
(2013) 08 CAL CK 0074

In the Calcutta High Court

Case No : APO No. 62 of 2013, GA No. 521 of 2013 with WP No. 2763 of 2000

Union of India

APPELLANT

Vs

Rameshwar Lal Agarwal

RESPONDENT

Date of Decision : 02-08-2013

Acts Referred:

Citation : (2013) 4 CHN 379

Hon'ble Judges : Arun Mishra, C.J.;Joymalya Bagchi, J

Bench : Division Bench

Advocate : Ashoke Chakraborty and S. Ghosh, for the Appellant;Shyamal Sarkar and R. Dhara, for the Respondent

Judgement

1. The question involved in the appeal is about the reweighment of the consignment of salt booked by the respondent. Admittedly, at the originating Station Nawa, City in State of Rajasthan, the consignment could not be weighed due to non-availability of the functional weighing machine. The declaration made by the consignor was mentioned as an weight and endorsement to the said fact was made in the railway receipt, issued by the appellant. The destination of the goods was Ranigunj, West Bengal where weighment facility was not available. The weighment of the consignment was done at Andal Station in the State of West Bengal. Out of the twenty wagons loaded with iodised salt 15 wagons reached Ranigunj, West Bengal on January 15, 2000, while communication dated 17th January, 2000 was issued by Goods Shed Superintendent, Eastern Railway, Ranigunj requiring the petitioner to deposit an amount of under charges paid of Rs. 3,89,445/- alleging overloading of 15 wagons therein the weight declared by consignor. The respondent/petitioner initially preferred a Writ Petition in this Court being WP 1105 of 2000, the same was decided on 18th May, 2000, direction was issued to a General Manager, Eastern Railway to consider the representation and to decide the same by a speaking order within the stipulated period of time. Thereafter order was passed by the General Manager, Eastern Railways on 30th June, 2000. Applying principle laid down by this Court in other

cases, the quantity on reweighment at Andal an amount of overloading has been reduced and worked out to 22.02 tonnes in the case of Rameshwar Ashoke Kumar and the demand was substantially reduced. Accordingly, proportionate refund was ordered. The aforesaid order was questioned by the petitioner successfully before the Single Bench.

2. The Single Bench by judgment dated 2nd August, 2012 passed in WP 1105 of 2000, has allowed the Writ Petition and has quashed the demand in toto holding that Railway Authority was under obligation for making arrangement for reweighment and Railway has failed and neglected to deal with the instant case in accordance with the provisions of sections 65 and 79 of Indian Railways Act, 1989 (hereinafter referred to as the Act) and paragraph 1744 of Indian Railways Commercial Manual. The Single Bench has referred to and relied upon certain decisions while allowing the writ application and respondent have been directed to refund the balance amount which was paid by the petitioner towards levy of under-charges in terms of communication dated 17th August, 2000. Aggrieved thereby, the intra-Court appeal has been preferred by the Railways.

3. Shri Ashoke Chakraborty, learned Senior Counsel appearing on behalf of the appellants submitted that there are misconstruction of the provisions of sections 65 and 79 of the Act and the provisions contained in the Railway Commercial Manual with respect to re-weighment. section 78 of the Act has not been referred to as well as proviso to section 65 has not been taken note of by the Single Bench. It was submitted that weighment was not done at the originating Station. Thus, it was incumbent upon the Railways to weigh the consignment at least once. At Andal station the consignment was weighed and before taking delivery the consignee was informed with respect to the under charges paid on the basis of the actual weight found in the 15 wagons. The weight of the bags loaded was found to be more than declared at the originating station. It was open to the petitioner to apply u/s 79 of the Act and the provisions contained in the Railway Manual for reweighment of the goods. On prayer being made reweighment could have been done but the consignee obtained the delivery and later on applied only for weighment of the wagons, not for reweighment of the bags of the salt. However, delivery had been taken by them. Reweighment of the bags was not possible as the delivery had been taken by the consignee petitioner and he had not applied for reweighment of the bags containing salt.

4. It was also submitted by the learned Senior Counsel that in the facts and circumstances of the instant case the decisions which have been relied upon are wholly distinguishable and there is a power with the Railways to make the weighment u/s 78 of the act and for reweighment application has to be filed u/s 79 of the Act before taking delivery of the goods and subject to payment of demurrage charges which indicates that once delivery is taken reweighment cannot be applied for. In this case there was no such application filed for reweighment of the goods. The reweighment was done at Andal where electronic weighment facility was available which is advance weighment technology. Thus

weighment made at the electronic machine could not have been doubted. In view of the decisions of the Single Bench substantial relief had been granted applying the principle of yet another case and refund of the substantial amount had been ordered by the General Manager which was also not necessary in the facts and circumstances of the case. Whatever that may be as order was passed giving substantial relief, there was no scope for further interference in the just order passed by the General Manager, Eastern Railway in the writ application. It was liable to be dismissed.

5. Shri Sarkar, Learned Counsel appearing on behalf of the respondent has submitted that weighment could not have been done at Andal Station behind back of the respondent/petitioner and when the application was filed for weighment of the wagons it was not done. He has also relied upon the provisions contained in section 65 and section 79 of the Act, and the provisions contained in paragraph 1744 of the Indian Railways Commercial Manual.

6. First we come to the facts of the instant case. It is not in dispute that there was no weighment done at the originating station in the State of Rajasthan. Weighment was done at Andal Station in the State of West Bengal, as at Ranigunj, which was destination, weighment facility was not available. It is also not in dispute that before delivery was taken respondent/petitioner was informed in writing of the undercharges paid as the weight loaded in 15 wagons was found to be more than the declared one at the originating station. Thus the difference of under charges was demanded of Rs. 3,89,445/-.

7. The delivery was taken of certain consignment out of invoices Nos. 25 to 29 on 17.01.2000, 18.01,2000 and 20.01.2000, whereas demand after weighment had already been raised on 17.01.2000. Thereafter delivery was taken by the petitioner without filing any application for reweighment of the goods as per provisions contained in section 79 or paragraph 1744 of the Indian Railway Commercial Manual.

8. In our opinion, the Single Bench has not correctly appreciated the provisions of the Act as well as of the Commercial Manual. Section 65(2) of the Act provides that the railway receipt shall be prima facie evidence of the weight and the number of bags stated therein. However, in the railway receipt in the instant case there was a mention that there was no weighment facility at originating station as such they were loaded on the basis of the declaration made by the consignor. It is apparent from the proviso to section 65(2) of the Act that in case of consignment in wagon loaded is not checked by the Railway's servant authorised in this behalf and statement to that effect is recorded in the railway receipt by him, then the burden of proving the weight shall lie on the consignor, the consignee or the endorsee. Thus in the instant case when on Railway Receipt this fact was recorded that weight could not be checked at the originating station, thus the burden of proving the weight was on the consignor, the consignee or the endorsee as per the section 65(2) of the Act which is quoted below:--

65(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.

9. Section 78 of the Act confers a power upon the railways notwithstanding anything contained on the railway receipt to have the right to remeasure, reweigh or reclassify any consignment before the delivery of consignment and to recalculate the freight and other charges, correct any other error or collect any other amount that might have been omitted to be charged. The provisions contained in section 78 are quoted below:

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.

10. Section 79 of the Act deals with the weighment of the consignment on the request of the consignee or endorsee. Railway administration on request made by the consignee or endorsee shall allow the weighment of the consignment subject to certain conditions or payment of charges as may be prescribed and the demurrage charges, if any. Section 79 of the Act is quoted below:

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 further that no request for weighment of consignment in wagonload 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.

11. The provisions contained in section 79 of the Act presupposes that an application has to be made for reweighment in case the consignee or the endorsee is not satisfied with the weight and has to file an application before taking delivery. No such application in the instant case had been filed by the petitioner before taking delivery. No application at all had been filed later on also for weighment of the consignment which was booked. On the contrary, the application was filed only for weighment of the wagons. Thus, in the instant case, the consignee had failed to exercise the option u/s 79 of the Act of getting the

consignment weighed.

12. The provisions contained in section 78 of the Act are independent one than the provisions contained in section 79 of the Act. When an application is filed u/s 79, obviously the incumbent, a consignee or endorsee, has to be associated with the process of the weighment but not in the case where the Railways has measured weight under the provisions of section 78 of the Act. In the instant case, it was not obligatory upon the Railways to call the petitioner at Andal Station where the weighment was made in exercise of power u/s 78 of the Act as at the destination at Ranigunj there was no weighment facility available. As such the consignment had been weighed in the factual matrix at Andal Station. Thus it is apparent that Railways had exercised the right u/s 78 of the Act, and the respondent/petitioner failed to exercise his right u/s 79 of the Act.

13. The provisions contained in paragraph 1744 of the Indian Railway Commercial Manual of the Railways read thus:--

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 warrant 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, it has reason to believe that the wagon offered to him for delivery at destination, does not contain the quality 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 tempered in transit;

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

(3) the consignment is of perishable nature and is likely to loose 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 enforce.

14. It is apparent from the para 1744 of the Indian Railway Commercial Manual that request for reweighment of the goods in case the consignee or an endorsee is not satisfied has to be made in case the consignee has the reason to believe that wagon offered to him for delivery at the destination does not show the quantity of goods entrusted. In case the petitioner was not satisfied with the under charges claimed on the basis of weighment done at Andal Station he ought to have applied for reweighment of the consignment, that too before taking the delivery. Once delivery has been taken, the respondent was estopped to question the weighment done by the Railways. Section 65 of the Act cast a burden of proof of such consignment which has not been weighed at the originating station and such endorsement has been made to that effect in the railway receipt on consignee. In case the consignee wanted to prove the weight was somewhat different than the weighment made by Railways the consignee ought to have applied for reweighment. The acquiescence of the petitioner is clear. Hence, it cannot be allowed to question the weight so determined by the Railways. The General Manager after due consideration of this decision of this Court on other cases has already ordered substantial refund of more than Rs. 2 lacs out of initial demand of Rs. 3,89,445/-. Thus, there was no further scope for interference the writ jurisdiction by the Single Bench.

15. The Single Bench has further referred to provision of sections 65 and 79 of the Act to hold that Railway authorities were under an obligation for making arrangement for reweighment. The Single Bench has ignored the fact that no application for weighment of consignment of goods was ever filed by the consignee. The application filed for weighment of wagon is not the one contemplated u/s 79 of the Act or Para 1744 of Indian Railway Commercial Manual. Thus the finding recorded that Railways failed or neglected to make reweighment, in the instant case, in view of the provisions, is palpably incorrect and is not legally sustainable.

16. The Single Bench has also referred to a decision in Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, , in which normal rule of construction has been emphasized where certain power has to be exercised in particular manner then the said authority has to exercise the power only in that manner. The aforesaid proposition is undisputable. In the instant case, the respondent/petitioner has failed to invoke the provisions of section 79 of the Act. As such, it cannot be said that authority has exercised the power in unauthorised manner u/s 78 of the Act. There was no breach of provisions of section 79 read with paragraph 1744 of the Indian Railway Commercial Manual.

17. The decision in the case of Union of India (UOI) and Others Vs. Agarwala and Co. and Another, has been relied upon, in which the Single Judge has held that there was failure of authority to comply with the provisions of section 79 of the Act and paragraph 1744 of the Indian Railway Commercial Manual as the

representation of the petitioner was not considered for re-weighment of the offloaded bags in their presence or in presence of the sender. The Division Bench in Union of India (UOI) and Others Vs. Agarwala and Co. and Another, an appeal against the said decision, has laid down that for taking charges on account of overloading, once the goods have been put up for weighment, such punitive charges cannot be levied unless the goods are re-weighed in presence of the parties and in the aforesaid case the demand itself was made much later after the delivery had been obtained. The facts of the case of Agarwal & Co. & Ors. are distinguishable. There was application filed u/s 79 of the Act along with the provisions of para 1174 of the Indian Railway Commercial Manual which was not filed in the instant case. Yet another main distinguishing feature is that in the instant case, delivery had been taken after the demand of punitive charge. When no application was filed for re-weighment, obviously there was no obligation on the part of the railways to make re-weighment u/s 79 of the Act read with para 1174 of the Indian Railway Commercial Manual.

18. Reliance has also been placed by the Learned Counsel on Union of India & Anr. v. Ultra Tech Cement Ltd. & Anr., AIR 1911 Cal 216 where the question arose as to whether the demand should be raised by the Railways on the ground of overloading prior to consignment being released. The facts of the aforesaid case indicate that the demand was raised after several weeks of the delivery of the respective consignment. Thus, it was held that claims were bound to fail on the ground that the petitioner was not afforded chance to exercise right conferred of reweighment on it u/s 79 of the Act. The factual situation is juxtaposed here.

19. It is clear that having failed to exercise the right u/s 79 of the Act, the respondent-writ petitioner has failed to discharge the burden cast upon it under the proviso to section 65 of the Act. Thus, we find the decision of the Single Judge to be unsustainable one.

20. Resultantly, the appeal is allowed. The impugned order is set aside. Parties to bear their own costs. Urgent xerox certified copy of this judgment, if applied for, be given to the parties as expeditiously as possible upon compliance with the usual formalities.