
(2013) 03 DEL CK 0183

In the Delhi High Court

Case No : LPA 176 of 2013 and CM 4923 of 2013

Devyani Phosphate Private Limited and Another

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 21-03-2013

Acts Referred:

Citation : (2013) 03 DEL CK 0183

Hon'ble Judges : V.K. Jain, C.J

Bench : Single Bench

Advocate : P.K. Mullick, for the Appellant; Sachin Datta, CGSC and Ms. Dinesh Sharma, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Jain, C.J.—The appellant no. 1 set up a unit for manufacture of Single Super Sulphate Fertilizer (SSP) at Jndri in District Udaipur, Rajasthan with installed capacity of 60,000 MT per annum and commenced production on 3.7.2009. At that time, a Scheme framed by the respondent-Union of India as revised on 25.8.2008 was in force for providing subsidy on sell of SSP. Under the aforesaid Scheme, the manufacturers of SSP were required to sell their products at a maximum rate of Rs. 3400/- per MT. Such manufacturers, irrespective of their annual production were entitled to get subsidy/reimbursement from the Government and were to receive "on account" payment of 85% (90% with bank guarantee of claims of sale of SSP). Vide order dated 13.8.2009, the aforesaid Scheme of providing ad hoc subsidy for SSP was revised with effect from 1.10.2009. Under the revised policy, the manufacturers were left free to decide the selling price of SSP with effect from 1.10.2009 and it was directed that ad hoc concession for SSP with effect from 1.10.2009 would be provided to those eligible SSP units only which have an annual capacity utilization of at least 50% or annual production of 40,000 MT of SSP. It was also directed that capacity utilization/production for three months from the date of the notification on pro-rata basis will be taken into account for the capacity utilization/production bench-

mark for ad hoc subsidy for sale of SSP with effect from 1.10.2009. Vide OM dated 13.7.2010, the eligibility criteria was somewhat relaxed by providing that where SSP manufacturing units had failed to achieve the specified requirement of capacity utilization on annual basis, a pro-rata basis could be applied in the quarter 1.5.2010 to 31.7.2010 for payment of subsidy with effect from 1.5.2010 in the year 2010-11 subject to the condition stipulated in class 5 of the said OM. A further relaxation was made vide OM dated 05.08.2010 by introducing a pro rata basis for achieving the minimum bench mark of production for the period 01.10.2009 to 30.04.2010 though the annual basis was retained for the period 01.10.2009 to 30.01.2010. The appellant-company could not achieve the production target stipulated in the revised policy issued by the Government of India though it has commenced production on 30.7.2009 and, therefore, the appellant sought exemption for the first year of operation as a gestation period and sought relaxation of subsidy on the SSP sold by it with effect from 01.10.2009. Since the request of the appellant was not acceded to by the Government of India, WP(C) No. 7384/2010 was filed by it, seeking quashing of the revised policy to the extent the said policy imposed eligibility condition of capacity utilization to the extent of at least 50% or annual production of 40000 MT of SSP, as a pre condition for entitlement to the subsidy. The appellant also sought relaxation of subsidy payment from 01.10.2009 along with interest on that amount.

2. The main contention for the learned counsel for the appellant before us is that OM dated 13.08.2009 is skewed in favour of manufacturers having large installed capacity since they are required to achieve lesser capacity utilization by stipulating that to be eligible to obtain subsidy, the specific manufacturers could either have at least 50% capacity utilization or production of 40000 MT of SSP in a year. This would mean that if the installed capacity of manufacture is 200000 MT per annum, he can avail subsidy even if he achieved only 20% capacity utilization whereas the appellant having installed capacity of 60,000 MT per annum is required to achieve minimum capacity utilization of 50%. This is also the submission of the learned counsel for the appellants that since they had already sold SSP to the farmers at a rate which was lower than, then their cost of production, modification in the policy by insisting upon capacity utilization of 50% would prejudicially affect the financial interest of the appellant-company. This was also his submission that insisting upon at least 50% capacity utilization would render the manufacturing unit of the appellant wholly unviable. Yet another submission of the learned counsel for the appellants was that at the time of selling their products, they are not in a position to know as to what would be their total production in the financial year and whether they would be able to achieve the prescribed bench mark or not.

3. We note from the submissions made before the learned Single Judge that the case of the respondent-Union of India is that the change in the policy is aimed to encourage production of SSP so as to decrease the dependence on DAP which is the substitute for SSP and which despite some production in the country is also

require to be imported. Yet another reason for encouraging production of SSP is that Phosphoric (P₂ O₅) acid contained in SSP is 16% as against 46% in DAP, in addition to sulphur and calcium. The SSP, according to the Government, has great agronomic importance for crops such as oil seeds. This was also the case of the Government that as a result of the revised policy, there has been substantial increase in the production of SSP in the country which has gone up from 30 lakhs MT in the year 2008-09 to 43.01 lakh MT in the year 2011-12. This was also the contention of the Union of India before the learned Single Judge that open MRP will provide flexibility to the manufacturers to sell SSP in those areas where production units are not located also giving wider option to the farmers to choose the brand of their choice.

4. It is also by now settled proposition of law that any change in the policy decision of the Government can be interfered by the Court only where such change is shown to be wholly arbitrary, irrational or actuated by mala fide considerations. In *BALCO Employees Union (Regd.) Vs. Union of India and Others*, , the Supreme Court held that unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of the power, the Court will not interfere with such matters. The Court observed that it is neither within the domain of the courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.

In *G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others*, , the Supreme Court observed that in matters of economic policy which lack adjudicative disposition, unless they violate constitutional or legal limits on power or have demonstrable pejorative environmental implications or amount to clear abuse of power, the same could not be interfered with.

5. Considering the objective behind the modification of the Scheme, we find it difficult to accept the contention that the change in policy is arbitrary or mala fide. The aim of the government to increase the production of SSP in the country by insisting upon the manufacturing units producing at least 50% of their installed capacity or 40000 MT of SSP per year, making the said fertilizer available throughout the country and reducing the import of DAP which otherwise is a costly substitute cannot be faulted with. This is more so when SSP is found to be more beneficial to certain crops as compared to other fertilisers. The Government, in our view, was justified in hitting the insufficiencies which had crept amongst of SSP units, which were not producing SSP in adequate quantity, but were still taking subsidy from the Government. The substantial increase in production of SSP after change in the policy fortifies the stand taken by the Government before the learned Single Judge.

6. As regards the contention that the revised policy is skewed in favour of large

manufacturers, we find from the note placed before the Cabinet Committee of Economic Affairs, which was produced before the learned Single Judge that the Government noted with concern, the fact that some manufacturers of SSP were utilizing their capacity to the level of 5% to 10%, whereas large units were finding it difficult to achieve 50% capacity utilization, on account of difficulty in producing rock either from indigenous or imported source and it was for this reason that the Government decided to provide subsidy only to those unit which has annual capacity utilization of at least 50% or had annual production of 40000 MT of SSP, whichever is lower.

7. The learned Judge on perusing the production figure of the appellant-company found that it had produced only 5903 MT of SSP in the year 2009-10 and 3352 MT in the year 2010-11. This figure increased to 15282 MT in the year 2011-12. It is thus evident that despite revised policy of the Government, the appellant-company did not bother to increase production and achieve the prescribed target by producing at least 30000 MT of SSP in a year. The aim of the policy being to increase production and discourage inefficiency of the units which were not producing SSP in sufficient quantity, no fault can be found with the change effected in the policy.

8. The amended policy came into force on 30.8.2009. The manufacturing unit of the appellant-company had gone into production only on 03.07.2009. Therefore, the appellant had more than ample time with it to increase production so as to achieve the capacity utilization of at least 50% by the end of the financial year 2009-10. As noted earlier by us, even after change in policy, the appellant did not increase production and could not achieve capacity utilization of at least 50% even in the year 2010-11 and 2011-12.

9. The learned counsel for the respondent also brought to our notice the decision of Division Bench of Bombay High Court in Gajraj Fertilizers Pvt. Ltd. vs. Union of India and Anr. WP No. 7165/2009 decided on 30.03.2010. In the said case, this very revised policy dated 13.08.2009 was challenged by certain SSP manufacturers on the very same grounds which have been taken by the appellant before us. Rejecting the contention, the Division Bench of Bombay High Court, inter alia, observed as under:

6. We have perused the record placed before us and the judgments cited supra. The petitioner in Writ Petition No. 7350/2009 admittedly produced in the year ending 31st March, 2009, 4998 MT of SSP, whereas the petitioner in Writ Petition No. 7165/2009 produced 4737 MT. Admittedly, their capacity to produce is between the range of 50,000 MT to 60%. The reason highlighted for the meagre production according to the petitioners is stated to be stiff competition, non-availability of raw material. The petitioners are private enterprises who entered into a commercial venture. Through these petitions, the petitioners claim that the subsidy which was granted by way of concession by Government of India must be made available to them irrespective of their capacity of production. We have verified the object behind issuing such circular reflecting policy decision taken by

Government of India.

7. The respondent Union had filed affidavit in reply and extensively replied the contentions and grounds raised by the petitioners. It may be that petitioners are facing stiff competition in the market with large producers of SSP, but at the same time, when raw material is available in the country, as per the list annexed by the respondents, we do not find any justifiable and satisfactory reason for the petitioners not to raise their production level. The petitioners are producing hardly 4000 to 5000 MT compared to their huge capacity of production. In this view of the matter, question arises as to whether petitioner could claim the concessions. The policy of the Union has to be considered from the peculiar facts and circumstances in which the same was adopted. Certainly, the policy has to be reasonable and it must have some nexus with the object it tries to achieve. As it was disclosed that the objective was to help farmers of this country, who badly need enough of fertilizers. The concession was granted to those units who produce more than 40,000 MT of SSP or 50% of their capacity. We do not find reasonable rational behind policy framed by the Government of India.

For the reasons stated hereinabove, we are in agreement with the view taken by the Bombay High Court.

We find no merit in the appeal and the same is hereby dismissed. There shall be no order as to costs.