Jagjit Cotton Textile Mills vs Chief Commercial Superintendent N.R. & ... on 21 April, 1998

Equivalent citations: AIR 1998 SUPREME COURT 1959, 1998 (5) SCC 126, 1998 AIR SCW 1804, 1998 ALL. L. J. 1314, (1998) 2 SCR 1065 (SC), 1998 (4) ADSC 185, (1998) 3 JT 297 (SC), 1998 (2) SCR 1065, 1998 ADSC 4 185, (1998) 4 CIVLJ 179, (1998) 3 SCALE 209, (1998) 4 SUPREME 234

Author: M.Jagannadha Rao

Bench: S.B. Majmudar, M. Jagannadha Rao

PETITIONER:
JAGJIT COTTON TEXTILE MILLS

Vs.

RESPONDENT:
CHIEF COMMERCIAL SUPERINTENDENT N.R. & OTHERS

DATE OF JUDGMENT: 21/04/1998

BENCH:
S.B. MAJMUDAR, M. JAGANNADHA RAO

ACT:

HEADNOTE:

JUDGMENT:

With Nos.7197, 7206, 7200-04, 7198-99, 7207-10, 7190- /93, CA Nos7514/95, 4266/96, T.C. (c) Nos.15-48, 48A-147/97, 1 & 2/98 & C.A. No. 2164 /98 @ S.L.P. (c) No. 7766/94 J U D G M E N T M.JAGANNADHA RAO, J.

Leave granted in S.L.P (C) No.7766 of 1994.

These Civil Appeals and Transferred Cases raise common questions and can be disposed of together. The Civil Appeals rise out of judgments of the High Court of Allahabad and Rajasthan High Court.

The transferred cases arise from the Delhi High Court and from Railway Claim Tribunal (Lucknow Bench). Counsel have referred to the documents contained in T.C. No.47 of 197 (Eastern coalfield Ltd. vs. Ashoke Silicate & Glass Works, Delhi) for convenience, apart from the pleadings and documents in the other paper books. T.C. No 47 of 1997, referred to above, is a case filed as C.W.P. No.864 of 1985 in the Delhi High Court and transferred to this Court by virtue of orders in T.P.(c) No.713. of 1995. On transfer it was numbered in this Court as T.C. No. 47 of 1997.

The broad facts in all the cases are similar. The appellants/petitioners are all consignees of coal from the collieries. The issue relates to the right of the Railways to recover 'penal charges' relating to overloading of coal in goods wagons beyond the permissible carrying capacity' of each wagon, from the consignees. While the Railways claim that the said charges can be recovered from the appellants- consignees, the appellants, on the other hand, contend that the Railways ought not to have permitted overloading or, coal at the collieries railway-siding and that the consignor collieries and therefore the consignees cannot be made to pay these 'penal charges'. The petitioners/appellants not only seek refund of penal charges paid but a direction that in future, the Railways should be directed not to collect the same from the consignees.

The broad facts of the case can be gathered from the Delhi case T.C. No. 47 of 1997. The paper book in this case contains exhaustive pleadings and documents. The T. C. was initially filed as a writ petition in the Delhi High Court. The writ petitioner, Ashoka Silicate & Glass Works, Delhi is a consignee of coal. It obtained a letter of identification or sponsorship from the Commissioner of Food & supply, Delhi recommending the allotment of a particular quantity of coal year after year as per the petitioner's requirements. Thereafter the petitioner completed 'financial arrangements' through its agent M/S Ramsaran Das & Bros, who have their office in New Delhi. The said agent obtained a Form, which is basically a form for approval of the sponsored quantity of coal wither for every month in the year or for a particular month. The said programme was then submitted to the Collieries (The Eastern Coalfields Ltd. which is a subsidiary of Coal India Ltd.) for their approval so that the Colliery could agree to supply accordingly. After receiving the approval from the Collieries, the said programme was submitted to the Director of Movements(Railway) who works under the Railway Board so that the requisite number of wagons could be allocated for supply of coal by the Collieries to the petitioner. Once the Programme is approved as above, the wagons would be brought and kept at the private railway siding of the Collieries for loading the coal. After the completion of loading, a forwarding note would be prepared by the Colliery. the wagons would be earmarked for different consignees and they move from the colliery to a focal point or booking point where the weigh bridge of the Collieries or Railways is located. The wagons constitute a 'rake' at the focal point and then each wagon would pass across the weigh bridge and the weight of the wagon loaded with coal would be verified and noted in the forwarding note and in the railway receipt. The Railways Act, 1890 and the Railways Act, 1989 contain provisions which require that the "average carrying capacity" of each wagon be marked on the wagon. Section 53 of the old Act refers to (i) the maximum carrying capacity,

(ii) normal carrying capacity(and its variations) and (iii) Rule 161A of the IRCA refers to the permissible carrying capacity. As of now, weight upto and excess of 2 tonnes (previously it was 1 tonne) - over and above the permissible carrying capacity of each wagon - is not subject to any penal

charge. But beyond that, penal charges are levied and collected at the time of delivery of the coal from the consignee, or else the goods will not be released.

Invariably, the consignees in all the cases before us have obtained delivery of the coal including the coal which is in excess of the permissible carrying capacity of the wagon and have paid - apart from the normal rate for carriage- the penal charges also. In none of the cases before us has the consignee - who had the choice of rejecting the overloaded coal at the destination point - rejected the excess coal so overloaded while taking at the destination point.

The cases before us cover two periods, namely where the penal charges were levied and collected by the Railways when the Railways Act, 1890 was in force (upto 30.61990) and again where such charges were levied and collected after the Railways Act, 1989 came into force, i.e from 1.7.1990. There are certain difference in the respective provisions applicable under the old Act and the new Act which have been placed before us and we shall refer to them at an appropriate stage.

It is contended for the consignees - as revealed, from the Judgments of the Allahabad High Court in appeal that the relevant Rule 161A or the IRCA (Indian Railway Conference Association) in force during the period of the old Act of 1890 is consistent with section 53 of the old Act and hence liable to be declared void. It is in addition contended in this Court that Rule 161A is ultra-vires of the old Act inasmuch as under the old act, there is no provision corresponding to section 73 of the New Act, which permits such penal charges to be leied and collected for overloading, - from the consignor, consignee or endorsee, as the case may be. It is also contended that Rule 6 and 29 of the Special Tariff for Coal in the Eastern Railway permit only ordinary rate of tariff to be levied and hence Rule 161a is implitly excluded. Reliance is also placed on clause 187 of the Manual to infer that the liability for the penal charges is only on the consignor. Yet another contention based before us is that Rule 161A of the Indian Railway Conference Association and Section 73 of the new Act, in so far as they permit recovery of the penal charges from the consignee - who it is said is not a 'delinquent' - are arbitrary and violative of Article 14 of the Constitution of India. The submission is that for no fault of the consignee, Rule 161A of the Indian Railways Conference Association and section 73 of the new Act permit recovery of penal charges from consignee, and therefore they are arbitrary and violative of Article 14. It is also contended for the appellant that the title to the goods has not passed to the consignee at the time when the colliery overloaded the goods into the wagons. The contract between the colliery and the consignee, no doubt, was 'F . O. R. - Railway Siding' but it is contended that inasmuch as title passed only after the overloading, and after Railway receipt is prepared later, the consignor alone is the 'delinquent' and is responsible to pay the penal charges. The consignee, it is said, has no choice except to take delivery of the overloaded goods. The consignee also contend that apart from directing refund of penal charges already collected, there should be a direction that in future the same should not be collected from the consignees.

On the other hand, it is contended for the Railways that the petitioners must go for a civil suit as held by the J & K High Court in Darshan Kumar vs. Station Master [AIR 1988 J & K p.74]. It is contended that these charges are compensatory charges though they are called 'penal' and that it is not necessary that there should be mens rea. Rule 161A of the Indian Railways Conference Association is not inconsistent with section 53 of the old Act. It is contended that the said Rule was

issued by the Railway Board under the power delegated to it by notification issued by the Central Government on 24.3.1905 and 8.10.69(respectively with regard to power under section 54 and section 29) and that the letter dt. 7.5.1981 (Annexure-Q in TC No.47/97) shows that the Railway Board validity issued Rule 161A in Part (vol.1) of the Indian Railway Conference Association and that the said Rule is protected by sections 54(1) and 29(1) of the old Act. It is also contended that the Railways are entitled to Collect the penal charges from the consignee under Rule 161A inasmuch as in the second part of Rule 161A, there is no restriction as to the party from whom the penal charges are to be collected. So far as the new Act of 199 is concerned, it is contended that section 73 specifically permits the levy and collection of penal charge from the consignor, consignee or endorsee, as the case may be. In other words Rule 161A of the Indian Railway conference Association is now replaced by a statutory provision in the new Act. It is pointed out that the penal charges are not by way of penalty but are charges leved to compensate the Railways for the deterioration or damages done to the rails, bridges, wagons and the engines which are made to carry extra load over and above the permissible carrying capacity, consequent to the overloading. The penal charges are payable by the consignee, inasmuch as the consignee has taken delivery of the overloaded goods and benefited by using the same in its consumption processes. It does not lie in the mouth of such a person who is beneficiary of the overloading, to contend that it is liable only for the normal charges and not for the penal charges. Again under section 55 of the old Act and section 83 of the new Act, there is a lien in favour of the Railways which extends to the collection of the penal charges. It is also to be presumed that the consignee has passed on the burden to its consumers. (Mr . B. Sen, learned senior counsel, appearing in CA No. 7514 of 1995 arising from the Judgment of the Rajasthan High Court, however, contended that cement is a controlled commodity so as price is concerned and his clients could not have passed on the extra burden to consumers, similar argument was raised in C.A. No. 4266 of 1996).

In the above contentions, the following points arise for consideration:

(1) What is the distinction between the words 'maximum carrying capacity' used in section 53(1) of old Act (section 72(1) of new Act), 'normal carrying capacity used in section 53(2) (section 72(2) of new Act' and 'permissible carrying capacity' used in Rule 161A of the Indian Railway Conference Associationt (section 73 of the new Act)? (2) Whether Rule, 161A of the Indian Railway Conference Association is inconsistent with section 53 of the old Act? (3) Whether Rule 161A is ultra-vires of the Railways Act , 1890?

(4) Do Rules 6, 29 of Eastern Railways Coal Tariff confer any right on the consignees which excludes or overrides Rule 161A?

(5) Are the charges levied under Rule 161A of the Indian Railway Conference Association or under section 73 of the new Railways Act, 1989 (read with Railway (punitive charges for overloading of Wagons) Rules, 1990 penal in nature or are also compensatory? Are they arbitrary and violative of Article 14 of the Constitution of India as they permit the Railways to recover the penal charges from the consignees who, according to the appellants/petitioners, are not responsible for the overloading

of the coal beyond the permissible limits in the wagons at the colliery siding and are not 'delinquents'?

(6) What is the effect of delivery of the Railway Receipt to the consignee under the Railways Act, 1890 and the Railways Act, 1989 and does it have the effect of transferring all the cosignee, including the liability to pay penal charges at the time of delivery of the overloaded goods to the consignee?

(7) In any event, does the Railways not have a lien for collection of the penal charges from the consignee because of section 55 of the Railways Act, 1890 or section 83 of the Railways Act, 1989?

(8) Can the consignees (except the appellant in CA No. 7514 of 1995 and CA No. 4266 of 1996) seek refund from the Railways without pleading and proving that they have not passed on the burden of the penal charges to their consumers?

(9) Are the consignees entitled to any direction that the Railways should not, in future, collect these penal charges from the consignees?

Point 1:

At the outset, it is necessary to understand the distinction between the words 'maximum carrying capacity', 'normal carrying capacity' and 'permissible carrying capacity' used in various provisions. The penal charges under Rule 161A and section 73 of the new Act are leviable only for exceeding the 'permissible carrying capacity'.

Now Rule 161A which deals with overloading of coal was introduced w.e.f. 7.5.1981 and is contained in IRCA (Indian Railway Conference Association) Goods Tariff. The said rule was in force till the new Rules called "The Railways (Punitive charges for overloading of wagons) Rules, 1990 were framed under section 87 of the new Act (published in Gazette on 7.6.1990). Since 1981, Rule 161A has undergone minor changes concerning the extent to which extra-free-load is permissible etc. For the purposes of the point involved, these minor variations are not relevant and it is sufficient to refer to the Rule 161 A as it was originally introduced in 1981. It reads as follows:

"Rule 161 A: Penalty for loading coal beyond permissible carrying capacity of the wagons:

(1) In loading coal, consignors are required not to exceed the permissible carrying capacity of the wagon used or any reduced carrying capacity that may be required in the circumstances referred to in Rule 163. Should overweight be discovered at the booking point or en-route or at destination, such overweight beyond permissible carrying capacity of the wagon used will, notwithstanding anything contained in this

Tariff or in any other Rules or instruction, be charged at the normal wagon load rate if the overweight is more than one tonne and at smalls rate applicable to coal traffic, if the overweight is m ore than one tonne, for the entire distance from the booking point to the destination .

(2) The Railway Administration may issue separate instructions in regard to limits of weight beyond which over-loaded wagons could not be carried. Such instructions may also specify the charges, penalties and other consequences that would ensue from loading beyond such limits" .

Rule 161A(1) is, it will be noticed in two parts. The first part deals with the prohibition while the second part concerns the levy and collection of penal charges and does not specifically say from whom. The Rule uses the word 'permissible carrying capacity'.

We shall next refer to Section 53. It reads as follows:-

"Section 53: Maximum carrying capacity for wagons: (1) The gross weight of every wagon or truck bearing on the axles when the wagon or truck is loaded to its maximum carrying capacity shall not exceed such limit as m ay be fixed by the Central Government for the class of axle under the wagon or truck.

(2) Subject to the limit fixed under sub-section (1), every railway administration shall determine the normal carrying capacity for every wagon or truck in its possession and shall exhibit the words and figures representing the normal carrying capacity so determined in a conspicuous manner on the outside of every such wagon or truck.

(3)..... .....

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), where a railway administration thinks it necessary or expedient so to do in respect of any wagon or truck carrying any specified class of goods or any class of wagons or trucks of any specified type, it may, by notification, vary the normal carrying capacity for such wagon or truck or such class of wagons or trucks and, subject to such conditions as it may think fit to impose, determine for the same such carrying capacity as may be specified in the notification and it shall not be necessary to exhibit the words and figures representing the carrying capacity so determined on the outside of such wagon or truck or such class of wagons or trucks:

Provided that in no case the gross weight of such wagon or truck or such class of wagons or trucks shall exceed the limit fixed under sub-section (1) for the class of axle under the wagon or truck."

> The section uses the words 'maximum carrying capacity' , 'normal carrying capacity' and variation of normal carrying capacity. (The corresponding section under the new Act, 1989 is Section 72).

The above provisions of old section 53 were the result of the Railways (Amendment) Act, 1954 (Act 22 of 1954). The purpose of this section is made clear in the statement of object and Reasons of the amending Bill which preceded the said amending Act of 1954. It reads as follows:

> "With view to secure better utilisation of the available wagon space, railways allow within the limit of safety, loading of certain classes of goods somewhat in excess of the marked carrying capacity of the wagons. Although such enhanced carrying capacity is not exhibited on the outside of the wagon required by sub-section (1) of Section 53 of the Indian Railways Act, 1890, railways notify it through circulars for the guidance of the public. Freight charges are also collected in such cases on the increased artying capacity so permitted.
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> As however, this practice is not strictly in conformity with the irovisions of section 53 of the Indian Railways Act, 1890, the present Bill seeks to amend this section suitably to permit loading wagons (when occasion so requires) beyond the marked carrying capacity without exhibiting the enhanced capacity on the outside of the wagons".

The variation of the normal carrying capacity as permitted by Section 53(4) are however subject to the proviso at the end of the sub-section which says that in no case shall he gross weight of such wagon or truck exceed the limit fixed under Section 53(1) for the class of axle under the wagon or truck. For example, excess upto 1 tonne over an d above the normal capacity was permitted without extra charge initially and now the said limit is raised to 2 tonnes.

Thus, it is to be noticed that while Section 53(1) of the old Act (Section 72(1) of the new Act) uses the words 'maximum carrying capacity', and Section 53 (2) of the old Act (section 72 (2) of the new Act) uses the words 'normal carrying capacity', Rule 161A of the Indian Railway Conference Association an Section 73 of the new Act (which empowers levy capacity'.

New inasmuch as penal charges under Rule 161A (or under Section 73 of the new Act) are leviable only for exceding the "permissible carrying capacity", it is, therefore, necessary to understand the significance of these words. That, to a large extent, is explained by the Statement of Objects and Reasons of the 1954 Amendment of the old act set out above. Section 16 if the old act(and Section 27 of the new Act) deals with the u of rolling stock. What design or type of rolling ck is to be used is to be decided by the Central Government, Ministry of Railways (Railway Board), in consultation with its Research and Design Organisation. The maximum gross-weight bearing on the axles is determined by the Commissioner of Railway safety, when granting permission under section 16 of the old Act (Section 27 of the new Act). The Railways submit to the Commissioner the complete design particulars indicating the 'gross weight' and the 'gross weight bearing on each axle'. The 'gross weight', for which sanction is given by the Commissioner of Railway safety on behalf of the Central Government is the maximum and can in no cases be exceeded by any executive order of the

Railway Board, without reference to the Commissioner. On the other hand, the 'normal' or 'marked' carrying capacity determined by the railway Administration under Section 53(2) is subject to the maximum referred to in Section 53(1). The normal carrying capacity specified in Section 53(2) can be varied by the railway administration in exercise of powers granted under Section 53(4) (inserted by the 1954 Amendment) but subject again to the maximum limited by section 53(1) as stated in the proviso below section 53(4). Any variation of the normal capacity as permitted by section 53(4) is "subject to such conditions as it (the Central Government) may think fit to impose" and even these conditions cannot override the limits prescribed under Section 53(1). Inasmuch as the enhanced capacity, if any, under Section 53(4) may not possibly be immediately exhibited on the outside of the wagon when occasion arises, it has become necessary to notify it for guidance of the public. Thus it is clear that the 'gross weight' and 'maximum carrying capacity' (Section 53 (1)(section 72(1) of new Act) are laid down by the Commissioner of Railway Safety on behalf of the Govt. of India while the 'normal carrying capacity' (Section 53(2))(section 72(2) of new Act) is marked on the wagons by the railway administration but is always below the limits prescribed in Section 53(1).

So far as the words 'permissible carrying capacity' which occur in Rule 161A of the Indian Railway Conference Association and section 73 of the new Act are concerned, the said words obviously refer the average carrying capacity' mentioned in Section 53(2) (Section 72(2) if new Act) or such enhanced permissible limits of carrying capacity as may be fixed under Section 53(4) of the old Act (or Section 72(4) of the new Act). This view of ours is clearly strengthened by the definition of "permissible carrying capacity" in Rule 2(d) of the 1990 Rules. Rule 2(d) says as follows:

> Rule 2(d) 'Permissible carrying capacity' means the normal carrying capacity determined under sub-
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> section (2) or (3) of section 72 or where a railway administration has determined a varied carrying capacity under sub-section (4) of section 72, such varied carrying capacity, whichever is higher."
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> This permissible carrying capacity cannot, as already state, exceed the upper limits prescribed by the Commissioner of Railway Safety under Section 53(1) of the old Act (Section 72(1) of the new Act). (See also Johari's commentary on Railways Act, 1989 (1991 Ed.) pp.124,241,242).
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> The above meaning of the words will be helpful in understanding the discussion under Points 2 to 8. Point 2:
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> The first contention for the appellants is that Rule 161A is inconsistent with section 53(1) of the Act. It will be noticed that while section 53(1) prohibits overloading in excess of the maximum carrying capacity, Rule 161A permits loading beyond the permissible carrying capacity and the charging therefore. Obviously the contention is based upon a misconception of equating the permissible carrying capacity with the maximum carrying capacity, which words are distinct and different as explained by us under Point 1. Rule 161A does not enable the consignors, as Wrongly thought by

the petitioners, to load the wagon beyond the maximum carrying capacity. The penal charges under Rule 161A are attracted if the weight goes above the permissible carrying capacity which is always under section 53(1). Therefore the contention itself is based on wrong premises. In addition, the High Court of Allahabad has pointed out that Rule 161a is in fact designed to achieve the objects covered by section 53(1) (2) and (4). There are , therefore, unable to find any inconsistency between Rule 161A and section 53 of the old Act. For the aforesaid reasons, this contention is rejected.

Point 3:

The question is whether Rule 161A of the Tariff is ultra-vires of the old Railways Act, 1890, Counsel for the consignees argued that the Rule is traceable to the rule making power under section 47(1)(g) and is limited by the punishment provided in section 47(2) read with section 93 of the old Act. It is argued that section 47(1)(g) enables rules to be made generally "for regulating the travelling upon, and the use, working and management of the railway" and section 47(2) says that breach of rules may be punished by fine not exceeding Rs. 160 and that section 93 states that railway companies, contravening section 53 with regard to 'maximum load' to be carried in any wagon, could be directed to pay Rs.20 for every day of the contravention. Hence it is argued that no penalty under section 161A can be imposed. It is also contended that Rule 161A has not been published in the Gazette as required by section 47(3).

It is, however, contended for the Railways that for purposes of Rule 161A of the IRCA, the rule making power of Section 47(1)(g) is not relevant in this context that Rule 161A is protected by section 29(1) and Section 54(1) of the old Act. We shall therefore, reer to section 29(1) and section 54(1) to find out if this contention of the Railways is well founded. Section 29 reads as follows:

"Section 29: (1) The Central Government may, be general or special orders fix maximum and minimum rates for the whole or any part of a railway, and prescribe the conditions in which such rates will apply.

(2) The Central Government may, by a later order, fix the rates of any other charges for the whole or any part of a railway and prescribe the conditions on which such rates of charges shall apply."

Under section 3(13) of the old Act, 'rate' is defined as including "any fare, charge or other payment for the carriage of any passenger, animals or goods." In our view, 'other payment' could be by way of a penal charge as levied by Rule 161A.

Again section 54(1) states that the railway administration may impose conditions not inconsistent with the Act or with any general rules made thereunder, "With respect to the receiving, forwarding or delivery of any animal or goods."

Thus both sections 29(1) and 54(1) in our view protect Rule 161A. But it is argued that Rule 161A is in Part 1(Vol.1) of the IRCA and that it is only Part 1(Vol.2) that is issued under the authority of the Central Government as stated on the cover page of the IRCA Rules. This point requires a deeper investigation.

It is true the cover page of IRCA Rules states that only Rules in Part 1(Vol.2) are issued under the authority of the Central Government and not the rules in Part 1(Vol.1). We, however, find from the letter dated 7.5.1981 (Annexure-Q in T.C. 47/97 of Ashoka Silicate & Glass Works i.e. W.P. No.864 of 1985) that the said Rule 161A was issued by the Railway Board in the Ministry of Railways, Government of India, and communicated to all General Managers in the Railways and all Non-Government Railways(including Port Trust Railways). Question is whether when the Railway Board issued Rule 161A and included the same in IRCA Part 1 (Vol.1), the said rule could be statutory though not issued by the Central Government as in the case of Rules in Part 1 (vol.2)?

In this connection, the notifications of the Central Government delegating its powers under section 54 and section 29 to the Railway Board are important. The Notification of the Government of India (No.14-21, No.81) dated 24.3.1905 (Act IV of 1905) and issued in the name of the Government-General shows that the Railway Board was invested with powers of the Central Government under various sections including section 54 of the old Act. Again Notification (No.TRC/1079/69/11) dated 8.10.69 issued by the Central Government under section 2 of the Indian Railway Board under section 29 of the old Act of 1890 (published in gazette on 18.10.69) of the Central Government.

The effect of the above delegation is that Rule 161A of IRCA Rules, Part 1 (Vol.1) - which is traceable to section 29 or section 54 of the old Act - is clearly issued by the Railway Board as per its letter dated 7.5.1981 in exercise powers delegated to it by the Central Government. In other words, though it may be true from the cover page of IRCA Rules that Part 1(Vol.2) alone is issued under authority of Central Government, it is established that Rule 161A in Part 1(Vol.1) has the authority of the Railway Board, the delegate of the Central Government. Therefore, the contentions of the appellants/petitioners that Rule 161A is traceable to section 47(1)(g), that the rule is not published in the Gazette as required by section 47(4) and that only fine or penalty as stated in section 47(2) or section 93 of the old Act could be imposed, are wholly unsupportable.

We may incidentally point out that in the High Court the question of vires of Rule 161A was not specifically raised and the only point argued was that Rule was inconsistent with section 53. However, as the point has been argued before us, we have considered the same and we find no substance in the point. Point 3 is held against the appellants/petitioners.

Point 4:

> To Contend that Rule 161A is excluded by other rules, reliance is placed by the appellants/petitioners on Rules 6 and 29 of Eastern Railway Coal Tariff Part 1, as impliedly excluding Rule 161A. Rule 6 carries the heading 'charges payable in respect of the overloading the excess coal and re-loading the same and the demurrage

charges payable therefor. Therefore, it is clear that this rule does not cover penal charges for overloading coal beyond the permissible limits and cannot be said to exclude Rule 161A. Coming to Rule 29, it reads as follows:

"Rule 29: Wagons not be loaded in excess of maximum weight prescribed: Consignors in loading are required not to exceed the maximum weight prescribed for a wagon. Should overweight be ascertained on weighment, the load will be reduced. In case of consignments weighed in route, any overloading, however, detected at destination is liable in the same rate as the remainder of the consignment."

It is true Rule 29 deals with coal but we may point out that Rule 161A also deals exclusively with coal and was specifically introduced to deal with overloading coal beyond the permissible carrying capacity. It will be noticed that Rule 29 deals with loading beyond the maximum weight prescribed by section 53(1) (see discussion in Point 1), while Rule 161A deals with penal charges for loading in excess of the permissible carrying capacity asa stated in section 53 (2) and section 53(4). Rule 29 was introduced to clarify that for carriage of the excess coal the rate to be charged is the normal rate. The Rule was not intended to deal with the penal charge. Finally, one more strong reason against the petitioner's contention is that Rule 161A contains a non-obstante clause. The non-obstante clause in Rule 161A reads as follows:

"notwithstanding anything contained in this Tariff or in any other Rule or instructions"

Therefore, the said clause would, in any event, override Rules 6 and 29 of the Eastern Railway Coal Tariff, Part I, even if they are to cover the same field. for all the above reasons, we hold on Point 4 that Rule 161A is neither excluded by Rule 6 nor by Rule 29 of the Eastern Railway Coal Tariff.

Points 5 and 6:

These two points are more substantial. Elaborate submissions were made buy counsel on both sides on them.

We have already set out the facts showing the manner in which, according to the consignees, the goods are loaded at the Collieries siding, weighed thereafter when the train passes over the weigh bridges and how the railway receipt is latter issued. Counsel on both sides concentrated on the question as to whether title to goods passed to the consignee before the goods were loaded or whether title did not pass till the railway receipt was issued after the overloading and detection of extra load. This was done to find who was at fault at the time of overloading.

An endeavour was made by the learned counsel for the Railways, on the basis of the judgment of this court is Kuchwar Lime and Stone Co. Vs. M/S Dehri Rohtas Light Railway Co. Ltd. & Another [AIR 1969 SC 193] to contend that the title in the goods passed to the consignee the moment allotment orders were passed by the Coal

Commissioner under Colliery Control Order, 1945 and it was contended, as stated in that decision, that the Colliery when it loaded the goods in the wagons acted as the 'agent' of the consignee. It was argued for the Railways, that if at the time of overloading the title had passed and the colliery was only the agent of the consignee, then the Railway could recover the penal charges from the consignee. This argument could not, if any, however, be pursued further because, during the relevant time when the goods in question before us were loaded, the Coal Commissioner was not in the picture so far as certain types of coal were concerned and, the collieries and the consignees were dealing with each other as principals i.e. as sellers and buyers. This clear from the subsequent notifications under the Coal Control Order, 1945 set out in the recent judgment of this Court in Coal India Ltd. & another vs. Continental Transport and Construction Corporation & Others [1997 (9) SCC 258].

Yet another endeavour was made by the learned counsel for the Railways to contend that the contract between the collieries and the consignees was not merely an F.O.R. contract but was "F.O.R. - Railway Siding" at the Colliery - what in English law is called Free Along Side (F.A.S.) contract and that title in regard to unascertained goods in such cases passed to the consignee as soon as the goods were brought to the private Railway siding at the colliery and were identified or earmarked for loading to the particular consignee in whose favour the wagons in question were allotted. Reference in this connection was made on behalf of the Railways to the meaning of FAS contracts in Halsbury's Laws of England (4th Ed., 1984) (Vol.41 , Sale of Goods para

940) and to Benjamin on Sale (5th Ed. 1997) (para 21.010, 21.011). It is stated in Benjamin as follows"

"An f.a.s. contract is one by which the seller undertakes to deliver goods free alongside a ship designated by the buyer..... ..... under an f.a.s. contract, goods are commonly appropriated in the 'contractual' sense on delivery alongside and if that appropriation is 'unconditional', property and risk will pass at that point, before actual shipment."

But this argument could not also be pursued further inasmuch as the counsel for some of the consignees contended that even if the contract was an F.A.S contract, the appropriation was not unconditional, inasmuch as the Railway Receipts were issued after loading and weightment, and the said receipts were not delivered to the consignee's agent till the price was paid and that title did not pass till Railway Receipts were delivered to the consignee's agents. It was argued that price was not paid in advance but was paid only against the Railway Receipts. Learned counsel for the Railways on the other hand submitted from the very pleadings in T.C 47 of 1997 show that the consignees has always a running account with the collieries (and not merely a Bank guarantee as contended by the consignees) and it was a case of automatic adjustment of the price at the time the goods were placed alongside the colliery siding and that therefore title passed when goods were placed at the siding and were earmarked for loading to each particular consignee. Reference in this connection was made for

the Railways to Section 19 and Section 23(1) of the sale of Goods Act to show that the goods though unascertained, became ascertained at the point when they were placed alongside the wagons and they stood appropriated to the contract unconditionally. it was also argued that Section 23(2) which deems delivery to the carrier as the stage of passing of title was not applicable if in an F.A.S. contract, the goods became ascertained and became unconditionally appropriated to the contract even before they were loaded into the wagon. On the same lines, learned counsel for the collieries relied upon the Coal Control 1945 to say that title passed to the consignees even at the pit-head or alongside the railway siding.

As we had certain doubts about the actual terms of the individual contracts in the various cases before us, we felt that it would not be safe to go by the above contentions of the learned counsel for the Railways based on F.A.S. contract. We shall accordingly assume that in all these cases before us title remained with the collieries even at the time of the loading of the coal into the wagons and we shall deal with the respective rights and liabilities of the consignor and consignees on that basis.

The discussion here can be split up into two periods the one covered by the old Act of 1890 and the other covered by the new Act pf 1989.

Period covered by the new Act of 1989:

> We shall first deal with the Period covered by the new Act, i.e. after 1.7.1990. This period does not present much difficulty in view of the specific provision in Section 74 of the new Act which deals with passing of property in the goods upon delivery of the railway receipt. In this context, reference is also necessary to Section 73 of the new Act which corresponds to Rule 161-A, Section 73 of the 1989 Act reads as follows:
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> "Section 73:Punitive charge for overloading a wagon. Where a person loads goods in a wagon beyond its permissible carrying capacity as exhibited under sub-section (2) or sub-section (3), or notified under sub-section (4), of Section 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 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."

This section gives power to the railways to levy and collect the penal charges from the consignor, consignee nor the endorsee, as the case may be, of the goods are overloaded beyond the 'permissible carrying capacity'.

Section 74 deals with the effect of Railway Receipt and the transfer of the 'liabilities' of the consignor to the consignee. It reads as under:

> "Section 74: Passing of property in the goods covered by railway receipt; 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".

There are two answers to the contention of the appellants/petitioners. Firstly, Section 73 clearly states that the penal charges can be collected from the consignor, consignee or the endorsee, as the case may be. The words `as the case may be' occurring in sections 73 and 74 have also to be explained. The `consignor' shall be liable for the penal charge even at the stage of delivery of goods at the destination if he has booked the goods for 'self'. The 'endorsee' will be liable if the delivery is applied for at the destination by the endorsee. The 'consignee' will be liable if the delivery is applied for at the destination by the consignee. Thus the above section, therefore, expressly permits these penal charges to be collected from the consignee also. Secondly, under section 74, once the railway receipt is delivered to the consignee, not only the rights of the consignor but also the liabilities of the consignor to pay the penal charges under section 73 in respect of the overloaded goods covered by the railway receipt. Period covered by the old Act:

> So far as the period covered by the old Act is concerned, the provision corresponding to section 73 of the new Act is Rule 161A of the IRCA Rules. That Rule, which we have already extracted, came into force in 1981 and we have held that it has statutory force having been made by the Railway Board under powers delegated to it. Question is whether under Rule 161A, the Railways can collect the Penal charges from the 'consignee'.
>
> Sub-clause (1) of Rule 161A is in two parts. The first part says that the 'consignors' are required not to exceed the permissible carrying capacity of the wagon. The second part, which is important in this context reads as follows:
>
> "Should overweight be discovered at the booking point or on route or at destination, such overweight beyond the permissible carrying capacity of the wagon used will, notwithstanding anything contained in this Tariff or in any other Rules or instruction, be charged at the normal wagon load rate if the overweight is upto one tonne (now two tonnes) and at smalls rates applicable to coal traffic, if the overweight is more than one tonne, for the entire distance from the booking point to the destination."

It is contended for the petitioners/appellants that inasmuch as the first part of Rule 161A prohibits the consignor from loading, the penal charges referred in the second part of the Rule must have been intended to be collected from the consignor only. On the otherhand, it is contended for the Railways that the language employed in the second part is wide and it does not say that the levy and recovery is restricted to the consignors only.

It is to be noticed that the second part of Rule 161A speaks of discovery of the overweight at the booking point or en route or at the destination and recovery of the penal charge therefor for the

entire distance from the booking point to the destination. The rule-making authority must, in our opinion, be deemed to have been aware that title in the goods might have passed to the consignees in several cases after the loading or after the weightment and before the actual delivery of the goods to the consignee such as where the Railway Receipt is delivered to the consignee against the receipt of price. In our view, the second part of Rule 161A is quite wide and unrestricted and can be treated as permitting recovery of the penal charges "from the consignor or consignee or the endorsee, as the case may be", though these words are not expressly used in Rule 161A. That is how the Railway becomes entitled to recover the penal charges from the consignee also even under the old Act.

Learned counsel for the consignees, Sri Pankaj Kalra invited our attention to the decision of this Court in Director of Enforcement vs. M.C.T.M. Corporation Pvt. Ltd. & Others [1996 (2) SCC 471] to contend that the 'delinquet' is the consignor and hence the consignee cannot be made to pay the penal charges. That case was concerned with the question whether for purposes of proceedings under section 23(1)(a) of the Foreign Exchange Regulation Act, 1947 the department had to prove mens rea in cases involving breach of section 10 of the said Act. It was held that the 'delinquency' of the defaulter by reason of wilful contravention of section 10 had itself established his 'blameworthy' conduct and it was not necessary to prove any guilty intention. It was held that officers of the Enforcement Directorate were acting as adjudicators and not as judges of Criminal Courts and they determine the liability of the contravenor for breach of his 'civil obligations' laid down under the Act and impose a 'penalty' for the breach of the said obligations as laid down under the Act. In that context it was observed that the word 'penalty' is a word of Wide significance, sometimes it means recovery of an amount as a penal measure in civil proceedings, or an exaction which is not compensatory in character. Reference was made in that case to Corpu Juris Secundum, (Vol.85, p.580, para 1023), to the effect that a 'penalty' can be imposed for a tax delinquency which is a civil obligation, entailing remedial and coercive processes, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for violation of criminal or penal laws. Learned counsel also referred to N.K. Jain & Others vs. C.K. Shah & Others [1991 (2) SCC 495] and Pratibha Processors & Others vs. Union of India & Others [1996 (11) SCC 101], as to the meaning of penalty. The former case arose under Employees Provident Fund etc, Act, 1952 and the latter under the Customs Act, 1962. Other decisions relating to strict construction of penal statutes were also referred to. It was contended that when the 'delinquent' is the consignor and if section 73 and Rule 161A permit punishing the consignee, the said provisions must be held to be in violation of Article 14 of the Constitution of India.

In our view, these contentions are not tenable. As has been noticed in our discussion on Point 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 upword variation thereof and this limit is called the permissible carrying capacity. Section 73 of the new Act and Rule 161A 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 section 73 of the new Act and the old Rule 161A is intended for dual purposes - one is to see that the gross

weight at the axles is not unduly heavy so that the 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 161A 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 section 73 or Rule 161A which permits levy on such a consignee cannot, in our view, be said to be arbitrary or unreasonable in the context of Article 14.

In the Civil Appeal arising out of SLP(C) No.7766 of 1994 from Allahabad, it was contended that when the wagons were initially weighed at the colliery or focal point, there was no extra load and that the defective weigh bridges at those points were the real cause for this problem. We find from the pleading and from the SLP grounds that no such plea was raised in the High Court. Such a plea cannot be permitted to be raised for the first time by way of rejoinder in the SLP.

In Civil Appeal No. 4266 of 1996 (arising out of Writ Petition No.18317 of 1989 filed in the Allahabad High Court) the Writ Petition and the SLP reflect the same points as urged in the other cases. The common Judgment of the High Court does not also show that any special point was urged. Counter was filed on 7.7.1997. No rejoinder was filed. But an additional affidavit is now filed on 25.3.1998 stating that when penal charges were not paid by the appellant, the Railways diverted three rakes containing coal allegedly belonging to the appellant and realised Rs.77,97,007 besides adjusting Rs.50,13,119 towards penal freight. It is also stated that Rs.53,49,000 were charged as interest and in all Rs.1,81,59,798 were recovered by the Railway towards penal freight and interest. It is also urged that the appellant manufacturers urea, which is controlled and cannot pass on the burden to its consumers. We may state that no plea of diversion was raised in the SLP nor argued in the High Court. Even now no dates of the so called diversion are given in the additional affidavit. These points regarding diversion not raised in the High Court cannot be urged here for the first time before us. It is for the appellant to restore to such appropriate legal remedies as are available to it in this behalf.

For the aforesaid reasons, we hold on Points 5 and 6 against the petitioners/appellants.

Point 7:

This point which deals with Railways' lien furnishes an alternative answer to the problem, apart from what we have stated in our discussion under Points 5 and 6.

The discussion here has also to be split up upto two parts, the period covered after the new Act and the period under the old Act.

Period covered by the new Act :

The relevant section here is sub-clause (1) of section 83 of the new Act. It reads as follows:

"Section 83(1): Lien for freight or any other sum due: If the consignor, the consignee or the endorses fails to pay on demand any freight or other charges due from him in respect of any consignment, the railway administration may detain such consignment or part thereof or, if such consignment is delivered, it may detain any other consignment of such person which is in, or thereafter comes into, its possession."

The section permits enforcement of 'lien' in case of failure on the part of the consignor, consignee or endorsee to pay the freight and "other charges due from him". In our view, the words "other charges" take in the penal charges leviable under section 73 of the new Act and, therefore, section 83 permits the Railways to recover the same from the abovesaid persons - which include the 'consignee' -as a condition precedent for the delivery of the goods.

Position under the old Act:

The corresponding provisions which deals with the 'other charges' used in section 55 or the word 'other payment' in the definition of 'rate' in section 3(13), they clearly include the 'penal charges' leviable under Rule 161A of the Rules. Thus, under section 55(1), it is permissible for the Railways to withhold the delivery of the goods from the consignee unless the consignee pays the penal charges also. That is the effect of the 'lien'.

For the aforesaid reasons, we hold that the Railways had a lien for the penal charge under section 55(1) of the old Act and have a lien for the penal charges under section 83 of the new Act. Under both statutes, the said charges are recoverable from the consignee as a condition precedent for delivery of the goods. Point 7 is decided accordingly.

Point 8:

This point deals with the question, whether in case the petitioners/appellants are entitled to seek refund they have further to plead and prove that they have not passed on the penal charges to their consumers. Further, appellants in CA No. 7514 of 1995 and in CA No . 4266 of 1996 have claimed that the goods they manufactured are sold

at controlled prices and they could not have passed on this liability to their consumers.

In view of our findings on Points 5,6, and 7 that the collection of the penal charges from the consignees is valid and they are not entitled to claim any refund, 'lien' under the old Act is Sub-clause (1) of section 55. It reads as follows:

"Section 55(1): lien for rates and other charges: if a person fails to pay on demand made by or on behalf of a railway administration any rate, or other charge due from him in respect of any animals or goods, the railway administration may detain the whole or any of the animals or goods, or, if they have been removes from the railway, any other animals or goods of such person then being in or thereafter coming into possession."

It is to be noticed that the old section 5(1) uses the words 'a person' and does not use the words 'consignor' consignee or endorsee' which occur in the corresponding provision of the new Act, namely, section 83. But, we have already held under Points 5 and 6 that the above words though absent in section 73 of the new Act are to be implied in Rule 161A which was in force till fresh Rules were framed under the new Act. On that basis, the word `a person' in section 55(1) of the old Act in our view must be understood to mean 'consignor', 'consignee', or 'endorsee'. If that be so, the words 'due from him' in section 55(1) would mean due from 'consignor, consignee or endorsee'. So far as the words 'rates and other charges' used in section 55(1) are concerned, it is necessary to refer again to the definition of the word 'rate' in section 3(13) of the old Act. It says 'rate' includes "any fare, charges or other payment for the carriage of any passenger, animal or goods". In our view, whether we go by the words this point does not survive. Further, in all these cases, the consignees have taken delivery of the excess load and used the same in their business, commercial or manufacturing processes and hence they cannot blow hot and cold.

Point 9:

This Point deals with the relief that the Court should prohibit the levy and collection of penal charges under section 73 of the new Act of 1989 read with the Railways (Punitive charges for overloading of Wagon) Rules, 1990, in the future.

Inasmuch as we have held under Points 5 and 6 as well as under Point 7 that these penal charges can be collected from the consignees or endorsees of the railway receipt, under the new Act of 1989 and the 1990 Rules made thereunder, the petitioners/appellants are not entitled to any direction against the Railways for the future.

In the result, all the Civil appeals and the Transferred Cases are dismissed but in the circumstances, without costs.