

Union of India and Ors. Vs. Skylark Fiscal Services Pvt. Ltd. and Anr.

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SooperKanoon Citation : sooperkanoon.com/70731

Court : Kolkata

Decided On : Jun-09-2016

Judge : Debasish Kar Gupta

Appellant : Union of India and Ors.

Respondent : Skylark Fiscal Services Pvt. Ltd. and Anr.

Judgement :

IN THE HIGH COURT AT CALCUTTA Constitutional Writ Jurisdiction Original Side Present: The Honble Justice Debasish Kar Gupta And The Honble Justice Md.Mumtaz Khan APO No.154 of 2014 With WP No.137 of 2009 Union of India & ORS.Versus Skylark Fiscal Services PVT.LTD.& Anr.

With APO No.139 of 2014 With WP No.137 of 2009 Skylark Fiscal Services PVT.LTD.& Anr.

Versus Union of India & ORS.For the appellant : Mr.Ashok Chakraborty, Sr.Adv., Mr.Pinaki Ranjan Chakraborty, Mr.Saptarshi Roy For the respondent : Mr.Rabilal Maitra, Sr.Adv., Mr.Ram Anand Agarwal, Mr.Kumar Gupta, MRS.Nibedita Pal, Mr.Ramesh Dhara Judgment on: 09/06/2016 Debasish Kar Gupta , J.

: This appeal is directed against the impugned judgement by which the writ application of the respondents/writ petitioners was allowed directing the appellants/respondents to refund a sum of Rs.14,24,678/-, to the respondents which had been realised from the respondents as punitive charges.

The following facts and circumstances were taken into consideration by the learned Single Judge while passing the impugned judgement: Respondent No.1 purchased iron ore fines from Orissa Mineral Development Company Limited, (hereinafter referred to as OMDC), a Government of India enterprise.

The said OMDC had a private siding.

It was served by Baraja MD Railway Station having electronic-in-motion weight bridge stand facility.

On February 12, 2009, 3700-M.T. of aforesaid iron ore fine was loaded in the wagon at the above private siding of OMDC situated at Baraja MD Railway station on the basis of declaration of the weighment of consignment in wagon-load by the respondent company.

According to the appellants, weighment of above consignment was not feasible at the Baraja MD Railway Station due to congestion.

On February 13, 2009, a railway receipt was issued in respect of the above consignment by the appellant authority demanding an amount of Rs.14, 24, 678/- from the respondent Company on account of punitive charges for overloading after conducting weighment of wagon-load the consignment in question at Dangopusi Railway Station situated at a distance of 30 K.M. from the forwarding station.

The aforesaid weighment was conducted by the Railway authority without issuing any notice to the respondent Company.

As February 14 and 15, 2009, were holidays being Saturday and Sunday respectively, the respondent Company submitted a representation on February 16, 2009, to the appellant no.2, the Chief Commercial Manager, South Eastern Railway, for re-weighment of the consignment in question in wagon-load before unloading the same at Paradip Port.

The above representation contained that the respondent Company had to pay the aforesaid punitive charges under compulsion which should be treated as a payment on protest.

On February 16, 2009, the rake in question was unloaded at the destination point at Paradip Port.

The prayer of the respondent Company for further weighment of the consignment in wagon-load was not allowed.

The learned Single Judge while setting aside the demand of the punitive charges, observed that the appellant authority failed to maintain procedural fairness in the light of the provisions of Sections 65 and 79 of the Railways Act, 1989 (hereinafter referred to as the said Act, 1989) read with paragraphs 1422, 1423, 1424 and 1745 of the Indian Railways Commercial Manual (hereinafter referred to as the IRCM). It is submitted by Mr. Ashok Kumar Chakraborty, learned Senior Advocate, appearing on behalf of the appellants, at the very outset that the writ application was not maintainable on the grounds of availability of efficacious alternative remedy and lack of territorial jurisdiction.

According to him, the Railway Claim Tribunal was the appropriate forum for adjudicating the claim of the appellant.

Further, the events relating to booking of railway wagon, weighment of consignment in wagon-load and payment of punitive charges took place within the territorial jurisdiction of the State of Orissa.

It is further submitted by Mr. Chakraborty that weighment of consignment in wagon-load at Dangaposi Railway Station was permissible in the light of the provisions of Section 73, 2nd proviso to Section 79 of the said Act, 1989 read with paragraph 1744 (c) (4) and 1745 of the IRCM in view of the congestion in the yard at BarajaMd. Railway Station.

According to Mr. Chakraborty, the representation was submitted by the respondent Company to the respondent No.2 on February 16, 2009, praying for re-weighment of the consignment in wagon-load lodging protest against issuing of railway receipt claiming punitive charges after the iron ore fines had been unloaded at the destination point at Paradip Port on that date.

According to him, such failure constituted conscious relinquishment of the right of re-weighment on the part of the respondent Company.

Reliance is placed by Mr.Chakraborty on the decision of Union of India versus Biswanath Agarwal, reported in 2015 (2) CHN (CAL) 156 in support of his submissions.

It is submitted by Mr.Rabilal Moitra, learned Senior Advocate, appearing on behalf of the respondents, that the learned Single Judge was pleased to entertain the writ application considering the fact of violation of principles of natural justice as also denial of the right of re-weighment of consignment in wagon-load as provided in Section 79 of the said Act, 1989 read with paragraphs 1745 of the IRCM.

It is further submitted by Mr.Moitra that the entire cause of action had been taken place within the territorial jurisdiction of the South Eastern Railway and in accordance with the provision of paragraph 1744 (b) of IRCM, the representation was submitted to the respondent No.2 having his office within the territorial jurisdiction of this High Court.

It is submitted by him, with reference to the pleading made in the writ application and the averments made in the affidavit-in-opposition filed thereto that the fact of submission of representation for re-weighment of the consignment in wagon- load on protest before unloading of the rake was not in dispute.

Reliance is placed by Mr.Moitra on the decision of Dwarka Nath versus Bihar State reported in AIR 1959 SC249 in support of his submissions.

We have heard the learned Counsels appearing for the respective parties and we have also carefully considered the facts and circumstances of this case.

At the very outset the preliminary objection of the appellants with regard to the maintainability of the writ application is taken up for consideration.

In Harbanslal Sahnia versus Indian Oil Corporation Ltd., reported in (2003) 2 SC107 principle of law relating to maintainability of writ petition in spite of availability of alternative remedy was observed as follows:7.

So far as the view taken by the High Court that the remedy by way of recouRs.to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion.

In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

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. The present case attracts applicability of the fiRs.two contingencies.

Regarding the next ground of territorial jurisdiction of this High Court to entertain the writ petition, it was not in dispute that the originating railway station, namely BarjaMd.Railway Station , the Railway Station in which the weighment of the consignment in question was conducted, namely Dangaposi Railway Station as also the office of the respondent No.2, in which the respondent Company submitted the representation, were situated within the territorial jurisdiction of this High Court.

Therefore, the cause of action arose in part within the territorial jurisdiction of this High Court.

We do not find any error in the decision of the Learned Single Judge in entertaining the writ petition in view of the above observations.

In order to consider the grievances of the appellants with regard to the decision making process of the learned Single Judge, the following provisions of the said Act, 1989 are to be taken into consideration: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 trainload 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 subsection (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 subsection (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) recalculate 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." The provisions of paragraphs 1744 and 1745 of IRCM are also taken into consideration for the same reason and those are quoted below:"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 but there is no sign of tampering with packing, (3) the consignment is likely to lose weight in transit, (4) yard, weighment is not of feasible perishable due to open wagon the original nature and congestion in is the (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).It would be profitable in the light of the facts and circumstances involved in this case to take care of the effect of conjoint reading of the provisions of Sections 65, 72 (4), 73, 78 and 79 of the said Act, 1989 and paragraph 1744 of IRCM.

The provisions of proviso to Section 65 permits the railway authority to issue railway receipt in respect of a consignment accepting the declaration of weight or measurement of the consignor or consignee or endorse, as the case may be, under certain circumstances.

A power is given to the railway authority under sub-section (4) of Section 72 to take appropriate steps for the purpose of safety in case the weight or measurement of the consignment in wagon-load exceeds the maximum capacity which includes recovery of punitive charges under Section 73.

For such recovery, Section 78 confers a right upon the railway authority to remeasure, re-weigh or re-classify any consignment in order to re-calculate the freight and other charges.

The provisions of Section 79 permits railway authority either to allow re-weighment of a consignment at the request of a consignee or endorsee on payment of such charges as may be prescribed and the demurrage charges, if any, or to reject such prayer on the grounds provided in two provisos of that Section read with the contingencies provided in sub-paragraph (c) of paragraph 1744 of the IRCM.

Further, a statutory power is given to the railway authority under the above provisions for weighment or measurement of a consignment in wagon-load in case of loading in excess of maximum carrying capacity but at the same time a protection is given under the above provision to the consignor or consignee or endorsee, as the case may be, by way of re-weighment or re-measurement of such consignment in their presence on the basis of their request.

In *Union of India versus Biswanath Agarwal*, reported in 2015 (2) CHN (CAL) 156, a Larger Bench of this Court, while interpreting the provisions of Section 78 of the said Act, 1989, observed that the expressions re-measure, re-weigh, re-classify, re-calculate and correct any other error appearing in the above Section gives an indication of the exercise to be undertaken in terms of such provision to be a repetition of the same exercise undertaken earlier, the true sense of duplication that the above expression convey has to be understood in the light of the particulars as to measurement or weight or classification or calculation as contained in the railway receipt.

It has further been observed in *Biswanath Agarwal (supra)*.that the operation of Section 79 of the said Act, 1989, 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 re-weighment) in myriad other circumstances.

But the exercise of the right under this Section is subject to several conditions.

A weighment or re- weighment under this Section cannot be obtained for the mere asking.

Just as the discretion which is to be exercised by the railway official under this Section has to be within the bounds of reasonableness as is expected of a state or authority answering to this discretion 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 re-weighment of a consignment.

It will not be out of context to mention that while interpreting the different provisions of the said Act 1979, in *Biswanath Agarwal (supra)*, the above larger Bench of this Court further observed as follows: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 courts 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. (Emphasis supplied) Now, the questions that fall for determination before us are, whether the decision making process of the Learned Single Judge with regard to submission of the representation by the respondent Company for reweighment of the consignment in question in wagon-load on protest before unloading of the same arbitrariness in the action of the appellant railway authority are sustainable in the light of the provisions of the said Act, 1989 read with those of IRCM?.

Admittedly, on February 12, 2009, the appellant authority failed to undertake weighment of the consignment in question in wagon-load at BarajaMd.Railway Station due to congestion.

So, there was no fault or laches on the part of the respondent Company in the matter of loading of the iron ore fine on the basis of its declaration of the weighment.

It was also not in dispute that on the next date, i.e.on February 13, 2009, the weighment of the consignment in question in wagon-load was undertaken by the appellant authority at Dangoposi Railway Station situated at a distance of 30 K.M.from the forwarding station in absence of the respondent Company and/or without even service of any notice on it.

The submission of a representation by the respondent Company in the office of the appellant No.2 on February 16, 2009, with a prayer for re-weighment of the consignment in wagon-load on protest, was also not disputed by the appellants.

In reply to the statement made in paragraph 16 of the writ petition that the appellants unloaded the rake in question at Paradip Port on February 16, 2009 at late hours without paying any heed to its representation which had been submitted before the appellant No.2 on the same date, it was stated in paragraph 13 of the affidavit-in-opposition thereto that the appellant No.2 being the Chief Commercial Manager, South Eastern Railway, had no role to play in this regard since the rake

in question had been arrived at Paradip Port situated under the jurisdiction of the East Cost Railway.

Necessary to point out that the above affidavit-in-opposition was affirmed by the Chief Commercial Manager (FS & FM).South Eastern Railway himself.

In view of the provisions of sub-paragraphs (b) and (c) of paragraph 1744 of IRCM, the appellant No.2 was the appropriate authority to deal with the representation of the respondent Company.

Undisputedly, the office of the respondent No.2 was closed on February 14 and 15, 2009, those days being Saturday and Sunday respectively.

So, there was no laches on the part of the respondent Company to submit the representation without any delay.

Therefore it leads us to irresistible conclusion that the respondent No.2 not only failed or neglected to take steps on the basis of the above representation due to misconception, but also his attempt to dispute the submission of representation by the respondent Company before unloading of the rake at Paradip Port on February 16, 2009, was not acceptable in its face value.

The respondent company had to pay the punitive charges before forced unloading of the rake in question at Paradip Port even after submitting representation before the appellant No.2 prior thereto.

The above conduct of the appellant No.2 was violative of the provisions of Section 79 of the said Act, 1989 read with paragraph 1744 of IRCM as also failure on the part of the appellants to ensure fair play, which is a fact of the principles of natural justice, to the respondent Company.

The decision of Biswanath Agarwal (supra) does not help the appellant in view of the fact and circumstances involved in the present case.

At the end of the day, we are of the opinion that the impugned judgement does not require our interference.

The appeal bearing APO No.154 of 2014 stands dismissed.

The appeal bearing APO No.139 of 2014 stands disposed of without passing any further order.

Since the time specified in the order impugned for refund of punitive charges has already expired, the appellant authority is directed to refund the above charges within two months.

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

Urgent photostat certified copy of this judgment, if applied for, be given to the parties, on priority basis.

I agree.

(Md.Mumtaz Khan, J.) (Debasish Kar Gupta, J.)

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