

(2011) 12 CAL CK 0005

Calcutta High Court

Case No: A.P. No. 29 of 2011

Ramji Yadav

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Dec. 8, 2011**Acts Referred:**

- Arbitration and Conciliation Act, 1996 - Section 11

Citation: (2012) 4 CHN 458**Hon'ble Judges:** Sanjib Banerjee, J**Bench:** Single Bench**Advocate:** Jishnu Chowdhury and Mayukh Maitra, for the Appellant;

Judgement

Sanjib Banerjee, J.

This is the usual scrap dealer's application hoping to make something out of nothing. But however prejudiced one may be, the rule of law that guides our society and is at the heart of the Constitution does not permit an impressionistic judgment to be rendered before the perceived recalcitrant is afforded a reasonable opportunity to present his case. In any event, the scope of the present request u/s 11 of the Arbitration and Conciliation Act is also restricted. This petitioner participated at an auction for purchase of some condemned wagons. The earnest money was deposited. The bid sheet, which is the contract between the parties, specified the date within which the balance sale value had to be paid and the time by which the delivery had to be taken. The bid sheet also referred to the general conditions governing the auction sale. These general conditions provide for the sale to be on "as is where is" basis and with no liability to seller railways in terms of any indemnity or warranty.

2. The petitioner did not pay the balance sale value within the time stipulated. There was an understandable time-lag between the date fixed for balance payment to be made and the time provided for delivery to be taken. Following the expiry of the

time for tendering the balance payment, a show cause notice was issued by the railways to the petitioner. Such a show cause notice is generally a reminder to the auction purchaser since it is within the concerned official's authority to extend the period of payment by about 50 days or so. The petitioner here did not reply to the show cause notice but, subsequently, demanded some special favours to be extended to him by the railways. The petitioner did not tender the balance payment or attempt to take delivery of the goods within the stipulated dates or even within any reasonable period thereof. By September, 2005, the contract was cancelled.

3. In January, 2008, came the petitioner's first gambit in trying to recover the earnest deposit. A notice was issued to the relevant General Manager with a grievance that the wagons could never have been removed from the Andal Scrap Yard since there was no access thereat to facilitate the removal of the wagons. The letter dated January 15, 2008 did not elicit any response from the railways. The letter contained a demand for the appointment of an arbitrator by the General Manager within 30 days from the date of receipt thereof.

4. The petitioner does not appear to have pursued the matter immediately thereafter and it was only on May 18, 2010 that Advocate representing the petitioner reminded the General Manager of the previous notice of January 15, 2008 and requested for the appointment of an Arbitrator. It was only thereafter that the railways reacted. By a letter dated August 17, 2010, the relevant official wrote back to Advocate representing the petitioner that the "appointment of Arbitrator is not tenable in terms of the Agreemental provision." As is the wont of government officials, no further line was expended in explaining why the petitioner's demand was not within the "Agreemental provision."

5. The present request was carried to the Chief Justice of this Court or his designate in January, 2011.

6. The petitioner has relied on the general conditions governing auction sales and says that a reference to such general conditions will be evident from the opening lines of the bid sheet that forms the contract between the parties. The petitioner says that there is a dispute between the parties as to whether the railways were entitled to forfeit the earnest deposit without considering the petitioner's plea for constructing roads and bridges for the abandoned of wagons to be carried out as scrap by the petitioner. The point that the petitioner makes is that the quality of the dispute, or lack of it, will not be decisive in facilitating a reference if a party is entitled to one.

7. The respondent says that the general conditions referred to in the bid sheet contain two sets of documents: the first being the special conditions for auction sale; and, the other being the general conditions that have been relied upon by the petitioner. Copies of both sets of conditions have been appended to the railways' affidavit. Several of the clauses in the two sets of conditions overlap.

8. The respondent seeks to demonstrate that the respondent acted in accordance with the agreement governing the parties in forfeiting the earnest deposit and in proceeding to seek fresh bids for the same wagons that the petitioner had sought to purchase. The railways suggest that clause 23 of the general conditions, which contains the arbitration agreement governing the parties, carves out an exception for certain matters and the decision to forfeit the petitioner's earnest deposit would be one of the excepted matters. In furtherance of the argument, the opening lines of clause 23 have been placed. It is necessary to extract the entirety of the relevant portion of the clause since the immediate dispute hinges on the words indicated in parentheses in the opening lines thereof:

23. In the event of any questions, dispute or difference arising under these conditions or in connection with this contract (except as to any matter decision of which is specially provided for by this conditions) the same shall be referred to the Arbitrator.....

9. The railways suggest that since clause 4.b of the general conditions lay down that if the balance sale value is not tendered by the auction purchaser by the stipulated date or any extended period as may be granted by the relevant official, it would stand forfeited, there was no infirmity on the railways' part in forfeiting the earnest deposit of this recalcitrant auction purchaser. The further point made by the railways on the basis of clause 4.b of the general conditions is that implicit in the clause is the decision of the railways to forfeit the earnest deposit; and such decision would be one of the decisions governed by the words in parentheses in clause 23 of the general conditions.

10. Such argument is fallacious and unacceptable. The words in parentheses in clause 23 require a dispute to arise and for a decision to be rendered on such dispute for the decision to be kept beyond the pale of an arbitral reference envisaged under the agreement. The word "decision" in the words in parentheses in clause 23 would not cover a course of conduct charted by the railways even if such course of conduct is mandated by the other clauses of the general conditions. The word "decision" in the words in parentheses in the clause 23 of the general conditions would imply rival stands being taken by the two parties and a decision thereon being rendered by an official specified in such regard in the conditions itself.

11. In the present case, no railway official rendered any decision on any dispute raised by the petitioner or on any representation carried by the petitioner. The railways' decision to forfeit the money was on the railways' understanding of the railways' rights in terms of the agreement. Such course of action cannot be termed as a decision within the meaning of that word in the words in parentheses in clause 23 of the relevant general conditions.

12. It, therefore, is evident that there was an arbitration agreement governing the parties; that the petitioner, in aid of a seemingly "unmeritorious claim covered thereby, raised dispute and sought a reference; and, the appointing authority declined to make the appointment on such official's flawed reading of the arbitration agreement between the parties.

13. The letter of cancellation was issued in September, 2005. By the time the request for the reference was made in January, 2008, it was still within the period when a suit could have been launched by this petitioner in respect of the same claim if there was no arbitration agreement between the parties. Again, by the time the reminder of May 18, 2010 was issued by Advocate representing the petitioner, a period of three years had not elapsed from the date of the commencement of the reference which was triggered off by the petitioner's issuance of the demand for reference in January, 2008. The refusal to appoint an arbitrator came in August, 2010 and the petition filed within the period of limitation since Article 137 of the schedule to the Limitation Act, 1963 will govern such a matter.

14. However frivolous the petitioner's claim appears to be in the light of the indisputable conduct, the petitioner is entitled to a reference in accordance with the demand contained in the request of January 15, 2008 as reiterated by the request of May 18, 2010 and declined by the railways' letter of August 17, 2010.

15. The only solace for the respondents may be in the railways' right to urge at the relevant time that the agreement contemplates a railway officiator be appointed as arbitrator.

16. A.P. No. 29 of 2011 is directed to be placed before the Hon'ble the Chief Justice for constituting an arbitral tribunal in accordance with the arbitration agreement between the parties to adjudicate upon the disputes covered thereby.

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