

**HIGH COURT OF JUDICATURE FOR RAJASTHAN  
BENCH AT JAIPUR**

S.B. Arbitration Application No. 3/2018

M/s. Potential Infra Projects Limited (Formerly Known As Potential Infra Projects Private Limited), Having Its Head Office At CJ-69 (Ground Floor), Sector-2, Salt Lake City, Kolkata And Local Office At At 6-F, 35, Mahima Trinity, Swej Farm, New Sanganer Road, Jaipur Through Its Director Mr. Sandeep Gupta S/o Shri D.D. Gupta, R/o A-703, Felicity Apartment, Swej Farm, New Sanganer Road, Sodala, Jaipur.

----Petitioner

Versus

Om Metals Infraprojects Limited, Having Its Registered Office At Om Tower, M.I. Road, Church Road, Jaipur Now At J-28, Subhash Marg, C-Scheme, Jaipur Through Its Director Shri Bahubali Kothari.

2. The Public Works Department, Government Of Rajasthan, Jacob Road, Civil Lines, Jaipur Through Its Chief Engineer.

----Respondents

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For Petitioner(s)	:	Mr. Alok Chaturvedi
For Respondent(s)	:	Mr. S.C. Mittal

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**HON'BLE MR. JUSTICE MOHAMMAD RAFIQ**

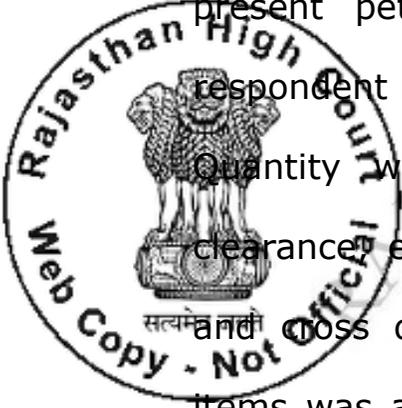
**Judgment**

**23/02/2018**

This application on behalf of petitioner M/s. Potential Infra Projects Limited has been filed under Section 11 of the Arbitration and Conciliation Act, 1996, praying for appointment of Arbitrator in terms of Clause 29.2 of the Contract Agreement dated 17.04.2012.

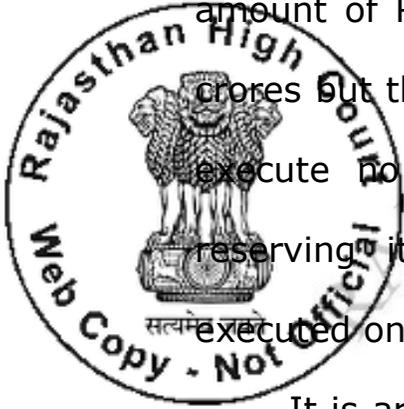
The respondent no.2 - Public Works Department, Government of Rajasthan, issued a work order in favour of respondent no.1 as Concessionaire in the name of "Bhilwara-Jaipur

Toll Road Private Limited" for the purpose of widening and strengthening the State Highway No.12, which starts from Jaipur to Bhilwara and the work order was issued for widening and strengthening the road at about 00/00 km to 212/00 km (Section-2). The respondent no.1 thereafter entered into a separate agreement called "Piece Rate Works" contract agreement with the present petitioner, which was executed on 17.04.2012. The respondent no.1 thereafter gave the details of work through Bill of Quantity which was initially issued for five items viz. site clearance, earth work, sub-base, base-course, flexible pavement and cross drainage structures and the price for aforesaid five items was approximately Rs.6,99,65,405/-. The respondent no.1 thereafter extended the work for performing different items/works and finally the respondent no.1 gave the work to the petitioner approximately of Rs.33 crores. The petitioner performed the work and completed the same on 30.03.2015. The petitioner completed the work of Rs.31.35 crores and to this effect, the work completion certificate was also issued by the respondent no.1, whereas the petitioner completed the work of approximately Rs.33 crores. The petitioner raised the bills approximately of Rs.33 crores. The petitioner requested the respondent no.1 to release the amount of Rs.60,00,000/-, which was lying with it of which the respondent no.1 was clearly liable to pay immediately on completion of the work but the respondent no.1 did not pay the said amount. Since the respondent no.1 procrastinated the matter and failed to pay the due amount, the petitioner wrote several letters for release of the final payment of Rs.1.30 crore in terms of the bills raised by the petitioner but the respondent no.1 hanged the matter for long time and finally the respondent no.1 agreed to



settle the matter with the petitioner and ready to pay Rs.92,91,578/- as against the original bills of Rs.1.30 crores.

Mr. Alok Chaturvedi, learned counsel for petitioner submitted that looking to the delaying approach and intention of the respondent no.1, the petitioner has no other alternative option and thus the petitioner entered into the agreement to receive the amount of Rs.92,91,578/- as against the original due of Rs.1.30 crores but the respondent no.1 again pressurized the petitioner to execute no claim certificate and the petitioner under protest reserving its right executed no claim certificate, which was executed on 26.09.2016.



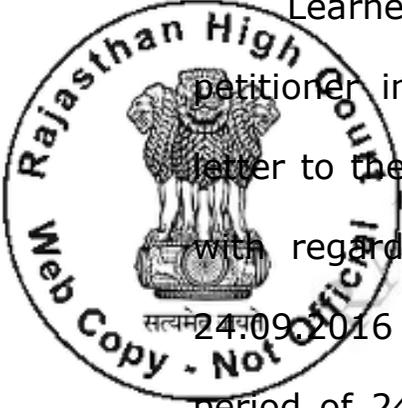
It is argued that despite execution of the no claim certificate and the minutes of meeting dated 24.09.2016, the respondent no.1 paid Rs.10 lacs, which was originally due on 15.10.2016, on 24.10.2016 with a delay of about nine days. The respondent no.1 paid another Rs.10 lacs after the delay of 21 days on 05.11.2016 and therefore, amount of near about Rs.19,000/- accrued as interest on the delayed payment. The respondent no.1 failed to make the remaining payment of Rs.22,91,578/- due to be paid on 31.12.2016. As against this, the respondent paid Rs.10 lacs on 16.01.2017 with delay of 16 days and Rs.5 lacs on 24.04.2017 with delay of 114 days and Rs.3,44,354/- was paid on 25.05.2017 with delay of 145 days and thus interest thus again accrued on the delayed payments.

Learned counsel submitted that the respondent no.1 sent a letter to the petitioner with regard to the amount of damages of Rs.3,55,645.88 mentioning the details of the damage amount of ten different periods. The respondent no.1 was agreed to settle the dispute of the petitioner in Rs.91,91,578/- as against the

original due amount of Rs.1.30 crores but on the other hand, the respondent no.1, in its letter dated 22.02.2017, mentioned the period of damage, which was prior to the minutes of the meeting dated 24.09.2016, which clearly shows the ulterior motive of the respondent no.1 in not applying the agreed amount in terms of the minutes of meeting dated 24.09.2016.

Learned counsel for the petitioner further submitted that the petitioner in response to their letter dated 22.02.2017, sent a letter to the respondent no.1 on 08.03.2017 raising the objection with regard to payment of damages related to the period of 24.09.2016 and that the amount can be debited only after the period of 24.09.2016 on account of any damage, but subject to furnishing the requisite details of the damages to the petitioner. The respondent no.1 did not furnish the requisite details of the damages to the petitioner. The respondent no.1 despite the demand with regard to details of the damages, did not furnish any detail with regard to the amount of damages till date.

It is next submitted that the petitioner thereafter requested the respondent no.2 to intervene in the matter. On 06.09.2017 the petitioner again submitted a reminder to the respondent no.2 to intervene in the matter and specifically requested the respondent no.2 for withholding the VGF amount till final payment of the dues of the petitioner. The respondent no.1 despite amicable settlement, failed to pay the agreed payment and therefore the petitioner sent a letter on 29.08.2017 to the respondent no.1 and claimed Rs.1,07,71,701/- including the interest. Since the respondent no.1 failed to pay the amount claimed in the letter dated 29.08.2017, the petitioner sent a notice through counsel on 29.11.2017 for appointment of arbitrator in terms of Clause 29.02



of the contract agreement dated 17.04.2012 and in response thereto the respondent no.1, vide letter dated 23.12.2017, appointed Mr. Sunil Kumar, Managing Director of the respondent no.1 as Sole Arbitrator to settle the dispute and fixed the date of hearing of arbitral proceedings on 23.01.2018.

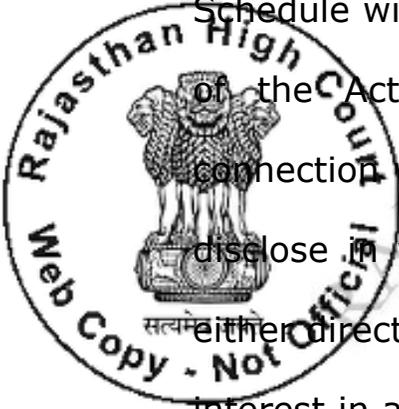
Learned counsel for the petitioner argued that the Sole Arbitrator appointed by the respondent is none other but the Managing Director of the respondent no.1 company and in view of the settled proposition of law, the Managing Director of the respondent no.1 cannot be appointed as the Sole Arbitrator in terms of Section 12(5) of the Act of 1996.

Mr. S.C. Mittal, learned counsel for the respondent submitted that the respondent duly replied to the notice sent by the counsel for the petitioner that as per Clause 29.2 Mr. Sunil Kumar, Managing Director of respondent no.1 Om Metals Infraprojects Limited, has already been appointed as Arbitrator to resolve the dispute and the petitioner cannot therefore insist upon appointment of a private Arbitrator and any other person as the Arbitrator as it having signed the agreement with open eyes, is bound by the terms of the agreement. In the facts of the case it cannot therefore be said that the respondent did not act within the period of thirty days in accordance with the agreed procedure required by Section 11(6) of the Act of 1996. The application filed by the petitioner should be therefore dismissed.

On hearing learned counsel for the parties and perusing the material on record, this Court is satisfied that there does exist a dispute between the parties, which is of live nature and that the petitioner in this behalf duly served upon the respondent a legal notice calling upon to settle the dispute through Arbitrator and the



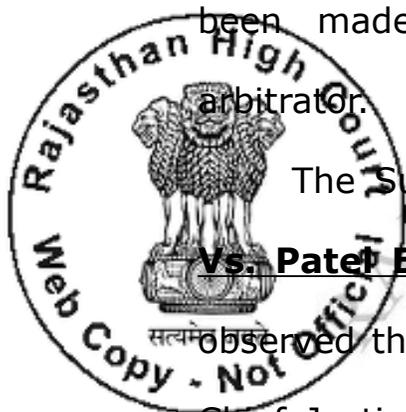
appointment of the Director of the respondent no.1 to act as the Sole Arbitrator cannot be sustained. Appointment of an independent and impartial arbitrator has been emphasised now even by the Parliament in the newly introduced Act of 2015, especially in Clauses 1 and 5 of the Fifth Schedule with reference to explanation to Section 12(1)(b) and Clauses 1 and 5 of Seventh Schedule with reference to Section 12(5) of the Act. Section 12(1) of the Act provides that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances, (a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality and (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months. Section 12(5) of the Act provides that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule, shall be ineligible to be appointed as an arbitrator. Clauses 1 of both Schedule Fifth and Seventh are similarly worded which provide that if the arbitrator is an employee, consultant, advisor or has other past or present business relationship with a party, it would give rise to justifiable doubts as to his independence or impartiality. Clauses 5 of both Schedule Fifth and Seventh also provide that for a similar consequence, if any arbitrator happens to be manager, director or



part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Sub-section (5) of Section 12 of the Act has been given overriding effect over any prior agreement to the contrary. Therefore, independence and impartiality of arbitrator as mandated by the Act of 2015 has now been made a paramount consideration for appointment of arbitrator.

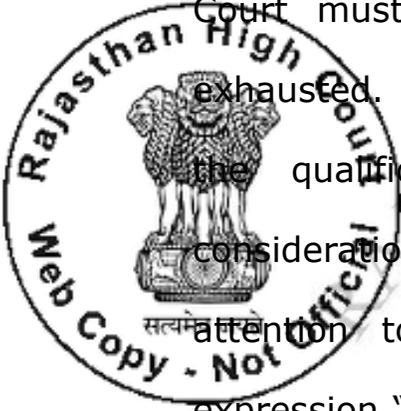
The Supreme Court in **Northern Railway Administration Vs. Patel Engineering Company Ltd. - (2008) 10 SCC 240,**

observed that Section 11(6) of the Act of 1996 provides that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to; (a) any qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator. It was held that appointment of arbitrator or arbitrators named in the arbitration agreement is not a must, but while making appointment the twin requirements of sub-section (8) of Section 11 have to be kept in view, considered and taken into account. Mandate of law contained in sub-section (6) of Section 11 of the Act has to be followed in all such cases, which provides that, "a party may request the Chief Justice or any person or institution designated by him to take the necessary measures." The expression "necessary" as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. This expression has to be read with the requirement in Section 11(8) of the Act that the Chief Justice or the person or an institution



designated by him in appointing an arbitrator shall have "due regard" to the two cumulative conditions contained in Sections 11(8)(a) and (b) relating to qualifications and other considerations as are likely to secure the appointment of an independent and impartial arbitrator. As held by the Supreme Court in Northern Railway Administration, Ministry of Railway, New Delhi(supra), the Court must first ensure that the remedies provided for are exhausted. But at the same time, due regard has to be given to the qualifications required by the agreement and other considerations. The expression "due regard" means that proper attention to several circumstances have been focused. The expression "necessary" as a general rule can be broadly stated to be those things which are reasonably required to be done or legally ancillary to the accomplishment of the intended act. Necessary measures are the steps which are reasonably required to be taken, one of which is to secure appointment of an independent and impartial arbitrator.

In view of above discussion, the application deserves to succeed and same is allowed. Hon'ble Mr. Justice Dalip Singh (Retd.), R/o House No.48, Rathore Nagar, Lane No.1, Vaishali Nagar, Jaipur (Cell No.8527877488 and Landline No.0141-2351322), is hereby appointed as an independent sole arbitrator to resolve the disputes between the parties. Payment of the costs of arbitration proceedings and the arbitration fees shall be made as per the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015 read with Manual of Procedure for Alternative Dispute Resolution, 2009 of this Court, as amended from time to time.



A copy of this order be sent to Hon'ble Mr. Justice Dalip Singh (Retd.), for needful.

(MOHAMMAD RAFIQ),J

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