

(1987) 05 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : Writ Petition No's. 558 to 560 of 1985

Darshan Kumar and etc.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-05-1987

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226
Constitution of Jammu and Kashmir, 1956 — Section 103
Railways Act, 1890 — Section 78B

Citation : AIR 1988 J&K 28

Hon'ble Judges : M.L. Bhat, J;M.A. Shah, J

Bench : Division Bench

Advocate : H.L. Bhagotra and Charanjit Kumar, for the Appellant; Avtar Singh, for the Respondent

Final Decision : Dismissed

Judgement

Shah, J.—All the above noted three writ petitions based on identical questions were heard together and are being disposed of by the single order.

2. It is stated that the petitioners purchase the coal and indents wagons from the railway administration, which are supplied to the petitioners for

loading of coal as per the terms of letter of sponsorship. After the wagons are allotted, the coal is loaded in the wagons by the labour of the

petitioners. It is alleged that the loading is done under the guidance and supervision of the railway staff of the forwarding station and the coal is

loaded in wagons in accordance with the guidelines given by the railway authorities. Each wagon has marked carrying capacity and the minimum

weight for the charge of freight of coal is specified. It is also not disputed that the over-loading of the wagons is not permitted by the railway

administration, because the over-loaded wagon is a potential danger to the safety of a running train. The Ministry of Railways have, therefore, issued strict instructions to railway employees to ensure that wagons are not allowed to be over-loaded. It is further stated that the wagons after having been loaded with coal under the supervision of the railway staff must be weighed on the weigh-bridges, in case the weigh-bridge is not provided at the forwarding station, the same may be weighed at the first weigh-bridge station and in case the wagon is found to be over-loaded, the excessive load should be off-loaded and the wagons despatched to the destination station. The petitioners, who are dealing in coal, load the wagons in accordance with the above instructions, when the wagons are found overloaded, the railway administration by way of incorporating an amendment in the Goods Tarrif Part I, Vol. 1 incorporated Rule 161-A, which was made effective from Aprl. 15, 1984 (sic) In this rule, a penalty for loading commodities in loose condition beyond the permissible carrying capacity of the wagon stood revised. This provision caused the trouble to the petitioners giving rise to the present petitions.

3. The petitioners have filed these petitions attacking Rule 161-A of the Goods Tarrif as violative of the petitioners' fundamental rights as guaranteed under Article 19(1)(g) of the Constitution of India A plea is also raised that the the increased rate of penal freight as provided in Rule 161-A of the Railway Goods Tarrif is absolutely unjust, inequitable, arbitrary, excessive, unbearable for a commodity like coal and as such is illegal. On the abovesaid premises, the petitioners have, therefore, prayed for the following reliefs in the writ petition : --

- (i) That a writ of mandamus or any other appropriation writ, order or directions be issued to the respondents to diligently supervise the loading, provide weigh-bridges at the railway stations from where coal is booked and to weigh the coal in the wagons, which are booked by the petitioners for despatch and ensure that the wagons are not over-loaded beyond the permissible carrying capacity of the wagons and in case the wagoas are found over-loaded, they should be unloaded immediately.
- (ii) That a writ of prohibition or writ or any other nature, order or direction be issued prohibiting the respondents from imposing/levying/demanding any penalty/penal freight from the petitioners for the wagons, which have

already arrived or which are likely to arrive in future.

(iii) Any other relief, which this Court may deem fit and proper in the facts and circumstances of the cases to meet the ends of justice.

4. Objections have been filed on behalf of the respondents : several preliminary points are also raised indicating therein that the petitions are not

maintainable, as the dispute flows from a contract of consignment of coal handed over to Railway Administrative as a carrier for transport from one

station to another under terms and rules incorporated in the contract of consignment and also in Railway receipts. It is further pointed out that once

the rules of goods Tarrif are accepted as a part and parcel of the contract of carriage, they loose their statutory character and become part and

parcel of the contract, the vires of which cannot be challenged in the writ petitions. The maintainability of the petitions is also attacked on the point

that essentially if any petitioner feels aggrieved against the overcharge or the imposition of penalty, the determination of which is dependent on

variety of factors, can well be gone into in a regular Civil Suit, for which specific provision is made u/s 78-B of the Indian Railways Act. It is stated

that the loading of coal in Railway wagons is done by the petitioners or their agents in their own siding and the wagons are placed at their disposal,

hence they cannot blame the Railway Administration for over-loading as they themselves are responsible for over-loading. The Railway

Administration accepts the weight subject to reweighment at the weigh bridge enroute or at the destination, which weight is considered as the

correct weight. The weight in the Railway Receipt is entered for the purposes of the charging freight at the forwarding station and no admission is

conveyed by the Railway Receipt that the weight as shown therein has been received : a reference is made for this purpose to Rule 115 of Goods

Tarrif No. 36.

5. Regarding provisions of Rule 161-A, the respondents have put forward a plea that it is one of the conditions of contract and one of the

provisions as a safety measure to avoid over-loading. In fact it is submitted that the over-loading of coal wagons is not a phenomenon to be viewed

from financial angle alone, it is a phenomenon which has a serious safety aspect. Regarding to para 27 of the writ petitions, it has been pointed out

that no loading of coal is done on any Railway Station in the J. & K. State or

anywhere on the Northern Railway within the jurisdiction of this

Court and the petitioners themselves have admitted in the said paragraph of the writ petitions that the office of respondents is situated at New

Delhi, as such this Court has no jurisdiction to entertain the present writ petitions.

6. Heard respective counsel for the parties at length. Learned counsel for the petitioners laid great stress on their right to carry on the trade in coal

with special reference to the obligations cast on the Railways to provide them the transport facility for the transportation of coal from the booking

station to the destination. It is submitted that the respondents by putting restrictions and providing for heavy penalties under Rule 161-A of the

Rules have practically deprived the petitioners of availing the facility of loading coal wagons. Under the various provisions of the Railway Act and

the rules, it is obligatory on the part of the railways to abide by their own rules and provide weigh bridges at the starting stations and in case the

facility is not available at the starting station, it becomes the duty of the Railway staff under whose supervision the wares are loaded that there

should not be any over-loading, if the facilities prescribed under the rules are not provided the penalty under Rule 161-A cannot be imposed on the

petitioners for no fault of theirs. It is also submitted that when the wagons are weighed enroute or at the destination the reasons for the overweight

may not be overloading, but may be due to the overweighing of the coal by rains and due to the weight of the coal being dependant upon the

quality. By referring to Annexure-I, a notification issued by the Railway Administration on Mar. 8, 1983, it is stated that the order makes the goods

clerk incharge responsible for overloading, in case the over-loading is found in violation of the permissible limits for the wagons specified in the

order. The action of the respondents is, therefore, attacked with the allegations that the restrictions imposed violate the fundamental right of the

petitioners guaranteed to them under Article 19(1)(g) of the Constitution of India. Reliance is placed by learned counsel for the petitioners on

Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , M.S. Desai and Co. Vs. Hindustan

Petroleum Corporation Limited, and Civil Miscellaneous Mancat Ram Vs. Delhi Development Authority and Others, to support the contention that

the petitions under above said circumstances are maintainable before the High

Court.

7. Reiterating the objections filed, the learned counsel for the respondents, at the outset submitted that the petitions are not maintainable in this High

Court as no part of the cause of action arose in favour of the petitioners within the territorial jurisdiction of this court and that the petitions being

based on disputed questions of fact are not maintainable. It is further submitted that the petitioners have got efficacious appropriate and alternative

remedy u/s 78-B of the Railways Act of a regular civil suit where all the questions regarding over-weight, quality of coal and the circumstances

under which the penalty can be imposed or not under the provisions of rule 161 can be thoroughly gone into, the petitioners cannot be permitted to

maintain the present petitions. It is also submitted that the wagons are provided to the petitioners for loading of coal on priority 'C' under the

contract, which incorporates in it all provisions of the Railway Goods Tarrif and the Rules made thereunder with a specific caution to the provisions

of Rule 161A of which the vires is challenged. The choice is purely of the petitioners either to enter in the said transaction with their eyes wide open

or not to choose the railway wagons for the transportation of coal, their business cannot be said to be adversely affected if they bring the coal by

other transport methods than the railways. Thus the restrictions imposed under the contract and the rules made thereunder cannot be said to be in

violation of the fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India as the restrictions are not a complete bar for the

movement of coal and are purely based on the volition of the party concerned. In support of the contentions, reliance is placed by the learned

counsel for the respondents on Darshan Kumar Mahajan and etc. Vs. Station Master, Rly. Station and Others, , Viklad Coal Merchant, Patiala

and Others Vs. Union of India (UOI) and Others, and Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., .

8. To attack the vires of Rule 161-A, nothing substantial could be pointed out in support of the arguments that the provisions providing penalty for

over-loading of coal wagons in any way violates any provisions of the Constitution. Moreover, once the petitioners enter into a contract to use the

Railway Wagons for loading of coal incorporating therein all the rules of Railway Tarrif as one of the conditions, it becomes obligatory on the part

of the petitioners to strictly follow the conditions of the contract, failure of which is not justiciable in the writ petitions, as the same become pure and

simple part of the contract for which the proper forum is not the writ petitions under Article 226 of the Constitution of India, but lies elsewhere

under the provisions of the Railway Act. The High Court cannot in a writ petition enter into the controversy based on disputed questions of fact

regarding over-loading, as the imposition of penalty is closely connected with overloading, the violation of which is made penal for which who is

responsible, either the railway staff or the petitioners can hardly be said to be a dispute to be determined in writ petition. The ratio of Central Inland

Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , where their Lordships were dealing with a case of

power of Central Inland Water Transport Corporation Ltd. under its Service Discipline and Appeal Rules with respect to the right of the

corporation to terminate services of permanent employees cannot be pressed into service in the facts and circumstances of the present cases to

hold that the court can also go into the cases where the contractual obligations are involved, as the contract of goods carrier cannot be equated

with the contract of service which totally depends on different footings. In M.S. Desai and Co. Vs. Hindustan Petroleum Corporation Limited, ,

their Lordships of the Gujarat High Court were dealing with the cases of the termination of dealership for sale of petroleum products by

instrumentality of state, wherein it is held -- that binding executive instructions of Govt. not followed and that termination is arbitrary -- it is held that

under such circumstances when the challenge not raising question purely of breach of contract -- Writ Petition is competent. The facts of this case

also cannot to be equated with the facts in hand, which are distinguishable on several grounds.

Similarly in Civil Miscellaneous Mancat Ram Vs. Delhi Development Authority and Others, , the situations which are enumerated for the

interference by the High Court in writ jurisdiction in contractual matters are not available in the cases in hand.

9. It is a well settled law as laid down by their Lordships of the Supreme Court in Viklad Coal Merchant, Patiala and Others Vs. Union of India

(UOI) and Others, that if the restrictions are imposed in such a manner, which do not impose total ban on transport of coal by coal merchant, the

same cannot be said to be violative of Article 19(1)(g) of the Constitution of India. In fact in the instant case by incorporating the provisions of heavy penalty of over-loading under Rule 161-Aof the Goods Tarrif, the respondents have not imposed any ban on the coal merchants, the provision is in fact meant to restrict the over-loading, the violation of which is made penal which by no stretch of imagination can be said to be a ban or restriction on movement. Similarly when the coal merchants while engaging the coal wagons enter into a contract accepting the goods tariff as part of the contract it loses its statutory character and cannot be assailed on the ground that any such condition is ultra vires the provisions of the constitution. Their Lordships in Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., while dealing with the incorporation of the statutory provision in a lease of forest land to a company have specifically laid down as follows :--

A statutory provision, if incorporated in a lease or contract, will become a part of the terms of the lease or contract and the incorporated provision will lose its statutory character.

On the alternative remedy provided u/s 78-B of the Railway Act, this court, in Darshan Kumar Mahajan and etc. Vs. Station Master, Rly. Station

and Others, has held that the disputed questions of fact like the one projected in the present petitions are not open to determination in the writ

jurisdiction, but for that the proper remedy with the coal merchant lies u/s 78-B and not in the writ petitions.

10. Viewed from all angles, we find force in the arguments of the learned counsel for the respondents and hold that the petitions are not

maintainable for the reasons stated hereinabove. All the three petitions are, therefore, dismissed. However, under the circumstances parties are left

to bear their own costs. It also disposes of C. M. P. Nos. 1091, 1089 and 1087 of 1985 and the stay order granted on 25-6-1985 stands

vacated. '

Bhat, J.

11. I have gone through the lucid judgment prepared by my learned brother, Shah J. I am in full agreement with the conclusions arrived at by his

Lordship. However, I would like to add a few words of my own.

12. Petitioners have grounded the petition on the alleged infringement of Article

19(1)(g). Their case is that the impugned freight which is sought to be recovered from them on account of overload is a restriction on their right to carry on trade.

13. Respondents have not imposed a ban on the movement of coal which the petitioners are transporting in railway wagons on payment of freight.

Respondents have only claimed increased rate of freight for the goods which are loaded in the wagons in excess of the capacity of the wagons. The

wagons are loaded by the petitioners. Therefore the respondents have a right to see that the wagons carry the load to the extent of the capacity

which is available in a particular wagon. If the petitioners overload the railway wagon and put excess coal in it, the respondents are within their

rights to claim increased freight from the petitioners. The movement of coal as such is not barred by the respondents. By charging increased freight

for the overload, respondents cannot be said to infringe the rights of the petitioners in so far as it is guaranteed for carrying trade under Article 19

of the Constitution.

14. Article 19 does not give absolute right to the petitioners. Their right has reasonable restriction. If the petitioners want to get the coal through

railway wagons, they have to conform to the rules of transport and are not supposed to overload the wagons. They cannot claim that they have the

right to overload the wagons. If the petitioners are not ready to pay for the overload, they need not hire railways wagons for transporting the coal.

They can employ other means of transport for movement of coal because the restriction for transportation of coal is not at all there. The contention

of the petitioners therefore that their right to carry on trade is interfered with is misconceived.

15. Petitioners want this court to determine disputed questions of fact. As to who is responsible for loading the wagons is a matter that cannot be

considered by this court in writ petition, nor can this court go into the question of having weigh bridges at a particular place or not having weigh

bridges at a particular place. The petitioners, as was correctly held by Shah, J. have a remedy to file a civil suit under the Railway Act for getting

their disputes settled. This court will not go into the intricacy of the dispute raised by the petitioners in this petition.

16. The petitioners and respondents have a contractual relationship. The wagons

are hired by the petitioners on contract and they have to pay the freight according to the capacity of the wagons which lift the coal. In case they overload the wagons, they cannot refuse to pay the increased rate because they have no right to overload the wagons. This contractual relationship of parties, which may have sanction of some rule also, cannot be properly decided in this writ petition.

17. The question really revolves round the liability of the petitioners to pay more freight for overload and that liability to pay more freight for the

overload does not seem to be inequitable or arbitrary as contended by the petitioners.

18. Viewed thus, the petitioners have no case in their favour and the writ petition stands rightly dismissed.