LETTERS PATENT APPEAL

Before the Hon'ble Mr. Justice Bhagwati Prasad
and the Hon'ble Mr. Justice Bankim N. Mehta

ACTION COMMITTEE FOR RESOLVING THE PROBLEMS OF GUJARAT SALT MANUFACTURERS & ANR. v. UNION OF INDIA & ORS.*

ADMINISTRATIVE LAW — Natural Justice — Constitution of India, 1950 — Art. 14 — Railways Act, 1989 (24 of 1989) — Secs. 65, 73, 79 & 83 — Recovery of charges by the Railways for excess loading of wagons — Charges are levied by the Railways as a service provider — There is no "delinquency ingrained in the levy that is penalty", and hence, "it involves no breach of civil obligation" — Held, principles of natural justice would not apply while imposing such charges — Decision of the learned Single Judge in *Action Committee for Resolving the Problems of Gujarat Salt Manufacturers v. Union of India,* 2005 (1) GLR 889 set aside to the extent of observance of principles of natural justice.

વહીવટી કાયદો — કુદરતી ન્યાય — ભારતનું બંધારણ, ૧૯૫૦ — આર્ટિ. ૧૪ — રેલવે અધિનિયમ, ૧૯૮૯ — કલમ ૬૫, ૭૩, ૭૯ અને ૮૩ — વેગનોમાં મર્યાદા કરતાં વધારે માલ ભરવા બદલ રેલવે દ્વારા ચાર્જની વસુલી — સેવા-પ્રબંધક તરીકે રેલવે દ્વારા ચાર્જ લાદવામાં આવે છે — લેવીમાં એવી મજબૂત ક્ષતિ સામેલ નથી કે જેને દંડનાત્મક ગણી શકાય અને તેમાં દીવાની પ્રકારની ફરજનો ભંગ સંકળાયેલો નથી'' — ઠરાવવામાં આવ્યું કે, આવા ચાર્જિસ લાદતી વખતે કુદરતી ન્યાયના સિદ્ધાંતો લાગુ નહિ થાય — *ઍક્શન કમિટી ફૉર રિસોલ્વિંગ ધ પ્રૉબ્લેમ્સ ઑફ ગુજરાત સૉલ્ટ મૅન્યુફેક્ચરર્સ વિ. યુનિયન ઑફ ઈન્ડિયા,* ૨૦૦૫ (૧) જી.એલ.આર. ૮૮૯માં વિદ્વાન ન્યાયાધીશનો ચુકાદો કુદરતી ન્યાયના સિદ્ધાંતોનું અવલોકન પૂરતો રદ કરવામાં આવ્યો.

It is further held that the question of weighing, off-loading and overloading, however, is subject to a situation where can it be said that notice is required to the consignor. If so, this would become very onerous because that would mean detention of the goods, that would frustrate carriage of the goods, and therefore, at that stage the question of notice is not germane. However, learned Single Judge has held that after such off-loading, there would be applicability of the principles of natural justice because the consignor may submit explanation contending that there was no overloading and the material if any with him to support the said stand and it will be for the railway administration to consider the same and to immediately decide as to whether overloading was there in the wagon or not. (Para 7; *See* also Para 8)

After referring to *Jagjit Cotton Textile Mills v. Chief Commercial Superintendent, Northern Railways,* 1998 (5) SCC 126, the Court observed :

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*Decided on 20-1-2010. Letters Patent Appeal Nos. 342, 343 to 440 of 2005 arising out of judgment and order of the learned Single Judge dated 12-1-2005 in Spl.C.A. No. 14858, 15084 and 15181 of 2003 reported in *2005 (1) GLR 889.*

In all cases where there is a breach of civil obligation, the observance of principles of natural justice is always pressed into service. In the instant case, Railway is service provider and service provider when charges for the service rendered, the Hon'ble Supreme Court in the case of *Jagjit Cotton Textile Mills,* (1998 (5) SCC 126) has held that they are within their rights to get the charges. That being the interpretation given by the Hon'ble Supreme Court, it has a direct answer to the question raised in the petition and the findings of learned Single Judge that principles of natural justice have to be applied in the matter. Since, service provider charges for the service rendered, it cannot be said that there is any delinquency ingrained in the levy that is penalty or charges which the Railway would ask the consignor to pay for overloading, and therefore, it involves no breach of civil obligation and that being the position, the charges which have been demanded by the Railways for the service rendered and overloading it, cannot be considered to be one which is beyond its competency under Sec. 73 of the Railways Act and other provisions of the said Act. (Para 22)

The consignor could have pre-empted the act of Railways which has taken place and could ask for action as contemplated under Secs. 65 and 69 of the Railways Act. Having not done so after the stage of Sec. 73 of the Railways Act asking for the weighment etc. is not in consonance with the scheme of the Railways Act. Actions of service provider are of commercial nature. If the Railways as service provider enters into the kind of enquiries which learned Single Judge has ordered and which the petitioners demand then there is a risk of its service capacity getting hampered. Apart from rendering services, it will get involved into a kind of adjudicatory process which will mean diversion. Such diversion of the national service provider would be that its operating capacity will be put under jeopardy. (Para 22)

The findings of learned Single Judge that observance of principles of natural justice necessary in certain contingency do not appear to be a sound principle of law and in the light of the decision in the case of *Jagjit Cotton Textile Mills,* (1998 (5) SCC 1260) the observation of the Hon'ble Supreme Court is that Railways being service provider, the charges, penalty as referred in Sec. 73 of the Railways Act for the services rendered cannot be considered to be in any way civil obligation and that way the principle of natural justice is not considered to be involved in it. In that view of the matter, the judgment of learned Single Judge is set aside to the extent of observance of the principles of natural justice as the challenge of Railways was kept open when its appeals were decided by this Court. (Para 24)

Cases Referred to :

(1) *State Govt. Houseless Harijan Employees' Association v. State of Karnataka,* 2001 (1) SCC 610

(2) *Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I,* 2008 (14) SCC 151

(3) *Shridhar S/o. Ram Dular v. Nagar Palika, Jaunpur,* 1990 (Supp) SCC 157

(4) *K. I. Shephard v. Union of India,* 1987 (4) SCC 431

(5) *Jagjit Cotton Textile Mills v. Chief Commercial Superintendent, N. R.,* 1998 (5) SCC 126

Cases Partly overruled :

(1) *Action Committee for Resolving the Problems of Gujarat Salt Manufacturers v. Union of India,* 2005 (1) GLR 889

K. S. Nanavati, Sr. Advocate with *Keyur Gandhi*, for Nanavati Associates, for the Appellant.

J. J. Yajnik, for Respondent Nos. 1 to 5.

Pranav Dave, A.G.P., for Respondent No. 6.

BHAGWATI PRASAD, J. These appeals arise out of the decision of learned Single Judge rendered on 12-1-2005 in Special Civil Application No. 14858 of 2003 and allied matters. (reported in 2005 (1) GLR 889, *Action Committee for Resolving the Problems of Gujarat Salt Manufacturers v. Union of India)*.

2. While hearing these appeals, we may mention here that the railways also preferred appeals. That were disposed of by a Division Bench of this Court as having become infructuous, but it was without prejudice to the contention which will be available to the appellants herein in the appeal filed by the other side *i.e.* the Railways, and therefore, we are considering the arguments of the railways also because that right has been reserved to the railways while disposing of those appeals as infructuous. The order of the Court dated 4-12-2009 is quoted hereinbelow :

> "All these appeals are filed by the Union of India against the orders of the learned Single Judge which are already implemented during pendency of the appeals.
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> In the facts and circumstances of the case, since the directions given by the learned Single Judge are complied with, these appeals have become infructuous and on this short ground alone, the appeals are dismissed without going into the merits of the contentions raised in the appeals and without prejudice to the contentions which will be available to the appellants herein in the appeals filed by the other side."

3. The facts giving rise to the controversy are that the appellants were giving a demand note to the consignor to pay penal freight, unloaded charges, detention charges in exercise of powers under Sec. 73 of the Railways Act, 1989 (hereinafter referred to as "the Railway Act"). The notices had recital that the consignment loaded by consignee was weighed en route at Viramgam Railway weigh-bridge and overloading was found. The charges pertaining to excess weight were to be recovered and the goods were off-loaded at Viramgam. This aspect was common to all the manufacturers who have received the demand notices and have preferred number of petitions

before this Court. These petitions pertain to various periods from 1999 to 2001.

4. It is not disputed that the actual recovery has not been effected before delivery of the goods at the destination station as is provided under Sec. 73 of the Railways Act which says that before delivery is made recovery should be effected. Such demand notices were issued after the goods were delivered at the destination to the petitioners.

5. These demand notices were earlier challenged in Special Civil Application being Special Civil Application No. 8939 of 2001 and other allied matters in which agreed order was passed. By virtue of which it was ordered by this Court that a post-decisional hearing be given. After such post decisional hearing, the concerned authority passed the order. After considering the representation of the consignees, the demand notice was upheld. The group of petitions raised common grounds before learned Single Judge :

"(i) The charges are sought to be recovered on the ground of overloading from forwarding station;

(ii) The excess goods were off-loaded at Viramgam Railway Station;

(iii) It is the case of the Railways that *en route* weighing was made at Viramgam Railway Station since there is no facility of Railway Weigh-bridge at the forwarding station from where the wagons were loaded."

6. Apart from these questions, it was also urged on behalf of the appellants that weigh-bridge at the Railway Station, Viramgam, was seized and sealed by the State authorities, but this ground has become non-existent from the fact that the seizure was the subject matter of the Special Civil Application before this Court and the seizure was lifted and the State authorities have not taken any punitive action so far that when it was the concern of the Special Civil Application and the controversy has otherwise taken time which is not relevant for the purpose of deciding the present question. Learned Single Judge while considering the question raised on behalf of the petitioners came to the conclusions at Paragraph Nos. 9, 10, 13, 14, 15 and 16 which are quoted hereinafter :

"*Para 9 :* Therefore, in view of the aforesaid observations of the Apex Court, it appears that the recovery of the amount for overloading is of compensatory in nature and cannot be equated with the penalty which may be imposed for branch of the statutory provisions. It also appears that with a view to ensure safety of all railway tracks, wagons itself and other functioning connected therewith, no wagon should be loaded with goods exceeding the normal carrying capacity or permissible carrying capacity and such overloading must be prevented. Any loading of the goods in a wagon exceeding the normal or permissible capacity, if made, may result into damage

to the axile of railway tracks, break down etc., and therefore, the charges may be recovered under Sec. 73 of the Act are like extra higher rate *i.e.* something like surcharge for excess load to meet with the said expenses as observed by the Apex Court and the principles of delinquency in the matter of levying of charges cannot be equated with the civil consequences which may arise on account of breach of the statutory provisions of other enactment like F.E.R.A., Customs Act, Employees P.F. Act. Even otherwise also, when the goods are carried by railways as carrier like other agency carrying goods, if the overloading is to result into damage to the carrier itself, recovery of extra charges by the agency of carrier is not a principle unknown and such charges are recoverable. Since, the functioning of the railway administration is governed by the statutory provisions, Sec. 73 expressly authorises for collection of such charges, but merely because the language used is "punitive charges or by way of penalty" it will not carry the same degree of observance of principles of natural justice as may be required in the cases, where there are enabling powers with the authority to impose penalty for breach of the statutory provisions. As such, the punitive charges as contemplated under Sec. 73 of the Act for overloading of a wagon can be said as the charges/rates for extra load material. Section 2(35) defines the rate which would include in fare, freight or any other charge for the carriage of any passenger or goods. Therefore, the applicability of the penal rate or charging of the penal rate in case of overloading are the charges which the railway may charge in case of overloading, but they cannot be said as fully *simpliciter* penalty like penalty for breach of any statutory enactment or statutory provisions. The aforesaid becomes apparent from the provisions of Sec. 83 of the Act, which authorises the Railways to exercise the right of *lien* for the freight or any other sum due which would include the recovery of penal charges in case of overloading. The provisions of Sec. 83 made by the legislature authorising the right of *lien* further strengthens the position that the penalty charges for overloading are only by way of additional compensatory measures and not as that of imposition of penalty for breach of any statutory provisions or enactment.

Para 10 - It is true that as expressly provided under Sec. 73 of the Act, the language used by the legislature is "before the delivery of the goods", and therefore, one of the modes provided for recovery of punitive charges for overloading of the wagons would be of before the deliver of the goods. As per the proviso to Sec. 73 the railway administration has power 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 cost for such unloading and any charge for detention of any wagon, and therefore, it cannot be said that once the goods are already delivered, even if there was a case for overloading, the punitive charges are not recoverable at all by the railway administration from the consignee or consignor or endorsee as the case may be. However, if the goods are already delivered at the destination point and any charges are to be recovered by railway as

per Sec. 73, such right of recovery shall be subject to additional measure of right of *lien* under Sec. 83 in respect to the same consignor or consignee or endorsee. If the situation arises to the extent that the Railway administration is not in a position to exercise the right of lien, then in that case as per the scheme of the Act there is no express enforcement provided for recovery of such punitive charges as contemplated under Sec. 73 and the option available to the railway would be for recovering the amount by resorting to normal remedy. Therefore, Mr. Nanavati is not right in submitting that the demand notices are *ultra vires* to the scope and ambit of Sec. 73 of the Act as the goods are already delivered. Even after the delivery of the goods, the charges for overloading if ultimately found, are recoverable by the railways from the person concerned either by exercising the lien as contemplated under Sec. 83 or any other remedy by resorting to the normal mode of recovery of the amount. Therefore, the said contention of Mr. Nanavati that the action is *ultra vires* or beyond the scope of Sec. 73 of the Act cannot be accepted. However, the aforesaid would be subject to the rider that in the event the right of *lien* is to be exercised by the railway authority against the person concerned and if the person concerned is aggrieved of such action on the part of the railway authority, it would be for such person concerned to resort to appropriate proceedings before the appropriate forum and to establish that such punitive charges are not recoverable for overloading, and therefore, no *lien* can be exercised by railway administration. The aforesaid would be in a matter where the railway has accepted the goods or the wagons are loaded on "said to contain" basis. As such the situation of recovering punitive charges for overloading of the wagon would arise only in the case where goods are not weighed or checked by railway authority at the time of loading and the wagons are allotted for loading to the consignee and the railway receipt is on the basis of "said to contain". As per Sec. 65(2) of the Act the railway receipt is the *prima facie* evidence of the weight, but as per the proviso of the said sub-sec. (2) of Sec. 65 in case of consignment in wagon loaded or train and the weight or packet is not checked by railway servant authorised in this behalf, a statement to that effect is recorded in the receipt by him, then the burden for proving the weight or the number of packets, as the case may be, shall lie upon the consignee or the consignor or the endorsee. Therefore, if the wagons are loaded and the railway servant authorised in this regard has not checked and the railway receipt is issued on the basis of "said to contain" the burden would *lie* upon the consignee or consignor or endorsee as the case may be, and therefore, unless there is a prohibitory order of the competent forum for preventing the railway from exercising the right of *lien* under Sec. 83 of Railway Act the punitive charges decided as per Sec. 73 of the Railway Act are recoverable by exercising the right of *lien*.

Para 13 – On the question of applicability of the principles of natural justice, the law is settled by now and it would vary from facts of each case and there cannot be a straight-jacket formula for the applicability of

the principles of natural justice. If the pre-decisional hearing is to defeat the very purpose of exercising the power by the authority, it may not be given or if giving opportunity of hearing is to frustrate the maintenance of public interest or leaves room to the person who may be given opportunity to misuse the position, then also the pre-decisional hearing may not be given. In a matter of exercising power under contractual obligations even before termination of the contract, it is not necessary that in every case the opportunity of hearing must be given, but it would either depend upon the terms and conditions of the contract or would depend upon the consequence which may arise if the opportunity of hearing is given by the authority before termination of the contract. In a matter where the opportunity of hearing is already given, may be by way of post-decisional hearing, Court may not entertain the contention of the person making complaint before the Court that the opportunity of hearing is not given. When earlier S.C.As. were filed by the petitioners for challenging the very demand notices, this Court upon the agreement of both the parties namely the petitioners herein as well as the Railways Authority directed for giving opportunity of hearing to the petitioners and for passing of fresh orders. Therefore, once while challenging the very demand notices, the petitioners accepted for giving of opportunity for passing of fresh order, it would not be open to the petitioners to now contend that the order is bad since no pre-decisional hearing is given.

Para 14 – The question which incidently arise for considering is regarding the scope and ambit of power under Sec. 73 of the Act and as to whether there is any applicability of principles of natural justice, and if yes, to what extent. As observed earlier, the punitive charges though titled as penalty under Sec. 73 cannot be equated with the penalty to be imposed in respect to any breach of any statutory provisions or all other enactment. As per the language used by the Apex Court in case of "*Jagjit Cotton Textile Mills*" (supra) they are like higher rate *i.e.* something like a charge for the excess load. But if there is a contingency resulting into excess load or overloading of the wagons, the consequence is enabling power to the railway administration to charge such higher rate and resultant liability of the consignor, consignee or endorsee, as the case may be, to pay such higher rate. Since, charging of such higher rate as per Sec. 73 is to result into additional financial liability on the part of consignee, consignor or endorsee as the case may be, it would not be proper to hold that there is no applicability of the principles of natural justice at all. By now, it is well settled that even if the statute does not provide for express applicability of the principles of natural justice such principles of natural justice are to be read, if exercise of power is to result into any additional financial consequence. Further, even if the provisions of Sec. 73 of the Act are considered as it is, by proviso it has been expressly provided that it shall be lawful for the railway administration to unload the excess load beyond the capacity of the wagon if detected at the forwarding station or at any place before destination station and to recover the cost of such unloading and any charge for destination

of any wagon on this account. Therefore, such powers are also for authorising the railway administration to off-load the goods from the wagon if it is so detected either at the forwarding station or at the place before the destination station and it also enables the railway administration to recover the cost of such unloading and any charge of destination of any wagon on this account. Therefore, the stage of off-loading of the goods from the wagon is one of the contingencies which may arise during the period when the goods are already loaded in the wagon, but before it reaches to the destination station, it is so detected by the railway administration that there is overloading of the goods beyond the capacity of the wagon and such contingencies which may arise in any case prior to recovery of the punitive charges before the actual delivery of the goods. In this regard, it would be necessary to refer to the statutory rules framed by the Central Government namely : The Railways (Punitive Charges for Overloading of Wagon) Rules, 1990 and also Weighment of Consignments (In Wagon-load or Train-load) Rules, 1990. It is required to be recorded in this group of petitions of this Court is considering the issue of the loading or overloading or off-loading of the wagon-load and all these matters pertain to goods loaded to its fullest extent in a wagon or more than one wagon by the concerned consignor. The aforesaid Rules of 1990 providing for punitive charges for overloading do not expressly provides for any procedure to be followed for recovery of the punitive charges prior to coming to the conclusion by the railway administration that there is overloading in wagon beyond the permissible carrying capacity. Therefore, it can be said that the Rule making Authority has framed the Rules only to the extent of fixation of the charges and did not provide for any procedure to be followed before recovery of punitive charges for overloading. However, the said Rules gives an option to the consignee or endorsee of the consignment if he has reason to believe that the wagon offered to him does not contain the quantity of goods entrusted for carriage. Of course, such option available to the consignee or endorsee of wagon load is subject to the provisions of Rule 4 which authorises the Railway Administration to disallow such request if the circumstances as mentioned in sub-rule (1) to (3) exist. Therefore, if a contingency has arisen as provided in proviso to Sec. 73, in the event if it is so detected by the railway that the goods are loaded beyond the capacity of the wagon and if it is intimated by the railway to the consignor, the steps may be taken by the consignor to intimate to the consignee for opting the weighment of the consignment as per the Rules of 1990. Similar will be the situation in case the railway administration has off-loaded the goods exceeding the capacity of the wagon at any stage before it reaches to the destination station. Even when the punitive charges are proposed to be recovered before delivery of the goods, such option may be exercised by the consignee or the endorsee of the wagon. Therefore, in view of the aforesaid, it cannot be concluded that there is no applicability of the principles of natural justice whatsoever. However, at the same time, the degree of applicability of principles of natural justice in the matter of recovery of punitive charges as per Sec. 73 cannot be stretched to the extent as they

are applicable in case of imposition of penalty for breach of any statutory provision, but they can rather be equated in the matter where the transaction is in the realm of contractual obligation. Had it been a matter pertaining to contractual obligation between the private parties such applicability of principles of natural justice may not arise at all but since the railway administration is a department of Government of India, it cannot be held that it is not expected to act in just, fair and reasonable manner even in the matter of contractual obligations. As such functioning in just, fair and reasonable manner would itself attract applicability of some degree of principles of natural justice and in view of the aforesaid statutory Rules giving option to the consignee or weighment of the consignment loaded at the destination station, if the principles of natural justice are completely excluded the effect may result into nullifying the effect of the Statutory Rules of 1990 for weighment of the consignment at the destination station, and therefore, also it would be difficult to conclude that there is no applicability of principles of natural justice at all before recovery of punitive charges from the consignee or the consignor as the case may be.

Para 15 : The next aspect which may be required to be considered is the degree of applicability of the principles of natural justice and at what stage. To properly consider the said aspect if the scheme is considered, it appears that when the wagons are allotted to the consignor for loading if the conditions of wagon is such which may result into damage to the goods or which may result into any additional financial burden to the consignor, he may reject the wagon and for such purpose the option available to the consignor would be as per the Railway Manual. Similarly, when the goods are loaded it is open to the railway administration to insist for proper and strict implementation of the procedure to be followed as per Railway Manual. If the goods are to be loaded in the bags of specified size, it is for the railway administration to ensure and compare the weight of the goods loaded in the wagon. Even as per the Railway Manual Clause 1422 the weighment can be checked by weighing of 10% to 20% of the goods, and thereafter, to compare to the whole lot provided the consignment is in the uniform standard size bags. Much grievance is raised by the learned Counsel appearing for both the sides namely that on behalf of the petitioners, it has been submitted that the goods were despatched in the bags of standard size, whereas Mr. Yajnik for the railway authority not only disputed the position, but he submitted that even after the earlier order passed by this Court in Spl.C.A. No. 8939 of 2001 and allied matters dated 8-7-2002, the goods are not loaded in the bags of standard size as approved by the Salt Commissioner so authorised. Mr. Yajnik, learned Counsel appearing for the railway authority made statement at the bar that the area from which the salt is being loaded is having about 50% of the production of salt of the country and every day about 900 wagons are loaded of salt. He also submitted that keeping in view of the aforesaid aspects if the goods are not loaded in the uniform standard bags as provided by the Salt Commissioner, it is practically

impossible for the railway administration to weigh the goods loaded in the wagon. He further made statement at the bar on behalf of the railway administration that as per the instructions issued by the Central Government salt is one of the essential commodities and the supply cannot be interrupted on the ground that the consignment is not loaded in the bags of standard size, because the wagons are expected to reach at destination station well in time, and therefore, as and when the wagons are loaded R.R. is issued on the basis of the said "said to contain" with a view to see that speed is maintained in loading and supplying goods at the destination station. It is not even the case of the petitioner that the goods were first weighed and thereafter loaded in the wagon. Therefore, if the wagons are allotted to the consignor and the goods are loaded and R.R. is issued on the basis of "said to contain", it is open to the railway administration to weigh the goods at any *en route* stations. Further, it is an admitted position that there is no weigh-bridge for weighing railway wagons at the forwarding station, and therefore, even if the railway has to detect the overloading or even for verifying as to whether the loading is within the permissible capacity or prescribed capacity, the only weighbridge available *en route* at the nearest station is at Viramgam. It appears that as per railway administration after the goods are loaded at the forwarding station as and when it passes through Virangam Railway Station since there is available *en route* weighment, the wagons are weighed and it is checked by the railway administration as to whether there is overloading of the wagon or not. In the present case, as per the railway administration the wagons were found to be overloaded on *en route* weighment, at Viramgam, and there was off-loading of the goods and the penalty which is proposed to be recovered as per the demand notices is for the quantity of the goods which was overloaded and also the off-loading charges of handling of the material etc., as per Sec. 73 of the Act.

Para 16 : Under normal circumstances, if the goods are loaded at the forwarding station by the consignor and R.R. is issued on the basis of "said to contain" and when on *en route* weighment, it is detected by the railway administration that there is overloading, it would be impossible to conceive situation of applicability of the principles of natural justice at the stage before off-loading of the goods. In a matter, where there is huge continuous activity of carrying goods by wagon through railway with the limited tracks available, it would be improper to hold that if overloading is found at the nearest *en route* weighbridge, the railway administration should not off-load the goods but prior that to, intimation should be given to the consignor of such overloading and after the consignor is heard, the off-loading should take place and till then the wagon should be allowed to remain in stagnant position. Such a situation would not only result into absurdity, but it would result into disruption of the whole railway schedule for passing of various trains including the passenger and goods trains. It would also result into great loss and damage to the public property as well as great loss and damage to the consignor who would be desirous to see that the goods reach to the destination

station not only well in time, but as per the scheduled time. If the off-loading is not made immediately of the excess goods from the wagon by the railway administration, it may continue to damage the axle and the railway track which would be not only against the interest of the railway, but such cannot encouraged keeping in view the maintenance of the safety of all concerned who are using the railway transportation either directly or indirectly. Therefore, if the overloading is detected at the *en route* station immediately first steps which may be required to be undertaken by the railway administration is to off-load the goods from the wagon to the extent is overloaded and upto the stage of off-loading of the goods considering the facts and circumstances referred to hereinabove, it appears that the principles of natural justice of prior hearing cannot be made available when the railway administration has to off-load the goods on the ground of overloading."

7. Apart from the aforesaid findings, learned Single Judge has further held that the question of weighing, off-loading and overloading, however, is subject to a situation where can it be said that notice is required to the consignor. If so, this would become very onerous because that would mean detention of the goods, that would frustrate carriage of the goods, and therefore, at that stage the question of notice is not germane. However, learned Single Judge has held that after such off-loading, there would be applicability of the principles of natural justice because the consignor may submit explanation contending that there was no overloading and the material if any with him to support the said stand and it will be for the railway administration to consider the same and to immediately decide as to whether overloading was there in the wagon or not. Learned Single Judge has further held that after such notice and explanation being considered, in Para 17 of the judgment as under :

"In case the consignor or consignee or endorsee from whom punitive charges are recovered either before the actual delivery or by exercising right of *lien* by railway administration and if such consignor or consignee or endorsee is aggrieved by such action of the railway administration, the course available would be to challenge the said action before the appropriate forum."

8. It was further observed by learned Single Judge that the principles of natural justice may arise after the off-loading of the goods but before the actual delivery of the goods. It was also held that if there were extraordinary circumstances warranting dispensing with the applicability of the principles of natural justice, the same may be dispensed with, but it is expected that the railway observes the aforesaid principles of natural justice to that extent. Learned Single Judge has however observed that since actual delivery has been made and post-decisional hearing is already given to the petitioners so far, the impugned orders passed afresh cannot be quashed

and set aside on the breach of principle of natural justice. Learned Single Judge was also considering the case of Action Committee regarding which he has held that the Action Committee has nothing to do with the dispute.

9. According to learned Single Judge the following matters were required to be enquired into before the contention raised by the petitioners to quash the demand notice was required to be gone into.

> "Whether the goods were despatched in the standard size bags; (2) whether there was any left-out material in the wagons; (3) whether the option was exercised to reject the wagon; (4) whether *en route* weighing mechanism was in proper condition or was defective; (5) whether the quantum of any penal charges is actual or not; and (6) whether actually any weighment was made at the destination station by the consignee or endorsee or not. Therefore, unless and until all materials are placed on record and full-fledged inquiry is conducted and opportunity is given to lead the evidence and opposite the parties are permitted to cross-examine on the said aspect, no final conclusion can be arrived at that the charges are not recoverable at all by the railway authority on account of overloading of the goods which are proposed to be recovered by the railway administration by the impugned demand notices. As such, after full-fledged inquiry, in case the payment is made or the right of *lien* is exercised by the railways officers in the subsequent consignment as per Sec. 83, and if the petitioner establishes the case, the said amount can be ordered to be refunded by the competent Court, but only after the full-fledged in query is undertaken in this regard. It is well settled that this Court while exercising power under Art. 226 of the Constitution normally would not undertake the fact finding inquiry, more particularly when there are serious disputed questions of facts which would be required to be examined and concluded before the final relief is granted to the party entitled for such purpose."

10. Learned Single Judge has further observed that to observe the principles of natural justice, the petitioners would be entitled to the following informations :

> "(1) the date and time at which the goods were weighed on *en route* weigh-bridge Viramgam; (2) the relevant extract of recording of the weight of the wagon concerned in the weigh-bridge; (3) the details of permissible capacity of the wagon, the actual weighment as per the weight recorded in the weigh bridge; (4) the details of the weight as per the permissible limit and details of the quantity of the weight of the goods which were off-loaded; (5) the date and time at which the goods were off-loaded; (6) the intimation, if any, given by railway authority to the consignor or any authorised officer of the consignor in this behalf

and/or to the concerned railway authority at the destination station; (7) the basis of the calculation of all the penal freight, the basis of off-loading charges and also the basis of detention charges. After such details are considered, it would be obligatory on the part of the railway administration to give credit of the amount so realised of off-loaded goods. In my view, such would be the fair minimum treatment which would be expected by any citizen when he enters into contract with the railway administration, a Central Government Body and when the punitive rates are proposed to be recovered under Sec. 73 of the Act. If the matter is examined accordingly no such details are mentioned even in the demand notices, and therefore, it would be just and proper to direct the Additional railway manager who has issued demand notices to give intimation to the petitioners by fresh details as referred to hereinabove and it is only thereafter the punitive charges can be recovered by railway administration subject to the observations made hereinabove in this judgment".

11. Arguing the appeal, learned Senior Counsel Mr. Nanavati appearing for the appellants submitted that he has no point to urge as far as the question of giving notice at the stage of weighing and off-loading is concerned, but as far as the question giving information as has been ordered by learned Single Judge and observance of principle of natural justice is stressed and concerned, when learned Single Judge was of the opinion that principles of natural justice can be invoked, it was necessary for the learned Single Judge to have quashed the demand notice made and in that light giving relief to the petitioners by quashing the demand notice. Learned Counsel in that light submitted and supported the judgment of learned Single Judge that the principle of natural justice has a direct implication in the matter in issue and the respondent railways cannot be permitted to give good-bye to the principles of natural justice. He has placed reliance on the decision of the Hon'ble Supreme Court in the matter of *State Govt. Houseless Harijan Employees' Association v. State of Karnataka,* reported in 2001 (1) SCC 610, particularly, at Paragraph Nos. 27, 28 and 29 which read as under :

"Para 27. This Court has consistently held that the requirements of natural justice will be read into statutory provisions unless excluded expressly or by necessary implication.

Para 28. In the case of *Union of India v. Col. J. N. Sinha,* 1970 (2) SCC 458, this Court said :

"It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the

other hand a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the provision concerned the principles of natural justice."

Para 29 : The Constitution Bench in *Olga Tellis v. Bombay Municipal Corpn.*, 1985 (3) SCC 545 placed the onus to prove the exclusion of the rules of natural justice by way of exception and not as a general rule on the person who asserted it :

'The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence'."

12. He has also placed reliance on a decision of the Hon'ble Supreme Court rendered in the matter of *Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I,* reported in 2008 (14) SCC 151, at Paragraph Nos. 19 and 20 which is reproduced below :

"Para 19 : Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or quasi-judicial.

Para 20 : We may, however, hasten to add that no general rule of universal application can be laid down as to the applicability of the principle *audi alteram partem*, in addition to the language of the provision. Undoubtedly, there can be exceptions to the said doctrine. Therefore, we refrain from giving an exhaustive catalogue of the cases where the said principle should be applied. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of all these matters that the question of application of the said principle can be properly determined. (See : *Union of India v. Col. J. N. Sinha,* 1970 (2) SCC 458.)"

13. He has further relied on the judgment of the Hon'ble Supreme Court in the matter of *Shridhar S/o. Ram Dular v. Nagar Palika, Jaunpur*, reported in 1990 (Supp) SCC 157, particularly at Paragraph No. 8 which reads as under :

> *"Para 8 :* The High Court committed serious error in upholding the order of the Government dated February 13, 1980 in setting aside the appellant's appointment without giving any notice or opportunity to him. It is an elementary principle of natural justice that no person should be condemned without hearing. The order of appointment conferred a vested right in the appellant to hold the post of Tax Inspector, that right could not be taken away without affording opportunity of hearing to him. Any order passed in violation of principles of natural justice is rendered void. There is no dispute that the Commissioner's order had been passed without affording any opportunity of hearing to the appellant, therefore, the order was illegal and void. The High Court committed serious error in upholding the Commissioner's order setting aside the appellant's appointment. In this view, orders of the High Court and the Commissioner are not sustainable in law."

14. He has further relied on the decision of the Hon'ble Supreme in the matter of *K. I. Shephard v. Union of India*, reported in 1987 (4) SCC 431 at Paragraph No. 16 which is quoted hereinbelow :

> *"Para 16 :* We may now point out that the learned Single Judge of the Kerala High Court had proposed a post-amalgamation hearing to meet the situation, but that has been vacated by the Division Bench. For the reasons, we have indicated, there is no justification to think of a post-decisional hearing. On the other hand, the normal rule should apply. It was also contended on behalf of the respondents that the excluded employees could now represent and their cases could be examined. We do not think that would meet the ends of justice. They have already been thrown out of employment and having been deprived of livelihood they must be facing serious difficulties. There is no justification to throw them out of employment and then give them an opportunity of representation when the requirement is that they should have the opportunity referred to above as a condition precedent to action. It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose."

15. On the strength of the aforesaid principles of law as has been held by the Hon'ble Supreme Court, learned Counsel emphasized that the principles of natural justice has become the order of the day in adjudicatory process. The question of levying penalty on the consignor requires adjudication and in that view of the matter, the finding of learned Single Judge that the principles of natural justice are applicable is perfectly in consonance of the law laid down by the Hon'ble Supreme Court and it was necessary that the demand notices were quashed. Thus, his entire emphasis is that

principle of natural justice is embodied in the process which is the subject-matter of action by the respondent Railways under Sec. 73 of the Railway Act and its non-observance entails the Railways quashing of their action which is arbitrary.

16. Learned Counsel for the appellants in rejoiner commenting on the judgment of the Hon'ble Supreme Court in the case of *Jagjit Cotton Textile Mills v. Chief Commercial Superintendent, N.R.*, reported in 1998 (5) SCC 126 submitted that it is not a judgment wherein the question of natural justice was considered by the Hon'ble Supreme Court to be observed in the light of Sec. 73 of the Railway Act, and therefore, it is not a case which lays down the law which will govern the present controversy. He further states that the Hon'ble Supreme Court has time and again held that its decision should be read in the light of the facts governing the decision. He further submitted that this is also held by the Hon'ble Supreme Court that its decision should not be read as a precedence. He further submitted that the cases decided by the Hon'ble Supreme Court though require observance but then they cannot be seen in isolation as in the instant case it was the goods of consignment and no delinquency was seen, and therefore, constitutionality of Sec. 73 of the Railway Act was upheld.

17. *Per contra,* Mr. J. J. Yajnik, learned Advocate for the Railways emphasized that Railways is not "State" in terms of their service. It is expected to subject to each of its actions to be governed by the principle of natural justice. It is a service provider and it charges for the service rendered. All charges which are subject matter of service rendered by the Railway are statutorily fixed. Thus, there being statutory obligation on the part of the Railways to charge for its service, the question of natural justice is not the one which can be pressed into service.

18. Learned Counsel further relies on the interpretation of Sec. 73 of the Railway Act as given by the Hon'ble Supreme Court in the matter of *Jagjit Cotton Textile Mills v. Chief Commercial Superintendent, N.R.,* reported in 1998 (5) SCC 126 wherein the Hon'ble Supreme Court at Para 42 has held as under :

> "*Para 42 :* ..... 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 F.E.R.A. or Customs Act or the Employees' Provident Funds 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 Art. 14. Further, the question of reasonableness of the quantum of any such extra rate cannot be challenged before us and the appropriate forum

therefore is the Railway Rates Tribunal. Rule 161A can therefore be resorted to for collecting these penal charges from the consignee also."

19. He has further submitted that Sec. 73 of the Railway Act which is quoted hereinafter, is a self-contained Code and there are other provisions in the Act which make the provision obligatory on the consignor if he considers that the weight is doubtful then he can ask for the weighment. For example, Sec. 65 and Sec. 79 which are also quoted hereinafter.

"Sec. 73 : *Punitive charge for overloading a wagon :-* Where a person loads goods in a wagon beyond its permissible carrying capacity as exhibited under sub-sec. (2) or sub-sec. (3), or notified under sub-sec. (4), of Sec. 72, a railway administration may, in addition to the freight and other charges, recover from the consignor, the consignee or the endorsee, as the case may be, charges by way of penalty at such rates, as may be prescribed, before the delivery of the goods :

Provided that it shall be lawful for the railway administration to unload the goods loaded beyond the capacity of the wagon, if defected 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."

"Sec. 65 : *proviso* - "Provided that in the case of a consignment in wagon-load or train-load and the weight or the number of packages is not checked by a railway servant authorized in this behalf, and a statement to that effect is recorded in such railway receipt by him, the burden of proving the weight or, as the case may be, the number of packages stated therein, shall lie on the consignor, the consignee or the endorsee."

"Sec. 79 : *Weighment of consignment on request of the consignee or endorsee :-* A railway administration may, on the request made by the consignee or endorsee, allow weighment of the consignment subject to such conditions and on payment of such charges as may be prescribed and demurrage charges if any :

Provided that except in cases where a railway servant authorised in this behalf considers it necessary so to do, no weightment shall be allowed of goods booked at owner's risk rate or goods which are perishable and are likely to lose weight in transit :

Provided further that no request for weighment of consignment in wagon-load or train-load shall be allowed if the weighment is not feasible due to congestion in the yard or such other circumstances as may be prescribed."

20. Thus, there is an in-built mechanism in the provisions of the Railway Act wherein the consignor can ask for weighing. If he has ignored his rights as given in the Act then if the respondent railway authorities act within their rights as conferred on it under Sec. 73 of the Railway Act, it cannot be said that it is obligatory on the part of the railways to give a notice. Further, the argument of the learned Counsel for the appellants that under

Sec. 73 of the Railway Act charges could be levied only before the delivery is not a sound argument because Sec. 83 of the Railway Act provides for a *lien*. In that light, the findings of learned Single Judge are perfect and ask for no interference. Learned Counsel has stated that it is provided in law governing the consignments that it should be packed in bags which are of different measures and in that contingency if the packing is done as provided then the same controversy would not come. The consignor can claim as to what is the weight. In that view of the matter, having ignored to pack in bags, the consignor has taken a risk of loading loose material and thus subjecting itself to the provisions of Sec. 73 of the Railway Act.

21. Heard learned Counsel for the parties. We have given our thoughtful consideration to the submissions on behalf of both the parties. The most important question in this matter centres around is the observance of the principles of natural justice *i.e. audi alteram partem*. The cases relied on by learned Counsel for the appellants show that the controversy involved in those cases required observance of principle of natural justice and we respectfully agree that there cannot be any divergent opinion on this issue that the controversy involved in those matters required observance of principles of natural justice.

22. Now, we come to the arguments raised by learned Counsel for the appellants that the matter of *Jagjit Cotton Textile Mills* (supra) will not govern the case of the present appellants. We feel that in all cases where there is a breach of civil obligation, the observance of principles of natural justice is always pressed into service. In the instant case, railway is service provider and service provider when charges for the service rendered, the Hon'ble Supreme Court in the case of *Jagjit Cotton Textile Mills* (supra) has held that they are within their rights to get the charges. That being the interpretation given by the Hon'ble Supreme Court, we feel that this has a direct answer to the question raised in the petition and the findings of learned Single Judge that principles of natural justice have to be applied in the matter. Since, service provider charges for the service rendered, it cannot be said that there is any delinquency ingrained in the levy that is penalty or charges which the railway would ask the consignor to pay for overloading, and therefore, it involves no breach of civil obligation and that being the position, we feel that the charges have been demanded by the railways for the service rendered and overloading it cannot be considered to be one which is beyond its competency under Sec. 73 of the Railway Act and other provisions of the said Act. There were statutory safeguards available to the consignee under Secs. 65 and 79 of the Railway Act to get the consignment weighed but having not exercised those statutory rights, it had ignored the rights available to it. At the stage, when the railways

is going to enforce its statutory rights it is asking for notice etc. The consignor has not acted when its turn was there and it is asking to the opponent to surrender to the wishes of it and operate at its peril which would be an unfair treatment to the railways. The consignor could have pre-empted the act of railways which has taken place and could ask for action as contemplated under Secs. 65 and 69 of the Railways Act. Having not done so after the stage of Sec. 73 of the Railways Act asking for the weighment etc. is not in consonance with the scheme of the Railway Act. Actions of service provider are of commercial nature. If the Railway as service provider enters into the kind of enquiries which learned Single Judge has ordered and which the petitioners demand then there is a risk of its service capacity getting hampered. Apart from rendering services it will get involved into a kind of adjudicatory process which will mean diversion. Such diversion of the national service provider would be that its operating capacity will be put under jeopardy.

23. Argument of learned Counsel for the appellants that the judgment of the Hon'ble Supreme Court should not be read as a statute and should also be read as of what point is decided is an established principle and we cannot deviate from it, but in our opinion, the point decided in the case of *Jagjit Cotton Textile Mills* (supra) is clearly that the charges were for the services and not for the penalties for breach of any act which has the colour of civil obligation. In that view of the matter, the argument of learned Counsel for the appellant is of no consequence.

24. In the result, we are of the opinion that the findings of learned Single Judge that observance of principles of natural justice necessary in certain contingency do not appear to be a sound principle of law and in the light of the decision in the case of *Jagjit Cotton Textile Mills* (supra) the observation of the Hon'ble Supreme Court is that railways being service provider, the charges, penalty as referred in Sec. 73 of the Railway Act for the services rendered cannot be considered to be in any way civil obligation and that way the principle of natural justice is not considered to be involved in it. In that view of the matter, the judgment of learned Single Judge is set aside to the extent of observance of the principles of natural justice as the challenge of railways was kept open when its appeals were decided by this Court. The appeals of consignors have no force and are dismissed. So also the Special Civil Application.

(SBS) *Orders accordingly.*

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