

**IN THE HIGH COURT OF MADHYA PRADESH, AT
JABALPUR
BEFORE
(HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA)
ON THE 24nd OF NOVEMBER, 2022
Arbitration Case No. 94/2019**

Between:-

**1. JUPITER INTERNATIONAL (SALES),179,
SAKET NAGAR, INDORE, A PARTNERSHIP
FIRM, THR. ITS PARTNER B.K. KHERIA, AGED
ABOUT 66 YEARS, S/O LATE SHRI
GOURISHANKAR KHERIA .**

**2. B.K.KHERIA, AGED ABOUT 66 YEARS S/O
LATE SHRI GOURISHANKAR KHERIA,R/O 179,
SAKET NAGR, INDORE (MADHYA PRADESH).**

.....APPLICANTS

**(SHRI AKHILESH JAIN, LEARNED COUNSEL
FOR THE APPLICANTS).**

AND

- 1. THE UNION OF INDIA, THR. CHIEF
SECRETARY, MINISTRY OF DEFENCE
NEW DELHI (DELHI)**
- 2. THE CHIEF ENGINEER, JABALPUR
ZONE, MILITARY ENGG.SERVICES,
BHAGAT MARG , P.B. NO. 84, (M.P)**

**3. ENGINEER IN CHIEF, INTEGRATED-HQ
OF MOD(ARMY), KASHMIR HOUSE,
RAJAJI MARG, NEW DELHI-110011
.....NON-APPLICANTS**

**(MS. KANAK GARWAR, LEARNED
COUNSEL FOR THE NON-APPLICANTS).**

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This petition coming on for final hearing this day, the court passed the following:

ORDER

The petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996(in short hereinafter referred as “Act”) for appointment of Arbitrator to resolve the disputes between the parties.

Facts of the case adumbrated in nutshell are, that the applicant entered into a contract with the non-applicants for “Provision of Training Hall Cum Research Centre at INF School, Mhow”. The non-applicant No.2 invited tenders for the said purpose and the applicants being eligible, their tender was accepted and the work order was issued. As per the work order, the subject work was required to be completed by 28/2/2011 but the same could be completed by 09/4/2015 because of the delay and hindrance on the part of the non-applicants in execution and completion of the work. There was delay in handing over the buildings, change in scope of work, delay in taking decisions on various

problems like finalization of design of trusses and other steel items. Although department granted time extensions without levy of compensation but failed to pay escalation beyond contract period. The applicants made repeated requests for early resolution of the problems of the work but the non-applicants failed to take any early action which caused delay in execution of the work.

The applicants completed the work on 9/4/2015 but because of delay, the payment could not be released. The applicants submitted final bill which was forwarded for audit but certain claims were not incorporated in the final bill. Then on 29/5/2017 he withdrew “no claim certificate” signed by them and stated that payment of final bill shall be received under protest. The aforesaid claim was not accepted by the non-applicants on the ground that the claims were not raised during the currency of work and disputed the claims.

As per Clause 70 of the agreement, the applicants demanded amicable settlement of the dispute, however, the said request was turned down for appointment of Arbitrator on the ground that the applicants signed the final bill without protest and received the final bill, therefore, claims of the applicants are deemed to be waived and extinguished.

Counsel for the applicants referred Clause 70 of the agreement which provides for arbitration by reference to sole arbitration for

resolving dispute between the parties. As per condition No.70, sole arbitration of a serving officer to be appointed by Engineer-in-Chief.

It is further submitted that in view of the amended provisions of Sub-section 5 of Section 12 of the Act,1996, a serving officer of the non-applicants cannot act as sole arbitrator and, therefore, the present application is filed under Section 11(6) of the Act for appointment of Sole Arbitrator.

Counsel for the non-applicants did not dispute the existence of “the dispute” and “arbitration clause”, however, submits that since the applicants have received the final bill without any protest, therefore, they cannot seek appointment of Arbitrator under Section 11 of the Act, 1996. It is not disputed that the applicants had withdrawn “no claim certificate” before the final payment. He had withdrawn the same on 29/5/2017 whereas undisputed part of final bill was paid on 28/4/2018.

After hearing learned counsel for the parties and taking into consideration the Arbitration Clause 70 between the parties and amended provisions of Sub-section 5 of Section 12, I find that the application deserves to be allowed. There is no dispute regarding existence of “arbitration clause” and “dispute” between the parties. The law is no longer res-integra that the applicant cannot be denied the appointment of Arbitrator only on the ground that they have received certain payment in pursuance to the bill. The Apex Court in the case of

National Insurance Company Limited Vs. Boghara Polyfab Pvt. Ltd. (2009) 1 SCC 267 and in the case of *Oriental Insurance Co. Ltd. and another Vs. Dicitex Furnishing Ltd. (2019) Vol. 16 scale 242* allowed the application for appointment of Arbitrator despite receiving the part payment of the bill.

Para 21 of the judgment in the case of Dicitex Furnishing Ltd. is reproduced as under:-

An overall reading of Dicitexs application under Section 11(6) clearly shows that its grievance with respect to the involuntary nature of the discharge voucher was articulated. It cannot be disputed, that several letters spanning over two years stating that it was facing financial crisis on account of the delay in settling the claim, were addressed to the appellant. This court is conscious of the fact that an application under Section 11(6) is in the form of a pleading which merely seeks an order of the court, for appointment of an arbitrator. It cannot be conclusive of the pleas or contentions that the claimant or the concerned party can take, in the arbitral proceedings. At this stage, therefore, the court which is required to ensure that an arbitrable dispute exists, has to be prima facie convinced about the genuineness or credibility of the

plea of coercion; it cannot be too particular about the nature of the plea, which necessarily has to be made and established in the substantive (read:arbitration) proceeding. If the court were to take a contrary approach and minutely examine the plea and judge its credibility or reasonableness, there would be a danger of its denying a forum to the applicant altogether, because rejection of the application would render the finding(about the finality of the discharge and its effect as satisfaction) final, thus, precluding the applicant of its right even to approach a civil court. There are decisions of this court (Associated Construction v Pawanhans Helicopters Ltd. (2008) 16 SCC 128 and Boghara Polyfab(supra) upheld the concept of economic duress. Having regard to the facts and circumstances, this court is of the opinion that the reasoning in the impugned judgment cannot be faulted.

In view of the facts of the present case and the law laid down by the Apex Court, I deem it proper to appoint Hon'ble Shri Justice H.P Singh(former Judge) r/o Bungalow No.139, Priyadarshini Colony, Dumna Road, Jabalpur(M.P) Pin-482001 as an arbitrator to resolve the dispute between the parties.

After obtaining consent in writing from Hon'ble Shri Justice H.P Singh, copy of this order be sent to him for initiating the proceedings between the parties.

Accordingly, arbitration case stands allowed and disposed off.

(Vijay Kumar Shukla)
JUDGE

Pramod