

(2019) 09 GAU CK 0023

In the Gauhati High Court

Case No : Miscellaneous First Appeal No. 61 Of 2016

Union Of India @APPELLANT@Hash Shree Shiv Sai Steel Industries

Date of Decision : 10-09-2019

Acts Referred:

Railways Act, 1989 — Section 72(4), 73, 73(2), 73(3), 78, 79, 83

Citation : (2019) 09 GAU CK 0023

Hon'ble Judges : Achintya Malla Bujor Barua, J

Bench : Single Bench

Advocate : K P Maheswari

Final Decision : Dismissed

Judgement

1. Heard Ms. U. Chakraborty, learned Special Senior Counsel appearing for the appellant Railway. Also heard Ms. M. Sarma, learned counsel for the respondent claimant.

2. The claimant respondent booked a consignment of 10 wagons at sponge iron on 12.01.2009 under train load condition vide Invoices No. 1, 2, 3, 4, 5, 6, 7, 8 & 9 for being transported from Ex-Rou to NGC. At the time of delivery, the appellant railway authorities formed the view that there were some excess loading of the item so transported and upon such view being formed, apart from the freight charges and other charges, a penalty amounting to Rs. 4,26,401/- was also imposed. Being aggrieved, the respondent claimant preferred a claim before the Railway Claims Tribunal at Guwahati which was registered as OA No.61/2009. The claim preferred by the respondent claimant was given a final adjudication by a common judgment dated 19.01.2016. The learned Tribunal while deciding the issue No.1 framed therein had taken note of the provisions of Section 73 of the Railways Act, 1989 and arrived at a conclusion that in view of the provisions of Section 73, in the facts and circumstances of the present case, the punitive charges could not have been imposed.

3. Section 73 of the Railways Act 1989 is as follows:-

"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."

4. A bare reading of Section 73 of the Railways Act, 1989 would go to show that whenever there is an excess loading of the goods beyond the permissible carrying capacity, the railway administration may in addition to the freight and other charges, recover from the consigners, consignee or the endorsee, as the case may be, charges by way of penalty on such rates as may be prescribed before the delivery of the goods. The relevant aspect of Section 73 is that the recovery of the penalty that may be imposed can be made only before the delivery of the goods concerned. The provision of Section 73 that the recovery of the penalty can be made only before the delivery of the goods concerned would have to be read to be a condition precedent for imposing any such penalty.

5. The said question as to whether the recovery has to be made before the delivery of the goods was given a consideration by the Division Bench of this Court in Union of India & 5 Others -vs- Megha Technical & Engineers Pvt. Limited in WA No.71 to 74/2013, wherein in the order dated 07.03.2013 it was held as follows:-

"Once delivery is made, power under Sections 73, 78, 79 and 83 cannot be invoked. Learned Single Judge rightly relied upon the plain language of the said Sections and the judgment of the Hon'ble Supreme Court in Jagjit Cotton Textile Mills vrs. Chief Commercial Superintendent N.R. and others (1998) 5 SCC 126..... The contention that even after delivery any other consignment can be detained under Section 83 of the Act cannot be accepted as such power can be exercised if demand had been raised before delivery which is a condition precedent for exercise of power under Section 83. Thus, we do not find any ground to interfere with the view taken by the learned Single Judge. The appeals are dismissed."

6. A reading of the provision of the Division Bench clearly reveals that the learned Division Bench in arriving at its conclusion also relied upon the judgment of the Hon'ble Supreme Court in Jagjit Cotton Textile Mills vrs. Chief Commercial Superintendent N.R. and others (1998) 5 SCC 126. The learned Division Bench by going through the plain language of Section 73 and the judgment of the Hon'ble Supreme Court referred therein arriving at its conclusion that once a delivery is made the power under Sections 73, 78, 79 and 83 to impose a penal charge cannot be invoked. We also take note of that against the said judgment of the Division Bench, an appeal was carried by the railway authorities before the

Supreme Court wherein, by the order dated 01.07.2014 in Petition for Special Leave to Appeal (Civil) CC No.7730-7733/2014, the judgment dated 07.03.2013 of the Division Bench was upheld and the SLP stood dismissed. In other words, we are to understand that the law laid down by the Division Bench in its judgment and order dated 07.03.2013 had been upheld by the Supreme Court and that the interpretation of Section 73 of the Railways Act 1989 would be that no penalty charges can be imposed on the consigner, consignee or endorsee after the delivery of the goods in question had been made.

7. We find that in the judgment dated 19.01.2016, the learned Tribunal had allowed the claim made by the respondent claimant by arriving at a factual satisfaction that in the instant case, the delivery of the goods in question were made at a point prior in time and the penalty was imposed at a point subsequent to it and therefore, a conclusion was arrived that such procedure adopted was contrary to the provisions of Section 73. The learned Tribunal also took into consideration the aspect that before imposing the penalty charges no opportunity of hearing was given to the respondent claimant. As regards the other aspect that no opportunity of hearing was given before the penalty charges were imposed, Ms. U. Chakraborty, learned Special Senior Standing Counsel for the railway authorities submits that the question of the requirement of an opportunity of hearing to be given is presently pending before the Hon'ble Supreme Court and therefore, it should not be taken into consideration by this Court at present. To such submission Ms. M. Sarma, learned counsel for the respondent/claimant submits that the claimants are not urging upon the ground that the imposition of penalty is bad also for the reason that no opportunity of hearing was given prior to its imposition.

8. In view of such categorical submission, we interfere with that part of the judgment of the learned Claims Tribunal where the claim was allowed also on the ground of no opportunity of hearing been given to the claimant respondent before imposing the penalty charges. But as regards the other ground taken by the appellant railway authorities that penalty charges can also be imposed subsequent to the delivery, we are unable to accept such contention of Ms. U. Chakraborty in view of the categorical conclusion by the Division Bench of this Court in its judgment and order dated 07.03.2013 in Union of India & 5 Others v. Megha Technical & Engineers Pvt. Limited(supra) which had been upheld by the Supreme Court by its order dated 01.07.2014. For the purpose we require the learned Special Senior Standing Counsel to point out us from the record as to the date and time when the delivery was made and also the date and time at which the penalty was recovered. The records reveal that delivery of the goods concerned were made on 17.01.2009 whereas the penalty was 31.01.2009. Apparently, the factual situation in the appeal shows that goods in question were delivered at a prior point of time whereas, the recovery was made at a point subsequent to it.

9. The provisions of Section 73 being clear that penalty charges can be imposed

only before the delivery of charges, therefore, we are of the view that the imposition of penalty charges in the present case subsequent to the delivery being made would be unsustainable. In view of such conclusion, the findings of the learned Tribunal on the basis of the determination that the goods were delivered prior to the recovery of penalty being made does not require any interference. As regards the other aspect that no opportunity of hearing was given, the said part of the judgment stands interfered in view of the specific stand of the respondent claimant that they do not urge upon such ground to sustain their claim.

10. The appeal stands dismissed for the reason as stated above. Interim order if any passed earlier stands vacated.