* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **RFA Nos. 623/2017 & 628/2017**

% **17th July, 2017**

\+ **RFA No.623/2017**

NORTH DELHI MUNICIPAL CORPORATION ..... Appellant

Through: Mr. Sunil Goel, standing counsel with Ms. Supreet Bimbra, Adv.

versus

PREM CHAND GUPTA ..... Respondent

\+ **RFA No.628/2017**

NORTH DELHI MUNICIPAL CORPORATION ..... Appellant

Through: Mr. Sunil Goel, standing counsel with Ms. Supreet Bimbra, Adv.

versus

PREM CHAND GUPTA ..... Respondent

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. There is a limited legal issue which arises for determination in these appeals and which is as regards the entitlement

claimed by the appellant/defendant to not pay interest in view of Clause 9 of the Contract and which reads as under:-

> "Clause 9 AFTER AMENDMENT:
> "CLAUSE 9
> Payment of Final Bill
> The final bill shall be submitted by the contractor in the same manner as specified in interim bills within three months of physical completion of the work or within one month of the date of the final certificate of completion furnished by the Engineer-in-Charge, whichever is earlier. No further claims shall be made by the contractor after submission of the final bill and these shall be deemed to have been waived and extinguished. Payment of those items of the bill in respect of which there is no dispute and of items in dispute, for quantities and rates as approved by Engineer-in-Charge, will, as far as possible be made **after** the period specified hereunder, the period being reckoned from the date of receipt of the bill by the Engineer-in-Charge or his authorized Asstt. Engineer, complete with account of materials issued by the Department and dismantled.(*sic materials).*
> **The payment of passed bills will depend on availability of funds in particular head of account from time to time in MCD. Payment of bills shall be made strictly on Queue basis i.e. first the past liabilities will be cleared and after that the release of payment for passed bills will be in order of demand received at HQ under particular head of account. No interest shall be payable to the contractor in case of delay in payment on account of non-availability of fund in the particular head of account of MCD.**
> (I) If the Tendered value of work is up to Rs. 5 lakhs;**6** months
> (II) If the Tendered value of work exceeds RS. 5 lakhs: 9 months".

2. I may note that these appeals are filed against the impugned judgments dated 22.2.2017 and 1.2.2017 which notes that the amount payable for the work done by the respondent/plaintiff, and as claimed through the suit, already stands paid to the respondent/plaintiff during the pendency of the suit. The issue decided by the judgment is only that the appellant/defendant claimed

entitlement under Clause 9 not to pay interest whatsoever because of Clause 9 and that this argument was misconceived and that interest had to be paid. Effectively what is argued on behalf of the appellant/defendant is that the appellant/defendant has a legal right because of Clause 9 not to make payment of interest in spite of delay in making payment of the work done.

3. A clause in a contract which disentitles payment of interest, although payment is made with delay, has been the subject matter of a decision by this Court in the case of ***Union of India Vs. M/s N.K. Garg & Co.*** OMP No. 327/2002 decided on 2.11.2015: ***2015 (224) DLT 668***. In the said detailed judgment this Court has held by reference to the provisions of Section 23 of the Indian Contract Act, 1872 as also provisions of the Interest Act, 1978 and judgments of the Supreme Court, that a clause in a contract whereby a guilty party refuses to pay interest for delayed payment is illegal and is hit by Section 23 of the Indian Contract Act.

4. The said judgment in the case of ***M/s N.K.Garg Co. (supra)*** is reproduced in its entirety as below:-

"1. An issue of far reaching importance calls for decision in the present petition which is filed under Section 34 of the Arbitration & Conciliation Act, 1996. On behalf of the petitioner/Union of India, it is argued that in view of Clause 16(2) of the General Conditions of Contract (GCC) applicable to the contract in question, petitioner cannot be held liable for payment of any interest on the amounts awarded by the Arbitrator to the respondent/contractor, and that this defence and shield of non-liability for payment of interest enures for the benefit of the petitioner irrespective of the length of the time for which arbitral and court/judicial proceedings continue. In sum and substance, it is argued that even if the petitioner/UOI is found liable to pay any amount to the contractor, whether in a civil suit or any arbitration proceedings by an award, petitioner because of Clause 16(2) of the GCC cannot be called upon to pay interest for the pre-reference/present period or the post reference period including *pendente lite* period and till passing of the Award/decree.

2. Counsel for the petitioner places reliance upon, the below mentioned judgments of the Supreme Court and one judgment of the Full Bench of this Court, to argue that the Supreme Court has held that Clause 16(2) of the GCC is a valid clause thereby disentitling a contractor for payment of interest although the award is in favour of the contractor. In all the judgments relied upon on behalf of the petitioner, the same deal either with Clause 16 (2) of the GCC or to contractual clauses in other contracts which are similar/more or less identical to the subject Clause 16(2) of the GCC. These judgments of the Supreme Court and Full Bench judgment of this Court are as under:-

(i) ***Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), Palghat & Others, (2010) 8 SCC 767;***

(ii) ***Sayeed Ahmed & Co. Vs. State of U.P. and Ors., (2009) 12 SCC 26;***

(iii) ***Union of India Vs. Saraswat Trading Agency and Others, (2009) 16 SCC 504;***

(iv) ***Union of India Vs. Krafters Engineering and Leasing Private Limited, (2011) 7 SCC 279;***

(v) ***Union of India Vs. M/s. Bright Power Projects (I) P. Ltd., (2015) 7 SCALE 638;*** and

(vi) Full Bench judgment of this Court in FAO(OS) No.494/2010 decided on 24.2.2012 titled as ***Union of India Vs. M/s Conbes India Pvt Ltd*** and which essentially relies upon the judgment of the Supreme Court in the case of ***Krafters Engineering and Leasing Private Limited (supra).***

3. The judgments of the Supreme Court and the Full Bench judgment of this Court relied upon by the petitioner do squarely apply in favour of the petitioner because the ratio of these judgments is that if there is a contractual clause which provides that interest will not be payable, then, on account of

such a clause, a contractor is not entitled to payment of interest on the amount awarded in his favour by a decree/award. Therefore, once a contractual clause prohibits grant of interest, then, under the Arbitration & Conciliation Act, 1996, interest cannot be granted for either the pre-reference or the post-reference period till the award is passed. Ordinarily therefore this petition would have had to be allowed by setting aside the impugned Award dated 11.2.2002 to the extent that the Arbitrator has awarded interest in favour of the respondent and against the petitioner for the pre-reference period and the post-reference period till the passing of the Award, however, Learned Senior Counsel for the respondent has very vehemently argued that the clause in question no doubt has been interpreted and applied by the Supreme Court in its aforesaid decisions to deny the claim of interest, but, the fact of the matter is that the subject Clause 16(2) of the GCC is invalid/void and thus liable to be struck down in view of the provision of Section 23 of the Indian Contract Act, 1872 and hence the said Clause 16(2) will not stand in the way of the respondent being entitled to interest. What is argued on behalf of the respondent is that the judgments of the Supreme Court (as also the decision of the Full Bench of this Court) relied upon by the petitioner proceed on the basis that the Clause 16(2) of the GCC is a valid clause and thus has to be applied, however none of the decisions of the Supreme Court (as also the decision of the Full Bench of this Court) pertain to or have decided the issue and laid down a ratio as to what would happen if the clause in question itself is invalid and void because of Section 23 of the Indian Contract Act, 1872. It is argued on behalf of the respondent that once the clause in question goes as being violative of Section 23 of the Indian Contract Act, 1872, then, the respondent is entitled to payment of pre-reference and post-reference interest till the passing of the Award and the ratios of the judgments of the Supreme Court (as also the decision of the Full Bench of this Court) as relied upon by the petitioner will in such a situation not stand in the way of the respondent being granted pre-reference and post-reference interest till the date of the Award.

4(i). I note that the respondent was granted interest by the Arbitrator by the impugned Award dated 11.2.2002 and therefore there was no need for the respondent prior to the decision of this petition to have questioned Clause 16(2) of the GCC as being hit by/being violative of Section 23 of the Indian Contract Act, 1872 for holding the said clause to be invalid and void. Since the issue is a purely legal issue, and since the petitioner places reliance solely upon Clause 16(2) of the GCC, I have hence permitted the learned senior counsel for the respondent to argue the aspect of seeking dismissal of the objection petition under Section 34 of the Arbitration & Conciliation Act which has asserted the disentitlement of payment of interest to the respondent on the sole ground of Clause 16(2) of the GCC, because of this clause being hit by Section 23 of the Indian Contract Act. Once if this Clause 16(2) goes, then, the respondent would be entitled to the

payment of interest, especially in view of the Constitution Bench judgment of the Supreme Court in the case of ***Secy., Irrigation Deptt., Govt. of Orissa Vs. G.C. Roy (1992) 1 SCC 508*** which holds that by whatever name/heading called, once there is found to be wrongful retention of moneys by one person against the other, a person whose moneys have been wrongly withheld, is rightfully entitled to be reimbursed under whatever name the same is called, be it damages or interest. The relevant para of the judgment of the Supreme Court in the case of ***G.C. Roy's*** case ***(supra)*** reads as under:-

"43. xxx xxx xxx

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

xxx xxx xxx"

(ii) I may hasten to add that the learned senior counsel for the respondent relies upon para 43 of the Constitution Bench judgment in the case of ***G.C. Roy (supra)*** on the basis that though no doubt in the judgment in the case of ***G.C. Roy (supra)*** the Supreme Court was dealing with the position that an agreement does not bar grant of interest, however, it is argued that once the impugned Clause 16(2) of the GCC goes, there would not remain any bar under the contract for payment of interest and hence para 43(i) of judgment in the case of ***G.C. Roy (supra)*** will apply. Reliance is also placed by the learned senior counsel upon Sections 4 & 5 of the Interest Act, 1978 to sustain the claim of interest.

5. At the outset let me reproduce Clauses 16(1) and (2) of the contract in question as also Section 23 of the Indian Contract Act, 1872, and which read as under:-

"**Clauses 16(1) and 16(2)**

16(1) Earnest money and security deposit: The earnest money deposited by the Contractor with his tender will be retained by the Railway as part of security for the due and faithful fulfilment of the contract by the contractor. The balance to make up this security deposit which will be 10 percent of the total value of the contract, unless otherwise specified in the apecial conditions, if any, may be deposited by the contractor in cash or in the form of Government Securities or may be recovered by percentage deduction from the contractors "on account" bills, provided also that in case of a defaulting contractor the railway may retain any amount due for payment to the contractor on the pending "on account bills" so that the amount or amounts so retained may not exceed 10% of the total value of the contract.

16(2) Interest on Amounts: No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract, but Government Securities deposited in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon."

Section 23. What consideration and objects are lawful, and what not.-The consideration or object of an agreement is lawful, unless-

It is forbidden by law, or

is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

involves or implies, injury to the person or property of another;

or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

6. A reading of Section 23 of the Indian Contract Act shows that where a contractual provision is against a specific statutory provision or if a contractual clause is allowed to be implemented the same will result in frustration of a right conferred by law or if the contractual clause is immoral or oppose to public policy, then, in such cases the contractual clause is invalid and void. In the present case I have to examine the third part of Section 23 of the Indian Contract Act, 1872 as to whether the clause prohibiting payment of interest can be said to be immoral or against the public policy.

7. What is public policy has been pronounced upon in a recent judgment of the Supreme Court in the case of ***India Financial Assn., Seventh Day Adventists Vs. M.A. Unneerikutty and Anr. (2006) 6 SCC 351.*** The relevant paras of the said judgment quoted below encapsulate the law with respect to the doctrine of public policy. The relevant paras of the judgment are paras 16 to 19 and which paras read as under:-

"16. Section 23 of the Contract Act lays down that the object of an agreement becomes unlawful if it was of such a nature than, if permitted., it would defeat the provisions of any law.

17. The term "public policy" has an entirely different and more extensive meaning from the policy of the law. Win field defined it as a principle of judicial legislation or interpretation founded on the current needs of the community. It does not remain static in any given community and varies from generation to generation. Judges, as trusted interpreters of the law, have to interpret it. While doing so precedents will also guide them to a substantial extent.

18. The following passage from Maxwell *Interpretation of Statutes*, may also he quoted to advantage here:

"Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Where there is no

express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only or whether it is an Act which is intended as a matter of public policy...."

19. The doctrine of public policy may be summarized thus:

"Public policy or the policy of the law is an illusive concept; it has been described as 'untrustworthy guide', 'variable quality', 'uncertain one', 'unruly house', etc.; the primary duty of a Court of a law is to enforce a promise which the parties have made and to uphold the sanctity of contract which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; ... but the doctrine is extended not only to harmful cases but also to harmful tendencies. This doctrine of public policy is only a branch of common law, and just like any other branch of common Jaw it is governed by precedents. The principles have been crystallised under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public." (underlining added)

8. The following principles can be culled out from the aforesaid paragraphs of the judgment of the Supreme Court in the case of ***M.A. Unneerikutty and Anr. (supra)***:-

(i) Public policy is a changing concept. It is not a static but a dynamic concept. It is amenable to change from time to time, and courts have been empowered by interpreting the public policy principle to resort to judicial legislation; euphemistically called interpretation; to further public interest, equity, justice and good conscience.

(ii) The law which is made for a person's benefit no doubt can be waived by such person, however, where law has a public interest/public policy element, then such rights cannot be waived by an individual person inasmuch as such rights are a matter of public policy/public interest.

9. The crux of the matter is that can it be held by this Court that Clause 16(2) is opposed to public policy as per the ratio in ***M.A. Unneerikutty and Anr.'s*** case ***(supra)***. This aspect I will discuss in the later part of this judgment, however let us also presently look at the meaning of the expression 'immoral' as found in Section 23 of the Indian Contract Act.

10. The Supreme Court in its judgment in the case of ***Gherulal Parakh Vs. Mahadeodas Maiya and Others AIR 1959 SC 781*** has observed that the word immoral is a very comprehensive word taking every aspect of personal conduct deviating from standard norms of life. Morality includes the aspect that what is repugnant to good conscience would be immoral. Simultaneously the Supreme Court has also observed that no universal standard can be laid down for such fluid concept of morality because laying down of universal standards will defeat the purpose of the concept itself. The Supreme Court while deciding ***Gherulal's*** case ***(supra)*** however held

that the provision of Section 23 of the Indian Contract Act indicates that legislature's intention was to give a restrictive meaning to the word 'immoral' by restricting it to 'sexual immorality' and this Supreme Court held by observing that no other case was brought to the notice of the Supreme Court before deciding of ***Gherulal's*** case ***(supra)*** that the expression 'immorality' has been held in any other precedent as immorality other than sexual immorality. It bears note that this judgment passed is of 1959 vintage.

11. In my opinion, the ratio of ***Gherulal's*** case ***(supra)*** has to be really read in a holistic manner that what is immorality will necessarily depend upon time and age. What may not be immoral at one point of time may become immoral at another point of time and age. It is for this reason that the Supreme Court in ***Gherulal's*** case ***(supra)*** clearly has observed that to such fluid concept of 'immorality' no universal standard can be laid down. Thus the question is at a time now in the year 2015 that should this Court hold that when there is illegal/wrongful withholding of principal amounts by a person, such withholding of money continues beyond even a reasonable point of time still can such action be said to be moral and not immoral, ie, is it not immoral to hold on to moneys of another without payment of interest although the period of wrongful/illegal retention of monies may run into years and years spanning into decades so to say. This long period of time is taken to arrive at a final decision in a substantial number of commercial disputes in this country; whether through arbitration or the civil courts. It is not unknown that in many many cases it takes even between 20 to 30 years before the same finally reaches and is decided by the Supreme Court.

12. In the facts and issues to be decided in the present case, the expressions 'immoral' and 'public policy' would dovetail into each other i.e in cases where there is illegal/wrongful holding on to the principal amounts payable to another person for long periods. The aforesaid wrongful/illegal action will thus simultaneously be both immoral and/or against public policy. How this is so, let me endeavour to explain.

13. In my opinion, and it goes without even so saying, that the entire concept of rule of law and existence of relevant legislations in any country in this age (or in any age for that matter) is to prevent dishonesty. This principle that dishonesty is not promoted is as absolute and inviolable as the rising of the sun in the east. It can never ever be argued that a legislation or a contract can be so interpreted by courts, or that they be so applied by courts, which will result in promoting of dishonesty. Dishonesty is an anathema to the rule of law. Illegal holding on to the principal amounts by one person clearly leads to dishonesty on his part as such person wrongly benefits from the moneys illegally/wrongfully retained by him. Simultaneously such actions also cause grave loss and injury to the person who is entitled to receive the principal amounts at a much earlier point of time. Because the aggrieved person receives the due amount after years and years spanning sometimes into decades of delay, such wrongful act of a

person of retaining of due amount by not paying interest will really only because of passage of the long period of time amount to immorality and violation of the principle of public policy affecting the public at large. It is high time that considering the period of time it takes in various litigations in this country to achieve finality, without in any manner observing as to how and why same issue arises, illegal/wrongful non-payment of monies without paying interest thereon should be held to be immoral and/or against public policy. Delay of decades, and sometimes generational delay before litigations achieve finality, is such a long period that there results clear cut travesty of justice to the aggrieved person; as demonstrated from examples given immediately hereinafter. In sum and substance what is being observed by this Court is that holding on to principal amounts beyond the particular point of time when it was actually payable, in the guise of defences raised during pendency of litigations by simply arguing that since defences were raised for non-payment of awarded amount and which are only decided when an award is passed, hence there is entitlement to not pay interest on the principal amount on the ground that a contractual clause supports so, the same will clearly permit dishonesty. Immorality arises as defences on merits take decades to decide in a substantial number of cases. It is the long period of time of illegally/wrongfully holding on to the principal amounts of monies which makes the holding on to moneys without paying interest as immoral. Therefore, in today's date and age to say that moneys can be retained for years and years and decades is clearly immoral and has to be held against public policy otherwise there will be gross injustice to the existence of the commercial world which cannot survive without payment of moneys in time.

14(i). Let us take a case where a person A has to be paid by a person B Rs.1 lakh as on 1.1.2002. I am specifically taking this date of 1.1.2002 as the Award in this case is dated 11.2.2002. If the contractor in this case would have received the amount due to him on 1.1.2002, then, by today the said amount of Rs.1 lakh even on a most safe investment in a fixed deposit in nationalised banks would have earned interest between 8% to 9% per annum at an annual cumulative rate. Around every ten years the moneys will thus surely double. In fact it may be noted that if a person is adventurous enough to lend his moneys, instead of putting the same in nationalised banks, then such a person could have also earned a higher rate of interest varying between 12% to 14% p.a. simple. In any case, one can safely take a return between 8% to 9% p.a. compounded every year as being a reasonable rate inasmuch as this has been the approximate rate of interest payable on fixed deposits by nationalised banks in this country during this period. Also, it bears note that Section 2(b) of the Interest Act, 1978 defines the current rate of interest as highest rates payable by the nationalised banks payable on deposits other than savings bank account deposits. If the moneys which were due as on 1.1.2002 is not paid for ten years till 1.1.2012, then such a person who was entitled to the same on time on

1.1.2002 effectively gets only half of his money if payment is received after ten years on 1.1.2012 because in this period of ten years the amount would have been doubled. If this period of ten years increases to twenty years, and a person who is entitled to moneys does not receive the moneys for twenty years, then, in fact he effectively receives only 1/4th of the amount because in 20 years the original amount would have become four times. Once the period goes above 20 years, and which it does in many cases, one can really understand the plight of a person whose moneys do not come to his hands on time. It is classically said that one cannot survive only on love and oxygen. Therefore, if moneys are allowed to be illegally retained over a long period of time without payment of interest, and which immorality results on account of a court or an arbitrator holding that a contractual clause entitles due amounts to be paid without interest thereon, there is clearly a very grave injustice on account of amounts being illegally withheld by the person and not paying on time the same to the person who was entitled to the same because when a person receives his moneys after a huge delay in fact he gets just a small percentage than what he actually should have received.

(ii) In addition to the example given above which shows that over a period of time actually a person ends up receiving much lesser than what the person actually should have received, there is the additional fact that whatever moneys which may come to the hands of a person after many years and decades will also be along with fall in the value of money i.e purchasing power of money due to inflation. Also depreciation of the Rupee is a well known fact.

(iii) It is further to be also noted that if a person does not receive his moneys on time, then, for the purpose of running of his business enterprise he will necessarily have to borrow moneys from someone and for which borrowing of moneys he will have to pay interest. This rate of interest definitely will be higher than the rate of interest payable on fixed deposit by nationalised banks. Therefore there is not only a double whammy of receiving a small percentage alongwith fall in money value, but a triple whammy upon the person who is entitled to the payment moneys on time i.e firstly, a person ends up getting lesser percentage of money every year than what he ought to have got, even that lesser percentage of money is received with a lesser purchasing power and thirdly the person who is entitled to the moneys is forced to pay moneys in the form of interest by borrowing moneys to keep his entrerprise going.

(iv) The illegal retention of moneys is in fact in my opinion even a quadruple whammy because an aggrieved person suffers the distress of knowing and understanding that the person who is illegally and unlawfully retaining his moneys, uses such moneys either in investment or to grow his business/enterprise, and which otherwise have benefited the aggrieved person if he would have received the moneys due on time.

15. The question is that are the aforesaid observations which are being made by this Court are too general or can it be said that the

observations can have foundation in statutory provisions? The answer in this regard is yes and the statutory provisions are those contained in the Interest Act, 1978, and which I am referring to herein below. The Interest Act, 1978 is a short legislation comprising of just six sections. Let me reproduce the relevant sections being Sections 3 to 5 in their entirety and sub-Sections (a) and (b) of Section 2 of the said Act. These provisions read as under:-

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

(a) "court" includes a tribunal and an arbitrator;

(b) "current rate of interest" means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of Scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949).

Explanation.— In this clause, scheduled Bank means a bank, not being a Co-operative bank, transacting any business authorised by the Banking Regulation Act, 1949 (10 of 1949).

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3. Power of court to allow Interest.- (1) In any proceeding for the recovery of any debt or damage or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say ;-

(a) If the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed to the date of institution of the proceedings:

Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.

(2) Where in any such proceedings as are mentioned in sub-section (1),:—

(a) judgment, order or award is given for a sum which, apart from interest on damages, exceeds four thousand rupees, and

(b) the sum represents or includes damages in respect of personal injuries to the plaintiff or any other person or in respect of a person's death, then, the power conferred by that sub-section shall be exercised so as to include in that sum interest on those damages or on such part of them as

the court considers appropriate for the whole or part of the period from the date mentioned in the notice to the date of institution of the proceedings, unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages.

(3) Nothing in this Section,—

(a) shall apply in relation to—

(i) any debt or damages upon which interest is payable as of right, by virtue of any agreement; or

(ii) any debt or damages upon which payment of interest is barred, by virtue of an express agreement;

(b) shall affect—

(i) the compensation recoverable for the dishonour of a bill of exchange, promissory note or cheque, as defined in the Negotiable instrument Act, 1881 (26 of 1881); or

(ii) the provisions of rule 2 of Order II of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908);

(c) shall empower to court to award interest upon interest.

4. Interest payable under certain enactments.—(1) Notwithstanding anything contained in section 3, interest shall be payable in all cases in which it is payable by virtue of any enactment or other rule of law or usage having the force of law.

(2) Notwithstanding as aforesaid, and without prejudice to the generality of the provisions of sub-section (1), the court shall, in each of the following cases, allow interest from the date specified below to the date of institution of the proceedings at such rate as the court may consider reasonable, unless the Court is satisfied that there are special reasons why interest should not be allowed, namely:-

(a) where money or other property has been deposited as security for the performance of any obligation imposed by law or contract, from the date of the deposit;

(b) where the obligation to pay money or restore any property arises by virtue of a fiduciary relationship, from the date of the cause of action;

(c) where money or other property is obtained or retained by fraud, from the date of the cause of action;

(d) where the claim is for dower or maintenance, from the date of the cause of action.

5. Section 34 of the Code of Civil Procedure, 1908 to apply.—Nothing in this Act shall affect the provisions of section 34 of the Code of Civil Procedure, 1908 (5 of 1908)." (underlining added)

16. No doubt, Section 3(3)(a)(ii) of the Interest Act does allow parties to enter into an agreement for non-payment of interest, however, the later Section 4 begins with a *non obstante* clause thereby overriding the language of Section 3 including the bar contained in Section 3(3)(a)(ii). The entire substratum of Section 4 of the Interest Act is immorality and nothing else, though the words 'moral' or 'immoral' are not specifically used in the said

provision. Even an ordinary reading of Section 4 of the Interest Act leaves no manner of doubt that where unreasonableness of action comes in, Section 4 of the Interest Act will step in to allow payment of interest notwithstanding the provision of Section 3(3)(a)(ii) thereof. The various sub-Clauses of sub-Section (2) of Section 4 of the Interest Act by their very nature deal with immoral factual situations and thereby taking the expanded meaning of the word 'immorality' i.e sexual immorality as held in ***Gherulal's*** case in 1959. In the fact situations provided under the said Section 4(2), courts have been categorically mandated by use of the expression "shall" to award interest. Sub-Section (2) of Section 4 of the Interest Act mandates payment of interest in cases of violation of a fiduciary relationship or breach of duty by a person with whom an amount payable is deposited and who fails to pay the deposit or where an amount is retained by fraud and so on. Also, it bears note that the first line of sub-Section (2) of Section 4 provides that the language of sub-Section (2) of Section 4 is without prejudice to the generality of sub-Section (1) and therefore sub-Section (1) of Section 4 has to be interpreted in a very wide language to cover cases which are cases which are beyond those mentioned in the four sub-Clauses (a) to (d) of sub-Section (2) of Section 4.

17. Therefore, on and after the passing of the Interest Act, 1978, what was observed by the Supreme Court in 1959 in ***Gherulal's*** case ***(supra)*** that there could arise such cases that a personal conduct which deviates from standard norms of life can be said to be repugnant to good conscience and hence immoral becomes extremely relevant, and therefore today in the year 2015 there is no need to restrict the word immorality only to sexual immorality which was done by the Supreme Court in ***Gherulal's*** case ***(supra)*** only because there were no cases decided till 1959 holding immorality in cases other than sexual immorality**.** This conclusion is to be clearly arrived at in view of the explicit, categorical and mandatory language of Section 4 with its sub-Sections of the Interest Act, 1978. I therefore hold that if the four examples which are found in the four sub-Clauses (a) to (d) of sub-Section (2) of Section 4 of the Interest Act can be said to be transactions having such amount of immorality for the courts to be mandated to grant interest, then, in commercial contracts when moneys are illegally retained for a long period of time running into years and years and decades, this Court should and does hold that Clause 16(2) of the contract is both immoral and against public policy and it is illegal for the petitioner to argue that no interest will be payable merely because there is such a contractual clause in favour of the petitioner. Putting it in other words, the four sub-Clauses of sub-Section (2) of Section 4 of the Interest Act do not restrict immorality to instances of sexual immorality as the only immorality, and hence in today's age and date the expression 'immoral' will have to be interpreted to include immorality arising in commercial transactions especially because a whiff of the same surely exists in the first sub-Clause (a) of sub-Section (2) of Section 4 of the Interest Act, 1978

which deals with payment of interest on a deposit, and deposit of moneys is generally and ordinarily a commercial transaction.

18. Also, it bears note that a lot of water has flown under the bridge since ***Gherulal's*** case ***(supra)*** decision in 1959 because commerce and business are the life blood of existence of most nations today, including our country. It is commerce and business which provides a huge overriding percentage of employment and the Gross National Product of this country. Surely, commerce and business cannot survive if principal amounts are held on for a long period of time without there being an obligation to pay interest. If this is allowed it will have a deleterious effect that commerce and business cannot survive in the absence of receipt of payment of principal amounts on time by the person who is entitled to such amounts.

19. In addition to the aforesaid reasoning, and if there is any further requirement of buttressing the case of entitlement of a person to interest, and so far as *pendente lite* interest is concerned, one may only refer to Section 5 of the Interest Act, 1978 and which specifically provides that so far as *pendente lite* interest is concerned, Section 34 of the Code of Civil Procedure, 1908 (CPC) will prevail over anything which is otherwise contained to the contrary to the Interest Act, 1978; the contrary provision being the Section 3(3)(a)(ii) of the Interest Act which allows an agreement for not paying interest. Once Section 5 of the Interest Act, again with a *non obstante* clause, allows overriding effect and power of Section 34 CPC for grant of *pendente lite* interest, clearly, the post reference interest till the passing of the award is clearly payable to a person and it cannot be argued that *pendente lite* period would stand exempted because of the language of a clause such as the Clause 16(2) of the GCC in the present case.

20. Therefore, non-payment of interest can under no circumstances be justified in today's world and it is clear that illegal retention of moneys for a long period of time will clearly amount to immorality and violation of the public policy. Therefore there is not even an iota of doubt that illegal retention of principal amounts of moneys which are to be paid by a person to another person at an appropriate point of time, on account of a contractual clause, such as Clause 16(2) of the GCC, results in an immoral action which is violative of public policy and hence such a clause having the language of Clause 16(2) of the GCC in the present case, is liable to be and is accordingly struck down in view of Section 23 of the Indian Contract Act.

21. I may note that in this petition a detailed Judgment was passed by a learned Single Judge of this Court on 19.3.2008 dismissing the objections except to the aspect of interest and which aspect was deferred in view of the pendency of a case in the Supreme Court as noted in paras 8 to 10 of the Judgment dated 19.3.2008. I am however deciding the issue as regards payment of interest as there is no bar upon this Court to

decide the same or that there is any stay of the proceedings in the present petition and I am deciding the case on the basis which is not pending before the Supreme Court and only because of which the issue of interest was not decided. For the sake of convenience the said paras 8 to 10 of the Judgment dated 19.3.2008 are reproduced below:-

"8. The learned counsel appearing on behalf of the petitioner has lastly argued on the point of interest awarded by the learned arbitrators in favour of the respondent. Mr. Pathak the learned counsel appearing on behalf of the petitioner has relied upon Clause 16(2) of the General Conditions of Contract and also the provisions of Section 31(7) of the Arbitration and Conciliation Act, 1996 in support of his contention that since there was a prohibitory clause in the contract between the parties against award of interest, the learned arbitrators went wrong in awarding interest contrary to the terms of the contract between the parties. In this regard, it would be relevant to refer to Clause 16(2) of the General Conditions of Contract and the same is reproduced here-in-below:-

"**INTEREST OF AMOUNTS**

No interest will be payable upon the earnest money or the security deposit or amounts payable to the contractors under the contract, but Government securities deposited to term of sub-clause (1) of this Clause will be repayable with interest accrued thereon."

9. The above referred prohibitory clause came for consideration before this Court in a number of judgments and in all those judgments, this Court took a view that the arbitrator was justified in awarding interest on the amount withheld by the Department. Reference is made to a Division Bench judgment of this Court in FAO (OS) No. 187/2006 titled Union of India VS. Pradeep Vinod Construction Company decided on 03.04.2006. At this stage, Mr. Pathak, the learned counsel appearing on behalf of the petitioner has pointed out that the Railways have taken the above referred judgment of Division Bench of this Court in Special Leave Petition before the Hon'ble Supreme Court and according to him the Special Leave Petition has been admitted for hearing and in that Special Leave Petition, the Hon'ble Supreme Court has stayed the payment of interest. Having regard to the facts that the Hon'ble Supreme Court has stayed the payment of interest in Pradeep Vinod Construction's Case, the award of interest by the learned arbitrators in the present case is upheld subject to the condition that the interest shall be paid to the respondent depending on the final out come of the abovementioned case pending in the Supreme Court.

10. For the foregoing reasons, I do not find any merit in the present objections petition. The same is, therefore, dismissed leaving the parties to bear their own costs."

22. In view of the above, there is no merit in the objection petition that interest has been wrongly granted by the Arbitrator because of the bar of Clause 16(2) of the General Conditions of Contract in question, as this

> Clause 16(2) is invalid and void as the same is hit by Section 23 of the Indian Contract Act, 1872.
> 23. The petition is therefore dismissed. Parties are left to bear their own costs."

5. In view of the ratio laid down in the case of ***M/s N.K.Garg Co. (supra)***, it is held that the appellant/defendant cannot claim on the basis of Clause 9, that it is not liable to pay interest. The court below has thus rightly decreed the suit for the rate of interest at 8/9% per annum.

6. Appeals are accordingly dismissed by adopting and applying the ratio in the case of ***M/s N.K. Garg Co. (supra).***

JULY 17, 2017/ib **VALMIKI J. MEHTA, J**