

(2010) 03 CAL CK 0074
In the Calcutta High Court
Case No : A.P. No. 375 of 2008

M/s. Ferro Crafts

APPELLANT

Vs

Eastern Railway and Others

RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : 114 CWN 700

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Himadri Kumar Bandopadhyay, for the Appellant; S.N. Das, for the Respondent

Final Decision : Dismissed

Judgement

Sanjib Banerjee, J.—This is a petition u/s 11 of the Arbitration and Conciliation Act, 1996 by a contractor saying that the appointing authority under the general conditions governing railway contracts failed to appoint an arbitrator despite request. The petitioner says that disputes and differences had arisen by or about the year 2007 whereupon the petitioner had requested the General Manager for appointing an arbitrator. The petitioner says that it would be evident from the respondents' letter of October 23/30, 2007 (appearing as Annexure-R2 at page 20 of the respondent's affidavit) that the respondents had agreed to the petitioner lodging its claim. The letter of October 23/30, 2007 needs to be looked at carefully. In the first paragraph, the respondent referred to the petitioner's letter and informed the petitioner that it had demanded the appointment of arbitrator "without indicating specific itemized claims". It was in such context that the respondents requested the petitioner to send specific claims to the respondent. It is an admitted position that the final claim on the disputed matters was submitted by the petitioner on February 18, 2008.

2. Clause 64(1)(i) of the general conditions governing railway contracts provides as follows:

"In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the excepted matters referred to in clause 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration".

3. The last portion of the clause is relevant in the present context. The clause mandates that a contractor may demand that the disputes be referred to arbitration "after 120 days but within 180 days of his presenting his final claim on disputed matters..."

4. Since the final claim of this petitioner was lodged on February 18, 2008, the petitioner could have demanded that the disputes be referred to arbitration on or after June 18, 2008 (or thereabouts). Instead, the petitioner made the request for the disputes to be referred to arbitration on June 12, 2008 which fell within the period of 120 days from the date of presentation of the petitioner's final claim. In such circumstances, it is evident that the petitioner failed to comply with the pre-condition for making a demand for the reference of the disputes to arbitration.

5. Even though the petitioner made a premature demand for a reference it did not preclude the petitioner from making a further demand within the time envisaged by clause 64(1)(i) of the general conditions governing railway contracts, but the petitioner did not make any further demand. This petition was filed in Court on or about July 24, 2008 and no demand was made by the petitioner subsequent to June 12, 2008 for a reference. Since the clause permits a contractor a window of 60 days between the expiry of the 120th day from the date of presentation of the final claim and the 180th therefrom, and since the petitioner did not make a demand for a reference within such period, it may not be permissible for this petitioner to make a demand for reference at all. But no conclusive pronouncement on such aspect is necessary once it is noticed that the present petition u/s 11 of the Arbitration and Conciliation Act, 1996 was carried without the pre-condition to the arbitration agreement and the procedure for making a reference being complied with.

6. Section 11 of the 1996 Act respects the agreement and the procedure agreed to between the parties and a request to the Chief Justice or His Designate cannot be made unless the agreed procedure fails. Since the petitioner here did not adhere to the agreed procedure of making a demand for a reference after the expiry of 120 days from the date of presentation of the final claim, the petitioner has not met the mandatory precondition for invoking this jurisdiction.

7. A.P.No.375 of 2008 is dismissed as being not maintainable. This order should

not prejudice the petitioner's claims or the petitioner's right to otherwise enforce the petitioner's claim as may be available to the petitioner in law.

8. There will be no order as to costs. Urgent certified photocopies of this order, if applied for, be issued to the parties subject to compliance with all requisite formalities.