

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

Date of decision: 3rd February, 2015

+ **W.P.(C) 2957/2012**

M/S RARE EARTH OVERSEAS

..... Petitioner

Through: Mr. Shahid Ali, Adv.

Versus

CONTAINER CORPORATION OF INDIA LTD. ...Respondent

Through: Mr. Abhas Kumar, Adv.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The petitioner filed this petition seeking the reliefs of, (i) quashing / setting aside of the policy formulated and adopted unilaterally by the sole respondent for determining the compensation claims for losses / damages caused to consignments deposited with the respondent; and, (ii) for a direction to the respondent to compensate the petitioner equivalent to the loss suffered by the petitioner on account of destruction of the goods of the petitioner in the incident of fire at the Inland Container Depot (ICD), Tughlakabad, New Delhi on 10th April, 2010, pleading:

(i) that the Govt. of India, to facilitate the export from places like Delhi where the port of loading in ships is not available had felt the need to constitute a statutory body and therefore established the

respondent Container Corporation of India Ltd. as a subsidiary of Indian Railways to cope with the requirement of exporters operating from places where the ports of loading are not situated;

(ii) that the petitioner, executing an export order placed by its foreign client based at Ukraine, had on 9th April, 2010 deposited goods with the warehouse of the respondent situated at Export Warehouse, ICD, Tughlakabad, New Delhi in order to transport the goods through the respondent to port of loading in the ships at Mumbai Port;

(iii) that as per the practice, the petitioner had also deposited the invoice shipping bills for export and packing list showing the value of the goods deposited as Rs.6,06,282.75 paise;

(iv) that owing to the failure of the respondent to perform its duty / obligation to secure the said goods including against the risk of fire, on 10th April, 2010, while the goods of the petitioner were still lying deposited at ICD, Tughlakabad, a major fire occurred therein destroying *inter alia* the goods of the petitioner;

(v) that the petitioner in response to a public notice issued by the respondent inviting claims, on 13th April, 2010 preferred a claim but

the respondent vide communication dated 7th February, 2011 informed the petitioner that in terms of its policy, a sum of Rs.1,07,090/- only was payable to the petitioner;

(vi) that on making further enquires, the petitioner further learnt that the claim had been so assessed in accordance with the provisions of The Indian Railways Act, 1989 and The Railways (Extent of Monetary Liability and Prescription of Percentage Charge), Rules, 1990 (hereinafter referred to as the Rules) which provide for maximum payment @ Rs.50 per Kg. of goods.

Contending that though the sum of Rs.50 per Kg. may have been a good compensation in the year 1990, when the policy contained in the Rules was framed but can no longer be good today and that weight cannot always be the criteria for payment of compensation, the writ petition was filed.

2. The petition was entertained and the respondent filed a counter affidavit, pleading:

(a) that the respondent is governed by the provisions of the Railways Act with regard to the compensation claim of any kind of loss / damage caused to the consignment in transit;

(b) that as per Section 103 of the Railways Act, where the value of a consignment entrusted to Railways for carriage has not been declared by the consignor, the amount of liability of the Railway Administration for the loss, destruction, damage, deterioration or non-delivery of consignment shall in no case exceed such amount calculated with reference to the weight of the consignment as may be prescribed; however where the consignor at the time of entrusting the consignment for carriage by Railways declares the value thereof and pays such percentage charge as may be prescribed on such value of the consignment as is in excess of the liability of the Railway Administration as per weight, the liability of the Railway Administration for the loss, destruction, damage, deterioration or non-delivery of such consignment shall not exceed the value so declared;

(c) that the amount payable in the event of non-declaration of the value has been prescribed by Rule 3 of the Rules aforesaid as Rs.50 per Kg.;

(d) that since the petitioner had not declared the value or paid any amount towards percentage of such value, the petitioner in accordance with the Act and the Rules was entitled to an amount @ Rs.50 per Kg.

only and the amount offered to the petitioner had been so calculated on the weight of 2141.80 Kg.;

(e) that 90% of the exporters or importers availing of the facility of the respondent insure their goods with some Insurance Company; so as to not to burden them with double liability towards insurance charges, the policy aforesaid of giving an option to them of declaring value of the goods and paying percentage charge had been adopted.

3. The petitioner filed an application stating that during the hearing of the petition on 7th November, 2012, it was felt that though the petitioner had sought quashing / setting aside of the policy formulated by the respondent but since the petitioner had not impugned Rule 3 of the Rules aforesaid, the petition was deficient and seeking leave to amend the petition and to also claim the relief of impugning Rule 3 of the Rules aforesaid.

4. Though the respondent opposed the aforesaid application of the petitioner but the amendment was allowed vide order dated 12th March, 2013.

5. The counsel for the respondent dispensed with the filing of counter affidavit to the amended petition and the counsel for the petitioner stated that no rejoinder to the counter affidavit needs to be filed.

6. The petition till then, as per Roster of this Court was pending before a Single Judge of this Court, however finding that the amended petition challenged the vires of a statutory rule and which challenge was to be heard by a Division Bench, the petition was vide order dated 4th July, 2013 ordered to be put up before a Division Bench of this Court.

7. Thereafter, the matter was adjourned from time to time on the request of the counsels and finally on 2nd September, 2014 arguments were heard and judgment reserved.

8. The counsel for the petitioner argued that the rate of Rs.50 per Kg. fixed as rate of compensation in the year 1990 cannot be good for the next 25 years.

9. We had during the hearing enquired from the counsel for the petitioner, would not setting aside Rule 3 of the Rules supra which provides for payment of compensation @ Rs.50 per Kg., create a vacuum, with the petitioner being not entitled to any compensation and be thus detrimental to the interest of the petitioner.

10. No answer was forthcoming.

11. The counsel for the respondent argued that the petitioner having not opted for insurance with the respondent by declaring the value of the

consignment and paying percentage charge of such value, cannot be entitled to the value now claimed by him and can only be entitled to the compensation in terms of the Rules i.e. @ Rs.50 per Kg. of the consignment. It was further contended that hardship, even if any to the petitioner being attributable to the failure of the petitioner itself to declare any such value, is no ground to quash the Policy / Rules. Reliance in this regard was placed on ***Bharat Petroleum Corporation Ltd. Vs. Maddula Ratnavalli*** (2007) 6 SCC 81. It was further contended that even if this Court were to hold that the compensation under the Rules @ Rs.50 per Kg. needs to be amended, such amendment can be prospective only and cannot benefit the petitioner. Reliance in this regard was placed on ***M/s. Kusumam Hotels (P) Ltd. Vs. Kerala State Electricity Board*** (2008) 13 SCC 213.

12. The counsel for the petitioner in rejoinder argued that the damage in the present case was owing to the depot of the respondent lacking the fire fighting facility which it ought to have maintained; that the loss of goods in the present case was not in transit but at the depot of the respondent; that the severity of the incident is evident of the fact that it took eleven hours to bring the fire under control.

13. The petitioner itself in the petition has described the respondent either as an ‘autonomous body’ set up under the Ministry of Railways in the year 1988 or as a ‘statutory body’ established as a subsidiary of Indian Railways. The respondent in its counter affidavit has described itself as a Public Sector Undertaking. The respondent on its website www.concorindia.com describes itself as “A Govt. of India Undertaking” or as a “Central Public Sector Undertaking”.

14. Though the petitioner in the amended petition has *inter alia* impugned Rule 3 of the Rules aforesaid and which Rules have been framed by the Central Government in exercise of powers under Section 112 of the Railways Act but we have at the time of dictating the judgment found that the petition does not implead Union of India as a respondent. We fail to see as to how, without impleading the Union of India, challenge to the vires of the Rule aforesaid can be maintained.

15. As far as the other reliefs claimed in the petition are concerned, the same are dependent upon the challenge to the vires of the said Rule and if the said challenge is not maintainable for this reason, the question of the petitioner being entitled to other reliefs, would not arise.

16. Unfortunately, not only did the petitioner fail to implead the Union of India but even the counsel for the respondent failed to take any such objection, either in the counter affidavit or at the time of arguments and which resulted in the said lacuna being discovered after the judgment has been reserved.

17. Not only so, what further becomes evident is that the said Rule is in consonance with Section 103 of the Railways Act. It is the said Section 103 which provides that in the absence of the consignor making a declaration of the value thereof and paying such percentage charge as may be prescribed on such value, the liability of the Railways will be confined to what may be prescribed. The Rule merely prescribes the said value. The purport of the challenge by the petitioner appears to be to the liability being so restricted. For such a challenge to be maintainable, the petitioner is required, if entitled, to challenge the vires of Section 103 of the Act and which has not been done. However, if the purport is only to challenge the amount of fixed liability prescribed being not enhanced with the passage of time, then of course Section 103 need not be challenged.

18. We may notice that a provision as in Section 103 of the Railways Act, is also to be found in the Carriage of Goods by Road Act, 2007, Multimodal

Transportation of Goods Act, 1993, The Carriage by Air Act, 1972 and The Carriage of Goods by Sea Act, 1925. The Supreme Court in ***Nath Bros. Exim International Ltd. Vs. Best Roadways Ltd.*** (2000) 4 SCC 553 examined judgments of various High Courts *inter alia* to the effect that relative rights and liabilities of common carriers and those for whom they carry, are outside the Indian Contract Act and the liability of a common carrier for loss of goods may be limited. A Division Bench of the High Court of Madras, in ***Shivashankar Textiles Vs. Union of India*** MANU/TN/0724/2005 held that when rights of consignor and the Railway Administration are governed by statutory provision, Railway Administration cannot be held liable to entire value of good entrusted and it is for the consignor to declare the value, pay percentage charges and then claim such value in the event of loss and unless the consignor does so, he would have no right to defeat the statutory provision.

19. As far as the challenge on the ground of the rates of fixed compensation prescribed in the year 1990, having notwithstanding passage of time being not been revised, though there is considerable judicial authority (See ***Anuj Garg Vs. Hotel Association of India*** (2008) 3 SCC 1, ***Hotel Association of India Vs. Union of India*** MANU/DE/0284/2006,

Atam Prakash Vs. State of Haryana (1986) 2 SCC 249, *Bipin Shantilal Panchal Vs. State of Gujarat* (2002) 10 SCC 529, *Malpe Vishwanath Acharya Vs. State of Maharashtra* (1998) 2 SCC 1, *Onkareshwar Prasad Vs. State of Bihar* MANU/BH/1166/2011 (where rates of treatment fixed were held to be archaic), *Raghunandan Saran Ashok Saran (HUF) Vs. Union of India* 95 (2002) DLT 508 (DB) and *Ramji Veerji Patel Vs. Revenue Divisional Officer* (2011) 10 SCC 643) in support of the proposition that with the passage of time a legislation which was justified when enacted may become arbitrary and unreasonable with the change of circumstances but the present is not a case where Section 103 of the Act in absolute terms limits the liability of the Railways for compensation. Liability is limited only in the eventuality of the consignor not declaring the value of the consignment and not paying the charges in the form of premium for insurance on such value. It is only in that event that the liability of the Railways and of the respondent is limited.

20. However, having said that, it is not as if, Section 103 also absolves the Railways of all liabilities. The Legislature deemed it appropriate to, in the event of the consignor not so declaring the value and thereby taking insurance, fixing the liability of the Railways as per weight of the

consignment / goods. What that liability should be was left to the Central Government to prescribe (see Section 112 empowering the Central Government to by notification make rules to carry out the purposes of Chapter XI of the Act which contains Sections 93 to 112 and Sub-section (2)(c) whereof specifically provides for the Central Government to make rules providing for the maximum amount payable by the Railways for the loss, destruction, damage, deterioration or non-delivery of any consignment under Sub-Section (1) of Section 103). The Central Government in discharge of its liability under Section 103 read with Section 112 prescribed the Rules aforesaid and Rule 3 whereof prescribes *inter alia* the rate of Rs.50 per Kg.

21. The language of Section 103 precludes the consignor, in the event of having not declared the value of consignment and taken insurance therefor by paying the premium, from claiming any compensation in excess of that prescribed. The general or so-called common law would ordinarily make a carrier liable in tort for damage caused to the goods. Though by Statute the said liability has been limited but such provision in a Statute, if static, would run the risk of being declared *ultra vires* and which would result in the Railways / respondent, as a carrier of goods becoming liable under the

general law of tort. It is perhaps for this reason only that Section 103, instead of fixing / limiting the compensation itself has left it to be prescribed with the intent that the Government by making assessment from time to time as may be required would prescribe the limits of the compensation. The Government however has not done so.

22. It cannot be lost sight of that Railways enjoys monopoly in the country. There is a need to approach the aspect of such compensation from a holistic perspective, keeping in mind the interest of the citizens. It *prima facie* appears that the Government is required to have a relook into the Rules from time to time to keep pace with the inflationary trends and to ensure that the rate of compensation fixed in the year 1990 at least remains static in terms of value and does not fall with the passage of time. The buying power of Rs.50 today is far less than what it was in the year 1990. What thus has happened is that the value of compensation payable today under the aforesaid provisions is far less than that payable in the year 1990. There does not appear to be any reason therefor.

23. All the aforesaid are but our meanderings on the subject and which we feel our duty to record, having reserved judgment and having applied ourselves to the subject. The same, in the absence of Union of India as

aforesaid, can by no stretch of imagination be binding. For the same reason, we cannot also issue a direction to the Ministry of Railways to have a relook into The Railways (Extent of Monetary Liability and Prescription of Percentage Charge), Rules, 1990.

24. We accordingly dispose of this petition by granting liberty to the petitioner to, if so desires, within two months herefrom file a fresh petition with appropriate parties and claiming appropriate reliefs and by further directing that if the petition is preferred within the time of two months, the same shall not be rejected / dismissed on the ground of delay and laches. Though Union of India is not a party to the writ petition, a copy of this order be forwarded to the Chairman, Railway Board as well as to the Secretary, Railways, Government of India for consideration.

No costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

FEBRUARY 3, 2015

‘bs’