

**State of Kerala Vs. Union of India (Uoi)**

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**Court :** Kerala

**Decided On :** Feb-07-1990

**Reported in :** II(1990)ACC11

**Judge :** Pareed Pillay, J.

**Appellant :** State of Kerala

**Respondent :** Union of India (Uoi)

**Judgement :**

Pareed Pillay, J.

1. State of Kerala is the appellant-plaintiff Plaintiff filed the suit for refund of the wharfage amount paid to the defendant on the ground that it happened to be paid solely on the acts of omission on the part of defendant's officials. The Sub Judge held that plaintiff is not entitled to get back the wharfage amount collected by the defendant.

2. Steel rods were despatched from Tata Nagar to Punalur Railway Station as per the indent of the Executive Engineer. The consignment was despatched on 8.12.1977. The consignment reached Punalur railway station 1-2.1.1978 in two wagons. Executive Engineer reported for taking delivery of the consignment. Some of the bundles were seen tampered with. Executive Engineer on the same day applied for re-weighment of the goods. The application was allowed on 19.1.1978. The goods were weighed on 10.2.1978 in a weigh bridge in the presence of the Claims Inspector, Southern Railways. On weighment it was found to be only 57.40 tonnes as against the despatched consignment of 59.90 tonnes. 2 1/ 2 tonnes of steel rods were found short. The defendant permitted the Executive Engineer to take the goods only after payment of wharfage. It is the case of the plaintiff that for re-weighing delay was caused by the defendant and so there is no justification for the defendant to claim wharfage.

3. Learned counsel for the plaintiff relied on Ext. A-1 (v) a copy of the communication by the Director of Traffic (Commercial) Govt. of India, Ministry of Railways, New Delhi to the following effect:

Wharfage and demurrage accruing during the period between application for re weighment and communication of decision should be waived unless it is considered that the party had applied for reweighment on on frivolous ground.

But the plaintiff never approached the defendant for waiving the wharfage. Plaintiff as matter of right cannot demand the defendant to waive the wharfage.

4. Plaintiffs counsel argued that plaintiffs officers were ready to take delivery of the consignment and the re weighment was delayed as the Claims Inspector of the defendant did not report in time. Counsel submitted that P.W. 1's evidence and the pleadings in the plaint which are not disputed in the written statement would clearly prove plaintiff's case. Counsel for the defendant submitted that there is no provision for any open

delivery under the Railways Act and so the proper and correct method for the plaintiff would have been to take delivery of the consignment and then make a claim and as that was not done and as they allowed the consignment to remain in the railway premises the defendant is certainly entitled to claim wharfage.

5. Admittedly the goods were not removed from the railway premises and the plaintiff removed it only on 10.2.1978. As the railway administration is not bound to give open delivery on demand by the consignee the consignment cannot be left at the railway premises for reweighment at a later stage. At the plaintiff could not have insisted on open delivery, defendant cannot be saddled with any liability for the delay in reweighing the consignment. Merely because open delivery was agreed to by the defendants and ultimately it was discovered that there was shortage the wharfage claimed by the defendant cannot be denied. Section 77 of the Railways Act deals with the responsibility of a railway administration after termination of transit. Under Section 77(4) the consignee has liability to pay demurrage or wharfage so long as the goods are not unloaded from the wagon or removed from the railway premises. As there is no provision in the Railway Act to enable a consignee to claim refund of wharfage paid to the railways on the ground that on re-weighment shortage was found in the consignment plaintiff cannot succeed in the suit. As the consignee has no right to demand that the goods shall be opened and inspected in the railway premises before he can be called upon to take delivery he cannot leave the consignment with railway premises or in the wagon and call upon the railway officials to re-weigh the consignment and contend that as there was shortage as found out in reweightment he is not liable for wharfage. No rule enjoining on defendant's officers the duty of examination and weightment or goods if required by the consignee before taking delivery was brought to my notice. In the absence of any such rule the consignee cannot leave the consignment in the railway premises and avoid payment of wharfage.

6. In *Union of India v. I.G. Tobacco Merchant* : AIR1966MP52 the Madhya Pradesh High Court held:

It is settled that the Railway Administration is not bound to give open delivery on the demand of the consignor. The consignee has no right to demand that the goods shall be opened and inspected in the railway premises before he can be called upon to take delivery. What is proper for the consignee to do is that he should take delivery of the consignment in the condition in which it is found after giving notice as to its condition to the officer giving the delivery, and then sue the Railway Company for damage.

As the defendant could legally claim the wharfage the plaintiff cannot contend that the defendant ought to have waived it. Plaintiff is not legally entitled to get back the wharfage amount paid to the defendant.

The judgment and decree of the Court below are confirmed. The appeal is dismissed with no order as to costs.

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