

GAHC010031942017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4416/2017

BOKAJAN CEMENT FACTORY
A UNIT OF CEMENT CORPORATION OF INDIA LTD., BOKAJAN, DIST.
KARBI ANGLONG REPRESENTED BY ITS GENERAL MANAGER.

VERSUS

THE UNION OF INDIA and 7 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVT. OF INDIA, MINISTRY
OF RAILWAYS, RAIL BHAWAN, NEW DELHI-110001.

2:THE GENERAL MANAGER
NORTH EASTERN FRONTIER RAILWAYS
MALIGAON
GUWAHATI-781012.

3:THE CHIEF COMMERCIAL MANAGER
NORTH EAST FRONTIER RAILWAYS
MALIGAON
GUWAHATI-781012.

4:DIVISIONAL RAILWAY MANAGER C
N.F. RAILWAY
LUMDING
DIST. NAGAON
ASSAM.

5:THE STATION SUPERINTENDENT
BOKAJAN RAILWAY STATION
N.F. RAILWAY
BOKAJAN
DIST. KARBI ANGLONG
ASSAM.

6:THE DIVISIONAL COMMERCIAL MANAGER TC

N.F. RAILWAY

LUMDING DIVISION
P.O. LUMDING
DIST. NAGAON
ASSAM.

7:THE DEPUTY F.A. and CAO TRAFFIC
N.F. RAILWAY
MALIGAON
GUWAHATI
ASSAM.

8:THE STATION SUPERINTENDENT
KAHALGAON RAILWAY STATION
EASTERN RAILWAY
KAHALGAON
PIN-813203
DIST. BHAGALPUR
BIHAR

Advocate for the Petitioner : Mr. J. Roy, Sr., Advocate

Advocate for the respondents : Mr. B. K. Das, Advocate

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 04.10.2023

Date of Judgment : 04.10.2023

JUDGMENT AND ORDER (ORAL)

The instant writ petition has been filed challenging the notice of demand dated 02.08.2008 as well as the notice of demand dated 27.01.2017 issued by the respondent No.5.

2. The relevant facts of the instant case are that the petitioner who is engaged in the business of manufacture and sale of cement procures a commodity by the name of fly ash from various sources which is an

essential material for manufacturing cement. The instant writ petition pertains to the consignment of fly ash booked from Kahalgaon to Bokajan Railway Station vide RR No. C147943 dated 21.02.2007. The said Railway Receipt has been enclosed as Annexure-1 to the writ petition. A perusal of the said Railway Receipt reveals that the weight as declared by the petitioner was 2482.90 tones and an amount of Rs.23,89,403/- was paid as the charges. Further to that, it is also seen from the said Annexure-1 that there was a remark "said to contain 80125 dry fly ash as per forwarding note". The said consignment upon reaching the Bokajan Railway Station, the Railway Authorities on 24.02.2007 permitted the petitioner to unload the said consignment of fly ash which related to the Railway Receipt No. C147943 without exercising any lien over the said goods. It is also an admitted fact that prior to unloading of the goods, the Railway Administration did not issue any demand notice nor informed about any re-weighment done during transit.

3. On 02.08.2008, a notice of demand was issued by the respondent No.5 intimating the petitioner that the petitioner is liable to pay an additional amount of Rs.12,09,775/- as punitive charges on the ground that on re-weighment done at Railway Weigh Bridge, Maldah, it was found that in respect to the consignment pertaining to Invoice being RR No. C147943 dated 21.02.2007, there was overloading of 249.76 tones as per the E/sheet enclosed to the said notice of demand. The petitioner was thereupon asked to make payment of the said amount. It is not known what transpired thereafter but on 18.03.2010, the Deputy General Manager, Production of the petitioner had issued a communication to the Divisional Railway Manager (C) denying the allegation made in the notice

of demand and further stating that there might be a mechanical error in the Weigh Bridge showing abnormally high rate which is practically not possible. It is further seen that thereupon vide another communication issued by the Manager, Production, an appeal/request was made to write of the undercharge amount of Rs.12,09,775/- on the ground that the undercharge amount was received by the petitioner after a lapse of more than 2 years. It was further mentioned that at the time of delivery of the rakes, the Weigh Bridge weighment sheet along with RR was not received nor any error sheet as mentioned in the claim by the Railway Authorities. Under such circumstances, it was again requested to write of the undercharge amount of Rs.12,09,775/-. It is further seen that subsequent thereto, another communication was written on 01.10.2015 by the HOD, Production requesting to waive of various amounts including the punitive charges on the basis of RR No. C147943 dated 21.07.2007. Although such representations were submitted but the Railway Administration did not accept the request of writing of the amount of Rs.11,11,662/- which was the amount later on found by the Railways payable as the wagons used were 40 and not 41. Subsequent thereto, vide another communication dated 27.01.2017 which has also been put to challenge in the instant proceedings, the petitioner was again directed to pay the amount of Rs.11,61,687/- along with other amounts.

4. The learned senior counsel appearing on behalf of the petitioner submits that the notice dated 27.01.2017 has been challenged only to the extent of the punitive charges of 2017 and not in respect to the other amounts. It was the specific case of the petitioner that imposition of the punitive charges on the ground of overloading in terms with Section 73 of

the Railways Act, 1989 by denying the right of re-weighment.

5. It reveals from the records that vide an order dated 26.07.2017, this Court had issued notice and stayed the notices dated 02.08.2008 and 27.01.2017. A period of 6 years had passed by, but the Railway Administration did not find it necessary to file the affidavit-in-opposition.

6. I have heard the learned counsels for the parties and also perused the necessary materials on record. The issue which arises for consideration as to whether the Railway Administration could have issued the demand notice dated 02.08.2008 after a period of more than 1 ½ years from the date the petitioner had taken delivery of the goods in question.

7. Mr. J. Roy, the learned senior counsel for the petitioner submits that the issue involved in the instant writ petition is squarely covered by the judgment and order dated 06.08.2012 passed by the Coordinate Bench of this Court in the case of **Megha Technical & Engineers (Pvt.) Limited vs. Union of India & Five Others** [WP(C) No.1262/2011]. In that regard, the learned senior counsel for the petitioner has drawn the attention of this Court to paragraph Nos.17, 18 & 19 of the said judgment and order wherein the Coordinate Bench of this Court upon framing the point of determination as to whether the Railway Authorities can raise the punitive charges for over-weighment after the delivery of consignment is caused and whether the lien can be presumed after the delivery of cause in view of Section 83 of the Railways Act, 1989 observed at paragraph Nos.17, 18 & 19 of the said judgment as follows:-

“17. The apex Court in Jagjit Cotton Textile Mills (supra) has considered about the extent and ambit of the Section 73 and held that the Section 73 clearly

*states that the penal charges can be collected from the consignor, consignee or the endorsee, as the case may be. The words "as the case may be" occurring in Sections 73 and 74 are also to be explained. The consignor shall be liable for the penal charge even at the stage of delivery of goods at the destination if he has booked the goods for "self" or for any other causes. If the goods booked for the endorsee the endorsee is liable if the delivery is applied for at the destination by the endorsee. The consignee will be liable if the delivery is applied for at the destination by the consignee. In **Jagjit Cotton Textile Mills** (supra) Supreme Court held that though Railways authorities are seized of the powers of raising the punitive charges for overloading of the wagon but that the punitive charges are required to be raised when the delivery is applied for at the destination station. It is, therefore, clear that the Apex Court interpreted the power of raising the punitive charges or other charges in regard to the overloading before the delivery is caused. Otherwise, the provision as laid down in Rule 1740, that the result of weighment or re-weighment whether found at the station or communicated to, it should be recorded in the connected invoice, unloading tally book, goods delivery book and machine prepared abstracts and in the case of weighment at intermediate stations, the result should also be advised telegraphically to the destination station and the Traffic Accounts Office if it entails recovery of the undercharge, would be rendered otiose. No construction is permissible by rendering a rule otiose. Moreover, the decision of the High Court of Delhi in **Jayaswals Neco Limited Vrs. Union of India and Ors.** following the decision of **Jagjit Cotton Textile Mills** (supra) held that when the 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 Railway 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 the demand of the penalty in respect of a consignment after such consignment has been delivered. This Court persuaded by the said rationale holds the similar view.*

18. While interpreting Section 83 of the Railways Act, 1989, the Apex Court in **Jagjit Cotton Textile Mills** (supra) held that the section permits enforcement of the lien in case of failure on the part of the consignor, consignee or endorsee to pay the freight and other charges due from him. Other charge embraces the penal charges leviable under Section 73 of the new Act, i.e. the Railways Act, 1989. Therefore, Section 83 permits the Railways to recover the charges as stated from the persons, which include the consignee as the condition precedent for the delivery of goods. As such the said interpretation does not leave any space for ambiguity'. The words "condition precedent for the delivery of the goods" can only be understood in the way that after delivery is caused, no lien can be raised by the Railways. What Mr. U. K. Nair, learned standing counsel, North Eastern Frontier Railways submitted that by applying maxim **Nullus Commodum Capere Potest De Injuria Sua Propria** a lien can be presumed by the Railways in the circumstances when the weighment cannot be questioned by the petitioners as it has been well crystallized in **Union of India Vrs. Salt Marketing Centre**, reported in **1995 (3) GLT 548** where this Court held as under:

“ As stated above, as far as the power of reweighment is concerned, the same is available with the Railway. However, when it comes to the question of levying penalty on the basis of reweighment which has been done in the absence of the - consignor/consignee/endorsee, we are of the opinion that the penalty can be levied only after issuing show cause to the person from whom the penalty is sought to be recovered and after affording him reasonable opportunity of placing his case before the competent authority who is going to levy the penalty. The punitive measure of realizing the actual penalty can be exercised by the authority only after following the principles of natural justice and not on the basis of any evidence which may have been collected by the Railway ex-parte at the back of the consignor/consignee/endorsee.”

Unless the petitioners are given any opportunity of having their say in regard to

the unilateral weightment and the result thereof than how the question whether the petitioners have disputed the result or not can be inferred. As such said plea of Mr. Nair cannot be sustained in the factual context under reference

*19. Since the statutory provision as engrafted In Section 83 of the Railways Act, 1989 read with the interpretation as rendered by the Apex Court demands that the lien shall be raised as condition precedent of the delivery and no lien can be presumed after the delivery. In this regard, the Delhi High Court has culled out the law in **Jayaswals Neco Limited Vrs. Union of India and Ors.** that the lien cannot be presumed. This High Court in **Megha Technical & Engineers (Pvt.) Ltd. Vrs. the Union of India & Ors.** reiterated the principles as laid down in **Nirmal Traders** (supra). In this batch of the cases, the said observation of the larger Bench in **Megha Technical & Engineers (Pvt.) Lid.** (supra) is not germane inasmuch as the punitive charges as raised by the Railways authorities have been so raised after the delivery of the consignment and that too without raising any lien. As such, the action of the Railway respondents as a whole is illegal and unsustainable therefor."*

8. From a perusal of the above quoted paragraphs, it transpires that when the 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 thereafter to demand penalty or to seek any lien over any future consignment for the purpose of such penalty. It was held by the Coordinate Bench that upon a harmonious construction of Sections 73, 79 & 83 of the Railways Act, 1989, the position that emerges is that the Railways cannot demand penalty in respect of a consignment after the consignment has been delivered. It was therefore held by the Coordinate Bench of this Court that imposition of punitive charges as raised by the notices of demand after the delivery of the consignment and that too without raising any lien have rendered the action of the respondent Railways wholly illegal and unsustainable.

9. Now coming back to the facts involved in the instant case, it would be seen that on 24.02.2017 itself, the delivery of the goods were taken. The Railways neither provided the petitioner with the re-weighment sheet nor issued any demand notice prior to delivery or even at the time of taking delivery. The Railways also at the time of taking delivery never exercised its lien in terms with Section 83 of the Railways Act, 1989. Under such circumstances, the demand notice so issued on 02.08.2008, that too after 1 ½ years enclosing therewith the weighment sheet for the first time to the petitioner is contrary to the provisions of Sections 73, 79 & 83 of the Railways Act, 1989.

10. Accordingly, the demand notice dated 02.08.2008 is set aside and quashed. In view of the setting aside and quashing of the demand notice dated 02.08.2008, the resultant notice dated 27.01.2017 in so far as imposition of punitive charges of an amount of Rs.11,61,687/- is also set aside and quashed.

11. This Court, however, clarifies that as regards the other amount specified in the notice of demand dated 27.01.2017, this Court has not interfered.

12. Accordingly, the instant writ petition stands allowed.

JUDGE

Comparing Assistant