
(2006) 12 CAL CK 0034

Calcutta High Court

Case No: C.O. No. 15765 (W) of 1991

Agarwala and Co. and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision: Dec. 20, 2006

Acts Referred:

- Constitution of India, 1950 - Article 226
- Railways Act, 1989 - Section 65, 65(2), 69, 72(4), 73

Citation: AIR 2007 Cal 90

Hon'ble Judges: Debasish Kar Gupta, J

Bench: Single Bench

Advocate: P.K. Samanta and Prasanta Bishal, for the Appellant; N.C. Roychowdhury and R.P. Mukherjee, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Debasish Kar Gupta, J.

The petitioners file this application under Article 226 of the Constitution of India praying for a writ in nature of mandamus to set aside and cancel the memorandum of demand being annexure "E" to E3 to this writ petition and to forebear the respondents from enforcing realisation of impugned demand in any manner whatsoever.

2. The fact of the case in a nutshell is this on October 8, 1991 M/s. Hari Trading Company and M/s. Laxmi Trading Company despatched iodised salt consignments from Chirai, Gujarat to Bharampur (West Bengal) in 30 wagons against bills for Rs. 3,20,205/- and Rs. 2,42,831/- respectively. The railways authority at Chirai issued receipts against the loading of such consignments containing endorsements as follows : "Senders weight accepted SM enroute to weigh and advise jointly destination to weight before delivery". The senders engaged J. B. Boda surveyors Pvt. Ltd., for supervision of crushed salt in bags for human consumption in B. G.

wagons and also for weighment the weight of bags at random. Thereafter, 24 wagons out of the aforesaid 30 wagons reached the destination station at Berhampur Court when shortage of 1/141 bags of salt were detected and short certificates were issued to that effect. Then the petitioners were informed by the Station Superintendent Bharampore Court, Eastern Railway, as per his communication issued under Memo No. BPC/goods/11/91 dated October 29, 1991, that an amount of Rs. 52,938/- was charged as weighment charge by CGS/KKF as per his weighment order No. GI/635/91 dated February 12, 1991 and GI/635/9J dated October 12, 1991 and GI/ 635/91 dated October 14, 1991 against the aforesaid salt weights. The petitioners were requested to pay the aforesaid amount to clear the outstanding dues as well as to enable the office to deliver the balance consignment of the salt. On October 30, 1991 the petitioners submitted representation to the respondent Nos. 2 to 4 with request for re-weighment of the consignment and of the alleged excess eight salt, bags in their presence as per provisions of paragraph 1744 of Indian Railway Commercial Manual-II. The Railway Authority did not pay any heed to that representation. Hence this writ application.

3. Mr. P. K. Samanta Learned Advocate, on behalf of the petitioners submits that on October 10, 1991 and October 11, 1991 the consignor raised the bill disclosing the weight of the iodised salt. Drawing my attention towards the railway receipts dated October 7/8, 1991 Mr. Samanta submits that the Railway Authority accepted the sender's weight and advised Station Master en-route to weight before delivery. He draws my attention towards the provisions of Sub-section (2) of Section 65 and submits that the railway receipt is the prima facie evidence of the weight and number of packages stated therein. In the event the weight of number of packages of train loaded consignment is not checked by the Railway Authority and the statement for that effect is recorded in the railway receipt, the burden of proving the weight and number of packages as stated in railway receipt should be on the consignor or the consignee. But in the present case the railway receipts did not contain endorsement that the weight of number of packages were checked by the Railway Authority. Mr. Samanta further submits that the alleged en-route weighment of the consignment without notice either to the consignor or to the consignee and in their absence without complying with the requirement of Rule 117(4) of the goods tariff cannot be sustained in law. Mr. Samanta further submits that in accordance with the provisions of paragraph 1423 of the Indian Railway Commercial Manual-II, in case of non-checking of the weight and number of packages at the forwarding station, an appropriate remark should be inserted to the effect that on the connected invoices and railway receipts. The weight of the wagons are to be taken at a particular station and the charges are subject to alteration on weighment at the destination station. But in the present case no such remark was recorded in the railway receipt. Mr. Samanta further submits that on receipt of the representation dated October 30, 1991 with a request of reweighment of the said consignment in presence of the petitioners, as per provisions of paragraph 1744 of the Indian

Railway Commercial Manual-II read with the provisions of Section 79 of the Railways Act, 1989, it was not permissible for the respondent authority to sit tight over the matter. Mr. Samanta further submits that under the provisions of Section 73 of the Railways Act, 1989, the Railway Administration has the option to offload the goods beyond the permissible carrying in capacity and to recover cost of charges for detention of wagons and the cost of handing of bags subject to obtaining the sender's instruments regarding disposal of the goods as required under the provisions of paragraph 1877(D) of the Indian Railway Commercial Manual-II. But in the present case the Railway Administration off loaded the alleged excess weight bags at en-route weighment Station (Kankaria) and disposed of the same by appropriating the sale proceeds without obtaining the sender's instruction as regards disposal of the alleged excess. Further in addition to appropriate an amount of Rs. 40,980/- the impugned under-charges were levied on the petitioners which includes flat charges for alleged excess/weight at penal rate amounting to Rs. 27,317, detention of wagons charges for an amount of Rs. 25,367 and handling charges of Rs. 254. According to Mr. Samanta such action cannot be sustained in law. Mr. Samanta submits that the penal charges were imposed upon the petitioners without giving an opportunity to defend against such unilateral action without due compliance of the rules and in violation of principles of natural justice thereby.

4. Mr. Samanta relies upon the decision of AIR 1936 253 (Privy Council) to submit that where a power is given to do a certain thing in a certain way, it must be done in that way or not at all. And other methods of performance are necessarily forbidden. Mr. Samanta also relies upon the decision of [Ram Phal Kundu Vs. Kamal Sharma](#), in this regard. Relying upon the decision of [B.S. Vadera Vs. Union of India \(UOI\) and Others](#), Mr. Samanta submits that the rules made by the appropriate authority must not be enforced in breach. Relying upon the decisions of [Mohan Lal Vs. Union of India \(UOI\) and Others](#), Mr. Samanta submits that the defence that railway receipts were issued carelessly is not available to the respondent authority. Relying upon the decision of [Tolaram Relumal and Another Vs. The State of Bombay](#), Mr. Samanta submits that the Court must lean towards the construction of penal provisions which exempts the subject from penalty.

5. Mr. N. C. Roychowdhury appearing on behalf of the respondent authority draws my attention towards the invoices dated October 7/8, 1981 to show that the consignor's weight was accepted and SM en-route was advised to take weight before delivery. Drawing my attention towards the provisions of Section 65 (proviso) of the Railways Act, 1989. Mr. Roychowdhury submits that now the onus is upon the petitioner to prove the correctness of the weight furnished by the petitioners. It is not open for the writ Court to interfere with such disputed questions of fact. Drawing my attention towards the provisions of Sub-section (4) of Section 72 of the Railways Act, 1989. Mr. Roychowdhury submits that in order to maintain safety the Railway Authority is empowered to maintain the maximum carrying capacity of the

wagons. Drawing my attention towards the provisions of Section 73 (proviso), Mr. Roychowdhury submits that the Railway Authority complied with the provision for measuring the consigned goods. Mr. Roychowdhury further drawn my attention towards the provisions of Section 69 of the Railways Act, 1989. Mr. Roychowdhury submits that it was open to the consignee to ask for reweighment of the consigned goods before taking delivery but they took delivery of the goods on October 22 to 25, 1991 detecting shortage of bags and without asking for reweighment or without any objection. Mr. Roychowdhury further submits that the respondents received the representation dated October 30, 1991 of the petitioners on November 26, 1991. The matter being sub-judice before this Hon'ble Court the respondent could not consider the representation of the petitioners. Mr. Roychowdhury further submits that the actual weight of the consigned goods cannot be determined by the writ Court. Hence no relief can be granted to the petitioners.

6. I have given my anxious consideration to the submissions made by the learned Counsels appearing on behalf of the respective parties. I have also considered the materials on record. I find that the Railway Authority at Chirari issued invoices and the railway receipts accepting the sender's weight and with a further direction to the Station Master en-route for weighment of the goods before delivery. It was permissible in accordance with the provisions of proviso to Section 65 of the Railways Act, 1989 if the facility of weighment is not available at a station. Therefore, there was no irregularity or non-compliance of any provision of the Railways Act on the part of the Railways Authority to accept the sender's weight. I further find that Sub-section (4) of Section 72 of the Railways Act, 1989 authorises the Railway Authority to maintain maximum carrying capacity of the wagon for the purpose of safety. I find no irregularity in enroute weighment of the consignment of the goods in question. It further appears to me in view of the provisions of Sub-section (4) of Section 72 of the Railways Act, 1989 that the Railway Authority has the power to take appropriate steps in case the weight of the goods exceeds maximum carrying capacity. But I find that on receipt of the communication dated October 29, 1991 (Annexure "E" at page 60), the petitioner company as per their representation dated October 30, 1991 prayed for re-weighment of the off loaded bags in their presence or in presence of the sender with prior notice. It appears from the statements made in the affidavit in opposition affirmed on behalf of the respondent Nos. 1, 2, 3, 4 and 5 (at paragraph 13 at page 13) that the aforesaid representation dated October 30, 1991 was received by the respondents on November 26, 1991 i.e. after filing of this writ application. So, the respondent authority did not consider the aforesaid representation of the petitioners in view of the pendency of this writ application. But I find that representation dated October 30, 1991 was received by this Station Superintendent, Berhampore Court, Eastern Railway on October 1991 as appears from his endorsement on the aforesaid representation (Annexure "F" at page 73 of the writ petition). And no proceeding with regard to those goods was pending before any Court at that point of time. On the basis of the materials available on

record as aforesaid I find that the statements made in paragraph 13 of the affidavit-in-opposition affirmed on behalf of the respondent Nos. 1, 2,3,4 and 5 are not correct.

7. In this regard the provision of Section 79 of the Indian Railways Act, 1989 are 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 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 owners 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.

8. Therefore, there was a failure on the part of the respondent authority to comply with the provisions of Section 79 of the Railways Act, 1989 read with the provisions of paragraph 1744 of the Indian Railway Commercial Manual II. Or in other words the railway authority failed to consider the representation of the petitioner for re-weighment of the off loaded bags in their presence or in presence of the sender. Therefore, I find that a power is given to the respondent authority in accordance with the provisions of the Railways Act, 1989 for re-weighment of the goods and to take steps in respect of off loading of goods in excess of the maximum carrying capacity. But at the same time a protection is given to the consignor and the consignee by way of re-weighment of off loaded goods in their presence on the basis of their request. But in the instant case the Railway Authority failed and or neglected to comply with the provisions of Section 79 in discharging their function. Therefore, applying settled principles of law on the basis of the decision of *Nazir Ahmed v. King Emperor* (supra), I find that the respondent authorities failed to discharge their function in a way as provided in Section 79 of the Railways Act, 1989.

9. In view of the above this writ application succeeds. The impugned demands of the respondent authority as communicated to the petitioner under memo No. BPC/goods/II/91 dated October 29, 1991 being (Annexure-"E" at page 66) along with communications being annexure E1, E2, E3 (at pages 67, 68 and 69 of the writ application respectively) are set aside and quashed. The respondent authority is directed to refund the security deposit of the petitioners within the period of six weeks from the date of communication of this order. The respondent authorities are further directed to refund the sale proceeds, of the off loaded goods in question to the petitioners within the aforesaid period of six weeks from the date of

communication of this order.

10. This writ application is disposed of.

11. There will be, however, no order as to costs.

12. Urgent xerox certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.