
(1997) 02 GAU CK 0021
In the Gauhati High Court
Case No : Writ Appeal No. 10 of 1997

Kamrup Forwarding Agency	Vs	APPELLANT
Union of India and Ors.		RESPONDENT

Date of Decision : 13-02-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 14, 226, 226
Railways Act, 1989 — Section 72, 72, 73, 73, 78, 78

Citation : (1997) 1 GLJ 401 : (1997) 2 GLT 106

Hon'ble Judges : A.K.Patnaik, J and M.Sharma, J

Bench : Division Bench

Advocate : T.N.Srinivasan, S.K.Ghose, P.Bora, G.N.Sahewalla, B.K.Sharma, B.Gogoi, A.K.Goswami, Advocates appearing for Parties

Judgement

A. K. Patnaik, J.—The facts which are relevant for disposal of this appeal are that the appellant, a dealer of coal registered its indents at the Baihata, Railway Station and loaded coal in 34 BCN Wagons on 12.12.96 for being despatched to Sriganganagar Railway Station. The Station Master of the Baihata Railway Station issued RRs dated 12.12.96 to the appellant mentioning therein that the consignments were to be reweighed enroute or at the destination. Thereafter, the 34 wagons were despatched from Baihata Railway Station but were not reweighed enroute and 33 out of the 34 wagons arrived at Srigangaaagar Railway Station. The Chief Goods Superintendent of Sriganganagar Railway Station then issued a notice dated 22.12.96 to the representative of the appellant camping at the destination that as desired by the Vigilance Branch HQ, New Delhi and Sr. DCN (BKN), the whole consignment of 33 wagons will be weighed at Dharamkarita and delivery will be affected after collecting all the due or the charges. On receipt of the said notice dated 22.12.96, the appellant submitted a letter dated 23.12.96 stating, inter alia, that weightment of the coal at Dharamkanta after unloading was illegal and requested the Chief Goods Superintendent to arrange delivery of the consignment as early as possible. The respondents, however, took the coal to some private weighbridge for weightment

and issued a notice dated 30.12.96 to the appellant stating therein that if delivery is not affected within 15 days from the date of receipt of the notice and all the charges paid, the consignment will be treated as unclaimed and would be sold by public auction under sections 55 and 56 of the Indian Railways Act, 1989. The appellant submitted his objections to the said notice dated 30.12.96 in his letter dated 31.12.06 and in the letter dated 2.1.97 of his Advocate to the Chief Goods Superintendent of Sriganaganagar Railway Station. In the meanwhile, a letter dated 1.1.97 along with an amended notice dated 30.12.96 were issued by the Chief Goods Superintendent of Sriganaganagar Railway Station reiterating that if delivery was not taken within the time stipulated therein after payment of all the charges as per the rules, the consignments will be sold by public auction under section 84 of the Railways Act, 1989. Although the charges that were required to be paid by the appellant have not been stated in the said amended notice dated 30.12.96, it has been stated in the writ petition that the said charges comprised of penal freight collected under the Railways (Punitive Charges for Overloading a Wagon) Rules, 1990 (for short the 1990 Rules), wharfage and demurrage.

2. Aggrieved, the appellant filed CR No.67 of 1997 for declaring the 1990 Rules as ultra vires and for a Mandamus directing the respondents to cancel, recall or otherwise forbear from giving effect to the sale notices dated 30.12.96. The learned Single Judge disposed of the same at the motion stage by the impugned judgment and order dated 9.1.97 directing the respondents to give the appellant reasonable opportunity to state his case against the proposed penal charges and permitting the appellant to lift the consignments of coal on payment of 50% of the proposed penal charges and on furnishing adequate security for the balance amount of penal charges subject to final orders which maybe passed by the respondents. It is against the said judgment and order dated 9.1.97 of the learned Single Judge passed in Civil Rule No.67 of 1997 that this appeal has been filed. On 10.1.97, while entertaining this appeal, we passed an interim order directing that the coal belonging to the appellant will not be sold by the Railways for realising the charges and that the impugned judgment and order of the learned Single Judge will remain stayed for the time being. Thereafter, on 16.1.97, we permitted the respondents to file an affidavit Pursuant to the said orders, the respondents filed an affidavit in opposition to the various averments made in Civil Rule No.67 of 1997 as well as an affidavit in opposition to the , averments made in the additional/supplementary affidavit filed by the appellant in this writ appeal.

3. At the hearing of the appeal, Mr. SK Ghosh, learned counsel for the appellant, submitted that in the impugned judgment, the learned Single Judge has not decided the question of vires of the 1990 Rules under which penal freight charges were proposed to be recovered from the appellant for overloading of the wagons. He contended that a reading of sections 72 and 73 of the Railways Act, 1989 (for short the 1989 Act) would show that no carriage of goods beyond the maximum carrying capacity of a wagon was permissible under law and that the

proviso to section 73 stipulated that any goods loaded beyond such/maximum carrying capacity of the wagon, if detected at the forwarding station or at any place before the destination station, have to be unloaded by the Railway Administration at the cost of the consignor, consignee or the endorsee as the case may be, Mr. Ghosh argued that since sections 72 and 73 made carriage of goods a wagon beyond its maximum carrying capacity unlawful, no punitive freight charges could be recovered for carrying of goods beyond the maximum carrying capacity and any rules made under the 1989 Act authorising the levy and recovery of such charges for, carriage beyond the maximum carrying capacity of a wagon would be ultra vires the 1989 Act. Mr. Ghosh pointed out that a reading of the 1990 Rules alongwith its schedule would show that no maximum limit has been fixed in respect of carriage of goods beyond the permissible for a consignment. The consequence is that the 1990 Rules permits carriage of goods beyond the maximum carrying capacity of a wagon by realising punitive charges from the consignor, consignee or the endorsee. In support of his submission, Mr. Ghosh relied on the judgment of the Supreme Court in the case of Rameswar Prasad vs. State of UP, AIR 1983 SC 383 in which the Supreme Court has held that the State Government by issuing a notification containing a direction to the Transport Authorities to issue limitless number of permits had attempted to circumvent the provisions of the Motor Vehicles Act, 1939. Mr. Ghosh further submitted that the schedule to the 1990 Rules would show that the punitive charges to be levied for overloading of wagons are highly disproportionate to the value of goods found to be overloaded and the 1990 Rules were therefore arbitrary and unreasonable and were hit by Article 14 of the Constitution. Mr. Ghosh pointed out that in the present case the value of coal which was loaded in the 34 wagons was about Rs.21 lacs and the total freight that was paid for transportation of the coal from Baihata Railway Station to Sriganganagar Railway Station was about Rs.22 lacs whereas the punitive charges for overloading the wagons which have been calculated as per the 1990 Rules works out to more than Rs.3 8 lacs.

4. Mr. BK Sharma, learned counsel for the respondents, on the otherhand, submitted that the appellant having entered into a contract with the Railways for carriage of goods was bound by the terms and conditions of the contract which included the provision that the appellant would be liable to punitive charges for overloading of wagons under the 1990 Rules. Hence, the appellant cannot challenge the 1990 Rules as ultra vires. In support of this submission, Mr. Sharma relied on the judgment of the High Court of Jammu and Kashmir in the case of Darshan Kumar vs. Union of India, AIR 1988 J & K 28. Mr. Sharma submitted that the object of section 73 of the 1989 Act is to ensure that no person loads goods in a wagon beyond its permissible carrying capacity and keeping the said object in mind, the 1990 Rules have been framed for levying punitive charges for overloading of wagons beyond their permissible capacity and the 1990 Rules and the schedule to the said Rules are consistent with the said sections 72 and 73 of the 1989 Act. Mr. Sharma further contended that

considering the object of the said sections 72 and 73 of the 1989 Act very high punitive charges have to be levied to prevent such overloading and the 1990 Rules cannot be held to be arbitrary, unreasonable and ultra vires of Article 14 of the Constitution.

5. We do not agree with the submission of Mr. Sharma that the appellant having entered into a contract with the Railways for carriage of goods cannot challenge the vires of the 1990 Rules and beg to differ from the decision of the High Court of Jammu and Kashmir in the case of Darshan Kumat vs. Union of India on this point. In our opinion, a contract for carriage of goods with the Railways or any rules cannot override the provisions of the 1989 Act and the Constitution and a person who has entered into a contract with the Railways for carriage of goods can challenge the provisions of the said contract or any rules as ultra vires the 1989 Act or the Constitution and can also challenge a decision of the Railways Administration to recover punitive charges under the 1990 Rules on the ground that the same are arbitrary and violative of Article 14 of the Constitution.

Sections 72 and 73 of 1989 Act, which constitute the basis of the challenge of the appellant to the vires of the 1990 Rules are quoted hereinbelow:

"Section 72: Maximum carrying for wagons and trucks. (1) The gross weight of every wagon or truck bearing on the axles when the wagon or truck is loaded to its maximum carrying capacity shall not exceed such limit as may be fixed by the Central Government for the class of axle under the wagon or truck.

(2) Subject to the limit, fixed under subsection (1) every Railway Administration shall determine the normal carrying capacity for every wagon or truck in its possession and shall exhibit in words and figures the normal carrying capacity so determined in a conspicuous manner on the outside of every such wagon or truck.

(3) Every person owning a wagon or truck which passes over a railway shall determine and exhibit the normal carrying capacity for the wagon or truck in the manner specified in subsection (2).

(4) Notwithstanding anything contained in subsection (2) or subsection (3), where a Railway Administration considers it necessary or expedient so to do in respect of any wagon or truck carrying any specified class of goods or any class of wagons or trucks of any specified type, it may vary the normal carrying capacity for such wagon or truck or such class of wagons or trucks and subject to such conditions as it may think fit to impose, determine for the wagon or truck or class of wagons or trucks such carrying capacity as may be specified in the notification and it shall not be necessary to exhibit the words and figures representing the carrying capacity so determined on the outside of such wagon or truck or such class of wagons or trucks.

Section 73 : Punitive charge for overloading a wagon. Where a person loads

goods in a wagon beyond its permissible carrying capacity as exhibited under sub? section (2) or subsection (3), or notified under subsection (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 it 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."

A reading of section 72 of the 1989 Act quoted above would show that it provides for determination of maximum carrying capacity of a wagon in accordance with subsection (1) and for fixation of normal carrying capacity by the Railway Administration in respect of a wagon in its possession and by the owner of the wagon in respect of other wagons passing over the Railway under subsections (2) and (3) and the said normal carrying capacity is to be displayed in a conspicuous manner on the outside of every wagon. Subsection (4) further enables the Railway Administration to vary such normal carrying capacity of a wagon by a notification where it considers it necessary. Such normal carrying capacity exhibited outside the wagon as per the provisions of subsections (2) and (3) or notified under subsection (4) of section 72 have been treated to be the permissible carrying capacity. Section 73 of the 1989 Act further provides , that where a person loads goods in a wagon beyond the said permissible carrying capacity, a Railway Administration may, in addition to the freight and other charges recover from the consignor, consignee or endorsee, as the case may be charges by way of penalty at such rate as may be prescribe before delivery of the goods. It is thus clear that the object of the aforesaid provisions of sections 72 and 73 of the 1989 Act is to ensure that no person loads goods on a wagon beyond its permissible carrying capacity and the said object is sought to be achieved by providing that in case a person loads goods beyond the permissible carrying capacity of a wagon, charges by way of penalty at the prescribed rates would be recovered from the consignor, consignee or the endorsee, as the case may be. Since the maximum carrying capacity of a wagon is beyond its permissible carrying capacity, any loading of a wagon with goods beyond its maximum carrying capacity will also be liable for charges by way of penalty at the prescribed rates under section 73 of the 1989 Act. The proviso to section 73 of the 1989 Act providing for unloading of goods loaded beyond the capacity of the wagon and for recovery the costs of such unloading and charges for retention of a wagon for such unloading does not in any way detract from the main provision in section 73 of the 1989 Act for recovery penalty in respect of goods loaded in the wagon beyond its maximum carrying capacity and its permissible carrying capacity. Hence, the 1990 Rules in so far they prescribe rates of punitive charges not only for carrying of goods beyond the permissible carrying capacity of a wagon but also beyond its maximum carrying capacity is consistent with the

provisions of sections 72 and 73 of the 1989 Act. In the decision of the Supreme Court in the case of Rameswar Prasad vs. State of UP (*supra*) cited by Mr. Ghosh, the Court had come to the conclusion that the State Govt had circumvented the provisions of the Motor Vehicles Act, 1939 by issuing a notification allowing limitless issue of permits, but the 1990 Rules did not permit carriage of goods beyond the permissible carrying capacity or the maximum carrying capacity of a wagon but seeks to prevent such carriage by prescribing high punitive charges for overloading of the wagons beyond their permissible capacity. Further, considering the fact that the object of section 73 is to prevent overloading of wagons by unscrupulous persons, the high rates of punitive charges prescribed by the 1990 Rules are not disproportionate, unreasonable or arbitrary. The challenge of the appellant to the vires of the 1990 Rules therefore fails.

6. It was next urged by Mr. Ghosh, learned counsel for the appellant, that assuming that the 1990 Rules were valid, the recovery of punitive charges from the appellant in the facts of the present case by the Railway Administration is without jurisdiction and is arbitrary. Mr. Ghosh submitted that for assuming the jurisdiction to recover punitive charges under section 73 of the 1989 Act, the Railway Administration must come to definite conclusion that there has been overloading of a wagon beyond its permissible carrying capacity. But the facts of the present case would show that there has been no overloading of the wagons by the appellant beyond the permissible capacity of the wagons. Mr. Ghosh pointed out that in the circular dated 6,10.88 of the NF Railway, a copy of which has been annexed to the Civil Rule, a detailed procedure has been laid down for loading and booking of coal and under the said procedure, before loading of coal is permitted, the mechanical staff is required to paint markings inside each and every wagon indicating the prescribed height of load on all four sides so that it can be seen by the loader as well as by the staff of the commercial, mechanical and security department of the Railways while taking measurement and checking the depth of the loaded wagons. Mr. Ghosh also referred to paragraph 1508 (b) of the Indian Railways Commercial Manual, wherein it is stated that where weighment facilities are not available at the station, the Railway staff must check by visual inspection of the spring axle guards of the wagons and from the leadline marked on the wagons as to whether there has been overloading of the coal or not. He also referred to paragraph 1511 which stipulates that after a wagon has been loaded by the owner, it should be seen that instructions for loading laid down in paragraphs 1507 to 1510 have been complied with. Mr. Ghosh submitted that the appellant's case is, that the 34 wagons were loaded upto the said markings painted inside the Wagons and this would be evident from the fact that the RRs issued by the Station Master of the Baihata Railway Station did not indicate any defect in loading. But as there were no weighment facilities in the said Railway Station, in the RRs it was indicated that the weighment was to be done enroute or at the place of destination. Mr. Ghosh referred to paragraph 1422 (2) of the Indian Railway Commercial Manual ii which it has been stated that loose goods and bulky goods in bulk such as sand stones,

timber etc which cannot be weighed "in an ordinary weighing machine provided in the station should be weighed in a wagon bridge at the forwarding station if one is provided there, and if there was no weighbridge at the starting station, the wagon may be reweighed at a convenient weighbridge enroute or the wagon should be weighed at destination, if a weighbridge was available there. Mr. Ghosh vehemently argued that as no wagon weighbridge was available at Baihata Railway Station which was the forwarding station, the 34 wagons carrying coal should have been weighed enroute at a weighbridge station in accordance with the aforesaid instructions but this has not been done by the Railway Administration. Mr. Ghosh further pointed out that even at the Sriganganagar Railway Station there was no weighbridge in which the coal loaded in the wagons could be weighed. He relied on paragraph 1743 (b) of the Indian Railway Commercial Manual which stipulated that in case weighment facilities did not exist at the destination station, charges should be retained in sender's weight or prescribed minimum weight, whichever was higher. Mr. Ghosh submitted that since no weighment facilities namely weigh bridge existed at the destination station the Railway Administration should have accepted the weight as declared by the appellant and delivered the coal to the appellant. But contrary to the instructions contained in the said paragraph 1743 (b), the Railway Administration has taken the coal in tractor trolley to a private weigh bridge located at a distance from Sriganganagar Railway Station and has weighed the coal in absence of the appellant or his representatives and determined exorbitant punitive charges of Rs.38 lakhs and odd on the basis of such weighment. Mr. Ghosh vehemently submitted that the 1989 Act and the Rules made thereunder as well as the instructions contained in the Indian Railway Commercial Manual nowhere permitted weighment of goods carried by the Railway in a private weigh bridge and, therefore, the punitive charges calculate[^] on the basis of the weighment at the private weighbridge and sought to be recovered from the appellant are contrary to the 1989 Act and the instructions contained in Indian Railway Commercial Manual. Mr. Ghosh relied on the decision of the Supreme Court in the case of Union of India vs. Anglo Afghan Agencies, AIR 1968 SC 718 in which a scheme which was executive in character was enforced by the Supreme Court on grounds of fair play and justice.

7. In reply, Mr. BK Sharma, learned counsel for the respondents, relying on the averments in the affidavit in opposition filed on behalf of the respondent in Civil Rule No.67 of 1997, submitted that the loading of the 34 wagons at Baihata Railway Station had been done by the appellant and as he has loaded the wagons beyond their permissible capacity he was liable for punitive charges for overloading under section 73 of the 1989 Act, Rule 161 of the Goods Tariff as well as the 1990 Rules. Mr. Sharma further submitted there were no weighment facilities at the Baihata Railway Station and there was no weighbridge enroute for BG wagons in which the coal of the appellant were transported from Baihata Railway Station to Sriganganagar Railway Station. Mr. Sharma further stated that there was no weighbridge at the destination station, and in the circumstances, ,

the Railway Administration had no option but to have the weighment done at a private weighbridge near the destination station after the coal was unloaded by the appellant. Mr. Sharma pointed out that in the letter dated 23.12.96 of the appellant, a copy of which has been annexed to the affidavit in opposition as Annexure 1, the appellant had clearly stated that he had no objection if the weighment was done by the Railways at their own expenditure but this fact has been suppressed by the appellant in the writ petition and the writ petition should be dismissed on this ground alone for having come to the Court with unclean hands. Mr. Sharma further submitted by referring to paragraphs 9 and 10 of the affidavit in opposition that the loading in the wagons by volumetric measurement is always subject to remeasurement or reweighment either enroute or at the destination as per the provisions of the Goods Tariff and section 78 of the 1989 Act and that, in case, on such reweighment or remeasurement enroute or at the destination station a party is found to have overloaded the wagons, he would be liable for penal charges. Mr. Sharma submitted that on the basis of weighment done at the private weighbridge a penalty of Rs.38,90,015.00 has been imposed on the appellant for overloading the wagons in accordance with section 73 of 1989 Act and the 1990 Rules. Mr. Sharma cited the judgment of the Division Bench of this Court in the case of Union of India vs. Hasija Coal Traders, (1995) 2 GLR 398 (1995 (1) GLJ 299) and in the case of Union of India vs. Salt Marketing Centre, (1995) 3 GLR 361 (1995 (2) GLJ 538) in support of his submission that the Railways had the powers under section 73 of the 1989 Act and the 1990 Rules to levy penalty for overloading wagons beyond their permissible capacity. Regarding the instructions contained in the Indian Railways Commercial Manual, Mr. Sharma submitted that these instructions have no statutory force and cannot override the express provisions contained in sections 73 and 78 of the 1989 Act and the 1990 Rules.

8. It is true that executive instructions cannot override statutory provisions, but it is also well settled that in any area in which the statutory provisions are silent, executive instructions can operate so long as they are not inconsistent with the statutory provisions (see Union of India vs. R. Narsiman, AIR 1988 SC 1733). Section 73 of the 1989 Act and the 1990 Rules provide for recovery of punitive charges for overloading of a wagon beyond its permissible capacity, but the said statutory provisions do not indicate the manner in which it is to be determined as to whether a person has loaded goods in a wagon beyond its permissible carrying capacity. Similarly, section 78 of the 1989 Act provides that Railway Administration has the right to remeasure or reweigh any consignment before delivery of the consignment notwithstanding anything contained in the RRs, but the said section also does not indicate the manner in which such reweighment or remeasurement is to be done by the Railway Administration. No other specific provision either in the 1989 Act or in any statutory rule made under the said Act has been brought to our notice which provides for the manner in which the Railway Administration has to determine whether a wagon has been overloaded beyond its permissible carrying capacity for the purpose of recovering punitive

charges under section 73 of the 1989 Act or the manner in which the remeasurement or reweighment is to be done as provided in section 78 of the 1989 Act. In these areas in which the statutory provisions are silent, however, executive instructions contained in the Indian Railway Commercial Manual had made elaborate provisions which are quoted hereinbelow:

"1422. Weighment of outward goods (1) Outward goods should be weighed as indicated below, the particulars of weighment being entered on the forwarding note in the place provided for the purpose

(i) Consignments in small lot All consignments should be weighed in full at the forwarding station.

(ii) Consignments in wagon loads In the case of consignments of grain, salt, b f seeds, sugar, pressed cotton or other staples, in bags or bales of uniform size and weight, the weight declaredly the consignor may be checked by weighing a proportion of the number of bags or bales of uniform size and averaging their weight. If the bags or bales are not of uniform size and weight, those of uniform size and weight, should be grouped separately, each lot being treated for the purpose of weighment as a separate consignment and weighed as such. The remainder of the consignment of bags or bales or other commodities not of uniform size should be weighed in full. The proportion weighed should not be less than 10 percent at stations where the traffic is large and 20 percent at other stations.

(2) Goods loose, bulky goods or goods in bulk such as such, static, timber, etc which cannot be weighed on the ordinary weighing machine provided at stations r should be weighed on a wagon weighbridge at the forwarding/station, if one is provided there. If there is no weighbridge at the starting station, the wagon may be weighed at a convenient weighbridge station enroute, which should as far as possible, be the first weigh bridge station. In case there is no weighbridge earoute the wagon may be weighed at destination, if a weighbridge is available there.

Note Commodities like fire wood, charcoal, grass dry, etc. should not be weighed at a weighbridge if the Railway Administration has quoted wagon kilometre rates or rates on floor area basis such commons dietorof (sic).

(b) Names of stations provided with weighbridges are notified by Railways in their Supplementary Goods Tariffs.

1423. (a) Wagons requiring to beweighed enroute should be labelled to destination, but booked in the wagon summary to stop at the first weighbridge station enroute. Distinctive bracket labels vide specimen appearing at Appendix XIV/D should be used by the booking station on wagons that have to be so weighed. These labels have a red band which is intended to attract notice and to indicate that the wagon is to be weighed enroute. Freight charges should, in such cases, be invoiced by the booking station on the sender's declared weight or on

the minimum weight laid down in the tariff for the application of wagon load rate, whichever is greater. The following remarks should invariably be made on the connected invoice and railway receipts : "Wagon to be weighed at..... station charges are subject to alteration as a result of weightment"

(b) All such invoices should be sent by the forwarding station to the weighbridge station.

1424. (a) At weighbridge stations, where the wagons are required to be weighed, the Station Masters should ensure that such weightment is done and that the wagons are not pushed on without weightment.

Note Detailed instructions in regard to the weightment of commodities chargeable on carrying capacity of the wagon used will be notified by each Railway Administration separately.

(b) The result of weightment should be recorded in the weightment registers in Form Com W4, which should be written in duplicate by carbon process, separately for local and through traffic. The pencil copy of the register should be retained as station record and the carbon copy submitted monthly to the Traffic Accounts Office along with the returns.

(c) The result of weightment should also be recorded by the weighbridge station staff on the wagon labels and invoices. The letter should, after being stamped with the name of the weighbridge station, be sent forward to the destination for accountal and recovery of charges due.,

1427. The freight charges, in the cases referred to in the preceding para, should be invoiced on the sender's declared weight. It will be the duty of the destination station to weigh all such consignments and recover undercharges, if, due before delivery of goods.

1428. Weight for charge for timber and other commodities in the absence of weightment facilities In case weightment particulars are not available at destination for any reason or it is not possible to ascertain the weight of the consignment by any other method such as measurement, charges should be levied on the sender's weight or prescribed minimum" whichever is higher.

1429. Care and use of weighbridges : Care should be taken in using weighbridges to see that (i) no vehicle is run on to them while they are raised for weightment with the levers down;

(ii) vehicles for weightment are placed centrally;

(iii) no engine is run on to them;

(iv) vehicles are not passed over them at a speed exceeding 8 Kilometres per hour;

(v) after weightment the levers are released gently;

- (vi) only authorized persons are permitted to handle the machines.
- (vii) working parts, surroundings and weighbridge house, as far as possible are kept clean and protected;
- (viii) vehicles are placed and weighed with loose couplings and
- (ix) the weighbridge house is kept locked when not in use.

1431. Testing of weighbridges by Weighbridge Inspector All weighbridges will be tested half yearly by an Inspector of Mechanical Department. After testing, he should furnish a certificate for each weighbridge showing that it has been adjusted and tested. This certificate must be displayed in the weighbridge house until the next inspection and the issue of a fresh certificate. The date of each testing should also be painted on the weighbridge.

1743. Invoices labels endorsed for weightment (a) All consignments, the invoices or labels of which have been endorsed for weightment, should be weighed at the destination station, if not already weighed enroute.

(b) Where invoices or labels have been endorsed for weightment at an intermediate weighbridge station and the result of such weightment has not been communicated to the destination station, the latter should call for the same telegraphically from the weighbridge station. If no reply is received, the entire consignment should be reweighed at the destination station. In case, weightment facilities do not exist at destination station, charges should be retained on the sender's weight or prescribed minimum weight, whichever is higher.

1744. Reweighting of the request of owners (a) As laid down in the IRCA Goods Tariffs, Railways do not undertake to weigh consignments at the destination station as a matter of course. Such weightments can only be considered in exceptional cases, when the condition of the consignment or package warrants this.

(b) Requests for such reweightments of goods booked in wagon loads should be referred to the Divisional Commercial Superintendent, who may permit the reweightment at his discretion provided that facilities for reweightment exist at the destination."

In the aforesaid paragraphs of the Indian Railway Commercial Manual, the detailed manner in which weightment is to be made of the outward goods at the starting station or enroute at the weighbridge stations or at the destination station has been indicated. But not a word has been mentioned in the aforesaid paragraphs that where weightment facilities are not available at the starting station or in the station enroute or in the destination station, weightment has to be done in a private weighbridge. Paragraph 1428 suggests that the weight of a consignment can be ascertained by other methods such as measurement, but does not suggest weightment in a private weighbridge. Further, the fact that provisions have been made in paragraph 1429 quoted above with regard to the

care and use of the weighbridge at the stations and in paragraph 1431 for testing of the weighbridge by the Inspector of Mechanical Department and for issue of certificate by him and for display of such certificate in the weighbridge house clearly indicates that a weigh bridges which is not maintained by the Railways and which has not been tested and certified by the Inspector, Mechanical Department of the Railways such a private weighbridge cannot be used for the purpose of weighing goods loaded in wagon. A reading of paragraphs 1744 would show that a request for reweighment of the goods booked in a wagon can be granted by the Divisional Commercial Superintendent at his discretion provided, that facilities for reweighment exist at the destination station. Where, there was, the facilities for reweighment do not exist at the destination station, a request for reweighment in a private weighbridge has to be rejected. Finally, the last portion of paragraph 1743 states that where facilities for weighment do not exist of the destination station charges are to be retained on the sender's weight or prescribed minimum weight whichever is higher.

9. The aforesaid executive instructions have been issued by the Railway Administration for the purpose of guiding its officers in the matter of exercise of statutory powers vested on the Railway Administration and are not inconsistent with sections 73 and 78 of the 1989 Act. Rather, the use of the word "may" in , both sections 73 and 78 of the 1989 Act indicates that a discretion has been vested in the Railway Administration to recover punitive charges for overloading a wagon and to reweigh or remeasure any consignment and the exercise of such discretion, in our opinion, cannot be arbitrary but has to be guided by the executive instructions contained in the relevant paragraphs of the Indian Railway Commercial Manual. Since the said executive instructions do not provide for weighment in a private weighbridge in the absence of weighment facilities at the destination station and, on the contrary, provide that where weighment facilities do not exist at the destination station charges were to be retained on the sender's weight or prescribed minimum weight whichever was higher, we are of the view that the levy of punitive charges of Rs.3 8,93,1057 on the appellant on the basis of the weighment made in a private weighbridge is arbitrary and violative of Article 14 of the Constitution.

10. Coming to the letter dated 23.12.96 of the appellant on which reliance has been placed by the respondents in their affidavit in opposition, the translated version of the said letter annexed to the said affidavit as Annexure 1 is quoted hereinbelow:

"The Chief Goods Supervisor,

Rly, Goods Shed, NF Railway, Sriganganagar

Sub : Regarding Coal delivery.

Ref: Your letter No.CGS/96/12/22/1 dated"22.12.96

Sir,

With due respect I beg to state that our coal rake was loaded from Baihata to Sriganganagar on "Measurement weight basis" under the supervision of station authority by labourers and it is stated clearly on RR that "to be reweighed at enroute weighbridge or at destination."

Hence weighment of rake coal on Dharamkata after unloading is illegal. There e is not any objection if rake is weighed by the Railway on its own expenditure. Railways is harassing us unnecessarily. We are agree to take delivery on as and where basis. When the delivery of coal was stopped by Railway most probably our rake was just left from Baihata. The decision taken"by the Railway so hurriedly without having concrete reasons was only to harass us. We have paid Rs.2,20,917 as freight charge to Railway in advance. We have suffered a lot of monetary loss because of Railway Administration for this entire responsibilities. We will not at all be responsible for demmorage, wharfage and any other loses caused to railway due to this delay and weight taken on Dharamkata Railway shall be responsible for all such type of losses.

Hence it is again requested to arrange delivery of consignment as early as possible.

Thanking you

Yours faithfully,

Sd/For Kamrup Forwarding Agency

On reading of the letter dated 23.12,96 as a whole we find that the appellant has not readily agreed to weighment in a private weighbridge and has instead raised objection to such weighment of the coal after unloading of the same. That apart, it has now been settled by the Apex Court in the case of Olga Tellis vs. Bombay Municipal Corporation, AIR 1986 SC 180, that there can be no estoppel or waiver of a fundamental right including the right under. Article 14 of the Constitution. Regarding the two decisions of the Division Bench of this Court in the case of Union of India vs. Hasija Coal Traders (supra) and Union of India vs. Salt Marketing Centre (supra) on which reliance has been placed by Mr. Sharma, we find on a perusal of the two decisions that the question as to whether punitive charges can be recovered for overloading of a wagon on the basis of weighment done in a private weighbridge did not arise for decision in I the said two cases.

11. In our view, therefore, the respondent No.9 was not justified in demanding punitive charges for overloading of the wagons to the extent of Rs.3 8,93,015/ on the basis of weighment done in a private weighbridge. Besides such punitive charges for overloading, demurrage to the extent of Rs.14,856/ and wharfage charge of Rs. 1,67,424 upto 31.12.96 have been demanded from the appellant as indicated in paragraph 33 of the affidavitinopposition. But it appears from the impugned notice dated 30.12.96 that the consignments were received at Sriganganagar Railway Station on 23.12.96. On 23.12.96 itself, the appellant has addressed the letter dated 23.12.96 quoted above to the Chief Goods Supervisor

of the said Railway Station requesting him to deliver the coal to horn. But Instead of delivering the coal, the Chief Goods Superintendent of the Sriganganagar Railway Station issued the notice dated 30.12.96 demanding the punitive charges which we have held to be as arbitrary. The appellant, therefore, cannot be held to be liable for demurrage or wharfage charges for detention of the coal on account of such demand which was not justified.

For the reasons stated above, we set aside the impugned judgment of the learned Single Judge and hold that the demand of punitive charges for overloading wagons, wharfage, and demurrage charges on the appellant was illegal and we quash the impugned notice dated 30.12.96 and direct the respondents to offer delivery of the coal to the appellant forthwith in accordance with law. But considering the entire facts and circumstances of the case, the parties shall bear their own costs.