

**(2014) 09 CAL CK 0111**  
**In the Calcutta High Court**

**Case No :** Writ Petition No. 14656 (W) of 2011 (C.A.N. 1192 of 2013)

Rashmi Metaliks Limited

APPELLANT

Vs

Union of India

RESPONDENT

**Date of Decision :** 29-09-2014

**Acts Referred:**

Railways Act, 1989 — Section 30, 30(2), 31, 54, 70  
Railways Board Act, 1905 — Section 2

**Citation :** (2014) 09 CAL CK 0111

**Hon'ble Judges :** Aniruddha Bose, J

**Bench :** Single Bench

**Advocate :** Saktinath Mukherjee, Senior Advocate, Pradip Kumar Tarafder, Kishore Dutta, Bhaskar Banerjee, Joydip Sen, Sambuddha Dutta, Debjit Mukherjee, Asim Kumar Kundu and Joydeep Mukherjee, Advocate for the Appellant; K.P. Pathak, Additional Solicitor General, Ashok Kumar Chakraborty, Senior Advocate, Somnath Bose, Asish Kumar Roy, Dipanjan Dutta, Raj Sekhar Basu, Saptarshi Roy, Sujata Mukherjee, Rajendra Chaturbedi and Swapan Banerjee, Advocate for the Respondent

## **Judgement**

Aniruddha Bose, J.—In the year 2008, a new rate system was adopted by the Railway authorities for transportation of iron ore, in the Rates Circular No. 24 of 2008, issued on 12 May 2008. It was provided, inter alia, in this Rates Circular:-

"4. The classification of Iron Ore destined for domestic consumption is Class 170.

Accordingly following footnote should be inserted below the Commodity Head "Mines and Ores" at S. No. 13 of the IRCA Goods Tariff No. 45 Pt. I (Vol. 11)

Iron Ore Domestic will be charged at Class-170 and Iron Ore for other than domestic consumption will be charged at Class-200X"

The same Circular also laid down certain conditions which were to be fulfilled for availing the rate specified for "Iron ore Domestic", which was to be charged as per class 170. "Iron Ore for other than domestic consumption", carried a much higher freight rate. There has been subsequent variation of the conditions and

also manner of classification of the said item in two successive Rate Circulars, No. 30 of 2008 and 36 of 2009. I shall refer to these circulars later in this judgment.

2. Such freight rates are fixed in relation to individual commodities in terms of Sections 30 and 31 of the Railways act, 1989 (the 1989 Act), which provides:-

"30. Power to fix rates.

(1) The Central Government may, from time to time, by general or special order fix, for the carriage of passengers and goods, rates for the whole or any part of the railway and different rates may be fixed for different classes of goods and specify in such order the conditions subject to which such rates shall apply.

(2) The Central Government may, by a like order, fix the rates of any other charges incidental to or connected with such carriage including demurrage and wharfage for the whole or any part of the railway and specify in the order the conditions subject to Which such rates shall apply.

31. Power to classify commodities or alter rates. The Central Government shall have power to-

(a) classify or reclassify any commodity for the purpose of determining the rates to be charged for the carriage of such commodities; and

(b) increase or reduce the class rates and other charges."

3. These Rates Circulars have been issued by the Railway Board constituted under the provisions of the Indian Railway Board Act, 1905 (the 1905 Act). The power of the Central Government in terms of Sections 30 and 31 of the 1989 Act has been vested in the Railway Board by a Statutory Order bearing No. 990 issued on 31 March, 1999 under Section 2 of the 1905 Act. A copy of the said notification as also the copy of the Rates Circular No. 24 of 2008 have been produced before this Court on behalf of the first respondent in course of hearing.

4. The Rates Circular No. 30 of 2008, which had been issued replacing Rates Circular No. 24 was subsequently superseded by the Rates Circular no. 36 of 2009, by the Railway Board under memorandum No. TCR/1078/2007/3 dated 1 June 2009. As per this circular, Iron Ore was to be charged at the rate specified against class 180. This Circular in substance raised the freight rate for iron ore. The same Circular also introduced a distance based charge, applying a progressive rate-reduction method, postulating lower charge for longer distance. Iron Ore meant for domestic consumption, however, was to be charged at a flat rate as per class 180, subject to fulfilment of certain conditions specified therein. So far as the present proceeding is concerned, Rates Circular No. 36 of 2009 is relevant and this Circular stipulates:-

"RATES CIRCULAR NO. 36 OF 2009

GOVERNMENT OF INDIA (BHARA T SARKAR) MINISTRY OF RAILWAYS (RAIL

MANTRALAYA) RAILWAY BOARD

No. TCR/1078/2007/3. New Delhi,

dated 01.06.2009

The Chief Commercial Managers,

All Indian Railways.

Sub: Classification of Iron Ore

In supersession of Rates Circular no. 24 & 30 of 2008 and 25 & 34 of 2009,

Sanction of the Central Government is hereby accorded to the following.

1. Iron Ore will be charged at Class 180 for train load movement. Besides, following

Distance Based Charge will be levied on this traffic.

The aforesaid Charge will be leviable on base freight rate mentioned in the Goods Tariff and shall form part of Normal Tariff Rate (NTR).

In certain cases the NTR for a particular distance may become less than that for the lower distance. In order to ensure that the NTR per tonne over longer lead is not less than the NTR per tonne over shorter lead, NTR for each distance slab should not be less than the highest NTR in the lower slab.

2. Notwithstanding Para 1 above, traffic of Iron Ore meant for domestic consumption for manufacture of Iron and Steel as well as Cement will be charged at Class 180 without levy of Distance Based Charge prescribed in Para 1 above, subject to fulfillment of conditions laid down in Para 3 of this circular.

3. Following conditions must be complied with while booking as well as while granting delivery of Iron Ore traffic for domestic consumption in terms of Para 2 above.

(A) Iron ore traffic booked to private sidings (including assisted sidings) of Iron and Steel manufacturing Units (including integrated steel plants and mini steel plants etc) and Cement Units: Following procedure will be followed for registration of indents and issue of Railway Receipts, submission of documents and effecting delivery.

I. "One Time" submission of documents

Certified copies of documents as prescribed below should be submitted by the manufacturing unit (consignee) to the Senior Divisional Commercial Manager of the division in which the loading takes place.

a) Industrial Entrepreneur Memorandum (IEM) or certificate from Joint Plant Committee under Ministry of Steel indicating the licensed capacity of the plant or a copy of the Memorandum of Understanding (MOU) between the Plant and the

associated Ministry (in case of Public Sector Undertakings only);

b) Consent For Operation (CFO) from Pollution Control Board for the current financial year or a copy of the application addressed to the concerned PCB for renewal of CFO for the current year duly acknowledged by the PCB together with a CFO for any of the preceding years not more than three years old;

c) Factory license for the current financial year or copy of the application addressed to the Inspector of Factories of the concerned state government duly acknowledged by the addressee together with a copy of the factory license for any of the preceding years not more than three years old;

d) Certificate of registration under Contract Labor Act or an affidavit under oath certifying that this registration is not legally required to be done by the unit under the provisions of the Contract Labor Act.

e) Central Excise Registration Certificate

f) Monthly Excise Return for the month prior to the current month.

## II Periodic Submission" of documents

Certified copies of following documents should be submitted by the manufacturing unit (consignee) to the Senior Divisional Commercial Manager of the division in which the loading takes place.

a) The company will need to submit copies of the relevant Monthly Excise Returns on a quarterly basis. In case of new plants not having any earlier monthly excise return, the unit should furnish a certificate from the excise department mentioning non-commencement of production in lieu of the monthly excise return.

b) Failure in submission of any of the prescribed excise related document will result in summary disqualification from eligibility under Para 3(A).

## III Submission of Affidavits

The manufacturing unit will be required to submit an affidavit (only once together with the documents submitted "one Time") on non-judicial stamp paper of Rs. 100/- in the format given below certifying that only iron ore for domestic consumption will be received in their siding.

"It is certified under oath that all consignments of iron ore received at-----siding is meant for domestic consumption at the manufacturing unit-----located at-----with Factory registration no-----and Cenvat no----- . It is also certified that the iron ore received at-----will not be exported out of India under any circumstances. However, if at any stage, Iron Ore received at this siding is intended to be used wholly or partially for export purposes, the company undertakes to advise the concerned Senior Divisional Commercial Manager well in time before receipt of such consignment in their siding."

#### IV Issue of Railway Receipt

Railway receipt will be issued only in the name the consignee in respect of whom the prescribed documents have been submitted by the consignor to Railways under provisions of Para 3(A). Delivery of such consignments will only be made to the consignee mentioned on the railway receipt. Non conformity with these conditions will result in charging freight at Class 180 plus Distance Based Charge and recovery of undercharges will be made.

V Procedure for manufacturing units receiving iron ore for domestic consumption as well as for export

On receipt of an advice as prescribed in the text of the affidavit in Para 3(A) III that Iron ore booked to such sidings is to be used wholly or partially for export, provisions of Para 3(B) will apply for each rake booked thereafter.

#### VI Submission of Indemnity Note

The consignee must also furnish a stamped indemnity note (only once together with the documents submitted "one Time") to indemnify the railway against misdeclaration of export iron ore as domestic iron ore for non payment of Distance Based Charge or any other misuse of rules prescribed by Railways from time to time.

(B) Iron ore traffic booked to terminals other than private sidings (including assisted sidings) of Iron and Steel manufacturing Units as well as Cement Units: Following procedure will be followed for registration of indents and issue of Railway Receipts, submission of documents and effecting delivery for each rake independently. It may be noted that no "One Time" submission of documents is permitted in this category of traffic.

#### I Registration of Indents;

(a) At the time of registration of each indent, consignor will make an endorsement in the forwarding note declaring that the consignment is meant for domestic consumption within India.

(b) At the time of registration of each indent, consignor will furnish certified copies of all the documents mentioned in Para 3(A) I as well as a copy of the Monthly Excise Return for the month prior to the current month for each rake. These documents should be submitted by the consignor on behalf of the consignee.

(c) Conditions (a) and (b) above will also be required to be fulfilled by consignors whose indents have already been registered.

II Submission of Affidavit by consignor before issue of Railway Receipt  
Consignors will give an affidavit on non-judicial stamp paper of Rs. 100/- which should inter alia include the following averment.

"It is certified under oath that the consignments of iron ore registered under

Indent No----dated-----, invoice no--and RR no-----at-----Goods Shed/siding and loaded on date---in wagon nos.-----is meant for domestic consumption at the manufacturing unit-----located at-----with Factory registration no-----and Cenvat no-----It is also certified that this consignment is not meant for export out of India and this consignment will not be exported out of India under any circumstances."

### III Submission of Affidavit by consignee before taking delivery

After arrival of the consignment at the destination terminal, consignee will be given delivery of the consignment only after he furnishes an affidavit on non-judicial stamp paper (for each rake) which should inter alia include the following averments.

"It is certified under oath that the consignments of iron ore received on date----with RR no----in wagon nos.-----at-----Goods shed/siding is meant for domestic consumption at the manufacturing unit-----located at-----with Factory registration no-----and Cenvat no-----It is also certified that this consignment is not meant for export out of India and this consignment will not be exported out of India under any circumstances."

### IV Issue of Railway Receipt

Railway receipt will be issued only in the name the consignee in respect of whom the prescribed documents have been submitted by the consignor to Railways under provisions of Para 3(B). Delivery of such consignments will only be made to the consignee mentioned on the railway receipt. Non conformity with these conditions will result in charging freight at Class 180 plus Distance Based Charge and recovery of undercharges will be made.

### V Furnishing of Indemnity Note by consignee

The consignee must also furnish a stamped indemnity note to indemnify the railway against mis-declaration of export iron ore as domestic iron ore for non payment of Distance Based Charge or any other misuse of rules prescribed by Railways from time to time.

### 4. Other Conditions

a) Under provisions of Para 3, railway receipt will be issued only in the name of the consignee in respect of whom the prescribed documents have been submitted by the consignor to Railways.

b) Delivery of such consignments will only be made to the consignee mentioned on the railway receipt.

c) If conditions at 4(a) and (b) above are not complied with, freight will be realized at Class 180 plus Distance Based Charge, by raising undercharges wherever necessary. CGS of destination terminal must keep a close watch on compliance of these instructions.

## 5. Pelletization Unit

Pelletization units receiving iron ore in their private or assisted sidings for conversion into iron ore pellets for domestic consumption of iron and steel manufacturing plants will be treated at par with steel manufacturing units. However, they will need to comply with provisions of Para 3(B) for availing freight rates as prescribed in Para 2.

The Iron Ore Pellets for export as well as Iron Ore moved for such pelletization (for export) will be charged at Class 180 along with levy of Distance Based Charge.

6. If at any stage, it is detected that the endorsement of Forwarding Note and/or the affidavit furnished under the provisions of Para 3 was false, inaccurate or misleading, penalty for mis-declaration shall be imposed as per extant instructions. In addition, such consignors and consignees will be blacklisted for a period of three years for transport of iron ore from any terminal of Indian Railways. Railway may also take recourse to further legal action in such cases.

7. Only such Iron Ore traffic as fulfills the conditions for treating it as domestic in terms of the provisions of Para 3 above will be entitled to rates for domestic traffic i.e. Class-180. All other traffic of Iron Ore will be charged at Class 180 plus Distance Based Charge as per para 1 above.

8. Some of Iron & Steel manufacturing units get iron ore lumps from the mining area to their units and dispatch the left over/residual iron ore fines for export. In this case, the incoming material will be charged at Class 180 subject to fulfilment of conditions mentioned in Para 3 above. The outward movement of iron ore fines from such units will be charged at Class 180 along with levy of Distance Based Charge.

9. The Iron Ore traffic booked at Class 180 without levy of Distance Based Charge will not be rebooked/diverted at Party's request.

10. This issues with the concurrence of the Finance Directorate of the Ministry of Railways.

11. These instructions will come into force with effect from 06.06.2009 and will remain valid upto 05.9.2009.

12. Issue necessary instructions to all concerned. Monthly appreciation reports should positively be furnished by 7th of following month."

5. The petitioners are manufacturers of various products in respect of which iron ore is used as raw material. The first petitioner is an incorporated company, whereas the second petitioner is a Director thereof. They have an integrated steel plant at Gokulpur in the district of Paschim Medinipur and they claim to bring iron ore to their unit in the form of lumps and fines from different mines situated in the States of Jharkhand and Orissa. The petitioners also claim to be exporters of iron ore fines, which, it is submitted, are sent directly from the

mines. Large portion of raw material of the petitioners, i.e. iron ore are transported through railways. From a flowchart Annexed as "P2" to the writ petition, it appears that the iron ore which the petitioners procure from the mines are all transported through the railways. In this writ petition, the petitioners primarily question the legality of certain steps taken against them on the allegation of evasion of freight charges. The basic allegation against them is that for the period between May 2008 and March 2010 they have transported iron ore which were not meant for domestic consumption availing the lower freight rate specified for "iron ore domestic." There are similar allegations against the petitioners for later period also, but for adjudication of this writ petition, it is not necessary to refer to those allegations in detail.

6. The Railways had formulated a "Wagon Investment Scheme", giving special privilege to the investors in the said scheme in terms of availability of rakes. As per that scheme, an investor is required to purchase at his own cost rakes of wagons which are to be handed over to the railways to be absorbed in their common pool of wagons. The investor, in turn, becomes entitled to guaranteed supply of specified number of rakes per month along with ten per cent rebate in freight for a period of ten years. In addition, there are certain other incentives for an investor under the said scheme. After completion of ten years, the rakes become property of the railways. The petitioners claim to have made investment for five rakes under the said scheme and an agreement was entered into between the petitioners and the East Coast Railway as per the said scheme on 30 May 2007. So far as this writ petition is concerned, the significance of the said scheme is that the petitioners want the wagons to which they became entitled to use under that scheme to be kept outside the scope of penal measures which the Railway Administration have sought to impose upon them.

7. The petitioners at all material times have been transporting large quantity of iron ore paying the freight charges meant for domestic consumption, utilizing, inter alia, the benefits of Wagon Investment Scheme. The petitioners appear to have certain complaint about the benefits extended to them under the said scheme, but for the purpose of this proceeding, these complaints are not of much relevance. On the allegations to which I have referred to earlier, on 16 August 2011 the petitioners were issued a notice requiring them to make payment of Rs. 666,00,08790/- (Rupees Six Hundred Sixty Crores Eight Thousand Seven Hundred and Ninety Rupees only), which was to be deposited within ten days. This demand was made on the allegation that between May 2008 and March 2009, the petitioners had transported 8,72,031.95 tonnes and for the period between April 2009 and March 2010, 9,67,581.15 tonnes of iron ore for "domestic use" at their plant but substantial portion of such iron ore had neither been used for domestic production nor reflected in their inventory. From this notice, it appears that the Railways had arrived at such figure from information collected from other Government Departments like the Department of Central Excise, Department of Commercial Taxes, West Bengal and the balance-sheets and profit and loss accounts of the petitioner no. 1 themselves.

In that notice, the Railway Administration claimed the differential freight calculating the charges on the basis of transportation of iron ore for other than domestic use, along with penalty for false and misdeclaration. The said demand was made in "Section-A" of the notice, after describing the methodology of computation of the sum demanded from them. Direction was also issued for suspension of their loading operation in any siding of the South Eastern Railways, if the petitioners failed to deposit the sum assessed within the prescribed time frame, which at the initial stage was stipulated to be ten days. In "Section-B" of this notice, allegation has been made of obtaining rakes beyond entitlement by submitting false or altered excise documents showing higher production figure. In respect of charges contained in Section-B of the notice dated 16 August 2011, a copy of which has been made Annexure "P6" to the writ petition, the petitioners have been asked to show cause as to why penal action shall not be taken against them. The said notice was signed by the Assistant Commercial Manager (Freight), to Senior Divisional Commercial Manger, S.E. Railways, Chakradharpur, and was issued "For and on behalf of President of India." Before me, argument was advanced primarily in relation to the charges contained in Section-A of the notice.

8. Paragraphs 10.0, 11.0 and 12.0 of the said notice specifies:-

"10.0 Combining 8.0 and 9.0, the total amount of freight evasion resorted by you for the period 2008 to 2011, in contravention to the provision of prevalent rate Circulars, works out to be Rs. 1,32,00,01,758-00 Since, you had given misleading and false declaration regarding the intended end-use of your consignment for the aforesaid quantity (indicated in 7.0 and 9.0 above), your consignment attract penalty for false and misleading declaration in terms of Railway Board's circular No. 95 of 2006 dated 8.11.2006 (Copy enclosed). The amount of penalty for mis-declaration for the aforesaid freight evasion amount indicated at Para 10.0 works out to Rs. 528,00,07,032-00 Thus the total amount, accruable to Railway, towards the evaded freight and the applicable mis-declaration penalty thereof works out to a sum of Rs. 660,00,08790-00 (i.e. Rs. 1,32,00,01,758-00+528,00,07,032)

11.0 Thus, the Railway Administration demands from you the aforesaid amount of Rs. 660,00,08790-00 (Six hundred sixty Crores eight thousand seven hundred and ninety rupees only) to be deposited by you with FA & CAO, S.E. Railway within 10 days of issue of this letter i.e. on or before 27.08.2011.

12.0 Loading operation by your company (either as indenter, consignor or as consignee) in any siding of South Eastern Railways is suspended with immediate effect. If you fail to deposit the entire amount mentioned at Para 11.0 above within the stipulated time frame, Railway will be constrained to undertake following action as mandated in the relevant Railway Rate Circular which inter alia reads as follows:

"If at any stage, it is detected that the endorsement of Forwarding Note and/or

the affidavit furnished under the provisions of Para 5 was false, inaccurate or misleading, penalty for mis-declaration shall be imposed as per extant instructions. In addition, such consignors and consignees will be blacklisted for a period of three years for transport of iron ore from any terminal of IR. Railway may also take recourse to further legal action in such cases. "

[Railway Board Directive No. TCR/1078/2007/3 Dt 12.05.2008, Rate Circular No. 24/2008, copy enclosed]"

9. This notice was followed with a corrigendum dated 18 August 2011, copy of which has been made Annexure "P7" to the writ petition. The said Corrigendum stipulates:-

"sub: CORRIGENDUM

REF: Demand Notice Letter No. Comm./51/Frt Undercharge/RML/CKP/11 Dt 16-08-2011 issued by Assistant Commercial Manager (Freight), South Eastern Railway, Chakradharpur division.

The following corrigendum issued in regard to above referred letter.

1.0 In place of Para 11.0 of Section-A of the above referred letter please read the following:

"11.0 The Railway Administration, prima facie, calculated the freight evasion done by you in the stated duration to be an amount of Rs. 660,00,08790 (Six hundred sixty Crores eight thousand seven hundred and ninety rupees only). Considering the sum involved, you are given 25 days (i.e. on or before 11-09-2011) to respond as to why the above sum should not be deposited by you with FA & CAO/S.E. Railway towards evaded freight and resulting mis-disclaration penalty. Please note that you have full opportunity to be heard by the Railway Administration, either in person or through your nominated counsel/representative within the allotted time frame. In case you desire so, please intimate us immediately so that Railway Administration can fix a time and place convenient to you for such a hearing. Please note that in the event of such a hearing being fixed on your request by Railway Administration, failure to attend the same by you will constrain the Railway Administration to take a final decision on the matter ex-parte."

2.0 In place of Para 12.0 of Section-A of the above referred letter please read the following

12.0 "Loading operation by your company (either as indenter, consignor or as consignee) in any siding of South Eastern Railways is suspended with immediate effect. If you fail to act as mentioned at Para 11.0 above within the stipulated time frame, Railway will be constrained to realize the aforesaid sum and undertake further action as mandated in the relevant Railway Rate Circular which, inter alia, reads as follows:

"... In addition, such consignors and consignees will be blacklisted for a period of

three years for transport of iron ore from any terminal of IR. Railway may also take recourse to further legal action in such cases."

[Railway Board Directive No. TCR/1078/2007/3 Dt 12.05.2008, Rate Circular No. 24/2008, copy enclosed]"

3.0 The show-cause time limit fixed vide Para 14.0 of Section-B of the above referred letter is also hereby amended from "10 days" to "25 days" i.e. on or before 11-09-2011.

Please note that, through the above Corrigendum, the time for your response, as fixed in the earlier demand notice, is now extended by an additional 15 days (i.e. from 10 days to 25 days)

All other Paragraphs of the referred demand notice, excluding those mentioned and underlined above, will remain unchanged. "

10. When this writ petition was originally moved, on the question of grant of interim order, submission was made mainly on the question of legality of the order on the question of suspension of loading operations. In the petition, the constitutional validity of Clause 6 of Rates Circular No. 36 has been challenged. The legality of the demand notice as well as the corrigendum, which are Annexures "P6" and "P7" to the writ petition has also been questioned. On behalf of the petitioners, the jurisdiction of the railway authorities to recover the amount computed as "evaded freight" with threat of penalty, through a notice of demand-cum-show cause was questioned. An interim order was passed by this Court upon hearing learned counsel for the parties in the following term on 6 September 2011:-

"On the question of suspension of loading activities, I do not find that the railways are empowered to do so on the basis of allegations which are yet to be established. Under the provisions of the Railways Act, 1989 or any circular issued on behalf of the railways, or the petitioners' agreement with the railways there is no such provision. In these circumstances, the decision to suspend loading activities of the petitioners altogether without giving them any opportunity of hearing prima-facie appears to be without jurisdiction. Such suspension of loading activities partakes the character of imposition of interim punishment. Imposition of such interim punishment, without there being any express provision in law or any other valid instrument would offend the principles of natural justice, as no prior opportunity of hearing was granted.

In the light of these submissions, and the legal position, in my opinion as an interim measure without prejudice to the rights and contentions of the parties, the petitioners ought to be allotted rakes at the prescribed rate. The charges against the petitioners are still at the stage of allegations, and no provision of law has been cited under which petitioners' operations could be altogether suspended on the basis of allegations yet to be substantiated after considering response of the petitioners. For the purpose of blacklisting also prior opportunity

of hearing is necessary.

It has also been contended on behalf of the petitioners that if supply of iron ore is stopped to their factory, their entire operation would have to be suspended. In such a situation, balance of convenience lies in favour of passing an interim order for continuance of loading operation on regular payment of freight.

I accordingly direct the railways to permit the petitioners to carry on their loading operations on payment at the prescribed rate. On condition which shall be specified in the later part of this order, clause 12 of the demand notice dated 16th August, 2011 as modified by a corrigendum dated 18th August, 2011, to the extent the same suspends loading operation of the petitioners shall remain stayed until 15th December, 2011 but pendency of this proceeding or subsistence of this interim order shall not prevent the appropriate officer of the Railways in proceeding with the adjudication on the demand-cum-show-cause notice. Such officer shall also be at liberty to pass final order vis-a-vis the said notice.

Time to file to reply to the show-cause notice is extended by a further period of four weeks as it is submitted on behalf of the petitioners that they will have to obtain copies of certain documents which have been seized by the Excise Department. This Court would not expect any unnecessary delay in obtaining copies of these documents from the Excise Authorities and if application is made, having regard to the pendency of this proceeding, the Excise Authorities could make available copies of the seized documents as expeditiously as possible. Thereafter, on filing of the reply, the appropriate officer of the Railways shall conclude the hearing of the show-cause notice upon giving the petitioners opportunity of hearing.

When this matter was heard before this Court on 5th September, 2011, I had orally indicated that before considering prayer for interim order for stay of the order of suspension of loading operation of the petitioners, the petitioners ought to satisfy this Court that revenue interest of the railways ought to be secured. In my opinion, assets in the region of Rs. 300/- crores (rupees three hundred crores) approximately should be secured by the petitioners for this purpose. A supplementary affidavit has been filed in Court today affirmed by one Sanjoy Kumar Patwari on 6th September, 2011, i.e. today itself, in which it has been disclosed that the petitioner company have fixed assets of Rs. 388/- crores and the total loan outstanding against such fixed assets is Rs. 97/- crores. If the loan amount is deducted from the value of assets, the figure comes to little less than Rs. 300/- crores. Mr. Mukherjee submitted that the petitioner company do not have any other fixed assets free from encumbrance. That being the position, even if the railways were to enforce the demand today itself, this would be the quantum of fixed assets available for liquidating the claim of the railways. I accordingly direct the writ petitioners not to alienate or encumber further the said assets or create any third party right in respect thereof in any manner whatsoever without leave of this Court.

Further, to prevent any misutilisation of the concessional rate, I appoint the Senior Divisional Operational Manager, Kharagpur of South Eastern Railways as Special Officer in this matter so that the petitioners' operations relating to utilization of iron ore could be monitored pending further direction of this Court. The petitioners shall report to him on rake by rake basis every fortnight disclosing the volume of iron ore which is being used for domestic consumption and other use. The Special Officer shall be at liberty to match the export figure with the Customs Authorities and the ports of export. He shall also be at liberty to verify the records of the petitioner no. 1 for this purpose. A statement of accounts shall be maintained by the Special Officer in which the quantum of domestic use and other use shall be separately shown.

The respondents shall file affidavit-in-opposition to the writ petition by 14th November, 2011, as prayed for on behalf of the respondents. Reply thereto, if any, be filed by 30th November, 2011. Matter shall be listed under the heading "Specially Fixed For Orders" at 2 P.M. on 1st December, 2011.

The petitioners shall disclose their schedule of assets before this Court on the next date of hearing but the copy thereof in advance shall be served upon the learned Advocate for the Railways within a period of fortnight.

Liberty to apply for vacation or variation of this order to the parties upon notice to the other side."

11. The matter was heard on several occasions thereafter mainly on the questions of proper compliance of the interim order as it was argued on behalf of the respondents that there had been repeated acts of evasion in the same manner specified in the said notice, subsequent to passing of the interim order also. On 25 September 2013, when this matter was taken up for hearing it was submitted before this Court by Mr. K.P. Pathak, learned Additional Solicitor General that under the law the Railway Administration did not have the power or authority for making direct recovery of evaded freight through any coercive means. It was accepted that the proper course for them would be to institute a proceeding of civil nature in accordance with law. It was recorded by this Court in the interim order passed on 25 September 2013:-

"An interim order was passed by this Court in this matter on 6th September, 2011 permitting the loading operations on compliance of certain conditions, primarily to protect the revenue interest of the railways. The Senior Divisional Operational Manager, Kharagpur of South Eastern Railways was appointed as Special Officer of this Court for prevention of any misutilisation of the concessional rate, so that the petitioners' operations relating to utilization of iron ore could be monitored during pendency of this proceeding.

This Court had also observed in the said interim order that "pendency of this proceeding or subsistence of this interim order shall not prevent the appropriate officer of the Railways in proceeding with the adjudication on the demand-cum-show-cause notice." Such officer was also given the liberty to pass final order vis-

a-vis the said notice. At that point of time only, Mr. Mukherjee, learned Senior Counsel appearing for the petitioners had questioned the legality of continuing with show-cause notice, which also required the petitioners to deposit the sum demanded. His contention was that it was not permissible under the Railways Act to carry on with this kind of adjudication proceeding for determining the alleged evaded amount and imposition of penal charges was argued by him to be without the authority of law.

The matter was heard from time to time and the loading operations have also continued, though there has been repeated allegations of continuance of the same alleged acts of evasion of freight subsequent to passing of the interim order. Hearing at the interlocutory stage so far, however, primarily remained confined on the question of proper implementation of the interim order.

Learned Additional Solicitor General, appearing on behalf of the respondents, however, submitted that the composite effect of the said notice and the corrigendum was not meant for effecting direct recovery of the sum evaded by the petitioners but the object behind these notices was to elicit response from the petitioners as to whether they were owing up the liability or disputing the same, in whole or part. His further submission on that point is that under the law, the Railway Administration does not have the power or authority of making direct recovery of evaded freight through any coercive means but the proper course for them would be to institute a proceeding of civil nature in accordance with law. He, however, sought to justify the action in suspending loading operations at concessional freight rate. Before me, in course of hearing it was also submitted that the investigation on these allegations is being conducted by the Central Bureau of Investigation. That issue, however, is not under challenge before me at this stage. Thus, I refrain from making any comment on the criminal investigation, which I am apprised, is going on in relation to the subject controversy.

In view of this specific submission made by the learned Additional Solicitor General, in my opinion, the order passed on 6th September, 2011, to the extent I permitted continuance of adjudication on the notice to show-cause ought to be modified. The notice issued upon the petitioner, to which I have referred to in the earlier part of this order, shall remain a demand notice per se, and so far as the subsequent element of "show-cause" introduced by the corrigendum is concerned, as the petitioners have contested in this writ petition itself the entire set of allegations against them, it shall be deemed that the petitioners had denied their liability on the whole. This would conclude the issue relating to the necessity of adjudication for the purpose of realization of the amount demanded as evaded freight, and penalty charges through the machinery of Railway Administration.

In the writ petition, certain Rate Circulars and the authority of the Railway Board to issue such Rate Circulars and content thereof are also under challenge. That aspect of the controversy has to be heard and decided upon. So far, I have only

been addressed on the issue relating to power of railway authorities to conduct adjudication, and present status of the controversy on that count in this proceeding has been expressed in the preceding paragraphs of this order.

The other parts of the interim order passed by this Court from time to time and directions contained therein shall remain operative until further order of this Court."

12. In this factual background, in substance three issues raised in this writ petition remain to be addressed to in this proceeding. The first one is as to whether Clause 6 of the Rates Circular No. 36 of 2009 is constitutionally valid. The second one is on the question of power of the Railway administration to effect suspension of loading operations of the petitioners, and to undertake the exercise of blacklisting. The other question which requires adjudication is as to whether after delivery of goods, such demand can be made or not. It has been contended on behalf of the petitioners that such demand at the post-delivery stage is contrary to the provisions of Sections 73, 78 and 79 of the 1989 Act. I shall also examine as to whether any penal measure can be taken by the Railway Administration against the petitioners before actual adjudication is made before a Court of competent jurisdiction on the question of alleged evasion of freight by the petitioners.

In Clause 6 of the Rate Circular No. 3, two forms of penal measures are contemplated, if there is detection that the endorsement of the Forwarding Note and/or the affidavit furnished in terms paragraph 3 is false, inaccurate or misleading. Such measures are penalty for misdeclaration and blacklisting for a period of three years for transport of iron ore from any terminal of Indian Railways.

13. Provisions relating false or misdeclaration of goods is contained in Rule 126 of Goods Tariff No. 41. This appears from the Special Rates Circular No. RA 47/710.1B/Part-II issued by the South Eastern Railway. This document forms part of the said notice, and is part of the Annexures to the writ petition (at page 92). The said Special Rates Circular appears to have been issued under the Authority of the Railway Board's letter No. TCR/2210/2006/1 dated 8 November 2006 & RC No. 95/2006. The said Rule 126, as quoted in that document, stipulates:-

"Sub: Penalty for false declaration-Rule 126 of Goods

Tariff No. 41, Part-I (Vol-I).

Rule 126(1)(a) mentions penalty for misdeclaration in of Goods Sanction of the Central Government is hereby accorded to the modification of the penalty clause of Rule 126(1)(a) as follows:-

(a) If, on arrival at destination, it is found that goods have been improperly described and that a lower rate than that correctly applicable has been thereby obtained, charges at four times the applicable freight rate will be levied by the

booked route as shown on the related invoice. These penal charges will be in addition to the freight already paid and the freight already paid shall not be deducted.

(b) If, in a consignment of packages chargeable at different rates, a group of packages covergeable at a particular rate is improperly described and thereby a lower rate obtained, the charge at four times the applicable freight rate referred to in sub-clause (a) above, shall apply duly to the group of packages in the consignment improperly described and not to the entire consignment. These penal charges will be in addition to the freight already paid and the freight already paid shall not be deducted.

(c) If the weight of a consignment loaded in container is improperly described and whereby a lower rate than that correctly applicable has been obtained charges at four times the chargeable haulage rate will be levied. These penal charges will be in addition to the freight already paid and the freight already paid shall not be deducted.

(d) In case of false declaration of goods restricted for movement in containers, charges in four times the highest haulage rate will be believed. These penal charges will be in addition to freight already paid and the freight already paid shall not be deducted.

Please note and act accordingly.

Enclo: As above

Sd/- Illegible 16.11.06

For Chief Commercial Manager (F5)

(Authority Rly Board"s letter No. TCR/2210/2006/1 dated 08.11.2006 i.e. RC No. 95 of 2006)"

14. The power of the Railway Board to issue the Rates Circulars itself has been questioned on behalf of the petitioners in this proceeding. But upon going through the provisions of the 1905 Act, and the statutory Order No. 990 dated 31 March 1999, I do not find any deficiency or shortcoming in the authority of the Railway Board to exercise power under Sections 30 and 31 of the 1989 act. As I have already observed, the basic charge against the petitioners in this proceeding is that they have transported iron ore paying the rate meant for domestic consumption but such iron ore has been used for purposes other than domestic purpose. No material has been shown to me in course of hearing from where it can be ascertained as to what is actually meant by "Iron Ore Domestic". But from the applicable Rate Circulars, and in particular from the forms of affidavits specified in the relevant Rates Circulars, which are required to be furnished in terms of such circulars, it is apparent that the petitioners were required to consume the iron ore at their manufacturing unit when paying the lower rate for domestic use. "Iron Ore Domestic", so far as the petitioners are

concerned, thus meant iron ore means for consumption at their own manufacturing unit.

15. The Railway authorities have relied on the production documents and the accounts of the petitioners in respect of their manufacturing unit to compute the quantum of allegedly evaded freight charges. It was submitted by the Mr. Pathak in course of hearing that the iron ore found in the mines located in the States of Odisha and Jharkhand have between 60%-65% Fe-content, and to produce 1 kg of metallic iron using iron ore of that quality, 1.6 kg of the former would be required. For the period covered by the notice, it was submitted, actual iron ore consumed at the factory of the petitioners went far below the quantum transported by the petitioners for domestic consumption, upon payment of lower freight rate. On this issue, it has been the case of the petitioners that in the petitioners' plant, raw iron ore can be converted into purified iron ore and the latter is an intermediary product, and selling of such intermediary product cannot be held to be diversion of raw material. Otherwise also, the petitioners have denied the allegations. On the question as to what constitutes consumption, Mr. Mukherjee, learned Senior Counsel appearing for the petitioners has relied on the decisions of the Supreme Court in the cases of *State of Karnataka Vs. B. Raghurama Shetty and Others*, *Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others*, and a judgment of the Gauhati High Court in the case of *Arunodoy Construction Co. Vs. State of Assam* [ (2006) Supp GLT 476]. On behalf of the petitioners, it was also sought to be argued that iron ore itself is to be distinguished from processed iron ore, citing a judgment of the Supreme Court in the case of *National Mineral Development Corpn. Ltd. Vs. State of M.P. and Another*, . In this proceeding, however, I do not think there is scope for determination of that question, which would entail a factual enquiry on matters technical in nature. Thus the ratio of these authorities are not required to be examined in this judgment. The main issue which requires to be addressed in this writ petition is as to whether the Railway Administration has the power or authority to proceed against the petitioners on the allegation of evasion of freight rate, and the nature of penal measures that can be taken by the respondents.

16. Mr. Pathak had argued that the writ petition ought to be dismissed without going into these questions as sufficient material was produced before this Court to justify the action of the Railways on the ground that fraud was committed. His submission on this point is that this Court ought not to exercise its discretion in favour of the petitioners in the given factual and legal perspective. The two authorities relied on this point are *Chandra Singh Vs. State of Rajasthan and Another*, *United India Insurance Co. Ltd. Vs. Rajendra Singh and Others*, . In order to demonstrate what would constitute fraud, he referred to the decisions of the Supreme Court in the cases of *Ram Chandra Singh Vs. Savitri Devi and Others*, and *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, . Further, the case of *Virendra Kumar Gupta Vs. State of U.P. and Others*, was cited to persuade this Court to reject the writ petition itself on the ground that dishonest act on the part of the petitioners would disentitle them

from obtaining relief. The other point on which he sought dismissal of the writ petition at the threshold is that no writ petition can be maintained against a show cause notice, referring to the decision of the Supreme Court in the case of *Special Director Vs. Mohd. Gulam Ghouse* [ 2014(164) E.L.T. 141 (S.C.)]. Further, he argued, relying on the case *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, that in matters of economic policy, there cannot be judicial review. Substantial argument was also advanced by Mr. Pathak on the question of maintaining the writ petition itself. Relying on the Constitution Bench decision of the Supreme Court in the case of *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, , *Oriental Bank of Commerce Vs. Sunder Lal Jain and Another*, , he has submitted that the petitioners are not entitled to apply for a writ in the nature of *Mandamus* as they have no vested legal right to enforce in these proceedings. According to him, the petitioners should not be permitted to carry on transportation of goods in breach of conditions in the Rates Circular. But in this case, I am examining the Railways' power and authority to do certain acts, which has adverse civil consequence so far as the petitioners are concerned. I am not examining the question as to whether there have been actual fraudulent acts or not.

17. I am thus unable to accept submission of Mr. Pathak for outright rejection of the writ petition. I have already indicated the issues on which I shall restrict my scrutiny in this proceeding, and these issues can be broadly classified as jurisdictional issues. So far as the cases of *Chandra Singh (supra)* and *United India Insurance Co. Ltd. (supra)* are concerned, evasion of freight by the petitioners which has been alleged in the impugned notice are yet to be established before any authority, and in this proceeding the petitioners have urged that the Railway Administration has no power to adjudicate on that issue. On presumption that the petitioners have committed fraud, I cannot prevent the petitioners' entry to this forum. As regards the case of *Mohd. Gulam Ghouse (supra)*, this judgment does not lay down in absolute term that show cause notice cannot be challenged at all. In this case, jurisdictional issues have been raised, and these issues can be examined by the Court even at the show cause stage. This is also not a case in which I shall be testing any economic policy. The scope of enquiry would be to test the power of the authority to prescribe and impose punishment. The case of *M/s. Sitaram Sugar Co. (supra)* does not aid the respondents' case on this point.

18. Mr. Mukherjee has argued that after delivery of the goods have been effected, it is no more open to the Railway Administration to raise the issue of evasion of freight. On this point, provisions of Sections 73, 78 and 79 of the 1989 Act and Rules 114 and 115 of the Goods Tariff Rules have been referred to. Provisions of Sections 73 and 79 of the Act relate to overloading of wagons and weighment at the request of the consignee. These provisions, in my opinion, have no relevance so far as this writ petition is concerned. Section 78 of the 1989 Act specifies:-

"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 re-classify 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."

Rules 114 and 115 of the said Rules lay down:-

"114. Caution against paying charges to wrong persons.-The public are cautioned against paying any charges to any person other than clerks appointed to receive money in the goods sheds or officers; they can obtain a receipt in a printed form for all payments made.

115. Right to Correct Charges.-The weight, description and classification of goods and quotation of rates as given in the Railway Receipt and Forwarding Note are merely for the purposes of estimating the Railway charges and the Railway reserves the right of re-measurement, re-weighment, re-classification of goods and re-calculation of rates and other charges and correction of any other errors at the place of destination and of collecting any amount that may have been omitted or undercharged. No admission is conveyed by a Railway Receipt that the weight as shown therein has been received or that the description of goods as furnished by the consignor is correct."

19. Provisions of Section 78, empowers the Railway Administration to recalculate freight and other charges and re-classify any consignment before the delivery of goods. Rule 115 deals with the power of authorities to correct classification of goods and quotation of rates given in the Railway Receipt or Forwarding Note at the destination station. Petitioners' case is that since the goods forming subject-matter of this proceeding have already been delivered, the Railway Administration has lost their power or authority to raise demand on the allegation of evasion of freight in respect of such goods.

20. Under ordinary circumstances, post-delivery demand for higher freight rates would not have been permissible. But in this case, the iron ore was being transported under a special arrangement. The stipulation was that the transported iron ore would be used for domestic consumption, to enable the petitioners to avail of the lower rate. Whether such iron ore is used for domestic consumption or for purpose other than domestic thus could have been detected only after delivery was effected. The nature of evasion complained against in this proceeding is such, that such evasion could have occurred only after delivery. It would have been impossible for the Railway Administration to ascertain before delivery as to whether iron ore involved in transportation was to be utilized for domestic consumption or not. To protect the Railways' interest on this count furnishing of affidavits have been prescribed in the Rates Circular itself. The

petitioners have practically disowned the affidavits furnished on their behalf, and I shall deal with that aspect of the controversy later in this judgment. The evasion alleged by the Railways would have been incapable of being detected at the time or point of delivery. Reclassification of tariff in this case could be done after delivery only in the given case, provided the allegations against the petitioners are found to be true. Moreover, in Clause 6 of the Rates Circular, there is provision for imposition of penal measures at "any stage" there is detection that the endorsement on the Forwarding Note and/or affidavit is false. The "stage" referred to in that clause includes post-delivery stage as well. The alleged evasion by the petitioners as complained of would fasten on the petitioners with civil liability for committing fraudulent acts. The limitations placed upon the Railway in terms of Section 78 of the 1989 Act and said Rule 115 in initiating action at the post-delivery stage would not operate in the instant case. In my opinion, in the given case, the power of the Railway Administration to undertake an enquiry or undertaking of this nature is derived from Section 30(2) of the 1989 Act, to ensure compliance of conditions specified for enjoying lower rate of freight.

21. I shall deal next with the question of legality of Clause 6 of the Rates Circular 36 of 2009. I have already held that the Rates Circular itself has been issued by the Railway Board in valid exercise of power. The said clause contemplates imposition of two forms of penal measures, imposition of penalty and blacklisting. Citing two judgments of the Supreme Court in the cases of UCO Bank, Calcutta Vs. Commissioner of Income Tax, West Bengal, and Catholic Syrian Bank Ltd. Vs. Commissioner of Income Tax, Thrissur, , Mr. Mukherjee argued that such circulars are for guiding the Railway Administration only, but cannot be held enforceable against the petitioners to their detriment. But these two decisions relate to circulars issued by the Central Board of Direct Taxes in income tax matters. Such circulars have been held to be legally binding on the revenue authorities if they tone down the rigour of the law and are beneficial to the assessee. The Rates Circular issued by the Railway Board are of a different genre, which creates duties and obligations on the part of the consignor or consignee. Though termed as Circulars, these are actually Orders, as would be evident from Section 30 of the 1989 Act. These circulars have the force of law. The said two judgments do not aid the petitioners. It has to be examined now, in the light of the submissions advanced on behalf of the petitioners, as to whether the conditions specified in the Rates Circular are legally sustainable or not.

22. Submission of Mr. Mukherjee on the two forms of penal measures contemplated in Clause 6 is that the 1989 Act does not prescribe these two forms of punishment, and in the absence of specific legislative mandate, the Railway Board could not have had introduced these penal steps. He has taken me through Chapter XV of the 1989 Act, dealing with "Penalties and Offences", which does not specify these forms of penal measures. The authorities relied on in support of this proposition is Satwant Singh Sawhney Vs. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi and Others, and

Karnataka Rare Earth and Another Vs. The Senior Geologist, Department of Mines and Geology and Another, and State of Madhya Pradesh and Another Vs. Thakur Bharat Singh, . The first and the third judgments are authorities for the proposition that executive action, if it is to operate to the prejudice of any person, must be supported some legislative authority. The next decision has been cited to support the petitioners' argument that an administrative order cannot ordinarily impose penalty. On behalf of the respondents, it has been contended that the penal measures as contemplated under the said clause are in reality consequence of breach of conditions. Further, it was argued that in terms of Sub-Section (2) of Section 30, the Railway Board while exercising the power of the Central Government is authorized to impose penal charges, for breach of conditions of the Rates Circular. Such "penal charges" would come within the ambit of the expression "any other charge" employed in that sub-section.

23. Before I proceed to test the validity of two the forms of penal measures contemplated in Clause 6, I shall examine as to whether in this proceeding, adjudication on these issues ought to be undertaken or not, in the light of submissions of Mr. Pathak recorded in the order of this Court passed on 25 September 2013. Mr. Mukherjee had relied on five authorities, Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd., , State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, , The State of U.P. and Another Vs. Shri Anand Swarup, , General Manager, North East Frontier Railway and Others Vs. Dinabandhu Chakraborty, and S.K. Roy Chowhury Vs. The Collector of Calcutta [91985)1 CLJ 332], in support of his submission that the Railway Administration has no power to adjudicate on the question of quantum of evasion. The composite ratio of these judgments is that if law does not provide for adjudication on quantum of dues recoverable from any person, a person or authority cannot unilaterally assess the sum of money payable to him and embark on a recovery proceeding directly by deducting or otherwise effecting realization of the sum from what is legitimately due to such person.

24. In this proceeding, Mr. Pathak has agreed, in course of hearing, that to effect recovery, the Railway Administration would have to institute a civil suit. Accordingly, on the question of realization of penalty also, recourse would have to be taken to the same process. So far as Clause 6 of the Rates Circular No. 36 is concerned, thus only two questions as require to be addressed to. First, whether the Railway Board at all has the power to impose penalty, in the manner prescribed therein, and whether Blacklisting would be a permissible form of penal measure. In relation to the issue of Blacklisting, it would be necessary to determine as to whether for effecting Blacklisting also, the Railway Administration would have to wait for adjudication of the question as to whether there has been at all evasion of freight, and if so, the quantum thereof by a Civil Court, or that aspect could be decided by the railways by conducting an independent proceeding complying with the principles of natural justice.

25. On the point of imposition of penalty, the rate specified in, Rule 126 has been

adopted as specified in Rates and RC No. 95/2006. The said Rule has been reproduced in the earlier part of this judgment. The provisions of Sub-Section (2) of Section 30 empowers the Central Government, which power now vests with the Railway Board, to fix the rates of any other charges incidental to or connected with charges or rates for carriage of goods. The Railway Board under the aforesaid provision is also empowered to specify in the order the conditions subject to which such rates were to apply. The expression "condition" in my opinion includes penal consequences which may entail if such conditions are breached, and such consequences can have in-built penal element. The Railway Board has also the power to fix the rates of any other charges incidental to or connected with the freight rates for carriage of goods. Such charges can include penal charges as well. There is no limitation under the law in relation to the conditions which Railway Board may impose. In such circumstances, the condition imposed can be challenged only on the ground of being unreasonable or arbitrary. No such case has been made out that the penal rates imposed is arbitrary or unreasonable. Accordingly, the Railway Board is empowered to impose penal rate for breach of condition in availing a lower rate of freight.

26. The petitioners sought to contend that the power to impose penalty is only contained in Chapter XV of the 1989 Act and there is no power on the part of the Railway Board to impose penalty beyond what is prescribed in Chapter XV. In my opinion, power to impose penal rate of charges for breach of conditions in availing a lower freight rate is derived from Sub-Section (2) of Section 30 of the 1989 Act. The penalties specified in Chapter XV are in consequence of a Criminal Act. These penalties can be imposed upon conviction by a Criminal Court. Penalties under Chapter XV have to be distinguished from civil liabilities the authorities can saddle an errant transporter of goods with. The power to demand the sum arising out of civil liability flows from Section 30(2) of the 1989 Act and the Railway Board has the jurisdiction and power to specify such penal rate of freight in case of breach of conditions stipulated in the Rates Circulars.

27. On the question of blacklisting, submission of Mr. Mukherjee is that there is no power under the Railways Act, 1989 to "Blacklist" a transporter. The second limb of submission of Mr. Mukherjee on the same point is that the Railways being Common Carriers has no power to refuse to carry goods tendered to them. This argument has been advanced both in respect of suspension of the petitioners' loading activities as also on the point of blacklisting. Mr. Mukherjee has relied on a passage from the Halsbury's Laws of England (3rd Edition), 4th Volume dealing with carriage of goods. The statement of law contained under the heading Common Carrier's duty in the said volume:-

"A common carrier exercises a public employment; and just as an innkeeper is bound at law to receive guests into his inn if he has no lawful excuse, so a common carrier is bound to accept goods which are offered to him for carriage, if he has no lawful excuse. Therefore, if he wrongfully refuses to carry goods offered to him, he may be indicted for such refusal, and he is also liable in an

action for such damage as the owner of the goods sustains in consequence of the refusal to carry; but although a carrier may be bound by statute to carry, it does not follow that his obligation is to carry as a common carrier unless the statute so provides, and carrier who is under a statutory obligation to carry may cease to act as a common carrier.

A common carrier's obligation, moreover, is only to carry according to his profession."

28. In order to sustain his submission that railways are common carriers and are under obligation to receive goods tendered for delivery Mr. Mukherjee has referred to a decision of the Judicial Committee of Privy Council in the case of *Irrawaddy Flotilla Company Vs. Bugwandass* (XVIII Indian Appeals), a decision of this Court in the case of *Kajora Coal Co. Ltd. Vs. Secy. of State*, *Sohan Pal, Munna Lal Vs. The East Indian Railway Company*, *Secy. of State Vs. Anant Ram Chopra*, and a judgment of Nagpur High Court delivered in the case of AIR 1933 261 (Nagpur). In the decision of the Judicial Committee the applicability of Common Law of England to railways as carriers was recognized. In the case of *Sohan Pal, Munna Lal* (supra) it was held by the Full Bench of the Allahabad High Court:-

"A Railway Company is by law a common carrier. It cannot lawfully refuse to carry goods properly tendered to it. It is given statutory existence and wide statutory powers in exchange for public duties and it is bound to carry goods. Section 54 enables it to make provisions or conditions with regard, for example, to the receiving of goods. It is not bound to receive goods at all unless they are first weighed, or unless they are properly labelled, but those provisions, namely, with regard to receiving goods, are antecedent to the act of delivery; in other words they provide that the company may insist on the consignor doing certain acts before he is able to deliver the goods to the Company at all. Similarly, with regard to forwarding, for example, live stock and wild animals, they can reasonably insist on their being put under proper control."

29. The same principle has been made applicable to a Railway Company in the case of *Chhogalal* (supra). The decision reported in AIR 1931 Calcutta 33, however, seem to me not applicable in the instant case. Further reference has been made to the following passage of P. Hari Rao's Commentary on the Railway Act, 1989 (fifth Edition-2001) at page 23:-

"In India, it may be stated that all railway companies are generally speaking, carriers (or common carriers so far as their duty is to carry goods), but all carriers are not railway companies. Some carriers are governed by the Indian Carriers Act (III of 1865) and some other carriers (the Indian railways) are governed by the Indian Railways Act (IX of 1890). It may be stated that, in respect of matters for which there may be no provision in the Indian Railways Act, resort may probably have to be made to the provisions of the English Common Law of carriers, which is indeed the fountain head of all the

fundamental principles of the general law of carriers, but all the same, it must not at all be forgotten that, the Indian railways are, after the enactment of the Indian Railway Act (IX of 1872) only bailees, and not insurers."

30. The stand of the railways on the other hand is that upon enactment of the Railways Act 1989, the common law principles cannot be made applicable in the Indian context. The respondents have traced the source of power to order refusal of acceptance of goods for carriage, which would be a consequence of an order of blacklisting, to Section 71(1)(c) and Sub-Section (2) of that provision. Section 71 of the 1989 Act provides:-

"71. Power to give direction in regard to carriage of certain goods.-(1) The Central Government may, if it is of the opinion that it is necessary in the public interest so to do, by general or special order, direct any railway administration-

(a) to give special facilities for, or preference to, the carriage of such goods or class of goods consigned by or to the Central Government or the Government of any State or of such other goods or class of goods;

(b) to carry any goods or class of goods by such route or routes and at such rates;

(c) to restrict or, refuse acceptance of such goods or class of goods at or to such station for carriage, as may be specified in the order.

(2) Any order made under sub-section (1) shall cease to have effect after the expiration of a period of one year from the date of such order, but may, by a like order, be renewed from time to time for such period not exceeding one year at a time as may be specified in the order.

(3) Notwithstanding anything contained in this Act, every railway administration shall be bound to comply with any order given under sub-section (1) and any action taken by a railway administration in pursuance of any such order shall not be deemed to be a contravention of section 70."

31. I accept the submission made on the part of the respondents that the common law principles would not apply on a subject which is directly covered by statutory provisions in this country I do not think the Railway Administration is under absolute obligation to carry the goods tendered to it, at a rate lower than the normal freight rate, but in breach of conditions which would entitle a consignor or consignee the benefits of such lower rate. Even if I proceed on the basis that Railway is a common carrier having duties and obligations under common law beyond what is laid down in statute, then also I do not think the obligation to accept goods is absolute. As would be evident from the passage in Halsbury's Laws of England, a common carrier's duty to accept goods is subject to right of refusal on lawful excuse. Thus, Railway Administration would not be bound to accept the goods if freight rate paid for the same is lower than what is prescribed. That would constitute a lawful excuse. On the aspect of "Blacklisting" two questions would have to be addressed to. First one is as to whether in the

given statutory architecture, there is scope of taking recourse to the penal measure of "Blacklisting", which would have the impact of banning the petitioners from using Railway as a mode of transport for carriage of goods.

The second question which would have to be addressed to is as to whether the Railways would have to wait till adjudication is made by a Civil Court confirming the allegations of the respondents of freight evasion by the petitioners, or they could proceed with a departmental enquiry, upon giving opportunity of hearing, for "Blacklisting" the petitioner No. 1.

32. "Blacklisting" is sought to be introduced as penal measure, in the form of consequence for breach of condition. On behalf of the respondents, it was contended that source of power to effect "Blacklisting" lies in Section 71(1)(c) and (2) of the 1989 Act. I accept that under the aforesaid provisions, the Central Government is empowered to direct the Railways to refuse to accept goods of a delinquent user of its facilities, which would imply "Blacklisting". But there has to be direction of the Central Government to that effect. No material has been shown that such power has been vested in the Railway Board in terms of the 1905 Act. Thus direction has to be issued by the Central Government, or any other authority upon whom such power may be lawfully delegated following the statutory scheme.

33. Mr. Pathak, learned Additional Solicitor General had agreed that before ordering "Blacklisting" the petitioners would have to be given opportunity of hearing. Contention of the petitioners on the other hand is that before adjudication on the question of evasion, there cannot be any penal measure. I reject this argument. "Blacklisting" is an administrative measure, which the Central Government may direct the Railway Administration to effect, in exercise of power vested in them by Section 71 of the 1989 Act. To effect recovery of the sum, if found due on account of freight evasion, a civil suit would have to be instituted because the Railways Act, 1989 does not prescribe any other mode of recovery. For that purpose, adjudication of the dues by the Civil Court would be an inevitable exercise. But that would not imply forestalling exercise of other powers of the Central Government or the Railway Administration for taking administrative measures, which power they are vested with under the statute. To comply with the principles of natural justice, similar adjudicatory exercise may be required to be taken at the administrative level. Such administrative exercise in my opinion would be permissible.

34. When the petitioners had approached this Court at the initial stage, interim order was prayed for staying the order of suspension. On behalf of the petitioners it has been submitted that there is no power of suspension under the provisions of the Railways Act or the Rates Circular and the order for suspension is beyond the power of the Railway Authorities. In this regard, reference was made to the case of V.P. Gidroniya Vs. The State of Madhya Pradesh and Another, in this judgment, dealing with employer employee relationship three forms of suspension have been referred to, which may be imposed on a public servant.

These are:-

- i) As a measure of punishment.
- ii) During pendency of enquiry under statutory powers or under appointment order, and
- iii) Forbidding discharge of duties during enquiry but on payment of full wages.

35. It has been submitted on behalf of the petitioners that the power to suspend must originate from the statute or contract. If there is no provision for suspension in either of these two instruments then suspension would have to be followed with full salary in a case arising out of employer-employee relationship. Mr. Mukherjee has referred to four decisions delivered under the provisions of the electricity law, being M/s. Shree Balasaria Corporation (P) Ltd. Vs. CESC Ltd. [(1996)1 CHN 15], Nishikanta Banik Vs. CESC Ltd. [(1996)2 CHN 534], Soumendranath Sen Vs. CESC Ltd. [(1989)1 CLJ 333] and Brojendra Nath Samanta and others Vs. CESC Limited and CMC, , to contend that unless there was statutory provision, supply of electricity could not be denied if the intending consumer complied with the conditions for supply. For the same proposition, certain judgments delivered under the municipal laws was referred to but I do not consider it necessary to refer to these judgments, as these authorities lay down the same principle of law. The obligation of the Railways to accept their goods as a common carrier was also reiterated on this issue.

36. Mr. Pathak on the other hand argued that the railways operate at two levels, providing public utility services and commercial activities for carrying goods. His submission is that in the commercial field, railways ought to have greater latitude in fixing the rates and for delinquent consignors, they should be given power to undertake penal measures. According to him power of suspension was implicit in the commercial activities of the railways and in support of this proposition he cited decision of the U.S. Supreme Court in the case of McCulloch Vs. Mariland [(1819)17 US 316] as also a judgment of the Supreme Court in the case of Sakiri Vasu Vs. State of U.P. and Others, . In the decision of Sakiri Vasu (supra), it has been held that when power is given to an authority to do something it includes such incidental or implied powers which could ensure the proper doing of that thing. It has been held in that judgment:-

THE reason for the rule (Doctrine Of Implied Power) is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his "Statutory Construction" (3rd edn. page 267):-"if these details could not be inserted by implication, the drafting of legislation would be an indeterminable process and the legislative intent would likely be defeated by a most insignificant omission."

IN ascertaining a necessary implication, the Court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein."

It has also been submitted by him that when undertaking commercial activity, each consignment ought to be treated as a separate contract. Railways has the same liberty as any other commercial entity to not to enter into a contract, and though referred to as suspension, the Railways was actually exercising their right not to enter into a contract.

37. In support of his submission that running of railways is commercial activity, Mr. Pathak has relied on the judgments of the Supreme Court in the cases of Union of India (UOI) and Another Vs. Ladu Lal Jain, and Bakhtawar Singh Bal Krislin Vs. Union of India ( AIR 1988 SC 1033). Stress was laid on the case Coal India Limited and Others, Vs. Alok Fuels (P) Ltd., th. Director, etc. etc., to sustain his argument on implicit power to suspend. In this judgment it has been held:-

"It is true as has been contended on behalf of the respondents that Clause 13(1) of FSA provides that in the event respondents fail to pay any amount including any interest due to BCCL under FSA within a period of 30 days of the same falling due, BCCL shall have the right to suspend supplies of coal to the respondents, but Clause 13(1) does not stipulate that in no other contingency BCCL can suspend supplies of coal under FSA to the respondents. Moreover, Clause 13(1) of FSA enumerates the three options available to BCCL in case the dues towards the price of coal and interest is not paid by the respondents and it does not provide for the different contingencies in which BCCL can suspend the supplies of coal to the respondents. In our considered opinion BCCL will also have the right to suspend supplies of coal to the respondents where it has doubts that the respondents may mis-utilize the allotted coal and divert or sell the same in open market because, as would be clear from Clause 4.4 of the FSA and the new Coal Distribution Policy decision dated 18.10.2007, the very object of FSA as well as policy of the Government is to allot coal to respondents for utilization in their plants and not for any other purpose. Therefore, if the FIR lodged by the CBI, which is a premier investigation agency of the Central Government, created serious doubts that the allotted coal may be diverted or sold in the open market instead of being utilized in the plants of respondents, BCCL would be within its rights to suspend the supplies of coal to the respondents till the doubts are cleared in appropriate proceedings."

On the question of dual role of the Railways while discharging public service duties and commercial activities, I do not think in the latter case the Railway Authorities have the same freedom as ordinary persons in relation to making or not making of contract. The activities of Railways is guided by the 1989 Act, and the functions they can discharge are also specified in the said statue. Their activities of transporting goods also has be traced to statutory provisions. The commercial contracts of Railways thus have to be conducted within the statutory framework.

38. In relation to issue of the order of suspension at the initial stage, it was contended on behalf of the petitioners that the same was in violation of the principles of natural justice. In response it was submitted on behalf of the

Railways that requirement to comply with the principles of natural justice was not an absolute proposition of law. In this regard decisions of the Supreme Court in the cases of A.S. Motors Pvt. Ltd. Vs. Union of India (UOI) and Others, , S.B.I. Vs. Hemant Kumar, and Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, have been relied upon. Mr. Pathak raised the issue of public interest and submitted that the petitioners were breaching the law with impunity and in such circumstances the Court ought to balance equity between the parties and look into the question of public interest while issuing any direction or order State of Maharashtra and Others Vs. Prabhu, . His further submission on this count is that in similar circumstances the enquiry of the Court would remain confined to the question as to whether the action of the authorities is "fair, just and equitable" LIC of India and Another Vs. Consumer Education and Research center and Others, . Some other authorities were cited by Mr. Pathak on the point of principles on limitations in application of the principles of promissory estoppel and doctrine of legitimate expectation but in this proceeding I am not examining the claim of the petitioners founded on these principles. As such I am not dealing with these authorities.

39. On the question of exercising power of suspension, I am inclined to hold that this power should be held to be implicit with the Railway Authorities in cases relating breach of the aforesaid condition in the Rates Circular, being incidental to the power for implementing the provisions of the Rates Circular. In the writ petition, the petitioners have taken a reckless stand to the effect that they ought to be held eligible to continue with their loading and unloading activities even without furnishing the affidavit and avail of the lower freight rate. If I am to apply the doctrine of common carriers obligation to not to refuse acceptance of goods, in a case of this nature, it would lead to an absurd consequence. By a mere declaration that the goods would be used for one purpose, the goods would be permitted to be used for other purposes which entail a much higher freight rate and the Railways would have to permit perpetuation of such deficit payment, and wait for recovery by way of a civil suit. Suspension in the instant case would imply interim punishment for breach of conditions of Clause 6 of the Rates Circular, as also prevention of violation of such conditions. In my opinion, however, the principles of natural justice would be required to be complied with prior to issuing suspension order by issuing a notice to show cause as refusal to permit the petitioners to load their goods would carry adverse civil consequence and this is not a case where compliance of principles of natural justice would be an idle formality. There would be a necessity in this matter to require the petitioners to explain their stand as suspension would imply preventing them from future loading activities. But such suspension would have to be for a limited period. Suspension for unlimited period would partake the character of "Blacklisting", for which direction of the Central Government would be necessary. In the event, however, the petitioners refuse to furnish affidavit from an authorized person, it would be well within the power of the Railways to refuse to accept their goods for loading, and that would constitute lawful refusal.

40. The order of suspension as contained in the demand notice originally specified that the loading operation of the petitioners would remain suspended for indefinite period. In the corrigendum, issued on 18 August 2011, suspension was made with immediate effect without a timeframe given as to how long such suspension shall remain operative. No prior opportunity was given to the petitioners before issuing the order of suspension. The said order of suspension cannot be revived now. But the Railway Administration shall be at liberty to issue a fresh order of suspension preceded by a fresh notice on being satisfied with the materials available with them if they choose to do so, but such suspension shall be for a limited period and could be imposed only upon giving opportunity of hearing to the petitioners, as indicated in the preceding part of this judgment.

41. Argument was also advanced on behalf of the petitioners for detaching the petitioners' loading and unloading activities through the wagons to which they became entitled to on the basis of the Wagon Investment Scheme. But I find the said scheme operates in relation to availability of rakes and not directly concerned with freight rate except possibly touching upon discount in such rate. Thus any decision on the petitioners whether in relation to Blacklisting or suspension as well as penal charges shall cover the wagons obtained through such scheme as well.

42. Question was raised on behalf of the petitioners as regards the authority of the Assistant Commercial Manager (Frt.) to issue the demand notice but I find the same has been issued for and on behalf of the President of India. The respondents has argued that the function of realization of revenue from rail transportation of goods is entrusted with the commercial department headed by the Chief Commercial Manager and the said authority, in turn can delegate to his subordinate officers and existing practise of the railways is to issue such communication by a responsible senior supervisor of the concerned department. In this case, the demand-cum-show cause notice has been issued by the in-charge Gazetted Officer of the division. His authority to do so beyond his power. I do not find the demand notice to be invalid on that count.

43. There is another aspect of the controversy which I would like to address. As per Clause 3 of the Rates Circular, the petitioners are to furnish an affidavit and indemnity note, which are conditions for obtaining the lower rate. Such affidavits were to be filed in a form which has been specified in the Rates Circular itself. In paragraph 44 of the writ petition it has been stated that neither the petitioner company nor any of its director or authorized officer had executed any document including the indemnity bond and a class three employee was made to sign blank documents at the instance of the Railway Authorities. The obligation to issue the indemnity note or the affidavit, as per the said Rates Circular is on the manufacturing unit. In the event the petitioners have availed of the concessional rates without filing of such affidavit or indemnity note, then the transportation of goods at concessional freight rate has been illegal. There has been breach of the conditions specified for transportation of goods availing lower rate of freight. In

such circumstances, the Railway Administration would be entitled to recover the differential rate by instituting appropriate proceeding. In the event, in future the petitioners do not furnish the affidavits and indemnity note as postulated in para 3 of the Rates Circular, then it shall be open to the Railway Authorities to refuse to accept loading of iron ore on payment of lower rate meant for domestic use. As question has been raised on authority of the person to file affidavit, to eliminate future controversy, I am of opinion that in future such affidavits shall be filed by a Director of the Company, or any other senior staff having been authorized by the Board in that regard. The petitioners shall also be required to strictly comply with other provisions of the said Rates Circular to avail the rate benefits meant for domestic use of iron ore.

44. In Clause 6 of the Rates Circular, there is stipulation to the effect that if it is detected that endorsement of forwarding note and/or the affidavits furnished under the provisions of para 3 was false, inaccurate or misleading, penalty for mis-declaration shall be imposed. In this case, on petitioners' own admission, they have not filed any affidavit and if any affidavit was filed, the same was without their authorization. Fact remains that the petitioners have availed of the benefits of such affidavits and it was primarily their responsibility to furnish such affidavit. The necessity of filing such affidavit was known to the petitioners. The petitioners having been beneficiaries of these affidavits, they shall be responsible for any false or inaccurate or misleading statements made in such affidavits and they shall be liable for the consequence of such false, inaccurate or misleading statements.

45. I had appointed Special Officer in this matter as an interim measure in the interim order passed on 6 September 2011. It has been submitted on his behalf that there has been non-cooperation on the part of railways and there has been further evasion of freight during the pendency of this proceeding. Certain reports have been filed by the Special Officer, which forms part of records. If during subsistence of interim order passed on 6 September 2011 in this proceeding, the petitioners have transported iron ore for domestic use without furnishing proper affidavit and indemnity note, then the petitioners shall be required pay the differential rate for goods transported during this period. Railways in that case shall compute the amount and make demand on the petitioners within a period of 8 weeks from date and the petitioners shall pay the sum within a further period of 4 weeks from the date of receiving the demand notice. For recovery of this amount, the Railways would not be required to institute any independent proceeding as transportation of goods during this period was done in terms of an interim order passed by this Court. If, however, it is found that documents were furnished in proper form by authorized persons but according to the Railways there was misstatement in such documents, in that event the Railways will have to issue a fresh demand notice and recover the sum by instituting a civil suit. The reports filed by the Special Officer shall be taken into account for the purpose of computation of dues in terms of this direction.

46. An application has been taken out by the petitioners, being CAN No. 4556 of 2012 seeking certain variation of the orders of this Court passed on 6 September 2011. This application is treated on day's list. The other Application taken out by the petitioners questions certain aspects of the report of the Special Officer filed before this Court on 24 January 2013. The petitioners have in this application (being CAN No. 1192 of 2013) sought for quashing that report. As I have not entered into merit on the question of quantum of alleged evasion, both these Applications shall also stand disposed of. No specific finding on these applications is necessary.

47. The Special Officer appointed by this Court is accordingly discharged and the interim order in this matter shall also stand dissolved.

48. This writ petition is thus disposed of in the following terms:-

- a) Clause 6 of the Rates Circular No. 36 of 2009 is valid and enforceable.
- b) The Railway Administration is entitled to impose penal charges in the manner prescribed in aforesaid Clause or para 6.
- c) The Central Government shall be entitled to issue direction on Railway Administration for blacklisting the petitioner if there is any false, inaccurate or misleading statement in the endorsement of the forwarding note and/or affidavit furnished under the provisions of para/clause 3 of the said Rates Circular, but the authorities will have to give fresh notice of show cause in such a situation, and give opportunity of hearing to the petitioners.
- d) The Railway Administration shall also be empowered to suspend the operation of the petitioners in relation to their loading activities for a limited period of time after issue of a fresh notice to show cause and upon giving opportunity of hearing to the petitioners, if breach of conditions in availing lower freight rate is established during such administrative proceeding.
- e) In the event the petitioners have transported any goods paying the lower freight rate specified for domestic use of iron ore without filing proper indemnity note or affidavit from an authorized person as per the prescribed form, then the petitioners shall be charged as per the regular rate fixed for transporting iron ore and the Railway Administration in such a situation shall raise demand on the petitioners within a period of eight weeks. A statement shall be given to the petitioners as part of the demand notice showing the manner of computation of the differential rates. The petitioners shall be liable pay the differential rates within a period of four weeks from the date of receipt of the demand.
- f) The entire transportation of goods, being iron ore by the petitioners which have been carried on without furnishing of affidavits by an authorized person as admitted in paragraph 44 of the writ petition, shall be charged at the regular rate for transportation of iron ore and the petitioners shall not be entitled to claim lower freight rate meant for domestic use for such goods. But recovery for the same would have to be by institution of a civil suit.

g) The Railway Authorities shall otherwise be entitled to proceed with adjudication at the administrative level in terms of Section-B of the demand notice.

h) As agreed by Mr. Pathak, for recovery of the sum specified in the demand notice, the respondents shall be entitled to proceed with the civil action.

49. Urgent certified photocopy of this order be made forthwith available to the parties if applied for, subject to compliance with all necessary requisite formalities.

Later:

Prayer is made on behalf of the petitioners for stay of operation of this judgment. Such prayer is considered and rejected.