

(2013) 02 DEL CK 0160

In the Delhi High Court

Case No : Writ Petition (C) 7384 of 2010

Devyani Phosphate Private Limited and Another

APPELLANT

Vs

UOI

RESPONDENT

Date of Decision : 04-02-2013

Acts Referred:

Citation : (2013) 2 AD 641 : (2013) 4 ILR Delhi 2518

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : P.K. Mullick in W.P.C 7384/2010, Mr. Sanjay Katyal in W.P.C 6573/2011 and Mr. Kaushal Yadav in W.P.C 8164/2011 and W.P.C 700/2012, for the Appellant; Rajeeve Mehra in W.P.(C) 7384/2010, W.P.(C) 6573/2011, W.P.(C) 8164/2011 and W.P.(C) 700/2012, ASG with Mr. Sachin Datta in W.P.(C) 7384/2010 and W.P.(C) 8164/2011, Mr. Dinesh Sharma in W.P.(C) 8164/2011 Mr. Neeraj Chaudhari in W.P.(C) 6573/2011, Mr. Jatan Singh and Mr. Tushar Singh in W.P.(C) 700/2012 CGSC, with and Ms. Inderjeet Sidhu, Advocate in W.P.(C) 7384/2010, W.P.(C) 6573/2011, W.P.(C) 8164/2011 and W.P.(C) 700/2012 and Mr. Ravjyog Singh in W.P.(C) 6573/2011, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J.—These writ petitions involve a common issue, which is: Is the provision in the Office Memorandums (OMs) issued by the respondents from time to time, requiring the petitioners (and those who are similarly placed), to achieve a minimum benchmark qua production of Single Super Sulphate Fertilizer (in short SSP) unreasonable and/or arbitrary? The challenge is difficult, and is therefore decidedly, an uphill task for the petitioners, as it ventures into an area which relates to policy making. The grounds for challenge are usual, that is, the policy in vogue is arbitrary, unfair and unreasonable. Article 14 of the Constitution of India has therefore been invoked by the petitioner, while laying a challenge to the policy evolved by the respondents.

2. Therefore, while the issue is short, one would have to touch upon the OMs issued by the respondents from time to time in order to give a sense of how the

policy has evolved, though the impugned clause which relates to the minimum bench mark for production by industrial units, such as those operated by the petitioners, has continued to be in existence to the detriment of the manufacturers.

3. Therefore, in sum and substance the reliefs are identical, which essentially seek from this court a writ, order or direction for striking down the impugned clause which fixed a minimum benchmark for production by units, with consequential relief, for release of funds in the form of subsidy with interest. There are four writ petitions pertaining to the aforesaid issues.

3.1 Since WP(C) 7384/2010 was being dealt with as a lead case, the respondents have filed their counter affidavit in the said case. The counter affidavit is followed by an additional affidavit dated 03.09.2012. The said additional affidavit is accompanied by the note dated 20.07.2009 placed before the Cabinet Committee on Economic Affairs. This note attains significance in view of the issue raised in the present writ petition.

4. With the aforesaid preface in place, let me advert briefly to the facts obtaining in the present writ petition:

4.1. The Government of India, apparently since 1992 has been administering, what is ubiquitously known as the concession scheme, [which is presently known as the Nutrient Based Subsidy (NBS) policy] for decontrolling phosphatic and potassic fertilizers. Amongst the phosphatic fertilizers, SSP is apparently very popular with the farmers of the country. Besides being a good source for phosphate, it evidently provides sulphur and calcium as well. SSP contains 16% phosphoric acid, 11% sulphur and 16% calcium. I am informed that SSP is agro-nomically suitable for dry land oil seeds crop. Overall, SSP is good for farm produce.

5. It is in this context that the Government of India (GOI) on 25.08.2008 revised the concession scheme for SSP for the year 2008-2009. By virtue of this scheme, the GOI revised the concession scheme inter alia by fixing a uniform all India Maximum Retail Price (in short MRP) qua SSP at the rate of Rs. 3400 per metric ton. This was in a sense a deviation from the earlier practice of having respective State Governments fix the MRP for SSP. The revised concession scheme provided for on account payment of 85% of claims (with which furnishing of the bank guarantee was scaled upto 90%) irrespective of their annual production, provided the manufacturers claim was certified by a statutory auditor and subject to the manufacturer filing the complete information in the manner prescribed. The balance claim for subsidy was dependent on due certification by the State Government with regard to the quantity as well as the quality of SSP sold in the State.

6. The aforementioned policy however underwent a change with the issuance of OM dated 13.08.2009. The said OM, which according to the petitioners is responsible for their woes, introduced for the first time the minimum benchmark

for production. In addition, by virtue of the said OM of 13.08.2009, the selling price of SSP was left open and thus, replaced the provision in the preceding concession scheme which provided for an all India MRP of Rs. 3400 per Metric Ton (MT) qua SSP. The said OM also introduced an ad hoc concession of Rs. 2000 per MT qua SSP. The OM of 13.08.2009 was made effective from 01.10.2009.

6.1. As regards the minimum bench mark for production, the OM provided that concession for SSP would be extended only to those units which achieved an annual capacity utilization of at least 50% or annual production of 40,000 MT qua production of SSP. Though, the words "whichever is lower" did not appear in the OM dated 13.08.2009, it is the common stand of counsels for the both parties that, this was the purport of the said OM. As a matter of fact, not only does the underlying Cabinet Note pointedly refer to this aspect but also, the subsequent OMs have clarified this point; thus removing any scope for ambiguity. For the purpose of ascertaining minimum benchmark for production, capacity utilization as on 31.03.2009, of the concerned unit, was to be taken into account. The above provisions, as indicated above, came into effect from 01.10.2009.

7. On 04.03.2010, the GOI introduced the first phase of its NBS policy w.e.f. 01.04.2010. The said NBS policy was made, inter alia, applicable to SSP as well. The stress in the NBS policy was, apparently to pay subsidy, based on the presence of primary nutrients in the fertilizer, namely, Nitrogen (N), Phosphate (P), Potash (K) and Sulphur (S). The extent of subsidy was to be determined by the GOI. In so far as payments of NBS to the purchasers/marketers was concerned, it was provided that the same would be released as per the procedure laid down in OM dated 13.08.2009.

7.1. The aforesaid was followed by the OM dated 09.04.2010 which really related to the implementation of the NBS policy for decontrolling phosphatic and potassic fertilizers except SSP. This circular provided freight subsidy in respect of all decontrolled fertilizers except SSP. It may be recalled that price fixation with respect to SSP had been decontrolled pursuant to OM dated 13.08.2009. The OM dated 09.04.2010 thus provided for freight subsidy on decontrolled fertilizers which were moved by rail, based on actual claims.

8. The GOI, thereafter, issued a OM dated 21.04.2010, for implementation of NBS policy qua SSP. This policy was brought into effect from 01.05.2010. Accordingly, for production and sale of SSP, it provided as follows: Per metric ton nutrient based subsidy was provided for powdered and granulated SSP which met quality specifications as indicated in the fertilizer control order for the period 2010-2011 w.e.f. 01.05.2010 at the rate of Rs. 4400 per MT which notably was inclusive of cost of freight. This circular also provided additional per metric ton subsidy with fortified SSP which had Boron, at the rate of Rs. 300.

8.1. However, clause 8 of this OM continued with the provision of minimum benchmark for production, which was pari materia with the provision in OM dated 13.08.2009. The said clause 8, provided that capacity utilization/production

would be calculated as on 31.03.2010, bearing in mind capacity utilization and production for the period 01.04.2009 to 31.03.2010. The manufacturing units were required to inform the concerned department their installed capacity/production, duly certified by a statutory auditor. The information in this behalf was required to be sent to the concerned inspection agency.

8.2. Clause 10 of this very OM, indicated that NBS policy for SSP was optional and was, therefore, available only to those manufacturers/sellers of SSP who would adhere to prescribed quality standards and maintain the MRP printed on the bag. Thus, SSP producers/manufacturers, who were desirous of opting for the NBS policy qua SSP were required to enter into a Memorandum of Understanding (MOU) as per the enclosed proforma with the department of fertilizers, GOI to avail of NBS policy.

9. It appears that the fertilizer manufacturers generally were unhappy with the introduction of clause 8 in the circular dated 21.04.2010 (to which I have already made a reference above), which deals with minimum bench mark for production. Accordingly, the Fertilizers Association of India (in short FAI), addressed a communication dated 27.04.2010, to the respondents. FAI in its communication inter alia brought to fore, their grievance that minimum benchmark for production of SSP to claim NBS was a "harsh step". The reasons adverted to were as follows: the capacity utilization of the entire SSP industry in the year 2009-10 was only 40%; about 32 units had attained capacity utilization of more than 50% or, production of more than 40000 metric tons in the year 2009-10, and therefore, a large number of SSP manufacturers would be ineligible for subsidy under NBS policy, in the year 2010-11 if, the minimum production benchmark as provided in clause 8, was made applicable for the year 2009-2010. There were other difficulties also put forth, with which one is not presently concerned with. The sum and substance of the representation was that SSP had been marked out for alleged discrimination as manufacturers of other fertilizers, in respect of which subsidy was being extended, did not have the minimum benchmark for production clause being made applicable to them.

10. In view of the representation of FAI, the GOI issued yet another OM dated 13.07.2010, with respect to extension of subsidy under the NBS policy for the period 2010-2011. The GOI, while retaining the minimum production bench mark, relaxed the rigour of its earlier OM dated 21.04.2010, having regard to the difficulties faced by the manufacturers due to purported uncertainty and change in the policy between 2009-2010, by indicating as follows in clause 4 (a), (b) and 5:

....4. It is clarified that the following criteria for payment of subsidy will be applicable w.e.f. 1st may 2010:

(a) Units which have achieved at least 50% capacity utilization or production of Rs. 40000 MTs of SSP on annual basis for 2009-10 and have fulfilled the requirement of the policy under NBS are eligible for claiming subsidy for sale of

SSP under NBS directly or through marketing arrangement, as the case may be, w.e.f. 1st May 2010 for the year 2010-11, subject to the stipulation in paragraph 5 of this OM.

(b) In those cases where the requirement of stipulated capacity utilization/production on annual basis has not been fulfilled, capacity utilization/production criterion on a pro rata basis for the quarter 1st May 2010 to 31st July 2010 would be applied for payment w.e.f. 1st May 2010 for the year 2010-11, subject to the stipulation in paragraph 5 of this OM.

5. Payment of subsidy for the year 2010-2011 w.e.f. 1st May 2010 will be provisional. Any SSP unit which fails to achieve the benchmark criteria of 40000 production or 50% capacity utilization on annual basis for 2010-2011 (w.e.f. 1st May 2010 to 30th April 2011) would not be considered for subsidy under Nutrient Based Subsidy policy or otherwise, for next year, i.e., 2011-12 and recovery of the entire subsidy already paid under the NBS w.e.f. 1st May 2010 would be made along with interest thereon. Each SSP unit is required to furnish an undertaking to this effect while making claims for subsidy under the NBS w.e.f. 1st May 2010...

11. The GOI with respect to its earlier OM of 13.08.2009 vide its OM of 05.08.2010 inter alia extended the period of achieving the minimum production benchmark by indicating that any SSP unit which failed to achieve the benchmark criteria of 40000 MT or 50% capacity of utilization on pro rata basis from 01.10.2009 to 30.04.2010 or on an annual basis from 01.10.2009 to 30.09.2010, would not be eligible for ad hoc subsidy for sale of SSP for the period 01.10.2009 to 30.04.2010. Thus, in effect, it indicated that anyone who had obtained a subsidy contrary to the provision of OM 05.08.2010, would have to refund the same alongwith penal interest.

12. The aforesaid narrative, broadly sketches out chronologically the recent twists and turns in the policy, which is encapsulated in the various OMs issued by the GOI from time to time. In so far the petitioners are concerned, they have, notwithstanding the provisions contained in the OMs qua minimum benchmark for production continued to lodge their claims for payment of subsidy at various stages with the respondents. Before I refer to those communications, it may be important to briefly advert to the relevant facts pertaining to each of the petitioners.

WP(C) 7384/2010 (Devyani Phosphate Private Ltd. & Anr.)

13. The aforementioned petitioner, i.e., Devyani Phosphate Private Ltd. (in short DPPL) apparently had set up a medium scale unit for manufacture of SSP which is located in RICO Industrial Area, Gugli, Rajasthan. The said unit apparently commenced its commercial production w.e.f. 03.07.2009. DPPL was inducted into the concession scheme for decontrolled phosphatic fertilizers vide notification bearing No. 19011/10/2009-MPR dated 16.02.2010 w.e.f. the date of its commercial production, i.e., 03.07.2009.

13.1 It is the case of DPPL that, they had submitted their claim for receipt of subsidy in the prescribed forms. Evidently; on account payment, equivalent to 85% of the total subsidy claimed vis-?-vis supplies made for the months of August and September, 2009, was released to DPPL.

13.2 However, w.e.f. October, 2009, the DPPL has not received its share of the subsidy, on account of its failure to achieve the minimum benchmark for production, as stipulated in OM dated 13.08.2009. DPPL claims that, failure to achieve the minimum bench mark for production, was on account of factors such as: time lag, required for stabilization of production in market being a new unit; uncertainty in the market; and lack of demand on account of failure of monsoon.

13.3 From time to time the DPPL has made representations dated 17.08.2010 for release of subsidy for the period 01.10.2009 to 30.04.2010 followed by reminders dated 27.08.2010, 08.09.2010., 16.09.2010, 25.09.2010, 30.09.2010 and 20.10.2010.

13.4 DPPL claims subsidy in the sum of Rs. 233.31 lacs (approximately) for the period 01.10.2009 to 30.09.2010. During this period, DPPL claims it suffered business losses to the tune of Rs. 121.31 lacs. The said business losses include a loss of Rs. 63.35 lacs on account of interest on investment and other losses quantified at Rs. 57.96 lacs on account of labour, power and other expenses. The subsidy for the aforementioned period is thus claimed with interest at the rate of 18% per annum.

WP(C) 6573/2011 (Narmada Agro Private Ltd.)

14. In the captioned petition there are two petitioners: Narmada Agro Chemical Private Ltd. (in short NACPL) and Krishna Industrial Corporation Ltd. (in short KICL). NACPL claims to be in the business of manufacturing SSP, since 1990. It claims to have annual installed capacity of 15000 metric tons. KICL on the other hand claims to be in the business of manufacturing SSP for the last 30 years. Admittedly, both NACPL and KICL have not been able to achieve the minimum bench mark for production.

14.1 While, KICL approached the respondents vide representation dated 24.04.2010 for waiver of the minimum bench mark for production due to its inability to achieve the same in the previous five (5) years; NACPL made its representations vide communications dated 16.05.2011 and 27.05.2011.

14.2 Both seek release of subsidy for the period 2009-2010. For this period NACPL has quantified the subsidy payable to it in the sum of Rs. 26,08,000/-.

WP(C) 8164/2011 (V.K. PHOSPHATES LTD.)

15. The petitioner in this case is: V.K. Phosphates Ltd. (in short VKPL). VKPL claims that, it is a small scale unit, engaged in the sale and manufacture of SSP, with an annual installed capacity of 30000 metric ton. Presently, the manufacturing unit of the petitioner is lying closed since, April, 2011.

15.1 VKPL avers that it lodged its claim for release of subsidy on 20.02.2011 vis-?-vis SSP, sold between the period October to December, 2009, in the State of Uttarakhand.

15.2 It is the case of VKPL that, a representation dated 30.05.2011 was made to the respondents, to withdraw the provisions and its policies issued from time to time which, incorporated the minimum benchmark for production.

15.3 It is averred by VKPL that, the State Government of U.P. had issued a certification on 04.07.2011, with regard to quality and quantity of SSP sold by it, for the period October to December, 2009 and February, 2010. Accordingly, VKPL made representations on 18.07.2011 to the respondents for release of subsidy for the period October to December, 2009 and February, 2010.

15.4 The aforesaid representation was followed by yet another representation dated 22.09.2011, wherein it was indicated that apart from the claim already lodged, it had a claim for subsidy against 145 metric tonnes of SSP sold in the state of Uttrakhand, which had been duly verified by the said State.

15.5 VKPL, apart from challenging the aforementioned OMs, which prescribed for a minimum benchmark for production, claimed subsidy to the tune of Rs. 8,97,500/- on account of sale of SSP, for the months of October to December, 2009 and February 2010, with interest at the rate of 24% per annum from 01.10.2009 till the date of realization.

WP(C) 700/2012 (Agri Green Fertilizers and Chemicals Pvt. Ltd.)

16. The petitioner in this case is Agri Green Fertilizers and Chemicals Pvt. Ltd. (in short AGFCPL). It appears AGFCPL had set up a manufacturing unit in Kudappa district in the State of Andhra Pradesh. AGFCPL also claims to be a small scale unit. Apart from anything else, it is also aggrieved by the minimum bench mark for production issued by the GOI. AGFCPL, as on 31.03.2009, has an industrial unit established with an annual installed capacity of 60000 metric tons. AGFCPL has lodged, a claim in the sum of Rs. 76,26,328/- towards subsidy for the year 2009-2010. Similarly, for the year 2009-2010, AGFCPL claims a sum of Rs. 27,94,000/- towards subsidy. Thus, in all the total sum claimed is a sum of Rs. 104,20,328/-.

16.1 Like other petitioners, apart from laying a challenge to the minimum bench mark for production contained in the impugned OMs, it seeks release of subsidy in the sum of Rs. 104,20,328/- for the periods referred to above with interest at the rate of 24% per annum w.e.f. June, 2009 till the date of its actual realization.

SUBMISSIONS OF COUNSELS

17. In the background of the aforementioned facts, arguments were addressed on behalf of the petitioners by Mr. P.K. Mullick, Mr. Sanjay Katyal and Mr. Kaushal Yadav, while the respondents were represented by Mr. Rajiv Mehra, learned ASG alongwith Mr. Jatan Singh, Mr. Neeraj Chaudhary & Mr. Sachin Dutta, CGSCs. The

line of arguments which was put forth on behalf of the petitioners was common and thus can be summed up as follows:

(i) The OM dated 13.08.2009, read with the succeeding OMs, imposes an unreasonable and an arbitrary eligibility condition for grant of subsidy to SSP manufacturing units which is based on a minimum benchmark for production. The said benchmark for production is skewed in favour of manufacturing units which have large installed capacities as against smaller units. This has resulted in smaller units becoming sick and unviable. The unreasonableness and arbitrariness was demonstrated by adverting to the following hypothetical figures to show that higher the installed capacity the lower is the eligibility standard:-

(ii) What was sought to be demonstrated is: the bigger the unit lower the benchmark which is required to be achieved in order to secure subsidy from GOI. As would be seen in the hypothetical examples cited before me, in case of Units 3 to 6, the eligibility criteria in percentage terms drops from 40% to 13%. Therefore, while unit No. 6 would only have to manufacture SSP equivalent to 13% of its installed capacity to secure subsidy, unit No. 1 and 2 would have to manufacture SSP, equivalent to 50% of its installed capacity.

(iii) According to the petitioners the provision for minimum benchmark for production was thus unfair and unreasonable as it did not take into account the age of the unit, the demand for the product in as much as the latter depended on the buying power of the consumer, i.e., the farmer which changed dramatically if, drought was experienced or a natural calamity occurred such as floods etc.

(iv) The petitioners at the time of selling their product, an activity which went on throughout the year, were unable to predict as to whether or not at the end of the financial year they would be in a position to manufacture and sell SSP equivalent to the minimum benchmark fixed by the GOI. In other words, while the petitioners sold SSP to the farmer at the subsidized rate, which was well below their cost of production, they were unable to recover the same when, at the end of the financial year, they were not able to demonstrate that they had achieved the minimum benchmark fixed for production.

(v) If the objective of the respondent was to secure to the farmers adequate quantities of SSP at affordable prices, the said objective could only get impeded with the existence of the impugned provision for achieving minimum benchmark qua production by SSP manufacturers/sellers. In other words, it was submitted that even without the impugned provision of minimum benchmark for production, farmers were getting quality SSP fertilizer at subsidized rates.

(vi) The impugned provision has been made applicable only qua manufacturers of SSP, there is no such provision qua other fertilizer such as Diammonium Phosphate (in short DAP), NPK-complex etc. This situation has created a class-discrimination as there is no intelligible differentia between two classes of manufacturers of fertilizers. It is because the cost of raw materials for manufacture of SSP is high that, it is made subject to government control and

therefore, necessarily survives on the subsidy extended by the government, which is, 60% of the actual cost of SSP.

(vii) The impugned provision demonstrably discriminates between large and small manufacturers. The said provision, therefore, ignores ground realities which hamper production such as: non-availability of raw material, floods, strike and also delay in receipt of subsidy. It was submitted that the quality concerns of the GOI are adequately met as before commencing manufacture the concerned unit has to obtain recognition and get itself covered by the fertilizer subsidy scheme of the respondent. It is only those units which meet the stringent norms adopted in this behalf, receive recognition of the respondent. The final product is subjected to quality test periodically by a GOI agency, i.e., Projects and Development India Ltd., which is a public sector undertaking under the control of the respondents. Subsidy is received by the concerned unit only upon certification of quality and quantity of the concerned State Government where SSP is sold.

(viii) In the submissions made on behalf of VKPL, there was a specific reference to an entity by name of Suman Phosphate & Chemicals Ltd. which, against an installed annual capacity of Rs. 3,30,000 MTs of SSP had achieved production of only Rs. 40,246.383 MTs of SSP, during the period 01.05.2011 to 30.04.2012, and thus, in line with the extant provision for minimum benchmark for production, would be entitled to subsidy.

17.1 In support of their submissions the petitioners relied upon the following judgments: V. Sivamurthy Vs. State of Andhra Pradesh and Others, ; Union of India (UOI) and Another Vs. International Trading Co. and Another, and CSIR and Others Vs. Ramesh Chandra Agrawal and Another, .

18. On behalf of the respondents, the learned ASG argued that the entire thrust of the impugned provision was to encourage production of SSP in order to decrease the dependence on expensive substitute which went by the name of DAP. It was contended that apart from the above, SSP had great agronomic importance for crops, such as, oil seeds and, those crops, which were grown in water shed areas in addition to vegetable and fruits. Another reason put forth for encouraging production of SSP was that phosphoric (P₂O₅) acid content in SSP was 16% as against 46% in DAP, in addition to, Sulphur and Calcium.

18.1 It was submitted that in the country and today, eighty seven (87) units were manufacturing SSP, which were located in various States, and had a combined installed capacity of approximately Rs. 85 lac MTs were covered under the subsidy scheme of the GOI. The argument was made with the purpose that, despite the challenge made by the petitioners the subsidy scheme was working well. By way of example the respondents gave following statistics to show that with the advent of the scheme under the OMs mentioned above the production of SSP in the country has gone up. The figures put forth in that behalf were as follows:

18.2 It was contended that, production of SSP enabled the GOI to reduce its dependence on import of DAP. It was stated that despite DAP being produced in the country, it had to be imported and the only way in which the dependence on imported DAP could be reduced, was by increasing the production of SSP. The respondents thus submitted, that during the period 2006-2007 to 2008-2009 the average production of SSP was Rs. 25.28 lac MTs as against an installed capacity of 76 lac metric tonnes; a situation which necessitated introduction of the minimum benchmark of production.

18.3 It was submitted that during this period SSP was sold locally, in and around the area when the manufacturing unit was located, and therefore, had to be transported to distant places, where there was no manufacturing units, in the near vicinity. The sale of SSP was, therefore, almost negligible in the State, which did not have SSP units located within its territory. Some manufacturing units produced SSP as low as 5 to 10% of their capacity. It was also observed that many SSP units were not seeking to claim the balance 15% of the SSP sold by them, which raised concerns about the quality of SSP sold in the market. It was also noticed that even though the price of raw material used in SSP, i.e., rock, sulphate had fallen in the international market, the production of SSP had not increased. Therefore, in the background of these experiences, the GOI took the step of introducing the impugned provision in the OM dated 13.08.2009, and simultaneously, gave the manufacturer the liberty to arrive at his own MRP as against the fixed MRP of Rs. 3400 per MT. Parallely, the manufacturer could claim an ad hoc concession of Rs. 2000 per MT. The said concession at the relevant point of time was fixed keeping in mind the trend of cost of raw materials used in the manufacture of SSP.

18.4 In sum and substance it was contended that the policy contained in OM dated 13.08.2009 was framed keeping in mind the following objective:

(i) Open MRP will provide flexibility to the manufacturers/ marketers to move and sell SSP in those states where production units are not located. (ii) The minimum benchmark condition for production will give wide option to farmers to choose the brand of SSP of their choice as the manufacturers shall be able to sell their products far and wide in the country.

(iii) The minimum benchmark/ eligibility condition is aimed at encouraging higher capacity utilization by the SSP units which will not only increase the production of SSP but also its availability of quality SSP in the country and commitment of the producers/ manufacturers.

(iv) Further the minimum benchmark/ eligibility condition will discourage non serious producers under the scheme to avail subsidy.

18.5 It was contended that, the impugned benchmark was introduced by the GOI after due deliberation. In this regard, the learned ASG relied upon the note placed before the Cabinet Committee on Economic Affairs.

18.6 Apart from the above, it is contended that, a similar challenge had been raised before the High Court of Bombay, Aurangabad Bench, in WP(C) Nos. 7165/2009, 7350/2009 titled Gajraj Fertilizers Pvt. Ltd. vs UOI and Balaji Fertilizers Pvt. Ltd. vs UOI. The said writ petitions, I was informed, were disposed of by a common judgment dated 30.03.2010 passed by the Division Bench of that court. The Division Bench of the Bombay High Court dismissed the challenged laid by two SSP manufacturers to the impugned provision.

18.7 It was also contended that the writ petition was not maintainable as it sought to challenge the policy decision of the GOI, the scope for interference qua which was narrow and could only be based on the grounds of malafide and extreme arbitrariness. Reliance in this regard was placed on the following judgments: Duncan Industries Ltd. and Another Vs. Union of India (UOI), BALCO Employees Union (Regd.) Vs. Union of India and Others, ; P.T.R. Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others, ; M/s Neyveli Lignite Corporation Ltd. Vs. Commercial Tax Officer, Cuddalore and Another, and WP(C) 13091/2009 dated 04.03.2010 titled Sophisticated Marbles & Granite Industries vs. UOI & Anr.

REASONS

19. Having heard the learned counsels for the parties and perused the record, the following aspects clearly emerge:

(i) The GOI, apparently since October, 1992 had been administering concession schemes vis-?-vis decontrolled phosphatic and potassic fertilizers. Evidently, prior to this, as per the stand of GOI, it used to administer what was known as the Retention Price Scheme which went back to the year 1977. With the issuance of OM dated 25.08.2008, GOI revised its concession scheme for the year 2008-2009. The main focus of the revision apparently was, fixation of a uniform all India MRP of Rs. 3400 per MT vis-?-vis SSP. Pertinently, at this stage, GOI did not introduce a minimum benchmark for production. Manufacturers/sellers of SSP were thus entitled to on account payment of 85% of the subsidy on sale of SSP. The balance 15%, was required to be paid, on due certification of quantity as well as quality of the SSP sold, in a particular State, by the concerned State Government.

(ii) This, however, underwent a change with the issuance of circular dated 13.08.2009. For the first time in clause 6 of the said circular, the following provision was made, introducing minimum benchmark for production:

....6. Ad hoc concession for SSP w.e.f. 1st October 2009 will be provided to those eligible SSP units only, which have either annual capacity utilization of at least 50% or annual production of 40000 MT of SSP. For the purpose of recognizing capacity utilization/ production, capacity as on 31st March 2009 will be taken into account. The SSP units are required to inform the Department their installed capacity as on 31st March 2009 certified by the statutory auditor with a copy to the PDIL. PDIL will also be required to submit a separate report on the installed

capacity of the units as on 31st March 2009. Capacity utilization/ production for three months from the date of this notification on pro rata basis will be taken into account for the capacity utilization/ production benchmark as above for ad hoc subsidy for sales of SSP w.e.f. 1st October 2009....

20. Undoubtedly, after the introduction of NBS policy with respect to SSP vide OM dated 04.03.2010, there has been no variation in the impugned clause, to the extent it relates to stipulation of a minimum benchmark for production of SSP by manufacturers in order to enable them to avail of the subsidy granted by the GOI. The only change was re-numbering of the impugned clause. This becomes quite clear on reading OMs dated 04.03.2010, 19.04.2010 and 21.04.2010. As a matter of fact the last of these three OMs, i.e., OM dated 21.04.2010 seeks to implement the NBS policy qua SSP. Resultantly, NBS policy was made effective qua manufacturers of SSP w.e.f. 01.05.2010. While under the OM dated 13.08.2009 ad hoc concession was receivable by an eligible SSP manufacturer at the rate of Rs. 2000 per MT this was enhanced for the year 2010-2011 to Rs 4400 per MT w.e.f. 01.05.2010. The NBS under OM dated 21.04.2010, however, was extended to powdered granulated and fortified SSP with Boron. As a matter of fact, for the last category an additional subsidy for 300 MT was made available. In this OM dated 21.04.2010, the minimum benchmark for production was incorporated in clause 8, which in sum and substance was same as in clause 6 of circular dated 13.08.2009. Therefore, in order to avoid prolixity, I have not extracted the same.

20.1 What is, however, important to note is that with the introduction of NBS policy, SSP manufacturers were given an option to accept the regime stipulated in the said OM of 21.04.2010 subject to the said manufacturers entering into a MOU with the concerned department. This was clearly stipulated in clause 10 of OM dated 21.04.2010. for the sake of convenience the same is extracted hereinbelow

...10. NBS policy for SSP is optional and available to only those manufacturers/ marketers of SSP who will adhere to quality standards and maintain the Maximum Retail Price (MRP) printed in the bag. The SSP producers/ manufacturers who wish to opt for the NBS policy for SSP would be required to enter into an MOU as per the enclosed proforma with the Department to avail NBS....

20.2 There is no dispute, and I heard none of the counsels disputing this fact, that each one of them executed a MOU in that behalf to avail of the benefits of the subsidy under the NBS policy.

21. It is also not in doubt that because the FAI made a representation to the GOI that vide OM dated 13.07.2010 the rigour qua eligibility was relaxed, in as much as, where SSP manufacturers had failed to achieve the requirement of SSP capacity utilization/production on annual basis, a pro rata basis was applied for the quarter 01.05.2010 to 31.07.2010 for payment of subsidy w.e.f. 01.05.2010

for the year 2010-2011 subject, however, to the condition stipulated in clause 5 of the said circular. I have already referred to the relaxation made in that behalf and therefore, need not advert to the same once again.

22. Similarly, a further relaxation was given by GOI vide OM dated 05.08.2010 by introducing a pro rata basis for achieving the minimum benchmark of production for the period 01.10.2009 to 30.04.2010 while retaining the annual basis for the period 01.10.2009 to 30.09.2010. Therefore, it cannot be said that the GOI had not calibrated its policy taking into account the difficulties faced by SSP manufacturers, in particular, the fact that the new units may have been set up in 2009 or existing units required time to adjust themselves to the change in policy, which required them to meet a minimum benchmark of production.

23. This apart the empirical data which the GOI has placed before me, seems to suggest that there has actually been a flip in the production and sale of SSP. I have no reason to doubt the figures given by GOI, as there was no challenge raised to the same before me by the petitioners. The figures put forth by the GOI suggest that between 2006-2007 to 2011-2012, while the production of SSP has increased from Rs. 28.06 lacs MTs to Rs. 43.25 lac MTs with a dip in 2007-2008, the consumption and sale has also gone up from Rs. 28.06 lac MTs to Rs. 43.01 lac MTs.

23.1 Like production, consumption and sale also dipped in 2007-08. If these figures are to be believed, qua which I have no doubt, almost the entire amount of SSP produced is consumed. There is obviously a great demand for SSP. This fact is also supported, if one were to have regard to the figures of DAP produced, imported and consumed in the country. The said figures for the sake of convenience are set out hereinbelow:

24. A perusal of the figures would show that the large quantity of the DAP was consumed in the country and over the year the trend has only increased. Therefore, the GOI in my opinion would be well within its right to formulate policies which would give flip to production of SSP in the country. By all accounts the policy appears to have worked, as the production has only increased. Though the concern remains, that the, import content has not been brought down to the extent perhaps expected by the GOI. The figures also suggest that perhaps much has to be achieved in terms of policy to reduce the dependence on DAP, which is one of the reasons given for formulating the extant policy by the GOI.

25. The question which arises, therefore is, are the figures referred to above coincidentally in favour of GOI or was the aspect pertaining to introduction of minimum benchmark for production thought out, and thereafter introduced after due care and caution. The note placed before the Cabinet Committee of Economic Affairs seems to suggest that the persons concerned with framing the policy had taken into account the then existing state of affairs, which was, the factum of abysmally low utilization of installed capacity by SSP manufacturers, while introducing the impugned provision. To give a synoptic account of the

same, I may only refer to the following extract as set out in the note:

....3.4 Availability of quality SSP to the farmer continues to be a major concern. In view of production of small quantity of SSP annually by many units and their capacity utilization as low as 5%-10% of the installed capacity, there is concern about economic sustainability and seriousness of such units as producers. Accordingly, benchmark of say 50% capacity utilization can be considered for payment of subsidy. However, there are certain large capacity units, which may find difficult to attain 50% capacity utilization as they may sometime find it difficult to procure rock either from indigenous or imported sources. Accordingly, it is proposed that concession for SSP should be provided to those units only, which have annual capacity utilization of at least 5% OR annual production of 40000 MT of SSP, whichever lower. This is due the fact that while 50% capacity utilization is appropriate benchmark for those units having lower installed capacity of say 85 thousand MT and below, this may adversely affect SSP units with higher capacity of one lakh MT to four Lakh MT. the proposed benchmark would cover majority of the SSP producing units. Initially, a three months time from the date of notification of the proposed policy would be provided to observe the capacity utilization on pro rata basis. After examination of three months data, the proposed change will be introduced. The installed capacity of the SSP units on 31st march, 2009 as determined by the PDIL will be considered for this purpose. This will ensure production of quality SSP and commitment by SSP producers.

3.5. As mentioned at paragraph 2.2 above, with the approval of the competent authority in the Department, a revised notification modifying the provision relating to marketing arrangement was issued by the Department on 25th August 2008, whereby all SSP units were allowed to produce and market SSP irrespective of their production. This was in view of ensuring availability of SSP to the farmer and not to violate the equality of opportunity to the SSP units. This was in modification of the proposal approved by the CCEA that all SSP should be marketed by large producers, manufacturing more than one lakh MT of SSP per annum or through NPK/urea manufacturers who are already covered under the subsidy/concession Scheme and who are having a wide marketing network in the country. The revision was notified on 25th August 2008 and was applicable from May 2008 to June 2009. It is proposed that the same may be considered and approved.....

25.1. In so far as financial implication of the policy was concerned, it was also examined. It appears that, the policy framers, were of the view that there was no substantial difference in the input cost qua both indigenous and imported rock route. As a matter of fact, the view taken was that there was a marginal saving of Rs. 4.67 crores annually.

26. As against this if, one were to look at the performance of each of the petitioners, it appears that they wish to survive only on subsidy and make no real attempt at increasing their productivity; when there is every evidence

available to show that there is a huge market for sale of SSP. In this regard I may only refer to installed capacity of each of the petitioners and the quantum of production carried out by them between 2007-08 to 2011-12:

27. The above table would show an abysmally low capacity utilization by each of the three petitioners. As a matter of fact, the ratio of production to the installed capacity, if one were to take the most recent year, 2011-2012, ranges from 0.74% to 51%. The worst case of unutilized capacity is presented by VKPL. As a matter of fact, VKPL and AGFCPL have reduced their installed capacity from 60000 MTs as obtaining 2009-2010 to 33000 and 30000 MTs respectively in the year 2011 and 2012.

27.1. As against this, the total production of SSP, as indicated above, has been on the increase from Rs. 22.46 lac MTs produced in 2007-2008, to Rs. 42.25 lac MTs in the year 2011-2012. There is, however, an unutilized capacity of nearly Rs. 35-37 lac MTs; if one were to take into account the total installed capacity in the country, which obtained in the year 2009-2010, as per the data provided by GOI. The total installed capacity in 2009-2010 was Rs. 80.96 lac MTs.

27.2. There is a case, therefore, rightly made out by the GOI that policy needed to be introduced to increase productivity. The fact that since the introduction of the policy in August, 2009, there has been an increase in the production, would show that perhaps the policy has worked.

27.3. The argument of the petitioners that the policy is skewed and tends to benefit the bigger players, i.e. larger manufacturers, may at first blush seem to be correct, but this argument ignores the fact that petitioners in reality do not want to take any steps for increasing their productivity and/or their efficiency. One could have understood an argument that policy over all had not resulted in increase in production of SSP; that, however, does not appear to be the case. Therefore, to suggest that the provision for minimum benchmark for production ought to be declared unreasonable and discriminatory, is without merit and hence rejected.

28. The contention of the petitioners that the cost of production for SSP is in the range of Rs. 7000 per MT or more, and when, they sell SSP produced by them at the subsidized price, they suffer a loss, is an argument which cannot be accepted as, in a sense, the petitioners are responsible for what has befallen them, in view their abysmal performance in not being able to improve the level of their production. It is obvious that the cost of production of their product is high as the volumes that they produce are abysmally low. Larger the output, lower will be the cost of production. Therefore, to suggest that losses have been, incurred by the petitioners on account of a lopsided or skewed policy of the GOI, in my view, ignores the demonstrable inefficiency of the units run and managed by the petitioners.

29. The main thrust of the policy introduced by the GOI is to provide good quality SSP fertilizer in optimum quantities to the farmers. As long as the

Government is able to achieve this objective, the incidental impact on inefficient manufacturers cannot render the policy in vogue illegal, on the grounds of arbitrariness or unreasonableness.

30. It is well settled in framing economic policies, the GOI needs a play in the joints. There is no perfect solution to every conceivable problem which may arise in the implementation of an economic policy. If by and large the policy is fair and achieves the object it seeks to achieve, the court is not called upon to iron out the creases or correct perceived defects in the policy just because there is another point of view available. Policies are forged based on past experience, collation of empirical data and an element of experimentation. Therefore, time and again courts have indicated that policies of the State, if assailed, can be set aside on very narrow grounds of malafides or extreme arbitrariness, or being unconstitutional or even violative of statutory or other provisions of law. In this regard there are several decisions rendered by this court as well as by the Apex Court. I need not burden the judgment by replicating the principle enunciated in this behalf. Suffice it to say, whichever way the present case is examined, it does not fall within the realm of extreme arbitrariness or any other known ground of challenge which perhaps could have persuaded me to strike down the policy in issue. Accordingly, the challenge to the impugned policy is repelled. In the result, the captioned writ petitions are without merit and hence dismissed. The parties will, however, bear their own costs.