
(2008) 03 CAL CK 0042
In the Calcutta High Court
Case No : F.M.A. No. 317 of 2001

Union of India (UOI)

APPELLANT

Vs

Biswanath Agarwal

RESPONDENT

Date of Decision : 20-03-2008

Acts Referred:

Constitution of India, 1950 — Article 12

Railways Act, 1989 — Section 65, 65(2), 72(1), 72(2), 72(3)

Citation : (2008) 3 CHN 401

Hon'ble Judges : Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : S.N. Chattopadhyay, for the Appellant; Saptangshu Basu, for the Respondent

Judgement

Bhaskar Bhattacharya , J.—This appeal is at the instance of the Eastern Railway and is directed against the award dated 22nd November, 2000 passed by the Railway Claims Tribunal, Calcutta, in Railway Claim Application No. 979 of 1999 by which the Tribunal passed an award for refund of Rs. 24,473/-.

2. The facts giving rise to filing of the present appeal may be summed up thus:

One consignment dated 29th October, 1998 was booked from Chirai to Malda Town Station and the consignment was loaded in five wagons. As the loading was not supervised by the Railway staff, in the receipt, such fact was specifically mentioned. According to the Railway, while the consignment loaded on wagon was on its way to the destination station, a vigilance team of the Eastern Railway intercepted the train concerned and conducted reweighment of those wagons at the Pakur Railway weighbridge and found that there was overloading; as a result, the Railway authority demanded the excess charge for 34 quintals amounting to Rs. 22,104/- at the destination from the owner of the consignment.

The respondent immediately protested against the said action of the Railway and claimed reweighment at the destination when the Railway authority, on such

prayer, specifically recorded that there was no provision for reweighment at the Malda Town Station. Finding no other way, in order to avoid demurrage, the claimant was compelled to remove the goods on payment of excess charge and thereafter, lodged the claim for repayment of the amount.

The Tribunal, by the award impugned herein, has accepted the contention of the claimant that the Railway authority was not justified in taking decision to reweigh the goods in the absence of the representative of the claimant and at the same time, could not also deny the demand of reweighment at the destination and, thus, passed the award for repayment.

3. Being dissatisfied, the Railway authority has come up with the present appeal.

4. Mr. Banerjee, the learned Advocate appearing on behalf of the Railway authority, by relying upon an unreported decision of a Division Bench of this Court in the case of *Union of India v. Bajranglal Jugalkishore*, (FMA No. 401 of 2001 disposed of on 16th March, 2006) has vehemently contended before us that the law has permitted the Railway authority to reweigh the consignment in the absence of the owner of the goods and in a case of demand of additional charge on the basis of such reweighment, if the owner demands reweighment after disputing the allegation of overloading, such demand may be refused if reweighment is not feasible due to congestion in the yard or such other justified circumstances as specified in the Section 79 of the Railways Act. In the said case, like the present one, the Railway authority at Malda Town Station specifically recorded that there was no such facility of reweighment of the consignment at the Malda Town Station to weigh the goods.

5. The Division Bench, however, was of the opinion that in view of absence of any such facility, the Railway authority had right to ignore the demand of reweighment and to levy the excess charge by refusing the prayer of fresh weighment in the presence of the owner of the consignment at the destination.

6. The Division Bench further held that there is no provision in the Railways Act qua Section 78 that the consignor must be noticed before the reweighment and that under the provision of Section 79 of the Act, the Railway had also the right to reject the prayer of reweighment if the application did not conform to the requirement of the said provision.

7. Mr. Basu, the learned Advocate appearing on behalf of the respondent, has opposed the aforesaid contentions advanced by Mr. Banerjee and has contended that once the consignment was booked after issue of a receipt granted by the Railway authority at the time of booking, if on further reweighment the consignment is found to be overweighted and consequently, the Railway authority wants to charge further amount for such overweight, the owner of the consignment must be given opportunity to be present at the time of reweighment. In support of such contention, Mr. Basu relies upon the following decisions of the Apex Court to convince us that the principles of natural justice demands that such provisions must be read into the statutory provision even if

there is no express provision in the statute for giving opportunity of being present to the consignor or the consignee at the time of reweighment:

- 1) Basudeo Tiwary Vs. Sido Kanhu University and Others, ;
- 2) State of U.P. Vs. Vijay Kumar Tripathi, and Another, ;
- 3) Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others,

8. Therefore, the question that arises for determination in this appeal is whether the Railway authority after granting a receipt of booking of consignment specifying the weight of the goods can demand extra-charge alleging overweight at the destination by refusing the demand of the owner of reweighment or without giving an opportunity to the owner of the consignment to be present at the time of reweighment if demanded by such owner.

9. In order to appreciate the points involved in this mandamus appeal, it will be profitable to refer to the following provisions of the Railways Act and the Railways Manual:

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 works 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 over-loading 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.

74. Passing of property in the goods covered by Railway receipt.-- The property in the consignment covered by a Railway receipt shall pass to the consignee or the endorsee, as the case may be, on the delivery of such Railway receipt to him and he shall have all the rights and liabilities of the consignor.

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.

Regulation

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 wagonloads.--(1) In the case of consignments of grain, salt, seedsr sugar, pressed cotton or other staples, in baps 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.

(2) 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 on route, which should as far as possible, be the first weighbridge station. In case there is no weighbridge enroute 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.

(a) 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 accountal and recovery of charges due.

1425. 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.

1426. Stations unable to weigh consignments due to weighing machine being out of order.--Where consignments, referred to in paras 1422(a)(i) and (ii)(1) cannot be weighed at the forwarding station, owing either to the absence of a weighing machine or to its having gone out of order, the weighment should be done by the destination station in accordance with the instructions contained in these Paras. A suitable remark should be given on the invoice and railway receipt, by the forwarding stations thus:

Weighing machine out of order, consignment to be weighed at destination.

1431. Testing of weighbridges by Weighbridge Inspector.--All weighbridges will be tested half yearly by an Inspector of Mechanical Department. After testing, he should furnish a certificate for each weighbridge showing that it has been adjusted and tested. This certificate must be displayed in the weighbridge house until the next inspection and the issue of a fresh certificate. The date of each testing should also be painted on the weighbridge.

1442. Preparation of invoices.--(a) After the goods have been carefully checked, counted, weighed and examined as to compliance of the packing condition, etc. and freight and other charges have been calculated and entered in the forwarding note, invoices should be prepared.

(b) The invoice form contains separate columns/boxes for most of the information required to be entered therein, viz., chargeable distance, handled by wagon owner and number, type of wagon, carrying capacity/area, tare, total number of the wagons loaded, forwarding note number, risk rate, invoice number, date, station from with (numerical code) and to, charged via, carried via, name and address of the sender and consigned, number, description, marks, measurement, actual weight and charged weight of packages, class of rate chargeable, rate per quintal, freight charges, other charges total to-pay/paid and remarks regarding defective condition of packing/consignment. Columns for recoding undercharges and overcharges detected at destination station have also been provided in the form. Any further particulars, required to be recorded on the invoice, affecting the rate or condition of carriage, viz., particulars of permit, pass or licence under which the consignment is booked, the remarks recorded by the sender on the forwarding note regarding election of route, election of Railway risk, when an alternative owner's risk rate exists, or for dispatch of the

consignment in an open wagon instead of a covered wagon, etc., should be entered in the space available on the invoice. The particulars of credit note, if any, tendered in lieu of freight charges, should also be recorded on the invoice.

(a) Under the provisions of Section 65 of the Railways Act, 1989:

(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 loadings; 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 entered 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 be on the consignor, the consignee or the endorsee.

1451. Grant of receipt foil of invoice to consignors.--(a) As soon as an invoice is prepared and the freight and other charges, if any due, have been collected, the receipt foil of the invoice should be given to the sender, who will forward it to the consignee at destination station.

(b) Railway receipts (i.e., receipt foils of invoices) should not be granted till goods tendered or dispatch have been correctly examined and weighed, When senders are required to load their consignments, the Railway receipts should not be given until the loading has been completed to the satisfaction of the Railway.

(c) There should be no undue delay in the issue of Railway receipts to consignors. These must be made over to them on the very day the consignments are accepted for booking or in the case of consignments required to be loaded by the consignors, on the day the consignments are loaded. At large stations, however, where it is not feasible to do so, the Divisional Commercial Superintendent may permit the issue of the Railway receipts not later than the day following the day of acceptance or of loading of the goods, as the case may be.

1745. When the request of a consignee or a endorsee for reweighment 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. /M-2 issued for each reweighment. In addition, demurrage charges due under the rules should also be recovered if the request for reweighment is received after placement of the wagon for unloading. The

reweighment charges should be accounted for as a special debit in the station books and balance sheet.

1811. Responsibility of stations for undercharges.?(a) Receiving stations are held responsible for recovery of undercharges on goods traffic, both local and through, whether paid or to-pay except in the following cases, which are debitable to the forwarding stations:

- (i) in all cases where repayment of freight is compulsory;
- (ii) undercharges of and under one rupee in freight paid by credit note; and
- (iii) percentage charge due on animals, birds and goods containing valuable articles.

(b) The above exceptions, however, do not relieve the receiving station of the responsibility for checking the invoices. Undercharges in the excepted items detected at receiving stations should be reported to the Traffic Accounts Office and to the forwarding station. In the event of no such report having been made by the receiving station, it will be held responsible for such undercharges if, when debited by the Traffic Accounts Office to the forwarding stations, they are declared to be irrecoverable.

(c) Under the provisions of Section 78 of the Railways Act, 1989 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-weight 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.

1877. Disposal of excess off-loaded consignments.--(a) When, as a result of weighment, a wagon is found to be overloaded beyond the permissible limits, the Railway reserves the right to have the excess weight removed. A separate record should be maintained whenever excess weight is off-loaded.

(b) The Railway administration may dispose of such excess weight, if offloaded, by public auction after following the prescribed procedure. Sale proceeds will first be adjusted against Railway dues which may include the freight due on the off-loaded consignment upto the point of off-loading. cost of detention of wagon and expenses incurred on off-loading of the excess consignments and its auction, and the balance, if any. may be paid to the consignor/consignee/endorsee entitled thereto.

(c) Whenever the Railway administration does not off-load the excess weight on operational considerations and to save detention to wagons or for other reasons, and allow the wagon to move to destination as it is, it will be within its right to recover penal charge for excess loading as provided in the Goods Tariff.

(d) Immediately after unloading the excess weight, the sender's instructions regarding its disposal should be obtained through the Station Master of the booking station. For this purpose, the weighbridge station should send to the booking station a statement in the proforma appearing at Appendix XVIII/F. in a sealed cover booked under a free service way bill. A copy of the statement should also be sent to the destination station for informing the consignee/endorsee.

(e) The booking station, on receipt of the statement referred to in Clause (d) above, should serve a notice on the sender in the proforma appearing at Appendix XVIII/G and obtain his acknowledgement, which should be preserved at the booking station. The date of acknowledgement of the notice served on the sender should be intimated to the weighbridge station.

(Emphasis supplied)

10. After hearing the learned Advocates for the parties and after going through the materials on records, we find that the goods were loaded at Chirai, Gujrat and the Railway authority issued receipt against the loading of the consignment admitting that the sender's declared weight was accepted with the following endorsement:

Directly loaded from the truck. Wgns B/s not counted nor supervised by Rly. staff.

11. According to the Railway, while the consignment loaded on the wagon was on its way to the destination station, a Vigilance team of the Eastern Railway intercepted the train concerned and conducted reweighment of those wagons at the Pakur Railway weighbridge and found that there was excess loading; ultimately, the Railway authority demanded the excess charge for 34 quintals amounting to Rs. 22,104/- at the destination from the owner of the consignment.

12. The respondent immediately protested against the said action of the Railway and claimed reweighment at the destination when the Railway authority, on such prayer, specifically recorded that there was no provision for reweighment at the Malda Town Station. Finding no other way, in order to avoid demurrage, the claimant was compelled to remove the goods on payment of excess charge and thereafter, lodged claim for repayment of the amount.

13. In our view, in order to take additional or punitive charge for excess loading in a wagon, the concerned parties must be given intimation of the excess loading and once the goods have been booked after giving proper receipt, such excess charge cannot be levied unless the goods are reweighed in the presence of the representatives of the parties concerned showing that the weight given in the booking slip was wrong. 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.

14. We are quite conscious that there may be mistakes in the measurements due to various reasons including the fault in the weighing machines and in such a situation, if such mistake is subsequently detected, the Railway authority is always at liberty to rectify the mistake by reweighing the goods in the presence of the representatives of the party who booked the consignments. Such right of further measurement has also been given to the owners of the consignment u/s 79 of the Act in case they subsequently discover any mistake in the weighment recorded at the time of booking.

15. Therefore, without reweighment of the consignment in the presence of the representatives of the parties concerned, there was no scope of claiming additional charges on the alleged ground of excess loading.

16. In this case, no further notice was given to the sender or his representatives before reweighment disclosing that through mistake or otherwise, the sender's wrong declaration was accepted and that the consignment was overweighed. The consignment was allegedly reweighed at Pakur Railway Station, 78 kilometres away from the destination, without any notice to the sender or its representatives and it was disclosed for the first time at the place of destination that the consignment was overweighed.

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.

18. In this case, the prayer of reweighment has not been rejected on the ground of non-compliance of formalities required under the law at the instance of the claimant but the Railway authority has rejected such prayer on the ground of non-availability of the facility of the reweighment at the destination station. In our view, if for any reason, the provision of weighment at the destination is not available, the Railway authority should make arrangement of reweighment at the nearest station where there is a weighbridge for meeting the requirement; otherwise, the excess charge on the allegation of overloading cannot be realised. It is preposterous to suggest that the Railway authority, a State within the meaning of Article 12 of the Constitution of India, should be given blanket authority to realise the excess charge on the allegation of overloading without giving opportunity to the owner of the consignment to controvert such allegation.

19. In the unreported decision cited by Mr Banerjee, a Division Bench in a similar situation like the present one held as follows:

8. We have carefully perused the judgment of the learned Tribunal. We are afraid, we cannot accept the reasoning assigned by it. The learned Counsel for the respondents submits that the Railway receipt was a conclusive piece of

evidence showing total and complete acceptance qua the weight of the consigned materials. Learned Counsel refers to the receipt (brought on record at running page 22) and submits, that the risk rate having been mentioned to be under the railways, the authorities therefore, were estopped from turning around and making a claim to the effect that there was overloading. We cannot accept such a contention inasmuch as a Railway receipt, which is issued u/s 65(2) of the Railways Act, 1989, is merely a prima facie evidence of the weight and the number of packages stated or mentioned therein. Section 65(2) of the Railways Act, 1989 reads thus:

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 endorse, (highlighting by Court)

9. Section 78 of the Railways Act, 1989 authorises the Railways to remeasure or reweigh any consignment before its delivery. Thus, under the provisions of Section 78, the Railways do have the right to reweigh a consignment before its delivery. Section 78 of the Railways Act, 1989 reads thus:

78. Power to measure, weight, 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-weight 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 the charged,

10. Under the provisions of Section 79, an option is given to a consignee to make a request for weightment of the consignment on payment of such charges as may be prescribed but such a request cannot be accepted for the mere asking of the same if such weightment is not feasible due to congestion in the yard or such other circumstances as may be prescribed.

11. In the instant case, it appears from the Lower Court's Records that on

4.2.1999 the respondents wrote to the Goods Shed Superintendent, Eastern Railway at Malda that since there was no excess weight loaded on the wagon, the entire consignment be delivered under proper weight in order to avoid demurrage charges. A typed copy of the letter has been brought on record in the memo of appeal at running page 20 of the paper book but the endorsement made thereon by the concerned authorities has not been disclosed. We have looked into the photocopy of the said document which is contained in the Lower Court's Records and we find that just below the said letter there is a remark which reads that "there is no such weighment facility at Malda town/goods to weigh the entire consignment.

12. In the context of the statutory authorization conferred u/s 78 as mentioned above, we are of the view that the remark/endorsement quoted above was in line with the provisions of Section 79. We take this view also in view of the fact that there is nothing on record to show that the respondent had made the request in terms of Section 79 after payment of charges as required therein. Section 79 of the Railways Act therefore becomes necessary to be quote. It reads thus:

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.

13. Apart from the aforesaid, Rule 1744 of the Indian Railways Commercial Manual also lays down that firstly, weighment of consignment cannot be undertaken in a routine manner and secondly, the Divisional Commercial Superintendent has the discretion to permit reweighment provided facilities for reweighment exists at the destination. The relevant portion of Rule 1744 reads thus:

Reweighment at the request of owners.?a) As laid down in the IR.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.

14. In the instant case, the consignment was booked from Chirai and the destination was Malda town. Since Malda Town/Malda Goods Shed did not have weighment facilities, the concerned authority was justified in making the aforementioned observations on the letter dated 4.2.1999 quoted above."

20. With great respect, we are unable to subscribe to the views taken by Their Lordships. As indicated above, in the said case, the Railway authority expressed in writing on the application of the claimant its inability to accede to the prayer of reweighment on the ground of absence of facility at the Malda Station. Therefore, in our view, it could not be inferred that the application for reweighment was rightly refused, as the same was not accompanied by the required charges or for non-compliance of any of the formalities required by law. If any application is made for reweighment without complying with any of the mandatory rules and regulations, it is the duty of the Railway authority to reject such application on that ground pointing out the deficiency of the applicant so that he can apply afresh after removing the shortcomings. But, if the Railway authority without pointing out any defect in the application, rejects such prayer on the ground of absence of facility of reweighment at the destination, in the proceedings initiated by the claimant challenging the action of the Railway, the latter cannot justify their action on the ground that the application of the claimant was not in form, because, it is apparent that even if the application was in form, the Railway was unable to comply with the prayer of reweighment in the absence of any provision of reweighment at the said station.

21. In our opinion, when the Railway authority on the basis of vigilance enquiry reweighs the consignment and decides to levy extra charge upon the owner of the consignment on the ground of overloading without giving any opportunity to him to be present at the time of reweighment, he has a right to demand reweighment in his presence for the purpose of verification of the genuineness of the claim. Such right of the owner does not emanate from Section 79 of the Act but arises in view of the proposed action of the Railway to impose further charge on the basis of reweighment at the instance of the Railway in his absence without giving him an opportunity to dispute the allegation. Section 79 of the Act, in our view, authorises the owner of the consignment to pray for further reweighment subject to the conditions mentioned therein and such right can be exercised by the owner of the goods even in cases where the Railway authority has not exercised its power u/s 78 or where no demand of excess charge has been made. The said provision gives an independent restricted right to the owner to pray for reweighment after the consignment is booked if he subsequently detects any mistake in measurement, whereas an unfettered right has been given to the Railway in the preceding section. The right u/s 79 has nothing to do with the cases of imposition of additional charge on the ground of overloading on the basis of action taken by the Railway after exercise of power u/s 78. It is true that

for the purpose of exercise of power u/s 78, no prior notice need be given to the owner of the consignment but if the Railway authority wants to impose further charge on the basis of such reweighment at its instance by invoking its right u/s 78, at least, a post-decisional opportunity must be given to the owner of demanding reweighment if the charge of overloading is disputed by him. Such reweighment, if for any reason is not possible at the destination, should be made, at the nearest station from the destination where such facility is available.

22. We accept the submission of Mr. Basu, the learned Advocate appearing on behalf of the respondent that even if there is no express provision in the Railways Act laying down the conditions for giving opportunity to the owner to demand reweighment in their presence, such provision should be deemed to be implied; otherwise, the provisions become arbitrary and capable of misuse at the instance of the Railway.

23. In this connection, we may appropriately refer to the decision of the Supreme Court in the case of Basudeo Tiwary Vs. Sido Kanhu University and Others, , relied upon by Mr Basu, where the Apex Court was dealing with a case of exercise of power u/s 35(3) of the Bihar University Act for the purpose of termination of service on the ground that the appointment was irregular or unauthorised. In the concerned statute, there was no provision for giving notice to the employee concerned. In such a situation, the Supreme Court made the following observations:

In order to impose procedural safeguards, this Court has read the requirement of natural justice in many situations when the statute is silent on this point. The approach of this Court in this regard is that omission to impose the hearing requirement in the statute under which the impugned action is being taken does not exclude hearing - it may be implied from the nature of the power - particularly when the right of a party is affected adversely. The justification for reading such a requirement is that the Court merely supplies omission of the legislature, (vide Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others,) and except in case of direct legislative negation or implied exclusion (vide S.L. Kapoor Vs. Jagmohan and Others,).

24. It was never the intention of the legislature that after grant of receipt at the time of booking of the consignment, the Railway Authority would be free to allege overweight at the time of delivery of the goods at the destination and to levy additional charge on the basis of that allegation after rejecting the prayer of reweighment on the ground of absence of facility of reweighment at the destination. Therefore, the present case does not fall in the category of either the direct legislative negation or the implied exclusion.

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.

Since the view, we propose to take, is in direct conflict with the one taken by another Division Bench of this Court in the case mentioned earlier, we refer this matter to the Hon''ble Chief Justice for constituting a Larger Bench for resolving the following points:

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?

26. Let this matter be placed before the Hon''ble Chief Justice for appropriate order.

Rudrendra Nath Banerjee, J.

I agree.