
(2018) 03 GAU CK 0107
In the Gauhati High Court
Case No : MFA 36 of 2009

M/S. KAMAKHYA BHANDAR

APPELLANT

Vs

UNION OF INDIA

RESPONDENT

Date of Decision : 21-03-2018

Acts Referred:

Railway Claims Tribunal Act, 1987 — Section 23, 81, 106

Railway Claims Tribunal (Procedure) Rules, 1989 — Rule 12(3), 32

Citation : (2018) 03 GAU CK 0107

Hon'ble Judges : KALYAN RAI SURANA

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. Heard Ms. M. Sarma, the learned counsel for the appellant as well as Ms. U. Chakraborty, the learned standing

counsel appearing for the respondent Railways.

2. This appeal under Section 23 of the Railway Claims Tribunal Act, 1987, is against the judgment and order dated 25.07.2008 passed by the learned

Railway Claims Tribunal, Guwahati Bench, Guwahati in Application No. O.A. 303/2005 as well as the judgment and order dated 20.11.2008 passed by

learned Railway Claims Tribunal, Guwahati Bench, Guwahati in Review Application No. 39/2008 arising out of O.A. No. 303/2005.

3. The case of the appellant in brief is that they are the legal title holder in respect of 4670 balties jagree (Gur) weighing 520 qtl. and the said

consignment was purchased from the consignor, namely, M/s. Kanha Traders vide sale invoice No. 86 dated 05.11.2004 on payment of consideration

of Rs.8,16,400/-. The consignment was booked on 06.11.2004, but did not reach the destination within the ideal transit time. The appellant had

submitted their claim for non-delivery of the goods vide their claim letter dated 07.02.2005 and on 08.02.2005, the respondents had asked them to submit the original R.R. purchase bill (beejuck), as such, the original R.R. and the beejuck was submitted to the Railway authorities on 10.02.2005. On receiving information of arrival of the consignment on 03.03.2005, a request was made to return the original R.R. to enable them to take delivery of the goods and had also requested for open delivery on proper assessment of loss. Accordingly, the Railways Administration had returned the R.R. vide their letter dated 03.03.2005 and the same was submitted to the concerned staff for taking delivery. It is stated that the unloading of goods was done on 13.03.2005 and that the Railway had assessed the loss and granted the assessment certificate on 31.03.2005. According to the assessment certificate, the appellant was delivered 265 balties jagree in good condition and remaining 4405 balties jagree was in badly melted and set-down condition and 7025 kg jagree was found short. It was projected that out of the purchase cost of Rs.8,16,400/- they could recover only a sum of Rs.3,41,704/- and therefore, the total loss sustained by them was Rs.4,76,696/- and the appellant prayed for recovery of the said amount along with 15% interest per annum.

4. The Railways appeared and contested the claim by filing their written reply and had projected that in the Railway receipt, it was mentioned that the contents were liable to melt in transit. While it was stated that the enquiry is in progress, it was denied that there was any negligence or misconduct on part of the respondent or its employees and it was prayed that the application be dismissed with cost. The learned Tribunal had decided the claim petition by order dated 05.12.2006. The learned Tribunal had arrived at a finding that the appellant had applied for assessment/open delivery which the Railways had failed to comply with and therefore, the appellant had no other way to take delivery of consignment and that the damaged goods were sold at reduced rates and it was further held that the appellant had offered the Railways to inspect their relevant books of account to verify the factual position of loss, but the Railways did not respond or carried out any inspection and therefore, by giving benefit of due entitlement of the appellant, they were awarded a sum of Rs.4,76,696/- with interest @ 6% per annum along with the cost and Legal Practitioner's fee. Aggrieved by the said

order, the Railways Administration preferred an appeal before this Court which was numbered as MFA 91/2007. The said appeal was analogously heard with several other appeals. This Court by a common judgment and order dated 29.04.2008 in various appeals including MFA 91/2007, had set aside the judgment and orders passed by the learned Railway Claims Tribunal, Guwahati Bench, Guwahati and remitted the matters back to the said learned Tribunal for giving decisions on the question raised in the original application and the parties were granted liberty to raise all questions which were raised before this Court, further directing that the learned Tribunal shall answer all the questions raised and decide in all the original applications on its own merit and in accordance with law.

5. Upon remand, both sides have submitted their affidavits to prove their respective cases. Upon hearing the parties, the learned Tribunal framed the following six issues:

(i) Whether the claim application is maintainable as the applicant registered under Registration Act?

(ii) Whether the Notice served by the applicant U/s 106 of the Railways Act is valid?

(iii) Whether this Tribunal has jurisdiction to hear and decide this application?

(iv) Whether the Applicant proves the shortage in delivery and damage in consignment?

(v) Whether the respondent Railways prove that they were not responsible for this shortage in the delivery/damage to the consignment on account of delay as per section 95 of the Railway Act?

(vi) What relief? What order?

6. In respect of issues No. 1 to 4, it was held that the claim petition was maintainable and that the valid notice under Section 106 of the Railways Act, 1989 was served on the Railways Administration and that the learned Tribunal had the jurisdiction to decide the application.

7. In respect of issue No. 4, it was held that as per the joint certificate, there was shortage in the consignment which was worked out to 6509.265

Kgs. However, the learned Tribunal rejected the authenticity of the beejuck i.e. the purchase bill dated 05.11.2004 as unreliable and by holding that

there was no remark regarding deterioration/damage condition of the consignment in the joint certificate, it was held that the appellant could not prove

the damage to the consignment.

8. In respect of issue No. 5, it was held that there was an abnormal delay in transportation of the consignment and normally the distance of 1619 Kms.

should have been covered by 9 or 10 days and therefore, it was held that the Railway was liable for the consequences arising between the delay in transit.

9. In respect of issue No. 6, it was held that as the appellant could not prove any damage to the consignment, but could prove only short delivery, they

were entitled to get compensation for shortage of 6509.265 Kgs. of jagree. Holding that the fair value of the consignment would be @ Rs.1500/- per

qtl. or Rs.15/- per kg., the loss suffered on account of short delivery was calculated at Rs.97,635/- and the said sum was awarded to the appellant

along with 6% interest from the date of filing of the claim petition till realization.

10. Against the said judgment dated 25.07.2008, the appellant had made a prayer for review under Rule 32 of the Railway Claims Tribunal

(Procedure) Rules, 1989, alleging that the learned Tribunal had heard the Railway Administration on unheard points against which the appellant had

submitted their reply dated 05.07.2008 in form of affidavit. Explaining their stand on issues No. 1 to 5, it was submitted that the appellant be heard on

the issues raised in the review application. The Railways Administration had filed their written objection to the review petition, inter-alia, taking a stand

that the appellant had failed to prove the damage to the consignment and also had taken a stand that there was no mistake or error apparent in the

record, as such, the review petition was liable to be dismissed. The said review application was registered as Review Petition No. 39/2008 in

application No. O.A. 303/2005. The learned Tribunal by order dated 20.11.2008, held that the conclusion arrived in the judgment was on the basis of

the records and it was held that no apparent mistake or error in the judgment was found and therefore, there was no sufficient ground for review of

the judgment. Hence, the review petition was dismissed.

11. Pressing for the relief of the claim against the damaged goods, the learned counsel for the appellant had pressed all the grounds taken in this appeal.

By referring to Rule 1746 of the Indian Railways Commercial Manual Vol-II (3rd Edition 1991), it is submitted the manual prescribed for journey time

of one day under 250 Km for all BG routes and additional one day each for

loading and unloading, as such, by referring to the distance from the loading station to the unloading destination station, it is projected that the distance was only 1619 Kms, which ought to have taken a maximum period of 9 to 10 days for delivery to be made. However, although the Railways Administration was aware that the consignment consisting of jagree was liable to melt, it took them about four months time for making the delivery.

12. It is further submitted that the goods were booked on 06.11.2004 and delivered on 13.03.2005 which was more than four months and therefore, the delivery certificate had contained a mention that 265 balties jagree was found in good condition and remaining 4405 balties jagree was found in badly melted and set-down condition found from all around the wagon, the appellant had successfully proved that the consignment had arrived at

balti damage condition. Referring to the various bills/invoices which was produced/exhibited before the learned Tribunal as well as enclosed to

this memo of appeal, it is submitted that the then prevailing market price of jagree was Rs.1600/- to Rs.1625/- per qtl. but they had sold the

consignment between the price of Rs.815/- to Rs.835/- per qtl. which resulted in the loss of Rs.4,74,696/- as per the claim petition and therefore, the

appellant was entitled to such relief together with interest, cost etc. thereof. It is also submitted by the learned counsel for the appellant that as per the

beejuck purchase invoice, the cost of the purchase of the jagree was @ Rs.1520/- per qtl. It is also submitted that the appellants had offered to the

Railways to inspect their books of account to satisfy themselves as to the loss sustained by the appellants but the same was not done and, as such, in

the absence of any evidence of rebuttal, the learned Tribunal had erred in law and in facts in rejecting the claim of the appellant on account of damage

to the consignment.

13. Referring to the review petition as well as the judgment dated 25.07.2008, it is submitted that the learned Tribunal had erred in law as well as on

facts in disbelieving the beejuck of M/s. Kanha Traders. It is submitted that as per the contention of the appellant, the Railway receipt showed that the

consigner was M/s. Kanha Traders, Amooaha and the name of consignee was self. The said consignee was first endorsed in favour of M/s.

Ganga Traders, Jorhat and subsequently, endorsed by Ms. Ganga Traders to the appellant and therefore, the beejuck was made out in the name of the

appellant to avoid unnecessary entries in books of account, but the learned Tribunal had disbelieved the beejuck on the ground that although original consignee was M/s. Ganga Traders, the name of the purchaser of goods was shown to be the appellant in the beejuck, which was the reason for disbelieving the authenticity of the beejuck. Hence, it is submitted that there was no infirmity in the entries made in the beejuck and therefore, the appellant was successful in proving that the goods was in damaged condition and that they were entitled to damages as claimed. In support of her submission, the learned counsel for the appellant has relied on the case of Chain Sukh Jain Vs. Union of India, 2003 (3) GLR 267 wherein, this Court has held that some amount of guess work is a must to find out about market price.

14. Per-contra, the learned standing counsel for the Railways has submitted that by virtue of the joint assessment carried out on 31.03.2005, the appellant had taken delivery of the consignment of jagree. Thereafter, by removing the goods, it was sold in the market. Therefore, as there was no comment recorded in the assessment sheet/note that there was any deterioration or damage to the quantity of jagree, a subsequent claim on account of loss for the damage goods was not sustainable as there were no entries in the delivery certificate that the jagree was in a damaged condition. It is further submitted that it has been recorded in the Railway receipt that the consignment was liable for melting and therefore, in the absence of any recording in the delivery certificate that the jagree was in a damaged condition, the consignment of jagree was even otherwise, by its nature, was liable to melt. Therefore, the Railways cannot be held liable if the jagree had arrived at a melted condition. On pointed query of this Court, the learned standing counsel for the Railways had admitted that if the consignment did not arrive within prescribed time, the Railways Administration cannot escape from the legal liability. However, in respect of the present case in hand she submits that there was no evidence of any damage and therefore, there was no way that any consequence would follow the late arrival of the consignment. It is further submitted that before taking delivery of the consignment, no notice was given to the Railways Administration towards the damage condition of the goods. Therefore, having removed the consignment of jagree from the Railways premises, the Railways would not be responsible for any loss arising out of any damage caused to the

consignment of goods.

15. Having considered the submission made by the learned counsel for both sides as well as on the perusal of the materials available on record, the

only issue surviving for decision in this appeal is-whether the appellant had been successful in proving the deterioration/damage to the consignment of

jagree transported through the Railways?

16. In the review petition, the appellant has taken a stand which is reflected in paragraph (i) of the review petition and the same is quoted below:

“That we respectfully clarify that the consignor originally endorsed the RR in favour of M/s. Ganga Traders and M/s. Ganga Traders re-endorsed

the RR in our favour and requested the consignor M/s. Kanha Traders, Amroha for making direct billing in our favour to avoid additional entry in

books of account. This practice is usual in commercial dealings”.

17. Therefore, it is the stand of the appellant that the original endorsee of the R.R. was M/s. Ganga Traders and M/s. Ganga Traders re-endorsed the

Railway receipt in favour of the appellant. A perusal of the LCR shows that in the notice issued under Section 106 of the Railways Act dated

07.02.2005, that the following statement had been made- “Wagon had still not reached destination. Originally claimed lodged by M/s. Ganga

Traders for non-delivery of wagon. Now we have purchased the goods and, as such, we are consignee. Please register claim and trace out our

missed wagon”. Hence, it is evident that when the consignment was loaded for transportation, the purchase invoice issued by M/s. Kanha Traders

could not have been in the name of Kamakhya Bhandar i.e. the appellant because as per the above quoted statement, the original endorsee was M/s.

Ganga Traders. Hence, although the invoice is dated 05.11.2004, the entry of the name of appellant in the said appeal must have been made after M/s.

Ganga Traders had made the original and/or initial claim. Admittedly, as per the submissions made in the review petition, the value of the original

consignment was not paid by appellant. Therefore, the appellant was required to prove the amount which they have paid for purchasing the

consignment. The Court must take note of the nature of transaction. The appellant herein who is a trader in jagree (gur) is aware as on 07.02.2005,

i.e. when notice was issued, that there was a delay of three months in the transit of jagree (gur) and after the said M/s. Ganga Traders had lodged

their initial claim, the appellant had thereafter purchased the consignment, which is fact admitted in the review petition. Hence, there is no material

before this Court to give a definite finding as to what was the purchase consideration for the jagree by the appellant. Therefore, the cumulative effect

of the observation is that the Court does not find any infirmity with the finding recorded by the learned Tribunal in the impugned order.

18. The other aspect of this issue is that it is the admitted case of the appellant that they had requested the Railways Administration to make an open

delivery of the consignment. Such a request is as per the provisions of Section 81 of the Railways Act, 1989 authorizing open delivery of the

consignment. Therefore, at the time of taking delivery, no effort was made by the appellant to make an endorsement to the effect that the jagreee was

in a damaged condition. It is elementary for assessing loss/damage, that an assessment is required to be made. In the present case, the appellant had

taken delivery of consignment of jagree, which was admittedly in a melted condition and such goods was removed from the Railways premises. If

their sale invoices are to be believed, such consignments though in damage conditions is shown to be sold between 21.03.2005 to 13.04.2005 and

thereafter, the Railways Administration was requested to inspect their books of account to determine their loss. In the opinion of this Court, after the

goods are sold and irretrievably lost, there is no way and under no legal principle that the books of account can be assessed by the Railways

Administration to determine the loss/damage or deterioration caused to the appellant on the consignment of jagree. The books of account will only

prove the amount or value of the goods sold and the books of account would not reflect upon the quality of goods sold. Moreover, as per the

assessment sheet, the assessment certificate was issued on 31.03.2005, by that date eleven transactions is shown to have taken place, and the

consignment of goods is shown to be sold and that after 31.03.2005 there are only four recorded transactions. There is no material available before

this Court to show the previous and/or opening stock of jagree which was lying with the appellant before receipt of the existing consignment. Hence,

this Court is not aware if the jagree contained in the assessment note dated 31.03.2005 was being sold for a lesser price or it was an earlier stocks of

jagree which the appellant was selling at a price alleged to be below the market value. Although there is no evidence available on record to show a

market value prevailing on 31.03.2005, the learned counsel for the appellant has produced today a certificate issued by the Kamrup Chamber of Commerce, certifying that at the relevant time, the price of jagree between Rs.1600/- to Rs.1625/-.

19. However, this being an Appellate Court, it is bound by the procedure of admitting evidence on record only if any additional evidence is brought on record in the prescribed manner. Therefore, this Court at this stage is not inclined to accept the certificate issued by the Kamrup Chamber of Commerce without affording an opportunity to the Railways Administration to counter the said document. Therefore, in this case, the purchase consideration of jagree by the appellant being not available on record and the assessment of the quality of the consignment of jagree as on 31.03.2005 having not been brought on record, this Court does not find any material to hold that the entire stocks of jagree (gur) was in the deteriorated/damaged condition so as to modify the judgment and order passed by the learned Tribunal. Accordingly, the point of determination as formulated above is answered in the negative and against the appellant by holding that the appellant had not been able to prove that there was any damage/deterioration to the consignment of jagree (gur) transported to the appellant through the Railways.

20. At this stage, the learned counsel for the appellant, by relying on the provisions of Rule 12 (3) of the Railways Claims Tribunal (Procedure) Rules, 1989 has submitted that the issues which were decided by the learned Tribunal were not covered by the pleadings made by the respondent in their written statement and therefore, the judgment passed by the learned Tribunal was not sustainable, having decided the issues which were not pleaded by the respondents.

21. In the opinion of this Court, the said submission cannot be acceptable because of the fact that this Court by a common judgment dated 29.04.2008 in MFA 91/2007 and other analogous cases had remanded the original applications back to the learned Tribunal, inter-alia, granting liberty to raise all questions as had been raised before this Court further directing the learned Tribunal to answer all the question raised and decide the original applications on its own merit and therefore, on the strength of the said order, it was not open for the learned Railways Claims Tribunal to frame issues

as per the pleadings because it was under direction from this Court to frame issues on the basis of any issue raised before this Court in the said earlier

appeal. In this connection, it is not the pleaded case of the appellant that the issues decided by the learned Tribunal were neither raised before this

Court in the earlier appeal, nor raised by the respondent at the time of hearing of the application, and that those issues were suo-motu taken up and

decided by the learned Tribunal. Under the circumstances, this Court does not find any merit in the plea taken by the learned counsel for the appellant

that the issues framed and decided by the learned Tribunal were not based on the pleadings of the parties.

22. In view of the discussion above, this appeal fails and the same is dismissed. Accordingly, the judgment and order dated 25.07.2008 passed by the

learned Railway Claims Tribunal, Guwahati Bench, Guwahati in Application No. O.A. 303/2005 as well as the judgment and order dated 20.11.2008

passed by learned Railway Claims Tribunal, Guwahati Bench, Guwahati in Review Application No. 39/2008 arising out of O.A. No. 303/2005 is

hereby upheld.

23. There shall be no order as to cost for this appeal.

24. Let the LCR be returned forthwith.