

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**WPA No. 11275 of 2019
Rashmi Cement Limited and another
Vs.
Union of India and others**

For the petitioners	:	Mr. Meghajit Mukherjee, Ms. Shivangi Thard, Ms. Priyanka Sharma
For the respondents	:	Mr. Sanajit Kumar Ghosh
Hearing concluded on	:	25.09.2020
Judgment on	:	05.11.2020

Sabyasachi Bhattacharyya, J.:-

1. The facts of the case, in a nutshell, are as follows:
2. On June 16, 2006, the Railway Board prioritized certain customers under Programmed Traffic and categorized them under Priorities 'A', 'B', 'C' and 'D' respectively. The petitioners came under category 'C'.
3. On June 17, 2011, such allocation of petitioners under Priority 'C' was suspended by the Railway Authorities on allegations that production figures submitted by the petitioners to the Central Excise, Kolkata differed with those placed before the EDRM Office. The petitioners filed a writ petition, bearing W.P. No. 16530(W) of 2011, against such suspension.

4. On September 19, 2012, a show-cause notice was issued to the petitioners, alleging freight evasion on the part of the petitioners. The petitioners preferred W.P. 22813(W) of 2012 challenging the show-cause notice.
5. In a different appeal of a sister concern of the petitioners, a division bench of this court held that the Railways had no power to impose penalty or stop user of Railway Traffic. The Railways filed a Special Leave Petition against the division bench order, but no interim order of stay was granted in connection therewith.
6. On December 14, 2015, the Supreme Court directed transfer of all similar matters, as the above, before it.
7. The petitioners, meanwhile, again applied for being conferred "Programmed Traffic" status under Priority 'C' on November 9, 2017.
8. On December 20, 2017, the respondent-authorities rejected such application primarily on three grounds:
 - (i) two destinations were applied for, instead of one;
 - (ii) 'C' category was not applicable to pellet manufacturing units; and
 - (iii) The matter was sub judice due to pendency of W.P. No.16530(W) of 2011, against the suspension order of the petitioners.
9. On December 22, 2017, the petitioners responded to the above rejection by indicating that:

- (i) a single destination (PSOR Jhargram) was specified;
- (ii) the petitioners would not undertake conversion of iron ore fines; and
- (iii) steps would be taken to withdraw the writ petition bearing W.P. No. 16530(W) of 2011 and the order passed in that regard would be furnished soon.

10. Since the Railway Authorities allegedly sat idle over the petitioners' response, the petitioners sent another application in that regard on January 11, 2019.

11. On February 22, 2019, W.P. No. 2368(W) of 2019, preferred by the petitioners against the respondents' inaction, was disposed of by a coordinate bench of this court, directing the respondents to decide the petitioners' application expeditiously.

12. On March 11, 2019, vide General Order (GO) No. 93, the petitioners were categorized as a Priority 'C' customers, under the head "Programmed Traffic other than Coal", with effect from April 1, 2019, to continue, unless cancelled earlier, till March 31, 2020.

13. On March 18, 2019, the petitioners' prayer was finally rejected, primarily on the grounds that a CBI investigation was pending against the petitioners for alleged supply of manipulated and forged excise returns by the petitioners for the period April, 2010 to February, 2011 and that M/s Sarda Energy and Minerals Limited was not similarly situated as the petitioners, apparently as alleged by the petitioners.

14. Learned counsel for the petitioners argues that Section 71 of the Railways Act, 1989 (the 1989 Act) empowers the Central Government to direct the Railway Authorities to give preference to carriage of goods or classes of goods. GO No. 93 dated March 11, 2019 was issued by the Central Government under Section 71, as evident from Clause 3.1(b) thereof. Accordingly, the said order amounted to a delegated legislation and the Railway administration was duty-bound, as the delegated authority, to comply and grant rakes to the petitioners under Priority 'C', if the prescribed eligibility criteria were fulfilled. In this context, learned counsel for the petitioners relies on the judgment of *Commissioner of Police, Bombay vs. Gordhandas Bhanji*, reported at AIR 1952 SC 16 (at page 21).
15. The petitioners further argue that the 1989 Act is a Consolidating Act and forms a useful code applicable to circumstances existing at the time when the legislation was passed. In this regard, the petitioners rely on a judgment reported at 1895 SCC OnLine Privy Council 3 (*Administrator General of Bengal vs. Prem Lal Mullick*) [also reported at (1894-95) 22 Indian Appeals 107]
16. It is further submitted by the petitioners that the 1989 Act provides for various punitive measures in Sections 73, 83 and 137 to 182, but does not include any power to stop supply of wagons or prevent transportation of goods, etc. to avail railway service. In particular, it is argued, Section 163 provides for fine, not stoppage of service, for submission of false accounts of goods, that is, concealing the true character of the goods to avoid freight and

Section 177 provides for imprisonment and fine, not stoppage of service, for submission of false Returns.

17. Section 93 of the 1989 Act engrafts the concept of common carrier under the Indian Carriers Act, 1865 [now Section 2(a) of The Carriage by Road Act, 2007]. Section 2(a) of the 2007 Act defines a common carrier, which includes the railways. Thus, the Railways are, by definition, a common carrier and cannot refuse services if the petitioners fulfil other conditions of availing such services, for example, payment of freight etc.

18. A Division Bench judgment of this court, passed in *MAT. No. 1970 of 2014 (Reshmi Metaliks Limited & Anr. vs. Union of India & Ors.)*, is relied on in this regard. It was held therein that the appellants' right to avail of railway services flows from the 1989 Act, which renders services as a common carrier. The railway administration, thus, has no jurisdiction/authority to refuse a consignment if freight charges are paid. Even if the consignors/consignee defaulted or evaded freight earlier for transportation of goods, the railway administration (as a common carrier) cannot refuse to accept any consignment, if freight charges are paid for it.

19. Learned counsel for the petitioners next relies on a judgment dated June 28, 2019, passed in *W.P. No. 23104(W) of 2018 [Rashmi Metalliks Limited & Anr. vs. Union of India & Ors.]*, which arose from a challenge lodged by the petitioners' sister concern, namely, M/s Rashmi Metalliks Limited. It was held therein that, in rejection of a prayer for Priority 'C' status, no condition can be added

to the Policy dated June 16, 2006 (annexed at page-27 of the petitioners' supplementary affidavit to the writ petition). Rejection must be on grounds mentioned in the Circular dated June 16, 2006, as referred to above. It is alleged that the order impugned in the present writ petition was passed on grounds alien to such Circular.

20. In reply to the arguments advanced on behalf of the respondents, learned counsel for the petitioners submits that the respondents are incorrect in alleging that the petitioners were not blacklisted but granted Priority 'D' status, as such, not prejudicing the petitioners in any manner. The petitioners submit that category 'D' is the residuary or general category, comprised of the customers having no priority, which are confined only to categories 'A', 'B' and 'C'. Denial of preferential status under Priority 'C' amounts to refusal, as envisaged under Section 71 of the 1989 Act. Thus, such refusal gives rise to a legally enforceable right and a corresponding legal obligation of the Railway Authorities to confer benefits of priority 'C' to the petitioners.

21. It is further argued that the respondents' allegations as to the writ petition being barred by limitation, since the cause of action arose on June 17, 2011 itself, when the allocation of Priority 'C' status to the petitioners was suspended, is also incorrect. Learned counsel for the petitioners argues that the petitioners have been placing indents regularly till date. Therefore, the deprivation of the petitioners from getting Priority 'C' status is a continuing wrong, giving rise to cause of action for the writ petition even currently.

22. The petitioners countered the respondents' argument, that the petitioners had an effective alternative remedy before the Railway Claims Tribunal, on the ground that the Tribunal is to adjudicate freight-related disputes and not matters of the present nature. In any event, in paragraph no. 3 (xxii) of the respondents' affidavit-in-opposition, a lower-category freight is claimed for Priority 'C', which is denied by the petitioners.
23. Learned counsel for the respondents indicates in the written notes of arguments that the respondents did not have any opportunity to make oral submissions in the matter and were, thus, unable to present their case properly before the court.
24. It is argued that the cause of action for the present writ petition arose as long back as in the year 2011, when the priority status of the petitioners was suspended. The facilities under the Priority 'C' were not continued by the railways thereafter in any event and as such, the petitioners cannot claim, as a matter of right, the reopening of the grant of Priority 'C' status only for the petitioners' benefit.
25. In any event, the respondents argue, the writ petitioners were not prejudiced due to refusal to grant Priority 'C' status, as the petitioners have been availing the benefit of Priority 'D' for a long time, as indicated in the affidavit-in-opposition, particularly in paragraph no. 3(v-xiv) thereof. The delay of nine years in taking out the present writ petition has not been explained by the petitioners, as indicated in the paragraph no. 3(xii) and (xiv) of the affidavit-

in-opposition. In this context, the decision rendered in *Narmada Bachao Andolan vs. The State of Maharashtra and Ors.* [(2011) 7 SCC 639], also reported at AIR 2011 SC 1989, is relied on by the respondents' counsel.

26. *Narmada Bachao Andolan (supra)*, is relied on by the respondents for the proposition that there cannot be any judicial review under Article 226 of the Constitution of India in the present context, as a writ court does not sit in appeal for re-appreciation of evidence or documents. The reasons assigned by the railways for the refusal are neither arbitrary nor mala fide. No statutory right to claim Priority 'C' status, which was available for one year only and discontinued later, is available to be claimed now.

27. Section 71 and other provisions of the 1989 Act, as relied upon by the petitioners, are not applicable in the present case. Learned counsel for the respondents further submits that not only has no fundamental right of the petitioners being violated, the petitioners had practiced fraud upon the Railways, for which the petitioners were suspended and blacklisted. As such, the petitioners have not come with clean hands, which is a pre-requisite of interference by this court under Article 226 of the Constitution. Learned senior counsel for the respondents places reliance in this respect on *Municipal Council, Neemuch vs. Mahadeo Real Estate & Anr.*, reported at (2019) 10 SCC 738.

28. By citing the case of *Manoharlal Sharma vs. Narendra Damodardas Modi*, reported at (2019) 3 SCC 25, the respondents argue that no writ lies against a Policy decision of the sovereign legislature of the country.

29. Learned counsel for the respondents then submits that the first writ petition filed in connection with the suspension of the petitioners was dismissed as withdrawn and the second writ petition was disposed of on February 22, 2019, by directing consideration of the same cause of action, which is the premise of the present writ petition. Upon the Railways having already disposed of the petitioners' representation on merits in terms of the direction given on February 22, 2019, the third writ petition, that is, the present one, is not maintainable on virtually the same cause of action.

30. Learned counsel for the respondents further argues that the petitioners had an alternative remedy, at best, before the Railway Claims Tribunal, if at all. Freight-related disputes, as the present one, are to be decided by the Tribunal, as evident from Sections 33 to 36 and Section 70 of the 1989 Act. In this context, *Municipal Council, Neemuch (supra)* is relied on by the respondents, in addition to the judgment dated December 6, 2019 passed by a coordinate bench of this court in *W.P. No. 6127(W) of 2012 in Shyam Steel Manufacturing Limited Company & Anr. vs. Union of India & Ors.*

31. *Narmada Bachao Andolan (supra)* is also relied on to highlight the alleged non-maintainability of the present writ petition.

32. It is next argued by the respondents that the petitioners, in effect, rely on the Doctrine of Negative Equality, which is not enforceable/justifiable in a writ court. That apart, it is argued that no special preference was given to any other company and the judgment rendered in MAT 1970 of 2014 *Reshmi*

Metaliks Limited (supra), pertaining to a sister concern of the petitioners, is factually different and not applicable to the present case.

33. *Shyam Steel Manufacturing Limited Company (supra)* also distinguishes the proposition laid down in *Reshmi Metaliks Limited (supra)*. *Narmada Bachao Andolan (supra)* is relied on again, to strengthen the said arguments.

34. In view of the judgment in *Shyam Steel Manufacturing Limited Company (supra)* having been passed on the basis of *Narmada Bachao Andolan (supra)*, the judgment rendered in *Reshmi Metaliks Limited (supra)* is rendered, as submitted by the respondents, per incuriam. *Reshmi Metaliks Limited (supra)* also did not consider Sections 33 to 36 of the 1989 Act.

35. It is reiterated on the basis of *Anuradha Bhasin vs. Union of India*, reported at (2020) 1 MLJ 574, that fundamental rights are restricted rights, to be adjudicated on Directive Principles and Fundamental Duties under Article 51(A) of the Constitution of India. In the present case, it is argued, no violation of any fundamentally/statutory right of the petitioners has been established.

36. The respondents lastly submit that quasi-criminal disputes cannot be decided separately. In any event, the allegation of fraud, pending investigation even at the present juncture, cannot be challenged in a writ petition, as also argued in paragraph 3(xx) of the respondents' affidavit-in-opposition to the writ petition.

37. It may be noticed at the outset, as regards the allegation of the respondents of not having got an opportunity of making oral submissions, that the same does not appear to hold water on the basis of the records. The order-sheet in this writ petition reveals that the matter was heard on several occasions. On January 28, 2020, the matter was heard substantially and fixed on February 4, 2020. On February 4, 2020, exhaustive arguments were again advanced by both sides, from which it became evident that the matter was urgent and required to be disposed of expeditiously. As such, no interim order was granted to the petitioners, although the petitioners had made out a prima facie case, since such an interim order would amount to allowing the writ petition itself. Affidavits were directed to be exchanged instead, and all contentions were kept open to be argued. The matter was accordingly fixed for final hearing on February 17, 2020.

38. On February 17, 2020, when the matter was next taken up for hearing, affidavits were filed, but the hearing was adjourned till March 4, 2020 on the prayer of both sides.

39. Thereafter, on March 5, 2020, hearing was adjourned on the prayer made by counsel for respondent nos. 1 and 4 to 7, till March 12, 2020.

40. Thereafter, the pandemic situation arose and the matter could only be taken up on September 24, 2020, when the same was enlisted. However, the respondents were absent on that date, though the petitioners were represented through counsel. Since substantial hearing had already been

undertaken, the petitioners' counsel was heard and written notes were directed to be filed by the petitioners, keeping the matter in the list on the next day, that is, September 25, 2020 under the heading 'For Orders', to give another opportunity of oral hearing to the respondents.

41. On September 25, 2020, however, counsel for the respondents appeared without any brief and prayed for an adjournment of the matter till after the Annual Puja Vacation. Despite having opportunity of oral arguments, counsel for the respondents was unready in the matter and, as such, chose not to advance arguments.

42. In view of such inordinate prolongation of the matter, particularly in the light of the initial orders, which had contemplated expeditious disposal, for which no interim order was granted, the oral arguments were closed on September 25, 2020. However, the respondents were given a further opportunity to file their written notes of arguments within October 1, 2020, either in soft or hard form, physically or over the internet. Accordingly, the respondents filed their elaborate written notes of arguments, in consonance with the extensive arguments made by the respondents' counsel on February 4, 2020, physically on September 30, 2020.

43. As such, the question of not giving any opportunity of oral arguments or hearing to the respondents does not arise at all. Rather, in spite of ample opportunities being given, the matter being heard at length previously and despite the petitioners' obvious urgency since the matter was pending for

about eight months without any interim order on the understanding that it would be heard off finally, the respondents adopted dilatory tactics and chose not to advance oral arguments merely on the last date of hearing. In any event, the respondents got enough opportunity to make submissionson all issues in their written notes of arguments. Even the written notes of arguments filed by the petitioners indicate that the petitioners dealt with the contentions of the respondents as well, which would not be possible unless the respondents had orally argued at some previous point of time. It must also be kept in mind that the respondents, being statutory authorities, do not enjoy the status of a privileged litigant in any manner and as such, the said contention of having got no opportunity of oral submissions cannot cut ice in the circumstances.

44. As regards the question of jurisdiction, General Order No. 93 dated April 1, 2019, a copy of which is annexed to the writ petition, categorized customers into 'A', 'B', 'C' and 'D' priorities. Such priorities pertained to giving "special facilities for" or "preference to transport of" goods/class of goods at a station/siding as per priority/preference mentioned in the said order. Even Section 71 of the 1989 Act does not refer only to "rates" (indicating freight) but also other special facilities for, or preference to, transport goods etc. Section 71(1) provides for priorities as regards routes as well, and not regarding freight only.

45. Sub-section (3) of Section 71 of the 1989 Act, on the other hand, binds the Railway administration to comply with any order given (by the Central

Government) under sub-section (1). Such privileges would be deemed not to be in contravention of Section 70 of the 1989 Act, which relates to the prohibition of undue or unreasonable preference or advantage being given to customers.

46. Sections 70 and 71 of the Railways Act, 1989 are set out below in this context:

“Railways Act, 1989:

70. Prohibition of undue preference.— *A railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or any particular description of traffic in the carriage of goods.*

71. Power to give direction in regard to carriage of certain goods.— *(1) The Central Government may, if it is of the opinion that it is necessary in the public interest so to do, by general or special order, direct any railway administration –*

- (a) to give special facilities for, or preference to, the carriage of such goods or class of goods consigned by or to the Central Government or the Government of any State or of such other goods or class of goods;*
- (b) to carry any goods or class of goods by such route or routes and at such rates;*
- (c) to restrict or refuse acceptance of such goods or class of goods at or to such station for carriage,*

as may be specified in the order.

(2) Any order made under sub-section (1) shall cease to have effect after the expiration of a period of one year from the date of such order, but may, by a like order, be renewed from time to time for such period not exceeding one year at a time as may be specified in the order.

(3) Notwithstanding anything contained in this Act, every railway administration shall be bound to comply with any order given under sub-section (1) and any action taken by a railway administration in pursuance of any such order shall not be deemed to be a contravention of Section 70.”

47. The aforesaid legal provisions, read with the General Order No. 93, clearly indicate that the present dispute is with regard to priorities in various fields and does not pertain to merely 'freight', which would bring the same within the jurisdiction of the Railway Claims Tribunal. 'Freight', or 'rates', is only a consequential component of such priorities at best, but not the pith of the dispute.
48. That apart, even if an alternative remedy was available, the same would *notipso facto* be a bar to the exercise of writ jurisdiction under Article 226 of the Constitution by this court, as stands the settled position of law, for which no authority is required to be cited.
49. In such view of the matter, the objection raised by the respondents as regards the jurisdiction of the writ court cannot be sustained.
50. As regards the limitation, it is well settled that the Limitation Act, which derives authority under the Constitution itself, does not apply, in terms, to judicial review under Articles 226 and 227 of the Constitution of India. However, exorbitant and inordinate delay may be a legitimate ground for refusing to grant relief to the writ petitioners.
51. In the present case, the initial writ petition challenged the suspension of the petitioners from the 'C' priority on June 17, 2011 on the ground of production figures submitted to the Central Excise, Kolkata differing with those given to the EDMR Office. Thus, the said writ petition, bearing W.P. No. 16530(W) of 2011, arose from a previous cause of action, which merged with the present

cause of action when the petitioners' subsequent prayer for reconsideration of the rejection of their categorization under 'C' priorities was refused afresh.

52. W.P. No. 22813(W) of 2012, on the other hand, challenged an initial show-cause notice alleging freight evasion, which does not have any direct bearing upon the present dispute, the latter having arisen subsequently and being much wider in scope.

53. W.P. No. 2368(W) of 2019, again, was preferred by the petitioners against the respondents' inaction to dispose of the petitioners' application dated January 11, 2019, regarding reply of the respondents to the petitioners' response dated December 22, 2017 to the rejection (dated December 20, 2017) of the petitioners' fresh application dated November 9, 2017, which was for conferring "Programmed Traffic" status under Priority 'C'. W.P. No. 2368(W) of 2019. The said writ petition was disposed of by directing expeditious disposal and, therefore, was from a previous and different cause of action than the present writ petition. The previous order, thus, could not operate as *res judicata* in the present dispute.

54. That apart, General Order No. 93 was issued by the Central Government on March 11, 2019 and the impugned order rejecting the petitioners' prayer for reconsideration of rejection of the second (fresh) application for getting Priority 'C' status was passed only on March 18, 2019, thereby furnishing a fresh cause of action for the present writ petition. The instant writ petition was filed in the year 2019 itself, without undue delay and, as such, cannot be

said to be so belated as to preclude interference under the writ jurisdiction. The initial suspension was of a temporary nature and comprised of an entirely different cause of action from the rejection dated March 18, 2019, of the fresh application made by the petitioners. The previous orders and causes of action attained finality by merging into the refusal dated March 18, 2019, which furnished the cause of action for the present writ petition. As such, the petitioners cannot be said to have come with unclean hands, or having occasioned any unreasonable delay whatsoever, in presenting the current writ.

55. Moreover, the respondents initially took out a plea of not having any notice of last hearing on September 25, 2020, although subsequently it was admitted by learned counsel for the respondents, that the respondents had received a notice of such hearing, on September 24, 2020 itself. Thus, the plea of not having appropriate opportunity of hearing does not lie in the mouth of the respondents, particularly since the respondents had advanced substantial oral arguments, which were even addressed in the petitioners' written notes of arguments. That apart, the respondents were afforded further opportunity of filing written notes of their arguments, which they availed of.

56. The plea of the Railways, that Priority 'C' was discontinued altogether subsequently and cannot be reopened, has been made in thin air. General Order No. 93 was still in force when the present writ petition was taken out and no subsequent Government Order/Circular was produced at any point of time by the respondents to prove any resolution to discontinue Priority 'C' status in general for all customers.

57. Section 71(3) of the 1989 Act, in any event, mandates the Railways to comply with the directions passed by the Central Government under Section 71(1) of the said Act and the Railways acted in complete violation of such statutory provisions in refusing the right of transport of goods to the petitioners under Priority 'C' arbitrarily and unilaterally. General Order No. 93 can be termed as delegated legislation, binding the Railways, even applying the principles laid down in *Commissioner of Police, Bombay vs. Gordhandas Bhanji (supra)*.
58. As for the "reasons" given in the impugned order dated March 18, 2019, those are mere eye-wash, which are untenable in law.
59. The CBI investigation (on the basis of an FIR lodged by the Railways) is still pending. As such, the petitioners, even under the criminal law of the country, are at best accused, but not convicts, in respect of the charges levelled by the Railways. Further, the subject-matter of such investigation has no proximate nexus to the present dispute. The said investigation is in respect of alleged previous forgery of documents / accounts by the petitioners while the dispute-at-hand pertains to withdrawal of priorities/facilities contrary to law.
60. Non-submission of relevant documents like production reports, etc, as alleged by the Railways, is vague. It is a curable defect at best and any essential document, if missing, could be asked for at any point of time from the petitioners. Such chance was never given to the petitioners at all.
61. The aforesaid two reasons are *ex facie* mutually contradictory, in any event, since the existence of one would, by its very nature, cancel out the possibility

of the other. If the mere allegation of forgery was a valid ground of refusal of Priority 'C' status at all, the question of production of documents (insufficient or otherwise) could not arise at all. On the other hand, if the latter was put forth as a ground of refusal, it would automatically pre-suppose that the allegation of forgery had been given a go-bye in inviting and examining relevant documents from the petitioners.

62. *M/s Rashmi Cement (supra)* and *M/s Sarda (supra)* have been sought to be distinguished on irrelevant grounds in the order impugned herein. That apart, it would amount to prejudging the result of the CBI investigation if the petitioners are held guilty of forgery and precluded from transporting their goods on the Railways, which is a public service rendered by a common carrier, without any verdict to that effect by any competent court or authority.

63. The argument, that the petitioners were given category 'D' facilities anyway, is flimsy at best. Such an argument can only be misleading and not valid in law, since General Order No. 93 itself shows that category 'G' is residual and that the priorities are available only in categories 'A', 'B' and 'C'. Customers under the 'D' category, in effect, would have no privilege /priority at all, which would tantamount to a violation of Section 71 of the 1989 Act in respect of the petitioners.

64. In view of the above discussions, the impugned order passed by the Railway Authorities dated March 18, 2019 cannot stand judicial scrutiny.

65. Accordingly, WPA No. 11275 of 2019 is allowed, thereby setting aside the Order dated March 18, 2019, annexed at page-141 of the writ petition, whereby the petitioners' prayer for restoration of Priority 'C' to the petitioners, was refused. The respondents are directed to provide category 'C' priority as per General Order No. 93 dated March 11, 2019 to the petitioners with immediate effect. This order is without prejudice to the petitioners' rights to claim further compensation and/or damages from the Railways and/or the concerned officials of the said authority who have been responsible for such illegal withholding of Priority 'C' facilities to the petitioners for so long.

66. There will be no order as to costs.

67. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)