corporation for the required products with 90% advance. The Corporation will immediately allot the work to the most suitable unit or units to complete supply within stipulated time. If the supply could not be completed in due to time by the Corporation, the purchasing authorities will deduct 1 = p.m. from bills.

The stores will be dispatched by the units only after they are given dispatch instruction by the ASIDC. Normally the dispatch will have to commence within the third day from the date of dispatch instruction, failing which the unit may be penalized the extent of bank interest on the amount. The stores will be received by the purchasing authority and the acceptance or rejection notes will be issued on the challans.

The Corporation will release payment upto 90% of the bills to the units on completion of supply. Any advance or advances will be deducted fully. The remaining 10% will be released on receipt of full

payment of the bills from the purchasing authority."

Only if the Corporation is unable to supply some items and such inability is communicated to it in writing, the purchasing authority can purchase them from alternative sources.

It is not in dispute that the plaintiff is a SSI unit registered with the Corporation and fulfills all the criteria laid down in the 1989 Act and the Scheme framed thereunder. It entered into an agreement with the Corporation on or about 19th October, 1990 wherein the plaintiff (Respondent herein) was termed as a principal and the Corporation as an agent. The said agreement was entered into in terms of the marketing support scheme formulated by the Corporation under the 1989 Act. Para 3 of the preamble and Clauses 1, 4, 6, 7 and 8 of the said agreement read as under:

"And whereas the Corporation has agreed to act as an Agent to market the goods manufactured by the Principal as specified in the schedule appended to this agreement, under the marking support scheme formulated by the Corporation under the AP SP Act, 1989\005\005..The principal hereby covenants with the Corporation as hereinafter provided :

"1. The Principal shall quote lowest rates in respect of "Scheduled Goods" to the Corporation and shall not quote to any party mentioned above directly or indirectly, rate lower than those quoted to the Corporation in respect of the goods for which competitive rates are being quoted by them. The rates so quoted to the Corporation by the Principal shall be valid for a period of one year from the date of submission of the quotation.

4. The Principal shall, when advised to do so, supply the goods wherever required within the stipulated time at his cost. In event of failure to comply with aforesaid clause, if any penalty is imposed by the actual buyer of the goods in the event of the Principal failing to comply the above provision of conditions, or if any losses are otherwise incurred, the said penalty or loss is to be borne by the Principal by reimbursing the said amount to the Corporation within 15 days from the date of demand. The Principal shall also be responsible for losses by way of breakages, theft or pilferage etc. during the transit of goods.

6. The Principal authorizes the Corporation to raise bills of sale on their behalf, disclosing or without disclosing the name of the principal, and to collect payment thereon from the buyer(s). On collection of payment from the buyer(s). Payment to the principal will be effected by the Corporation deduction the service charges. Penalty due to delayed supplies, or other dues/advance, if any. The Corporation may release 90% value of the materials on delivery and acceptance of the material by the buyer after deduction of dues/advance payment if any subject to receipt of payment from buyer(s). The balance 10% less penalty due to the delayed supplies etc. or any other dues will be paid to the Principal on receipt of full payment from the Purchasing Department.

7. The Principal hereby agrees to the terms and condition in the Marketing Support Scheme of the Corporation as amended from time to time and agrees to comply with

general specific instructions as might be issued by the Corporation regarding the Marketing of "Scheduled goods".

8. That in case of any shortage, leakage, damage, breakage, late supplies, late submission of R/R/Motor Transport Receipt, delivery challans, inadequate packing etc. or any losses in transit for whatever circumstance or reasons, it shall be on the account of the principal and the amount thus involved, shall be deducted from his bills."

A specimen copy of the orders placed by the Corporation on the Respondent from time to time is extracted below :

"DATED 16.6.1992
To
M/s. J.D. Pharmaceuticals Limited
M.C. Road
Guwahati \026 3

SUB: ORDER FOR SUPPLY OF STORES:

Dear Sir,
With reference to above, we have the pleasure to order with you for supply of the under noted articles to the Sub Divisional Medical and Health Officer, I/C. D.M.S. Dibrugarh, as per terms and conditions shown over overlead.

S.No.	Name of Item	Quantity	Price
1.	Tab Trimetoprim 80 mg with sulphamethoxagole 400 mg.	75,000	Rs. 559.35 / thousand tab

Delivery period: within 30.6.1992"

Some of the terms and conditions attached to the supply orders are as under:

"4. The Stores must be supplied through your challan issued in favour of indenting department and should be properly a/c Assam Small Industries Development Corporation Limited, marketing Division and will be submitted to this office after duly receipted by the department and stamped.

5. The above prices are inclusive of packing/ forwarding/ transportation charge, but exclusive of 5% commission and tax as admissible.

8. After execution of the order your bill should be submitted for payment. Payment will be made subject to receipt of the fund from the indenting department. No interest/ compensation can be claimed for delay in payment.

10. Terms and conditions other than the above, will be as per the deed of agreement executed by you, red with other tenders/quotations."

The Parliament also enacted 'Interest on Delayed payments to Small Scale and Ancillary Industrial Undertakings Act, 1993' (for short "the 1993 Act") being Act No. 32 of 1993 which came into force with effect from 23rd

September, 1992. "Appointed day" has been defined in Section 2(b) to mean the day following immediately after the expiry of the period of thirty days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier. Section 3 provides for the liability of buyer to make payment. Sections 4 and 5 thereof read as under:

"4. Date from which and rate at which interest is payable.--Where any buyer fails to make payment of the amount to the supplier, as required under section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at such rate which is five per cent points above the floor rate for comparable lending.

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

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

It stands admitted that the payments have not been made in relation to the supplies made for the said indents. A suit was filed by the Respondent herein on 7.9.1993 claiming the aforementioned amount (Rs.20,56,654.13) together with the interest payable thereon in terms of the 1993 Act (Rs.675,881/45). In the said suit, the Corporation in its written statement inter alia raised the following plea:

"4. That the suit is bad for non-joinder of necessary party and on the score alone the suit is liable to be dismissed.

10. That with regard the statements made in Para 16 to 46 of the plaint, the defendants do not admit anything contrary to the relevant records of the case. The defendants submit that the supply order placed by the defendants does not relate to a single transaction and as such, the plaintiffs cannot claim for recovery of its dues, if any, in one suit. The defendants have placed orders with the plaintiff firm as per the APSP Act, 1989 and as per the indent of the Govt. department. It was agreed in the terms and conditions of the order that the payment of the bills would be released to the plaintiffs on receipt of payment by the defendants from the concerned Government Department. This condition of payment has also been agreed to by the plaintiff and as per the terms and conditions of the agreement executed by the parties. The defendants submit that it has not received payment against the value of the medicines supplied by the plaintiff to the Government department and as such, the bill amount could not be released due to the aforesaid factor. The Drug Association, Assam where the plaintiff firm is also a Member, has informed the defendants by letter that the firm registered under them, are agreeable to accept orders without 90 percent advance payment at the

time of placement of the order and accordingly orders were placed and as per the terms and conditions of the agreement, the defendants were to release payment on receipt of the same from the concerned Government department. As stated earlier since the defendants has not received any payment from the Government Department against the value of the medicines supplied by the plaintiff firm, the required payment could not be released to the plaintiff firm."

The Trial Judge by a judgment dated 1st August, 1998 passed a decree in favour of the Respondent herein in the following terms:

"In the light of the above discussion and the decisions made therein, the plaintiffs suit is decreed for Rs. 2010141.33 on contest with cost. The plaintiffs shall be entitled to realize compound interest @ 23% with monthly rest in respect of the concerned bill amounts till the month of June, 1991 and at the rate of Rs. 23.5% with monthly rest w.e.f. 1.7.1991 till filing of the suit. The plaintiff shall be entitled to realize compound interest at the rate of Rs. 23.5% at monthly rest on the decretal amount from the date of filing the suit till the date of the decree and further interest at the said rate from the date of decree till realization."

An appeal preferred thereagainst, by the Corporation before the High Court was dismissed. The Corporation is, thus, in appeal before us.

Mr. R.F. Nariman, learned senior counsel appearing on behalf of the Corporation would raise the following contentions in support of the said appeal:

(i) Having regard to the terms and conditions of supply, the Corporation was to pay unto the Respondent the price for the goods supplied only as and when the same was received from the respective departments of the State Government. The Corporation is an agent of the Respondent and not the buyer of the goods; and as per clause 6 of the agreement until payments are received from the buyers (Departments of the State), no liability could have been fastened upon the Corporation to pay the said amount. Clause 8 of the terms and conditions of the orders for supply also make it clear that payment will be made subject only to receipt of funds from the indenting department.

(ii) The different departments of the State and other government corporations and undertakings being the buyers and the beneficiaries of the supplies only, they were liable to pay the price of the goods supplied over which the Corporation had no control and in that view of the matter the State of Assam was a necessary party. In any event, the recipient of goods, namely, the buyer being disclosed principal of the Corporation, the Respondent as a principal of the Corporation could maintain a suit as against the actual buyer only.

(iii) The provisions of the 1993 Act for payment of interest, are not applicable in view of the fact that the same applies only to a buyer of any goods or recipient of a service from a supplier for a consideration. Further clause 8 of the terms and conditions of the orders for supply provide that no interest can be claimed for delay in payment.

(iv) In the entire plaint, the Respondent has admitted that it is bound by the terms and conditions of supply and in particular clause 8 therof and, thus, it does not lie in its mouth now to contend, as has been done in the counter-affidavit filed before this Court, that the said

clause is illegal and of no effect being opposed to public policy.

Mr. Pravir Choudhary, learned counsel appearing on behalf of the Respondent, on the other hand, would submit that both the 1989 Act and the 1993 Act are beneficial legislations. The 1989 Act having been enacted by the State of Assam for granting certain reliefs to the SSI units as a part of its industrial policy, the terms and conditions of the agreement as also the conditions of supply shall be subservient thereto and, thus, to the extent the same is inconsistent with the Scheme, the later will prevail. In view of the provisions contained in the 1989 Act and the scheme, it will appear that the Corporation exercises a total control - from quality to pricing to indenting and, thus, the expressions used in the agreement as principal and agent will have no bearing. An agent as is commonly understood cannot have a control over the principal. As its agreement was with the Corporation, and the orders were all placed by the Corporation and as it had no privity with the departments of the State who received delivery of the goods, the Corporation is liable to pay the price with interest.

In view of the fact that the Respondent had no privity of contract with different departments of the government, they were not necessary parties. Reliance in this behalf has been placed on Balvant N. Viswamitra and Others Vs. Yadav Sadashiv Mule (Dead) Through LRS. And Others [(2004) 8 SCC 706]. In view of the statute and the scheme as also the guidelines issued, the question of the Respondent waiving its right thereunder does not arise. The 1993 Act, it was submitted, being also a beneficient statute, the same should be construed liberally. The Act, Mr. Choudhary would argue, will thus, have a retrospective effect.

THE EFFECT OF THE 1989 ACT

The 1989 Act indisputably is a beneficient legislation. There was a purpose behind enacting it. It was primarily enacted so as to enable the State to effectively perform a sovereign function namely health care. The Marketing Assistance Scheme being appended to the provisions of the Act and marked as Annexure \026A thereto forms a part of the Act. The scheme envisages pervasive control over the manufacturers including quality control of the production. Guidelines which were to be strictly adhered to by the authorities, as noticed hereinbefore, had also been issued by the State. Such guidelines having fulfilled the requirements of Article 166 of the Constitution of India were required to be followed by the Corporation.

The order for supply of stores, the provisions of the agreement and the terms and conditions of supply, therefore, cannot be read in isolation. They must be read in conjunction with the provisions of the Act, the scheme and the guidelines issued thereunder. The provision in the scheme relating to indenting envisages that the purchasing authorities will issue indent to the Corporation for the required products with 90% advance whereupon the Corporation would immediately allot the work to the most suitable unit or units to complete supply within the stipulated time. In the event, such supplies are not made within the specified time, the supplier would be subjected to penalty. In view of the fact that the supplying authority will have to send advance of 90%, the Corporation owes a duty to release payment upto 90% on completion of supply. If the Corporation had not taken the advance in terms of the provisions of the scheme, it acted at its own peril.

It is not disputed that the Respondent did not commit any breach or any irregularity in regard to the supplies. Once the supply of the goods was completed, having regard to the clause aforementioned, the Corporation was bound to release the payment upto 90% in view of the fact that the purchasing authorities were also obligated to issue indent to the Corporation with 90% advance. If such advance had not been given, the Corporation in terms of the scheme should not have issued the indent. It may be true that the terms and conditions appended with each order of supply stipulate that payment would be made subject to receipt of the fund from the indenting department. But, the scheme, guidelines, the agreement as also the terms and conditions for supply of stores, if read as a whole, the only meaning

which can be attributed thereto would be in relation to the 10% of the amount which the Corporation was to realize from the supplying authorities upon submission of bill by the manufacturer. The said term has nothing to do with payment of 90% advance in accordance with the provision of the Scheme.

Clause 8 of the terms and conditions of order of supply refers to a stage when after execution of the order a bill is submitted and payment thereof, i.e., 10% of the balance amount only would be subject to the receipt of the fund from the indenting department.

So read, Clause 8 may not be held to be opposed to public policy but it cannot be read in isolation. It cannot be read in such a manner so as to destroy or defeat the very purpose for which the Act or the Scheme was enacted. It cannot be read as laying down a term which would run contrary to the guidelines.

The expressions 'principal' and 'agent' used in a document are not decisive. The nature of transaction is required to be determined on the basis of the substance there and not by the nomenclature used. Documents are to be construed having regard to the contexts thereof wherefor 'labels' may not be of much relevance. The 1989 Act, the scheme and the guidelines postulate constitution of a State Board for the purpose of monitoring supplies to various departments of the State, the government corporations and the companies. The Managing Director of the Corporation is a member of the board in terms of the provisions of the 1989 Act. The Corporation was created for the purpose of giving effect to the provisions of the Act and the scheme framed thereunder. It is a statutory body and is a 'State' within the meaning of Article 12 of the Constitution of India. The contract by and between the parties being a statutory one, the Corporation was required to act fairly and reasonably. The principal purpose of the Act was to give encouragement to the growth of industries in the State of Assam and patronizing the products of small scale and cottage industries on preferential basis. The 1989 Act contemplates acts which would be for the betterment of the SSI units and not acts which would be detrimental to their interest. The terms used in the agreement must, therefore, be understood in that perspective.

In Chairman, Life Insurance Corporation and others Vs. Rajiv Kumar Bhasker [2005 AIR SCW 3636], a bench of this Court opined:
"39. Agency as is well-settled, is a legal concept which is employed by the Court when it becomes necessary to explain and resolve the problems created by certain fact situation. In other words, when the existence of an agency relationship would help to decide an individual problem, and the facts permits a court to conclude that such a relationship existed at a material time, then whether or not any express or implied consent to the creation of an agency may have been given by one party to another, the court is entitled to conclude that such relationship was in existence at the time, and for the purpose in question. [See "Establishing Agency" by GHL Fridman - 1968 (84) Law Quarterly Review 224 at p 231]."

It is no longer in doubt or dispute that while interpreting the terms of agreement, it is necessary to look to the substance of the matter rather than its form. Use of a terminology may not be sufficient to lead to a conclusion that the parties to the contract in fact intended that the said status would be conferred.

In The Bhopal Sugar Industries Ltd. Vs. Sales Tax Officer, Bhopal [(1977) 3 SCC 147], a 3-Judge Bench of this Court referred to the dicta laid down by this Court in Sri Tirumala Venkateswara Timber and Bamboo Firm Vs. Commercial Tax Officer, Rajahmundry [(1968) 2 SCR 476] wherein the

law has been laid down in the following terms:

"As a matter of law there is a distinction between a contract of sale and a contract of agency by which the agent is authorised to sell or buy on behalf of the principal. The essence of a contract of sale is the transfer of title to the goods for a price paid or promised to be paid. The transferee in such a case is liable to the transferor as a debtor for the price to be paid and not as agent for the proceeds of the sale. The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and will therefore be liable to account for the sale proceeds."

It was opined:

"It is clear from the observations made by this Court that the true relationship of the parties in such a case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the said relationship. This Court relied on a decision in W.T. Lamb and Sons v. Goring Brick Company Ltd. where despite the fact that the buyer was designated as sole selling agent, the Court held that it was a contract of sale."

In certain circumstances, even an agent can become a purchaser where an agent pays to the principal on its own responsibility. [See Gordon Woodroffe and Co. (Madras) Ltd. Vs. Shaik M.A. Majid and Co. [AIR 1967 SC 181]

Law contemplates different types of agency. Under the Contract Act, the concept of del credere agent is well-known. A del credere agent assumes responsibility for the solvency and performance of their contract by the vendees and, thus, indemnifies his employer against loss. He gives an additional security to the seller. [See Bowstead & Reynolds on Agency, 17th Edition, para 1-038]. However, it is not necessary to dilate thereupon as the status of the parties herein must be determined in terms of the provisons of the 1989 Act.

The 1989 Act makes a statutory provision beyond the concept of agency as contained in the Contract Act. It is a special statute. In terms thereof the Respondent was not required to pay any commission to the Corporation, though the Corporation was described as 'agent' of the Respondent under the agreement. 5% commission was to be paid to the Corporation by the purchasing authorities. The provisions of the 1989 Act, thus, should be given full effect. The status of the parties must not, thus, be determined as to how they have described themselves but having regard to the substance of the transaction as envisaged under the Act and the scheme framed, which as noticed hereinbefore, is as a part of the Act.

As a statutory agency came into being by and between the purchasing authorities and the Corporation in terms whereof the Corporation not only exercised the control in relation to the entire supply of materials, as a part of the statutory scheme, it also undertook to collect the price of the goods supplied from the purchasing authorities and pay the same to the manufacturers subject, of course, to the payment of its commission which would be a substantial amount. Under the scheme, the purchasing authorities had a duty to pay 90% of the price before the Corporation makes an indent and, thus, the latter had a statutory duty to realize the same before an indent is made, as also the remaining 10% when supplies are completed. If the payment was to be made by the Corporation to the Respondent both

under the contract as also in terms of the statutory provision, it cannot now turn round and contend that it was not part of its duty and leave the matter at that. It was obligated having regard to the statutory scheme on the part of the Corporation to realize the price for the consideration of the goods supplied. It was not constituted merely to act as a conduit pipe. It was bound to perform its statutory duties envisaged under the 1989 Act.

Furthermore, it is one thing to say that the Respondent delivered goods without receiving 90% of the indented amount but it is another thing to say that it has waived its right. No case of waiver of statutory duty has been made out. Nothing has been pointed before us that the Respondent gave up its claim to receive the amount directly from the Corporation. Its conduct suggests contra. The Respondent for a period of about two years made those supplies and had been asking the Corporation to make its payment and, as noticed hereinbefore, the Respondent filed a suit at the earliest possible opportunity. Even during last 12 years, the Corporation made no effort to realize the amount from the State and pay the same to a small scale industry for whose benefit the 1989 Act was enacted. It had shown utter despondency and behaved in a cavalier manner taking umbrage under specious plea that the State was a necessary party. There was no privity of contract between the Corporation and the purchasing authorities. All payment of the purchasing authorities were to be channelised through the Corporation. Having regard to the transactions between the parties as also the Scheme and the Act, we are of the opinion that the State of Assam was not a necessary party.

In terms of the agreement between the parties hereto, the State of Assam would not be a necessary party but merely be a proper party.

In Balvant N. Viswamitra (supra) a distinction has been made between a proper party and a necessary party in the following terms:

"25. It was contended by learned counsel for the respondents that the respondents were not made the party-defendants in the suit and hence no decree could have been passed nor could be executed against them. We are afraid we cannot uphold the contention. It is the case of the plaintiffs that the property was let to Papamiya. It is not even the case of the respondents that they were the tenants of the plaintiffs. They are claiming through Papamiya. At the most, therefore, they can be said to be sub-tenants i.e. tenants of Papamiya. There was no privity of contract between the landlord and the respondents. In our opinion, therefore, it was not necessary for the plaintiffs to join the respondents as defendants in the suit nor to give notice to them before initiation of the proceedings. The respondents cannot be said to be "necessary party" to the proceedings.
26. As held by this Court in Udit Narain Singh Malpaharia v. Addl. Member, Board of Revenue, Bihar 8 there is a distinction between "necessary party" and "proper party". In that case, the Court said: (SCR p. 681)
"The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding." (emphasis supplied)"

We respectfully adopt the same.

The Corporation for all intent and purport having undertaken the liability of the purchasing authorities would also be liable for all consequences arising from non-payment of the price of the goods supplied.

We may summarise the effect of the 1989 Act, the marketing support scheme of the Corporation, the O.M. dated 28.3.1988 referred to in Section 7(1)(iii) of the 1989 Act, and the agreement between the Corporation and the respondent, as follows :

i) The Corporation had to collect 90% of the value of the orders placed by the purchasing departments, in advance, and release the said 90% to the respondent on supply. This obligation is a statutory obligation having regard to the provisions of Section 7(1)(c) of the 1989 Act read with Clause 4 of the O.M. dated 28.3.1988 and the clause relating to 'indenting' contained in the Marketing Assistance Scheme. This would mean that if the Corporation accepts indents from Government departments without 90% advance and chooses to place corresponding supply orders on the respondent, it (the Corporation) is liable to pay the said 90% to the respondent on supply whether the Corporation chose to receive payment from the indenting departments or not.

ii) Though the respondent is described as the 'principal' and the Corporation is described as the 'agent' in the agreement dated 19.10.1990 between the respondent and the Corporation, the Corporation was not entitled to receive any commission or remuneration or consideration from the respondent for the orders procured/placed. It is entitled to receive the commission (at the rate of 5% of the price) only from the indenting departments. The Corporation, thus, acted as the 'agent' of both the respondent-supplier and the Indenting Government departments and took the responsibility of paying the price to the respondent. In fact, under clause 6 of the agreement, the respondent specifically authorized the Corporation to raise bills of sale on behalf of the respondent, either disclosing or without disclosing the name of the respondent, and collect the payment from the buyer department. The said clause also specifically contemplates the Corporation releasing 90% of the value of the material on delivery and acceptance, and payment of balance of 10% after receipt of full payment from the purchasing department. As noticed above, the statutory scheme and the O.M. required the Corporation to receive the 90% payment in advance along with the indents from the purchasing departments and any relaxation by the Corporation of that provision was done at its own risk.

APPLICABILITY OF THE 1993 ACT:

We have held hereinbefore that Clause 8 of the terms and conditions relate 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 with 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 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 1993 Act coming into force. Only the transactions at sl. no. 27 to 71 (that is supply orders between 22.10.1992 to 19.6.1993). will attract the provisions of the 1993 Act.

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% upto June, 1991 and 23.5% thereafter..

Mr. Choudhary has placed reliance upon a Full Bench decision of Guwahati High Court in Assam State Electricity Board & Ors. Vs. M/s. Shanti Conductors (P) Ltd. & Anr. [2002 (1) GLT 547] which having regard to the non-obstane clause contained in Sections 4, 5 and 10 of the 1993 Act opined that interest payable thereunder shall embrace within its fold even the contracts which might have been entered into prior to the enforcement of the Act stating:

"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 from the date of the enforcement of the Act and not from the date of payment prescribed under the agreement."

With respect, we do not subscribe to the said view as payment of interest at an enhanced rate cannot be made in relation to the transactions where Section 3 will have no role to play.

We, therefore, are of the opinion that in relation to the transactions made prior to coming into force of the said Act, simple interest at the rate of 9% per annum, which was the bank rate at the relevant time, shall be payable both prior to date of filing of the suit and pendente lite and as future interest in terms of Section 34 of the Code of Civil Procedure. Interest, however, will be payable in terms of the provisions of the 1993 Act (compound interest at the rate of 23.5.% per annum) in relation to the transactions made after coming into force of the Act, both in respect of interest payable upto the date of institution of the suit and pendente lite and till realisation. The judgment and decree to that extent requires to be modified. It is directed accordingly.

The appeal is, therefore, allowed in part in regard to interest and to the extent mentioned hereinbefore. The Corporation shall bear the costs of the Respondent in this appeal. Counsel’s fee is assessed at Rs. 25,000/-.