

Union Of India And Anr vs Brij Fertilizers Pvt. Ltd. & Ors on 14 May, 1993

Equivalent citations: 1993 SCR (3) 760, 1993 SCC (3) 564, AIRONLINE 1993 SC 618

Author: R.M. Sahai

Bench: R.M. Sahai, A.M. Ahmadi

PETITIONER:
UNION OF INDIA AND ANR.

Vs.

RESPONDENT:
BRIJ FERTILIZERS PVT. LTD. & ORS.

DATE OF JUDGMENT 14/05/1993

BENCH:
SAHAI, R.M. (J)
BENCH:
SAHAI, R.M. (J)
AHMADI, A.M. (J)

CITATION:
1993 SCR (3) 760 1993 SCC (3) 564
JT 1993 (3) 403 1993 SCALE (2) 902

ACT:
Fertilizer (Control) Order 1985-Clause(2)(q) Schedules I and II-payment of subsidy to small scale manufactures--Held, cannot be with-held on the basis of report of a Research Organisation prepared behind the back of respondents--High Court may interfere at the state of show cause notice where manufactures would be in peril if it and not--Essential Commodities Act, 1995

HEADNOTE:
The respondents were small scale manufactures of fertilizers. They were entitled to payment of subsidy on meeting prescribed standard in the manufacture of single super phosphate (SSP). The Government of Madhya Pradesh requested PDIL, a consultancy and R.& D Organisation, to test the rock phosphate at Hirapur mines for determining

disability allowance payable to SSP producers. On the basis of this report, the payment of subsidy was withheld, and a show cause notice issued to the respondents.

A writ petition filed in the High Court was allowed by a Division Bench which quashed the show cause notice and ordered that the subsidy be paid. It found that the PDIL report had been made without notice to the manufacturers or inviting their participation and that the laboratory report--; furnished by the manufacturers on which the payment (of subsidy was dependent had not been questioned.

On appeal before this Court, the questions to be decided were whether the withholding of payment of subsidy to the respondent was justified; whether the High Court committed any error in interfering at the stage of show cause in exercise of its extraordinary jurisdiction; and whether the report of PDIL, prepared behind the back of the respondents could be used to reject the standard fertilizer of the respondent.

It was contended for the appellants that a detailed technical examination was pending and the subsidy worked out had on in been provisional, and that PDIL had carried out the examination. PDIL being independent and reputed, it was not required to hear the manufacturers. Further, the non-release of

761

subsidy was also on the basis of input cost data. It was urged that the High Court was not justified in quashing the show cause notice and issuing directions for paying the subsidy without giving the department an opportunity to verify if the respondents had in fact complied with the Control Order.

Dismissing the appeal, this Court

HELD : 1. PDIL was engaged to find out the grade of phosphate from Hirapur mines to enable the manufacturers to claim disability allowance, and not whether they were producing fertilizer in accordance with the standard provided in the Control Order. The purpose being entirely different, the report could not be utilised for a different purpose. (767-G)

2. There is no evidence to doubt the authority of the reports submitted by the inspectors appointed under the Control Order that the fertilizer produced was of specified standard. (768-B)

3. On facts, in the absence of any reliable data or any material the inference drawn by the appellants in the notice that the fertiliser was not of a specified standard was baseless. The entire exercise was therefore vitiated being tainted with arbitrariness. (770-F-G)

4. The High Court should normally not interfere at the stage of show cause notice. But where, from the facts it is apparent that there was no material available with the department to doubt the statement on behalf of the respondent, it would be failing to exercise jurisdiction if

the Court does not discharge its constitutional obligation of protecting the manufacturers who are in perilous condition as they are not able to meet their liabilities to pay to financial institutions and various other authorities and are facing proceedings on various counts and have virtually closed their unit. The authorities did not realise either the purpose of granting subsidy or the harassment to which the manufacturers have been exposed. Entire litigation appears to be a sad plight for those who have set up small scale units in the hope that they will stand on their own on the subsidy given by the Government as admittedly the price of manufacturing fertilisers is much more than the price fixed by the Government for which it assured to pay subsidy. (771-B-D)

762

JUDGMENT :

CIVIL APPELLATE JURISDICTION: Civil appeal Nos. 1450-51 of 1993.

From the Judgment and Order dated 16.7.92. of the Delhi High Court in Civil Writ Petition No. 1780 of 1992 and Civil Misc. No. 3485 of 1992.

K.T.S. Tulsi, Addl. Solicitor General and S.N. Terdol for the Appellants.

Kapil Sibal, Vikas Singh, L.R. Singh, Yunus Malik and Gopal Singh for the Respondents.

The Judgment of the Court was delivered by R.M. SAHAI, J. Was there any valid justification for the appellants, the Union of India, to withhold the payment of subsidy to the respondents, the small scale manufacturers of fertiliser, is the main question that arises for consideration in this appeal directed against the judgment and order of the Delhi High Court? Two other questions that arise in this connection are if the High Court committed any error in exercise of its extraordinary jurisdiction to interfere at the stage of show cause and if a report prepared by the Project Development India Limited (in brief 'PDIL') behind the back of the respondents could be relied for rejecting the specification of standard fertilizer produced by the respondents.

Before advertng to these issues we consider it necessary to mention that the payment of subsidy to manufacturers of fertilisers was introduced in 1982 under a scheme framed by the Government of India in pursuance of which every manufacturer was required to give a written undertaking to the President of India. In 1985 Government of India issued a Fertilizer (Control) Order under the Essential Commodities Act. Sub-clause (h) of Clause (2) of the order defines 'fertilizer' to mean, any substance used or intended to be used as a fertiliser of the soil and/or crop and specified in Part-A of Schedule I and includes a mixture of fertiliser, mixtures of micro- nutrient fertilisers and special mixture of fertilisers'.

Sub-clause (q) of the same clause explains 'prescribed standard of fertilizer' as under:

"Prescribed standard" means

(i) in relation to fertiliser included in Column 1 of Part A of Schedule-1, the standard set out in the corresponding entry in Column 2, subject to the limits of permissible variation as specified in Part B of that Schedule; and

(ii) in relation to a mixture of fertilisers, the standard set out in respect of that mixture under sub-clause (1) of Clause 13 by the Central Government, subject to the limits of permissible variation as specified in Part B of Schedule-1;

(iii) in relation to a [mixture of NPK fertilisers, mixture of micronutrient fertilisers and combination thereof], the standard set out in respect of that mixture under sub-clause (2) of Clause 13 by the State Government, subject to limits of permissible variation as specified in Part B of Schedule

1.;"

And standard specified of single super phosphate (SSP) sulphur manufactured by the respondents is described in Schedule I of the Order as under:

"Single Super Phosphate (16% P 2O₅ Granulated)-

(i) Moisture, per cent by weight, maximum

(ii) free phosphoric acid (as P 2O₅) per cent by weight, maximum

(iii) Water soluble phosphates (as P 2O₅ per cent by weight , maximum

(iv) Particle size-Not less than 90 per cent of the material shall pass through 4 nun IS sieve and shall be retained on 1 mm IS sieve. Not more than 5 per cent shall pass through 1 mm IS sieve."

The Control Order further deals in detail with price control, distribution, restriction on manufacturers and sale etc. of fertiliser. Chapter VII deals with enforcement authorities. Paragraph 27 empowers the State Government and the Central Government to appoint inspectors of fertilisers. Paragraph 28 empowers the inspectors to secure compliance of the Order by requiring the wholesaler or retail dealer to give any information in his possession with respect to manufacture, draw samples of any fertiliser, enter upon and search any premises etc. How the sample has to be analysed has been provided by Schedule 11 of the Order.

The basic raw material for manufacture of fertiliser is rock phosphate. There are various mines spread all over the country from where these rocks are obtained. They are canalised through State

mineral corporations. One of such mines is located in Hirapur in the State of Madhya Pradesh. The Government of the State requested the PDIL to undertake laboratory test of these rocks and submit a report for determining disability allowance payable to SSP producers. The conclusion of the report is extracted below :

"The world reserve of good quality rock phosphate is gradually depleting making the use of non-standard and low grade phosphate, in the manufacture of phosphatic fertiliser as essential. In India, compared to other countries, the availability of usable quality rock phosphate is rather limited, though available in abundance.

This study was made, at the request of Madhya Pradesh Government with a view to effectively utilise, to the extent possible the lower grade indigenous rock phosphate from HIRAPUR MINES for SSP production. Experiments in PDIL laboratory has shown that this rock phosphate cannot be processed in the conventional route to produce SSP, as such, and it is imperative to make blends with any standard rock phosphate.

The report establishes that the rock phosphate available in our country whether it is in Madhya Pradesh or Jaipur appears to be incapable of producing SSP unless it is blended with imported rock. Proportion of the two depends on the strength of rock obtained from different mines. The PDIL conducted the test for those rocks whose strength varied from 29% P₂O₅ and 25% P₂O₅ and opined that blending of rock with 24% should be in proportion of 20% and 80%. The extract from the report runs as under :

"The chemical analysis has shown 24.85% P₂O₅ and 30.03% Silica plus insoluble besides other impurities like high R₂O₃ compared to 32.4% P₂O₅, 4.56% Silica plus insoluble and 0.75% R₂O₃ in standard Jordon variety. Many proportions of blends were tried in laboratory to find out the optimum blend which would produce SSP of specification laid down by F.C.O. and finally it was concluded that a blend of 20% Hirapur rock matrix and 80 Senegal will be a suitable proportion. This was confirmed even in pilot plant trials where for a comparison purpose two blends were tested e.g. 30:70 and 20:80 for Hirapur, Senegal rock phosphates. There was found from analytical results that 20:80 proportion was most suited. Accordingly study was concentrated towards this 20:80 Hirapur:Senegal blend."

We now turn to the various issues that arise in this case. Relying on these reports the subsidy Payable to the manufacturers was withheld and they were required by a letter dated 20th April 1990 to explain as to how they were able to achieve the standard specification. The letter reads as under:

"It is generally observed from the quarterly cost data being submitted by your company that you are either using only low grade rock phosphate for manufacture the P₂O₅ content of which is less than 30%, or in large proportion thereof. Please therefore intimate how you are manufacturing SSP of standard specification i.e. of

16% P₂ O₅ content, SSP as required under the specification laid down on the F. C. o. "

Both the assumptions in the letter were without any foundation. We shall examine it in detail later. It was at this stage that the manufacturers approached the High Court. They claimed that the fertiliser manufactured by them having been checked and verified by the inspectors appointed under the Control Order the opposite parties were not justified either in withholding the subsidy or issuing any notice. In the counter affidavit filed in the High Court the reason for issuing notice was explained as under:

"That in reply to Paras 15 and 16 of the Petition, it is submitted that upto 1.4.1992 imported Rock Phosphate was being procured by the SSP units, including the petitioners through the Minerals & Metals trading Corporation (MMTC) which was a canalising agency. Rock Phosphate is also available through the State owned indigenous sources such as Rajasthan State Mineral Development Corporation (RSMDC), Rajasthan State Mines & Minerals Limited (RSMML), Uttar Pradesh State Minerals Development Corporation (UPSMDC), Madhya Pradesh State Mining Corporation (MPSMC) and Hindustan Zinc Limited (HZL), and SSP is manufactured by using rocks of standard grade. The quality of indigenous rock phosphate from the above mentioned State owned sources varies considerably from low grade rock of 14% to 16% P₂ O₅ content to high degree rock of +3 1 % P₂ O₅ content. For producing SSP of 16% W.S. P₂ O₅ the rock phosphate used should contain a minimum of +3 1 % P₂ O₅ and the conversion efficiency of the rock should be more than 9 1 %. SSP of 16% W.S. P₂ O₅ can be produced by using low grade rocks only after suitably blending it with standard/high grade rock phosphate to have a feed conforming to the above mentioned minimum specifications of +31% P₂ O₅.

That in reply to Para 17 of the Petition it is submitted that indigenous rock phosphate is being procured by the SSP Units from Madhya Pradesh State Mining Corporation, Uttar Pradesh State Minerals Development Corporation, Rajasthan State Mining Development Corporation and Rajasthan Mines and Minerals limited. Since detailed technical examination of the various grades of indigenous rock phosphate available from sources other than RSMML was not available, the SSP Units were informed that pending detailed technical examination, the prices of such indigenous, rock phosphate would be reimbursed at par with RSMML price for rock phosphate (having +3 1 % P₂ O₅) on a provisional basis only. A copy of the circular letter issued by the Office of the FICC dated 29th September 1986 to all manufacturers of SSP is at Annexure-1.

Subsequently, Projects and Development India Ltd (PDIL), Sindri, which is a Consultancy and R & D organisation for fertilisers in the public sector, which had conducted an evaluation of MPSMC Rock Phosphate of Hirapur and Jhabua Mines, submitted its report, which indicated that taking into account the P₂ O₅ content and the impurities present in both Jhabua and Hirapur Rock, it is unsuitable to make SSP of 16% W.S. P₂ O₅ content, unless it is blended with minimum of 70% which grade imported Senegal rock with 30% low grade Jhabua rock and minimum of 80% high grade Senegal rock with 20% low grade Hirapur rock." After considering this a Division Bench of the High Court allowed the writ petition and issued a direction to the appellant to pay the subsidy which

was payable to respondents after determining it in accordance with the terms of the scheme under which it was payable within the period specified in the order. The direction was issued as the Bench found that the basis for denying the subsidy was the report submitted by PDIL prepared behind the back of the manufacturers without issuing any notice to them or inviting their participation. After excluding the report the bench held that since the payment of subsidy was dependent on basis of laboratory reports furnished by the manufacturers and these reports had been furnished by them and they had not been questioned at any time by the appropriate authorities it was not open to opposite parties either to withhold the subsidy or to initiate the proceedings by issuing show cause notices. To assail the finding on merits the learned Additional Solicitor General launched a two pronged attack. He urged that subsidy under the scheme of 1982 was payable only if the fertiliser conformed to specification of 16% water soluble phosphoric penta-oxide. The learned counsel submitted that under the scheme the Department of Fertilisers was entitled to conduct survey and check the quality and the manufacturers were required to give an undertaking that they were to supply prescribed information along with the monthly claim for subsidy. According to learned counsel claim for subsidy. According to learned counsel under the said scheme a circular was issued on September 29, 1986 to all the manufacturers of SSP wherein it was clarified that the indigenous rock phosphate being obtained by the manufacturers from sources other than Udaipur was pending a detailed technical examination. He urged that the circular further stated that the prices were to be worked out on the basis of rock phosphate having plus 3 1% P₂ O₅. Therefore, pending completion of detailed technical examination the subsidy worked out was provisional. Anti when the technical examination conducted by the PDIL indicated that on the admitted figures furnished by the manufacturers in their quarterly invoices the standard specification could not have been achieved the notice were issued, therefore, the High Court was in error in quashing it. According to him it was open to the department to get it ascertained from an authentic source if the manufacturers of fertiliser were using proper material and achieving the specified standard. He urged that the PDIL being independent and reputed body it was not required to issued any show cause notice. We do not consider it necessary to express any opinion if the PDIL report could have been discarded for want of show cause notice or for being ex-party as there are certain features about the report which obviate the necessity of considering its validity on this ground. From the counter affidavit filed by Managing Director of M/s Brij Fertilizers Pvt Ltd it appears that the manufacturers of SSP have been using rock phosphate which is of hard quality but in order to encourage use of indigenous rock phosphate and to avoid loss of foreign exchange the Government of Madhya Pradesh directed the PDIL laboratory to undertake laboratory test to find out the grade of phosphate from Hirapur mines to enable the manufacturers to claim disability allowance. The report, therefore, was not concerned with finding out whether any of the manufacturers who were engaged in producing fertilizer were doing so in accordance with standard provided in the Control Order. In the circumstances it may be that it was not necessary to issue any notice to the manufacturers.

Yet the question is, could it furnish material for rejecting the claim of respondents and withholding their subsidy? The learned Additional Solicitor General urged that the non- release of subsidy was not based, solely, on report of PDIL but on basis of input cost data supplied by the manufacturers which indicated that on basis of analysis of raw material input provided by the respondents the manufacturers could not have produced SSP of 16% water soluble P₂ O₅. This assumption appears to be unfounded for more than one reason. Under the Control Order there is a detailed procedure

provided for carrying out test to find out if the fertiliser produced was of specified standard. It is not disputed that no such test as provided was ever carried by any authority. Rather the report submitted by the inspectors appointed under the Control Order, indicates that the fertiliser manufactured by the respondents was standard. We are not willing to accept the submission of the Additional Solicitor General that these reports were incorrect and have been obtained through the connivance of the official machinery. There is no material on record to indicate that the Government at any point of time doubted the correctness of these reports or initiated any proceedings against any inspector or any officer for it is not possible to draw an inference against the authenticity of the reports which have been given by the authority empowered under the order. It is not the claim of department that at any point of time prior to submission of the PDIL report any step was taken or the government ever required the inspectors to find out if the manufacture carried on by respondents was in accordance with law and rules. To discard the certificate issued by the inspector in the circumstances would be arbitrary without any valid reason. With this we may now examine the PDIL report itself. As has been seen earlier the purpose of getting the rock tested was to pay disability allowance. The purpose being entirely different it could not be utilised for a different purpose. How risky it is to embark on such exercise shall be clear when the result of report obtained by the PDIL is applied to the dates of respondents relied by appellant to justify their action of issuing show cause notice. From paragraph two of the conclusions of the PDIL, extracted earlier, it is clear that the study was made at the request of Madhya Pradesh Government with a view to effectively utilise to the extent possible the lower grade indigenous phosphate from Hirapur mines for SSP production. The report concludes, that experiments in PDIL laboratory has shown that this rock phosphate cannot be processed in the conventional route to produce SSP, as such, it is imperative to make blends with any standard rock phosphate. The objection of the department is not that the rock phosphate should not be blended with imported one but that on the proportion shown along with the strength of indigenous rock used the standard as provided could not have been achieved. From the analysis of rock phosphate purchased by the manufacturers as per their invoices and attempt was made to demonstrate that if the figures mentioned therein were taken as correct and they are compared with the calculation given by the PDIL it would be clear that the standard specification could not have been achieved. It is necessary to mention at this stage that the rock phosphate found in Hirapur mines was of three grades. That is clear from the letter of Assistant General Manager, Mines to the Joint Director, Fertiliser Coordination Committee. Relevant part of the letter reads, "We were selling Hirapur Phosphorite for so many Fertiliser S.S.P. manufactures since starting of the mining and were never found any complaint regarding its suitability to manufacture SSP Fertiliser. We have learnt from Fertiliser Manufacturing Units that our Phosphorite is suitable for SSP Fertiliser manufacturing but in case of P_2O_5 contents increases in Phosphorite the Wear and Tear of the plant increases. We had also been directed by Joint Director (F&A) FICC, vide their letter dated 31.8.89 to sale our Phosphorite in category 'A' to SSP Units. This further certifies the suitability of our Phosphorite for SSP manufacturing of requisite grade. The material supplied to these units are of 32% category 'A' and not 25% as given in PDIL report hence the question of blending with other Rock Phosphate does not require to Manufacture the requisite grade SSP.

The M.P.S.M.C. was selling Hirapur Phosphorite in different percentages P_2O_5 grades and not in mix condition. Out grades and other specifications indicated as below:-

Before 5.3 1991 From 6.3. 1991 1.1st (A) 1st (A) P₂O₅ + 30%, SiO₂ P₂O₅ + 29%-31%, + 15%18% SiO₂ + 15%- 18% Fe₂O₃ below 4.5% Fe₂O₃ below 24% A. +1/2" 2.1/2" Size A)+ 1/2"2. 1/2" size B. R.O.M. B. R.O.M.

2. 1st (B) 1st (B) P₂O₅+ 28%-30% P₂O₅ + 27%-29% SiO₂ + 18% SiO₂+22% Fe₂O₃ F₂O₃ above 4.5% above 4.5% A) 1/2" size A) 1/2" size B) R.O.M. B)R.O.M. C) By Product Dust

3. II Grade P₂O₅ + 22% 25% SiO₂ and Fe₂O₃ No grantee. R.O.M."

Further no rock phosphate has been or could be purchased by any manufacturer except through corporation of the State. This fact is admitted in the counter affidavit of the appellant extracted earlier. It is also clear from the letter of Assistant General Manager that Brij Fertilisers did not use any rock except Grade 'A'. It is claimed by the respondents that on a technical assessment conducted by Bhabha Research Institute for Lalitpur rocks that the water soluble in rock phosphate with P₂O₅ with 29 to 32% is more than 16%. Even if this report is ignored the letter of Assistant Mines Inspector establishes that water soluble phosphate in Hirapur mines of grade 'A' was 16%. Each respondent has filed details of rock phosphate consumed by its unit from various corporations. The average grade mentioned is 31%. Not one has used grade II. Even Avadh Fertiliser has not used rock phosphate below 27%. From the chart appended in respect of Hirapur mines the blending in proportion of 50% indigenous and 50% indicates that even with rock of 30.66% the water soluble actually was 17.57%. These figures could not be disputed in the reply filed on behalf of Union of India. From the PDIL report it is clear that it had undertaken test of rock with 24.85% P₂O₅ and 30.03% Silica and suggested that most suited blend with such rock was 20% indigenous and 80% imported. It could not furnish any guideline or material to reject the rock phosphate used by the respondents which varies between 27% P₂O₅ to 31% P₂O₅. In absence of any reliable data or any material the inference drawn by the appellants in the notice was baseless. The counter affidavit filed in the High Court by the appellant did not explain the basis for concluding that for producing SSP of 16% or P₂O₅ the rock phosphate should contain a minimum of 31% P₂O₅. It is contrary to the letter of Assistant General Manager Mines. In any case PDIL could not furnish any basis for it. In absence of any valid justification the entire exercise undertaken by the appellant was vitiated being tainted with arbitrariness.

Failing in his effort to assail the order on merits the learned Additional Solicitor General vehemently urged that the department was not precluded from issuing show cause notice and requiring the manufacturers to appear and explain their claim. It was urged that the High Court was not justified in quashing the show cause notice and issuing the directions for paying the subsidy without giving an opportunity to the department to verify if the respondents had in fact complied with Control Order. True, the High Court should normally not interfere at the stage of show cause notice. But where, from the facts it is apparent that there was no material available with the department to doubt the statement on behalf of the respondents and their own officers at every point of time had issued the certificate the correctness of which could not be disputed or doubted except by raising unfounded suspicion or drawing on imagination it would be failing to exercise jurisdiction if the Court does not discharge its constitutional obligation of protecting the manufacturers who, as is

apparent from the counter affidavit filed in this Court and the various letters issued from different authorities are in perilous condition as they are not able to meet their liabilities to pay to financial institutions and various other authorities and are facing proceedings on various accounts and have virtually closed their unit. We are pained to say that the authorities did not realise either the purpose of granting subsidy or the harassment to which the manufacturers have been exposed. Entire litigation appears to be a sad plight for those who have set up small scale units in the hope that they will stand on their own on the subsidy given by the government as admittedly the price of manufacturing fertilizers is much more than the price fixed by the government for which it assured to pay subsidy.

show cause notice issued by the appellants and issuing the directions to pay the subsidy. The appeals fail and are dismissed with costs which is assessed at Rs. 10,000 one set.

U. R.

Appeal dismissed.