
(2010) 02 CAL CK 0089
In the Calcutta High Court
Case No : Writ Petition No. 70 of 2007

Ultra Tech Cement Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 12-02-2010

Acts Referred:

Railways Act, 1989 — Section 72(2), 72(3), 72(4), 73, 78

Citation : (2010) 02 CAL CK 0089

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : Phiroze Edulji, Rudraman Bhattacharya, Avijit Ganguly and Prithiraj Sinha, for the Appellant; R.P. Mookerjee, for the Respondent

Judgement

I.P. Mukerji, J.—The writ petitioner is a consignee of goods known as clinker and gypsum. The transportation was made by Railway. The quantities transported must have been enormous because they were transported between the beginning of 2005 and the end of 2006 and involved substantial freight.

2. The issue in this writ application is very short. The question to be answered is whether after unloading of the goods and delivery to the consignee and removal of those goods by it, the railways have any right to make a claim on account of an allegedly excess quantity of goods.

3. Admittedly, these goods had been unloaded, delivered to the writ petitioner and removed by it before the claim for demand was made.

4. The demanded sum is about Rs. 59,67,377/- raised by innumerable statements issued over a period of time, which are annexed to the writ petition and challenged in this writ.

5. Three Sections of the Railways Act are very relevant, namely, Section 73, 78 and 79. These Sections are set out below:

73. Punitive charge for overloading a wagon.? Where a person loads goods in a

wagon beyond its permissible carrying capacity as exhibited under Sub-section (2) or Sub-section (3), or notified under Sub-section (4) of Section 72, a railway administration may, in addition to the freight and other charges, recover from the consignor, the consignee or the endorsee, as the case may be, charges by way of penalty at such rates, as may be prescribed, before the delivery of the goods:

Provided that it shall be lawful for the railway administration to unload the goods loaded beyond the capacity of the wagon, if detected at the forwarding station or at any place before the destination station and to recover the cost of such unloading and any charge for the detention of any wagon on this account.

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 and consignment;

(ii) re-calculate the freight and other charges; and (iii) correct any other error or collect any amount that may have been omitted to be charged.

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

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

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

6. Now, these Sections provide inter alia for weighment, re-measurement and recalculation of freight of the loaded goods, and for recovery of additional charges if it is inter alia found that the goods loaded on the wagons were in excess of their carrying capacity. It also provides that the railway may recover these charges before delivery of the goods.

7. On this point I have been referred to three decisions of our Court. One is the Division Bench decision in Union of India (UOI) and Others Vs. Agarwala and Co. and Another, , the others, being an unreported Single Bench decision dated 30th July, 2009 in Ultra Tech Cement Ltd. and Anr. v. Union of India and Ors. W.P. No. 358 of 2006 decided by a Single Bench judge of our court and a judgment and order in appeal from that order by the railways dated 27th January 2010 in Union of India and Ors. v. Ultra Tech Cement Ltd. and Anr. APO No. 241 of 2009, decided by a Division Bench of the Court affirming the decision of the Hon''ble

Single Judge for the reasons given by His Lordship. Therefore, in this particular case it can truly be said that there has been a merger of the Single Bench judgment and order with the Division Bench judgment and order.

8. The aforesaid factual and legal position is not in dispute after hearing Mr. Rudraman Bhattacharya, learned Counsel for the petitioner and Mr. R.P. Mookerjee, learned Counsel for the railways.

9. In the above decisions similar demands made by the railways have been quashed and set aside on the ground that any penal charges could have been recovered only upon giving an opportunity of weightment to the writ petitioner. When this opportunity was not available and the goods have been delivered and removed this provision could not be invoked.

10. I am bound by these decisions and I am in respectful agreement with them.

11. But I would add the following:

Section 73 refers to recovery of penalty "before the delivery of the goods".

12. I read Section 73 as a kind of a lien, similar to the lien of a ship owner for unpaid freight. When the goods are in custody of the railways it may insist that such penalty may be paid before the goods are released. Therefore, a right has been given to the railways to recover these charges before the delivery of the goods.

13. But when this right has not been exercised by the railways, these authorities cannot be taken as good for the proposition that the claim of the railways to recover any penalty in terms of the contract of carriage or Section 73 is extinguished altogether.

14. It is true that when goods have not been inspected or weighed and they have been delivered and removed and in many cases consumed, the railways may be deprived of valuable evidence to substantiate its claim but the right to claim this penalty remains not by demand notices as sought to be done, but by appropriate civil action.

15. Therefore, following the above judgments of our court I allow the writ application by quashing the demand notices being annexure P6. But nevertheless, it will be open to the railways to establish its claim in an appropriate forum in accordance with law if so advised, on the basis of the above observations.

16. Urgent certified photocopy of this judgment/order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.