IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.370 OF 2005

1 Zuari Industries Limited a company incorporated under the Companies Act, 1956 and having its office at Jai Kisaan Bhawan, Zuarinagar, Goa 403 726.

2 Shri Yeshwant Narayan Gokhale, Indian Inhabitant, residing at Devashri Darshan, Magor Hill, Vasco-da-Gama, Goa. ... Petitioners

V/s

Union of India through the General Manager South Western Railway (formerly known as South Central Railway) having its office at Hubli-Karnataka. .... Respondent

Shri Gaurav Joshi, Senior Advocate with Shri D.J. Pangam, Advocate for the Petitioners.

Shri I. Agha, Advocate for the Respondent.

CORAM : C.V. BHADANG, J.

Reserved on : 26th AUGUST, 2016

Pronounced on : 29th AUGUST, 2016

JUDGMENT :

The challenge in this petition is to the judgment and order dated 14/06/2005 passed by the Railway Rates Tribunal of India at Chennai (Tribunal, for short) by which the complaint filed by the petitioners has been dismissed.

2. On hearing the learned Senior Counsel for the petitioners and the learned Counsel appearing for the respondent, it appears that the controversy has narrowed down to a great extent and it would not be necessary to set out the facts in detail. Suffice it to mention that the complainant Zuari Industries Ltd. is manufacturers of fertilizers having their factory situated near Sankval Railway station on the Castle Rock - Vasco section of Hubli Division of the South Western Railway. The bulk of their manufactured fertilizers are transported through railways in rake loads. The factory was set up in the year 1972 and the

railway siding was provided at the Sankval railway station for transportation of fertilizers from the factory. The said siding was originally on a Meter Gauge section. The same was converted into Broad Gauge during October, 1996 to March, 1998. Indisputably, the gauge conversion was executed by the railways at the cost of the petitioners. The petitioners claim that they had incurred cost of Rs.17.00 crores for the said 'gauge conversion', for which the plans were got prepared and were approved by the railway authorities to enable the complainant for a loading of 35 BCN/BCX wagons. Two lines were provided for the said purpose.

3. The respondent by a notice dated 5/07/2005 raised a demand of Rs.2,05,19,874/- towards shunting/siding charges for the period from 18/03/1998 to 11/03/2002, which led the petitioners to approach the Tribunal.

4. The petitioners claimed, that according to railway authorities only wagons with air brake could be operated on the section which has a gradient of over 1 in 40 and the railways insisted on the use of rakes with air brakes of minimum 40 BCN wagons. As the railway authorities started insisting for payment of shunting charges, in addition to freight, for shunting involved on account of placement of split rakes, the petitioners claimed that the two lines serving the petitioners' factory are part of the Sankval station and they are running lines operated by the station staff and the shunting involved in forming rake loads on the station is part of the normal operation to be done at the station. In short, the petitioners contended that the shunting charges could not be recovered. The petitioners claimed a declaration that the levy of shunting charges in addition to freight on the rake load traffic at Sankval station is unreasonable and for a

direction seeking its refund/waiver.

5. The respondent contested the claim. It was contended that the traffic on the meter gauge was opened on 5/06/1973 for transport of the manufactured goods. The gauge conversion was undertaken from October, 1996 to March, 1998 and completed. It was contended that the critical factor was limitation of the trailing load, between Castle Rock and Kulem Stations and ghat section of 26 kms, characteristic with steep falling gradient of 1 in 40 and accordingly two lines of 686 M (standard length) with loading platform of 560 M to deal with 35 BCNs in between the lines have been planned and the work was got executed. It was contended that the existing loading platform could hold 35 BCNs only as it was designed in 1996 prior to the conversion of the section and after conversion with the induction of high power locomotives and air brake rolling stock, the railways have

improved the trailing load to 40 BCNs/58 BOXNs. It was therefore claimed that the petitioners should develop the loading platform to load full rake of 40 BCNs.

6. On the basis of the rival pleadings, the Tribunal framed in all 6 issues. The parties led oral and documentary evidence. The Tribunal found that before and after the gauge conversion the petitioners were "consistently found to be asking for splitting the rakes and placing it on the two lines, though at times they were equally loading otherwise 40 BCN wagons also, as a full train loading". The Tribunal, therefore, found that the railways cannot be blamed for the faulty planning and the petitioners cannot wriggle out of a situation brought about upon themselves and at the same time avoid payment of charges, due from them for such shunting operations, as were undertaken at their request. It can thus be seen that the Tribunal has

primarily considered the issue of levy of shunting charges, in addition to the freight and found that the same is just and reasonable and the two private lines in question cannot be treated as part of the Sankval railway station. In that view of the matter, the complaint was dismissed.

7. On behalf of the respondent, additional affidavit of one Shri V. Sudhakar Naik dated 07/07/2014 has been filed on record which has put the controversy in a narrow compass. It appears from issue no.2 that the distinction between the shunting and siding charges was not clearly brought out before the Tribunal. The additional affidavit of V. Sudhakar Naik has brought the matter in a clear perspective. In para 4 of the additional affidavit, it is stated thus:

> 4. I further state that where the railway freight is levied from and to the serving station and separate

> siding charges are levied for haulage of wagons between serving station and the siding, the siding charge should be fixed on the basis of cost per engine hour and average time for a round trip from the serving station to the siding and back for placement and/or removal of wagons whether loaded or empty. Similarly, in the case of sidings where locomotives of the Railway have to be brought from stations other than the serving station, the time taken for bringing the Railway's locomotive for the depot station to the serving station and back should also be taken into account in arriving at the time required for performing the round trip to serve the siding for the purpose of working out the siding charges.

In para 7 the claim of the respondents is set out thus:

> 7. The Respondent in the above Writ Petition have accordingly contended that, they are entitled for the following charges subject to reconciliation, if any, order by this Hon'ble Court as stated herein above:
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> (a) Siding/Trip Charges - Rs.1,89,74,944/-
>
> (b) Loco Hire/Engine Haulage Charges - Rs.15,44,930/-.

8. There is a statement annexed to the affidavit, showing 'Trip Charges' and 'shunting charges'. In column C the Shunting Charges are set out. The entries in column 'F' of the statement, would show that all such shunting charges are paid by the petitioners to the respondent. Thus, during the course of the arguments at bar, there was no dispute that no amount is recoverable from the petitioners on account of the Shunting Charges. The dispute therefore now is restricted to the Trip Charges as set out in column B of the said statement. The total amount due at the foot of column G is shown as Rs.1,71,81,144/-. The amount due and payable along with the Loco Higher Charges of Rs.15,44,930/- is shown as Rs.1,87,26,074/-.

9. The dispute shortly stated is whether the respondent should have levied the trip charges on a 'wagon load' basis or the 'train load' basis, that is 'through distance basis'.

It is undisputed that from 11/03/2002, charges are levied on through distance basis. Thus, the dispute is regarding the liability to pay siding charges for the period from 18/03/1998 to 11/03/2002. Therefore, this period can be further split into two parts. The first part would be from 18/03/1998 (when the broad gauge section was commissioned) till 22/06/2000, while the second part would be from 22/06/2000 to 11/03/2002 (when the notification was issued by applying the through distance freight rates). The petitioners by a letter dated 22/06/2000 complained about levy of the siding charges and for application of the 'through distance freight rates'.

10. In so far as the first part of the aforesaid period i.e. from 18/03/1998 to 22/06/2000 is concerned, the learned Senior Counsel for the petitioners, on instructions, fairly states that the same is not pressed. Because, on account of a policy change on an all India basis, and the induction of high power

locomotives and air brake rolling stock the trailing load was improved to 40 BCNs/58 BOXNs from earlier 35 BCNs. He, therefore, gives up the said claim. During the course of the arguments at bar, it was not disputed that the amount of the siding charges for this period would come to Rs.82,10,146/-. So this claim of the respondent is not disputed or challenged by the petitioners. Thus, the dispute which survives is as regards the siding charges for the period from 22/06/2000 to 11/03/2002.

11. It is contended by the learned Senior Counsel for the petitioners that the application by the petitioners was made on 22/06/2000 complaining about the levy of the siding charges and seeking the application of through distance freight rates. It is submitted that the said application was kept pending and was decided by the respondents only on 11/03/2002. It is thus submitted that the respondent having accepted

the claim of the petitioners from 11/03/2002, there is no justification as to why the said benefit should not be extended from 22/06/2000 when the application was made. It is contended that the respondents cannot benefit out of a delay caused at their own end. The learned Senior Counsel has referred to the evidence of Mr. C. Raman (RW1) a Divisional Commercial Manager of the South Central Railway at Vijayawada. The learned Senior Counsel points out that this witness has clearly admitted that there was no change of any circumstance prior to the notification dated 11/03/2002 and the pattern of operation was the same as is continuing after 11/03/2002. The learned Senior Counsel has specifically referred to question no.63 wherein it was suggested to the witness that the benefit of through distance freight rate could have been given earlier also when the witness, stated that it could have been given. The learned Senior Counsel points out that from 22/06/2000 to 11/03/2002 there was no change in the circumstance nor the pattern of operation. The contention is that if the through distance freight rate can be levied from 11/03/2002, there was no justification for not extending the said benefit at least form 22/06/2000. Reliance is placed on the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Central Excise V/s. M.P.V. & Engg. Industries AIR 2003 SC, 4121*** and ***Commissioner of Customs (Imports), Mumbai V/s M/s. Tullow India Operations Ltd., AIR 2006 SC 536***. He, therefore, submits that the benefit of the notification dated 11/03/2002 (when the Zuari siding Sankval was notified for through distance freight rate basis) be extended from 22/06/2000. It is submitted that the reasons shown by the respondent for not promptly processing the application dated 22/06/2000 cannot be accepted.

12. The learned Counsel for the respondent has supported the impugned judgment. It is

submitted that the respondent has set out the circumstances in which the application could not be decided earlier. It is submitted that the through distance freight rates can be applied only from 11/03/2002 when the Zuari siding was notified and became eligible for application of such rates. It is submitted that the delay in issuing the notification, has occurred due to the field office being situated far off at Sankval Goa and the Divisional Office being at Hubli, Karnataka and the then Zonal Head Quarters at Secunderabad, Andhra Pradesh were required to coordinate and ascertain the factual position from various departments such as Engineering, Operating, Accounts besides the Commercial Department before a final decision could be taken by the competent authority. It is contended that the charges for placement and removal of wagons are leviable until the notification for charging on through distance basis is actually issued. It is submitted that the Tribunal has rightly rejected the contention of the petitioners for levying freight on through distance basis and the petitioners are not qualified and did not satisfy the essential requirement for such benefit prior to 11/03/2002.

13. I have carefully considered the circumstances and the submissions made. As noticed earlier, the dispute is whether the benefit of the through distance freight rates, which is admittedly extended to the petitioners from 11/03/2002, needs to be given from 22/06/2000. Before dwelling on the said issue, it is necessary to mention that it has been clearly brought out from the affidavit of Mr. Sudhakar Naik that there is distinction between the shunting charges and the siding charges. Indisputably, the petitioners had complained about the levy of the siding charges and had claimed for application of the though distance freight rates, vide their application dated

22/06/2000. That application was decided on 11/03/2002 notifying the Zuari siding at Sankval Railway station, for levy of charges on through distance freight rates basis. It has further come on record that prior to 11/03/2002 there has not been any change in circumstances or the manner of operations. The spacious reason given for delay in issuing the notification dated 11/03/2002 being mainly the coordination between three offices/establishments, to my mind cannot be accepted. For such a delay at the respondent's end the petitioners cannot be made to suffer, particularly, when there is no change in circumstance from 22/06/2000 till the notification was issued nor there was any change in the manner of operations. In my considered view, the claim of the petitioners for levy of the through distance freight rates from 22/06/2000 is just and proper.

14. In the case of ***M/s. Tullow*** (supra) the

importers were entitled to the benefit of exemption notification subject to production of the 'essentiality certificate', granted by the Director General of Hydrocarbons, at the time of importation of goods. It was held that the application for grant of such certificates should have been processed by the Director General of Hydrocarbons as expeditiously as possible. It was found that the applications were not processed expeditiously as there was no time schedule prescribed therefor. It has been held that if it is not within the power and control of the importer and depends upon the acts of other public functionaries, non-compliance of such condition by production of the essentiality certificate (subject to just exceptions) cannot be held to be a condition precedent which would disable it from obtaining the benefit for all times to come.

15. In the case of ***M/s. M.P.V. & Engg.***

Industries (supra), the question was about the benefit of the exemption notification (under the Central Excise Act) available to a small scale industry. In para 11 of the judgment, the Supreme court found that in so far as the eligibility criteria for entitlement of the exemption are concerned, they have to be strictly applied and construed. However, once it is found that the industry qualifies as a small scale industry, in the matter of grant of exemption, a liberal approach is permissible if it does no violence to the language of the notification. The following observations in para 11 are apposite:

> "11. It was then submitted by the Appellant that in construing a notification granting exemption, the notification must be strictly construed without stretching the language of the notification to confer any unintended benefit. Similar argument was advanced before the Tribunal. In dealing with the submission the Tribunal noticed the decision of this Court in Collector of Central Excise v. Parle Exports (Pvt.) Ltd., reported in [1988] 38 ELT 741 wherein this Court held that exemption

should be strictly construed although the exemption clause in the notification may be construed liberally. In other words, eligibility criteria should be construed strictly but a liberal approach may be adopted in construing other conditions. Reliance was also placed in U.O.I, v. Wood Papers Ltd. reported in [1990] 47 ELT 500. We may apply this principle to the case in hand. No doubt, so far the authorities are concerned they must examine the claim of the respondent to be a small scale industry strictly and in accordance with the rules. However, once it is found that the industry qualifies as a small scale industry, in the matter of grant of exemption a liberal approach is permissible if it does no violence to the language of the notification. <u>In a case of this nature it is only reasonable to take the view that the benefit of exemption will accrue to a unit found to be small scale industrial unit from the date on which the application was made for grant of registration certificate. Such a unit should not be deprived of the benefit to which it is otherwise entitled as a small scale industrial unit merely because the authorities concerned took their own time in disposing of the application. We therefore, agree with the majority view of the Tribunal and hold that the benefit of exemption under the notification in question should be extended to the respondent with effect from the date on which the application for grant of registration was made by it before the competent authority</u>. This is also in accord with the principle which found favour with

> this Court in State of U.P. and Anr. v. Haji Ismail Noor Mohammad & Co. and The Assessing Authority and Ors. v. Patiala Biscuits Manufacturers Pvt. Ltd., (Supra)."
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> (Emphasis supplied)

16. In the present case, from the evidence on record, it is clear that on the basis of the circumstances and the manner of operation there was no change, before and after 11/03/2002. Thus, there is no reason why the benefit of the through distance freight rates be not extended to the petitioners with effect from 22/06/2000. The Tribunal has primarily dwelt upon the shunting charges and in respect of which now there is no dispute as the entire shunting charges are paid.

17. In pursuance of the order dated 14/09/2005 the petitioners have deposited an amount of Rs.2,05,19,874/- before this Court which has been invested. Thus, the amount of the siding charges to the tune of Rs.82,10,146/-

and the loco higher charges of Rs.15,44,930/- along with proportionate interest can be paid to the respondents, while the remaining amount along with proportionate interest will have to be paid to the petitioners.

18. In the result, the following order is passed:

(i) The petition is partly allowed.

(ii) The petitioner is held entitled to the benefit of the through distance freight rates, with effect from 22/06/2000.

(iii) The respondent would be entitled to siding charges from 18/03/1998 to 22/06/2000 amounting to Rs.82,10,146/-.

(iv) The respondent shall also be entitled to amount of loco higher charges of Rs.15,44,930/-.

(v) The aforesaid amounts at clauses (iii) & (iv) along with proportionate interest, shall be paid to the respondent.

(vi) The remaining amount along with interest shall be refunded to the petitioners.

(vii) Rule is partly made absolute in the aforesaid terms, with no order as to costs.

C.V. BHADANG, J.

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