THE HIGH COURT OF JUDICATURE FOR MADHYA PRADESH: BENCH AT INDORE

(Division Bench)

W.A. No.42/2021

UNION OF INDIA AND OTHERS …APPELLANTS

Versus

M/S S.R. FERRO ALLOYS
(A REGISTERED PARTNERSHIP FIRM)
THROUGH ARJUN SINGH SACHAN **…RESPONDENT**

Coram:

Hon'ble Mr. Justice Mohammad Rafiq, Chief Justice
Hon'ble Mr. Justice Sujoy Paul, Judge

Presence:

Mr. H.Y. Mehta, Advocate for the Appellants.

Mr. R.S. Chhabra, Advocate for the Respondent.

Whether approved for reporting: **Yes**

Law Laid Down:

- **Railways Act, 1989** – Sec. 73 (*Punitive charge for overloading a wagon*), Sec.74 (*Passing of property in the goods covered by railway receipt*), Sec. 79 (*Weighment of consignment on request of the consignee or endorsee*); **Railway (Punitive Charges for Overloading of Wagon) Rules, 2005 -** Rule 3 (*Punitive charges for overloading*) – Questions (A) Whether the weighbridge at the point of re-weighment was defective at some point of time earlier and therefore, the claim of the Railways was misconceived, being a disputed question of fact and (B) whether the request for re-weighment could have been made only by the consignor and not by the consignee or his endorsee, could be agitated by the aggrieved party by way of statutory remedy provided under the Railways Act before the Railway Claims Tribunal or in a suit or before any other statutory forum.

- Section 73 of the Railways Act postulates punitive charges for overloading a wagon and proviso thereto amplifies its scope by stipulating 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 for the detention of any wagon on this account. Rule 3 of the Rules of 2005 also empowers the Railway administration to recover punitive charges on account of overloading of commodities from the consignor, the consignee or the endorsee, as the case may be, for the entire weight of the commodities loaded beyond the permissible carrying capacity for the entire distance to be travelled by train hauling the wagon from the originating station to the destination point, irrespective of the point of detection of overloading. Indisputably, the writ petitioner on being informed, shifted the goods in the underweight wagons and thereafter only the train could depart. It is for this reason of overloading in the wagons at the instance of the writ petitioner and detention of the train, the Station Manager (Goods) imposed a penalty, as provided under Section 73 of the Railways Act. **Relied** – Division Bench judgment of this Court in **S. Goenka Lime & Chemicals Limited vs. Union of India and Another, AIR 2016 MP 70.**

Significant Paras: 16 to 23

Reserved/Heard through VC on: 10.06.2021

O R D E R

(Passed on this 24th day of June, 2021)

Per: Mohammad Rafiq, Chief Justice:

This writ appeal under Section 2 of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 has been filed by the appellants (hereinafter referred to as "the appellants-Railways") assailing the order dated 06.02.2020 passed by the learned Single Judge in W.P. No.1256/2018 (M/s S.R. Ferro Alloys vs. Union of India and others) whereby the writ petition filed by the present respondent (hereinafter referred to as "the writ petitioner") has been allowed.

2. The respondent-writ petitioner in the aforesaid writ petition challenged the demand letter dated 15.05.2017 (Annexure P-10) and calculation sheet dated 18.05.2017 (Annexure P-12) whereby demand was made towards punitive charge for alleged overloading of loose Manganese Ore transported through Railway from Meghnagar (Madhya Pradesh) to Baraduar (Chhattisgarh).

3. According to the case set up by the writ petitioner in the memorandum of writ petition, it was a Partnership Firm registered under the Indian Partnership Act, 1932. The writ petitioner-Firm was engaged in the business of mining and in that connection it has to transport loose Manganese Ore throughout the country through Railways. The writ petitioner received an order for supply of loose Manganese Ore from M/s Chhattisgarh Steel and Power Limited, Village Amjhar, Champa, District Janjgir (C.G.). The writ petitioner submitted a forwarding note on 10.05.2017, as required under Section 64 of the Railways Act, 1989 (for short "the Railways Act") to the Station Manager, Meghnagar mentioning therein the weight of loose Manganese Ore i.e. 2800 Metric Ton (MT) along with other necessary details for its transportation from Meghnagar to Baraduar Goods Station. The respondent-writ petitioner was permitted to load the goods in the Railway Rake by the Station Manager. The goods were transported from the mines at Kajli Dungari to the Railway Station Meghnagar from 10.05.2017 to 12.05.2017 for the purposes of loading in the Railway Rake and transportation. According to the writ petitioner, trucks were duly weighed by *Tol Kanta* installed at the site

of the mine. The writ petitioner produced on record a chart with the dates, vehicle numbers, mineral, royalty books, slip number along with the quantity of the loose Manganese Ore transported by the vehicles. The Mining Officer, Jhabua permitted the petitioner to transport 2800 MT loose Manganese Ore and issued a certificate verifying the quantity of Manganese Ore i.e. 2800 MT with other details before transportation. The writ petitioner raised an invoice No.037(17-18) dated 12.05.2017 for sale of loose Manganese Ore weighing 2800 MT in favour of Chhattisgarh Steel and Power Ltd. (supra). Loading of 2800 MT goods was done in the wagons at Meghnagar Railway Station as per the rules and the requirement specified in that behalf by the Railways on 12.05.2017. The Station Manager issued a Railway Receipt No.212000253, as required by Section 65 of the Railways Act. According to the writ petitioner, Section 65(2) of the Railways Act contemplates that the Railway Receipt shall be *prima facie* evidence of the weight and the number of packages stated therein. The respondent-writ petitioner paid freight to the tune of Rs.39,66,177/- to the appellant for transportation of 2835 MT.

4. It was further stated by the respondent-writ petitioner that the goods loaded at Meghnagar Railway Station were got weighed at Katni In-Motion Rail weight. As per the allegation of the Railways, the excess weight of 185.60 MT was found. The communication with regard to excess weight was given to the representative of the writ petitioner with instructions to unload the material from the alleged

overloaded wagons and shift the same in the underloaded wagons. The writ petitioner arranged two labourers for shifting the goods in the underweight wagons as directed by the Railways. The material was accordingly adjusted and the train departed. The Station Manager (Goods), Meghnagar vide order dated 15.05.2017 (Annexure P-10) imposed penalty of Rs.25,43,179/- upon the respondent-writ petitioner on account of alleged overloading in the wagons and detention of the train. The respondent-writ petitioner by letter dated 16.05.2017 (Annexure P-11) resisted the demand raised by the appellants-Railways and requested for re-weighment of the goods under Section 70 of the Railways Act, as its case was that there was no overloading in the wagons and only 2800 MT was loaded. It was alleged that the goods had not yet reached the destination at the time the letter was addressed and the consignment could have been put to re-weighment. However, no heed was paid to the request of the writ petitioner. Baraduar Goods Station issued an under charges calculation sheet without re-weighment of the goods and called upon the writ petitioner to deposit a sum of Rs.26,11,800/-. Since the delivery of the goods was to be received by Chhattisgarh Steel and Power Ltd. (supra), a letter dated 18.05.2017 (Annexure P-13) was addressed to the Commercial Supervisor, Baraduar (Mall Dhakka), South East Central Railway, Janjgir (Champa) i.e. appellant No.3 herein, reiterating that only 2800 MT loose Manganese Ore was loaded by the writ petitioner from Meghnagar to Baraduar and on account of rake weighment at Katni Station, overload weight of 185.60 MT was alleged to have

been found. A request was made for re-weighment of the rake by Chhattisgarh Steel and Power Ltd. (supra) to the Senior Divisional Commercial Manager, BSP Division, who, however, did not pay any heed and levied punitive charges of Rs.25,43,179/-. The writ petitioner then filed an application under the Right to Information Act, 2005 (in short "the RTI Act") seeking information with regard to TARE weight of the wagon BVZC, a wagon used and meant for guard, with other information. According to the writ petitioner, the Divisional Rail Manager, WCR, Jabalpur provided information under the RTI Act that TARE weight of the BVZC wagon is 13.803 MT, however, it was taken to be 14.50 MT while making calculation for the illegal demand. The case of the writ petitioner was, therefore, that there is a marked difference between the actual TARE weight and the TARE weight shown by the weighment machine at Katni, which resulted into erroneous weighment of the consignment and consequently levy of illegal punitive charges on the petitioner. The writ petitioner, therefore, sent a notice dated 04.08.2017 (Annexure P-15) to the Commercial Supervisor, Baraduar and Goods In-charge Meghnagar and other officers of the Railways calling upon them to waive off the demand raised towards overloading and also citing the reason of defect in the weighing machine at Katni. The Senior Divisional Commercial Manager, Bilaspur, SECR submitted reply dated 06.09.2017 (Annexure P-16) refusing to waive off the demand. Hence, the writ petition.

5. The appellants-Railways contested the writ petition and filed reply thereto. It was contended that challenge to the calculation sheet (Annexure P-12) is wholly misconceived, which in fact, was prepared by the appellants–Railways on the basis of the undercharge calculation made by the appellants as per letter dated 16.05.2017 (Annexure P-11) written by the writ petitioner itself to the Senior Divisional Manager, Ratlam and Senior Divisional Commercial Manager, Bilaspur, requesting for re-weighment of the rake. The calculation sheet (Annexure P-12) contains the actual weighment and it cannot be construed to be an order. It is denied that the calculation sheet was prepared without the request of the writ petitioner. The appellants-Railways have made calculation of the actual freight to be recovered from the respondent-writ petitioner. The cause of action to file writ petition arose at New Katni Junction wherein, the weight was intercepted and it was found that petitioner had deliberately shown lesser weight of the article in question. Since New Katni Junction comes within the West Central Railway, its non-impleadment to the writ petition as respondent would be fatal particularly when the Western Central Railway is a different zone than Western Railway and South East Central Railway.

6. The appellants-Railways further contended in the counter-affidavit that weighment was made for the first time at New Katni Junction. The procedure for weighment of wagons/rakes and issue of RR Rules are applicable for the weighment of the consignment. As per Railway Board Rates Circular No.86/2006 dated 13.10.2006

(Annexure R-1), para No.1451(c) if the wagons are loaded in the wagon without weighing it where there is no facility of weighment. Thereafter, wherever for the first time the facility becomes available within 24 hours from loading of consignment, weighment can be done by the Railway authorities. Since the consignment was loaded from Meghnagar and weighment of the consignment was done for the first time at New Katni Junction, the first stop where such facility was available, it was found that consignment was having more weight than disclosed by the petitioner. Therefore, calculation sheet (Annexure P-12) was prepared on the request of the writ petitioner himself as per Annexure P-11 dated 16.05.2017. The appellants-Railways further maintained that respondent-writ petitioner demanded 45 wagons of BOST nomenclature. The permissible carrying capacity of one wagon is 63 tons, therefore, total 45 wagons can carry 2835 Metric Ton material. But when the weighment was done at New Katni Junction, it was found that the writ petitioner has loaded 2893.80 tons, which was more than the allowed weight of 2835 Metric Ton. Therefore, as per Railway Board's Rates Circular No.19 of 2012 dated 23.07.2012, the Railways was justified in raising additional demand of Rs.25,01,845/- for additional weight of 185.60 tons.

7. The learned Single Judge by impugned order dated 06.02.2020 allowed the writ petition by holding that the Railway Receipt issued in terms of Section 65 of the Railways Act is *prima facie* evidence of the weight and the number of packets stated therein. Since there was no weighment facility at Meghnagar, the weighment was taken at Katni

Goods Railway site. But, there is nothing on record to indicate that the said weighment was done in the presence of any representative of the petitioner or with due notice to it. Immediately after coming to know about the stand of the Railways that overload weight of 185.60 MT was found, the respondent-writ petitioner filed an application under Section 79 of the Railways Act on 16.05.2017 demanding re-weighment. The learned Single Judge noted that as per pleadings contained in para-13 of the writ petition, at the stage of filing of the application, the goods had not reached the destination, therefore, it was possible for the appellants-Railways to put the goods to re-weighment. The learned Single Judge also held that Section 79 of the Railways Act provides for re-weighment of consignment on payment of prescribed charges. The appellants-Railways did not dispute the factum of filing of application for re-weighment (Annexure P-11) but on that application no action was taken and re-weighment was not done nor was any reason assigned therefor. The learned Single Judge held that before imposing penalty and issuing demand vide impugned orders Annexure P-10 and P-12, no opportunity of hearing was given to the writ petitioner. Besides, the learned Single Judge also observed that the Counsel for the petitioner has also pointed out that the weighbridge at Katni was not functioning properly earlier. The learned Single Judge relying on the judgment of Calcutta High Court reported as **Skylark Fiscal Service Pvt. Ltd. and Another vs. Union of India and others**, **(2014) 2 High Court Cases (Cal) 457** and Gauhati High Court decision in the case of **Union of India vs. Salt Marketing**

Centre reported in **LAWS (GAU) 1995 818**, set aside the impugned demand contained in letter dated 15.05.2017 (Annexure P-10) and calculation sheet dated 18.05.2017 (Annexure P-12).

8. We have heard Mr. H.Y. Mehta, learned counsel for the appellants-Railways and Mr. R.S. Chhabra, learned counsel for the respondent-writ petitioner.

9. Mr. H.Y. Mehta, learned counsel for the appellants has argued that the learned Single Judge failed to appreciate that Section 79 of the Railways Act gives the right to make a request for re-weighment only to the consignee or his endorsee. In the present case, the request for re-weighment was made by the writ petitioner, who was consignor and therefore, since he had no right to demand re-weighment, there was no question of acceding to his prayer. It was argued that under Section 79 of the Railways Act, the payment of the charges for re-weighment is a pre-requisite condition and since the writ petitioner did not deposit any charges for re-weighment nor furnished any proof therefor, the respondent-writ petitioner therefore, did not have any right to demand re-weighment. Learned counsel for the appellants further argued that as per the law in question, there was no need for giving notice to the consignor before weighment was done at the first instance at New Katni Junction. On checking done at New Katni Junction, it was found that there was overloading done by the consignor. Learned counsel also argued that a Division Bench of this Court in **S. Goenka Lime & Chemicals Limited vs. Union of India and Another, AIR 2016 MP 70** has held that the Railway

administration is empowered to check weight of wagons at any point before delivery of goods and that giving of prior notice in such a situation would be counterproductive. The Division Bench also held that imposition of penalty is not only intended to recover extra charges but it is also aimed at discouraging consignor from overloading.

10. Learned counsel for the appellants also relied on a Division Bench judgment of Calcutta High Court in **Suresh Kumar Agarwal vs. Union of India, AIR 2010 (Cal.) 90 (DB)** and Division Bench judgment of Allahabad High Court in **Durgesh Coal and others vs. Northern Railway, New Delhi and others, 2000 (2) AWC 1682 All**: Manu/UP/0347/2000: 2000 All LJ 2529. Learned counsel argued that in these cases it was held that Railway Receipt is issued on the basis of forwarding note. If the consignor loaded the consignment from its own siding, the Railway administration cannot be held responsible for overloading. Reference was made to the endorsement on Railway Receipt at Annexure P-7.

11. It was submitted that the respondent-writ petitioner wrongly contended that weighing-bridge was not functioning properly at New Katni Junction. Such allegation is missing in the pleadings of the writ petition. Therefore, the appellants-Railways cannot be taken by surprise by such argument for the first time directly before the Division Bench. Moreover, the writ petition involves several disputed questions of fact, which cannot be looked into in exercise of extraordinary jurisdiction by the High Court. Again relying on the judgment of the Division Bench in **S. Goenka Lime & Chemicals**

Limited (**supra**), learned counsel submitted that this Court in that case has held that for such a plea, the aggrieved party had a statutory remedy to raise a dispute before the Tribunal on merits. It is therefore prayed that the impugned judgment be set aside and writ petition be dismissed.

12. *Per contra*, Mr. R.S. Chhabra, learned counsel for the respondent-writ petitioner argued that the learned Single Judge has rightly set aside the impugned demand, as the appellants-Railways failed to take any action on the application of the writ petitioner for re-weighment nor they gave any reason for not taking any such action. It is argued that despite application for re-weighment dated 16.05.2017 filed by the consignor, re-weighment was not carried out by the Railways inasmuch as no reason was assigned for not doing so. The application for re-weighment not only was not responded but was also not dismissed on the ground now raised in the appeal. The statutory authorities cannot be permitted to supplement reasons by raising fresh grounds at the appellate stage. Moreover, the appellants-Railways also did not offer any opportunity of hearing to the writ petitioner before imposing penalty and issuing demand. Besides that, weighbridge at New Katni Junction was not functioning properly, which was evident from the difference in TARE weight of BVZC wagon as was revealed from the information gathered by the writ petitioner under the RTI Act. While the actual weight of BVZC wagon was 13.803 MT whereas the weighment machine at Katni depicted it 14.50 MT. It is argued that the Railways did not dispute the

discrepancy of weighment of wagon BVZC in their reply to writ petition. Therefore, it cannot be said that the petition involves any disputed question of fact. The appellants-Railways, for the first time, have raised the issue about Section 79 of the Railways Act. It is disputed that Section 79 of the Railways Act does not permit re-weighment at the instance of the consignor. The Railways also for the first time raised this argument that consignee by letter dated 18.05.2017 had agreed to pay demurrage and penalty charges. It was also wrongly contended on behalf of the Railways that weighment can take place in the absence of the consignor and no notice or opportunity of hearing is required to be given. Reliance in this regard was wrongly placed by the Railways on the Division Bench judgment of this Court in **S. Goenka Lime & Chemicals Limited** (**supra**).

13. Mr. R.S. Chhabra, learned counsel for the respondent-writ petitioner placed heavy reliance upon the decision of the Supreme Court in **Jagjit Cotton Textile Mills vs. Chief Commercial Superintendent N.R. & Others, (1998) 5 SCC 126**, to argue that Section 73 of the Railways Act gives power to the Railways to collect the penal charges from the consignor, consignee or the endorsee if the goods are overloaded beyond the permissible carrying capacity. However, Section 74 of the said Act provides that the property in the consignment covered by a Railway receipt shall pass to the consignee or the endorsee, as the case may be, on the delivery of such railway receipt to him and he shall have all the rights and liabilities of the consignor. Therefore, the respondent-writ petitioner could very much

file the application for re-weighment under Section 79 of the Railways Act. Learned counsel further argued that Sections 73 and 74 of the Railways Act clearly state that penal charges can be collected from the consignor, consignee or the endorsee, as the case may be. Therefore, the consignor shall be liable for penal charges even at the stage of delivery of goods at the destination if he has booked the goods for self. It was also held by the Supreme Court that the endorsee would be liable if the delivery is applied for at the destination by the endorsee. The consignee would be liable if the delivery is applied for at the destination by the consignee. Section 73 of the Railways Act thus, expressly permits these penal charges to be collected from the consignee also. However, when the Railway Receipt is delivered to the consignee as per Section 74 of the Railways Act, not only the rights of the consignor but also the liabilities of the consignor pass on to the consignee. It is, therefore argued that Section 79 of the Railways Act has to be seen in consonance with Sections 73 and 74 of the said Act or else any other interpretation would lead to absurdity or arbitrariness thereby defeating the intent of the legislation. The Railways have not placed correct interpretation of Sections 73 and 74 of the Railways Act and the law propounded by the Supreme Court in **Jagjit Cotton Textile Mills (supra)**.

14. As regards the Division Bench judgment in **S. Goenka Lime & Chemicals Limited** (**supra**), it was argued by learned counsel for the writ petitioner that this judgment only deals with opportunity of hearing at the time of weighment whereas the judgment of the

Calcutta High Court in **Skylark Fiscal Service Pvt. Ltd. (supra)** and decision of Gauhati High Court in the case of **Salt Marketing Centre (supra)** deals with opportunity of hearing before levying punitive charges whereas, the weighment of goods is the first step, levy of punitive charges is second. Even though the principles of natural justice may not be required to be adhered to at the first stage but the same have to be mandatorily followed before the second stage i.e. before levying punitive charges. It is argued that the Division Bench in **S. Goenka Lime & Chemicals Limited** (**supra**) has not correctly analysed the ratio of the judgment of the Supreme Court in **Jagjit Cotton Textile Mills (supra)** and read it only for a limited purpose of challenge made to the Constitutional validity of Section 73 of the Railways Act read with Rule 3 of the Railway (Punitive Charges for Overloading of Wagon) Rules, 2005 (for short "the Rules of 2005"). It was argued that during the course of transportation of the goods, shipment was weighed at Katni In-Motion Rail weight on 14.05.2017 and allegedly an excess weight of 185.60 MT was found but this weighment was defective as demonstrated by TARE weight of empty BVZC wagon, which was mentioned as 14.50 MT at serial No.46 at page No.46 of weighment slip. The information received by the writ petitioner from the Railway authorities under the RTI Act reveals that TARE weight of BVZC wagon is 13.803 MT as against the weight depicted in wagon slip as 14.50 MT at page No.46. In these circumstances, there was material difference to the extent of 0.7 MT (700 kg) shown at the weighing machine at Katni. It was argued that

as the other wagons i.e. BOST were filled with goods, the authorities could not have measured the actual TARE weight and used the standard TARE weight. The defect in the machine can be ascertained only from BVZC wagon as the same was empty and the TARE weight was wrongly measured by the Railway authorities. The claim of the appellants-respondents is on the basis of the calculation derived out of a defective weighing machine. The claim as such was not disputed by the appellants-Railways in their reply before the writ court.

15. Learned counsel for the respondent-writ petitioner further argued that the Railways ought to have exercised their right under Section 78 of the Railways Act before delivery of goods to the consignee, which empowers them to re-measure, re-weigh or re-classify any consignment before its delivery. Even if Section 75(b) of the Railways Act is made applicable to the present case, the Railways would only have a right to recover freight from the consignor and not punitive charges. The punitive charges are to be recovered from the consignee in terms of Section 74 of the Railways Act. It is, therefore prayed that the appeal be dismissed.

16. The learned Single Judge in the impugned order has upheld the arguments of the writ petitioner that: (i) the re-weighment at New Katni Junction ought to have been done in the presence of the respondent-writ petitioner or with due notice to the writ petitioner; (ii) the application filed by the consignor under Section 79 of the Railways Act for re-weighment ought to have been decided, as it was made before the goods had reached the destination and (iii) the

counsel for the writ petitioner has also pointed out that the weighbridge at Katni was not functioning properly earlier, by referring to documents enclosed with the petition. All these arguments raised by the writ petitioner, which have found favour with the learned Single Judge in the impugned order, are covered by the Division Bench judgment of this Court in **S. Goenka Lime & Chemicals Limited (supra).** However, since the said judgment was not cited before the learned Single Judge, it could not be considered.

17. As regards the argument that the Railway administration could not have unilaterally taken re-weighment of the goods at New Katni Junction and that the weighbridge thereat was defective at some point of time earlier, it may be noted that no specific finding has been given by the learned Single Judge in this regard. Though the learned counsel for the writ petitioner on the basis of the information obtained under the RTI Act sought to argue that the weighbridge at some point of time in the past was defective and on that basis, tried to lead an inference that computation of excess load made by the Railways was incorrect but the impugned order does not indicate that the learned Single Judge has given any specific finding to that effect and has merely recorded the argument of the learned counsel for the writ petitioner at the bottom of page-3 of the impugned order in the following terms:

> ".....Counsel for the petitioner has also pointed out that the weighbridge at Katni was not functioning properly earlier, by referring to the documents enclosed with the petition."

18. Both the arguments: whether the Railways could have taken the re-weighment at New Katni Junction or whether the weighbridge

thereat was defective, were specifically taken note of by the Division Bench of this Court in **S. Goenka Lime & Chemicals Limited (supra)** and were rejected in paras 11 to 13 in the following terms:

> **"11**. As regards the argument that the Railway Administration could not have taken the goods to Katni Junction and the weighbridge thereat was defective, it is stated that the weighbridge at New Katni Junction is periodically checked by the Measurement Department. As per Rule 1422 of the Indian Railways Commercial Manual Volume II, the rake could be weighed at New Katni Junction weighbridge.
>
> The said rule reads thus:
>
> "1422. Weighment of outward goods.-- (a) Outward goods should be weighed as indicated below, the particulars of weighment being entered on the forwarding note in the place provided for the purpose--
>
> (i) Consignments in small lots. - All consignments should be weighed in full at the forwarding station.
>
> (ii) Consignments in wagon loads. - (1) In the case of consignments of grain, salt, seeds, sugar, pressed cotton or other staples, in bags or bales of uniform size and weight, the weight declared by the consignor may be checked by weighing a proportion of the number of bags or bales of uniform size and averaging their weight. If the bags or bales are not of uniform size and weight, those of uniform size and weight, should be grouped separately, each lot being treated for the purpose of weighment as a separate consignment and weighed as such.
>
> The remainder of the consignment of bags or bales or other commodities not of uniform size should be weighed in full. The proportion weighed should not be less than 10 per cent at stations where the traffic is large and 20 per cent at other stations.
>
> (2) Goods loose, bulky goods or goods in bulk such as sand, stone, timber, etc., which cannot be weighed on the ordinary weighing machine provided at stations should be

weighed on a wagon weighbridge at the forwarding station, if one is provided there. If there is no weighbridge at the starting station, the wagon may be weighed at a convenient weighbridge station en route, which should as far as possible, be the first weigh bridge station. In case there is no weighbridge en route the wagon may be weighed at destination, if a weighbridge is available there."

12. According to the respondents, the onus is on the owner of the goods as per the scheme of the Act and the Rules regarding loading or unloading. The Volumetric method adopted is the responsibility of the consigner. The weighment done at the weighbridge is meant to be authentic and any action of overloading arising in, is the responsibility of the consigner. As per section 87 of the Railways Act, the Rules of 2005 have been framed. Rule 3 of the Rules of 2005 provides for punitive charges for overloading the wagon. This provision is to prevent any foul play being committed by the consigner/owner. For that reason, the Railway Administration, scrupulously checks all railway wagons to detect any mischief. If the weighment is done at the originating Station and if overloading is noticed, the owner/consigner can be given option to unload the excess weight. However, when such weighing facility is not available at the originating Station, the responsibility is that of the consigner/owner to ensure that no overloading takes place and if such overloading is detected en route or at the destination Station the consigner/owner is made liable to pay punitive charges and other charges as the case may be.

13. On facts of the present case, it is stated that the grievance of the petitioner is founded on surmises and conjectures. Whereas, the punitive charges and other charges levied on the petitioner are on the basis of the actual weight detected en route, in accordance with the prescribed norms. The action of the Railways is strictly in conformity with the provisions of the Act and Rules made thereunder. The respondents have prayed for dismissal of the writ petition."

Still further, with regard to the contention of the writ petitioner that the weighbridge at the point of re-weighment at Katni was

defective at some point of time earlier and therefore, the claim of the Railways was misconceived, the Division Bench categorically held that this being a disputed question of fact, could be agitated by the aggrieved party by way of statutory remedy provided under the Railways Act or by filing a suit asking for appropriate relief. The relevant extract of the judgment in **S. Goenka Lime & Chemicals Limited (supra),** reads as under:

> "**25**. It was argued that the weighing machine at NKJ, Katni was defective and could not have projected the correct weight of the goods or aggregate weight along with the wagon weight. This being a disputed question of fact can be agitated by the petitioner by way of statutory remedy provided under the Railways Act or by filing a suit and ask for appropriate relief, if so advised. We do not intend to examine that controversy in the present petition."

19. The argument of the learned counsel for the writ petitioner that the judgment of the Supreme Court in **Jagjit Cotton Textile Mills (supra)** was not correctly analysed by the Division Bench in **S. Goenka Lime & Chemicals Limited** (**supra**) is noted to be rejected. The aforesaid judgment of the Supreme Court was thoroughly considered and was in fact, relied upon by the Division Bench to repel the challenge to the validity of Section 73 of the Railways Act and Rule 3 of the Rules of 2005, by quoting para-42 of the aforementioned judgment of the Supreme Court, as would be evident from para-15 of the report in **S. Goenka Lime & Chemicals Ltd.** (**supra**), which reads, thus:

> "**15**. Having considered the rival submissions, we may first deal with the challenge to the validity of section 73 of the Act

and Rule 3 of the Rules of 2005. The purport of section 73 of the Act of 1989 has been considered by the Supreme Court in the case of Jagjit Cotton Textile Mills (AIR 1998 SC 1959) (supra). The Supreme Court has opined that the provisions of the Act and the Rules made thereunder, empower the Central Government to fix the maximum and minimum rates. The expression "rate" is wide enough to encompass the amount towards penal charges, being other payment. The stipulation in section 73 was earlier engrafted in Rule 161-A of IRCA Rules. The Supreme Court further noted that section 73 of the Act gives power to the Railways to levy and collect penal charges from the consignor, consignee or the endorsee, as the case may be, if the goods are overloaded beyond the "permissible carrying capacity". The provisions in question, not only prohibit the "consignors" from exceeding the permissible carrying capacity of the wagon, but, also empower the Railway Administration to recover penal charges in the event of discovery of overweight at the booking point or en route or at the destination station, for the entire distance from the booking point to the destination station. It is held that the second part of the provision is quite wide and unrestricted and can be treated as permitting recovery of the penal charge from the consignor or consignee or the endorsee as the case may be, though these words are not expressly used in Rule 161-A. In para 42 of the judgment while specifically dealing with the challenge to the relevant provisions including section 73 of the Act, the court observed thus:

> "**42**. In our view, these contentions are not tenable. As has been noticed in our discussion on Points 1 and 2, the railway statutes define "maximum carrying capacity", "normal carrying capacity" (to be marked on the wagon); and the "permissible carrying capacity". No wagon can be loaded beyond the maximum carrying capacity. The wagon could not ordinarily be loaded beyond the normal carrying capacity or upto any upward variation thereof and this limit is called the permissible carrying capacity. Section 73 of the new Act and Rule 161-A of the old Rules permit loading in excess of the permissible carrying capacity without any penal charges, now upto a limit of 2

tonnes. (Earlier it was upto 1 tonne). What is now subjected to a penal charge is the excess over and above the permissible level above stated which is always below the maximum limit. In our view, this levy under Sec. 73 of the new Act and the old Rule 161-A is intended for dual purposes - one is to see that the gross weight at the axles is not unduly heavy so that accidents on account of the axles breaking down, could be prevented. The other reason behind the collection is that, inasmuch as the wagon has carried such excess load upto the destination point at the other end, the replacement cost of the coaches, engines or rails or of repairs to be bridges be covered. In our view, the extra rate is a higher rate i.e., something like a surcharge for the excess load, to meet the said expense. Therefore, we do not think that any principle of "delinquency" is ingrained in this levy as in the case of breach of civil obligations under the FERA or Customs Act or the Employees Provident Fund Act. Those cases involved penalties for breach of the Acts and were not concerned with charging a person for services rendered nor with an extra charge for services which involved extra strain to the property of the bailee who had rendered the service. Obviously the Railway Board has kept these aspects in mind while collecting these charges. There is therefore no violation of Article 14. Further, the question of reasonableness of the quantum of any such extra rate cannot be challenged before us and the appropriate forum therefor is the Railway Rates Tribunal. Rule 161-A can therefore, be resorted to for collecting these penal charges from the consignee also. After all, the consignee had received delivery of the overloaded goods and used the same for their business, commercial or industrial purposes. For the above reasons, a statutory provision like Sec. 73 or Rule 161-A which permits levy on such a consignee cannot, in our view, be said to be arbitrary or unreasonable in the context of Article 14."

(emphasis supplied)

20. Section 73 of the Railways Act postulates punitive charges for overloading a wagon and provides that where a person loads goods in a wagon beyond its permissible carrying capacity, the 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. The proviso to Section 73 of the said Act amplifies the scope of the main provision by stipulating 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 for the detention of any wagon on this account. It has come on record that the representative of the writ petitioner was sent a communication to unload the excess material from the alleged overloaded wagons and shift the same in the underloaded wagons. Indisputably, the writ petitioner arranged two labourers for shifting the goods in the underweight wagons. The material was accordingly adjusted and thereafter only the train could depart. It is for this reason of overloading in the wagons at the instance of the writ petitioner and detention of the train, the Station Manager (Goods), Meghnagar vide order dated 15.05.2017 (Annexure P-10) had imposed a penalty upon the respondent-writ petitioner, as provided under Section 73 of the Railways Act.

21. The punitive charges have also been prescribed under Rule 3 of the Rules of 2005. According to the same, where the commodities are

overloaded in a eight wheeled wagon, the Railway administration shall recover punitive charges as provided in parts I, II and III of the situations 'A' and 'B' of the Schedule, from the consignor, the consignee or the endorsee as the case may be, for the entire weight of the commodities loaded beyond the permissible carrying capacity for the entire distance to be travelled by train hauling the wagon from the originating station to the destination point, irrespective of the point of detection of overloading. The only exception, however is that if the customer carries out load adjustment at the originating station itself in case of detection of overloading at originating point, he may not be liable to pay punitive charges. Reliance on this aspect may be placed on the observations in para-20 of the Division Bench judgment in **S. Goenka Lime & Chemicals Ltd.** (**supra**), which reads as under:-

> "**20**. The argument then proceeds that if the overloaded goods were removed after being detected en route, the Railway Administration cannot be allowed to recover any amount in the name of penalty for the distance between the originating station and the destination station. This argument though attractive at the first blush, deserves to be stated to be rejected. Section 73 empowers the Railway Administration to collect penalty charges at the prescribed rate and as per Rule 3, the person becomes liable to pay such rates for the entire weight of the commodities loaded beyond the permissible carrying capacity for the entire distance to be travelled by train hauling the wagon from the originating station to the destination point, irrespective of the point of detection of overloading. This provision may appear to be harsh for levy of penalty charges, after the unloading of the wagon at the point en route where the overloading was detected. However, keeping in mind the purpose underlying Section 73 - is not only to recover extra charges for dual purposes, but, also to discourage the consignor from overloading the wagons beyond permissible limits which

> inevitably results in damage to the coaches, engines or rails or of repairs to the bridges. It cannot be overlooked that damage is bound to be caused due to overloading of wagons; and any accident on that account inevitably affects the rolling stock of the Railways. The fact that such accident in fact did not take place, can be no argument to extricate the consignor/owner. For, the damage due to overloading is inevitable. Further, the cascading effect of any such damage in the given situation, may be much more than the amount of the prescribed penalty to be recovered because of the overloading of wagons."

22. The contention that the Railways should have provided opportunity of hearing to the writ petitioner before re-weighment at New Katni Junction and at least, before levying of the punitive charges, was also categorically considered and repelled by the Division Bench in para-23 of its judgment in **S. Goenka Lime & Chemicals Ltd.** (**supra**), in the following terms:

> "**23**. The next contention of the petitioner that no opportunity of hearing was given to the petitioner nor any notice was given before the wagon was taken to NKJ Kami and the wagon was weighed in the absence of petitioner, also does not commend to us. The provision of Section 73 of the Act read with Rule 3 of the Rules, on the other hand, empowers the Railway Administration to check the weight of wagon at any point before the delivery of the goods to ascertain whether the loading of goods was within the permissible limits. Giving prior notice before taking such surprise action, would be counterproductive. If the aggrieved person has any dispute about the correctness of the weighment done by the Railway Administration en route before delivery of goods to the consignee, is free to question the same by way of appropriate proceedings including statutory remedy provided under the Railways Act. The aggrieved person must substantiate his claim in the said proceedings to succeed in questioning the assessment made by the Railway Administration."

23. In view of the above discussion, it must be held that the impugned order passed by the learned Single Judge having been passed under ignorance of the binding decision of the Division Bench in **S. Goenka Lime & Chemicals Ltd.** (**supra**), besides being per incuriam, is also liable to be set aside on the law propounded by the Division Bench, as discussed hereinabove. We, however, leave it open for the writ petitioner to pursue the statutory remedy before the Railway Claims Tribunal or in a suit or before any other statutory forum, as may be advised to it, and raise all the permissible arguments including the argument whether the request for re-weighment could have been made only by the consignor and not by the consignee or his endorsee, which shall be decided on its own merits in accordance with law. On this aspect, this Court may not be understood to have expressed any opinion, one way or the other.

24. Resultantly, the impugned order passed by the learned Single Judge is set aside. The present appeal succeeds and is allowed, however, with aforementioned observation.

(Mohammad Rafiq)
Chief Justice

(Sujoy Paul)
Judge

S/