

(2011) 04 OHC CK 0028
In the Orissa High Court
Case No : Writ Petition (C) No. 13394 of 2010

Shyama Minerals

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 11-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Criminal Procedure Code, 1973 (CrPC) — Section 144

Citation : (2011) 04 OHC CK 0028

Hon'ble Judges : V. Gopala Gowda, C.J; B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—The Petitioner in the present writ petition challenges the imposition of stacking charges on iron ore fines belonging to the Petitioner dumped at the railway siding awaiting loading into the railways rakes to be provided by the railways for which indents have been made on depositing Rs. 15,000/- (rupees fifteen thousand) per rake on the ground that such imposition of stacking charges is illegal. The further prayer of the Petitioner is to quash Annexures-6, 11 and 14 and for issuing a direction to the railways to provide rakes to the Petitioner at the earliest to clear the railway sidings.

2. The petitioner's case in nutshell is that the Petitioner is a licensed proprietorship business concern. He has been carrying on trading business in iron ore since 2007. He was granted licence vide letter No. 79875 dated 31.12.2008 by opposite party No. 2 for storing iron ore under the Orissa Minerals (Prevention of Theft, Smuggling and Illegal Mining and Regulation of Possession, Storage, Trading & Transportation) Rules, 2007 (for short, "Rules, 2007") and was allowed to store iron ore at Bansapani Plot No. 624, Khata No. 131/167 and the licence was valid till 30.12.2010. The said licence was issued in the name of one Rajib Kumar Panda, Power of Attorney Holder of the Petitioner. As per the procedure adopted by the Railways, the Railways had been allowing dumping of materials

for loading into the rakes on placing of indent with the pre-requisite deposit of Rs. 15,000/- per rake. The Divisional Manager (Commercial), South Eastern Railway, Chakradharpur vide letter dated 05.01.2010 certified that the Petitioner can use Public Sidings both at Bansapani and Jaroli railway stations for loading of rakes and dumping of materials as and when the empty rakes are supplied to them.

3. The further case of the Petitioner is that as against the several indents, since opposite party-railway did not provide the rakes, the materials were lying dumped here and there. Moreover, on the basis of the F.I.R. lodged by opposite party No. 2 with the Inspector-in-Charge, Joda Police Station alleging illegal transportation of iron ore from Bansapani railway siding without his permission, investigation was taken up. Vide order dated 04.03.2010 passed by the Sub-Divisional Magistrate, Champua in Misc. Case No. 16 of 2010 u/s 144 Code of Criminal Procedure, railway authorities including others were restrained from entering into and conduct any activity relating to loading and unloading of materials at the Bansapani railway siding for 60 days commencing from the date of the order i.e. 04.03.2010. Under the prevailing circumstances, the Petitioner could not enter into the business premises to shift the iron ore or contact the railway authorities for further transportation. It was only on 07.05.2010 opposite party No. 2 verified the stacks of the Petitioner at the Bansapani Railway siding and certified that the same is genuine materials and assessed their quantity roughly. Thereafter, a bill was submitted relating to stacking charges for the material (iron ore) lying at Bansapani railway siding as per the verification made by opposite party No. 2. The total amount of stacking charges raised against the Petitioner was Rs. 10,17,28,800/- for the period from 01.03.2010 to 10.05.2010 under Annexure-6 series. Thereafter, the Petitioner approached the Station Manager, South Eastern Railway and requested him not to impose any stacking charges since the indents were cancelled by the railways. In the meanwhile, the railway rake indenting system has been changed. On 27.03.2010, the Railway Authorities changed the procedure under Annexure-7. On 23.04.2010, the Chief Commercial Manager, Railways issued another procedure under Annexure-8. The Ministry of Railways issued another revised procedure/modality order on 21.05.2010 (Annexure-9). The Chief Manager, South Eastern Railways amended the earlier demand and claimed Rs. 8,69,61,600/- for stacking charges for the period from 01.03.2010 to 30.04.2010 (excluding the period when there was promulgation of Section 144 Code of Criminal Procedure order by the S.D.M., Champua). The Railway Ministry again issued letter dated 22.06.2010 allowing the stacked materials at Bansapani Railway siding for loading without transit pass on getting the materials verified by opposite party No. 2. Accordingly, the Petitioner submitted indents on the basis of the verification letter of opposite party No. 2 and approached the railway-authorities for allotment of rakes. However, the railway-authorities refused to allot rakes on the ground that unless the stacking charges are paid, the Petitioner cannot shift the iron ore from Bansapani siding. Thereafter, the Petitioner made a representation dated

02.07.2010 before the Station Manager, South Eastern Railway, Bansapani, Keonjhar requesting him either to allow for fresh indents of rakes or allow the Petitioner to shift the stacked iron ore to his own plot exempting him from paying stacking charges until a decision on the representation of the Petitioner is taken. But the railway authorities are going on increasing stacking charges per hour basis for keeping the materials stacked at railway sidings. On 14.07.2010, the railway authority notified on their notice board at Bansapani that unless the stacking charges are paid within seven days, the stacked materials would be disposed of and the Petitioner would be black listed. Hence, the present writ petition.

4. Mr. S.K. Purohit, learned Counsel for the Petitioner, submits that the Senior Divisional Manager (Commercial), South Eastern Railway, Chakradharpur had brought out a comprehensive wharfage and stacking policy on 29.06.2009 which was valid till 30.06.2010. The petitioner's case was covered within the said period. The circular is very specific as to when and how the wharfage or stacking charge can be levied. Referring to Clauses 3.5 to 3.10 of the said circular, Mr. Purohit submitted that the policy provides for applicability of wharfage and stacking charges only when the indenter or rail user cancels his indent. The said provisions are silent as to the consequence in the event of cancellation of a valid indent by the railways itself or for any reason the railway is unable to provide the rakes against the valid indents. The Petitioner is in no way responsible for cancellation of the rakes by the railway-authorities during the period from 6th March, 2010 till May, 2010. The availability of railway rakes being few and far, the Petitioner had to avail the rakes operated by persons who were operating with the railways on Private Public Partnership under WIS Policy. Under the compelling circumstances, the Petitioner was forced to stack the materials in the railway siding. The railways charged for the stacking and further directed unless the same is paid, the Petitioner would neither be provided with rakes nor the materials would be allowed to be removed from the railway siding. Thus, opposite parties started to earn stacking charges keeping the stock captive and the charge have presently assumed the diabolic figure.

5. It is further submitted that had the Railways allowed the stacked iron ore to be removed from the railway siding to the storage yard of the Petitioner or provided the rakes for transportation of the materials of the petitioner's buyers, such imposition of heavy stacking charges on the materials of the Petitioner would not have been there. Thus, the Petitioner has become a victim of the captivity of his stock by the railways, which is arbitrary and illegal. The cost of the iron ore is almost 1/3rd of the stacking charge imposed. The Petitioner has his own stockyard on plot No. 624 of Khata No. 131/167 at Bansapani railway siding. It was only for the purpose of sending the materials through booked rakes, the materials were stored at the railways siding. Since the railways itself has cancelled the rakes, the same is responsible for stacking and storage of the materials of the Petitioner at the railways siding. Especially when on 07.05.2010 the opposite party verified the stocks of the Petitioner and certified them to be

genuine, the opposite party-railway authority ought to have allowed the Petitioner to send the iron ore by providing rakes. By letter dated 21.06.2010, the period from 06.03.2010 to 30.04.2010 has been treated as "Dies non" and exempted from imposition of stacking charge. Hence, blocking the materials of the Petitioner against shifting after 07.05.2010 by the opposite party-railways in the guise of stacking charges not paid lacks propriety and authority. Concluding his argument, Mr. Purohit submitted that opposite parties are not justified in passing the order to the effect that in case of non-payment of stacking charges, the materials would be handed over to opposite party No. 2 and the Petitioner would be blacklisted. In support of his contention, Mr. Purohit has relied upon the judgment of this Court in the case of Anurag Ferro Products Pvt. Ltd. v. Union of India and Ors. in W.P.(C) No. 17332 of 2006 and order dated 02.08.2010 passed in W.P.(C) No. 15643(W) of 2010 and order dated 06.08.2010 passed in W.P.(C) No. 16741 (W) of 2010 by the Calcutta High Court.

6. Mr. A.K. Mishra, learned Counsel appearing on behalf of the railway-authorities submitted that the instant writ petition is bad for non-compliance of Section 80 of Code of Civil Procedure. Therefore, the writ petition is not maintainable as disputed questions of fact are involved in this writ petition. Since the Petitioner has committed unlawful act by dumping the alleged materials in the railway premises without any authority and required permission, the wharfage/stacking charges has been rightly imposed on such illegal stacking/storing. The Petitioner having contravened the Railway Rules is liable to pay the wharfage/stacking charges as per the provisions under para-3.3 of the Divisional Rate Circular No. 12(G)/2009 dated 29.06.2009. In the said Circular, it has been clearly mentioned that the stacking permission shall be granted by the Senior Divisional Manager (Commercial) in consultation with the Senior Divisional Operations Manager only to those Rail users who have indented for the wagons/rakes. In paragraph 3.2 of the said circular, it has been categorically mentioned that in "Dump and Load" system the consignor shall be allowed to dump the materials in the loading point on the confirmed forecast from the Chief Controller (Minerals) of the Division. However, for loading of iron ore, the advance stacking is not permitted in Chakradharpur Division. The Petitioner has willfully and deliberately stacked the alleged iron ore in contravention of the condition enumerated in paragraph 3.2 of the said Circular. In terms of the said policy, a consignor will be allowed to dump his material at the loading point on receipt of confirmed forecast from the Chief Controller (Minerals) regarding the placement of the empty rakes on the following day. In the said system, no advance stacking of iron ore is permissible. Hence, by an indent only, the Petitioner has no legal right to stack the alleged iron ore inside the railway premises without ascertaining the supply of rakes on receipt of the confirmed forecast from the Chief Controller (Minerals) regarding placement of the empty rakes. Placement of indent does not confer any right upon the Petitioner to dump the material inside the railway premises. The railway-authority after considering the genuine problem faced by various traders during the period of prohibitory orders, has taken a decision to declare the prohibitory

period as "dies non" for the purpose of levying the stacking charge. The Petitioner stacked the materials prior to the promulgation of the prohibitory orders whereby he cannot avoid the liability of payment of stacking charges. Under Annexure-3 of the writ petition, the Petitioner was only permitted to load the iron ore when the empties are supplied. The Petitioner was never allowed for advance stacking. Hence, under the "Dump & Load" system as enumerated in paragraph 3.2 of the DRC No. 12(G)/2009 no advance stacking of iron ore is allowed at that station. Without being aware of the exact date for supply of rakes, the Petitioner should not have stacked the materials in the railway premises in advance. Therefore, the Petitioner is liable to pay the stacking/wharfage charges for using the railway premises for unauthorized stacking. Revised stacking charge bill was raised and the Petitioner was served with the bill for the period from 01.03.2010 to 05.03.2010 and 01.05.2010 to 25.06.2010 excluding the prohibitory period, which is calculated at Rs. 8,69,61,600/-. Had the Petitioner taken effort to shift the material just and after the lifting of the prohibitory order, staking/wharfage charge could have been minimal. The Petitioner has deliberately delayed to shift the alleged materials to his own plot, therefore, the Petitioner is liable for payment of the enhanced stacking charges. As per Annexure-8 to the writ petition, the Petitioner was afforded opportunity to revalidate his old indent by the department of Mines of the State Government within the stipulated period of 30th April, 2010. The Petitioner did not make any effort to revalidate his old indents whereby his indents were treated to be cancelled as per procedure adopted by the Railways with the direction of the State Government. In order to bring transparency in carriage of iron ore, Annexure-7 to the writ petition was issued by the Railways. The purpose of Annexure-7 to the writ petition was to prevent illegal transportation of iron ore and minerals from Orissa. In paragraph-3 of the letter issued by the Chief Commercial Manager, South Eastern Railway vide the special rate circular No. OP 128/Misc.V/Pt III dated 23.04.2010 it is indicated that the pending indents as on 19th April would require similar revalidation by the Department of Mines of the State Government, failing which the indents would be treated as cancelled. This circular was issued by the Chief Commercial Manager, S.E.R. in order to prevent the illegal transportation of iron ore through the railways. No step was taken by the Petitioner to revalidate the indents which are cancelled.

7. It is the mandatory duty of the Petitioner to clear up the stacking/wharfage charges prior to placing of the indents. For nonpayment of stacking/wharfage charges, the railway is lawfully authorized to dispose of the stacked material in order to clear up the railway premises and not to allow the Petitioner to continue with the occupation of the railway premises for months together at the cost of other genuine traders, who are to dump their materials in the said premises. The provisions of paragraphs 3.5, 3.7 and 3.8 are applicable to the customers who are granted with the stacking permission in accordance with the provisions of paragraphs 3.3 and 3.4 of the DRC No. 12(G)/2009 dated 29.09.2009. The Petitioner comes under the "Dump and Load" system i.e. to dump the material at

the loading point on receipt of the confirmed forecast from the Chief Controller (Minerals) regarding placement of empty rakes. The Petitioner had unauthorizedly stacked the alleged materials to the tune of 4257 metric tons in advance at Bansapani Station for which it is liable to pay the stacking/wharfage charges. Because of illegal utilization of the railway premises by the Petitioner, the railway authorities are deprived of the utilization of the said sidings. Cost of the iron ore has no nexus with the stacking/wharfage charges which has been levied for occupation of the railway premises on day-to-day basis. The petitioner's deliberate action is the main reason for accumulation of the stacking charges. It is not at all a fact that the Petitioner had stacked the materials against the registered indents. Therefore, the Petitioner is responsible for unauthorized stacking/wharfage charges. In the case of M/s. Pattnaik Steel & Alloys Ltd. in Misc. Case No. 103/2010 (W.P. (CrI) No. 194/2010), this Court directed the Petitioner to make payment of the stacking charges to the railways which has been paid.

8. The Petitioner was never allowed for advance stacking of material. In terms of paragraph 3.2 of the Circular No. 12(G)/2009 dated 29.06.2009 under "Dump and Road" system, the consignor shall be allowed to dump the materials in the loading point on the confirmed forecast from the Chief Controller (Minerals) Division. Under the above circumstances, no advance stacking is permissible. Placement of indent does not confer any right upon the Petitioner to dump the material in the railway premises. In the counter affidavit filed by the opposite parties it is stated that the Petitioner stacked the alleged materials prior to the promulgation of the prohibitory order/period. To this, there is no denial by the Petitioner. The Petitioner has also not brought any materials before us to show that it was ever allowed for advance stacking. Therefore, advance stacking of materials in the railway premises by the Petitioner is not in conformity with the provisions made and is contrary to the provisions contained in DRC No. 12(G)/2009 dated 29.06.2009. Merely by placing an indent, no right accrues in favour of the Petitioner for stacking the materials in the railway premises. It is also found that the railway has nothing to do with passing of the prohibitory order. The Ministry of Railway took a lenient view and declared the prohibitory order as "Dies non" for the purpose of stacking charges and no stacking/wharfage charge was levied during that period, even though the materials were stacked/stored by the Petitioner in the railway premises. In the above circumstances, the Petitioner is liable to pay the stacking charges levied by the opposite party-Railway Authorities.

9. The judgment dated 05.09.2007 passed in the case of Anurag Ferro Products Pvt. Ltd. v. Union of India and Ors. in W.P. (C) No. 17332 of 2006 has no application to the facts of the present case as the facts of both the cases are different. In M/s. Anurag Ferro Products Pvt. Ltd. (supra), the question before this Court was whether the consignment detained by opposite parties could be subject to payment of wharfage? In that case this Court relying on the definition of wharfage held that wharfage is the charge levied on goods for not removing

them from the railway after expiry of the free time for such removal. It was further held that where a consignee comes to take delivery but the railway itself detained the same and does not deliver the consignments, no wharfage charge is leviable as the consignee desires to take delivery of the consignments and the same is not given to him due to detention by the railway-authorities. In the present case, the Petitioner dumped and staked its materials in the railway premises/siding without any permission obtaining from the railway-authorities. Therefore, the principle laid down by this Court in M/s. Anurag Ferro Products Pvt. Ltd. (supra) has no application to the present case.

10. The order of the Kolkata High Court dated 02.08.2010 passed in Rashmi Metalics Ltd. and Anr. v. Union of India and Ors. in W.P.(C) No. 15643(W) of 2010 and order dated 06.08.2010 passed in the case of Sunil Sponge Private Limited and Anr. v. Union of India and Ors. in W.P.(C) No. 16471 (W) of 2010 are interim orders. Apart from that the facts of those cases are different from the case of the Petitioner. Therefore, the interim orders passed by Kolkata High Court in those cases have no application to the present case.

11. In view of the above, we don't find any infirmity or illegality in the order passed by the railway-authorities asking the Petitioner to make payment of the stacking/wharfage charges.

12. In the result, the writ petition is dismissed. No order as to costs.