A M/S. S.K.L. CO.

v.

CHIEF COMMERCIAL OFFICER & ORS.

(Civil Appeal No. 6905 of 2005)

B DECEMBER 29, 2015

[VIKRAMAJIT SEN AND SHIVA KIRTI SINGH, JJ.]

Railways Act, 1989 – ss. 30, 31, 70 and 71 – Contract of lease of Front Second Class Luggage Rake (FSLR) and C *Ventilated Parcel Van (VP) – By Railways – For a period of two years – The notification whereby the tenders were invited for grant of lease, challenged – On the ground that as a result of leasing out FSLR, the traders were denied the facility of transporting their goods at the rates specified in the Coaching* D *Tariff No. 24 Part III (Rates for Parcels & Luggage Traffic) – Single Judge of High Court quashed the notification holding that award of contract of lease was bad in law – Division Bench of High Court held that action of inviting tenders could not be quashed as being opposed to ss. 30 and 31 – However, the* E *Division Bench issued directions to the Railways to incorporate certain regulatory checks on the unbridled power of the lessee by fixing upper limit on the tariff that could be charged by the contractors – On appeal, held: Railways is empowered to auction the space for a particular period,* F *provided the auction contractor adheres to prescribed tariff – The Railways is bound to follow and implement the ethos and parameters set by the Act – The intendment behind a statute can be metamorphosed or diluted by the Parliament and not by a sub-delegate – The Railways is directed to* G *ensure that the successful tenderer, does not change carriage prices in excess of those prescribed by the Railways in Coaching Tariff No. 24 Part III – The appellants have failed to adduce any evidence to establish that the Railways had given undue preference in favour of any person, violating* H *ss. 70 and 71.*

Disposing of the appeal, the Court A

HELD: 1. In the instant case, the statute does not prescribe any particular manner in which the wagons are to be leased. Therefore, it cannot be said that if the manner of taking a particular action is prescribed under a statute, that action must be undertaken and performed in that manner or not at all. [Paras 9 and 12] [173-E; 166-C] B

Babu Verghese v. Bar Council of Kerala **(1999) 3 SCC 422 : [1999] 1 SCR 1121 ;** *Hussein Ghadially v. State of Gujarat* **(2014) 8 SCC 425 – held inapplicable.** C

2. The onus to prove that there has been a violation of Sections 70 and 71 of the Railways Act, 1989 is on the appellant, who failed to adduce any evidence to establish that the Respondent – Railways had given undue preference in favour of any person. This is especially so in light of the fact that the lease was given after an auction process. [Para 12] [173-F] D

3.1 The direction by the Division Bench to the Railway Administration that when calling for tenders, it should fix the outer limit or the upper limit of rates chargeable by the contractor for different trains, ensures a regulatory check upon the unbridled power of the contractor in fixing the tariff rates while accepting the parcel service of the third parties. This direction has attained finality so far as the Respondents are concerned inasmuch as they have failed to challenge them by filing an appeal. [Para 12] [173-G-H; 174-A] E F G

3.2 The Respondents have not earned an entirely favourable Judgment. Even though several points pressed by the victor of a litigation may have been viewed with favour, and the Respondent may have succeeded only one or some, if the matter is taken by H

A **the vanquished party to the portals of a superior forum, the victor may still press all the points argued by it earlier. A holistic reading of the impugned Judgment discloses that this direction was not given *en passant* or casually in that in the penultimate paragraph of the impugned**
B **Judgment the Division Bench emphasised that although they were allowing two writ appeals, the success of the Respondents was subject to compliance with the directions. [Para 12] [174-D-E, F-G]**

C *Nalakath Sainuddin v. Koorikadan Sulaiman* **(2002) 6 SCC 1 : [2002] 1 Suppl. SCR 1 – referred to.**

3.3 The Respondents are bound to follow and implement the ethos and parameters set by the Railways
D **Act. The intendment behind a statute can be metamorphosed or diluted by Parliament but not by a sub-delegate. If a shift from the Railways being a social vehicle to it being essentially a milch cow towards was intended, that mutation was only within the province of**
E **Parliament. The Court is, of course, not interfering with the right of the executive to formulate policy, but while doing so the Rubicon dividing the power of the principal and the delegate or sub-delegatee should not be ignored. [Para 14] [176-E, G; 177-C-D]**

F *Avinder Singh v. State of Punjab* **(1979) 1 SCC 137: [1979] 1 SCR 845 ;** *Agricultural Market Committee v. Shalimar Chemical Works Ltd.* **(1997) 5 SCC 516: [1997] 1 Suppl. SCR 164 ;** *P. Nalla Thampy Thera v. Union of India* **(1983)**
G **4 SCC 598 : [1984] 1 SCR 709 ;** *Viklad Coal Merchant v. Union of India* **(1984) 1 SCC 619 : [1984] 1 SCR 657 – relied on.**

3.4 However, it cannot be accepted that the Respondents are not entitled or empowered to auction
H

the space for a particular period. It may do so provided the auction contractor adheres to the prescribed tariff. The Respondents are directed to ensure that the successful tenderer, does not charge carriage prices in excess of those prescribed by the Respondents in Coaching Tariff No. 24 Part III. [Paras 16 and 17] [177-G; 178-A-B]

DCM v. Union of India **(1988) 1 SCC 86 : [1988] 1 SCR 383 – referred to.**

Case Law Reference

[1999] 1 SCR 1121	**held inapplicable**	**Para 9**
[1984] 1 SCR 657	**relied on**	**Para 9**
[1984] 1 SCR 709	**relied on**	**Para 9**
[1988] 1 SCR 383	**referred to**	**Para 10**
[2014] 8 SCC 425	**held inapplicable**	**Para 12**
[2002] 1 Suppl. SCR 1	**referred to**	**Para 12**
[1979] 1 SCR 845	**relied on**	**Para 14**
[1997] 1 Suppl. SCR 164	**relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6905 of 2005.

From the Judgment and Order dated 15.07.2004 of the High Court of Karnataka at Bangalore in Writ Appeal No. 5722 of 2001.

Mrs. Rani Chhabra, Yashraj Singh Deora, Ms. Priyadarshinee Singh, Ms. Shreya Agrawal, M/s. Mitter & Mitter Co., Advs. for the Appellant.

Ms. Kiran Suri, Sr. Adv., Ms. Vimla Sinha, Ms. Shweta Garg, S. N. Terdal, B. Krishna Prasad, Advs. for the Respondents.

The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J. 1. This Appeal assails the Judgment dated 15.7.2004 of the High Court of Karnataka in

A Writ Appeal Nos. 5722-5723 of 2001 setting aside the judgment of the learned Single Judge dated 25.7.2001 who had allowed both the Writ Petitions and quashed the impugned Notification, holding that the awarding of contract of lease of FSLR and VP is bad in law. The factual matrix of the present
B case is that in pursuance of the budget speech of the Hon'ble Minister for Railways in the year 1999-2000, the Respondents issued a tender notice no. 3/2000-2001 (hereinafter referred to as 'impugned notice') on 19.6.2000, inviting sealed tenders from traders and other interested parties for leasing of Front
C Second class Luggage Rake of 4 or 8 tons and Ventilated Parcel Van of 18 tons capacity on the Broad Gauge on payment of lump sum rate for loading of parcels by certain trains for a period of two years.

2. The first compartment, immediately after the engine,
D is known as Front Second Class Luggage Rake (FSLR) and each FSLR consist of four different sections. The first section is meant for carrying goods/parcels of 4 tons capacity, followed by the section known as the 'Brake Van' which is occupied only by the guard. The third section is for carrying unreserved
E passengers, and the last section is again a luggage compartment with a capacity of 4 tons. Similarly, the last compartment in each train is known as Rear Second Class Luggage Rake (RSLR), which also consists of four sections similar to the FSLR. Further, if there is excess demand, a
F Ventilated Parcel Van (VP) is added to the train after reducing, if necessary, a passenger compartment so as not to exceed the maximum hauling capacity of the engine. The VP is meant exclusively for the purpose of carrying parcels and its normal capacity is 18 tons. The Respondents had noticed that in some
G trains, most of the time, the luggage capacity available in FSLR and RSLR was not being fully utilized resulting in loss of revenue. In view of this, as a matter of policy, it was decided by the Government of India to lease the luggage space in FSLR to traders and other interested persons after inviting tenders
H from them.

3. FSLR of Train no. 2627 Bangalore- New Delhi- Karnataka Express (Daily) [hereinafter 'Karnataka Express'] was leased for a period of two years at Rs. 19,800/- per 4 metric ton space per day. The lease was given on 24.7.2000 in favour of a company known as BIC Logistic Limited, in pursuance to a tender issued by the Respondents. The lessees agreed to pay for the two spaces each of 4 tons at that rate aggregating to Rs. 39,600/- per 8 tons per day. The Appellant filed Writ Petition No. 27568 of 2000 before the High Court of Karnataka, challenging the impugned notice. The Appellant is engaged in trading of grapes who contended that as a result of the Respondents leasing out the FSLR in the Karnataka Express, the Appellant was denied the facility of transporting grapes from Bangalore to New Delhi at the rates specified in the Coaching Tariff no. 24 Part III (Rates for Parcels & Luggage Traffic), which came into effect on 1.4.2000. Another trader of grapes filed Writ Petition No. 37150 of 2000 before the High Court of Karnataka on 27.11.2000 seeking to restrain the Respondent- Railways from charging any tariff other than that specified in Coaching Tariff No.24 Part III. The learned Single Judge by common Judgment dated 25.7.2001 allowed both the Writ Petitions and quashed the impugned notification, holding that the awarding of contract of lease of FSLR and VP is bad in law. Aggrieved by the decision of the learned Single Judge, the Respondents preferred two appeals.

4. Before the Division Bench, the Respondents contended that the learned Single Judge erred in holding that the authority of the Respondents to lease the carrying capacity in the trains is only in accordance with Section 30 and 32 of the Indian Railways Act, 1989 (for brevity the 'Act') which, for convenience, are reproduced below:

> 30. (1) The Central Government may, from time to time, by general or special order fix, for the carriage of passengers and goods, rates for the whole or any part of the railway and different rates may be fixed for different

A classes of goods and specify in such order the conditions subject to which such rates shall apply.

(2) The Central Government may, by a like order, fix the rates of any other charges incidental to or connected with such carriage including demurrage and wharfage for the B whole or any part of the railway and specify in the order the conditions subject to which such rates shall apply.

31. The Central Government shall have power to—

(a) classify or reclassify any commodity for the purpose C of determining the rates to be charged for the carriage of such commodities; and

(b) increase or reduce the class rates and other charges.

32. Notwithstanding anything contained in this Chapter, D a railway administration may, in respect of the carriage of any commodity and subject to such conditions as may be specified,—

(a) quote a station to station rate;

E (b) increase or reduce or cancel, after due notice in the manner determined by the Central Government, a station to station rate, not being a station to station rate introduced in compliance with an order made by the Tribunal;

F (c) withdraw, alter or amend the conditions attached to a station to station rate, other than conditions introduced in compliance with an order made by the Tribunal; and

(d) charge any lump sum rate.

G

5. The Respondents contended that the learned Single Judge failed to understand the objective and purpose with which the available parcel space in FSLR and VP was being sought to be exploited. The Respondents stated that it aimed H to benefit by getting maximum rate without affecting the

interests of the general public, for whom there was still adequate provision of space available in every train. The Respondents further stated that in pursuance of an order of the High Court dated 28.1.2002, an affidavit had been filed by the Respondents which would allay any apprehension of the Appellant, with respect to it being inconvenienced in transporting its commodities. The Respondents will not hesitate to consider adding another wagon to meet the needs of the general public. Finally, the Respondents contended that there was no express provision permitting them to give the wagon on lease, however, *au contraire*, neither was there any provision under the Act which prohibited the Respondents from doing so. The Appellant while supporting the order of the learned Single Judge, placed reliance on Section 70 and 71 of the Act, which is being provided for the facility of reference.

> 70. A railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or any particular description of traffic in the carriage of goods.
>
> 71. (1) The Central Government may, if it is of the opinion that it is necessary in the public interest so to do, by general or special order, direct any railway administration—
>
> (a) to give special facilities for, or preference to, the carriage of such, goods or class of goods consigned by or to the Central Government or the Government of any State or of such other goods or class of goods;
>
> (b) to carry any goods or class of goods by such route or routes and at such rates;
>
> (c) to restrict or refuse acceptance of such goods or class of goods at or to such station for carriage, as may be specified in the order.
>
> (2) Any order made under sub-section (1) shall cease to have effect after the expiration of a period of one year

A from the date of such order, but may, by a like order, be renewed from time to time for such period not exceeding one year at a time as may be specified in the order.

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

C 6. The Appellant contended that Section 70 was an implied restriction on the Respondents capacity to call for such tenders. The only exception to Section 70 is Section 71, which can be exercised only on the discretion of the Central Government, for the purpose of public interest. The Appellant D contended that by inviting such tenders, no public interest was being served and instead has led to the creation of a monopoly in favour of one person with respect to the mode of transportation, which in turn was detrimental to public interest. Extending the line of argument on Section 71, the Appellant E contended that the Central Government had not issued any special or general order, enabling the Respondents to give special or preferential facility in the carriage of goods to anyone who offers the highest lump sum rate. The Appellant submitted that the content of the affidavit filed by the Respondent ran F counter to the impugned Notification. As a result, the assurance sought to be given by means of an affidavit appeared to be an imaginary one. Finally, the Appellant submitted that the contractors are charging an exorbitant rate of Rs.8 per kg for transporting the consignment, whereas the Railways were G charging only Rs.2.38 per kg for the transport of perishables from Bangalore to Delhi. This power to revise the tariff rates was bestowed exclusively on the Central Government under Section 32, and thus its delegation to a third party by entering into a lease agreement is in contravention of the statutory H provisions.

7. In its reply, the Respondents contended that Section 70 of the Act stated that the Railway Administration shall not give any undue or unreasonable preference. It was submitted that the Respondent-Railways, by inviting tenders pursuant to a policy decision will not amount to giving any undue or unreasonable preference to one competitor over another. Further, it was submitted that even in the absence of Section 70, the Railway Administration being an Authority postulated by Article 12 of the Constitution, could not have discriminated between similarly placed parties, as that would tantamount to a violation of Article 14 of the Constitution. A B C

8. The Division Bench of the High Court opined that the impugned Notification was not issued under Section 30 and 31 of the Act, but instead was a product of a policy decision of the Government of India which aimed to augment the earnings of the Respondent-Railways by leasing the FSLR and VP in different trains. The Respondent-Railways are run as a commercial undertaking, and its administration cannot be prevented from taking steps to increase its revenue, as long as they are not detrimental to the interest of the general public. It was held that the action of inviting tenders could not be quashed as being opposed to Section 30 and 31. The High Court observed that to prove that Section 70 had been violated, the Appellant had to establish that undue preference had been given to one over another, and as the Appellant failed to provide any cogent evidence to that effect, this contention was dismissed. The apprehension of the Appellant was that due to the leasing out of space to a third party, there was less than adequate space for the general public, and that, as a result they would have no choice but to approach the third party and pay any rate that he may quote. The High Court observed that this apprehension of the Appellant had been allayed by the affidavit filed by the Respondents wherein they had stated that if the need arises they would ordain more space for the parcel service. Thus, the High Court allowed the appeals. However, with the intention of safeguarding the interest of the general D E F G H

A public, it also issued directions to the Respondent to incorporate certain Regulatory checks on the unbridled power of the lessee. The checks were meant to be in the form of an upper limit on the tariff that could be charged by the contractors for different trains. Aggrieved by the decision of the High Court,
B the Appellant has filed the present appeal.

9. The arguments of the learned Counsel for the Appellant are fourfold. Firstly, Babu Verghese v. Bar Council of Kerala, (1999) 3 SCC 422 reiterates that if the manner of taking a particular action is prescribed under a statute, that action must
C be undertaken and performed in that manner or not at all; as there is no provision under the statute to lease out space to a third party, the Respondents are hit by the said principle. Secondly, the decision of the Respondent-Railways to lease the parcel space in favour of a particular individual amounted
D to an unreasonable preference being given to that individual and therefore violated Section 70 (supra). Thirdly, the learned counsel relied on the maxim *delegatus non potest delegare* and submitted that under Sections 30 to 32, the power to fix the tariff rate is conferred only on the Central Government and
E the Respondent-Railways. Thus, by further delegating their authority, they violate the established legal principle that a delegatee cannot sub-delegate. Finally, the learned Counsel for the Appellant elaborated on the role of the Railways as a social vehicle, by citing the case of **Viklad Coal Merchant** v.
F Union of India, (1984) 1 SCC 619, the relevant paragraph reads thus:

> 13. Re Ground 1: Railway is a common carrier and being State owned it is subject not only to the provisions
G of the Act but also the fundamental rights guaranteed by Part III of the Constitution. However much before the advent of the Constitution when different railways were owned by incorporated companies, Section 28 of the Act precluded the different railway administrations from
H granting undue preference to any particular person or

any particular traffic or to any particular railway administration, or subject anyone to any undue or unreasonable prejudice or disadvantage in the matter of transport of goods or passengers. Railway being a State monopoly, to checkmate its monopolistic power in the larger public interest it has to be subjected to regulatory measures. Simultaneously it became necessary to arm Central Government with power to direct railway administration to give preference in the matter of transport of the goods of the Government, Central or State or specified goods to meet the demands of various regions as well as needs of Government. Intention was to classify Government in a class by itself for the purpose of Article.

14. To meet the challenge of Article 19(1)(g) the Central Government was armed with power to accord priority in transport of goods in larger public interest. Soon after the advent of the Constitution, to arm the Central Government with requisite power to direct the railway administration to give special facilities for or preference to the transport of any such goods or class of goods consigned to the Central Government or to the Government of any State or such other goods or class of goods as may be specified in the order, Section 27-A was introduced in the Act which enabled it by a general or special order to direct the railway administration to grant special facilities for or preference to the transport of goods. Such a general or special order can be issued by the Central Government if in its opinion it is necessary in the public interest to do so. Now indisputably the goods consigned to the Central Government or to Government of any State must obviously have a priority over what we may loosely describe as private transporters, because it is well-settled that the Central or the State Government is in a class by itself. This view is founded on the assumption that all activities of the

A State are in public interest in the sense that they are either undertaken on behalf of the public or that the loss or gain arising from them falls upon the public. The goods consigned to the Central or the State Government are, unless shown to the contrary necessarily to be used
B to carry on governmental activity undertaken for the benefit of public or to subserve some public interest and which may as well include the efficient administration of the governmental agencies. Section 27-A also confers power to direct any railway administration to give special
C facilities for or preference to the transport of goods or a class of goods as may be specified in a general or special order that may be issued in this behalf. The Central Government is better equipped to know what class of goods are required to be sent to any particular
D area expeditiously to meet some shortage, or for national security or to meet an emergency or any natural or man-made catastrophe so as to accord special treatment in the matter of transport. Section 28 can be said to some extent to be a corollary to Section 27-A
E inasmuch as the railway administration on its own is prohibited from giving 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
F 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. To repeat railway being a State monopoly undertaking, it had to be statutorily controlled from
G abusing its monopolistic character by prohibiting it from giving any undue or unreasonable preference or advantage or acting in any manner which would evidence undue or unreasonable prejudice or disadvantage in any respect whatsoever. Equality
H guaranteed by Article 14 is translated into statutory

provision in Section 28. A State monopoly like the railway administration cannot be trusted to act fairly and that is the object underlying Section 28. If everyone was to get equal facility for transport of his goods by railway without anyone claiming priority or anyone having power to grant preference or special facility, in an emergency this equal opportunity would create a havoc. Therefore on the other hand, the Central Government to meet the needs of the country arising in any eventuality can give directions for giving special facilities for or preference to the transport of goods or any class of goods. In the absence of power such as conferred by Section 27-A, floods, droughts, national security requirements, unscrupulous hoarders, artificial shortages, materials for national projects in a country of the dimensions of India cannot be effectively and adequately tackled. This is the genesis of the power conferred by Section 27-A.

The judgment discusses the Indian Railways Act, 1890 in which, Sections 27 and 28 correspond to Section 70 and 71 of the present Act. To further buttress his final submission on the role of the Railways, the learned Counsel for the Appellant also cited **P. Nalla Thampy Thera** v. Union of India, (1983) 4 SCC 598, the relevant paragraph has been provided below:

25. We have said earlier that the Railways are a public utility service run on monopoly basis. Since it is a public utility, there is no justification to run it merely as a commercial venture with a view to making profits. We do not know — at any rate it does not fall for consideration here — if a monopoly based public utility should ever be a commercial venture geared to support the general revenue of the State but there is not an iota of hesitation in us to say that the common man's mode of transport closely connected with the free play of his fundamental right should not be. We agree that the Union Government should be free to collect the entire

A operational cost which would include the interest on the capital outlay out of the national exchequer. Small marginal profits cannot be ruled out. The massive operation will require a margin of adjustment and, therefore, marginal profits should be admissible.

B 10. Per contra, learned Senior Counsel for the Respondents contended that the Appellant has only challenged the impugned Notification. However, the impugned notification was only an extension of what was envisaged in the policy of the Government, and that the Appellant erred by not challenging C the said policy decision of the Government. The learned Counsel relied on Article 73 of the Constitution and submitted that the Central Government had full power to deal with the property of the Respondent-Railways in any manner it found appropriate or beneficial. Further, it was contended that the D onus to prove unreasonableness was on the Appellant. This contention was supplemented with the case of DCM v. Union of India (1988) 1 SCC 86, the relevant portion has been reproduced below:

E 12. The relevant provisions of the Railways Act, 1890, which have a material bearing on the question are these:

Section 41 provides for filing complaints against Railway Administration. The section provides as follows, so far as it is material:

F "41. (1) Any complaint that a railway administration

(a) is contravening the provisions of Section 28 or

(b) is charging for the carriage of any commodity between two stations a rate which is unreasonable, or

G (c) * * *

may be made to the Tribunal and the Tribunal shall hear and decide any such complaint in accordance with the provisions of this chapter."

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Section 28 provides: A

28. 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. B

13. The third question formulated by us relates to the contravention of Section 28 of the Railways Act. The scope of this section has been considered by this Court in Rajgarh Jute Mills Ltd. v. Eastern Railway. There it was observed that a party who complains against the railway administration that the provisions of Section 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. Gajendragadkar, J. (as he then was) observed: C D

"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 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 Section 28. All cases of unequal rates cannot necessarily be treated as cases of preference because the very concept of preference E F G

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A 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 B other."

14. In the light of these principles, the Tribunal considering the material on record held that there is no evidence produced by the company to justify any grievance under Section 28. We see no reason to disagree with this C conclusion. It is, in our opinion, perfectly justified. In fact Mr K.K. Jain learned Counsel for the appellant also did not seriously dispute the correctness of that finding recorded by the Tribunal.

D 15. We may now turn to the second question. Mr K.K. Jain urged that the rate charged by the Railway Administration is per se unreasonable. Here again the onus to prove the alleged unreasonableness of the freight rests on the company. It is for the company to establish E that the rate charged by the Railway Administration for the carriage of Naptha is unreasonable. Of course, this onus could be discharged by relying upon the material produced by the Railways. Mr Jain, therefore, relied upon a statement Exhibit C-46 in support of his case. Exhibit F C-46 is a statement of surplus "working cost" in respect of carriage of Naptha from Bajuva to Dadhevi. It is, in our opinion, not necessary to analyse the statement. Even assuming that the Railways are earning some surplus income after deducting the operation cost that by itself G is no ground to hold that the freight charged is per se unreasonable. It must be borne in mind that the Railways are run as a commercial undertaking and at the same time it being an instrumentality of the State, should serve the national interest as well. There is however, no H obligation on the Railways to pass on the extra amount

realised by the carriage of goods to customers. Nor it is necessary to share the profit with the commuters. As Mr Barua learned Counsel for the Railways said that in the case of commodities of national needs such as foodgrains, crude oil etc., it may be necessary for the Railways to charge below the operation cost. To offset such a loss the Railways may charge higher freight for certain other classified commodities. Therefore, it seems to us, that the cost of operation cannot by itself be the basis for judging the reasonableness of the rate charged.

11. The Learned Senior Counsel submitted that the Appellant had failed to furnish any evidence to justify his claim that the Respondents had acted in an unreasonable manner by favouring one person over another.

12. We have carefully considered all the arguments addressed before us. We do not find any force in the contention of the Appellant on the applicability of the Taylor vs. Taylor principle applied by this Court in most recently in Hussein Ghadially vs. State of Gujarat (2014) 8 SCC 425. In the instant case the statute does not prescribe any particular manner in which the wagons are to be leased. On the issue of Section 70 and 71, we are in agreement with the contention of the Respondent, that the onus to prove that there has been a violation of the said section is on the Appellant, who failed to adduce any evidence to establish that the Respondent – Railways had given undue preference in favour of any person. This is especially so in light of the fact that the lease was given after an auction process. The Division Bench directed the Railway Administration that when calling for tenders, it should fix the outer limit or the upper limit of rates chargeable by the contractor for different trains. This ensures a regulatory check upon the unbridled power of the contractor in fixing the tariff rates while accepting the parcel service of the third parties. This direction has attained finality so far as the Respondents are concerned inasmuch as they have failed to challenge them

A by filing an appeal. As far back as on 5.8.2015 we had brought this state of affairs to the notice of the learned Senior Counsel for the Respondents. A challenge to this direction could have been made in any legally known manner to rectify the position. This is sought to be salvaged by learned Senior Counsel by
B relying on certain observations of a coordinate Bench in **Nalakath** Sainuddin v. Koorikadan Sulaiman 2002 (6) SCC 1. However, the question which has to be addressed by us is whether or not the Respondent is "a person aggrieved" by the impugned Judgment. In our opinion, we are not confronted by
C multiple possibilities on this aspect other than that the Respondents are persons aggrieved in view of the explicit direction of the Division Bench in the impugned Judgment extracted above. What we have before us is not an instance of the Respondents earning an entirely favourable Judgment,
D even though some of the arguments proffered by them may not have found favour with the Court. The settled position in law as is evident from a proper perusal of **Nalakath** is that even though several points pressed by the victor of a litigation may have been viewed with favour, and the Respondent may
E have succeeded only one or some, if the matter is taken by the vanquished party to the portals of a superior forum, the victor may still press all the points argued by it earlier. The Judgments of the High Courts which have been analysed by this Court in **Nalakath** do not go to the extent, as they clearly
F cannot, that a critical direction which is unfavourable to the Respondent can be assailed even in the absence of filing a cross or a separate appeal. A holistic reading of the impugned Judgment discloses that this direction was not given *en passant* or casually in that in the penultimate paragraph of the impugned
G Judgment the Division Bench emphasised that although they were allowing two writ appeals, they were at pains to reiterate that the success of the Respondents was subject to compliance with the aforementioned directions which we entirely affirm.

13. Instead of complying with the directions a futile effort
H has been made by the Respondents to dilute them, nay render

nugatory by a side wind in terms of the additional affidavit dated 3.9.2015 a perusal of which makes it abundantly clear that it should have assailed the directions in the impugned Judgment. These asseverations, inter alia, are as follows:

"That it is respectfully submitted that fixing of outer/upper limit cannot be done by Railways for the reasons listed as follows:

(i) The contracts for leasing parcel space of the Brakevans is an activity which comes under earnings contract in which price is not regulated by Railways.

(ii) The parcel leasing policy is introduced to maximize revenue through parcel traffic and to avoid underutilization of Parcel space available in each train.

(iii) The leaseholder takes the parcel space of the Brakevans after going through the competitive bids and he also incurs expenses towards ancillary services provided to his customers.

(iv) The leaseholder cannot charge exorbitant rates because there are alternative trains for the public in which in which parcel space is held by other lease holders as well as Railway. The customers can move their cargo either by road or by air. Thus in effect, these rates are actually market determined rates and no leaseholder can increase it beyond a point that traffic can bear in view of presence of other competing modes i.e. trucks flights and other trains wherein both leased and departmental parcel portions are available.

(v) The leaseholder takes the responsibility for safe custody of goods entrusted to him and compensates for any loss or damages on his own during transit.

(vi) If the charges levied by the leaseholder are high then there is every chance for the customers to move the

A traffic by road or air. Hence, the leaseholder is constrained to keep the rates low after ensuring his marginal profit.

(vii) Since introduction of Parcel Leasing Policy in the year 1991 and till date, except for this petition there B is no other case pending before any of the Hon'ble Court with regard to fixation of outer/upper limit.

(viii) Parcel Leasing Policy is well patronized among the merchant community and running successfully for the last 25 years all over India and all the parties viz., C the merchant community, leaseholder and Railways are benefited by this scheme."

14. The Appeal before us can be disposed of by us without any further complaint or grievance by the Appellant, by D directing the Respondents to fix the outer or upper limit of rates chargeable by contractors for different trains. We say this for the simple reason that the Respondents are bound to follow and implement the ethos and parameters set by the Railways Act. The learned Single Judge had followed and applied E decisions of this Court when called upon to interpret different sections of the Act. Over a quarter of a century ago it has been emphasised that the Railways enjoy a monopolistic character, the justification of corollary of which would be the fulfilment and attainment of public interest. The Railway Budget, F presented each year, is studied threadbare with special interest and emphasis on what the Central Government hopes to achieve in the coming year, and the most prominent and predominant feature whereof is the advancement of social interests. That the intendment behind a statue can be G metamorphosed or diluted by Parliament but not by a sub-delegate has been unequivocally reiterated by this Court. Avinder Singh v. State of Punjab 1979 (1) SCC 137 enunciates that the Legislature cannot efface itself; it cannot delegate the plenary or essential legislative function; and even if there is delegation, the delegate must function under its supervision H

otherwise "if the delegate is free to switch policy it may be usurpation of legislative power itself". In Agricultural Market Committee v. Shalimar Chemical Works Ltd. (1997) 5 SCC 516 we have restated that "the legislature cannot abdicate essential legislative function in favour of another. Power to make subsidiary legislation may be entrusted by the legislature to another body of its choice but the legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates". In applying this dicta, it seems to us that if a shift from the Railways being a social vehicle to it being essentially a milch cow towards was intended, that mutation was only within the province of Parliament. This is especially so keeping in perspective the observations made by this Court in **P. Nalla Thampy Thera** and **Viklad Coal Merchant**. In saying so, we do not intend, even a whit, to interfere with the right of the executive to formulate policy, but while doing so the Rubicon dividing the power of the principal and the delegate or sub-delegatee should not be ignored.

15. Railway tariff no doubt has to be realistic and keep pace with time and if the State so perceives, need not be a losing financial proposition. While it may be both pragmatic and sagacious to auction FSLR & VP it can be done with an objective of gathering the optimum revenue. It has not been contended before us nor is any material available disclosing that the tariff itself has been increased by adherence to the statutory procedure.

16. We are, however, unable to accept the argument articulated on behalf of the Appellant that the Respondents are not entitled or empowered to auction the space for a particular period. It may do so provided the auction contractor adheres to the prescribed tariff. We permit a period of three months to the Respondents to comply with the impugned Judgment of the Division Bench.

17. The Appeal is accordingly disposed of in these terms. The Respondents are directed to ensure that the successful tenderer, in our case, Respondent No.4, does not charge carriage prices in excess of those prescribed by the Respondents in Coaching Tariff No. 24 Part III. It will be seen that this direction is not drastically different to that contained in the impugned Judgment since the fixation of "the outer limit or the upper limit of rates chargeable by the contractor" would have been carried out by complying with a procedure envisaged by law. The Judgment of the Division Bench is upheld, but to this extent only.

Kalpana K. Tripathy

Appeal disposed of.