

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

**W.P.(C) 10480/2005 & CMs 7623/2005, 8/2007**

Reserved on: October 5, 2010  
Decision on: October 25, 2010

JAYASWALS NECO LIMITED ..... Petitioner  
Through: Mr. Siddharth Bhatnagar with  
Ms. Sonia Dube and  
Ms. Priyanka Chaudhary, Advocates.

versus

UNION OF INDIA & ORS. .... Respondents  
Through: Ms. Geetanjali Mohan with  
Mr. Ketan Madan, Advocate for Railways.

**W.P.(C) 10930/2005 & CMs 8011, 15463/2005, 9/2007**

JAYASWALS NECO LIMITED ..... Petitioner  
Through: Mr. Siddharth Bhatnagar with  
Ms. Sonia Dube and  
Ms. Priyanka Chaudhary, Advocates.

versus

UNION OF INDIA & ORS. .... Respondents  
Through: Ms. Geetanjali Mohan with  
Mr. Ketan Madan, Advocate for Railways.

**W.P.(C) 13144/2005 & 10027/2005, 1023/06, 10/2007**

JAYASWALS NECO LIMITED ..... Petitioner  
Through: Mr. Siddharth Bhatnagar with  
Ms. Sonia Dube and  
Ms. Priyanka Chaudhary, Advocates.

versus

UNION OF INDIA & ORS. .... Respondents  
Through: Ms. Geetanjali Mohan with  
Mr. Ketan Madan, Advocate for Railways.

**W.P.(C) 19958/2005 & CMs 12902, 15462/2005, 11-12/2007**

JAYASWALS NECO LIMITED ..... Petitioner  
Through: Mr. Siddharth Bhatnagar with  
Ms. Sonia Dube and  
Ms. Priyanka Chaudhary, Advocates.

versus

UNION OF INDIA & ORS. .... Respondents  
Through: Ms. Geetanjali Mohan with  
Mr. Ketan Madan, Advocate for Railways.

**W.P.(C) 20189/2005 & CMs. 13114, 15400/2005, 13-14/2007**

JAYASWALS NECO LIMITED ..... Petitioner  
Through: Mr. Siddharth Bhatnagar with  
Ms. Sonia Dube and  
Ms. Priyanka Chaudhary, Advocates.

versus

UNION OF INDIA & ORS. .... Respondents  
Through: Ms. Geetanjali Mohan with  
Mr. Ketan Madan, Advocate for Railways.

**W.P.(C) 2103/2007 & CM 3907/2007**

JAYASWALS NECO LIMITED ..... Petitioner  
Through: Mr. Siddharth Bhatnagar with  
Ms. Sonia Dube and  
Ms. Priyanka Chaudhary, Advocates.

versus

UNION OF INDIA & ORS. .... Respondents  
Through: Ms. Geetanjali Mohan with  
Mr. Ketan Madan, Advocate for Railways.

**W.P.(C) 2177/2007 & CMs 4028/2007, 1363/2008**

SUNFLAG IRON AND STEEL CO. LTD. .... Petitioner  
Through: Mr. Siddharth Bhatnagar with  
Ms. Sonia Dube and  
Ms. Priyanka Chaudhary, Advocates.

versus

*W.P.(C) Nos.10480,10930,13144,19958,20189 of 2005,  
2103,2177 of 2007, 3125 of 2008 and 9930 of 2009.*

UNION OF INDIA & ORS. .... Respondents  
Through: Ms. Geetanjali Mohan with  
Mr. Ketan Madan, Advocate for Railways.

**W.P.(C) 3125/2008 & CM 6042/2008**

JAYASWALS NECO LIMITED .... Petitioner  
Through: Mr. Siddharth Bhatnagar with  
Ms. Sonia Dube and  
Ms. Priyanka Chaudhary, Advocates.

versus

UNION OF INDIA & ORS. .... Respondents  
Through: Ms. Geetanjali Mohan with  
Mr. Ketan Madan, Advocate for Railways.

**W.P.(C) 9930/2009 & CM 8190/2009**

JAYASWALS NECO LIMITED .... Petitioner  
Through: Mr. Siddharth Bhatnagar with  
Ms. Sonia Dube and  
Ms. Priyanka Chaudhary, Advocates.

versus

UNION OF INDIA & ORS. .... Respondents  
Through: Ms. Geetanjali Mohan with  
Mr. Ketan Madan, Advocate for Railways.

**CORAM: JUSTICE S. MURALIDHAR**

- |                                                                                  |     |
|----------------------------------------------------------------------------------|-----|
| 1. Whether reporters of the local news papers<br>be allowed to see the judgment? | No  |
| 2. To be referred to the Reporter or not?                                        | Yes |
| 3. Whether the judgment should be reported in the Digest?                        | Yes |

**JUDGMENT**  
**25.10.2010**

1. Barring Writ Petition (Civil) No. 19958 of 2005 where the facts are  
slightly different, the facts in the other eight writ petitions are more or less  
*W.P.(C) Nos.10480,10930,13144,19958,20189 of 2005,*  
*2103,2177 of 2007, 3125 of 2008 and 9930 of 2009.*

similar. All the writ petitions, however, involve similar questions of law, and are accordingly being disposed of by this common judgment.

2. The Petitioner, a public limited company having its corporate office in New Delhi, owns an integrated steel plant in Raipur in the State of Chhattisgarh where, *inter alia*, it produces pig iron. For this purpose, the Petitioner procures iron ore from Tata Iron & Steel Company ('TISCO') at Noamundi. There is a railway siding inside the Petitioner's steel plant called the Nacast/Mandhar siding. Two staff members of the Commercial Department of the Railways, Respondent No. 1 herein, are posted at the said siding. An office has been constructed with an FAS terminal facility that has a computerized all India wagon tracking system.

3. According to the Petitioner, the iron ore excavated from the mines is stored by TISCO in hoppers called SILO which are situated at a height above the wagon level. The wagons, one after another are placed below the SILO and loaded through a computer-controlled electronic system. There is a control cabin and the quantity of iron ore to be loaded in a wagon, according to the advance payment made by the customer, is fed into the computer by the loading operator at the control cabin and the exact quantity of iron ore is discharged through the chutes into the wagon concerned by a system called 'Electronic Weight-o-meter'. The Petitioner states that since the carrying capacity of a wagon is prescribed and printed on every wagon,

the Petitioner has advised its staff and loaders not to load iron ore in any wagon in excess of its carrying capacity. It is stated that this is also the practice followed by TISCO. It is stated that there is a wagon tippler at the said siding inside the Petitioner's steel plant. Each loaded wagon is weighed electronically and thereafter the wagon is tipped (overturned) by a hydraulic system and thereafter empty wagon is again weighed automatically and the entire weightment is recorded in the computer. It is stated that by this process the gross weight and tare weight of a wagon are ascertained. The difference between the two weights gives the weight of the discharged iron ore. The weighing system of the wagon tippler is certified as true and correct by the Railway authorities.

4. It is stated that the Petitioner on an average receives about ten rakes of iron ore per month over and above the rakes for coke and coal. It is stated that the Petitioner is a regular customer of the Railways. Earlier to the present writ petitions, there had been no allegation of overloading or undercharging. It is stated that on 13<sup>th</sup> March 2005, the Railways issued a demand for the sum of Rs.17,82,863/- on account of under charging. Railways alleged that three rakes which were booked and delivered in the months of January and February 2005 when re-weighed on route at Champa in Chhattisgarh were found to have been overloaded. The Petitioner states that it had earlier made a complaint/representation that the weighbridge at Champa was incorrect. However, the Railways did not respond to the said

complaint. The Petitioner states that by a further letter dated 28<sup>th</sup> April 2005 the Railways raised a further demand for an amount of Rs. 6,43,110/- alleging that three rakes delivered in the months of March and April 2005 to the Petitioners when reweighed en route at Champa were found to be overloaded. On 27<sup>th</sup> June 2005 the Railways demanded a total amount of Rs. 24,25,973/- including the earlier demands.

5. In the other cases, admittedly, similar demands were raised by the Railways after the delivery of the rakes alleging that consignments which had been delivered when re-weighed earlier at Champa were found to be overweight. Only in W.P. (C) 19958 of 2005 the admitted position appears to be that the consignment was delivered on 30<sup>th</sup> August 2005 whereas the demand notice was sent on 28<sup>th</sup> March 2005 under Section 83 of the Railways Act, 1989 ('RA'). The Petitioner is stated to have paid the amount demanded on 29<sup>th</sup> August 2005 before taking delivery of the consignment.

6. The common question raised by the Petitioner in all the other eight petitions is whether the penalty under Section 73 of the RA can be raised after the delivery of the goods by which time the right of the consignor, the consignee or endorsee under Section 79 of the RA to seek re-weighment is rendered meaningless. It is submitted that the words "before the delivery of the goods" occurring in Section 73 of the RA do not give the Railways any discretion as to the time at which the penalty could be levied and demanded.

It is further submitted that the reliance placed on Para 1744 of the Indian Railway Commercial Manual Vol-II ('IRCM') and Rule 3(1) of the Weighment of Consignments in Wagon-load or Train-load Rules, 1990 ('1990 Rules') is misplaced since in the instant case there was no loss of goods in transit and the Petitioner was not making any claim against the Railways for such loss. It is submitted that in any event, Para 1744 of the IRCM cannot negate the right under Section 79 of the RA and to that extent is ultra vires the RA.

7. As regards the claim of the Railways under Section 83 of the RA, it is submitted that in the present case barring W.P.(C) 19958 of 2005 the Railways has not exercised any lien under Section 83 of the RA.

8. Mr. Siddharth Bhatnagar, the learned counsel appearing for the Petitioners has while reiterating the above submissions also placed reliance upon the decisions in *Jyoti Enterprises v. Union of India AIR 2003 Jharkhand 48* and *Nirmal Traders v. Union of India AIR 2003 Gauhati 122*. He submits that the Railways has the power to weigh or re-weigh any consignment en-route, and that it is not necessary for the Petitioners to be put on notice before such weighment or re-weighment. He however submits that the demand of penalty raised against the Petitioners in terms of the Section 73 of the RA is of punitive nature, and must be strictly in accordance with the terms of Section 73 of the RA. He submits that inasmuch as it is a penalty,

***W.P.(C) Nos.10480,10930,13144,19958,20189 of 2005,  
2103,2177 of 2007, 3125 of 2008 and 9930 of 2009.***

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the provision admits of only a strict construction and not a purposive one.

9. Appearing for the Railways, Ms. Geetanjali Mohan, the learned counsel first submits that the wording of Section 73 RA indicates that it is the discretion of the Railways whether or not it should raise a punitive demand on the Petitioners. According to her, the use of the word 'may' in the said provision would equally apply to raising a demand prior to the delivery. According to her, Section 73 read with Section 83 RA gives the Railways the power to exercise a lien over either the same consignment which was found to be of excess weight during in-motion weighment en route or re-weighment as the case may be or any other consignment for the purposes of recovery of the demands raised by the Railways. Obviously such lien as regards other consignments would be exercised only after the delivery of the consignments which were found to be of excess weight and this itself indicates that the penalty can be recovered from a consignor or consignee as the case may be even after the delivery of the goods. She placed reliance upon the decision of the learned Single Judge of this Court in *Jayaswals Neco Ltd. v. Union of India 114 (2004) DLT 178*.

10. Ms. Mohan submits that Para 1744 of the IRCM is consistent with Section 79 RA and is not ultra vires Section 79 RA. She submits that the proviso to Section 79 RA indicates the circumstances under which the Railways can decline the request for re-weighment. Para 1744 of the IRCM, *W.P.(C) Nos.10480,10930,13144,19958,20189 of 2005, 2103,2177 of 2007, 3125 of 2008 and 9930 of 2009.*

according to her, only further elaborates on what these circumstances are. She further points out that Section 79 RA itself indicates that where the consignment has been delivered at owner's risk rate ('OR'), no re-weighment shall be allowed and this is what Para 1744 indicates.

11. Referring to Rule 3(1) of the 1990 Rules, Ms. Mohan submits that even when the consignment is delivered at the Railway's risk rate (RR), the request for re-weighment could be refused, and this rule is consistent with Section 79 RA. It is submitted that where the RA makes no provision for the consignor or the consignee, as the case may be, to demand as a right the re-weighment of the consignment, such a right can be exercised subject to certain conditions. It is submitted that there is a possibility of manipulation of the weights by the consignors in connivance with the Railway staff. The Rates Circular No. 49 of 2005 and the General Rule 117 of the Goods Tariff clarifies that a 1% error margin in weighbridges is acceptable. It is submitted that overloading of the wagons can result in the weakening of the railway tracks which in turn can result in avoidable accidents with loss of life and railway property. Therefore, it is absolutely essential for Railways to be permitted to exercise the power of weighment and re-weighment in terms of Section 78 read with Section 83 of the RA.

12. Reliance is placed by Ms.Mohan on the decisions in *Jagjit Cotton Textile Mills v. Chief Commercial Superintendent N.R. AIR 1998 SC W.P.(C) Nos.10480,10930,13144,19958,20189 of 2005, 2103,2177 of 2007, 3125 of 2008 and 9930 of 2009.*

*1959; Action Committee v. Union of India 2005 (1) Gujarat Law Reporter 889 and Bhagaban Dey v. Union of India AIR 2010 Calcutta 13.* Reliance is also placed on the judgment in *State of Maharashtra v. Prabhu 1994 SCC (2) 481* to submit that the impugned demand of the Railways should not be interfered with if such interference would result in a greater harm to the society which, according to Ms. Mohan, is likely in the present cases.

13. First, the statutory provisions may be examined. Sections 73, 78, 79, 83 and 97 of the RA which are relevant for the present cases read as under:

**“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.

**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.

**83. Lien for freight or any other sum due.** (1) If the consignor, the consignee or the endorsee fails to pay on demand any freight or other charges due from him in respect of any consignment, the railway administration may detain such consignment or part thereof or, if such consignment is delivered, it may detain any other consignment of such person which is in, or thereafter comes into its possession.

(2) The railway administration may, if the consignment detained under sub section (1) is--

(a) perishable in nature, sell at once; or

(b) not perishable in nature, sell, by public auction,

such consignment or part thereof, as may be necessary to realise a sum equal to the freight or other charges:

Provided that where a railway administration for reasons to be recorded in writing is of the opinion that it is not expedient to hold the auction, such consignment or part thereof may be sold in such manner as may be prescribed.

(3) The railway administration shall give a notice of not less than seven days of the public auction under clause (b) of sub-section (2) in one or more local newspapers or where there are no such newspapers in such manner as may be prescribed.

(4) The railway administration may, out of the sale proceeds received under sub-section (2), retain a sum equal to the freight and other charges including expenses for the sale due to it and the surplus of such proceeds and the part of the consignment, if any, shall be rendered to the person entitled thereto.

**97. Goods carried at owner's risk rate.** Notwithstanding anything contained in section 93, a railway administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit, of any consignment carried at owner's risk rate, from whatever cause arising, except upon proof, that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on its part or on the part of any of its servants:

Provided that--

(a) where the whole of such consignment or the whole of any package forming part of such consignment is not delivered to the consignee or the endorsee and such non-delivery is not proved by

the railway administration to have been due to fire or to any accident to the train; or

(b) where in respect of any such consignment or of any package forming part of such consignment which had been so covered or protected that the covering or protection was not readily removable by hand, it is pointed out to the railway administration on or before delivery that any part of that consignment or package had been pilfered in transit,

the railway administration shall be bound to disclose to the consignor, the consignee or the endorsee how the consignment or the package was dealt with throughout the time it was in its possession or control, but if negligence or misconduct on the part of the railway administration or of any of its servants cannot be fairly inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor, the consignee or the endorsee.”

14. Para 1744 of the IRCM reads as under:

“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 reweighment of goods booked in wasgonloads 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 the endorsee of a wagon load or a train load consignment booked at Railway Risk Rate may, if it 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 weighbridge 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 open wagon but there is no sign of tampering with the original packing.
3. the consignment is of perishable nature and is likely to lose weight in transit,
4. weighment is not feasible due to congestion in the yard,
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.”

15. Rule 3(1) of the 1990 Rules reads as under:

**“3. Weighment of Wagon load or Train load Consignments-(1)**

The consignee or the endorsee of a wagon load or 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 authorized in this behalf for the weighment of such consignments at the destination station.”

16. A plain reading of the above provisions shows that the Railways are not bound to accept the weight depicted in a Railway Receipt. In terms of Section 78, the Railways have the discretion, before the delivery of a consignment, to re-measure, re-weigh or re-classify the consignment, re-calculate the freight and other charges and correct any other error or collect any amount that may have been omitted to be charged. There is no requirement in any of the above provisions that before such re-weighment the Railways should give prior notice to the consignor or consignee. In the present cases, for the in-motion weighment of the consignment at Champa prior to the delivery of the goods, there was no requirement of putting the consignee or the consignor on advance notice.

17. One consequence of re-weighment is that under-weighment at the point of dispatch is detected. A second possible result is that the weight is found to be less than what the consignment weighed at the point of dispatch.

18. The consequence of overloading a wagon at the point of origin, which is detected subsequently, has been stipulated in Section 73 RA. Under Section 73, the Railways “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.” The condition for raising such punitive demand for overloading is that it should be raised “before the delivery of the goods.” The proviso to Section 73 gives Railways the power 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.”

19. Although it was earnestly pleaded before this Court on behalf of the Railways that there is a discretion to raise a punitive demand even after the delivery of the goods and that Section 83 RA permits this, this Court is unable to agree with the submission.

20. Section 73 RA does give a discretion, whether or not to levy a penalty, to the Railways. The rates at which such penalty will be levied would be at rates “as may be prescribed.” However, there appears to be no discretion as regards when the demand or penalty can be raised. Such demand has to be made before the delivery of goods.

21. Turning to Section 83 RA, it is seen that for recovery of “any freight, or other charges” due from a consignor, consignee or an endorsee in respect of “such consignment or part thereof” or if the consignment is delivered, “any other consignment of such person” the Railways can detain either the same

consignment (if not yet delivered) or if it is delivered, any other consignment thereafter which comes into its possession. If such consignment detained is of a perishable nature, it could be sold at once or if it is not perishable in nature, such portion of it shall be sold by public auction to realize a sum equal to the freight or other charges. Before holding such public auction, seven days' advance notice should be given. However, where the Railways find that it is not expedient to hold public auction it may give its reasons in writing. After recovery from the public auction proceeds, the freight and other charges including the expenses for the same, the surplus sale proceeds and part of the consignment, if any, are to be rendered to the person entitled thereto.

22. At this juncture, reference may be made to the decision in ***Jagjit Cotton Textile Mills v. Chief Commercial Superintendent N.R.*** There, the question arose whether under Section 55(1) of the Railways Act of 1890 ('RA 1890') read with Rule 161A of the Rules thereunder, a lien could be exercised even in respect of the penalty leviable under Rule 161A (which corresponds to Section 73 of the RA 1989). The question was answered in the affirmative. In para 48 of ***Jagjit Cotton Textile Mills***, the Supreme Court clarified that "the words 'other charges' take in the penal charges leviable under Section 73 of the new Act and, therefore, Section 83 permits the Railways to recover

the same from the abovesaid persons - which include the 'consignee' - as a condition precedent for the delivery of the goods.”

23. What is important to note is that both in para 48 and in para 49 of the decision in *Jagjit Cotton Textile Mills*, Supreme Court appears to have recognized that demand of such penalty has to be made prior to the delivery of the goods. In para 49, it has been held that under Section 55(1) of RA 1890 “it is permissible for the Railways to withhold the delivery of the goods from the consignee unless the consignee pays the penal charges also. That is the effect of the ‘lien’.” The decision in *Jagjit Cotton Textile Mills* shows that even on a collective reading of Sections 83 and 73 RA the penalty can be demanded and the lien exercised only prior to the delivery of the goods. This is not to say that the word ‘penalty’ is not covered by ‘other charges’ at all. Where the Railways have managed to detect the overloading prior to the delivery, and they have yet to deliver the goods, the Railways will be well within its right to exercise lien under Section 83 and insist that without the payment of the penal charges, it will not give delivery of the consignment. It can detain the consignment and exercise its lien till the payment of the penalty. In fact, this is what the Railways did in W.P. (C) 19958 of 2005. This was perfectly consistent with the harmonious reading of Section 73 and Section 83. But after delivery as regards that consignment no lien can obviously be exercised for any penalty or charges. As regards

‘freight’ and ‘other charges’ in respect of such consignment that has been delivered it would be possible to exercise a lien over a future consignment. But as far as penalty in respect of a consignment is concerned, once delivery takes place, it can be neither levied nor collected even by exercising a lien over some other consignment.

24. The learned Single Judge of this Court in *Jayaswals Neco Ltd. v. Union of India* was dealing with a situation where the Petitioner challenged a demand for undercharging raised by the Railways for overloading of the wagons. The demand was raised three years after the transportation and was challenged on that ground. One of the questions posed by the court was whether “a train load facility was, in the light of the policy then prevalent, admissible to the petitioner for a two-point transportation?” The second was whether even if the policy did not envisage such a precedent, “did the railways sanction any such facility as alleged by the petitioner”? The questions were answered in the negative. The Court held that the Railways had not rendered any facility to the Petitioner for transportation of goods. It was accordingly held that merely because there was a delay of three years in raising a demand for undercharging, the demand was not rendered illegal. Thereafter a reference was made to Section 83 of the RA and the contention of the Petitioner that such lien could not be exercised even vis-a-vis the penalty amount was noticed. However, what was held is that since the

Petitioner had availed of the facility which was not admissible to it, no estoppel could be pleaded and, therefore, could not absolve it of the rigours of Section 83 RA.

25. This Court does not understand the above judgment in *Jayaswals Neco Ltd. v. Union of India* as holding that penalty could be levied and recovered from a consignor or a consignee or endorsee even after the delivery of the consignment. In that case, it was found that the Petitioner was not even entitled to avail of the train loading facility for a two-point transportation. It was accordingly held that no equities were created in favour of the Petitioner. The facts in the present cases are entirely different and, therefore, the said judgment is of no assistance to the Respondents.

26. In *Action Committee v. Union of India*, it was held that although there is no requirement for the Railways to give any notice prior to en route re-weighment, “if the overloading is detected at the en route station immediately first steps which may be required to be undertaken by the railway administration is to off-load the goods from the wagon to the extent it is overloaded and up to the stage of off-loading of the goods considering the facts and circumstances referred to hereinabove, it appears that the principles of natural justice of prior hearing cannot be made available when

the railway administration has to off-load the goods on the ground of overloading.” The Court went on to explain in para 17 as under (GLR @ p. 904-05):

“17. As such the liability to pay punitive rate would accrue the moment it is found by the railway administration that there is overloading of the goods in the wagon. After the off-loading it would be required for the railway administration to immediately intimate the consignor regarding overloading and also offloading of the goods. If such an intimation is given by railway administration to the person concerned the same would enable the consignor to exercise the option through consignee or endorsee at the destination station for weighment as per the Rules of 1990 in the event even such consignor is of the view that there was no overloading at all. Further, such intimation will also enable the consignor to make the payment of punitive charges and charges for offloading of goods in case he wants to avoid the disposal of the offloaded goods by railway administration with a view to realise the punitive charges and also offloading charges etc. Therefore, it appears that at that stage after offloading, there would be applicability of the principles of natural justice to that extent. Such principles of natural justice can further be applied to the extent that the consignor may submit explanation contending that there was no overloading and the material if any available with him to support the said stand and it will be for the railway administration to consider the same and to immediately decide as to whether overloading was there in the wagon or not. However, merely because the explanation is not accepted, the same would not give a cause of action to the consignor to challenge the decision of the railway administration with a view to avoid the payment of

punitive rates and other charges as per the scheme of Section 73 of the Act. It further appears that in case the railway administration has not accepted the explanation of the person concerned, the Railway Authority will so intimate to the consignor or the person concerned before actual delivery by forwarding the proof of en route weighment and the collection of the punitive charges and other charges which are proposed to be recovered before delivery. If the intimation is so given railway administration shall be within its power and right to recover such punitive charges and other charges for off-loading etc. as the case may be before actual delivery of the goods. It goes without saying that in case as per the Rules of 1990 weighment of the consignment at the destination station if it is opted and the option is accepted and upon the weighment of the consignment at the destination station it is found that the goods offered to the consignee or endorsee are less than the quantity of the goods entrusted of carriage, the consignor or consignee or the endorsee, as the case may be would be entitled to set off to that extent and no punitive charges will be recoverable in case if the quantity is found short but the reduction of punitive charges shall be in proportion that to. If ultimately it is found by the railway administration that any punitive charges and other charges for offloading of the materials etc., as the case may be are recoverable, the railway administration shall be within its right to recover the same before its actual delivery. In the event if for one reason or another the delivery is already given, then in that case as observed earlier if the right of lien is not available to the railway in case of non-availability of subsequent consignment, the only option available to the railway administration would be to file appropriate suit for recovery of the amount from the person concerned. However, if as observed earlier right of lien is

available, the railway administration may exercise such right on the subsequent consignment of such consignor or consignee or the endorsee as the case may be as per Section 83 of the Act. In case the consignor or consignee or endorsee from whom punitive charges are recovered either before the actual delivery or by exercising right of lien by railway administration and if such consignor or consignee or endorsee is aggrieved by such action of the railway administration, the course available would be to challenge the said action before the appropriate forum.”

27. Far from supporting the contention of the Respondents, the above decision in fact requires the Railways to immediately off-load the excess quantity and offer re-weighment to the petitioner. It appears that the principles of natural justice have been held to be applicable under these provisions by the Gujarat High Court. The decision does not hold that even after the delivery of the consignment the Railways can raise a demand for a penalty for overloading under Section 73 RA.

28. In *Jyoti Enterprises v. Union of India*, a learned Single Judge of the Jharkhand High Court negatived the plea that the *en route* weighment should take place in the presence of the consignor, consignee or endorsee. Three situations were envisaged. The first where the Railways detects an under-weighment, which is not off-loaded but is sent to the destination. Before delivery, the Railways claims freight for the excess weighment. The consignee then disputes the excess weighment and the Railways offers to

have it re-weighed. In the circumstances, there would be no violation of principles of natural justice. The second scenario again is that the detected excess weight is off-loaded and weighed subsequently. This also does not involve the violation of principles of natural justice. The third scenario was described as under: (AIR @ p. 51)

"(iii) In third case that excess weight of 20 MT is not off-loaded and is sent to DS. At DS delivery is made without re-weighment and without information of detection of excess weight to the endorsee and no claim is made at that time for extra freight etc. After some time the claim is raised. The endorsee can stick to his claim of the correctness of sender's weight even though dishonestly, the physical verification of actual delivered has become impossible. Excepting on some paper which are in exclusive custody of respondent, there is no other way left to railway to prove what its weight was. There is no reason to disbelieve the claim of endorsee. Matter becomes disputed and suspicious, re-weighment was not made in presence of endorsee etc. Transparency is wanting. In such a situation, claim based on the re-weighment en-route in absence of the endorsee causes prejudice to endorsee and, therefore, it is a violation of principles of natural Justice."

29. Interpreting Section 83 RA, it was held in ***Jyoti Enterprises*** that even if the lien is exercised it may only be exercised after the requisites provided under the rules are strictly complied with. In other words, if Section 73 RA is not complied with, the lien under Section 83 RA could not be exercised

vis-à-vis such penalty.

30. In *Nirmal Traders v. Union of India*, the goods were booked at OR and the re-weighment done en route by the Railways, resulting in under-weighment being detected. The demand for penalty was challenged on two grounds. One was that the re-weighment or in-motion weighment was done behind the back of the Petitioners and, therefore, violative of the principles of natural justice. The second was that the penalty had been levied without the proviso to Section 73 being invoked. In other words, the contention was that the excess weight should have been off-loaded and the Petitioner given an opportunity to seek re-weighment of the off-loaded consignment under Section 79 RA. The defence of the Railways was that under the proviso to Section 79 no weighment of consignment booked at OR could be allowed. The Gauhati High Court negated the plea of the Petitioner that a prior notice had to be given to the consignor or the consignee before the in-motion re-weighment is undertaken by the Railways. As regards the question whether the Railways was justified in declining to re-weigh the consignment on the request of the consignee, it was held that since under the first proviso to Section 79 RA, an element of discretion did exist in the Railways to deny re-weighment of the goods booked at OR, the consequence is that “when omission to exercise the discretion is challenged, the railways must be in a position to satisfy the Court that in the facts and circumstances of the case, the railway servant concerned could not have exercised his discretion to re-

weigh the consignment.” On the facts of that case, it was held that the Railways had failed to satisfy the Court that such discretion could not have been exercised in favour of the Petitioner. In other words, it could not be presumed that in all cases of consignment being transported at the OR, the Railways will, as a matter of course, refuse re-weighment. Even in that case, the Railways had pleaded “congestion” and other operational exigencies for denying re-weighment. This was not accepted by the Court. It was pointed out that such a plea could not be belatedly advanced without showing that in fact there was congestion and other operational exigencies which made it impossible for re-weighment of the consignment.

31. An additional fact that may be noticed from the above decision in *Nirmal Traders* is that the re-weighment of coal in respect of which the penalty was levied was ordered by the High Court as an interim measure. The penalty there was obviously levied prior to the delivery of the consignment. Upon re-weighment in terms of the interim order, it was found that there was a reduction in the weight. In the circumstances, the penalty was struck down by the Court.

32. The upshot of the above discussion is that none of the decisions cited have laid down a proposition that the penalty in respect of a consignment under Section 73 RA can be demanded even after the delivery of the consignment. Also, none of the decisions have discussed the validity of Para *W.P.(C) Nos.10480,10930,13144,19958,20189 of 2005, 2103,2177 of 2007, 3125 of 2008 and 9930 of 2009.*

1744 of the IRCM which has been relied upon by the Railways in the instant cases to deny re-weighment.

33. In the first place, it must be observed that in the present cases, there was no occasion for the Petitioner to request for re-weighment under Section 79 RA since the impugned demand of penalty was made after the consignments had been delivered. In fact the Petitioner's grievance is that by this procedure, it was denied an opportunity of seeking re-weighment in terms of Section 79 RA.

34. The answer of the Railways to this is two-fold. One, it is pointed out that there is no right in a consignor, a consignee or endorsee as the case may be to seek re-weighment of a consignment that is offered for delivery under Section 79 of the RA. The first proviso to Section 79 has been cited to say that no re-weighment should be allowed of the goods booked at OR and which are perishable and are likely to lose weight in transit. The second proviso to Section 79 is also invoked to say that no request for re-weighment shall be allowed if the re-weighment is not feasible due to congestion in the yard or other circumstances. Then para 1744 of the IRCM is relied upon to state that the Railways are not obliged to weigh the consignments at the destination "as a matter of course." Such re-weighment could only be considered "in exceptional cases when the condition of consignment or package warrant this."

35. Under Para 1744(c) where the consignment is booked at RR and the consignor, consignee or the endorsee, as the case may be, has reason to believe that the quantity offered for delivery is of a lesser weight than the quantity loaded in the wagon, then he could make a request to the Railways for re-weighment. Such request could be disallowed in five different cases. The submission of the Railways is, therefore that there is virtually no right at all to seek re-weighment under Section 79 and since Railways can always refuse re-weighment no prejudice is caused if a demand of penalty is raised after the delivery of the goods.

36. This Court is unable to accept the above submission made on behalf of the Railways. No doubt under Section 79 RA there is a discretion in the Railways to either allow or reject the request for re-weighment. However, as and when such a request is made, it cannot be presumed that it will be refused. Even where the goods are booked at OR, rejection of a request for re-weighment is not automatic. The first proviso to Section 79 RA in fact opens with the words “provided that except in cases where a railway servant authorised in this behalf considers it necessary to do so, no re-weighment of goods booked at owner’s risk rate will be allowed.....” A careful reading of the above proviso will show that in exceptional cases, the Railways can consider it necessary to allow the re-weighment even where the goods are booked at OR. This only means that when a consignor, a consignee or endorsee as the case may be makes a request for re-weighment of goods

booked at OR, a decision would have to be taken by the Railways whether such request comes within the exceptional cases and whether the Railways considers it necessary to allow re-weighment. In view of the language of the first proviso to Section 79, it is not possible to agree with the submission of learned counsel for the Railways that in all such cases, there will be an automatic rejection of the request for re-weighment.

37. Again as regards the second proviso to Section 79 RA, where the Railways is of the view that re-weighment is not feasible due to congestion or such other circumstances it will have to form an opinion in that regard in the first place. It cannot be presumed that if there is any request made for re-weighment, it will automatically be refused. As pointed out by the Gauhati High Court in *Nirmal Traders v. Union of India* the Railways will have to show that there was sufficient material to enable it to form such opinion.

38. Turning to Para 1744 of the IRCM, this Court finds that even this does not enable the Railways to automatically refuse a request for re-weighment where the consignment is booked under RR. In fact, it states that such re-weighment could be made in exceptional cases, when condition of the consignment or package warrants it. This necessarily means that whenever a request for re-weighment is made, the Railways have to, on a case by case basis, form an opinion whether the goods of which re-weighment has been

sought should be permitted to be re-weighed and whether it is an 'exceptional case'. Para 1744 (c) is also applicable only in the limited instance where the consignee has a doubt about the weight of the consignment that has been delivered to him and seeks re-weighment. It does not cover a situation like the one on hand where the consignee has been asked to pay the penalty amount for the alleged overloading detected on account of an in-motion re-weighment done by the Railways under Section 78 RA. There is nothing in Para 1744 that enables the Railways to automatically refuse a request made by the consignor, consignee or endorsee for re-weighment.

39. This Court, therefore, holds that the right under Section 79 RA in a consignor, consignee or endorsee as the case may be to seek re-weighment, although subject to the discretion of the Railways, does not get wiped away completely merely because the consignment is booked under OR or RR as is sought to be contended by the Railways. There cannot be a presumption that even without offering a chance to the consignor, consignee or the endorsee to make such a request, it is open to the Railways to presume that as and when such a request is made it can automatically be refused. These are not matters for presumption. The reasons for refusing such a request when made will have to be based on materials and an appropriate justification will have to be shown in each case for such refusal.

40. To summarize the position:

(a) Whenever the Railways are suspicious that there is excess weight in the consignment, the Railways can exercise its powers under Section 78 RA to have the weighment of the consignment/wagon done in-motion even without prior notice to the consignor, consignee or endorsee. There is no violation of principles of natural justice in such instance.

(b) At the destination point, prior to delivery, it will be open to the Railways to exercise its lien under Section 83 RA over the very same consignment for which it seeks to demand penalty for overloading. It can insist that till such time payment is made, it will detain the consignment and deliver it to the consignee only after the penalty is paid. However there has to be a specific exercise of lien under Section 83 RA in respect of such consignment before the delivery is made to the consignee. The lien cannot be presumed.

(c) Under the proviso to Section 73 RA, an option is available to the Railways to off-load the excess weight at the very point at which excess weight is detected. The off-loaded quantity can then be dealt with in accordance with the RA and the Rules thereunder. If the consignee is informed thereafter of the offloading of the excess consignment and the consignee or consignor seeks re-weighment, such request will be considered in terms of Section 79 RA.

(d) When delivery is made to the consignee at the point of destination, and no penalty for overloading is raised before such delivery, it will not be open to the Railways to thereafter to demand penalty or to seek any lien over any future consignment for the recovery of such penalty. On a harmonious reading of Sections 73, 79 and 83, the position that emerges is that the Railways cannot seek to demand a penalty in respect of a consignment after such consignment has been delivered.

(f) Where the consignment is booked at OR or RR, and penalty is demanded prior to delivery, the right of the consignor, consignee or endorsee to seek re-weighment under Section 79 does not get automatically extinguished. The reasons for the Railways refusing such a request when made will have to be based on materials and an appropriate justification will have to be shown for such refusal.

41. In Writ Petition (C) 19958 of 2005, the demand was made by the Railways and communicated to the Petitioner prior to the delivery of the consignment and such penalty amount was paid by the Petitioner without seeking re-weighment. In light of the above discussion, the said writ petition is without merit and is dismissed as such.

42. In each of the other eight writ petitions the impugned demand for penalty has been raised after the delivery of the consignment. The demand for *W.P.(C) Nos.10480,10930,13144,19958,20189 of 2005, 2103,2177 of 2007, 3125 of 2008 and 9930 of 2009.*

penalty amount in each of the said eight petitions is therefore quashed. When the notice was issued in some of the petitions on 11<sup>th</sup> July 2005, a statement was made on behalf of the Respondents that no coercive steps would be taken for recovery of the demand amount. That interim order has continued till date. Consequently no further directions are issued.

43. Writ Petition (C) Nos.10480, 10930, 13144, 20189 of 2005, Writ Petition (C) Nos. 2103 and 2177 of 2007, Writ Petition (C) No. 3125 of 2008 and Writ Petition (C) No.9930 of 2009 are hereby allowed with consolidated costs of Rs. 20,000/- which shall be paid by the Railways to the Petitioner within a period of four weeks. Writ Petition (C) No. 19958 of 2005 is dismissed. All pending applications stand disposed of.

**S. MURALIDHAR, J**

**OCTOBER 25, 2010**

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