

(2013) 09 PAT CK 0010

In the Patna High Court

Case No : Misc. Appeal Nos. 503, 525-528 with 531 of 2011

Kanhaiya Bhalotia

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2014) 1 PLJR 608

Hon'ble Judges : Jyoti Saran, J

Bench : Single Bench

Judgement

Jyoti Saran, J.—All these appeals raising common questions of law and facts have been taken up together with the consent of the parties with a view to their final disposal. Mr. Gautam Kejriwal, learned counsel has appeared for the appellant in each of the appeals while the Union of India in its Ministry of Railways has been represented by Mr. Anil Singh.

2. All the appeals are accompanied with interlocutory applications filed u/s 5 of the Limitation Act, 1963 for the condonation of delay in filing the appeals bearing I.A. No. 6695 of 2012 in M.A. No. 503 of 2011, I.A. No. 188 of 2013 in M.A. No. 525 of 2011, I.A. No. 191 of 2013 in M.A. No. 526 of 2011, I.A. No. 192 of 2013 in M.A. No. 527 of 2011, I.A. No. 193 of 2013 in M.A. No. 528 of 2011 and I.A. No. 190 of 2013 in M.A. No. 531 of 2011.

3. The appellant has stated in his application filed for condonation of delay that due to lack of communication between the appellant and his counsel and on ground of his indisposition suffering hepatitis, some delay has occasioned in filing of the appeals and which may be condoned as there is no deliberate laches on the part of the appellant in pursuing his remedy.

4. I have heard learned counsel for the parties on the prayer made for condonation of delay and upon being satisfied by the reasons assigned which are supported with prescriptions, the delay occasioned in filing each of the appeals is condoned.

5. I.A. No. 6695 of 2012, I.A. No. 188 of 2013, I.A. No. 191 of 2013, I.A. No. 192 of 2013, I.A. No. 193 of 2013 and I.A. No. 190 of 2013 stand allowed.

Re: M.A. No. 503 of 2011 & analogous appeals:

6. I have heard learned counsel for the parties in each of the appeals in extenso and since all these appeals raise common issues of law and facts and are relatable to the same appellant hence they are being disposed of by a common order.

7. The appellant is a trader engaged in the business of salt running under the trade name of M/s. Ranisati Salt Traders. In the course of his business the appellant purchased iodized salt packed in bags from a manufacturer of iodized salt, namely, Shree Salt having its office and works at Nawacity, Nagaur in the State of Rajasthan. The consignments of iodized salt packed in bags were booked for carriage in rail wagons from Nawacity to Jamui in the State of Bihar with the respondent-Railways and railway receipts were issued.

8. It is the case of the appellant that on the arrival of each of the consignment at Jamui, it was found short. The appellant after serving notice on the respondents u/s 106 of the Railways Act, 1989 (hereinafter referred to as "the Act") set up claim cases relatable to each of the consignment u/s 13(1)(a)(i) of the Railway Claims Tribunal Act, 1987 (hereinafter referred to as "the Act of 1987") claiming a recovery by way of compensation for the short delivery of the consignment of iodized salt. The respective claim cases having been rejected by the Tribunal under different orders hence the aforementioned appeals.

9. The respective relevant foundational facts governing each of the appeals are being reproduced hereinbelow for the sake of convenience:--

10. For the sake of convenience shall be referring to the representative facts as set out in M.A. No. 503 of 2011 unless clarified with specific reference to the other appeals.

11. It is the case of the appellant that he had purchased 1160 bags of iodized salt each weighing 50 Kgs. from M/s. Shree Salt on 21.7.2000 and booked the consignment on the same very day from Nawacity, Rajasthan to Jamui. It is further the case of the appellant that the consignment received on 28.7.2000 was short by 265 bags. It is the case of the appellant that he immediately requested the Chief Goods Supervisor for a shortage certificate but was refused and thus he made the entry in the delivery book maintained for the purpose and mentioned the short delivery of 265 bags of iodized salt at page 086486 of the delivery book. On getting no response from the respondent-Railway regarding making good the loss suffered by the appellant he served a statutory notice u/s 106 of the Act on 10.10.2000 which was received by the Chief Commercial Manager, Eastern Railway, Patna on 16.10.2000. Again getting no response, the claim case was filed on 21.3.2001 within the prescribed period giving rise to Case No. OC-00276 of 2001. The appellant in terms of Rule 7(1) of the Railway Claims

Tribunal (Procedure) Rules, 1989 (hereinafter referred to as "the Rules") framed u/s 30 of the Act of 1987 filed the following documents:--

- (a) Photocopy of the railway receipt;
- (b) Notice served on the respondent u/s 106 of the Act; and
- (c) Affidavit dated 5.3.2001 regarding loss.

12. Subsequently two affidavits were filed by the appellant on 7.12.2010. One of such affidavits was accompanied with a "Bijak" while the other one was a petition u/s 18(b) of the Act of 1987 read with Rules 20(b) and 44 of the Rules praying for a direction to the respondent to produce the loading register, forwarding note, the original railway receipt, the seal, rivet and label, the outward tally book and the delivery book of the relevant period etc., No documentary or oral evidence was led by the respondent-Railways. Of the issues framed whereas the tribunal found the notice u/s 106 of the Act validly served on the respondent, the issue Nos. 3 and 4 relatable to short delivery and statutory protection of the respondent under the proviso to Section 65(2) of the Act were decided against the appellant and in favour of the Railways and the claim was rejected.

13. Identical facts govern all the appeals except for variation in the number of bags received short by the appellant which is detailed in the chart hereinabove.

14. Mr. Kejriwal standing in support of the appellant to question the orders impugned in the appeals made reference to Section 18(3)(b) of the Act of 1987 to submit that the appellant by invoking the said provisions required the production of statutory registers maintained by the railways by filing a specific application to that effect on 7.12.2010 but no order was passed on the application. He submits that the documents mentioned in his application dated 7.12.2010 would have sufficiently proved loading of 1160 bags of iodized salt by the appellant but despite service of the said application on the railways neither they chose to produce the said registers nor the tribunal has bothered to pass any order on the same and which has severely prejudiced the case of the appellant. It was submitted that the failure on the part of the Railways to produce the said registers would draw adverse inference against them.

15. During the course of hearing of this batch of appeals Mr. Kejriwal had submitted the relevant extract of the Indian Railway Commercial Manual ("I.R.C.M." fort short), Volume-II to demonstrate the relevance of the registers, the production whereof the appellant had prayed by filing an affidavit. The preface of the Manual mentions that they are set of instruction issued to supplement the provisions relating to goods traffic and do not supersede, alter or substitute any statutory provisions.

16. With reference to paragraphs 1512 and 1513 of the instructions it was submitted that the same relates to "outward tally books" and requires the details of consignment to be entered therein by the loading clerk. He submits with reference to paragraph 1513 that an "outward tally book" is a record of actual

loading and is a relevant document (sic) establish any loss found at the destination station. With reference to paragraph 1533 it was submitted that every wagon has to be padlocked in addition to be sealed and riveted. It was submitted that paragraph 1534 required a preparation of summary of consignments loaded in triplicate in respect of each wagon and a copy whereof is retained as a station record. The second copy is placed in the wagon and the 3rd copy is sent by a passenger train to the destination station. He submitted that paragraphs 1535 to 1564 of the manual relate to sealing and riveting of wagons and which has to be carried out scrupulously.

17. Mr. Kejriwal thus with reference to different instructions relatable to forwarding note, outward tally book, delivery register, riveting and sealing of the wagons and their relevance as found in the instructions referred to above, submitted that any negligence of the railways in not acting in conformity with the provisions of the Act and the instructions issued by the railways, would entitle the appellant to a compensation for any short delivery. According to Mr. Kejriwal, save the exceptions provided u/s 93 of the Act the responsibility for any loss would lie with the railway administration. Mr. Kejriwal contended that it was in this background that a petition u/s 18(3)(b) of the Act of 1987 was filed and the tribunal even after noticing the affidavit did not choose to pass any orders thereon. It was contended that except relying upon the proviso to Section 65(2) of the Act, no objection has been raised by the railways in their written statement to contest the claim. Learned counsel with reference to Sections 89 and 102 of the Evidence Act submitted that the failure on the part of the railways to produce the said registers would draw adverse inference against the railways. Learned counsel submitted that Section 64 of the Act requires the consignor to execute a forwarding note giving details of goods entrusted to the railways for carriage and the responsibility as to the correctness of the particulars would lie with the consignor, who would have to indemnify the railway in case of incorrectness or incompleteness. Mr. Kejriwal relying upon the statutory provisions and the instructions issued by the railways which find mention in the I.R.C.M., submitted that the moment the consignor makes an entry on the forwarding note which forms the basis for issuance of railway receipt u/s 65 of the Act, the goods are entered in the "outward tally book" in terms of clauses 1512 and 1513 of the instructions, before being loaded in the wagons and after this exercise, the railway administration has also to ensure that the wagons are sealed and riveted properly and the labels are pasted accordingly. It was submitted that the seal found broken on the arrival of the consignment, the appellant after making a request with the respondent for issuance of short delivery certificate which was refused, made an entry to that effect in the delivery book at page 086486 on 28.7.2000 and similar entries were made with regard to the other consignments which are the subject-matter of other appeals. It was submitted that the appellant thereafter raised a claim for compensation by serving a notice u/s 106 of the Act on 10.10.2000 which was duly received by the Chief Commercial Manager on 16.10.2000 but was not acted upon and which

led to the filing of the respective claim cases which are being heard analogous with the present appeal. As per learned counsel, the failure on the part of the railways to produce the forwarding note, the outward tally book, the delivery register, the original railway receipt, the seal rivet and labels, clearly demonstrates that it is an attempt to suppress material facts from the court. It was submitted that even if the proviso to Section 65(2) of the Act requires the consignor to prove the load, the documents relied upon by the appellant remaining in the custody of the railways were sufficient evidence to prove the claim and the non-production thereof should draw a conclusion in favour of the appellant.

18. Learned counsel in support of his contentions has relied upon the following judgments:--

(a) Union of India (UOI) Vs. The Tata Iron and Steel Company Ltd., : With reference to paragraph 6 of the judgment it was submitted that once the consignment has been accepted by the railways, the responsibility of any loss to the consignment would squarely lie with the railways.

(b) Unreported judgment in M.A. No. 539 of 2007 and M.A. No. 540 of 2007 (Ram Salt Traders vs. Union of India) decided on 23.2.2011. It was submitted that the entire issues which are the subject-matter of these appeals were considered in the said appeals and a Bench of this Court taking note of the judgment in Hari Sao and Another Vs. The State of Bihar, , a judgment passed by the Rajasthan High Court reported in Union of India (UOI) Vs. Roop Narayan and etc., and the judgment passed in the Tata Iron and Steel Company (supra) has upheld the claim and which judgment would cover the present set of appeals also.

(c) M.A. No. 441 of 2011 (Ganesh Prasad Arya vs. Union of India) and analogous cases decided on 6.3.2013: It was submitted that although the appeals have been dismissed but the attention of the Court was not invited to the order passed in the case of Ram Salt Traders (supra) (hereinafter referred to as "Ganesh Prasad Arya-2").

(d) Union of India (UOI) Vs. Roop Narayan and etc., : With reference to paragraph 24 of the judgment it was submitted that the relevance of the forwarding note and the outward tally book has been discussed in the judgment and their Lordships have discussed the observance of the procedure provided under the instruction which forms part of the I.R.C.M. Volume-II. It was submitted that in a similar matter, on the same very ground raised, the Rajasthan High Court taking note, has allowed the claim.

(e) Unreported order in M.A. No. 353 of 2001 (Ganesh Prasad Arya vs. Union) as affirmed in LPA No. 440 of 2002 (hereinafter referred to as "Ganesh Prasad Arya-1").

19. According to Mr. Kejriwal, the law settled under the judgment passed in Ram Salt Traders (supra) and in the case of Rup Narayan (supra) would apply with all

force to the present set of appeals. It was submitted that the issues which have been advanced before this Court did not fall for consideration either in the case of Hari Sao (supra) or Ganesh Prasad Arya-2 (supra) and thus the judgments relied upon by the appellant which have taken note of the instructions forming the I.R.C.M., would be a relevant consideration for adjudication of the issue raised.

20. The arguments of Mr. Kejriwal have been contested by Mr. Anil Singh, learned counsel appearing for the railways. Mr. Singh began his arguments with reference to the various provisions of the Act in order to distinguish a carriage of goods at "owner's risk rate" and at "railway risk rate". It was submitted that a carriage at "owner's risk rate" is a special rate which is lower than the "railway risk rate" because in such case, there is no supervision of loading by the railways and the entire responsibility is that of the owner to get the goods loaded. It is stated that it is in this backdrop that the proviso requires the consignor, the consignee or the endorsee of the goods to prove any loss. Learned counsel has referred to the provisions of Sections 62 to 65 of the Act to elaborate on the distinction between goods loaded at the "owner's risk rate" and at the "railway risk rate". He has submitted that Section 72 provides for maximum carrying capacity of the wagons and which is not to be exceeded. Section 76 requires the consignee to surrender the railway receipt for obtaining delivery of the consignment. Section 79 provides for weighment of the consignment on request of the consignee or endorsee. Section 81 vests the right in the consignee or the endorsee to demand open delivery if there are signs of tampering with the consignment and which has to be carried out. Section 82 provides for partial delivery of consignments. Section 93 discusses the responsibility of the railway administration in case of loss, damage etc. during transit except the circumstances discussed in the provision. Section 97 opens with a non-obstante clause to exempt the railway administration from any loss, damage or non-delivery in case of consignment at "owner's risk rate" except if the same was caused due to negligence or misconduct of the railway administration. Section 102 of the Act provides for exoneration from liability in certain cases discussed in the provision. Section 106 provides for service of notice in cases of loss, damage, non-delivery etc. and Section 110 casts a burden of proving such loss on the person claiming compensation.

21. Mr. Singh having discussed the relevant provisions submitted that there is a clear distinction between a carriage of goods at "owner's risk rate" and at a "railway risk rate" and the responsibility entirely lies upon the person claiming compensation to prove any loss as also that the loss has occurred due to negligence and misconduct of the railway administration. It was submitted that until these conditions stand satisfied, the claimants who booked the goods at "owner's risk rate" are not entitled to any compensation.

22. Mr. Singh next referred to the copy of the railway receipt to submit that the railway receipt mentions the wagon number which is 28649, the number of bags

forming the consignment, i.e. 1160 bags each weighing 50 Kgs. bearing Forwarding Note No. 455, Invoice No. 70 loaded for transportation to Jamui. He further submits that the "said to contain" remark on the railway receipt as to the number of bags loaded in the wagons means that the number of bags entered is on the basis of the statement of the consignor. It is submitted that the railway receipt categorically mentions that neither the bags were counted nor the contents checked rather loading in the wagon took place directly from the truck. He submitted that the railway receipt also contains remark that "loading was not supervised". It was contended that these categorical remarks shifts the onus on the consignor/consignee or the endorsee to prove the entry relatable to packages or the weight thereof.

23. With reference to Rule 7 of the Rules it was submitted that amongst other documents, a copy of the original sale invoice is required to be filed but a glance of Form-I submitted with the claim application manifests that except for the notice u/s 106 of the Act and the railway receipt, no other document was filed by the claimant to establish his claim. It was submitted that even the "Bijak" was submitted after a lapse of almost nine years in the present case and after five years in other cases and the same also does not satisfy the requirements of a sale invoice rather is a copy of a bill issued by the trader. With reference to paragraph 1501 of the I.R.C.M. it was mentioned that the capacity of each wagon has to be utilised to its maximum extent. Responding to the relevance of outward tally book as found in paragraphs 1512 and 1513 it was contended by Mr. Singh that the said provision do not apply to consignments which are booked at "owner's risk rate" and are specifically so marked in the railway receipts bearing the remark of "said to contain", as in the present case. Mr. Singh referred to paragraph 1529 to submit that the carriage of goods at "owner's risk rate" are covered by paragraph 1529(b) and which categorically mentions that where the loading is not supervised by railway staff, the railway receipt should bear "said to contain" remarks and should also be endorsed with remarks of "loading not supervised by railway staff nor contents checked". Learned counsel with reference to paragraph 1577 submitted that despite the appellant complaining about the breakage and tampering with the seals, there is no document to show whether any request was made to the Station Master for examination of the contents of the wagons in presence of the Railway Protection Force. Learned counsel further with reference to paragraph 1835 of the instruction submitted that in cases other than the goods transported at "owner's risk rate", on a complaint made regarding the condition of consignment, the Station Master if dissatisfied may in presence of the independent witnesses record a counter remark but the delivery should not be delayed or refused. He submits that paragraph 1836 specifically relates to railway receipt bearing "said to contain" remarks and in which case it is specifically provided that although the endorsee may be permitted to enter remarks regarding the actual number of bags delivered but the consignee would not be allowed to record the remarks regarding the actual shortage. He submits that in cases where consignments

arrived in damage conditions or bearing signs of tampering, the consignee or the endorsee can make demand for "open delivery" which may be allowed in presence of the Railway Protection Force and the Station Master, without any prejudice. However, where the Station Master is not so authorized he may refer the matter to the Claim Inspector. Mr. Singh next with reference to Sections 101 and 102 of the Evidence Act submitted that the burden of proving loss lay on the person claiming and since in "owner's risk rate" cases there is no supervision by the railway administration and the entries in the railway receipt is simply on the basis of the statement made by the consignor, the sale invoice (Bijak) gains relevance for it would indicate that the goods loaded are the goods so purchased. It was submitted that in the present case neither the appellant sought an open delivery nor he registered any complaint regarding tampering of seals. It was submitted that no such complaint was ever made in the notice served u/s 106 of the Act rather the issue of breakage of seals has been introduced for the first time only before the tribunal and hence is an afterthought which cannot be believed.

24. Learned counsel in support of his submission has relied upon the following judgments:--

(i) AIR 1950 85 (Nagpur) : With reference to paragraphs 10 to 13 of the judgment it was submitted that the same issue fell for consideration and was tested against the provisions of the Railways Act, 1890 which was in force at the relevant time. A shortage of bags was complained by the consignor and their Lordships considering the claim against Rules 15 and 22 of the Goods Tariff General Rules took notice of the fact that the consignment was to be loaded and unloaded by the sender and thus under Rule 15 the mentioning of weight etc. in the railway receipt did not admit to the correctness of the statement specially when it contained the remarks "said to contain". It was held that since no witness was examined nor the Bijak was proved, and there was no admission on the part of the railway administration regarding the quantity loaded, the loss cannot be held to be proved.

(ii) Hari Sao and Another Vs. The State of Bihar, : With reference to paragraphs 6 to 8 of the judgment it was submitted that a similar issue fell for consideration in the backdrop of the provisions of the Railways Act, 1890. It was submitted that the claim was considered in the backdrop of Section 58 which is section 66 in the present Act, Section 73 which is Section 93 in the present Act and Section 74 which is somewhat similar to Section 97 of the present Act and it was held that once a consignor opts for carriage of goods at "owner's risk rate" then he is bound by the descriptions of goods, and the railways administration is to be held responsible for any loss, damage etc. only on proof that the loss was due to negligence and misconduct on the part of the railways. The provisions of Rules 15 and 22 of the Goods Tariff General Rules were also noticed and with reference to the judgment rendered in the case of Dominion of India (supra) and the judgment of the Madras High Court, the claim was rejected.

(iii) Union of India (UOI) Vs. Chotelal Shewnath Rai, : He submits that the Division Bench of this Court after taking note of all the judgments rendered by various courts has rejected the claim while discussing the various provisions of the then existing Railways Act, 1890 which left no responsibility for the railways in consignments booked at "owner"s risk rate".

(iv) Union of India (UOI) Vs. Bihar State Food and Civil Supply Corporation Ltd., : With reference to paragraph 11 of the judgment it was submitted that the distinction between the transportation of goods at "railway"s risk rate" and "owner"s risk rate" has been discussed.

(v) Union of India (UOI) Vs. The Tata Iron and Steel Company Ltd., : With reference to paragraph 6 of the judgment it was submitted that the said matter did not relate to carriage at "owner"s risk rate" and even the facts were different and hence the judgment rendered in the said case would not apply to the facts of the present case.

(vi) Union of India (UOI) and Another Vs. Aluminium Industries Ltd., : With reference to paragraphs 7, 9 and 13 it was submitted that the Division Bench has held that a forwarding note or a shortage certificate is neither evidence of the loss nor an acknowledgement of liability.

(vii) Union of India (UOI) Vs. Industrial Development Corporation of Orissa Limited, : With reference to paragraphs 9 and 10 it was submitted that it has been held that a shortage certificate merely indicates the status of the consignment on arrival and is no proof of loading.

25. Learned counsel with reference to the Bench decision of this Court rendered in the batch cases of "Ganesh Prasad Arya-2" (supra) submitted that all these issues as raised herein, were canvassed and upon consideration of the rival contentions in the backdrop of the statutory provisions, the claims have been rejected in absence of cogent evidence, proving loading and taking into consideration the suspicious character of the "Bijak". Learned counsel submitted that whereas the judgment relied upon by the learned counsel for the appellant in the case of TISCO matter is on a different set of facts and not relatable to goods booked at "owner"s risk rate", the judgment rendered in the case of Ram Salt Traders (supra) is neither a case of delayed production of "Bijak" nor has taken note of the Division Bench pronouncement rendered in the case of Chhotelal Shewnath Rai (supra) nor the suspicious character of the "Bijak" was a subject-matter in issue. It is submitted that the judgment is on a separate set of facts. With reference to the Single Bench judgment passed in the case of Roop Narayan (supra) by the Rajasthan High Court it was submitted that the issue of forwarding note and tally book was discussed by the Division Bench of this Court in the case of Chhotelal Shewnath Rai (supra) and which would be binding on this Court. Learned counsel thus concluding his arguments submitted that the entire arguments advanced by learned counsel for the appellant stand answered by the judgments referred to by him and the judgments relied upon by the

learned counsel for the appellant are either on a separate set of facts or have been passed without meeting the earlier judgments on the issue and thus are not binding.

26. Mr. Kejriwal in reply submitted that there is no different procedure of loading at "owner's risk rate" or a "railway's risk rate" and that the remarks "said to contain" are stamped in a routine manner. With reference to paragraph 1529 of the I.R.C.M. it was submitted that all loadings are in presence of a goods clerk and it is only where a goods clerk is not posted that a "said to contain" receipt is to be granted. It was submitted that since it is not the case of the railways that no loading clerk was posted, the loading would be held to be in the presence of the loading clerk. He thus concluding his arguments submits that all these aspects would have stood cleared had the railway produced the documents sought for by the appellant by filing petition u/s 18(3)(b) of the Act of 1987 and the same having not been produced has prejudiced the case of the appellant in driving home his contentions. He further submits that once a petition was filed requiring production of the documents, the railways were under a duty to meet the contentions and their failure to do so, would be an admission of the claims set forth by the claimant. Learned counsel has relied upon the judgment of the Supreme Court reported in Union of India (UOI) Vs. Brijlal Purshottamdas, to submit that once a charge of short delivery is made by the appellant, indicating negligence on the part of the railways, it was the duty of the railways to disclose how the consignment was dealt.

27. I have heard learned counsel for the parties and have perused the materials on record. One thing is manifest in this contest that except for the so-called "Bijak" there is no other evidence either documentary or oral to prove the number of bags loaded. I would first deal with the plea taken by Mr. Kejriwal regarding no distinction in the manner of loading of goods at "owner's risk rate" and "railway's risk rate". In the opinion of this Court the argument of Mr. Kejriwal is contrary to the statutory provisions and which is more than manifest from Sections 63, 79, 93 and 97 of the Act. Section 63 specifically provides that the goods entrusted to a railway administration for carriage, would be booked at "railway risk rate" except where "owner's risk rate" is applicable. Meaning thereby it is only in circumstances where the "owner's risk rate" is not applicable that the "railway risk rate" would apply to the consignment. Sub-section (2) further clarifies this position by providing that where "owner's risk rate" and "railway risk rate" both are in force and the consignor does not opt for either of the two rates then the goods shall be deemed to be booked under the "owner's risk rate". The first proviso to Section 79 relating to weighment of consignment on the request of consignee or endorsee further clarifies this distinction when it inter-alia provides that no weighment would be allowed of goods booked at "owner's risk rate". Whereas section 93 casts general responsibility on the railway administration to indemnify except in the circumstances provided thereunder, section 97 opening with a non-obstante clause, specifically relates to goods carried at "owner's risk rate" and exempts the railway administration from

any responsibility for loss, destruction or non-delivery except where negligence or misconduct on their part is proved. This distinction has also been discussed by the Supreme Court in the judgment of Hari Sao (supra) in which it was held that the "owner's risk rate" is a special rate which is lower than the "railway risk rate". In fact Section 65 of the Act itself conceives of two kind of loading. Whereas sub-sections (1) and (2) apparently are relatable to goods entrusted at "railway risk rate", the proviso is applicable where the consignment is booked at the "owner's risk rate" and in which circumstance the railway receipt is issued with remarks "said to contain". Meaning thereby that the entry is on the basis of the consignor's statement and thus the onus to prove the contents, lies with the consignor.

28. The entire foundation of the claim set forth by the appellant rests on his petition requiring production of the forwarding note, the original railway receipt, the outward tally register, the delivery book and the seals, rivets and labels. A notable feature of this contest is that the "Bijak" was submitted almost nine years in the claim case which is subject matter of M.A. No. 503 of 2011 and after five years in other cases. No reason has been assigned for the delay. Even otherwise a sale invoice can be an evidence of a purchase and may be of a corroborative value to support the weight/number of packages loaded but then it is not sacrosanct for the number/weight actually loaded rather the consignor would yet have to prove the weight or the number of packages actually loaded unless he has entrusted the consignment at a "railway risk rate".

29. The distinction created u/s 63 between two rates, the absence of any evidence to support any exercise of option by the appellant for the "railway risk rate" it has to be understood that the goods were booked at "owner's risk rate". The moment a consignment is booked at "owner's risk rate" it sails within the exceptions of the proviso to Section 65, the proviso to Section 79 and the provisions of Section 97 of the Act and unless the consignor is able to prove the weight or the number of packages actually loaded by cogent evidence and/or unless the consignor is able to prove the negligence or misconduct by the railways, he is not entitled to any compensation.

30. The reliance of the appellant on the provisions of Section 64 of the Act, paragraphs 1512 and 1513 of the I.R.C.M. and paragraphs 1533 to 1564 of the I.R.C.M. to submit that the statutory provisions and the instructions amply provides for maintenance of records relatable to all consignments and would prove the number of packages/weight loaded in the consignment, again appears thoroughly misconceived in view of the specific remarks in the railway receipt clearly mentioning that the "loading is not being supervised" and that the number of bags is mentioned on the basis of the statement of the consignor and thus accompanies "said to contain" remarks. The remark of "direct loading in the wagon from the truck" again provides an answer that the notings if any in the said registers, would not be a confirmation of the actual loading of the consignment rather would only contain the status as per the statement of the

consignor or on the basis of the entry made in the railway receipt.

31. The transportation of consignment is not in dispute. What is complained of is the short delivery of consignment. The "Bijak" was not enclosed with the claim case rather was filed after five years or more. Although Rule 7(b) of the Rules requires the filing of a sale invoice but even the "Bijak" so filed in lieu thereof, does not satisfy the requirement. The suspicion casts upon the said "Bijak" by the learned Tribunal also cannot be ignored for it hardly appears to be a document about a decade old nor was proved nor the Seller examined. It is again not in dispute that neither the appellant made any written complaint regarding tampered seals nor did he file any application for open delivery. The appellant also did not choose to lead any oral evidence in support of his contentions nor did he choose to examine any of the railway staff. In absence of any documentary or oral evidence, Mr. Kejriwal sought to lay the foundation of his contentions on the non-production of the forwarding note, loading register, outward tally book, delivery register and the seal, rivet and label. In this context it is to be noted that whereas the "forwarding note" is to be entered by the consignor himself and contains the statement made by the consignor, it is not an evidence of admission by the railways of the weight or the number of packages as held by the Division Bench of this Court in paragraph 8 of the judgment rendered in the case of Chhotelal Shewnath Rai (supra). That the railway receipt contains several remarks to demonstrate that the entries made therein was on the basis of the statement made by the consignor and that loading has not been supervised by the railway staff and that the consignment has been loaded directly from the truck in the wagons, there is no occasion for the entry of the goods in the outward tally book and even if any entry can be found therein, it would be a mere reflection of the entries found in the railway receipt. In fact paragraphs 1512 and 1513 relied upon by Mr. Kejriwal to submit that the "outward tally book" is an important piece of evidence to support the loading, is completely misplaced in view of the specific remarks made by the railway administration in the "railway receipt" that the "loading is not supervised". If the "loading is not supervised" there lies no occasion for the loading clerk to stand at the door of the wagon and to record the loading in his tally book. It is apparent that the instructions are applicable to carriage of goods at the "railway risk rate" casting a responsibility upon the railways in terms of Section 93 of the Act to ensure its safe delivery and for this purpose that the mechanism has been provided under paragraphs 1512 and 1513 regarding entry in the "outward tally book". The request for production of the delivery book also would not serve any purpose for the appellant for it only records the status of the goods at its arrival and the consignee/endorsee is not permitted to make any "short delivery remark" in the delivery book as is manifest from paragraph 1836 relating to "owner's risk rate" cases. The instruction specifically provided that the remarks "said to contain" in a railway receipt would only permit the consignee/endorsee to record the actual number of bags delivered to him in the delivery book but he shall not be permitted to record any remark rentable to shortage. Paragraph

1840 is supplemental to the provisions of Section 81 of the Act and entitles a consignee/endorsee who complains of tampering of consignment to seek "open delivery" in presence of the Railway Protection Force. As noted above, this provision was never invoked by the appellant. For the same reason, the request of the appellant for production of the seals rivet label etc. would be of no consequence. The very provision of the Railways Act and the instruction which form part of the I.R.C.M. leaves no room for confusion that the carriage of goods at "owner's risk rate" is a category unto itself and until such time that the consignor, consignee or the endorsee makes any complain regarding any negligence or misconduct of the railway administration or staff, he cannot seek any compensation whatsoever and the burden to prove any loss would lie entirely on them. This position is exposit from the judgment relied upon by the parties themselves.

32. The Supreme Court in the case of Hari Sao (supra) has considered the issue of carriage of goods at "owner's risk rate" and the various remarks mentioned in the railway receipt applicable to such cases and it has been observed at page 845 (AIR) as follows:--

7... u/s 74 where goods are tendered to a railway administration for carriage at special reduced rate known as "the owner's risk rate" then, notwithstanding anything contained in Section 73, the railway administration is not to be responsible for any loss, destruction, damage etc., from whatever cause arising, except upon proof that such loss, damage, destruction etc. was due to negligence or misconduct on the part of the railway administration or any of its servants... ..

8. It is, therefore, clear that the railway administration may be liable for loss, destruction or non-delivery of the goods u/s 73 if it fails to use reasonable foresight and care in the carriage of the same and would also be similarly liable even in respect of goods carried at special reduced rate if there was negligence and misconduct on its part or any of its servants... ..

There would be no presumption that the goods put in the wagons were chillies because the railway did not accept the consignment as such and described it as 251 bags allegedly containing chillies. Nor was there any acceptance of the weight of the goods by the railways. The endorsement of "S.W.A." would negative the plea, if any, that the weight was accepted by the railway. The endorsement "LAT emphasized that the loading and unloading being in charge of the consignor the railway could not be held liable for any negligence in loading or unloading.

33. In paragraph 10 of the judgment the Supreme Court has taken note of the judgment passed in the case of Dominion of India (supra) and observed as follows:--

10. It was held by the Nagpur High Court that there was no proof that 255 bags had in fact been loaded. Referring to Rule 22 of the Goods Tariff General Rules it was said that the receipt issued "qualified the number by stating that the wagon was "said to contain" 255 bags.... and the number was mentioned merely to calculate the freight". Reference was also made to Rule 15 under which mentioning of the weight in railway receipt did not amount to admission of correctness of the statement and according to Nagpur High Court "this rule applies with even more vigour where the railway receipt in addition contains the "said to contain" remarks".

34. A Division Bench of this Court in the case of Chhotelal Shewnath Rai (supra) while considering the import of a railway receipt, forwarding note and the Bijak has held in paragraph 8 as follows:--

8. I have already adverted to above that the entry about the weight of the consignment mentioned in the railway receipt and the forwarding note are no admission of the Railway Department about the weight carried in that consignment because in the case before us the railway has not weighed the consignment at the despatching station and the loading was done by the sender

So far as the Bijak (Ext.-2) is concerned, this is a statement made by the consigner that 565 maunds and odd ground-nut oil was despatched from Kharsalia to Tata Nagar. The person who wrote this Bijak (Ext.-2) has not been examined in this case nor is it known that the said person was actually present at the time when the ground-nut oil in question was loaded in the tank wagon. As such this document (Ext.-2) too cannot be said to be a legal evidence... ..

35. The Orissa High Court in the case of Aluminium Industries Ltd. (supra) has held in paragraph 9 that a "shortage certificate" is no proof of the fact that the quantum of goods claimed to have been despatched has actually been despatched unless the fact of despatch of the quantum of goods is actually established.

36. The legal position emanating from the statutory provisions governing the goods carried by the railways at the "owner's risk rate" as interpreted under various judgments leaves no room for confusion that it is only in circumstances where the consignor, consignee or the endorsee can prove negligence or misconduct by the railway administration or its servants, it cannot ask for any compensation and even if any such negligence is proved, yet the loss, destruction or short delivery or the likes would have to be proved by them with support of oral and documentary evidence. The registers relied upon by learned counsel for the appellant to establish his claim is not an answer to the issue posed for the same would only reflect the same position as emanating from the

railway receipt. The judgment relied upon by Mr. Kejriwal also do not come to his rescue. Whereas the learned Judge of the Rajasthan High Court in the case of Roop Narayan (supra) has merely taken note of the earlier judgments but even while recording his opinion to uphold the claim, no reason has been assigned by him to differ with the said judgments which specifically hold that the "forwarding note" is not an evidence of admission of the quantum of goods loaded. Further in view of the specific remark that the loading of goods is not under the "supervision of the railway staff" there is no occasion for any loading clerk to be present at the time of loading or making any entry to that effect in an "outward tally book". In so far as the judgment rendered in the case of TISCO (supra) is concerned, the same was in a different set of circumstances and did not relate to "owner's risk rate" case as pointed out by Mr. Singh. Further in paragraph 6 of the judgment the observation of the learned Judge reflects that it applied to the particular facts of the said case. In so far as the judgment rendered in the case of Ram Salt Traders (supra) is concerned, it is manifest from a perusal thereof that the Division Bench pronouncement of this Court rendered in the case of Chhotelal Shewnath Rai (supra) was not brought to the attention of the learned Judge and to that extent the judgment passed in the case of Ram Salt Traders (supra) would not bind this Court. In so far as the case of Genesh Prasad Arya-1 is concerned, it is manifest that the learned Judge has simply proceeded on the basis of the substantive provisions of Section 65 without examining the effect of the proviso thereof.

37. Having discussed the legal position, in the backdrop of the statutory provisions and the judicial pronouncement on the issue, it is manifest that the claim set up by the appellant was rightly rejected by the tribunal by the order(s) impugned in these appeals. The conclusion drawn by me is supported by the following uncontroverted position governing these appeals:--

(a) No document is on record regarding exercise of option by the appellant for carriage at "railway risk rate" meaning thereby the carriage was at "owner's risk rate".

(b) No authentic piece of evidence either oral or documentary has been led by the appellant as to the proof of number of packages loaded.

(c) No written complaint was registered regarding tampering with the consignment either with the railway administration or the G.R.P.

(d) No written complaint has been registered by the appellant regarding short delivery except entry in delivery book, as claimed by him.

(e) No request was made for open delivery in presence of the G.R.P.

(f) No mention of tampering with the seats even in Section 106 notice rather the first complaint in this regard is in the claim application itself.

(g) The "Bijak" was submitted after 5 years or more and is of a doubtful character and most of them even mention the wagon number and the railway

receipt number. Further same has not been proved in the manner prescribed under law.

(h) No examination of the Seller on the "Bijak".

(i) No railway staff examined to prove the loading.

(j) Booking under the railway receipt was for direct loading from the truck with no supervision of the railway staff.

(k) No negligence of the railway administration proved.

(l) The documents in relation whereto the petition u/s 18(3)(b) was filed would in no manner alter the situation since the railway receipt itself contains the following remarks:--

(i) "S.C." i.e. "said to contain" as per statement of consignor.

(ii) "Loading not supervised by the railway staff".

(iii) "Direct loading-P-17 not complied with".

(iv) "Neither K/S counted nor contents checked".

(v) "Loading direct from truck to wagon."

38. In view of the circumstances set forth above there cannot be any other conclusion but to dismiss these appeals.

39. In the result, these appeals are dismissed but without any order as to costs. Let the lower court records be returned to the tribunal concerned forthwith.