

Delhi High Court

Fertiliser Association Of India ... vs Union Of India & Ors on 18 March, 2015

Author: Rajiv Sahai Endlaw

*IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 18th March, 2015

+ LPA No.94/2015 & CM No.3076/2015 (for stay)

FERTILISER ASSOCIATION OF INDIA (FAI) Appellant

Through: Mr. Sandeep Sethi, Sr. Adv. with
Ms. Kaveeta Wadia & Mr. Shashank
Tripathi, Advs.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Navin Chawla with
Ms. Prabhsahay Kaur, Ms. Divya
Pandey & Mr. Ketan Paul, Advs.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This intra-court appeal impugns the judgment dated 6th January, 2015 of the learned Single Judge of this Court of dismissal of W.P.(C) No.4898/2013 preferred by the appellant.
2. The appeal came up before us first on 23rd February, 2015 when the counsel for the respondents no.1 to 5 [(i) Union of India, (ii) Joint Secretary, Department of Fertilizers, (iii) Dy. Secretary, Department of Fertilizers; (iv) Under Secretary, Department of Fertilizers and (v) Director, Department of Fertilizers] appeared on advance notice and with the consent of the counsels the appeal was finally heard at the stage of admission and judgment reserved.
3. The appellant filed the writ petition from which this appeal arises impugning, (i) paras 5&6 of the O.M. dated 3rd May, 2013; (ii) paras (ii) & (iii) of another O.M. dated 3rd May, 2013; (iii) O.M. dated 21st June, 2013; and, (iv) O.M. dated 26th June, 2013 issued by the respondents, pleading:-

(i) that the appellant Association represents fertilizer manufacturers, distributors etc.;

(ii) that there are 17 essential nutrients for growth and development of plants and of which Nitrogen (N), Phosphate (P) and Potash (K) constitute the primary nutrients;

(iii) that 90% of the countrys requirement of phosphate and the entire requirement of potassium, is met through imports;

(iv) that policies framed from time to time for sale price of fertilizers are aimed at providing fertilizers to the farmers at as less retail price (MRP) as possible and to cover up the actual costs, which are higher than the MRP, incurred by the fertilizer manufacturers of the country, by giving a Government subsidy;

(v) that the Government w.e.f. 1st April, 2010 introduced Nutrient Based Subsidy (NBS) Scheme to ensure availability of fertilizers with appropriate nutrients in the market at reasonable prices;

(vi) that all fertilizers covered by the NBS Scheme are notified under the Fertilizer (Control) Order, 1985;

(vii) that as per the NBS Scheme, the Government was required to notify the subsidy rates for nitrogen, phosphate, potassium and sulphate on per kilogram basis for each year and the subsidy rates so notified were to be converted into subsidy per tonne for each subsidized fertilizer product, based on its contents of nutrients; the subsidy rates were to be notified for the entire year;

(viii) para (ix) of the NBS Scheme provided that the market price of the subsidized fertilizers except urea were to be determined based on Demand Supply Basis and the fertilizer companies were required to print Retail Price along with applicable subsidy on the fertilizer bags and any sale above the printed net Retail Price was to be punishable under the Essential Commodities Act, 1955 (EC Act);

(ix) that the NBS Scheme was notified on 16th March, 2010, applicable w.e.f. 1st April, 2010;

(x) that the Government however vide Notification dated 5 th May, 2011 by restricting the increase by the fertilizer companies in MRP then prevailing of Rs.10750/- per metric tonne by Rs.600/- per metric tonne only;

(xi) that on opposition by the fertilizer industry, the Government vide Notification dated 8th July, 2011 again clarified that the market price of subsidized P & K fertilizers will be open and will be fixed by the fertilizer companies at reasonable level;

(xii) however vide O.M.(23011/5/2013-MRP) dated 3rd May, 2013, (clauses 5&6 whereof were impugned in the petition), the fertilizer companies were required to reduce the MRP by a minimum of Rs.1,500/- per metric tonne for Di-Ammonium Phosphate (DAP) Fertilizers and by Rs.1,000/- per metric tonne for Muriate of Potash (MOP) Fertilizers and that too retrospectively w.e.f. 1st April, 2013; for the purpose of reduction in MRP, the reference MRP of DAP and MOP fertilizers were prescribed as Rs.24,000/- per metric tonne and Rs.17,000/- per metric tonne respectively;

(xiii) that the Government, by fixing the MRP, attempted to go beyond the four corners of NBS Scheme and re-introduced cost plus approach which had been specifically done away with by the NBS Scheme;

(xiv) by another O.M. (23011/5 (NBS-Policy)/2013-MRP) dated 3rd May, 2013 (clauses (ii) and (iii) whereof were impugned in the writ petition) the Government mandated all fertilizer companies to alongwith their claims of subsidy submit certified cost data for the purpose of monitoring of the reasonableness of the MRP of P&K Fertilizers;

(xv) that the two OMs dated 3rd May, 2013 to the aforesaid extent are inconsistent with the NBS Scheme which gives freedom to fertilizer industry to fix MRPs according to market conditions; (xvi) that vide Notification dated 21st June, 2013 (impugned in the writ petition) the Government sought to implement the second O.M. dated 3rd May, 2013 by demanding the costing data in prescribed formats;

(xvii) that vide OM dated 26th June, 2013 (also impugned in the writ petition) the Government indicated the Reference Maximum Retail Price and expected minimum reduction in MRP as per para 5 of O.M. dated 3rd May, 2013 which stipulated that at the level of subsidy announced for the year 2013-14 the fertilizer companies were required to reduce MRP of DAP and MOP by a minimum of Rs.1,500/- per metric tonne and Rs.1,000/- per metric tonne respectively; it further provided that for the purpose of reduction in MRP, reference MRP of DAP & MOP shall be taken into account as Rs.24,000/- per metric tonne and Rs.17,000/- per metric tonne respectively and that a commensurate reduction in MRP in other grade of fertilizers covered under the NBS shall be done by the fertilizer companies;

(xviii) that the aforesaid OMs tinker with the basic NBS and are beyond the power of the Government;

(xix) that the basic foundation of NBS Scheme was MRP being open and market driven, to be determined by the fertilizer units; and, (xx) that when criteria is fixed by policy, the Government is bound to act in accordance with the said policy.

4. The Government / respondents contested the writ petition by filing a counter affidavit pleading:-

(a) that after the Notification dated 3rd May, 2013 fixing subsidy rates for 2013-14 and reduction in MRPs of DAP and MOP and commensurate reduction in MRPs of other subsidized P&K Fertilizers, a meeting with the representatives of the fertilizer Industry led by the appellant was held on 6 th May, 2013 and was attended by the CEOs of leading fertilizer companies of the country and all of whom expressed satisfaction with the revised policy and the new subsidy rates; another such meeting was held on 23rd July, 2013 and in accordance with the decision taken therein to educate consumers about the reduction in prices of fertilizers, the fertilizer

companies had issued advertisements giving wide publicity in the vernacular press about the reduced prices;

(b) that the Supreme Court in BALCO Employees Union (Regd.) Vs. Union of India (2002) 2 SCC 333 has inter alia held that Courts refrain from interfering with economic decisions as economic expediencies lack adjudicative disposition unless the decision is demonstrated to be so violative of the constitutional rights or legal limits on power or so abhorrent to reason Courts would decline to interfere;

(c) that even if the appellants were to claim legitimate expectation, they are not entitled thereto also in accordance with UOI Vs. International Trading Company (2003) 5 SCC 437;

(d) that right since independence sale, pricing and quality of fertilizers has been regulated to make available agricultural inputs including fertilizers to farmers at affordable rate so as to maintain prices of agricultural products and food security for the people; in consonance therewith, Fertilizer Control Order was issued in the year 1957 and Fertilizer (Movement Control) Order in the year 1973, both under the EC Act; again in consonance therewith, subsidy was introduced in the year 1977 for phosphate, due to its high price in the international market;

(e) that as per the exigencies from time to time, the policy in this regard was changed;

(f) under the NBS Scheme a fixed rate of subsidy on N, P, K and S is announced on annual basis after a thorough consultation process;

(g) MRP of P&K Fertilizers was left open for the year 2010-2011 under the NBS Scheme and fertilizer manufactures / marketeers were allowed to fix the MRP; the fertilizer companies had assured that MRP of P&K Fertilizer would not be increased beyond Rs.600/- per metric tonne;

(h) that however in the last quarter of 2010-11 the fertilizer companies started increasing prices of many P&K Fertilizers even though the landed price in the country remained stable, causing inconvenience to the farmers;

(i) the Government accordingly intervened and made modification in the policy to incorporate the clause that the fertilizer companies should fix the MRP of P&K Fertilizers at reasonable level;

(j) that despite the change in policy and increase in subsidy rates during 2011-12, the fertilizer companies continued to raise the MRPs of P&K Fertilizers during 2011-12, nearly doubling the prices; though due to the increase in international prices during the said time the subsidy had been increased but the increase in MRP was unreasonable;

(k) the same trend continued in the year 2012-13 leading to fall in the consumption of P&K Fertilizers and rise in consumption of urea, causing imbalanced fertilization of soil;

(l) that while fixing the subsidy rates for 2013-14 it was found that considering the downward trend in the international prices, there was scope for reduction in prices by minimum Rs.1,500/- per metric tonne and Rs.1,000/- per metric tonne from the prevailing levels of MRP of DAP and MOP, to give immediate relief to the farmers; and,

(m) fertilizer is a commodity covered under the EC Act; though the Government has done away with the practice of statutorily fixing MRP of P&K Fertilizers, in case of misuse of subsidy mechanism and procedure on the part of fertilizer companies in the garb of freedom to fix the MRPs on their own under the NBS Scheme / policy, the Government has the authority to suitably modify the policy / Scheme and issue necessary regulatory orders; though the provisions of the EC Act had not been invoked but NBS Scheme was modified for 2013-14.

5. Though the appellant had also filed rejoinder to the aforesaid counter affidavit but since neither counsel during the hearing referred thereto, need is not felt to go into the same.

6. The learned Single Judge in the elaborate, reasoned impugned judgment has inter alia found / observed / held:-

A. that fixing or indicating the MRP is not inherently contrary to the NBS - the NBS provides for a fixed subsidy thus compelling fertilizers, manufacturers, importers to reduce their cost and increase efficiency; although the manufacturers were free to fix the MRP of their respective products but the same was not substratal of the NBS and did not preclude the Government from examining the MRPs charged by various manufacturers or importers; B. that the purpose of providing subsidy is to ensure availability of fertilizer to farmers at reasonable price - thus monitoring of MRPs charged from farmers is not extraneous to ensuring that the subsidy is passed on to the farmers;

C. thus the contention, that fixing of MRP is repugnant to NBS, cannot be accepted;

D. it is incumbent upon the Government to ensure that the subsidy does not end up enriching the fertilizer companies instead of subsidizing / reducing the cost of fertilizer to the farmers; E. that no merit was found in the second contention of the appellants that while subsidy was fixed at the beginning of the year, the cost of manufacture of fertilizer fluctuated throughout the year and the increase could be recovered from the MRP only and thus MRP could not be fixed at the beginning of the year, in the light of the plea of the Government that before advising minimum reduction in MRP in the ensuing year, necessary data was taken into account; F. it

was also the contention of the appellants that the MRP fixed vide O.M. dated 26th June, 2013 could not have a retrospective effect w.e.f. 1st April, 2013; however, in the light of the plea of the Government that international prices prevailing between January, 2013 and March, 2013 had been considered, there was no merit therein also;

G. moreover, fixing of MRP was a policy decision in which the scope of judicial review is limited; reliance in this regard was placed on Federation of Rly. Officers Assn. Vs. Union of India (2003) 4 SCC 289; Bajaj Hindustan Ltd. Vs. Sir Shadi Lal Enterprises Ltd. (2011) 1 SCC 640; Prag Ice & Oil Mills Vs. Union of India (1978) 3 SCC 459 and Duncan Industries Ltd. Vs. Union of India (2006) 3 SCC 129;

H. the only other contention of the appellants was that the MRP fixed was unreasonable; however none of the fertilizer companies had complained of or challenged the reference MRP fixed by the Government and in fact MRP had been fixed after holding consultations with the fertilizer companies.

7. The senior counsel for the appellant before us confined the challenge only to the MRP fixed on 26th June, 2013 having retrospective effect from 1st April, 2013. It was contended that the MRP fixed on 26th June, 2013 could not be made applicable to the quantities already sold between 1st April, 2013 and 26th June, 2013 as well as to the quantities of fertilizer manufactured between the said dates in the expectation of receipt of subsidy at the prescribed rates and freedom to fix the MRP. It was contended that the principles of promissory estoppel, proportionality and legitimate expectation had become attracted as held by the Division Bench of this Court in judgment dated 23rd November, 2009 in LPA No.231/2008 titled Southern Petrochemical Industries Corporation Ltd. Vs. Union of India.

8. We may notice that the learned Single Judge has held the judgment of this Court in Southern Petrochemical Industries Corporation Ltd. to be not applicable as the petitioners therein had shown that the Government had announced increase in concession of Rs.750/- per metric tonne, Rs.100/- per metric tonne and Rs.500/- per metric tonne for DAP, SSP and MOP fertilizers respectively and that the petitioners therein had acted thereon and placed orders; however there was no material in the present case to indicate that the members of the appellant had acted to their detriment on the basis of any declaration made by the Government.

9. Per contra the counsel for Union of India / respondents took us through the counter affidavit filed to the writ petition to show the reasons / circumstances in which the direction impugned in these proceedings for reduction of MRP was issued. It was further contended that the direction in the present case was for reduction of MRP and not prohibiting sale at a price above the MRP.

10. We had during the hearing enquired from the senior counsel for the appellant as to what was the right of the members of the appellant to subsidy. We had put to him, whether not the purpose and intent of giving subsidy to fertilizer companies was to make the fertilizer companies sell at a price lower than that at which they would have otherwise sold without the subsidy. We had yet further

enquired as to what would be the effect of any fertilizer company not reducing the MRP from the prevailing prices as directed vide OMs impugned in these proceedings and continuing to sell at the prevailing prices or even at higher prices and whether not the only effect thereof would be to disentitle the said fertilizer company from receiving subsidy.

11. It was thus enquired that even if the fertilizer companies during the period 1st April, 2013 to 26th June, 2013 had sold any quantities of fertilizer at a rate higher than that suggested in the impugned OMs, would not the only effect thereof would be to disentitle the fertilizer companies from receiving subsidy for that much quantity and how the said fertilizer company could be said to be entitled to the subsidy when it had already received the higher price from the farmer. After all, the fertilizer companies cannot on the one hand receive the higher price and on the other hand also receive subsidy, thereby themselves benefiting from the NBS Scheme rather than the benefit thereof flowing to the farmer / consumer of fertilizer.

12. We could not get any response.

13. The aforesaid reasoning takes the wind out of the contention, of the Government being not entitled to retrospectively fix the price.

14. We may also notice that there are no pleadings, either in the writ petition or in the appeal, of the quantities of fertilizers if any sold during the period 1st April, 2013 and 26th June, 2013 or the MRP at which they were sold; to show prejudice from retrospective fixation of price, details of the date of manufacture of each bag of fertilizer sold between 1st April, 2013 and 26th June, 2013 were required to be furnished; in the absence thereof we cannot merely on the invocation of the argument of "retrospectivity being bad" interfere, when no prejudice is shown to have been suffered.

15. We thus do not find any merit in the appeal. The same is dismissed with costs of Rs.25,000/- payable to the respondents within three months hereof.

RAJIV SAHAI ENDLAW, J CHIEF JUSTICE MARCH 18, 2015 pp