
(2003) 04 GAU CK 0039
In the Gauhati High Court
Case No : Writ Petition (C) No. 6021 of 1999

Nirmal Traders

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-04-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Railways Act, 1989 — Section 78, 79

Citation : AIR 2003 Guw 122

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : G.N. Sahewalla, for the Appellant; B. Sharma, SC, Railways and B. Das, SC, CBI, for the Respondent

Final Decision : Partly Allowed

Judgement

I.A. Ansari, J.—Whether the railway administration has unfettered power to re-weigh goods booked with the railways enroute behind the back of the consignee or endorsee in exercise of their powers u/s 78 of the Indian Railways Act and whether the railway administration has also" unbridled discretion u/s 79 of the said Act not to re-weigh, on the request of the consignee or endorsee such a re-weighed consignment are the two moot questions, which this writ petition has raised.

2. In the above backdrop, the case of the petitioner needs to be considered. Petitioner"s case, briefly stated, runs as follows :

In the course of its business, the petitioner has booked 40 BCN Wagons as per the rake programme sponsored by the Government of Punjab tin 17-18 of November, 1999, The coal was loaded at Ledo Railway Station in the District of Tinsukia (Assam), Its destination being Bathinda. The said rake of coal was weighed at Electronic-in-Motion Weigh Bridge, at Ledo, in presence of representatives of North Eastern Coal Fields/Coal India Limited and the representatives of the Railway authorities, the Wagon having been booked by

North Eastern Coal Fields/Coal India Limited, which is a Government of India undertaking. The said weigh bridge stood-checked and certified, on 25-5-99, to be in order, the next date for verification being on 25-5-2000. The railway authorities from time to time issued circulars regarding loading and weighment of coal at various stations. In accordance with their policy, Circular No. 1 of 1997 was issued by the respondents to the Joint Commercial and Operating Circular with regard to weighment of coal loaded at electronic-in-motion Weigh Bridge at Ledo. In the said circular, the procedure/instructions were given regarding weighment of coal rake at weigh bridge. According to this circular, the railway staff issues receipt on the strength of weighment chart received from the computer at the said bridge making it, however, clear that the excess weight, if any, beyond the permissible limit will be charged as per the commercial rules, one of the conditions of weighment being that one commercial staff from the Railways will witness the weighment at the computer round the clock and jointly counter-sign the weight, so found, along with the operator of the Computer. The relevant circular has been annexed as Annexure-II to the writ petition. After weighment of the coal aforementioned, the petitioner duly paid the charges. The loaded coal was, however, found to be in excess of permissible limit in some BCN Wagons. The excess weight was found to be 70.1 tons and as per circular No. 1 of 1997, the Station Master, at Ledo Goods Station, raised the charges for the excess weight and the petitioner paid the same accordingly, whereupon the Station Master, Ledo, duly issued the R.R. (Railway Receipt) giving all details, the copies of the 4 RR being Annexure-III series. In respect of transport of goods from one Station to another, it is incumbent on the part of the Railway Administration to provide weighbridge, but there are many stations where there is no weighbridge and in this view of the matter, the N.F. Railway authorities have Issued several circulars describing the method of loading and booking. As per the procedure prescribed, the wagons are to be loaded by the consignees in presence of railway staff of Commercial Department, Security Department and Mechanical Department and the N.F. Railway Authorities prescribed the limit of height to which a wagon can be loaded. As per the prescribed procedure, the commercial staff of the Railways shall check each and every wagon to see if the loading is in excess beyond the permissible limit. Thus, the whole process is supervised by the security personnel and mechanical staff. The Coal India Limited has made the complete computer ticket of store Tare weight mentioning the carrying capacity of wagon, first weight, second weight and net weight, a copy of such computer tickets being Annexure-IV, The petitioner received a letter, dated 27-11-99, issued by the Chief Goods Supervisor, Northern Railways, Bathinda, informing the petitioner that the petitioner's consignment of coal loaded in 40 BCN Wagons was re-weighed, on surprise check, jointly by the C.B.I. and the Railway Officials at Laskar Weighbridge on 26-11-99 and it was found that the weight of the loaded coal was over-weighed to the tune of 620 tons approximately and demanded payment of Rs. 26,97,984/- for the excess weight. The re-weighing at Laskar Weigh-bridge was made without any intimation to the petitioner and hence, weighment so made behind the back of

the petitioner can be given no credence at all. The petitioner wrote, on 7-11-99, a letter to the Chief Goods Supervisor, Northern Railway, Bathinda, praying for re-weighing of the rake at the cost of the petitioner. The railway authorities have arbitrarily declined to allow re-weighing on the request of the petitioner. The re-weight at Laskar Weigh-bridge was not taken at Electronic-in-Motion Weigh Bridge as was the case at Ledo. The excess weight allegedly found by the Railways is not correct and the Railways ought not to have re-weighed the coal without any intimation to the petitioner and since the petitioner prayed for re-weighing at their own cost, the refusal to re-weigh by the Railway was arbitrary. The weighment at the weigh-bridge at Laskar Station was not binding on the petitioner. If the weight of the loaded coal was found to be in excess of the permissible limit, the Railways ought to have unloaded the same in accordance with the proviso to Section 73 of the Railways Act and no penalty could have been imposed on the petitioner. Unless the re-weighing is done in presence of the petitioner, it is not possible to prove inaccuracy of the weight found, on re-weighment, at Laskar Railway Station. The railways had no authority to re-weigh the same en-route in the absence of the petitioner. The Railways (Punitive Charges of Overloading of Wagons) Rules, 1990, which authorizes the Railway Administration to levy penalty without allowing any opportunity to the petitioner of being heard in the matter is unjustified and ultra vires.

3. At the time of issuing notice of motion on 6-12-99, this Court, it appears from the record, passed an Interim order directing the respondents to re-weigh the Wagons at any Railway Weight Bridge including Laskar Railway Station at the cost of the petitioner and after such re-weighing, whatever is found due to the railways shall be paid by the petitioner and thereafter, the coal, in question, shall be released in favour of the petitioner, the re-weighing, so directed, being subject to the deposit of a Bank Guarantee for an amount of Rs. 25,26,772/- aforementioned.

4. The respondent Nos. 1 to 11 have contested this case by filing their affidavit-in-opposition, their case being, briefly stated, thus : The petition is not maintainable inasmuch as this writ petition requires the determination of questions of disputed facts. The petitioner is also barred by principles of waiver, estoppel and acquiescence. The petitioner having entered into contract with railways for carriage of goods is bound by the terms of such contract including the provisions of the Railway Act. and the laws and the rules framed thereunder. Such contractual matters cannot be dealt with in exercise of writ jurisdiction. This Court lacks territorial jurisdiction over the impugned action. The quantity of the loaded coal was entered into the forwarding note as per the declaration made by the petitioner and the senders declared weight was accepted for the purpose of calculation of freight etc. As per the Railways Rules, issuance of railway receipt does not mean acceptance of the weight recorded in the RRs and the same is always subject to weighment/reweighment enroute or at destination. In the railway receipts, it was clearly mentioned that the loading was not supervised by the railway staff and the loading was at owner's risk. The weighbridge, at Lido, is

not a railway weighbridge and the railways do not admit the weight, calculated at the weighbridge at Ledo, as correct and final weight. The acceptance of freight and/or issuance of RRs did not amount to acceptance of the particulars mentioned therein, RRs are issued for the purpose of realisation of freight as per the declaration made by the parties and the loading of any consignment by a party is always subject to further clarification/weightment/reweightment enroute and/or at destination. Weighbridge is not available at every railway station inasmuch as installation of weighbridge at every station is not economically viable, for, such installation involves crores of rupees. In the absence of weighbridge, RRs are issued with the endorsement of SWA and wagons are always liable for weightment enroute and at destination." It is not obligatory for the railways to provide weighbridge at every railway station. Keeping in view the possibility of overloading of wagons, provisions have been made in the Railways Act and other relevant Rules for imposition of penalty. Neither provisions of the Railways Act and/or Rules nor principles of natural justice were violated by reweightment at Laskar weighbridge. As per the provisions of Section 79 of the Railways Act, no weightment of consignment booked at owner's risk shall be allowed. This apart, the request for reweightment by the petitioner could not be entertained, because such reweightment was not feasible due to congestion and other operational exigencies. There was no arbitrariness in weighing the goods at Laskar nor was there any arbitrariness in declining to allow reweightment on the request of the petitioner. The correctness or otherwise of the weight found on reweightment at Laskar cannot be ascertained in a writ petition and the petitioner should pursue other remedial means provided under the law. The reweightment allowed by this Court as an interim measure is not blinding on this Court nor can the petitioner claim that the weight found on reweightment, at Laskar, shall be treated as correct. If the writ petition is found to be not maintainable, dehors the interim order for reweightment, the mere fact that on reweightment, the weight was found to be less than what was found at the first weightment, at Laskar, cannot be proof of the fact that the weight found on reweightment at Laskar was the correct weight, particularly, when the CBI has found that the seals and locks of the wagons, in question, had been tampered with, According to the affidavit filed by the CBI, their investigation in the matter is still in progress. Under the circumstances, the case of the petitioner falls through and they cannot claim that a particular weight advantageous to them should be accepted without there being any finding that the weighbridge, at Laskar, was/is defective and/or that the weightment carried out at the said weighbridge was incorrect. The fact remains that the weightment, at Laskar weighbridge, was carried out in presence of none other than the CBI, whose credentials are not in doubt.

5. In their additional affidavit, the petitioner has further contended that the differences in weight might have been due to weighbridge itself inasmuch as the weigh bridge, at Laskar, is a manual one, whereas the weighbridge at Ledo is an electronic-in motion weighbridge and, hence, possibility of manual error in weighting the wagons for the first time, at Laskar Railway Station, cannot be

ruled out.

6. As far as respondent No. 2, namely, the CBI is concerned, it too has filed its affidavit-in-opposition, its case being, in brief, thus : The investigation revealed that before reweighment, the seal cards in some of the wagons were not found and in others, the impressions were different. One of the wagons was found to be missing. The said facts were brought to the notice of this Court by the CBI by filing an application. In such a condition, when the reweighment was conducted as per the order of the Court, still excess coal was found. The penal freight charges calculated on the basis of excess weight found during surprise check are legal.

7. I have perused the materials on record, I have heard Mr. GN Sahewalla, learned Senior counsel for the petitioner, and Mr. B. Sarma, learned Additional CGSC appearing on behalf of the respondents No. 1 to 11. I have also heard Mr. D. K. Das, learned standing counsel for the respondent No. 12,

8. Presenting the case on behalf of the petitioner, Mr. G.N. Sahawalla has submitted that though in the RRs, it has been mentioned that the loading has not been done under the supervision of the staff of the railways, the fact remains that the railway authorities have from time to time issued circular regarding loading and weighment of coal at various stations including Ledo and the Circular No. 1/97 addressed to Joint Commercial and Operating Manager relates to weighment of coal loaded on electronic-in motion weighbridge at Ledo. In this Circular, points out Mr. GN Sahewalla, procedure/instructions have been given regarding weighment of coal rake at Electronic-in motion weighbridge. This apart, the railway staff issued RRs, according to Mr. Sahewalla, on the strength of the weighment chart received from the computer after determination of the net weight. It is also one of the conditions of weighment at Ledo, points out Mr. Sahewalla, that one commercial, staff witnesses the weighment in the computer round the clock and jointly counter-signs the reading found in the computer.

9. Drawing my attention to Clause 3 of the Circular aforementioned (Annexure-2 to the writ petition) Mr. Sahewalla has pointed out that as per this clause, a nominated commercial staff witnesses the loading at Ledo and Jointly signs the weighment chart, which comes out of the computer, and as per Clause 6 of the said Circular, SS/LLO will issue RRs on the strength of the weighment, which are received from the computer after working out the net weight. In the face of these instructions, according to Mr. Sahewalla, merely because the railway staff has written in RRs (Annexure-3 series) that the loading was not done under the supervision of railways, it is not enough. In fact, as indicated by the Circular (Annexure-2) itself, submits Mr. Sahewalla, the loading was done in the presence of the nominated commercial staff of the railways and the RRs were prepared as per the chart produced by the computer. The railways, therefore, cannot, submits Mr. Sahewalla, shirk their responsibility merely because of the said endorsement found on the. Annexure-3 series.

10. It is also submitted by Mr. Sahewalla that though the petitioner has submitted in the writ petition that weighment at the back of the party is not permissible, yet, even if it is held that weight can be taken en-route and/or at destination behind the back of the party, the fact remains that when consigned or endorsee wants to get the re-weighment of the rake done, the railways cannot arbitrarily refuse to weigh the same in the presence of the consignee/endorsee, particularly, when the consignee/endorsee is willing to pay for such re-weighment.

11. Pointing out to the language used in Section 79, Mr. Sahewalla has submitted that it is only in respect of those goods, which are booked at owner's risk and which are likely to lose weight in transit or is perishable in nature that the railways may decline to weigh the same on the request of the consignee/endorsee provided that the railways do not dispute the weight originally found at the time of booking of the consignment and it is the consignor/endorsee, who takes Initiative to get such goods weighed before accepting delivery on the ground, inter-alia, that the weight of the goods, at the destination, is lesser than what the original weight of the goods at the time of booking of the consignment was.

12. In the case at hand, submits Mr. Sahewalla, a close reading of the weights of various wagons found on first re-weighment, at Laskar, show that the weights so found were higher than the weights recorded at Ledo, whereas when the weighment was done, again, in the presence of the representatives of the petitioner, the weight was not found to be abnormally high. Since the goods remained within the custody of the railways, it is for the railways to explain, submits Mr. Sahewalla, as to why the weight was found less, on re-weighment, at Laskar, but since the railways have failed to explain the same, there is no reason why Court should not accept the subsequent re-weighment, at Laskar weighbridge, as a correct one.

13. It is further submitted by Mr. Sahewalla that in order to do complete justice, a Writ Court can, indeed, direct re-weighment of the consignment and if the weight found, on such re-weighment, is held to be correct one, the direction issued by the railways for imposition of penalty on the consignor/consignee/endorsee has to be struck down. In support of this submission, Mr. Sahewalla has placed reliance on the unreported Division Bench decision, dated 7-8-98, of this High Court in Writ appeal Nos. 183/1990 & 189/1990 (Union of India v. Bharat Coal Depot, etc.).

14. Controverting the above submissions made on behalf of the petitioner, Mr. B. Sharma has submitted that by Section 73 of the Railways (Punitive Charges for Overloading) Rules, 1990, a special power has been given to the competent authority of the railways to levy penalty in the circumstances, which have been provided in these rules if the consignee/endorsee is found to have loaded goods in the wagons in excess of the permissible limits. In support of this contention, Mr. Sharma has placed reliance on Union of India (UOI) Vs. Hasija Coal Traders,

15. Mr. Sharma has also submitted that no notice is required to be given to the consignee/endorsee before carrying out re-weighment and contention of the petitioner that no re-weighment can be done without notice to the petitioner is incorrect. Reliance, in this regard, is placed by Mr. Sharma on Raghu Forwarding Agency and Another Vs. Union of India (UOI) and Others,

16. In support of his contention that the railways have the freedom to reweigh the goods en-route u/s 78 and Impose penalty for overloading on the consignee/endorsee u/s 73, Mr. Sharma has also relied on the Union of India v. Salt Marketing Center (1995) 3 GLT 548.

17. It is contended by Mr. Sharma that in the case at hand, the railways had good reasons for not re-weighing the consignment on the request of the petitioner inasmuch as congestion in the railway yards and other operational reasons did not permit the railways to accede to the petitioner's request for re-weighment and the second proviso to Section 79 makes it clear that for such congestions and other operational reasons, the railways can refuse to re-weigh the consignment.

18. It is also contended by Mr. Sharma that the railways have complete discretion u/s 79 not to re-weigh a consignment and if a railway servant refuses to reweigh a consignment on the request of the consignee or endorsee, no reason, according to the language in which Section 79 is worded, required to be assigned. It is, rather, according to Mr. Sharma, in a case, where, a railway servant agrees to re-weigh the consignment on the request of the consignee/endorsee that he has to assign reasons for agreeing to such request for re-weighment.

19. As regards the decision rendered in Bharat Coal Depot, etc. (supra), Mr. Sharma has submitted that this decision has not laid down that the weight found on interim directions of the Court has to be treated as a correct one or has to be acted upon.

20. Since the re-weighment has been done at Laskar, which is the weighbridge of railways, Mr. Sharma has submitted that the reading found on re-weighment, at Laskar weighbridge, is binding on the parties inasmuch as the weighbridge, at Laskar, is not a private weighbridge. Reference in this regard is made by Mr. Sharma to Kamrup Forwarding Agency v. Union of India, reported in (1997) 2 GLT 106.

21. It is also submitted by Mr. Sharma that since the re-weighment has been done at Laskar, which is out side the territorial limits of this Court, this Court cannot exercise writ jurisdiction in respect of the re-weighment done at Laskar.

22. In support of the railway administration's contention that this writ petition involves disputed questions of fact and the same cannot be gone into in a writ petition and that this Court should not exercise writ jurisdiction, Mr. Sharma has relied on the State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd., Mr.

Sharma also seeks to derive from the case of Darshan Kumar and etc. Vs. Union of India (UOI) and Others, support for his contention that the dispute, in question, should not be entertained in a writ petition.

23. As far as Mr. DK Das is concerned, his submission is that the CBI found involvement of railway staff in excess loading in the wagons in question and hence, this Court may not hold that the loading of the Coal, at Ledo, was not done under the Supervision of railway staff; Mr. Das also submits that the CBI investigation is still in progress and hence, the bank guarantee submitted by the petitioner may not be released.

24. Reacting to the above submissions made on behalf of the respondents, Mr. Sahewalla has pointed out that though Section 79 gives the railways the power to decline to reweigh a consignment on the request of the consignee and/or endorsee, such exercise of powers cannot be arbitrary; but in the case at hand, reiterates Mr. Sahewalla, the railways arbitrarily refused to reweigh the consignment.

25. Sworn off lengthy details of the present case and legal rhetoric, what is essential to note is that there can be no dispute that the railway administration do have the power u/s 78 of the said Act to re-weigh any consignment before delivery of the consignment. That this power has over-riding effect on all relevant provisions of the Act is clear from the very language of the Section 78, which runs as follows :

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

(i) re-measure, re-weigh or re-classify any consignment.

(ii) recalculate the freight and other charges; and

(iii) correct any other error or collect any amount that may have been omitted to be charged."

26. The use of the expression "notwithstanding anything contained in the receipt," occurring in Section 78, makes it amply clear that whatever weight might have been mentioned in a RR, the railways have the discretion to reweigh the consignment en route or at the destination before giving delivery of the consignment to the consignee or endorsee.

27. That the railways have special powers u/s 78 of the Indian Railways Act, 1989 to, inter alia, re-weigh or re-measure any consignment before delivery of the same cannot be disputed and is not, in fact, seriously disputed in the light of the language employed by Section 78. That the railways in exercise of their powers u/s 73 of the said Act can impose penalty in case of overloading of wagon is also not disputable and is not, in fact, disputed, in the present case, at the time of hearing. The submission of Mr. Sharma to the extent, therefore, that the

said Act provides for re-weighment of consignment en-route by the railways before delivery thereof to the consignor, consignee and endorsee or if a wagon is found to be overloaded, punitive charges, can be imposed by the railways is correct and to this extent, the reference made by Mr. Sharma to the case of Union of India (UOI) Vs. Hasija Coal Traders, is correct inasmuch as a Division Bench of this Court in Hasija Coal Traders (supra) has clearly laid down that the railways have the powers u/s 73 to impose penalty if the consignor has violated the provisions of the said Act or Rules made thereunder :

28. Thus, though it is true that in the light of the Circular No. 1 of 1997 (Annexure-11 to the writ petition) aforementioned, the railway administration cannot really deny their complete responsibility so far as the weights recorded in the relevant R.Rs are concerned, yet the fact remains that the weights reflected from the RRs are subject to the weight or weights, which may be found on re-weighment u/s 78, provided, of course, if the weight found, on the re-weighment, is the correct weight.

29. Coupled with the above, the submission of Mr. Sharma that before re-weighment is done u/s 78, no notice or intimation is required to be given to the consignee or endorsee is also correct and the reference made by Mr. Sharma, in this regard, to the case of Raghu Forwarding Agency and Another Vs. Union of India (UOI) and Others, is also not misplaced inasmuch as in Raghu Forwarding Agency (supra), this Court has, indeed, held to the effect that no notice is required to be served on the consignee, consignor or endorsee before re-weighment is done by the railways u/s 78. in this regard, I am tempted to quote the following observations of the Court in Raghu Forwarding Agency (supra) (para 6) :

"A bare reading of Section 73 quoted above would show that no notice is required to be given to the consignor, the consignee or the endorsee before making any weighment of a wagon has been loaded beyond its permissible carrying capacity for the purpose of levying punitive charges for overloading of wagon..... On an interpretation of Section 73 of the Act, 1989, the Supreme Court in Jagjit Cotton Textile Mills Vs. Chief Commercial Superintendent N.R. and Others, held that one of the purposes of the aforesaid Section 73 was to see that the gross weight at the axles was not unduly heavy so that accidents on account of the axles breaking down could be prevented. An emergency power has therefore been vested in the railway administration to unload the goods loaded beyond the capacity of the wagon as soon as it is detected and by implication therefore Section 73 has ruled out the requirement of issuing any notice to the consignor, the consignee or the endorsee before weighment of wagon carrying the goods. Again, treading of Section 78 of the Act. 1989 quoted above would show that the railway administration has been vested with the right to re-weigh any consignment and there is no stipulation in Section 78 that such re-weighment has to be made after giving notice to the consignor, consignee or the endorsee or in presence of such party. Thus, there is no provision either in

Section 73 or Section 78 of the Act. 1989 for weighment of goods enroute in presence of a party. No other provision of the Act. 1989 or the Rules made thereunder or any Executive instruction has been brought to the notice of the Court to show that weighment can be made by the railway administration en-route only after serving a notice on a party or in presence of such party."

(Emphasis is added)

30. To the extent, therefore, that Raghu Forwarding Agency and Another Vs. Union of India (UOI) and Others, upholds the powers of the railways to re-weigh consignment en-route without notice to, or in the absence of the consignor, consignee or endorsee, I respectfully agree. No clear authority could be cited by Mr. Sahewalla to show that in the absence of the consignee or endorsee or without any intimation or notice to the consignee or endorsee, no re-weighment can be done u/s 78.

31. Though in support of his veiled contention that the consignment cannot be re-weighed behind the back of the party, Mr. Sahewalla has made oblique reference to M/s. Salt Marketing Centre ((1995) 3 GLT 548) (supra), a bare reading of this decision clearly shows that no such law has been laid down in this decision. What this case laid down was that the punitive measure of realizing the actual penalty could be exercised by the authority only after following the principles of natural justice and not on the basis of any evidence, which might have been collected by the railways ex-parte at the back of the consignor/consignee/endorsee.

32. In M/s. Salt Marketing Centre (supra), relied upon by Mr. Sharma, this Court has clearly laid down that when the question of levying of penalty, on the basis of re-weighment taken in the absence of the consignor, consignee or endorsee arises, no penalty can be levied without issuing notice of showing cause to the person from whom the penalty is sought to be recovered. The relevant observations, in this regard, made in Salt Marketing Centre (Supra) may be quoted hereinbelow :

"8. As stated above, as far as the power of re-weighment is concerned, the same is available with the Railway. However, when it comes to the question of levying penalty on the basis of re-weighment which has been done in the absence of the consignor/consignee/endorsee we are of the opinion that the penalty can be levied only after issuing show cause to the person from whom the penalty is sought to be recovered and after affording him reasonable opportunity of placing his case before the competent authority who is going to levy the penalty. The punitive measure of realizing the actual penalty can be exercised by the authority only after following the principles of natural justice and not on the basis of any evidence which may have been collected by the Railway ex-parte at the back of the consignor/consignee/endorsee."

(Emphasis is supplied)

33. From the above, it is also abundantly clear that the mere fact that the re-

weighment has been taken at the railway weighbridge, it cannot be a reason for imposing penalty without giving an opportunity of showing cause to the person concerned. Viewed from this angle, reliance placed by Mr. Sharma on the decision in *M/s. Kamrup Forwarding Agency* (1997 (2) GLT 106) (supra) to show that on account of the fact that the re-weighment in the present case has been taken at Laskar Weighbridge, which is a railway weighbridge, the weight found therein is binding on the parties is not entirely correct inasmuch as the decision in *M/s. Kamrup Forwarding Agency* does not categorically lay down such a law. This apart, penalty can be imposed only if overloading is proved and to prove overloading, the railways must satisfy the Court that the weighment taken is correct. There is no law that the correctness of the weighment taken in the absence of the party concerned, at a railway weighbridge, cannot be questioned by the person/party concerned.

34. Though it was agitated in the writ petition that no re-weighment can be done by the railways behind the back of the consignee or endorsee, this aspect of the matter has not been too seriously pressed for. In fact, in the light of the position of law that has been pointed out above, Mr. Sahewalla has, while conceding that the railways may re-weigh a consignment en-route and behind the back of the consignee or endorsee, contended that if the consignee or endorsee doubts the correctness of the weight found on such re-weighment, then, the railways cannot arbitrarily decline to re-weigh the consignment on the request of the consignee or endorsee u/s 79 of the said Act. particularly, if the consignee or endorsee, as the case may be, is willing to pay for the fees/costs of the same.

35. The narrow question, therefore, which falls for consideration is whether in the facts and circumstances of the present case, the railway administration was legally justified in declining to re-weigh the consignment on the request of the consignee? To arrive at a correct decision on this aspect of the matter, one has to take recourse to Section 79 of the said Act, which reads as follows :

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

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

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

36. On a very close reading of Section 79, it clearly transpires that the railway administration may, on the request made by the consignee or endorsee, allow weighment of the consignment, but the first proviso to Section 79 clarifies that

no weighment shall as a general rule, be allowed of goods, which are booked at owner's risk or goods, which are perishable in nature and are likely to lose weight in transit, except in cases where the railway servant, authorized in this behalf, considers it necessary to allow weighment. Though it may be contended, by making use of the language in which Section 79 is worded, that it is only when a railway servant allows weighment that he may have to offer the reasons for the discretion so exercised, but when he refuses to allow the weighment, reasons are not required to be assigned, the fact remains that the first proviso to Section 79 gives a clear indication that though, as a general rule, weighment in respect of the goods described in this proviso are not to be allowed, yet an element of discretion remains still vested with the railway servant concerned to allow weighment of even such a consignment. It is trite that wider the discretion, more restraint and narrower shall be the exercise of such discretion. Thus, while laying down, as a general rule, that no re-weighment of the kinds of goods aforementioned are to be allowed, when a discretion does remain invested in the railway servant concerned to allow re-weighment of even of such a consignment, the respondents must be able to show (when their discretion not to re-weigh is challenged as arbitrary) that in the face of the facts and circumstances of the case, no discretion for re-weighment could have been exercised by the railway servant. If the railways fail to offer any such convincing explanation, the refusal by the railway servant concerned to re-weigh the consignment/goods will have to be treated as arbitrary.

37. In other words, since under the first proviso to Section 79, an element of discretion does rest with the railway servant concerned to re-weigh goods, which are booked at owner's risk, the consequence will be that when omission to exercise the discretion is challenged, the railways must be in a position to satisfy the Court that in the facts and circumstances of the case, the railway servant concerned could not have exercised his discretion to re-weigh the consignment. In the case at hand, however, the railway respondents have not mentioned even a word in their affidavit-in-position to show as to why such a discretion was not exercised by the railway servant concerned; rather, their stand in para 11 of their affidavit-in-opposition appears to be that as per provisions of Section 79, no consignment booked at owner's risk shall be allowed to be re-weighed meaning thereby as if no discretion in favour of re-weighment of goods booked at owner's risk can ever be exercised. This cannot, as already indicated hereinbefore, be treated as a correct interpretation.

38. Coupled with the above, in the light of the language in which Section 79 is couched, it is also worth pointing out that, there may be two contrary contingencies in which a consignee or endorsee may make request for re-weighment, namely, (i) a request for re-weighment may be made by the consignee or endorsee in a case, where re-weighment has already been done by the railways in exercise of their powers u/s 78 and the consignee or endorsee makes a request for re-weighment u/s 79 in order to ascertain if the weight recorded, on such re-weighment u/s 78, is the correct weight and at the same

time, such a request for re-weighment may also be sought for by the consignee or endorsee even when no such re-weighment u/s 78 has been done, but the consignee or endorsee insists or requests for re-weighment before taking delivery of the consignment for the purpose of ascertaining if there has been any loss of weight of the consignment, when it reached the destination. In the latter category of cases, since goods are booked on owner's risk or the same also may be perishable in nature or the same may be of such a nature, which is likely to lose weight in transit, the railways have a little wider discretion in declining to re-weigh such goods on the ground that since goods were booked at owner's risk or were perishable in nature or were likely to lose weight in transit, no re-weighment can be allowed for ascertaining such reduction of weight, if any, but in a case, where the railways have already weighed the consignment u/s 78 and propose to impose penalty on the ground of over-loading and when, in such a situation, the consignee or endorsee makes a request for re-weighment in their presence, the discretion to be exercised u/s 79 gets substantially narrowed down and in such a situation, railways must satisfy, as already indicated above, that for good and justified reasons, the discretion to re-weigh cannot be exercised. In the case at hand, as already indicated above, the railway respondents have not indicated distinctly as to why discretion was not exercised by the railway servant concerned in favour of re-weighment, when the request for re-weighment was made by the petitioner; rather, the stand of the railways is that since the consignment was booked at owner's risk. Section 79 does not allow re-weighment thereof.

39. What has been additionally pleaded by the railway respondents in support of their case is that they did not accede to the request for re-weighment "due to congestion and other operational exigencies." This assertion, in the affidavit, is a bald assertion inasmuch as no relevant material has been stated either in the affidavit or produced before this Court to show that at the point of time, when the request for re-weighment was made by the petitioner, the railway administration was not in a position to allow weighment on the ground of congestion and/or other operational exigencies.

40. Since the affidavit filed on behalf of railways shows that according to them, the goods booked at owner's risk are not to be re-weighed, there is not even a word used in the affidavit to give indication that despite their intention or desire to allow re-weighment, the railways could not, on account of congestion and other operational exigencies, allow re-weighment in the present case. Thus, the plea of congestion and other operational exigencies appears to have been taken by the respondents as a mere excuse for justifying denial of weighment.

41. It is also of immense importance to note that the second proviso to Section 79 clearly lays down that no request for weighment is to be allowed If it is not feasible due to congestion in the yard and such other circumstances as may be prescribed. The respondents appear to have taken resort to this exception merely as an excuse and it is for this reason that adequate materials could not

be placed by the railways in support of their such plea nor have they stated/cited even an iota of material facts in their affidavit-in-opposition to show convincingly that despite their willingness to re-weigh the consignment, as had been sought for by the petitioner, congestion in the railway yards and/or other operational exigencies did not make it possible for them to re-weigh the consignment.

42. It is no more *res integra* that in a writ petition and/or counter-affidavit, if the Facts are not pleaded or the evidence in support of such facts is not annexed to the pleading, the Court will not entertain the point. The Apex Court in *Bharat Singh and Others Vs. State of Haryana and Others*, has held that there is a distinction between pleadings under a writ petition/affidavit and plaint. It has been held that while in a pleading, i.e. a plaint or a written statement, facts and not evidence are required to be pleaded, in a writ petition or counter-affidavit, not only facts but also the evidence in proof of such facts have to be pleaded and annexed thereto. Hence, this Court cannot, in the complete absence of the evidence/material to support the pleadings of the railways that the consignment could not be re-weighed by the railways due to congestion in the railway yards and other operational exigencies, give any credence to such a plea.

43. Apart from the fact that the letter, dated 30-11-1999 i.e. Annexure-VI A (whereby petitioner's request for re-weighment was declined) assigned no reason for not acceding to the request of the petitioner, even the affidavit, in question, does not state the particulars, which could have substantiated the plea of the railway respondents that it was on account of congestion and other operational exigencies that the re-weighment could not be done.

44. What, thus, transpires from the above discussion is that the railways have failed to produce any material particulars to show that it was really on account of congestion in the yard or other operational exigencies that it could not re-weigh the consignment on the request of the petitioner. Hence, this plea of the railways can be given no credence at all.

45. As far as Mr. Sharma's contention that this Court does not have territorial jurisdiction to entertain the writ jurisdiction is concerned, this contention is, in my firm view, wholly unfounded. The initial weighment of the coal, in question, was, admittedly, taken at Ledo, which falls within the territorial jurisdiction of this Court, and the correctness of this weighment has been disputed by the respondents on account of the weight, which is said to have been found on re-weighment of the coal at Laskar weighbridge. The dispute, which has been raised by the petitioner, is the correctness of the weight found at Laskar as well as an assertion that the weight found at Ledo, was the correct one or substantially the correct one. In such a situation, one cannot say that though the correctness of the weight of the coal loaded at Ledo, which falls within this Court's territorial jurisdiction, is in dispute, this Court has no territorial jurisdiction to entertain the controversy, which has arisen in the present case.

46. The contention of Mr. Sharma that the disputed question of facts cannot be,

normally, entertained in a writ petition cannot be doubted and reliance placed in support of this contention by Darshan Kumar and etc. Vs. Union of India (UOI) and Others, and State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd., cannot be disputed.

47. In the case of Bharat Coal Depot etc. (supra), a Division Bench of this Court did not interfere with the interim order directing re-weighment of the goods (as has been done in the present case) by clearly holding that such orders are only provisional, which are subject to the order that may be passed finally and it is in this view of the matter that the Court upheld the interim order passed by this Court in Bharat Coal Depot (supra). I am guided to adopt this view from the following observations made in Bharat Coal Depot :--

"... .The orders passed are only provisional which are subject to alteration or modification on adjudication... Such orders are passed before adjudication for the purpose of averting any alteration in the status quo from taking place until the final adjudication of the case on merits.

The orders of this nature are discretionary in character. The Court is to pass an order on the fact situations. To protect and preserve the subject-matter, numerous aspects are to be taken into consideration as per the accepted principles of administration of justice. The Court at this stage is to find out a workable formula to protect the Interest of the parties. Mainly, the remedy is intended to preserve the status quo.

As alluded earlier, the writ petitions are yet to be adjudicated. There are serious questions of facts as well as law which are to be adjudicated and by expressing view at this stage on merits, we did not like to embarrass the learned single Judges.

.....The carrier however, is statutorily protected with the right to re-weigh, but when the consignor express his doubts on the result of the re-weighment at the weigh bridge, there is clothing unfair when one permits for re-weighment...

On the basis of the materials those are made available before us, we cannot discredit the Laskar Weigh Bridge as being unworthy. At the same time, we also cannot at this stage ignore the apprehension of the writ petitioners about the re-weighment made at Laskar. To avoid any misgiving of the parties, we are also of the view that a fresh weighment be made by the Railways at Laskar Weigh Bridge. To rule out the apprehension of the parties about the accuracy of the Laskar Weigh Bridge, we direct the respondents to cause effective testing of the Laskar Weigh Bridge through competent persons not inferior in rank to that of the Weigh Bridge Inspector of Technical Department under supervision of a higher officer and make necessary adjustment, if need be. On completion of the testing and adjustment, the officer concerned shall certify the same and furnish copies of the same to the writ petitioners. The respondents shall, thereafter, undertake re-weighment at Laskar in presence of the representatives of the Mechanical Department and Commercial Department with information to the

petitioners. The petitioners are also directed to report to the Station Master through its authorised agent(s) for the needful and extend necessary co-operation and assistance for undertaking the re-weighment. Re-weighment shall be made at the cost of the writ petitioners. In the event, the Railway authorities find it operationally inconvenient to make the re-weighment at Laskar by bringing the rakes back to Laskar, the respondents shall abide by the condition No. 2 as per order of the learned single Judge and make re-weighment at the nearest Govt. approved Weigh Bridge as per choice of the respondent No. 10 in the writ petition. On completion of re-weighment, if any excess load is found, the appellants shall take steps for realization of its dues on the excess load along with the penalty as per law."

48. As far as Mr. Sahewalla's reliance on the case of M/s. Bharat Coal Depots, etc. (supra) is concerned, it may be pointed out that there can be no dispute that a writ Court can direct re-weighment as an interim measure as has been done in the present case. What is, however, of immense importance to note is that how far the weight found pursuant to the power of re-weighment ordered by the Court can be said to be binding on the parties concerned has not been answered in M/s. Bharat Coal Depot, etc. (supra).

49. It is worth noticing that Kamrup Forwarding Agency (1997 (2) Gau LT 106) (supra) too does not lay down as to which weight is to be regarded as correct. This is so, for, in order to impose penalty on the ground of over-loading, the railways must be able to satisfy the Court that the weight, which has been found on the re-weighment en-route is the correct one.

50. Though in exercise of powers under Article 226 of the Constitution of India, disputed questions of fact are not entered into by the High Court and in order to exercise writ jurisdiction, the pleadings of the parties should be considered, yet the fact remains that pleading does not merely mean conclusions, it also means statement of facts; and hence, in the absence of any facts pleaded, mere conclusion of the railways that it was congestion and other operational exigencies, which made them decline the request of the petitioner for re-weighment can be given no importance or credence at all. Viewed from this angle, the refusal to re-weigh the consignment by the railways was nothing but arbitrary and in this view of the matter, the letter dated 30-11-99 (Annexure VI-A to the writ petition) aforementioned, whereby the railway declined the petitioner's request for re-weighment, cannot be allowed to stand good on record. In other words, in the case at hand, in the face of complete absence of any reasonable cause by the railways to re-weigh the coal, this Court, as the records reveal, acted within the ambits of its jurisdiction under Article 226, when it directed the respondents, as an interim measure, to re-weigh the coal.

51. In view of the fact that I am satisfied that in the present case, this Court does have the power to issue writ of mandamus directing the respondents to re-weigh the Coal, no illegality was, in my firm view, committed by this Court, when it passed the interim order, dated 6-12-99, aforementioned directing re-

weighment of the Coal.

52. The question, now, is as to what will be the consequence of the weight of the Coal, which has been found after the re-weighment was ordered by this Court on 6-12-99. There are, undoubtedly, three different weights of the Coal placed before this Court. The question as to whether which of the three weights of the Coal is the correct one is really a question of fact, which this Court, sitting as a writ Court, will not enter into. However, for their insistence on payment of penalty by the petitioner on the basis of the weights taken by them behind the back of the petitioner at Laskar Weigh Bridge, the railway respondents must be able to show that it is the second weight, taken u/s 78, which is the correct one and not the one taken pursuant to the interim directions of this Court or the weight recorded at Ledo.

53. In view of the fact that since after the Coal left its destination at Ledo, it remained in the custody of the railways, it is really for the railways to explain the reduction in the weight, which has been found, when the Coal was weighed in the presence of the petitioner on the interim directions passed by this Court. In the absence of any explanation showing that the second weight of the Coal taken u/s 78 was the correct one, the railway respondents cannot insist on payment of penalty on the basis of such weight. To this extent, the insistence of the railway respondents by its letter, dated 30-11-99 (Annexure VIA to the writ petition) aforementioned is nothing but arbitrary and has no legal foundation. Such an imposition of penalty, if allowed to stand good on record, will, undoubtedly, cause serious miscarriage of justice.

54. What crystallizes from the above discussion is that the respondents imposed penalty vide impugned letter dated 30-11-99 (Annexure VI-A to the writ petition) aforementioned without taking into consideration the weight, which has been found following the interim directions passed by this Court vide its order, dated 6-11-99, aforementioned.

55. In view of the above, the railway respondents are, now, required to take into consideration the weight of the Coal found on the interim directions of this Court and upon considering the matter in its entirety, the respondents concerned shall be at liberty to come to its own just and proper decision.

56. In the result and for the reasons discussed above, this writ petition partly succeeds. The impugned letter, dated 30-11-99 (Annexure VI-A to the writ petition) whereby the railway respondents declined petitioner's request for re-weighment is hereby set aside and quashed and in consequence thereof, the letter dated 30-11-99 (Annexure VIA to the writ petition) aforementioned to the extent that the same imposes penalty on the petitioner shall accordingly stand set aside and quashed. This does not mean, I must hasten to add, that the respondents will not be able to recover any penalty for over-loading of Coal at Ledo, if the facts and circumstances so justify. The respondents are, therefore, left at liberty to take a decision in respect of imposition of penalty on the

petitioner by taking into account the weight of the Coal, which has been found on re-weighment following directions of this Court, and, upon taking into consideration the facts, so directed, whatever decision is reached by the respondents, the same shall be communicated, in writing, to the petitioner. Lest taking of the decision involves inordinate delay, the respondents need to be directed to complete the whole exercise, as directed hereinabove, within a given time-frame. Till such time that the dispute with regard to correctness of the weight and/or imposition of penalty is finally settled either by the parties concerned or decided by a Court of competent jurisdiction, the Bank Guarantee, which has been submitted by the petitioner, cannot be released. However, in order to ensure expeditious disposal of the controversy/dispute, the railway respondents are directed to complete the entire exercise, so directed, within a period of one month from today.

57. No order as to costs.