
(2015) 02 CAL CK 0062
In the Calcutta High Court
Case No : FMA 317 of 2001

Union of India

APPELLANT

Vs

Biswanath Agarwal

RESPONDENT

Date of Decision : 25-02-2015

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Evidence Act, 1872 — Section 101

Railways Act, 1989 — Section 106, 106(3), 65, 65(2), 72

Citation : AIR 2015 Cal 225 : (2015) 1 CALLT 671 : (2015) 2 CHN 156 : (2015) 2 RCR(Civil) 751

Hon'ble Judges : Ashis Kumar Chakraborty, J.; Sanjib Banerjee, J.; A.K. Banerjee, J.

Bench : Full Bench

Advocate : Malay Kumar Das and Krishna Das Poddar, for the Appellant; R.K. Mittal and Narin Mittal, Advocates for the Respondent

Judgement

Sanjib Banerjee, J.—The following questions have been referred to this Full Bench by a judgment and order of a Division Bench of March 20, 2008.

"1) Whether the Railway Authority, after booking of a consignment, can, on the basis of its own reweighment in course of transit without notice to the owner, levy further charge on the ground of excess loading by rejecting an application for reweighment filed by the owner at the destination on the plea that there is no facility of such reweighment at the destination without making arrangement for reweighment at the nearest station from the destination where such facility is available?

2) Whether a demand of reweighment mentioned in the above situation comes within the purview of section 79 of the Act so as to reject such prayer on a ground for which the owner cannot be held responsible and at the same time, compelling the owner to pay the excess charge on the basis of reweighment in the absence of and without the notice of the owner?"

2. The reference has come to this Bench pursuant to an order of another Full Bench of three Judges to which the Hon"ble Chief Justice was a party.

3. The matter before the Division Bench was an appeal from an award passed by the Railway Claims Tribunal which required the respondent in the appeal to be paid a sum of Rs. 24,473/- primarily by way of refund.

4. A consignment of iodised salt was booked from Chirai in Gujarat on the Western Railway to Malda Town Station. According to the facts as recorded in the judgment of the Railway Claims Tribunal, the consignment was loaded on five wagons and, since the loading was not supervised by any railway staff, the relevant railway receipts qualified the total weight of the consignment by using the words "said to contain..." The booked weight as evident from the railway receipt pertaining to a particular wagon was indicated as 580q. Such wagon was caused to be weighed by a vigilance team of the Eastern Railway at Pakur, whereupon the actual weight of the goods on the wagon was found to be 614q. On the basis of such additional weight of the consignment, the respondent consignee was required to pay a further amount of Rs. 22,104/- on account of freight. Such payment was made by the consignee at the destination station. The award of the Railway Claims Tribunal passed on November 22, 2000 does not indicate whether any demand for reweighment was made by the consignee at the destination station. It is not even clear as to whether the notice for refund issued by the consignee to the railway administration under Section 106(3) of the Railways Act, 1989 was issued prior to the consignee taking delivery of the consignment. The award of November 22, 2000 does not record the date of any protest by the consignee to the demand for additional freight.

5. There is no doubt that the facts will be assessed by the Division Bench upon this reference being answered, particularly since Section 23 of the Railways Claims Tribunal Act, 1987 does not limit the scope of the appeal. The answers rendered in this reference to the questions raised herein have also to be applied to the facts of the case.

6. In the order of reference of March 20, 2008, the Division Bench noticed a previous Division Bench judgment of the year 2006 that apparently expressed a view contrary to the one proposed to be taken by the Division Bench making the order of reference.

7. In the unreported judgment rendered on March 16, 2006 in FMA No. 401 of 2001 (Union of India v. Bajranglal Jugalkishore), an award of the Tribunal to allow refund of excess freight was challenged. Coincidentally, in that case, too, a consignment of iodised salt was booked on a wagon from Chirai to Malda Town; but the consignment was as per railways" risk rate upon the railway receipt issued containing the words "said to contain..." In that case, too, a vigilance team of the Eastern Railway had the wagon weighed at Pakur and discovered an excess quantity. The additional freight was realised from the respondent to the appeal and, presumably, the consignment was released thereafter. A claim was

carried to the Tribunal upon a notice under Section 106 of the 1989 Act being served on the railway administration.

8. The Division Bench judgment in the earlier case quoted several passages from the Tribunal's order which seems similar, if not identical, to the award of the Tribunal that has been challenged in the appeal in which the present reference has arisen. The previous Division Bench referred to Section 65 of the 1989 Act as to the railway receipt only being prima facie evidence of the weight stated therein before noticing Section 78 of the 1989 Act and the railways' authority to remeasure or reweigh any consignment before its delivery. The judgment thereafter quoted Section 79 of the 1989 Act and noted Rule 1744 of the Indian Railways Commercial Manual before holding that since there were no weighment facilities in the Malda Town Station and the goods shed thereat, the concerned authority was justified in declining the reweighment sought by the respondent to the appeal. The judgment also recorded that the railway authorities could have proceeded to resort to punitive action under Section 73 of the 1989 Act, but had chosen not to do so and only charged for the excess weight loaded on the wagon.

9. Paragraph 19 of the unreported judgment is of some relevance in the context of the order of reference:

"19. Learned counsel for the Respondents lastly attempted to invoke the principles of natural justice and submitted that the entire action have been resorted to by the railways behind their back and therefore the same must be held to be arbitrary. We are afraid, we cannot accept such a contention inasmuch as there is no provision under the Railways Act qua Section 78 that a consignor/ consignee or endorsee must be noticed before reweighment. Under such circumstances, we are of the view that on all counts, the impugned order cannot be sustained. Accordingly, the same is set aside and this appeal therefore stands allowed. In the facts of this case, however, there shall be no order as to costs. 10. It is such view in the unreported judgment that the Division Bench in the order of reference disagreed with that has given rise to the reference, as would be evident from paragraph 25 of the order of reference which is reported at Union of India (UOI) Vs. Biswanath Agarwal, :

"25. We, accordingly, apply the aforesaid principles laid down by the Apex Court to the facts of the present case and hold that for imposition of additional or penal charge upon an owner of the consignment on the ground of alleged overloading, the owner must be given opportunity to dispute the allegation and if such allegation is disputed before the removal of the goods, the consignment must be reweighed in the presence of the owner either at the destination or at the nearest station from the destination where there exists a weighbridge. 11. It is time to see the order of reference in somewhat greater detail. In the second paragraph of the order of reference, the Division Bench recorded that upon the demand for additional freight being made on the owner of the consignment at the destination station, the "respondent immediately protested against the said action of the Railway and claimed reweighment at the destination station when

the Railway authority, on such prayer, specifically recorded that there was no provision for reweighment at the Malda Town Station." The order further recorded that in such circumstances, the respondent herein "was compelled to remove the goods on payment of excess charge and thereafter, lodged the claim for repayment of the amount."

12. In the claim petition filed by the respondent before the Tribunal, there is an assertion at paragraph 7(i)(s) thereof that the respondent herein "in its letter dtd. 10/11/98 demanded the alleged excess weight under proper weight at MLDT as per Goods Tariff Rule, which respondent did not comply." At the following paragraph, the respondent herein claimed that he had to pay the excess freight under protest by his letter dated November 10, 1998 to avoid demurrage or the like. There is a copy of a letter November 11, 1998 which is appended to the typed copy of the claim petition in the paper-book filed in the appeal before this court. Such letter appears to have been received by the railways on November 11, 1998 and nothing in the letter amounts to a request for reweighment. There is no other document appended to the claim petition before the Tribunal from which it would be evident that any request was made by the respondent herein for reweighment of the wagon.

13. The order of reference noticed the previous Division Bench view, the relevant provisions of the 1989 Act and several provisions of the Indian Railway Commercial Manual before framing the question that arose for consideration at paragraph 17 of the report:

"17. Now the question that falls for determination before us is, if the owner of the consignment, on receipt of a notice of demand of additional charge for the first time on the ground of overloading at the destination, demands reweighment by disputing the allegation of overloading, whether the Railway authority can reject such demand simply on the ground that at the destination, there is no provision for weighment and insist on payment of the excess charge without any further weighment." 14. Several paragraphs of the unreported Division Bench judgment were quoted thereafter in the order of reference before disagreeing with such view and expressing a contrary opinion. The order of reference traced the right of the owner of a consignment, charged with overloading without being permitted representation at the time of weighment, not to any provision in the 1989 Act but to the inherent right of the owner of the consignment to "at least, a post-decisional opportunity...if the charge of overloading is disputed by him." The order of reference also observed that if the reweighment as demanded by the owner of a consignment was not possible at the destination station, it ought to be conducted at the nearest station from the destination station where such facility was available.

15. Before the substantial issue of procedural fairness and natural justice as evident from the questions referred to the Full Bench is taken up by assessing the relevant provisions of the 1989 Act, a caveat may be entered that every legal issue that falls for adjudication has to be founded on certain facts. Indeed, the

terms of reference or the questions posed for consideration in a reference would indicate the facts on which the legal issue arises and, in course of the reference, the questions posed have only to be answered. But if the questions referred are not founded on facts which are evident therefrom, the applicability of the answers to the lis has to be assessed when the matter goes down for final adjudication after the reference is concluded. The respondent herein has not been able to show that any request for reweighment had been made by him prior to obtaining delivery of the consignment. There is no doubt that such aspect of the matter will engage the attention of the appropriate Division Bench while adjudicating the matter before it and considering whether the answers to the questions posed in the reference would be of any relevance in the state of the facts.

16. Paragraphs 20 and 21 of the order of reference indicate why the Division Bench in that case was unable to subscribe to the view taken by the previous Division Bench. It was observed in the order of reference that if the railways rejected a request for reweighment on the ground of the facility of weighment not being available at the relevant station, "in the proceedings initiated by the claimant challenging the action of the Railway, the latter cannot justify their action...because...the Railway was unable to comply with the prayer of reweighment..." The order of reference noticed the Supreme Court judgment reported at *Basudeo Tiwary Vs. Sido Kanhu University and Others*, where the Supreme Court observed that in order to impose procedural safeguards, "this Court had read the requirement of natural justice in many situations when the statute is silent on this point." The order of reference perceived that in the railways alleging that the consignor had declared the consignment to be of lower weight than the weight discovered in course of weighment at a railway weighbridge, the railways had either to afford the consignor or consignee or endorsee, as the case may be, the opportunity to be represented in case of a reweighment requested by such party or not insist on the demand for additional freight at all.

17. Before delving into the provisions of the 1989 Act to answer the questions posed in this reference, it may be profitable to notice two other recent Division Bench judgments in somewhat similar circumstances and another case where the request for reweighment was made by the consignee following a demand for penalty and other charges by the railways on account of one or more wagons being overloaded.

18. In the judgment reported at *Union of India Vs. Rameshwar Lal Agarwal*, a demand was made by the railways, almost in similar circumstances as in the present case, of under-declaration of the actual weight of the consignment of iodised salt in course of its transportation from Nawa, Rajasthan to Raniganj in this State. The writ petition was allowed by quashing the demand on the ground that the railways were under an obligation to arrange for reweighment but had failed to do so in accordance with the Section 79 of the 1989 Act and paragraph

1744 of the Indian Railways Commercial Manual. In the resultant appeal, the Division Bench noticed that there was no application for reweighment of the goods. At the loading station, the consignment was not weighed and the railway receipt recorded as such. The 15 wagons containing the consignment were weighed at Andal, the under-declaration of weight was discovered and a demand for payment of additional freight of about Rs. 3.89 lakh was made. The delivery of the consignment was taken without applying for reweighment as per Section 79 of the 1989 Act or paragraph 1744 of the said Manual. The Division Bench relied on the proviso to Section 65(2) of the 1989 Act, that if a consignment was loaded without its weight being checked by the railways, the burden of proving the weight as declared in the railway receipt would lie on the consignor, the consignee or the endorsee. The Division Bench interpreted Section 79 of the 1989 Act to imply that a request for reweighment thereunder had per force to be made before taking delivery of the consignment and reasoned that since the burden of proving the weight declared in the railway receipt was that of the person entitled to the consignment, upon the delivery of the consignment being taken without a request for reweighment, the demand raised for under-declaration of weight and under-payment of freight by the railways prior to discharging the consignment could no longer be resisted by the consignee or endorsee entitled to the consignment.

19. The Division Bench judgment in *Rameshwar Lal Agarwal* noticed another Division Bench judgment reported at *Union of India (UOI) and Others Vs. Agarwala and Co. and Another*, but found the dictum therein to not be applicable as the facts were distinguishable. A further Division Bench judgment reported at *Union of India and Another (E. Rly) Vs. Ultra Tech Cement Ltd. and Another*, was also referred to in *Rameshwar Lal Agarwal* and, again, distinguished on facts.

20. The issues in *Agarwala and Co.* and *Ultra Tech Cement Ltd.* were somewhat similar. In *Agarwala and Co.*, there was short delivery of a substantial number of bags of iodised salt that had been loaded in Chirai at the destination station in Berhampur in this State. It transpired that the consignment was not weighed at the loading station and the railway receipts were issued as per the consignor's declaration of weight with the observation that the goods would be weighed en route to the destination station. The goods were weighed at some in-between place without reference to the consignor or consignee and, on the wagons being found to be loaded beyond the permissible limit, several bags were off-loaded. The reason for the off-loading of such bags was not immediately made known to the consignee at the destination station and it was only after the delivery was obtained by the consignee that the railways slapped demands on the consignee for under-payment of freight wherein it was disclosed that several bags had been off-loaded en route to the destination station because of overloading of the relevant wagons. The consignee sought a reweighment upon receiving the demands. This, in effect, implied that the consignee disputed the claim of under-declaration of weight at the loading station and under-payment of the freight due on the consignment. A petition under Article 226 of the Constitution was

immediately carried by the consignee to this court against the demands raised and the arbitrary unloading of several bags and the sale thereof without notice to the consignee. The petition succeeded and in the appeal before the Division Bench, the same Bench which passed the present order of reference, held, upon reading several provisions of the 1989 Act and the said Manual, as follows in paragraphs 12 and 17 of the report:

"12. 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 reweighed in the presence of the representatives of the parties concerned. As provided in para 1451 of IRCM, the Railway receipts should not be granted till the goods are correctly examined and weighed and when the senders are required to load their consignments, the Railway receipts should not be given until loading has been completed to the satisfaction of the Railway."

"17. In our view, if the Railway authority specifically declares short-delivery at the destination to the representative of the sender without disclosing the reason of short-delivery, the acceptance of such short-delivered goods cannot create estoppel against the sender or his representative in claiming the balance amount of goods or compensation for the loss in future within the period of limitation because the shortage is admitted by the Railway authority and for non-removal he would be liable to demurrage."

21. In *Ultra Tech Cement Ltd*, a common question arose in the two writ petitions as to whether a claim on account of overloading a wagon ought to be made by the railways only prior to the release of the goods. In the unreported single Bench judgment of July 30, 2009, it was observed that the railways may make a claim on account of overloading a wagon after releasing the consignment but in doing so they would have surrendered their lien under Section 83 of the 1989 Act for realising their dues by withholding the consignment or even selling the same. As to the railways' right to impose a penalty under Section 73 of the 1989 Act - though the issue may not be similar in the present case but the analogy may not be altogether irrelevant - the single Bench held:

"The railways' right to impose the penalty for overloading under Section 73 of the Act is subject to the right to challenge the claim of overloading conferred on the consignee or the endorsee under Section 79 of the Act as has been recognised in *Agarwala and Co*. The right of the consignee or the endorsee to have the consignment weighed is not absolute and is hedged with the conditions spelt out in Section 79 of the Act. As to the circumstances that can be cited by the railways to refuse a request for weighment made under Section 79, may not be relevant in this context. But if the consignee or the endorsee has a right to seek weighment (or, more appropriately, reweighment) of the consignment, such consignee or endorsee must necessarily be made aware of the charge of overloading prior to the consignment being delivered. This is irrespective of whether the railways choose to exercise their lien over the relevant consignment.

"It would thus appear that though the railway administration may not lose the right to recover the penalty on account of overloading of wagons beyond their permissible carrying capacity after releasing the consignment, a railway administration may not recover such penalty if it fails to intimate the consignee or the endorsee of the charge of overloading prior to such consignee or endorsee unloading the wagons and taking delivery of the goods. For, if it were otherwise it would rob the consignee or the endorsee of the right to seek weighment of the wagons as guaranteed by Section 79 of the Act and as understood by the railways to have been guaranteed to the consignee or the endorsee on a reading of paragraph 1745 of the manual."

22. The view was upheld in appeal with the observation that since the demand on account of alleged overloading was made on the writ petitioners at a time when the petitioners could no longer "exercise the right conferred on a consignee or a consignor under Section 79 of the Act...we have no hesitation to hold that the steps taken by the railways are in violation of the said provisions of law..."

23. Two single Bench decisions of the Gauhati High Court may be of some relevance. In the judgment reported at Raghu Forwarding Agency and Another Vs. Union of India (UOI) and Others, , a petition under Article 226 of the Constitution was instituted for refund of the punitive charges recovered by the railways for overloading wagons beyond the permissible capacity and the wharfage and demurrage charges. A rake was indented for carrying dry coal in its 35 wagons. The dry coal was loaded without weighment but a certificate was issued by the railways that the loading inside the wagons was found to be up to the permissible loading height on a visual check. The railway receipt stipulated that the wagons would be weighed en route or at destination. The weighment was conducted en route, but in the absence of any representation from the petitioners. Such weighment apparently revealed overloading in most of the wagons beyond the permissible limit and consequential demands were raised by the railways. Pursuant to a request for reweighment and the deposit of the reweighment and haulage charges, the reweighment was conducted at a near-by private weighbridge which revealed the weight to be within the permissible limit. Despite this the railways insisted on the additional freight, penalty and demurrage and wharfage charges, whereupon the petitioners paid the additional freight and penalty and took delivery of 30 wagons but the remaining five were detained by the railways in lieu of the demurrage and wharfage charges. Upon the petition being received, a bank guarantee was required to be furnished covering the demurrage and wharfage charges upon which the delivery of the goods in the five wagons could be obtained by the petitioners. The court ultimately held that the result of the reweighment at a facility other than a railway weighbridge was not binding on the railways and, as such, the challenge to the demand for additional freight and penalty was repelled. But the railway demand on account of wharfage and demurrage was quashed since the delay was perceived to be upon a bona fide dispute as to the weight being raised.

24. In the judgment reported at (2003) 2 Gau LR 429 (Nirmal Traders v. Union of India), the issue that was framed was, whether the result of the weighment conducted by the railways in the absence of representation on behalf of the consignee or endorsee was binding on the consignee or endorsee despite a request for reweighment being declined. That case also involved a claim of overloading of wagons. When the petition under Article 226 of the Constitution was received, an interim order was passed directing the reweighment of the wagons at any railway weighbridge at the cost of the petitioner. Such interim order also provided that the petitioner would be liable to pay such amount as would be due on the basis of such reweighment before being entitled to obtain delivery of the goods by furnishing a bank guarantee for the remainder of the original claim. The reweighment conducted at another railway weighbridge pursuant to the interim order revealed lower weight than the weight indicated in the original demand by the railways. The petition was allowed by requiring the additional freight and penalty to be paid in accordance with the result of the reweighment conducted under the interim order.

25. In the context of the questions referred to this Full Bench, some of the provisions of the said Act of 1989 and paragraph 1744 of the said Manual need to be seen. In construing a particular provision, it is sometimes desirable to be aware of the company that it keeps. It is, thus, necessary to read some of the allied provisions before coming to Sections 78 and 79 of the 1989 Act to answer the questions:

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

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

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

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

Provided that in the case of a consignment in wagon-load or train-load and the weight or the number of packages is not checked by a railway servant authorised in this behalf, and a statement to that effect is recorded in such railway receipt by him, the burden of proving the weight or, as the case may be, the number of packages stated therein, shall lie on the consignor, the consignee or the endorsee." "72. Maximum carrying capacity for wagons and trucks. - (1) The gross weight of every wagon or truck bearing on the axles when the wagon or truck is loaded to its maximum carrying capacity shall not exceed such limit as may be fixed by the Central Government for the class of axle under the wagon or truck.

(2) Subject to the limit fixed under sub-section (1), every railway administration shall determine the normal carrying capacity for every wagon or truck in its

possession and shall exhibit in 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 sub-section (3), where a railway administration considers it necessary or expedient so to do in respect of any wagon or truck carrying any specified class 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 any consignment;
- (ii) re-calculate the freight and other charges; and
- (iii) correct any other error or collect any amount that may have been omitted to be charged."

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

Provided that except in cases where a railway servant authorised in this behalf considers it necessary so to do, no weighment shall be allowed of goods booked

at owner's risk rate or goods which are perishable and are likely to lose weight in transit:

Provided further that no request for weighment of consignment in wagon-load or train-load shall be allowed if the weighment is not feasible due to congestion in the yard or such other circumstances as may be prescribed." "1744. Reweighment at the request of owners. - (a) As laid down in the I.R.C.A. Goods Tariffs, railways do not undertake to weigh consignments at the destination station as a matter of course. Such weighments can only be considered in exceptional cases, when the condition of the consignment or package warrants this.

(b) Requests for such reweighments of goods booked in wagon loads should be referred to the Divisional Commercial Superintendent, who may permit the reweighment at his discretion provided that facilities for reweighment exist at the destination.

(c) The consignee or endorsee of a wagon load or a train load consignment booked at Railway risk rate may, if he has reason to believe that the wagon offered to him for delivery at destination, does not contain the quantity of goods entrusted for carriage, make a request in writing to the Divisional Commercial superintendent or any other railway servant authorised in this behalf for the weighment of such consignment at destination station such Railway Servant may allow request for weighment on a Railway Weigh bridge on payment of charges prescribed and demurrage charge if any, such request may be disallowed in the following cases if:

(1) the consignment is received in covered wagon and the seals of the loading station are intact and there is no other evidence of the consignment having been tampered in transit,

(2) the consignment has been received in open wagon but there is no sign of tampering with the original packing,

(3) the consignment is of perishable nature and is likely to lose weight in transit,

(4) weighment is not feasible due to congestion in the yard,

(5) weighment done on request shall be without prejudice to the rights of the railway administration to disclaim liability under the Railways Act or under any other law for the time being in force.

(d) (Section 79 of the Railways Act, 1989 is set out)"

26. Chapter IX of the Railways Act covers a very important facet of the railways" functioning: the carriage of goods. The chapter contains 27 sections, the last of them being the unusual rule-making provision pertaining to matters covered by the chapter in Section 87 thereof. The chapter spans across diverse matters as maintenance of rate-books to railway receipts and the legal implication thereof to conditions of carriage, the power to charge for freight, penalty for overloading

and the exigencies attendant to the carriage of goods.

27. In the context of the legal issues that have been raised in this reference, the implication of the proviso to Section 65(2) of the Act is of paramount importance. Such proviso mandates that when the weight or number of packages pertaining to a consignment is not checked by an authorised railway servant, and a statement to that effect is recorded in the relevant railway receipt by such authorised railway servant, the burden of proving the weight or the number of packages declared by the consignor, shall lie on the consignor, the consignee or the endorsee. The second paragraph of Section 101 of the Evidence Act, 1872 provides that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. In keeping with the ethos of the first paragraph of the Section 101 of the Evidence Act, the implication of the proviso to Section 65(2) of the Railways Act is that in case of railway receipts covered by the proviso, the initial onus of proving the weight or measurement as declared in respect of a consignment is always on the consignor, the consignee or the endorsee; but on such initial onus being discharged, the onus shifts to the railways. The manner in which the railways can discharge its onus is by causing the consignment to be weighed or measured and informing the consignee or the endorsee of the weight or measurement before it is delivered.

28. Though the expressions "re-measure", "re-weigh", "re-classify", "recalculate" and "correct any other error" appearing in Section 78 of the Railways Act carries a flavour of the exercise to be undertaken in terms of such provision to be a repetition of the same exercise undertaken earlier, the sense of duplication that the expressions convey has to be seen in the light of the particulars as to measurement or weight or classification or calculation as "contained in the railway receipt".

29. The gamut of the relevant provisions has to be seen in the light of the monopoly that the railways enjoy and the constraints under which the railways function in an economy that has remained on course for decades to take off but has not yet taken off to find its feet, so to say, as in a developed country. Section 65 of the 1989 Act and, in particular, the proviso to sub-section (2) thereof reveals the constraints under which the railways function: of there not being adequate infrastructure or personnel or time to verify every consignment at every loading station. It is easy to gauge from such proviso that not every consignment, which is received by the railways without an authorised railway servant checking its measurement or weight, is actually measured or weighed, as the case may be. The under-declaration of the weight of a consignment, and the consequential under-payment of the freight due thereon, can happen, broadly speaking, in two sets of circumstances: when an entire wagon is booked and it is loaded beyond its permissible capacity; or, when the consignment measures or weighs more than what is declared therefor by the consignor. If the goods are measured or weighed by an authorised railway servant at the loading station, it would, ordinarily, be in the presence of the consignor's representative and the

matter would be somewhat settled. If, however, the lack of infrastructure or the paucity of requisite personnel or time constraints or other exigencies preclude a consignment to be measured or weighed by an authorised railway servant at the loading station, Section 78 of the 1989 Act and the practice guidelines thereunder permit the exercise to be undertaken at a subsequent stage. Indeed, Section 78 of the Act permits the remeasurement, reweighment or reclassification of any consignment notwithstanding that the consignment may have been measured or weighed or classified by a railway servant authorised in such regard prior to the issuance of the railway receipt therefor.

30. When a wagon is overloaded, within the meaning of overloading as evident from Section 73 of the Act, the consignor or the consignee or the endorsee is liable to penalty at prescribed rates in addition to the additional freight and other charges. Similarly, every other consignee or endorsee entitled to the consignment is liable for the additional freight on account thereof as may be assessed upon the consignment being remeasured or reweighed or reclassified under Section 78 of the Act. Section 83 of the Act provides for the lien of the railways over a consignment in respect of any freight or other charges due in respect thereof and also recognises the railways' right to detain any other consignment of the person liable to pay freight or other charges in respect of any consignment.

31. The operation of Section 79 of the Act is not confined to situations where a demand for additional freight is made in respect of a consignment or a demand on account of additional freight and consequential penalty is made for overloading a wagon. The right to make a request for weighment (including reweighment) can be asserted in myriad other circumstances, including perceived short-landing or depletion in quantity upon damage to the bags or containers carrying the goods or even a perceived mis-declaration as to the quantity by the consignor in course of a sale of the goods by the consignor to the consignee by delivery of the relevant railway receipts. But the exercise of the right under Section 79 of the Act is subject to several conditions. A weighment or reweighment under Section 79 of the said Act cannot be obtained for the mere asking. Just as the discretion which is required to be exercised by the appropriate railway official under Section 79 of the said Act has to be within the bounds of reasonableness as is expected of a State or authority answering to that description in Article 12 of the Constitution, good grounds need to be made out by a consignee or endorsee, as the case may be, for seeking weighment or reweighment of a consignment. The first proviso to Section 79 of the Act pertains to perishable and like goods. The second proviso to the provision permits a request for weighment (or reweighment) in wagon-load or train-load to be declined if the weighment is not feasible due to congestion in the yard or due to other circumstances that may be prescribed.

32. The underlying suggestion in the order of reference and in the questions posed therein is that the right to seek reweighment need not be traced to

Section 79 of the Act when a consignee or endorsee, as the case may be, is slapped with a demand for additional freight (The legal position would be the same if the demand is based on the allegation of overloading of wagon.) in respect of a consignment which was not verified by an authorised railway servant at the loading station and the weight whereof which is found to be erroneous in course of the weighment undertaken by the railways under Section 78 of the Act in the absence of representation by the person entitled to the consignment.

33. If the said Act did not contain a provision as to further weighment as is recognised in Section 79 thereof, such a right would have had to be read in to the statute, if only to ensure a procedural safeguard against an arbitrary claim on account of additional freight (or overloading of a wagon) on the basis of any weighment undertaken by the railways in the absence of any representation thereat on the part of the person entitled to the consignment. But in an express provision for weighment at the behest of the consignee or endorsee appearing in Section 79 of this statute, the request for further weighment (or reweighment), has to be made under such provision, though the consequence of the denial of such a request may not be plain to see from the relevant provision.

34. There is an inextricable connection between Section 65(2) of the Act and Section 78 thereof. If Section 65(2) of the Act did not recognise the relevant contents of a railway receipt to be prima facie evidence thereof, there would be no question of remeasuring or reweighing the consignment covered by a railway receipt as envisaged in Section 78 of the Act; for, upon a railway receipt being issued, the railways would otherwise have been bound by the statement as to the weight or measurement of the consignment recorded in a railway receipt. The proviso to Section 65(2) of the Act qualifies the operation of the substantive provision.

35. Though Section 78 of the Act covers many facets of a consignment - measurement, weight, classification, calculation of freight and correction of any other error - Section 79 of the Act, understandably, only provides a special provision for the weighment of the consignment. That may be because matters as to measurement, classification, calculation of the freight and correction of any other error may not involve the cumbersome process that weighment would.

36. It is not only in a case of a consignment covered by a railway receipt which has been issued without verification of the weight of the consignment declared therein by any authorised railway servant that the consignment may be reweighed under Section 78 of the Act, but the exercise may also be done in respect of a consignment covered by a railway receipt issued by an authorised railway servant upon verification of the weight at the loading station. When a consignment covered by a railway receipt other than a situation covered by the proviso to Section 65(2) of the Act is reweighed, it is the reweighment, and the consequential calculation of freight on such basis, which will govern the consignment, unless the consignee or the endorsee can demonstrate otherwise. The reweighment conducted under Section 78 of the Act in such a case may be

in course of systemic checking or upon a vigilance team having reason to suspect that the weight disclosed in the railway receipt may not reflect the actual weight of the consignment.

37. The proviso to Section 65(2) of the Act may not only be seen to be qualifying a particular situation covered by the substantive provision in the sub-section, it may also be viewed as clarificatory in nature or having been incorporated by way of abundant caution. Since a railway receipt is only prima facie evidence of, inter alia, the weight of the consignment disclosed therein, upon the consignment being reweighed and the consignee or the endorsee being informed thereof prior to the delivery of the consignment, whether or not the consignment pertains to a situation covered by the proviso to Section 65(2) of the Act, it is the result of the reweighment that would be regarded as conclusive evidence of the weight of the consignment unless the consignee or the endorsee establishes otherwise.

38. In the context of the present reference, it is not necessary to consider a situation where the reweighment exercise under Section 78 of the Act conducted by the railways reveals a different weight than what is recorded in the relevant railway receipt issued by an authorised railway servant upon verification of the weight at the loading station.

39. Upon the weight of a consignment and, consequently, the freight payable thereon being discovered by the railways to be otherwise than as recorded in the relevant railway receipt covered by the proviso to Section 65(2) of the Act, if the concerned consignee or the endorsee were to dispute the result of the reweighment exercise conducted by the railways under Section 78 of the Act, the first step in discharging the burden would be to seek the consignment to be reweighed. When the consignor or the endorsee of a consignment covered by the proviso to Section 65(2) of the Act is informed of the additional weight and additional freight consequent upon a reweighment conducted under Section 78 of the Act by the railways without any representation of the consignor, the consignee or the endorsee, but the consignee or the endorsee does not seek a reweighment, the demand of the railways of additional weight and additional freight stands established. When such consignee or endorsee requests the consignment to be weighed again, if such plea is declined, the consignor, the consignee or the endorsee would still have to establish the weight of the consignment as recorded in the railway receipt issued by an authorised railway servant without verifying the weight thereof. That is the only difference between a railway receipt issued in respect of a consignment upon verification of its weight by an authorised railway servant and a situation where the railway receipt is issued by an authorised railway servant without verifying the weight of the consignment.

40. The normal function of a proviso is to except something out of the provision to which the proviso is attached or to qualify something enacted therein which, but for the proviso, would be within the purview of the enactment [See *Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta* and

Others,]. A proviso may also be seen as a qualification of the preceding enactment which is expressed in terms too general to be quite accurate [See (1909) AC 57 (Local Government Board v. South Stoneham Union)]. It is also a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision [See Ram Narain Sons Ltd. Vs. Asst. Commissioner of Sales Tax and Others,]. However, there is also the general rule in construing a provision containing a proviso that they ought to be construed together without making either of them redundant or otiose. It is also possible that a clause or a section worded as a proviso, may not be a true proviso and may have been placed by way of abundant caution. In an odd case, a proviso may deal with a subject related to the one covered in the main provision but deals with an aspect or state a rule independent of what is contained in the main provision.

41. The proviso to Section 65(2) of the Railways Act in this case pertains to a particular kind of railway receipts and forms a part of the provision covering railway receipts generally. The substantive provision in the sub-section is distinguished from what is contained in the proviso thereto in the proviso referring to only such railway receipts that are issued by the railways without an authorised railway servant checking the veracity of the declaration contained therein. It follows that in railway receipts other than those covered by the proviso, an authorised railway servant would have checked the declaration contained therein or would have inserted the declaration therein upon inquiring into the weight or the measurement referred to therein. It is a railway receipt other than one covered by the proviso that would be prima facie evidence of the weight and the measurement stated therein: in the sense that the declaration may be challenged by the consignor, consignee or endorsee upon producing cogent evidence to the contrary; or a subsequent reweighment or remeasurement by the railways may result in the contents of the railway receipts to not be regarded as conclusive.

42. In case of a railway receipt covered by the proviso to Section 65(2) of the Act, when a demand is made by the railways pursuant to a reweighment conducted under Section 78 of the Act it is such demand which, ordinarily, has to be accepted as appropriately indicating the weight of the consignment covered thereby, unless it is demonstrated to be erroneous by the consignor, the consignee or the endorsee. The proviso to Section 65(2) of the Act does not make out an exception in the classical sense from the substantive provision in the sub-section, it only places the burden of proving the veracity of the contents of the railway receipts in certain cases on the consignor, the consignee or the endorsee. If the proviso were to be regarded as an exception to the substantive provision in the sub-section in the true sense, then a railway receipt covered by the proviso would be meaningless. It is nobody's case that every consignment covered by a railway receipt under the proviso to Section 65(2) of the Act is weighed again by the railways - or is so required under the statute - before permitting delivery thereof.

43. If a demand for additional freight payable on a consignment depends on its weight, and a request for reweighment is made by the consignee or endorsee and such request is acceded to, the reweighment ought normally to be conducted at a railway weighbridge which may be the same weighbridge where the exercise had been conducted by the railways under Section 78 of the Act; but the reweighment should be in the presence of representation on behalf of the consignee or the endorsee or, at least, upon an invitation for representation. If the request for reweighment is declined, the consignee or the endorsee has still to establish by cogent evidence that the weight assessed in the impugned demand ought to be disregarded and the weight indicated by the consignor at the time of the issuance of the railway receipt ought to be accepted.

44. Since Section 78 of the Act does not provide for any representation of the person entitled to the consignment at the time of its reweighment and it may be impracticable in most cases to ensure representation, merely because the exercise of reweighment conducted under Section 78 of the Act is in the absence of the consignor, or the consignee or the endorsee, it may not be a good ground for rejection of the result of reweighment conducted under Section 78 of the Act. Again, merely because a request for further weighment made by the consignee or the endorsee under Section 79 of the Act is declined, it cannot be said that the demand for additional freight consequent upon reweighment under Section 78 of the Act may be disregarded. When a demand for additional freight consequent upon reweighment under Section 78 of the Act is made after discharging the consignment, the consignee or the endorsee is robbed of the opportunity to dispute such demand and as such the demand may, in appropriate cases, be set aside. But when such a demand is raised prior to releasing the consignment and the request for further weighment is declined on cogent grounds, the tribunal or the court is not bound to accept the weight disclosed in the railway receipt which an authorised railway servant had accepted without assessing the veracity thereof. As to what considerations would weigh with the tribunal or the court in such a situation cannot be put into a straightjacket; and, it has always to be kept in mind that in such a case the burden of proving the accuracy of the weight indicated in the railway receipt is on the consignor, the consignee or the endorsee. Ordinarily, upon the railways reweighing a consignment covered by the proviso to Section 65(2) of the Act and making a demand for additional freight on the consignee or endorsee prior to discharge of consignment, if no further weighment of the consignment is sought under Section 79 of the Act, the demand would remain undisputed and the weight of the consignment unrefuted.

45. As to whether a procedure is fair or not has to be assessed with reference to the nature of the procedure with reference to, inter alia, the scope and purpose thereof. The adherence to the principle of natural justice is but a facet of procedural fairness. But the extent to which the rule needs to be conformed to depends on the object of the procedure; and the operation of the strict rule may even be reasonably limited by a statute or the circumstances attendant to the procedure. In the context of a request by a consignor or an endorsee for further

weighment of the consignment under Section 79 of the Act being declined by the railways, the grounds for the refusal would be justiciable: not on the test of a fine toothcomb, but on more broader lines of reasonableness. The weighment of a wagon or a consignment may be an overwhelming exercise at times. Though it does not appear that the expression "or such other circumstances as may be prescribed" appearing in the second proviso to Section 79 of the Act has received the attention for the circumstances to be detailed in any rule other than what appears from the Railway Manual, the railways may cite grounds of delay, distance, extreme inconvenience or the like to decline a request for further weighment under such provision. It is the very nature of the railways functioning on tracks that may justify the refusal of a request for further weighment under Section 79 of the Act. It is in such light that the provision has to be seen and every refusal of a request for further weighment under Section 79 of the Act cannot result in the demand for additional freight raised consequent upon reweighment of the consignment under Section 78 of the Act being disregarded.

46. The two questions posed in the reference are, thus, answered as follows:

(1) The railways may certainly demand additional freight consequent upon conducting a reweighment under Section 78 of the Act in the absence of representation on behalf of the person entitled to the consignment despite rejecting a request for further weighment under Section 79 of the Act on cogent grounds; but as to the manner of assessment of the weight, and the consequential demand for additional freight, it will be for the tribunal or the court to decide in the circumstances of a particular case upon being mindful of the fact that the burden of proving the weight indicated in the railway receipt, when such receipt had been issued in the absence of any verification of the weight by an authorised railway servant, is on the consignor, the consignee or the endorsee.

(2) A demand for further weighment mentioned in the above situation would come within the purview of Section 79 of the Act, but as to whether the owner of the consignment will be compelled to pay the additional freight will have to be assessed on the facts of a particular case.

47. The answers to the questions have to be read in the light of the discussion that precedes it and its application to the facts of this case will be based on the satisfaction of the Division Bench as to its applicability.

48. Urgent certified website copies of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

Ashim Kumar Banerjee, J.

I Agree.

Ashis Kumar Chakraborty, J.

I Agree.