

GAHC010245072012



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

Case No. : MFA/84/2012

UNION OF INDIA
REPRESENTED BY THE GENERAL MANAGER, N.F. RAILWAY, MALIGAON,
GUWAHATI-11

2: THE GENERAL MANAGER

WESTERN RAILWAY
MUMBAI-2

VERSUS

M/S ANKUR BUISNESSP LTD
SRI RAMCHARIT THAKUR MARKET, S-J ROAD, GUWAHATI-1, ASSAM.

Advocate for the Petitioner : MS.M CHATTERJEE

Advocate for the Respondent : MR.K P MAHESWARI

BEFORE
HONOURABLE MR. JUSTICE BUDI HABUNG

ORDER

Date : 14-03-2024

1. Heard Ms. M. Chatterjee, learned counsel for the appellant. I have also heard Ms. M. Sharma, learned counsel for the sole respondent.

2. The brief fact of the case is that the claimant respondent booked Ex.KKF to NGC vide Invoice nos. 49 to 52, RR No. 398879 to 398882, all dated 08.04.2006 collecting freight on 2621 km at booking station, but the correct freight charging distance would be 2557 km and for which the refundable amount comes to Rs. 34,135/-. Moreover, vide amended application dated 07.07.2010, the claimant had submitted that an additional amount of Rs. 64,256/- was realized by the Railway at destination station NGC, after more than 5 years of delivery of the consignment under Rationalisation Scheme which is totally wrong and thus the non-refundable amount comes to Rs. 98,391/-(Rs. 34,135+ Rs. 64,256/-).

3. The case was contested. The learned Tribunal on examination of the pleadings of the parties, framed the following issues:

(i) Whether valid notice under section 106 of the Railways Act, 1989 served by the applicant to the respondent in time?

(ii) Whether the Railway administration had charged the freight as per the correct distance basis, if not, what relief is the applicant entitled for?

(iii) Whether the respondent N.F.Railways is justified to release under charges after delivery of the consignment?

4. On completion of inquiry, the learned Tribunal decided all the issues in favour of the respondent/claimant and directed the appellant/respondent to pay the respondent/applicant a sum of Rs. 98,391/- only along with interest at the rate of 6 % per annum from the date of filing of application till the date of order and 9% per annum

from the date of order till the actual payment. The respondent has also been directed to pay proportionate cost of application fee of Rs. 1967/- and Legal Practitioner's Fee of Rs. 2000/-.

5. Being aggrieved by the above impugned judgment and order, the appellant preferred this appeal amongst others on the following grounds:

(i) that the respondent/claimant initially claimed refund of freight over charges to the extent of Rs. 34,135/- collected by the booking station, i.e., KKF which lies over Western Railway due to wrong calculation of distance. Further, vide amended application, the respondent claimant raised another claim for refund of an additional amount of Rs. 64,256/- realised by the destination station, i.e., NGC as undercharges after delivery of the consignment under Rationalization Scheme and both the claims were clubbed together, raising the value of claims to Rs. 98,391/-. The above two amounts collected by the Railways at two different times on two different grounds gives rise to difference cause of action, hence, the different cause of action should not allow to be clubbed together in a single application and ought to have been dealt separately inasmuch as it was against the principle of law.

(ii) that the amount of Rs. 64,256/- collected at NGC as under charges is as per the extended rule. Moreover, the said amount was collected under Rationalisation Scheme as per debit raised by Audit at KKF, Western Railway vide their FOIS message dated 04.07.09 for short recovery of freight charges and the said message was communicated to the Respondent vide office letter dated 07.07.09 due to booking of mixed traffic clubbed with refined iodized salt via shortest route BPL

instead of Rationalized route via NAGDA-BXN-TDL as provided by the Railway Board in general order No. 01/2000. Hence, in the instant case, provision of section 83 of the Railway Act, 1989 is applicable but not section 73 of the Railway Act, 1989.

(iii) That the respondent accepted such outstanding undercharges by executing bond dated 24.07.2009 wherein he himself has undertaken to deposit the amount of Rs. 1,11,233/- within 30 days i.e., by 23.08.2009 which is evident on record. In fact, Railway administration is entitled for collection of undercharges amounting to Rs. 64,256/- even after three years of delivery of consignment under section 83 of the Railway Act, 1989.

(iv) That the learned RCT did not appreciate and consider the locus standi of the respondent/claimant inasmuch as without appreciating the invalid claim notice served by the learned counsel under his signature without any legal authority/ power of attorney of the respondent claimant is required under section 106 192 of the Railway Act 1989 and Railway Board's circular dated 18.11.2022; 22.11.2007 and N.F.Railway's notification dated 07.02.2009 and 09.04.2010.

(v) that while deciding the issue no. 3 was not justified for raising the application under section 73 of the Railway Act, 1989 which is only for collection of punitive charges, for overloading not for collection of any under charges which is contrary and inconsistent therewith.

(vi) that the learned RCT was not justified for directing the present appellants/railway respondents for making payment of Rs. 98,391/- only along with interest at the rate of 6% per annum from the date of filing

of the case till the date of the order, failing which the interest of 9% per annum till realization and the respondent shall also pay proportionate cost of application fees of Rs. 1967/- and Legal Practitioner's of Rs. 2000/- without any jurisdiction by interpreting the law wrongly.

6. The learned counsel for the appellant at the outset fairly submitted that she is not pressing against the decision of the learned RCT with regards to the issue no 1 and 2 of the impugned judgment dated 10.05.2012. However, she vehemently argued against the decision of the RCT with regards to the issue no. 3 of the impugned judgment which has been wrongly decided under the provision of section 73 of the Railway Act, 1989 whereas in the instant case, the provision of section 83 of the Railway Act, 1989 is applicable.

7. For better understanding the decision on the issue no. 3, may be reproduced herein below:

“Issue no.3

The applicant submitted vide his amended application dated 07.07.10 that an additional amount of Rs. 64,256/- was realized by the railway at destination station NGC after more than five years of delivery of the consignment under Rationalization Scheme as under-charges. In terms of Section 73 of the Railway Act:

“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 of the detention of any wagon on the account."

Regarding section 73 shows that the Punitive Charges for overloading can be charged before the delivery of the goods and not after. This is a case where the Punitive Charges for overloading was made after delivery which is against Section 73. In other words the Railway cannot demand and collect the penal charges after delivery. "

8. The learned counsel for the respondent claimant submits that the appellant respondent demanded the correction of under charges of Rs. 64,256/-, much after the delivery of the consignment which is not permissible under section 78 of the Railway Act, 1989 read with IRCM-Vol-II of 1991 Rule No. 1820 and as such, the collection of Rs. 64,256/- is illegal; hence, the respondent/claimant demanded refund of the same. She further submits that the demands were made under section 83 of the Railway Act, 1989 on 07.07.2009 much after the delivery of the consignment; whereas, the demand, if any, is to be made before the delivery of the consignment. She further submits that in this regard, a protest petition was filed by the respondent claimant on 12.09.2009 and deposited the amount of Rs. 1,11,233/- as demanded by the claimant/respondent under strong protest. She also made it clear that they had to pay the demands on protest, as under section 83 the Railway had already detained their other consignment and also were likely to detain their future consignment.

9. In support of her submission, the learned counsel for the

respondent has relied on the decision of the Hon'ble Gauhati High Court in ***MFA/61/2016 (Union of India Vs. MS. Shree Shiv Sai Steel Industries)*** decided on 10.09.2019, the relevant portion at para 5 is reproduced herein below:

“5. The said question as to whether the recovery has to be made before the delivery of the goods was given a consideration by the Division Bench of this Court in Union of India & 5 Others V. Megha Technical & Engineers Pvt. Limited in WA No. 71 to 74/2013, wherein the order dated 07.03.2013, it was held as follows:-

“Once delivery is made, power under Sections 73,78,79 and 83 cannot be invoked. Learned Single Judge rightly relied upon the plain language of the said Sections and the judgment of the Hon'ble Supreme Court in Jagjiit Cotton Textiles Mills Vrs. Chief Commercial Superintendent N.R. and others (1998) 5 SCC 126..... The contention that even after delivery any other consignment can be detained under Section 83 of the Act cannot be accepted as such power can be exercised if demand had been raised before delivery which is a condition precedent for exercise of power under Section 83. Thus, we do not find any ground to interfere with the view taken by the learned Single Judge. The appeals are dismissed.”

10. The learned counsel for the respondent also relied on the decision of the division bench matter of the Hon'ble Gauhati High Court in ***WA/71/2013, WA/74/2013, WA/73/2013 and WA/72/2013*** in ***Union of India and 5 Ors Vs. Mega Technical and Engineers Private Limited)*** decided on 07.03.2013. The relevant portion at para 19 is reproduced herein below:

“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 Jauaswals 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 and 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) Ltd. (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."

11. The learned counsel for the respondent submits that admittedly the appellant/respondent's goods were delivered on 23.04.2006, under clear receipt under full satisfaction of the appellant and the appellant demanded and collected under charges of Rs. 64,256/- on 12.09.2009 which is unjustified, illegal and also is in violation of the principal of natural justice and violation of the Railways Act, 1989.

12. She further submits that Railway held the right of re-measurement, re-weighment, re-classification and re-calculation of rates and other charges and of collection before goods are delivered, any amount that may have been omitted or under charged. She also submitted that section 73 and 78 of the Railway Act, 1989 also did not give mandatory direction that the Railway shall collect all their dues and charges before the delivery of goods.

13. Section 78 of the Railway Act, 1989 is reproduced herein below:

“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.”

14. After the statutory railway rules was put in Railway Rules Book known as IRCM-Vol-II of 1991, Rule No. 1820, contained mandatory direction that the railway will collect all their dues and under charges before delivery of the goods, which is reproduced herein below:

“IRC-Vol-II of 1991 Rule No. 1820

1820- Recovery of railway dues before delivery of goods. Before delivery of goods, it should be seen that all railway dues and oter charges have been paid. Wharfageand demurrage charges should be levied under tariff rules and recovered, from the consignees endorsee before the removal of goods from railway premises. Similarly, all undercharges noticed as a result of check of invoices, weightment of goods, etc, should be recovered from consignees/endorsee before delivery of goods. As regards overcharges claimed at the time of delivery, the procedure indicated in Chapter XXI should be followed.”

15. The learned counsel for the respondent while supporting the submission of the learned counsel for the appellant reiterated the same and submits that the appellant has no power to demand under section 73 of the Railway Act, 1989 and the RCT (Railway Claim Tribunal) has wrongly decided the issue no. 3 under section 73 of the Railway, which should have been under section 78.And, as there has been a decision under wrong section of law, the case may be remanded back to the

Tribunal for decision afresh under section 78 instead of section 73 of the Railway Act, 1989.

16. I have considered the submissions made by the parties. From the above, it is seen that both the parties are unanimously in agreement on the point that the issue no.3 of the impugned judgment dated 10.05.2012 which is under dispute has been decided by the learned Tribunal under wrong section of law under section 73 of the Railway Act, 1989 instead of deciding under section 78 of the said Act. In that view of the matter, I am of the opinion that the matter can be remanded back to the learned Tribunal for re-consideration for decision under section 78 of the Railway Act, 1989 instead of section 73 of the said Act.

17. With the above observation, this appeal stands disposed of.
Send back the LCR.

JUDGE

Comparing Assistant