
(2011) 05 CAL CK 0070
In the Calcutta High Court
Case No : A.P.O. 312 of 2010

Union of India and Another (E. Rly)

APPELLANT

Vs

Ultra Tech Cement Ltd. and Another

RESPONDENT

Date of Decision : 19-05-2011

Acts Referred:

Railways Act, 1989 — Section 73, 79, 83

Citation : AIR 2011 Cal 216

Hon'ble Judges : Shukla Kabir, J; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : Partha Sarathi Bose Bijoybrata Dey, for the Appellant; Rudraman Bhattacharya, for the Respondent

Final Decision : Dismissed

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against an order and/ or judgment dated 30th July, 2009 passed by the Hon'ble Single Judge in W.P. No. 357 of 2006 and W.P. No. 358 of 2006. The question involved in the said two writ petitions was as to whether a claim may be made by the railways on account of overloading a wagon only prior to the release of the goods.

2. The facts revealed that the Petitioner Company is one of the largest manufacturers of cement and clinker. The said company uses railway wagons to transport raw materials to its manufacturing units and to carry its products to its customers or en-route to its customers. The writ petitioners challenged the several demands made by the railways on account of overloading charges and penalty thereon for the petitioner company, whether as consignor or as consignee or as endorsee of the railway receipts, having loaded or caused to be loaded goods in railway wagons beyond the permissible carrying capacity thereof.

3. An incidental challenge has also been made to the quantum of penalty levied. According to the writ petitioner the penalty imposed was six times the freight rates applicable to the highest class. It is further the case of the writ petitioners

that since the extent of penalty was subsequently scaled down to twice the freight rates, there is implicit admission on the part of the railways that the imposition of the penalty at the rate of six times the freight rates was irrational and unjustified.

4. It is further appears to us that the railways raised several claims on account of overloading charges and penalty but no formal notice was issued, prior to the petitioner company taking delivery of the respective consignments on the ground that the wagons have been overloaded. It is also admitted that in every instance of claim challenged by the writ petitioner, there was no weighment at the boarding station and the railway receipts had been issued tentatively indicating the weight as declared by the consignor which was subject to verification upon actual weighment at an intermediate station.

5. On such facts, the Hon''ble single Judge duly considered the relevant provisions of the Railways Act, 1989, which are set out hereunder :-

65. Railway receipt.- (1) A railway administration shall,-

(a) In a case where the goods are to be loaded by a person entrusting such goods, on the completion of such loading; or

(b) in any other case, on the acceptance of the goods by it, issue a railway receipt in such form as may be specified by the Central Government.

(2) A railway receipt shall be prima facie evidence of the weight and the number of packages stated therein:

Provided that in the case of a consignment in wagon-load or train-load and the weight or the number of packages is not checked by a railway servant authorized in this behalf, and a statement to that effect is recorded in such railway receipt by him, the burden of proving the weight or, as the case may be, the number of packages stated therein, shall lie on the consignor, the consignee or the endorsee.

72. Maximum carrying capacity for wagons and trucks.-

(1) The gross weight of every wagon or truck bearing on the axles when the wagon or truck is loaded to its maximum carrying capacity shall not exceed such limit as may be fixed by the Central Government for the class of axle under the wagon or truck.

(2) Subject to the limit fixed under the subsection (1), every railway administration shall determine the normal carrying capacity for every wagon or truck in its possession and shall exhibit in words and figures the normal carrying capacity so determined in a conspicuous manner on the outside of every such wagon or truck.

(3) Every person owning a wagon or truck which passes over a railway shall determine and exhibit the normal carrying capacity for the wagon or truck in the manner specified in sub-section (2).

(4) Notwithstanding anything, contained in sub-section (2) or subsection (3), where a railway administration considers it necessary or expedient so to do in respect of any wagon or truck carrying any specified class of goods or any class of wagons or trucks of any specified type, it may vary the normal carrying capacity for such wagon or truck or such class of wagons or trucks and subject to such conditions as it may think fit to impose, determine for the wagon or truck or class of wagons or trucks such carrying capacity as may be specified in the notification and it shall not be necessary to exhibit the words and figures representing the carrying capacity so determined on the outside of such wagon or truck or such class of wagons or trucks.

73. Punitive charge for 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) recalculate 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 authorized in this behalf considers it necessary so to do, no weighment shall be allowed of goods booked at owner's risk rate or goods which are perishable and are likely to lose weight in transit:

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

83. Lien for freight or any other sum due.- (1) If the consignor, the consignee or

the endorsee fails to pay on demand any freight or other charges due from him in respect of any consignment, the railway administration may detain such consignment or part thereof or, if such consignment is delivered, it may detain any other consignment of such person which is in, or thereafter comes into, its possession.

(2) The railway administration may, if the consignment detained under sub-section (1) is -

(a) perishable in nature, sell at once; or

(b) not perishable in nature, sell, by public auction,

Such consignment or part thereof, as may be necessary to realize a sum equal to the freight or other charges:

Provided that where a railway administration for reasons to be recorded in writing is of the opinion that it is not expedient to hold the auction, such consignment or part thereof may be sold in such manner as may be prescribed.

(3) The railway administration shall give a notice of not less than seven days of the public auction under clause (b) of sub-section (2) in one or more local newspapers or where there are no such newspaper in such manner as may be prescribed.

(4) The railway administration may, out of the sale proceeds received under sub-section (2), retain a sum equal to the freight and other charges including expenses for the sale due to it and the surplus of such proceeds and the part of the consignment, if any, shall be rendered to the person entitled thereto.

6. His Lordship analyzed the submissions made by the writ petitioner where the writ petitioner contended that Section 73 of the Act permits the penalty can be recovered from the consignor or the consignee or the endorsee at the prescribed rate on account of goods loaded in a wagon beyond its permissible carrying capacity only prior to the delivery of the goods. The argument put forwarded before His Lordship is that since Section 73 is a penal provision, it has to be strictly construed and the penalty is to be extracted in the manner provided in such section or not at all. Therefore, the submission which was made before His Lordship is that once the delivery of the relevant consignment is given by a railway administration to the consignor or the consignee or the endorsee the railway administration is divested of the right to recover the penalty in respect thereof on such account.

7. His Lordship duly considered Section 73 and held that the process of recovery of the penalty would give rise to two questions - from whom and how? Section 73 has clearly answered the first question. Hence, the second question has been answered by His Lordship that how the penalty is to be recovered is found in both Section 73 and Section 83. His Lordship duly dealt with that question and found that Section 73, in effect, recognizes a lien over the goods, for the purpose

of realizing the penalty thereon and further held that the expression "before the delivery of the goods" has to be understood in such light. His Lordship further held that if it were to be accepted that the word "may" qua the expression "before the delivery of the goods" sets the outer limit of time for the exercise of the power to recover the penalty, it would militate against the clear prescription of Section 83 of the Act.

8. Thereafter, His Lordship duly dealt with Section 83 of the said Act and after analyzing the same came to the conclusion:

...On a conjoint reading of Sections 73 and 83 of the Act, it appears that a railway administration may recover the penalty on account of goods being loaded in one or more wagons beyond the permissible carrying capacity thereof in respect of a particular consignment prior to the delivery of the consignment or subsequent thereto. However, the two sections govern the realization of the charges and may not necessarily permit the demand for the charges to be made subsequent to the release of the relevant consignment.

9. His Lordship has also duly noticed the following paragraphs:-

1422. Weighment of outward goods- (a) Outward goods should be weighed as indicated below, the particulars of weighment being entered on the forwarding note in the place provided for the purpose:

(i) Consignments in small lots. -All consignments should be weighed in full at the forwarding station.

(ii) Consignments in wagon loads. - (1) In the case of consignments of grain, salt, seeds, sugar, pressed cotton or other staples, in bags or bales of uniform size and weight, the weight declared by the consignor may be checked by weighing a proportion of the number of bags or bales of uniform size and averaging their weight. If the bags or bales are not of uniform size and weight, those of uniform size and weight, should be grouped separately, each lot being treated for the purpose of weighment as a separate consignment and weighed as such. The remainder of the consignment of bags or bales or other commodities not of uniform size should be weighed in full. The proportion weighed should not be less than 10 per cent at stations where the traffic is large and 20 per cent at other stations.

(iii) Goods loose, bulky goods or goods in bulk such as sand, stone, timber, etc.. which cannot be weighed on the ordinary weighing machine provided at stations should be weighed on a wagon weighbridge at the forwarding station, if one is provided there. If there is no weighbridge at the starting station, the wagon may be weighed at a convenient weighbridge station en route, which should as far as possible, be the first weighbridge station. In case there is no weighbridge en route the wagon may be weighed at destination, if a weighbridge is available there.

(b) Names of stations provided with weighbridge are notified by railways in their

Supplementary Goods Tariffs.

1424. (a) At weighbridge stations, where the wagons are required to be weighed, the Station Masters should ensure that such weighment is done and that the wagons are not pushed on without weighment.

(b) The result of weighment should be recorded in the weighment registers in Form Com. W-4, which should be written in duplicate by carbon process, separately for local and through traffic. The pencil copy of the register should be retained as station record and the carbon copy submitted monthly to the Traffic Accounts Office along with the returns.

(c) The result of weighment should also be recorded by the weighbridge station staff on the wagon labels and invoices. The latter should, after being stamped with the name of the weighbridge station, be sent forward to the destination for accountable and recovery of charges due.

1725. In addition, a separate telegraphic advice of the net weight found on weighment should be sent, together with the booking particulars to the forwarding and destination stations and to the Traffic Accounts Office of the destination station. The destination station should, in all cases, paste the telegraphic weighment advice on the relevant page of the delivery book, the result of weighment, as also the particulars of the weighment advice, being recorded against the connected entry in the delivery book.

1427. The freight charges, in the cases referred to in the preceding para, should be invoiced on the sender's declared weight. It will be the duty of the destination station to weigh all such consignments and recover undercharges, if, due before delivery of goods.

1543. Invoices labels endorsed for weighment.- (a) All consignments, the invoices or labels of which have been endorsed for weighment, should be weighed at the destination station, if not already weighed en route."

(b) Where invoices or labels have been endorsed for weighment at an intermediate weighbridge station and the result of such weighment has not been communicated to the destination station, the latter should call for the same telegraphically from the weighbridge station. If no reply is received, the entire consignment should be re-weighed at the destination station. In case, weighment facilities do not exist at destination station, charges should be retained on the sender's weight or prescribed minimum weight, whichever is higher.

1745. When the request of a consignee or a endorsee for re-weighment of wagon load consignments at destination station is accepted on merits of each case by the Divisional Commercial Superintendent, the charges notified in the Supplementary Goods Tariff of the Railway should be collected and a separate money receipt, in Form Com. I M-2 issued for each re-weighment. In addition, demurrage charges due under the rules should also be recovered if the request

for re-weighment is received after placement of the wagon for unloading. The re-weighment charges should be accounted for as a special debit in the station books and balance sheet.

10. After considering those paragraphs of the manual and Section 78 and Section 79 of the said Act and after scrutinizing the same His Lordship found as follows:-

If such is the right which is given to the consignee or the endorsee that a request may be made for re-weighment of the loaded wagon, it follows that the consignee or the endorsee, as the case may be, must necessarily be made aware of the railways' claim on account of penalty for overloading prior to the delivery of the relevant consignment. If Section 79 of the Act is seen to confer a right on the consignee or endorsee to contest the railways' claim of overloading, then such right has to be allowed to be exercised before the wagons are unloaded and the delivery of the consignment is taken by the consignee or the endorsee. This would have a bearing on the railways' right to recover the penalty as recognized in Section 73 of the Act. There is an element of time involved that the railway administration needs to adhere to, but that is not in the timing of the recovery as the petitioners suggest but only in the timing of making the consignee or the endorsee aware of the imposition of the penalty.

11. The case, which was made out before the Trial Court on behalf of the railways is tried to be, canvassed before us that since there was no weighment at the boarding station for want of a weighbridge thereat and all the relevant railway receipts referred to the weighment being carried out at an intermediate station, it was incumbent for the consignor or the consignee or the endorsee to have deputed a representative at the weighment station to ascertain the result thereof. Therefore, it is submitted that since the writ petitioners or the consignors did not attend the weighment despite being made aware of the same, they cannot be heard to question the levy of the penalty on the ground that they were not informed of the overloading prior to the consignments being released.

12. His Lordship further held that in the backdrop of the said admitted position that the claim on account of penalty in respect of every consignment covered in either petition was raised more than several weeks subsequent to the delivery of the respective consignments. His Lordship also held that the claims are bound to fail on the ground that the petitioners were not afforded a chance to exercise the right conferred on a consignee or an endorsee u/s 79 of the Act. Accordingly, His Lordship allowed the writ petitions and set aside the claims on account of penalty for overloading raised by the railways.

13. Being aggrieved, this appeal has been filed before us on behalf of the railways.

14. The learned Counsel appearing on behalf of the appellant raised a point that the writ petition is not maintainable since the agreement which was entered into between the parties contained an Arbitration Clause. He further submitted that the disputes between the parties has been referred to the Arbitrator. Reliance has

also been placed on 2004 (3) SCC 553 and 2007 (14) SCC 680 : (AIR 2007 SC (Supp) 1733).

15. The second point he tried to urge before us is that the railway receipts were issued on the basis of the declaration given by the consignor and which was accepted by the railways with the instruction to the S.S. Weighbridge to weigh jointly at the destination before delivery. It is also stated that the consignees did not send their representative at the S.S. Weighbridge station at the time of weighment of goods. However, it is admitted that, in the instant case, no request was made by the consignee for re-weighment of the goods in accordance with Section 79 of the Railways Act.

16. On the contrary, it is submitted on behalf of the respondent company is that the Division Bench of this High Court has already affirmed the order of the Hon''ble single Judge in a similar situation. He also relied upon the unreported decisions in W.P. No. 70 of 2007 Ultra Tech Cement Ltd. v. Union of India & Ors. and W.P. No. 304 of 2009 Ultra Tech Cement Ltd. v. Union of India & Ors.. The Hon''ble single Judge was pleased to quash the demand notices and liberty was given to the railways to establish its claim in an appropriate Forum in accordance with law. The said order of the Hon''ble single Judge was affirmed by the Hon''ble Appeal Court by an order dated 8th April, 2010.

17. It is further submitted that since in the instant case the judgement of the learned Trial Judge in another writ petition being W.P. No. 358 of 2006 has already been upheld by the Hon''ble Division Bench by an order dated 27th January, 2010.

18. Our attention has also been drawn to the decision of the Hon''ble Division Bench in the case of Union of India (UOI) and Others Vs. Agarwala and Co. and Another, . It is further submitted that the argument which tried to be put forwarded with regard to the Arbitration Clause cannot have any relevance in the facts and circumstances of the case since such ground is not taken in the memorandum of appeal on behalf of the appellant.

19. After considering the facts and materials placed before us and after scrutinizing the Sections of the Railways Act as well as the paragraphs of the manual we find that admittedly the demand notices were issued by the railways after the delivery of goods.

20. After considering Sections 73 and 83 it appears to us that the said two Sections govern the realization of the charges and from the said sections it appears to us that as has been held by the Hon''ble single Judge in order to take punitive charge for overloading a wagon, the concerned parties must be given intimation of the overloading and once the goods have been booked after due weighment such punitive charge cannot be levied unless the goods are re-weighed in the presence of the representatives of the parties concerned. The said principle has been laid down in the case of Union of India v. Agarwala (supra) and further we have noticed that the conduct of the railways would show that the

belated demand has been made subsequent to the delivery being effected and thereby it violates the instruction given in the Railways Manual to its officials to obtain payment prior to the release of the goods prescribed.

21. We noticed the paragraphs of the manual and in the light of the sections of the Railways Act, we find that the writ petitioners were not afforded a chance to exercise the right conferred on a consignee or a consignor u/s 79 of the Act. Therefore, we have no hesitation to hold that the steps taken by the railways are in violation of the said provisions of law, thereby is not sustainable in the eye of law.

22. Accordingly, in our considered opinion, we do not find any illegality or irregularity in the order passed by the Hon"ble single Judge and the same has also been affirmed by us.

23. We do not find any merit in this appeal and accordingly we dismiss the appeal on the reasons stated hereinabove.

24. Photostat certified copy of this judgment, if applied for, be supplied to the parties.

Shukla Kabir (Sinha), J.

25. I agree.