

(2009) 04 CAL CK 0045

In the Calcutta High Court

Case No : Writ Petition No. 29191 (W) of 2008 and C.A.N. No"s. 451, 1725 and 2692 of 2009

Bhagaban Dey

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-04-2009

Acts Referred:

Railways Act, 1989 — Section 30, 33, 36, 37, 43

Citation : AIR 2010 Cal 13

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Ashok De, M.L. Poddar and Salil Kumar Sarkar, for the Appellant; Soumendra Nath Das, for the Respondent

Judgement

Jayanta Kumar Biswas, J.—The petitioner, carrying on the activity of supplying building materials under the name Dey Clearing Agency, booked 21 wagons with the Eastern Railway for carriage of stones from Pakur station to Dankuni Jn. station. The goods were loaded on October 29, 2008. Freight amounting to Rs. 4,27,222 was calculated, as will appear from the railway receipt, Annexure P2 at p. 18, on October 30, 2008 scribbling something that even Counsel for the parties are unable to decipher. At the destination station the goods were weighed by the railway administration on November 1, 2008 at 1.39 a.m. behind the petitioner's back. At 8 p.m. on November 1, 2008 the petitioner received a demand notice dated November 1, 2008, Annexure P3 at p. 19. He was asked to pay Rs. 5,57,758 punitive charges for overloading goods in the wagons. By the time the demand notice was received by him, he transported a substantial part of the goods from the place where they were unloaded from the wagons. Transportation of the remaining part was not allowed by the railway administration, since the demanded punitive charges were not paid by him. Feeling aggrieved, he took out the writ petition dated November 18, 2008.

2. By an order dated December 23, 2008 the writ petition was admitted and the

following interim relief was granted: "Till 15th February, 2009, no step shall be taken by the railway authorities which would result in disentitlement of the petitioner in carrying their goods by the railways on the charge of non-clearance of the impugned demand. This interim order shall not prevent the railway authorities from taking any other measure for recovery of such sum as may be permissible under the law. Such measures, if initiated shall be subject to the final decision in this writ petition." The interim order is still in force. At the time of admission the respondents did not raise the plea that the petitioner's remedy, if any, was before the Railway Rates Tribunal.

3. During pendency of the writ petition the railway administration issued a notice dated January 6, 2009 asking the petitioner to pay, in addition to the punitive charges, Rs. 9,21,600 wharfage charges. Seeking stay of operation of the notice the petitioner filed CAN No. 451 of 2009 dated January 19, 2009. Then the railway administration issued another notice dated February 7, 2009 asking the petitioner to pay, in addition to the punitive charges, Rs. 14,96,800 wharfage charges upto February 7, 2009. Seeking stay of operation of this notice the petitioner filed CAN No. 1725 of 2009 dated February 24, 2009. Then the respondents took out CAN No. 2692 of 2009 dated March 24, 2009 for an order dismissing the writ petition for lack of jurisdiction on the ground that over the subject-matter only the Tribunal has jurisdiction.

4. According to Mr. Das, Counsel for the respondents, in view of the provisions of Sections 33 and 36 of the Railways Act, 1989, against the demands the petitioner's remedy, if any, is only before the Tribunal. He has relied on Jagjit Cotton Textile Mills Vs. Chief Commercial Superintendent N.R. and Others, and Ramakrishna Steel Industries Ltd. Karamadai v. Union of India AIR 2001 Mah 227. According to Mr. De, Counsel for the petitioner, the tribunal has no jurisdiction to adjudicate and determine the issues involved in the writ petition; and, even if it has jurisdiction over the subject-matter, there is no reason to say that the writ Court does not have the jurisdiction to entertain the writ petition or to say that the petitioner should be relegated to the tribunal, and this he says citing two reasons; (i) the writ petition was entertained, and affidavits have been exchanged; (ii) there is no disputed question of fact that will require recording of evidence by the tribunal.

5. There is no dispute that in terms of the provisions of Section 33 of the Railways Act, 1989 the tribunal has been constituted, and that it was functioning at the date of institution of the writ petition and it is functioning at present. Section 36 of the Railways Act, 1989 provides as follows:

36. Complaints against a railway administration.-Any complaint that a railway administration:

(a) is contravening the provisions of Section 70; or

(b) is charging for the carriage of any commodity between two stations at a rate which is unreasonable; or

(c) is levying any other charge which is unreasonable,

may be made to the Tribunal, and the Tribunal shall hear and decide any such complaint in accordance with the provisions of this Chapter.

6. Mr. De has argued that questioning the punitive and the wharfage charges the petitioner could not file a complaint u/s 36 for the simple reason that the tribunal constituted u/s 33 is empowered to adjudicate and determine issues only with respect to disputes over rates. He says that since the petitioner does not dispute the rates at which the freight was to be paid by him for the carriage of the goods or the rates at which the punitive and the wharfage charges could be levied, if at all, by the railway administration there is no reason to say that the petitioner's remedy, if any, was before the tribunal. According to Mr. De, any subject-matter covered by Clause (c) of Section 36 has to be concerning a dispute only over rate, and hence it is not correct to say that with the issues involved in the writ petition the petitioner could file a complaint before the tribunal.

7. I am unable to agree with him. The provisions of Section 36 are clear. Clause (c) of the section provides that an aggrieved person can lodge a complaint with the tribunal constituted u/s 33 alleging that a railway administration is levying a charge which is unreasonable. As to any dispute over rates, the provisions of Clause (b) will apply. Hence, it cannot be said that questioning the reasonableness of the punitive charges the petitioner could not lodge a complaint with the tribunal that was functioning at the date the demand was made. Though the decision in Ramakrishna Steel, given in an appeal from an order of the Claims Tribunal, is of no assistance, the observation of the Supreme Court in Jagjit Cotton (para 42) supports the view that the appropriate forum to challenge the reasonableness of punitive charges levied u/s 73 is the tribunal.

8. By referring me to the provisions of Section 37 Mr. De has argued that from Clause (b) of the section it is clear that the tribunal has no jurisdiction to entertain a complaint concerning the wharfage charges demanded by the railway administration, and hence, in any case, because of the subsequent demands made by the railway administration asking the petitioner to pay wharfage charges, even if the tribunal had jurisdiction to entertain a complaint regarding the reasonableness of the punitive charges demanded by the railway administration, today there is no scope for the petitioner to seek adjudication; and determination of the issues involved in the writ petition by lodging a complaint with the tribunal u/s 36.

9. Once again I am unable to agree with Mr. De Section 37 of the Railways Act, 1989 provides as follows:

37. Matters not within the jurisdiction of the Tribunal.- Nothing in this Chapter shall confer jurisdiction on the Tribunal in respect of:

(a) classification or re-classification of any commodity;

(b) fixation of wharfage and demurrage charges (including conditions attached to

such charges);

(c) fixation of fares levied for the carriage of passengers and freight levied for the carriage of luggage, parcels, railway material and military traffic; and

(d) fixation of lump sum rates.

10. Nothing in Section 37 says that the tribunal will not have jurisdiction to entertain a complaint lodged questioning the reasonableness of wharfage charges demanded by a railway administration according to the provisions of Section 82. What Clause (b) of Section 37 provides is that the tribunal shall have no jurisdiction over any issue concerning fixation of wharfage charges. The rates at which wharfage charges will be payable are to be fixed by the Central Government according to the provisions of Section 30. This means that the validity or reasonableness of the rates fixed by the Central Government in exercise of power conferred by Section 30 cannot be questioned before the tribunal.

11. I am, therefore, of the view that questioning the reasonableness of the punitive and the wharfage charges demanded by the railway administration under Sections 73 and 82 of the Railways Act, 1989 respectively, the petitioner could lodge complaints with the tribunal u/s 36; and that the reasonableness of both the things could be challenged by him before the tribunal in view of the provisions of Clause (c) of Section 36 of the Railways Act, 1989.

12. The question, therefore, is whether the writ petition should be dismissed for lack of jurisdiction. It is not a case where the jurisdiction of the writ Court over the subject-matter, qua the Court of first instance, has been taken away by any constitutional or statutory provision. That is to say, it is not the case here that over the subject-matter the tribunal has exclusive jurisdiction. Section 43 of the Railways Act, 1989, however, provides as follows:

43. Bar of jurisdiction of Courts.- No suit shall be instituted or proceeding taken in respect of any matter which the Tribunal is empowered to deal with or decide, under this Chapter.

13. The chapter begins with Section 33 and ends with Section 48, The bar of jurisdiction of Courts mentioned in Section 43 does not apply to the writ Court. This means that with respect to the matters in the present case the writ Court has jurisdiction to entertain the writ petition. Hence, I am unable to accept the case of the respondents that the writ petition should be dismissed for lack of jurisdiction.

14. The next question, therefore, is whether today the petitioner should be relegated to the tribunal. According to Mr. De, since the writ petition involving disputed questions of fact was admitted and the parties have exchanged their affidavits, it will not be appropriate for the writ Court now to relegate the petitioner to the tribunal. I do not think the argument is based on a sound proposition of law, because the real nature of the disputed questions of fact

involved in a writ petition can be ascertained only after the parties exchange their affidavits.

15. In every writ petition disputed questions of fact are bound to be there. At the stage of admission the writ Court is not to relegate the petitioner to a fact finding forum, tribunal or Court on the ground that disputed questions of fact are involved in the case. The question whether the disputed questions of fact can be adjudicated and determined by the writ Court, in an appropriate case even by holding a trial on evidence, is to be examined only after the affidavits are exchanged by the parties.

16. If there are such disputed questions of fact that cannot be decided without recording oral evidence, and the possibility of arriving at conclusions by applying the principle of preponderance of probability is evident; and the questions cannot be decided on the basis of the available pleadings, documents, records and materials, the writ Court, in my opinion, must relegate the petitioner to the forum, tribunal or Court competent to adjudicate and determine the questions after recording evidence, and this is to be done for preventing miscarriage of justice. Hence, it cannot be said that simply because the writ petition was admitted and the parties have exchanged affidavits, today the petitioner cannot, or rather should not, be relegated to the tribunal.

17. According to Mr. De, here it is not necessary to go into any disputed questions of fact at all, because (i) the punitive charges could not be demanded after the delivery of the goods, and (ii) in any case, since the goods were weighed on November 1, 2008 behind the petitioner's back, on the basis of such weighment the railway administration could not levy the impugned punitive and wharfage charges. He has relied on Raghu Forwarding Agency and Another Vs. Union of India (UOI) and Others, . According to Mr. Das, the goods could be weighed by the railway administration behind the petitioner's back who, however, was free to seek weighment according to the provisions of Section 79 of the Railways Act, 1989.

18. I am unable to accept the contention that the punitive charges levied u/s 73 could not be demanded by the carrying administration after the delivery of the goods. I am also unable to accept the contention that the goods could not be weighed by the railway administration behind the petitioner's back.

Section 73 of the Railways Act, 1989 provides as follows:

73. Punitive charge for overloading a wagon - Where a person loads goods in a wagon beyond its permissible varying capacity as exhibited under Sub-section (2) or Sub-section (3), or notified under Sub-section (4), of Section 72, a railway administration may, in addition to the freight and other charges, recover from the consignor, the consignee or the endorsee, as the case may be, charges by way of penalty at such rates, as may be prescribed, before the delivery of the goods:

Provided that if shall be lawful for the railway administration to unload the goods loaded beyond the capacity of the wagon, if detected at the forwarding station or at any place before the destination station and to recover the cost of such unloading and any charge for the detention of any wagon on this account.

19. The provisions of Section 73 empower and entitle a railway administration to levy punitive charges for overloading a wagon and to recover such charges before the delivery of the goods. This does not mean that the demand cannot be made and the amount cannot be recovered after the delivery of the goods. In my opinion, the provisions of Section 83 make it clear that after the delivery of the goods in question also punitive charges according to Section 73 can be demanded and recovered by a railway administration.

20. Section 83 of the Railways Act, 1989 provides as follows:

83. Lien for freight or any other sum due.- (1) If the consignor, the consignee or the endorsee fails to pay on demand any freight or other charges due from him in respect of any consignment, the railway administration may detain such consignment or part thereof, if such consignment is delivered, it may detain any other consignment of such person which is in, or thereafter comes into its possession.

(2) The railway administration may, if the consignment detained under Sub-section (1) is:

(a) perishable in nature, sell at once; or

(b) not perishable in nature, sell, by public auction,

such consignment or part thereof, as may be necessary to realise a sum equal to the freight or other charges:

Provided that where a railway administration for reasons to be recorded in writing is of the opinion that it is not expedient to hold the auction, such consignment or part thereof may be sold in such manner as may be prescribed.

(3) The railway administration shall give a notice of not less than seven days of the public auction under Clause (b) of Sub-section (2) in one or more local newspapers or where there are no such newspapers in such manner as may be prescribed.

(4) The railway administration may, out of sale proceeds received under Sub-section (2), retain a sum equal to the freight and other charges including expenses for the sale due to it and the surplus of such proceeds and the part of the consignment, if any, shall be rendered to the person entitled thereto.

21. According to the provisions of Section 83 any freight or other charges due from a person for any consignment can be recovered by a railway administration by exercising lien over any consignment of such person that comes into the railway administration's possession subsequently. If the provisions of Section 73

provided that punitive charges according to them cannot be demanded and recovered by a railway administration after the delivery of the goods, then there would have been no need for making the provisions of Section 83.

22. Once the provisions of Section 83 are considered, it becomes clear that punitive charges u/s 73 can be demanded and recovered by a railway administration even after the delivery of the goods in question. In view of the provisions of Section 73, the railway administration is, however, not under any obligation to deliver the goods unless the punitive charges demanded by it are paid by the person concerned. Hence there is no reason to say that in view of the provisions of Section 73 and the fact that a substantial part of the goods in question was transported by the petitioner from the place where they were unloaded from the wagons, the railway administration was not entitled to demand the punitive charges.

23. It is not correct to say that a railway administration is not entitled to weigh or re-weigh goods meant for carriage between two stations behind the back of the person likely to be affected by the action.

24. Section 78 of the Railways Act, 1989, empowering a railway administration to re-weigh the goods, is as follows:

78. Power to measure, weigh, etc.- Notwithstanding anything contained in the railway receipt, the railway administration may, before the delivery of the consignment, have the right to:

- (i) re-measure, re-weigh or re-classify any consignment;
- (ii) re-calculate the freight and other charges; and
- (iii) correct any other error or collect any amount that may have been omitted to be charged.

25. Nothing in Section 78 says that a railway administration shall have the right to reweigh the goods only upon prior notice to the person likely to be affected by the reweighment. In the absence of a statutory obligation to give a prior notice, I do not think it will be lawful to read into the provisions the requirement of giving a prior notice to the person concerned.

26. The goods can be reweighed at the destination station, and, if necessary, even at any place before the destination station. The reweighment of the goods at the destination station, if necessary according to the railway administration, need not be postponed until service of a notice on the person likely to be affected by the reweighment. The postponement is bound to cause financial loss and administrative inconvenience to the railway administration whose wagons remain loaded with the goods until it can find the person concerned to serve the notice. These all shall equally apply to a case where the goods are weighed by a railway administration after issuing the railway receipt at the forwarding station.

27. Section 79 of the Railways Act, 1989, conferring a right on the consignee or

endorsee to seek weighment of the goods, is as follows:

79. Weighment of consignment on request of the consignee or endorsee.- A railway administration may, on the request made by the consignee or endorsee, allow weighment of the consignment subject to such conditions and on payment of such charges as may be prescribed and the demurrage charges if any:

Provided that except in cases where a railway servant authorized in this behalf considers it necessary so to do, no weighment shall be allowed of goods booked at owner's risk rate or goods which are perishable and are likely to lose weight in transit:

Provided further that no request for weighment of consignment in wagon-load or train-load shall be allowed if the weighment is not feasible due to congestion in the yard or such other circumstances as may be prescribed.

28. If a railway administration weighs or reweighs the goods in question behind the back of the person concerned, the action cannot prejudice the person, because, in view of the provisions of Section 79, he has a right to seek permission for weighment of the goods, and by exercising this right he can call upon the railway administration to reweigh the goods in his presence. Thus the unloaded goods can be reweighed and if the weight is less than the one claimed by the person concerned, then, while he can claim compensation for loss, the railway administration, however, cannot demand the punitive charges u/s 73. The question of demanding punitive charges arises only when the weight of the goods is found to be more than the one claimed by the person concerned.

29. Hence I am unable to accept the argument that since here the goods were weighed by the railway administration at the destination station behind the petitioner's back, the railway administration was not entitled to demand the punitive charges according to Section 73 alleging overloading of the wagons. I am unable to see how the decision in Raghu Forwarding, a decision given considering Jagjit Cotton, can be applied for the petitioner's benefit. It rather supports (para 6) the view I have taken. In Jagjit Cotton, none of the questions arising here was among the nine points (para 9) considered and decided by their Lordships of the Supreme Court.

30. Now it is to be seen what is the nature of the disputed questions of fact involved in the case. According to the petitioner, the goods were weighed at the forwarding station, and freight determined according to the weight was paid by him. According to the railway administration, since an appropriately functioning weigh-bridge was not available at the forwarding station, the goods could not be weighed at the forwarding station, and hence following the notified procedure they were weighed at the destination station, though behind the petitioner's back. The further case of the petitioner is that the notice demanding the punitive charges according to Section 73 was served on him only at 8 p.m. on November 1, 2008. According to the railway administration, the allegation is incorrect, because the notice was tendered to the petitioner's representative at around 8

a.m. on November 1, 2008 and before the delivery of the goods, but the person refused to accept the notice saying that he would inform the petitioner about the notice.

31. It is, therefore, to be ascertain whether the goods were duly weighed at the forwarding station, whether the case of the railway administration that, since the weigh-bridge at the forwarding station was not functioning, the goods could not be weighed is correct; whether the goods were actually weighed at the destination station on November 1, 2008 at 1.39 a.m.; whether the railway administration tendered the Section 73 demand notice to the petitioner's representative at around 8 a.m. on November 1, 2008; whether the petitioner's representative refused to accept the notice; and whether the petitioner had reasonable opportunity to exercise his right to weightment of the goods u/s 79.

32. In my opinion, none of these questions can be decided without recording oral evidence adduced by the parties in proof of them, and unless these questions are decided, it is not possible to say whether the Section 73 demand and the Section 82 consequential demand made by the railway administration are reasonable. I am, therefore, of the view that the disputed questions of fact involved in the case are such that they cannot be decided by me sitting in the writ court. It is not a case where the questions can be conveniently decided by holding a trial on evidence. I think the appropriate forum for adjudicating and determining the questions is the tribunal.

33. For these reasons, I dispose of CAN Nos. 451, 1725 and 2692 of 2009 and the writ petition ordering as follows. The petitioner will be at liberty to lodge complaint with the tribunal questioning the reasonableness of the impugned demands, and if complaint is lodged, then the tribunal shall give its decision in accordance with law. There shall be no order for costs.

34. Urgent certified xerox of this order, if applied for, shall be supplied to the parties within three days from the date of receipt of the file by the section concerned.