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March 24.

RAIGARH JUTE MILLS LTD.

v.

EASTERN RAILWAY AND ANOTHER

(S. R. DAS C. J., VENKATARAMA AIYAR, S. K. DAS, GAJENDRAGADKAR and VIVIAN BOSE JJ.)

Railway Rates—Freight charges—Complaint of undue preference—Unreasonable and excessive rates—Competitive traffic—Indian Railways Act, 1890 (9 of 1890), ss. 28, 41.

The appellant company owned jute mills situated in Raigarh in the State of Madhya Pradesh, and it had to bring raw material from many railway booking stations outside the State as there was no other means of transport both for bringing jute to the mills and for carrying the finished products to ports for export to foreign countries; the jute mills in West Bengal and Madras had facilities for direct shipment of their goods without carriage by rail to the ports, and so the prices of the products of the appellant could not be brought down to the competitive level for the purposes of export out of, or sale in, India. The appellant filed a complaint before the Railway Rates Tribunal under s. 41 of the Indian Railways Act, 1890, on the allegations that the Railway administration had contravened the provisions of s. 28 of the Act in that it had offered special rates for certain stations in its zone to Kanpur which were cheaper than those that were charged between Raigarh and some other railway stations, and that the charges levied for the freight of the appellant's goods were unreasonable and excessive. The Tribunal found that competition between the goods of the Kanpur mills and the appellant's goods had not been alleged or proved in the present case:

Held, that the mere fact that the goods of the Kanpur mills are transported at more favourable rates would not attract the provisions of s. 28 of the Act, unless there is competition between the goods of the Kanpur mills and the appellant's goods, and undue preference has been shown by the railway administration to the appellant's competitor.

Nitshill and Lesmahagow Coal Company v. *The Caledonian Railway Company*, (1874) II Railway and Canal Traffic Cases, 39, *Denaby Main Colliery Company* v. *Manchester, Sheffield and Lincolnshire Railway Company*, [1886] 11 App. Cas. 97, *Lancashire Patent Fuel Company Limited* v. *London and North-Western Railway Company*, (1904) XII Railway and Canal Traffic Cases, 77 and *Lever Brothers, Limited* v. *Midland Railway Company*, (1909) XIII Railway and Canal Traffic Cases, 301, relied on.

Held, further, that in considering the question as to the reasonableness of the railway freight the relevant factors would mainly be the working costs of the railway administration and

other material circumstances, and neither the geographical location of the appellant on account of which it has to incur additional expenses of transport, nor the cost incurred in producing the jute goods nor the commodity prices prevailing in the market, have any relevance.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 231 of 1954.

Appeal by special leave from the judgment and order dated August 17, 1953, of the Railway Rates Tribunal at Madras in Complaint Case No. 5 of 1952.

S. C. Isaacs and *R. C. Prasad*, for the appellant.

H. N. Sanyal, Additional Solicitor-General of India, H. J. Umrigar and *R. H. Dhebar*, for the respondents.

1958. March 24. The Judgment of the Court was delivered by

GAJENDRAGADKAR J.—This is an appeal by special leave against the order passed by the Railway Rates Tribunal, hereinafter called the tribunal, at Madras dismissing the appellant's complaint under s. 41 of the Indian Railways Act (9 of 1890), to be described hereinafter as the Act. The appellant, Raigarh Jute Mills Ltd., is a limited company owning jute mills which are situated in Raigarh in Madhya Pradesh. For the production of jute goods, the appellant has to bring raw material, viz., jute from many railway booking stations outside the State of Madhya Pradesh and there is no other means of transport except by rail both for bringing jute to the mills and for carrying the finished products to ports for export to foreign countries. In its complaint, the appellant has alleged that the railway administration had contravened the provisions of s. 28 of the Act and also that the charges levied by the railway administration for the freight of the appellant's goods were unreasonable and excessive. According to the appellant, the Assam Railway (now North-Eastern Railway) offered special rates for jute from certain stations in its zone to Kanpur and the basis of these rates was cheaper than that of the rates charged between Raigarh and some other stations on the East Indian Railway and the Bengal-Nagpur Railway (now the Eastern Railway). Both the Eastern Railway and the

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North-Eastern Railway are State Railways and as such it was not open to either of them to mete out differential treatment. The appellant further contended that the other jute mills in West Bengal and Madras had facilities for direct shipment of their goods without carriage by rail to the ports, whereas, in the case of the appellant, the railways charged freight up and down in respect of the entire traffic of the appellant; inevitably the prices of the products of the appellant could not be brought down to the competitive level for the purposes of export out of, or sale in, India. The appellant annexed to its complaint tables of goods rates of the two railways and urged that the unusual increase in the rates charged to the appellant was telling very heavily on the appellant as compared to other mills. According to the appellant, the freight rates should be on the basis prevailing in the year 1949 as the maket had gone down to the level existing in that year. The appellant's complaint therefore prayed that, since the prevailing rates were unreasonable and excessive, the tribunal should issue directions for the introduction of fair and reasonable rates.

When the complaint was first filed, both the East Indian Railway with its headquarters at Calcutta and the Bengal-Nagpur Railway with its headquarters at Kidderpore were impleaded as respondents. Subsequently, the railways were reorganized and the complaint was then suitably amended with the result that the Eastern Railway with its headquarters at Calcutta was substituted for both the original respondents. Later on, the Union of India was impleaded as respondent 2 to the complaint.

Both the respondents denied the allegations made in the complaint. It was alleged on their behalf that the existing tariff rates for the movement of jute were reasonable and not excessive. It was also alleged by the respondents that, beyond drawing attention to special rates which applied to traffic from certain stations on the Assam Railway section of the North-Eastern Railway to Kanpur, the appellant had not submitted concrete evidence, facts or figures to make out even a prima facie case that the prevailing tariff

rates for jute were unreasonable. The respondents' case was that the fact that the appellant's mill was situated far away from the port and as such had to incur additional cost had no relevance or bearing on the case made out in the complaint and the same cannot be treated as a ground for consideration of any special rates. The Union of India has specifically raised the additional plea that even after reorganization the two railways in question were separate entities and were working in the different regions having more or less divergent local conditions, and so they did not constitute one railway administration within the meaning of the Act and s. 28 was therefore inapplicable.

On these contentions four principal issues were framed by the tribunal. All the three members of the tribunal found that the freight rates for the transport of jute to Kanpur from certain stations in the Katihar section of the North-Eastern Railway were lower than those for its transport to Raigarh. In fact this position was conceded before the tribunal. On the question as to whether the disparity in the said rates amounted to "undue" preference under s. 28 of the Act, the members of the tribunal took different views. The President Mr. Lokur and Mr. Roy, member, were of the opinion that the two railways constituted one railway administration. They thought that it was just and equitable to hold that, although a railway administration may mean a manager, yet in this case it also meant the Government. They were, however, not satisfied that the disparity in the rates justified the appellant's complaint about "undue" preference. That is why they rejected the appellant's grievance that the railway administration had contravened the provisions of s. 28 of the Act. Mr. Subbarao, the third member of the tribunal, was inclined to take the view that, though the final control of both the railways may be with the Government or its representative, viz., the Railway Board, the actual management of the different zones was with the respective managers, and so the two railways in question cannot be said to constitute one railway administration. Proceeding to deal

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with the appellant's complaint on this basis, Mr. Subbarao rejected its argument of "undue" preference on the ground that s. 28 was inapplicable in the present case. In the result, the issue about "undue" preference was held against the appellant by all the members of the tribunal. In regard to the appellant's case that the increase in the freight for the transport of jute to Raigarh was unreasonable and excessive, the President Mr. Lokur and Mr. Subbarao found that the plea had not been proved by any evidence. On the other hand, Mr. Roy made a finding in favour of the appellant and held that the rates in question were shown to be unreasonable and excessive. Since the majority decision, however, was against the appellant on this point, the appellant's complaint was dismissed. It is against this order of the tribunal dismissing its complaint that the appellant has come to this Court in appeal by special leave.

Before dealing with the merits of the contentions raised by the appellant, it would be convenient to refer briefly to the provisions of the Act in regard to the constitution of the tribunal as they were in operation at the material time. Section 26 bars jurisdiction of ordinary courts in regard to acts or omissions of the railway administration specified in the section. Section 34 deals with the constitution of the Railway Rates Tribunal. According to this section, the tribunal consists of a President and two other members appointed by the Central Government. The tribunal had to decide the complaint filed before it with the aid of a panel of assessors as prescribed under s. 35 of the Act. Section 46 lays down that the decision of the tribunal shall be by the majority of the members sitting and shall be final. It is obvious that this provision about the finality of the tribunal's decision cannot affect this Court's jurisdiction under Art. 136 of the Constitution.

Let us now set out the material provisions of the Act on which the appellant's complaint is founded.

Section 28 provides:

"A railway administration shall not make or give any undue or unreasonable preference or advantage to,

or in favour of, any particular person or railway administration, or any particular description of traffic, in any respect whatsoever, or subject any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

A breach of the provisions of s. 28 by the railway administration may give rise to a complaint under s. 41 (1) (a). This section provides for complaints against a railway administration on five different grounds enumerated in cls. (a) to (e) and it requires that the tribunal to which such complaints may be made shall hear and decide them in accordance with the provisions of ch. V. In the present case, we are concerned with cls. (a), (b) and (c) of s. 41, sub-s. (1). Clause (a) covers cases of alleged contravention of the provisions of s. 28; cl. (b) deals with cases where it is alleged that the administration is charging station to station rates or wagon-load rates which are unreasonable; and cl. (c) deals with cases where the railway administration is levying charges which are unreasonable. Then s. 41, sub-s. (2) (i) lays down that, as soon as it is shown that the railway administration charges one trader or class of traders or the traders of any local area lower rates for the same or similar goods than it charges to other traders or class of traders or to the traders in another local area, the burden of proving that such lower charge does not amount to "undue" preference shall lie on the railway administration; and s. 41 (2) (ii) lays down that, in deciding the question of "undue" preference, the tribunal may, in addition to any other considerations affecting the case, take into consideration whether such lower charge is necessary in the interest of the public. The decision of the questions raised by the appellant before us will depend upon the scope and the effect of the provisions contained in ss. 28 and 41 of the Act.

Section 28 is obviously based on the principle that the power derived from the monopoly of railway carriage must be used in a fair and just manner in respect of all persons and all descriptions of traffic

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passing over the railway area. In other words, equal charges should normally be levied against persons or goods of the same or similar kinds passing over the same or similar area of the railway lines and under the same or similar circumstances; but this rule does not mean that, if the railway administration charges unequal rates in respect of the same or similar class of goods travelling over the same or similar areas, the inequality of rates necessarily attracts the provisions of s. 28. All cases of unequal rates cannot necessarily be treated as cases of preference because the very concept of preference postulates competition between the person or traffic receiving preference and the person or traffic suffering prejudice in consequence. It is only as between competitors in the same trade that a complaint of preference can be made by one in reference to the other. If there is no such competition then no complaint of preference can be made even though the charges levied against similar goods may not be equal. It may be possible to assume that there is competition between similar commodities put on the market in the same area for domestic consumption; but no such competition can be assumed between traffic of goods for export and traffic of similar goods for home consumption. It is only when goods or persons can be said to be *pari passu* that a question of preference arises and so it is where the competition between two persons or classes of goods is either admitted or proved that the question of the application of s. 28 would ever arise. Then again, even as between competing goods or persons, it would not be enough to prove mere preference to attract the provisions of s. 28, for theoretically every case of preference may not necessarily be a case of "undue" preference. It is only when the tribunal is satisfied that the railway administration has shown "undue" preference in favour of a particular class of goods that a complaint can be successfully entertained under s. 41(1)(a). The position under s. 28 thus appears to be clear. Whoever complains against the railway administration that the provisions of s. 28 have been contravened must establish that

there has been preference between himself and his goods on the one hand and his competitor and his goods on the other; and where it appears to the tribunal that such preference is "undue" preference, the complainant would be entitled to adequate relief under s. 41 (1) (a) of the Act.

It is true that, while enquiring into the complaint made under s. 41, as soon as the complainant shows inequality of rates and proves that the competing goods are charged less than his own, the onus shifts on to the railway administration to prove that such lower charge does not amount to "undue" preference. The initial burden to prove preference is on the complainant; but when the said burden is discharged by the proof of unequal rates as between the complainant and his competitor, it is for the railway administration to prove that the preference is not "undue". In the absence of satisfactory evidence adduced by the railway administration in justification of unequal rates, the tribunal may hold that the unequal rates complained against by the complainant amounts to "undue" preference. If, on the other hand, the railway administration leads evidence to show justification for the inequality of the rates, then notwithstanding the existence of unequal rates, the tribunal need not necessarily find that the administration has contravened the provisions of s. 28, because it is only where "undue" preference by the administration is shown that it can be said to have contravened the said section. In considering the question as to whether the alleged preference amounts to "undue" preference or not, the tribunal may also be entitled to consider whether the lower charge levied by the administration in respect of the competing class of goods was necessary in the interest of the public. That is the result of the provisions of s. 41, sub-s. (2)(i) and (ii).

In this connection we may refer to some of the English decisions to which our attention was invited. In *Lever Brothers, Limited* v. *Midland Railway Company*(1), it was held that the railway was not called upon to justify the disparity of rates on which the

(1) (1909) XIII Railway and Canal Traffic Cases, 301.

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complaint by Lever Brothers, Limited, was based because the applicants had failed to establish that Messrs. J. W. & Sons, Limited, in respect of whom the lower rate was charged, were the competitors of the applicants. Referring to the fact that the rates charged to the two respective companies were different, Vaughan Williams L. J. observed that he did not think that the difference in rates itself constituted any undue preference by the Midland Railway Company of Watsons as competitors of Levers. One of the reasons why the complaint made by Lever Brothers, Limited, failed was that it was not shown that Messrs. J. W. & Sons, Limited, were competitors of Lever Brothers, Limited, and that eliminated the application of s. 27 (1) of the Railway and Canal Traffic Act of 1888. Similarly in *Lancashire Patent Fuel Company Limited* v. *London and North-Western Railway Company* (1), it was held that no competition existed between coal carried for shipment and that carried for the trader and so the application made on the ground of undue preference was incompetent. It was proved in this case that the applicant's slack was carried by the railway companies at a higher rate than that for slack carried for shipment; but the complaint based on this unequal charges was rejected on the ground that "it cannot be said that the slack carried by the railway companies for the applicants ever comes into competition with the slack which is carried by the railway companies for ordinary shipment". On the other hand, in *The Nitshill and Lesmahagow Coal Company* v. *The Caledonian Railway Company* (2), it was held that the railway administration had shown undue preference because it was proved that the goods unequally charged were commercially and substantially of the same description and there was competition between them. Whether or not the goods were commercially and substantially of the same description was the point in issue between the parties; but the complainant's case was accepted and it was found that, on the whole, the two articles

(1) (1904) XII Railway and Canal Traffic Cases, 77, 79.
(2) (1874) II Railway and Canal Traffic Cases, 39, 45.

were substantially of the same description "and cannot but be regarded as competitive and that there ought not to be any difference in the rates at which they are carried". This decision shows that if unequal rates are charged for the carriage of similar or same goods travelling over similar or same areas, then the inference as to "undue" preference can be drawn unless the preference alleged is otherwise shown to be justified by valid reasons. In *Denaby Main Colliery Company* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1), the Earl of Selborne, in his speech, observed that he did not think it possible to hold (looking at the context in which the material words stand) that "the mere fact of inequality in the rate of charge when unequal distances are traversed can constitute a preference inconsistent with them". It may be pointed out incidentally that the provisions of s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31) are substantially similar to the provisions of s. 28 in our Act. Thus it is clear on these authorities that a complaint made under s. 41(1)(a) can succeed only if it is shown that preference has been shown by the railway administration to the complainant's competitor and the administration has failed to adduce evidence in justification of the said preference. It will now be necessary to consider the merits of the appellant's case in the light of this legal position.

The application made by the appellant does not in terms allege any "undue" preference at all. Mr. Isaacs, for the appellant, conceded that the application had not been happily worded; but his comment was that the pleadings of both the parties are far from satisfactory. That no doubt is true; but if the appellant wanted to make out a case against the railway administration under s. 41(1)(a), it was necessary that he should have set up a specific case of "undue" preference. The application does allege that the mills at Kanpur are able to carry raw jute at a lower rate but there is no allegation that between the goods of the Kanpur mills and the goods

(1) (1886) 11 App. Cas. 97, 114.

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of the appellant there is any competition in the market. On the other hand, the application refers to the advantage enjoyed by the jute mills in West Bengal and Madras over the appellant. Reading the complaint filed by the appellant as a whole, it would appear that the complaint by necessary implication refers to the competition between the goods of West Bengal and Madras mills on the one hand and the appellant's goods on the other. The appellant no doubt also avers that the rate charged for the transport of the goods are unreasonable and excessive but that is another part of the complaint which we will consider separately. It would, therefore, be difficult to accept Mr. Isaac's argument that the appellant's complaint should be read as including an allegation about competition between the appellant and the Kanpur mills. If no such allegation has been made by the appellant in his complaint, it would not be fair to criticise the respondents for not denying the existence of any such competition.

But apart from this technical difficulty, the appellant cannot even refer to any evidence on which it would be possible to base a conclusion as to the competition between the goods produced by the Kanpur mills and the appellant's goods. Mr. Isaacs has taken us through the evidence of Amritlal Bannerjee, Mustafi and Paul; but we have not been able to see any statement made by any of these witnesses which would show that there was a competition between the two sets of goods. On the other hand, such meagre evidence as is available on the record would seem to suggest that the goods produced by the Kanpur mills are sent to local markets for domestic consumption and do not enter the field of competition with the appellant's goods at all. That presumably is the reason why the appellant could not allege any competition between its goods and the goods of the Kanpur mills and none of the witnesses could speak to it. Mr. Isaacs was thus constrained to refer to the statement (R-18) filed by the respondents for the purposes of showing that the appellant's goods travelled to some centres in India which may be covered by the goods of the Kanpur

mills. In our opinion, this is an argument of desperation and it cannot help the appellant. One of the questions which was apparently raised before the tribunal was in respect of the volume of traffic and it is in connection with this particular part of the dispute that relevant statements were prepared by the respondents and filed before the tribunal. It would, we think, be unreasonable to make use of some of the statements contained in these documents for the purpose of deciding whether the appellant's goods and the goods produced by the Kanpur mills enter into competition in the markets in India. If the appellant had attempted to lead evidence on this point the respondents would naturally have had an opportunity to rebut that evidence. It is too late now to make out a case of this alleged competition and seek to prove it by stray statements contained in the document filed by the respondents before the tribunal for a wholly different purpose. That being the position of the evidence on the record we have no difficulty in accepting the view of the tribunal that competition between the goods of the Kanpur mills and the appellant's goods has not been alleged or proved in the present proceedings. If that be the true position, then the mere fact that the goods of the Kanpur mills are transported at more favourable rates would not attract the provisions of s. 28 of the Act.

The next question which remains to be considered is whether the appellant has proved that the rates charged by the administration in respect of the goods transported by the appellant are *per se* unreasonable. On this point the appellant has led no evidence at all. In its complaint it has no doubt averred that there has been an undue increase in the freight charges but no allegation is made as to why and how the actual charges are unreasonable. It appears that the appellant is under a disadvantage because its mills are situated at Raigarh in Madhya Pradesh far away from the shipping centres of transport and the competing mills in West Bengal and Madras are very near the export centres: but the fact that by its geographical location the appellant has to incur additional

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expenses of transport would not be relevant in considering the reasonableness of the freight charges. It is common ground that the freight charges are levied at the same rate by the railway administration in respect of either raw jute or jute products against all the mills. There is no inequality of rates so far as the mills in this zone are concerned. The appellant appears to have argued before the tribunal that the rates of freight leviable by the railway administration should have some relation to the costs incurred by the appellant in producing the jute goods as well as the commodity prices prevailing in the market. This argument has been rejected by the tribunal and we think rightly. It seems to us clear that the costs incurred by the appellant which are partly due to the appellant's geographical position can have no relevance whatever in determining the reasonableness or otherwise of the railway freight charged by the railway administration. Nor can the railway freight move up and down with the rise and fall of the commodity prices. In dealing with the question about the reasonableness of the railway freight, it would naturally be relevant to consider mainly the working costs of the railway administration and other material circumstances. When a complaint is made against the railway administration under s. 41(1)(b) or (c), the onus to prove the alleged unreasonableness of the freight rests on the complainant and if the complainant makes no effort to discharge this onus his plea that the rates are unreasonable must inevitably fail.

It appears that Mr. Roy, one of the members of the tribunal, was inclined to take the view that the special rates given to the Kanpur mills in Katihar area should be regarded as normal and reasonable rates; and since the rates charged to the appellant were higher than the said rates, he held that the rates charged against the appellant are unreasonable *per se*. In our opinion, this view is entirely erroneous. The rates charged to the Kanpur mills are admittedly special rates. Whether or not these concessional or special rates should have been granted to the Kanpur mills is a matter with which the present enquiry is

not concerned. There may be reasons to justify the said concessional rates; but it is plain that the special or concessional rates charged by the railway administration in another zone cannot be treated as the sole basis for determining what rates should be charged by the railway administration in other zones and so we do not see how the appellant can successfully challenge the majority finding of the tribunal that the rates charged against the appellant's goods are not shown to be unreasonable *per se*. In the result we must hold that the tribunal was justified in rejecting the complaint made by the appellant. The appeal therefore fails and must be dismissed with costs.

Before we part with this case, we would like to mention two points which were sought to be argued before us by the learned Additional Solicitor-General on behalf of the respondents. He challenged the correctness of the majority view of the tribunal that the two railways operating in two different zones in question constituted one railway administration within the meaning of s. 3, sub-s. (6). Alternatively, he argued that, even if the two railways were held to constitute one railway administration and that the disparity in charges amounted to the granting of "undue" preference to the Kanpur mills, s. 46 of the Act was a complete answer to the complaint under s. 41(1)(a). Since we have held in favour of the respondents on the points urged before us by Mr. Isaacs on behalf of the appellant, we do not propose to deal with the merits of these contentions.

Appeal dismissed.