
(2013) 01 CAL CK 0003
In the Calcutta High Court
Case No : Writ Petition No. 56 of 2010

Pradip Kumar Shah

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 22-01-2013

Acts Referred:

Railways Act, 1989 — Section 78, 79

Citation : (2013) 3 ACC 864 : AIR 2013 Cal 132

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Ramesh Kr. Chowdhury, for the Appellant; Krisana Das Poddar, for the Respondent

Judgement

Soumen Sen, J.—The petitioner despatched salt in 59 box wagons to Kolkata by railway under four railway receipts being dated 16th November, 2009. All the four consignees re-endorsed the said railway receipts in favour of the petitioner. The petitioner, from time to time enquired from the railway authorities regarding arrival of the consignments. In or about 21st November, 2009, the petitioner was surprised to learn that on the basis of a purported weighment of the said 59 wagon during movement at Waria Station, the respondent found that there has been mis-declaration as to weight and found that the contents are having an excess weight of 161.79 MT. On the basis of such excess weight, a demand for under charge amounting to Rs. 11,92,233/- was raised.

2. The petitioner did not accept the said demand of the railway authorities and instead requested the authorities concerned to re-weigh the same in the presence of the petitioner. The respondent authorities refused to re-weigh the same and instead after permitting the petitioner to take delivery of 44 boxes illegally detained delivery of 15 boxes to realise the said amount by selling the same in a public auction. This has resulted in filing of the present writ application.

3. Mr. Ramesh Chowdhury, learned advocate for the petitioner submits that once the petitioner raised a dispute with regard to the weighment the railway

authorities are duty bound to reweigh the said consignment in presence of the petitioner. That the said weighment at Waria Station was done without notice to the petitioner is not in dispute. It is argued that no demand could be raised on the basis of such unilateral weighment of the consignment, Mr. Chowdhury relied upon the following decisions for the proposition that in the event the railway authorities are required to weigh the same they can only do so after giving adequate notice and in presence of the petitioner.

(1) Unreported decision in WP No. 2756 of 2000 (Binod Kumar Agarwal v. Union of India & Ors.) decided on September 14, 2012.

(2) Unreported decision in APO No. 241 of 2009 and WP No. 358 of 2006 (Union of India and Ors. v. Ultra Tech Cement Limited and Another) decided on January 27, 2010.

(3) Union of India (UOI) and Others Vs. Agarwala and Co. and Another,

4. In Binod Kumar Agarwal (supra), the petitioner contended that iodized salt (goods) was carried by the Railways from Newa City, Rajasthan to Ranigunge, West Bengal. At the loading point, the goods were weighed and on the basis of such weighment, the railway receipt was issued. The goods was to reach Ranigunge and prior thereto at Andal the goods were re-weighed. There was no dispute with regard to re-weighment but it was contended that in case such re-weighment is to be effected, the same should have been done in the presence of the petitioner. It was only when the goods reached the unloading point at Ranigunge, the railway authorities raised demand for excess loading for the first time. The respondent contended that such re-weighment was effected u/s 78 of the Railways Act, 1989. As iodized salt was a perishable item, upon payment of the alleged charges, the goods were taken delivery of and thereafter, the representation was considered by the adjudicating authority when the railway authorities wanted to justify these acts and conduct by referring to Section 78 of the 1989 Act to reweigh the consignment at any point between the loading and unloading points and it was thus contended that the re-weighment was effected at Andal where an electronic weigh bridge exists.

5. The learned single Judge, in considering Section 78 of the 1989 Act observed as follows:--

While re-weighment is permitted and while Section 78 of the 1989 Act is silent with regard to such re-weighment being effected either in the presence of the parties or in their absence, the principles of natural justice warrant that such re-weighment be done in the presence of the parties, more so as the Railways are statutory authorities and each of their acts must be guided by fairness and must be transparent. At the unloading point when sums were demanded from the petitioner, an objection was raised and re-weighment was once again sought u/s 79 of the 1989 Act. Such re-weighment under the 1989 Act is mandatory as it cannot be left to the discretion of the Railway authorities who seek to levy charges for an excess load which has been found by them unilaterally.

Admittedly, this was not allowed. This again is in violation of the principles of natural justice. The representation made by the petitioner was considered by the adjudicating authority and while doing so a method has been evolved for calculating undercharges treating the instant case as a special case. There was no reason for treating the petitioner's case as a very special case or a special case and the method on the basis of which the charges are to be calculated is as per Clause (g) of the order dated 30th June, 2000. The methodology mentioned in Clause (g) does not find place either under the 1989 Act or the manual published. Therefore, the basis of such calculation is unknown. Admittedly, at the time of loading the said goods, the goods were weighed and the same finds mention in the Railway receipt which is an exercise to be undertaken mandatorily u/s 65 of the 1989 Act. This having been done, there was no reason for re-weighment being effected unilaterally or non-acceptance of the figures mentioned in the Railway receipt. In fact, in *Agarwala and Co. and Others Vs. Union of India (UOI) and Others*, an identical issue came for consideration and it was held, relying on the case of AIR 1936 253 (Privy Council) that it is settled law that under a statute when a power is given to do certain things in a certain way, it must be done in that way and in no other way. The appeal filed from the case reported in *Agarwala and Co. and Others Vs. Union of India (UOI) and Others*, was dismissed. Therein it was categorically mentioned that as per paragraph 1451 of the manual, Railway receipt should not be granted till the goods are correctly examined and weighed and the loading has been completed to the satisfaction of the Railways. Therefore, re-weighment of the consignment in the presence of the representatives of the parties concerned was essential and in its absence the amount levied on the ground of overloading cannot be sustained in the eye of law. As the basis of the method evolved by the adjudicating authority for levy of undercharges is unknown, the order dated 30th June, 2000 cannot be sustained in the eye of law and is, accordingly, set aside. The respondents are directed to refund the balance sum realized on account of undercharges within four weeks from the date of receipt of this order.

6. In *Union of India and Others v. Ultra Tech (supra)*, a Division Bench of this Hon'ble Court while upholding the order of the learned single Judge made the following observation:--

We are in full agreement with His Lordship and we do not find any scope of interference. Section 73 did empower the Railways to charge penalty on overloading. The Railways would have to do it before the delivery so that the consignor and/or the consignee, as the case may be, could demand re-weighment in terms of Section 79 to refute such charge. Such opportunity was not given to Ultra Tech Cement Ltd. in the instant case.

7. In that case it was found that the Railways contended that they got an information from their Supervisor that some of the wagons were overloaded. However, the railway authorities permitted them to unload the goods and after the said goods were unloaded by the consignee a claim was made on account of

overloading.

8. However, the Hon"ble Division Bench found that the Railway failed to disclose any reason for short delivery and having permitted the writ petitioner to remove the goods without any allegations of overloading and thereby acted illegally in demanding the penal charge for overloading after one week from the date of removing the goods.

9. In order to appreciate the point involved in this writ petition, it would be useful to refer to the following provisions of the Railways Act and the Railways manual:--

65. Railway receipt-(1) A railway administration shall, (a) in a case where the goods are to be loaded by a person entrusting such goods, on the completion of such loading; or (b) in any other case, on the acceptance of the goods by it, issue a Railway receipt in such form as may be specified by the Central Government. (2) A Railway receipt shall be prima facie evidence of the weight and the number of packages stated therein: provided that in the case of a consignment in wagon-load or train-load and the weight or the number of packages is not checked by a Railway servant authorised in this behalf, and a statement to that effect is recorded in such railway receipt by him, the burden of proving the weight or as the case may be, the number of packages stated therein, shall lie on the consignor, the consignee or the endorsee.

72. Maximum carrying capacity for wagons and trucks.-(1) The gross weight of every wagon or truck bearing on the axles when the wagon or truck is loaded to its maximum carrying capacity shall not exceed such limit as may be fixed by the Central Government for the class of axle under the wagon or truck. (2) Subject to the limit fixed under sub-section (1), every Railway administration shall determine the normal carrying capacity for every wagon or truck in its possession and shall exhibit in works and figures the normal carrying capacity so determined in a conspicuous manner on the outside of every such wagon or truck. (3) Every person owning a wagon or truck which passes over a Railway shall determine and exhibit the normal carrying capacity for the wagon or truck in the manner specified in sub-section (2). (4) Notwithstanding anything contained in sub-section (2) or sub-section (3), where a Railway administration considers it necessary or expedient so to do in respect of any wagon or truck carrying any specified class or goods or any class or wagons or trucks of any specified type, it may vary the normal carrying capacity for such wagon or truck or such class of wagons or trucks and subject to such conditions as it may think fit to impose, determine for the wagon or truck or class of wagons or trucks such carrying capacity as may be specified in the notification and it shall not be necessary to exhibit the words and figures representing the carrying capacity so determined on the outside of such wagon or truck or such class of wagons or trucks.

73. Punitive charge for over-loading a wagon. Where a person loads goods in a

wagon beyond its permissible carrying capacity as exhibited under sub-section (2) or sub-section (3), or notified under sub-section (4) of Section 72, a Railway administration may, in addition to the freight and other charges, recover from the consignor, the consignee or the endorsee, as the case may be, charges by way of penalty at such rates, as may be proscribed, before the delivery of the goods: provided that it shall be lawful for the Railway administration to unload the goods loaded beyond the capacity of the wagon, if detected at the forwarding station or at any place before the destination station and to recover the cost of such unloading and any charge for the detention of any wagon on this account.

73. Passing of property in the goods covered by Railway receipt. The property in the consignment covered by a Railway receipt shall pass to the consignee or the endorsee, as the case may be, on the delivery of such railway receipt to him and he shall have all the rights and liabilities of the consignor.

78. Power to measure, weigh, etc.--Notwithstanding anything contained in the Railway receipt, the Railway administration may, before the delivery of the consignment, have the right to (i) re-measure, re-weigh or reclassify any consignment; (ii) re-calculate the freight and other charges; and (iii) correct any other error or collect any amount that may have been omitted to be charged.

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 authorised 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 of 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. Regulation.

1424. (a) At weighbridge stations, where the wagons are required to be weighed, the Station masters should ensure that such weighment is done and that the wagons are not pushed on without weighment. (b) The result of weighment should be recorded in the weighment registers in Form Com./w-4, which should be written in duplicate by carbon process, separately for local and through traffic. The pencil copy of the register should be retained as station record and the carbon copy submitted monthly to the traffic Accounts Office along with the returns. (a) The result of weighment should also be recorded by the weighbridge station staff on the wagon labels and invoices. The latter should, after being stamped with the name of the weighbridge station, be sent forward to the destination for accountal (sic) and recovery of charges due.

1425. In addition, a separate telegraphic advice of the net weight found on weighment should be sent, together with the booking particulars, to the

forwarding and destination stations and to the Traffic accounts Office of the destination station. The destination station should, in all cases, paste the telegraphic weightment advice on the relevant page of the delivery book, the result of weightment, as also the particulars of the weightment advice, being recorded against the connected entry in the delivery book.

1426. Stations unable to weigh consignments due to weighing machine being out of order.--Where consignments, referred to in paras 1422(a)(i) and (ii)(1) cannot be weighed at the forwarding station, owing either to the absence of a weighing machine or to its having gone out of order, the weightment should be done by the destination station in accordance with the instructions contained in these paras. A suitable remark should be given on the invoice and Railway receipt, by the forwarding stations thus:--"weighing machine out of order. Consignment to be weighted at destination."

1442. Preparation of invoices.--(a) After the goods have been carefully checked, counted, weighed and examined as to compliance of the packing condition, etc. and freight and other charges have been calculated and entered in the forwarding note, invoices should be prepared, (b) The invoice form contains separate columns/boxes for most of the information required to be entered therein, viz., chargeable distance, handled by wagon owner and number, type of wagon, carrying capacity/area, tare, total number of the wagons loaded, forwarding note number, risk rate, invoice number, date, station from with (numerical code) and to, charged via, carried via, name and address of the sender and consigned, number, description, marks, measurement, actual weight and charged weight of packages, class of rate chargeable, rate per quintal, freight charges, other charges total to-pay/paid and remarks regarding defective condition of packing/consignment. Columns for receding undercharges and overcharges detected at destination station have also been provided in the form. Any further particulars, required to be recorded on the invoice, affecting the rate or condition of carriage, viz., particulars of permit, pass or licence under which the consignment is booked, the remarks recorded by the sender on the forwarding note regarding election of route, election of Railway risk, when an alternative owner's risk rate exists, or for dispatch of the consignment in an open wagon instead of a covered wagon, etc., should be entered in the space available on the invoice. The particulars of credit note, if any, tendered in lieu of freight charges, should also be recorded on the invoice.

10. In the instant case it is not the contention of the railway authorities that the goods were loaded at Newa City, Rajasthan, not under the supervision of the railway staff but it was recorded that the sender's weight was accepted. On way to the destination at Waria, such consignments were re-weighed when the railway authorities found that there was excess weight. The petitioner on being informed immediately demanded re-weightment. When re-weightment of the consignment in the presence of the representative of the parties are demanded and the railway authorities refused to do so there is no scope of claiming punitive

charges on the alleged charge of over-loading. This was also the view of the Division Bench in Union of India (supra). When the demand was made for re-weighment it was obligatory on the part of the Railway Authority to immediately re-weigh the said consignments instead of compelling the writ petitioner to accept the part of the consignment and retain the balance to claim hen over the same.

11. The learned counsel for the Railway Authorities submitted that the petitioner having lifted 44 boxes cannot challenge the demand as much as it was made clear that the said consignment is at the owner's risk.

12. The petitioner was allowed to leave 44 boxes without payment of any under charge. The clause owner's risk does not mean that when a demand is made on account of excess weight and the consignee disputes such weightment and demands re-weighment in presence of the railway authorities, the railway authorities cannot deny the petitioner the right to have the said containers weighed in the presence of the petitioner. The principles of natural justice and fair play demands that before such a claim can be raised and demanded, if such prayer for re-weighment is made within a reasonable time from the date of demand, the said authorities should allow such re-weighment in the presence of the petitioner.

13. The decision of the railway authorities visits the petitioner with civil and penal consequences and in view thereof it is obligatory on the part of the railway authorities, under such facts and circumstances, to have the said consignment reweighed in presence of the petitioner.

14. The railway authorities, pursuant to the order of this Court, reweighed the said consignment when variations have been noticed in respect of each of the said boxes. The variations as recorded in the said chart is in favour of the petitioner. The railway authorities submit that such variations occurred due to the passage of time. The petitioner cannot be held responsible for the same.

15. The railway authorities ought not to have reweighed the said consignment without the notice to the consignee and in any event when a demand was made for re-weighment they should not have deferred the matter. The principal of natural justice demands that re-weighment should have been done in presence of the petitioner.

16. In view thereof, the demand made by the railway authorities is set aside. The railway authorities are directed to refund the amount deposited by the petitioner in terms of this order within a period of two weeks from the date of communication of this order. Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.