
(2003) 05 AHC CK 0140

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 36323 of 1996

Hari Fertilizers

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 21-05-2003

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2003) 05 AHC CK 0140

Hon'ble Judges : M.Katju, J and R.S.Tripathi, J

Final Decision : Dismissed

Judgement

M. Katju, J.—We have heard the learned Counsels for the parties.

This writ petition has been filed against the impugned order dated 30/7/1996 Annexure 1 to the writ petition and for a mandamus directing the respondent No. 1 to pay the alleged balance of subsidy claimed by the petitioner amounting to Rs. 1312.17 lakhs with interest.

2. The petitioner is a unit of Orissa Cement Ltd. and this company is registered under the Indian Companies Act which was engaged in the manufacture and sale of Ammonium Chloride, a fertilizer and Soda Ash from its factory situated at Sahupuri, Varanasi, U.P. The controversy in this case relates to fixation of the correct retention price for the period 18/4/1985 to 31/3/1989 and consequently grant of subsidy to the petitioner for the said period.

3. In paragraph 3 of the writ petition it is stated that in order to introduce a rational system of pricing of fertilizers with a view to making the same available to consumers at a low price and at the same time to ensure reasonable return on the investment to the manufacturers and facilitate healthy development and growth of the fertilizer industry, the Government of India set up a Committee under the chairmanship of Shri S.S. Marathe, the then Chairman of the Bureau of Industrial Costs and Prices (BICP), respondent No. 2 in this petition. In May, 1977 this Committee submitted a report recommending to the Central

Government that the price of fertilizers should be kept low by fixing the selling price under the Fertilizer (Control) Order, and in order to compensate the manufacturers for selling the fertilizers at the controlled low prices a subsidy scheme should be evolved. The recommendation of the committee was that the Government should fix a low consumer price under the Fertilizer (Control) Order and simultaneously a retention price scheme should be introduced under which a fair exfactory retention price per tonne of finished product would be given to provide for a just return of 12% on the manufacturers investment. The difference between the selling price fixed under the Fertilizer (Control) Order and the retention price was to be paid by the Government to the manufacturer by way of subsidy. The Government accepted the recommendation of the Committee and published its resolution dated 1111977 in the Gazette of India, copy of which is Annexure8 to the writ petition. The scheme which was introduced by the Government of India vide its resolution dated 1111987 was to be administered by the Fertilizer Industry Coordination Committee (FICC) and one representative of the industry was to be a Member of the Committee. The retention price provided for periodical revisions in the retention price to neutralize the increase in the cost of raw material/inputs and cost of transportation. The aforesaid scheme was initially made applicable only to urea but Ammonium Chloride was brought under the scheme from 1941985. There were three manufacturers of Ammonium Chloride, namely, Hari Fertilizers, Punjab National Fertilizers and Chemicals Ltd. (PNFC) and Tuticorin Alkalies and Chemicals Limited (TAC). It is alleged that all the said producers also produced Soda Ash as joint product with Ammonium Chloride. Soda Ash is altogether a different marketable product with different chemical and physical properties and was manufactured as a coproduct.

4. It is alleged in paragraph 9 of the writ petition that the petitioner's plant was more than 37 years old, whereas the plant of the other two companies are relatively new plants with advanced technology. There was significant difference in the manufacturing process of the other two companies as compared to that of the petitioner. It is alleged that PNFC and TAC received ammonia at a subsidized price from the fertilizer plants who were able to sell this product at extremely low rates because they made it from Naphtha which was heavily subsidized by the Government and they were given another raw material viz. carbon dioxide free. In contrast, the petitioner made ammonia from coke and had to make its own carbon dioxide. Hence, the petitioner's cost was much higher than that of PNFC and TAC. It is further alleged that PNFC and TAC were supplied power from the grid whereas the petitioner had to generate its own power at a considerably higher cost and this also increased its production cost.

5. It is alleged in paragraph 9 (a) of the writ petition that instead of entrusting the determination of retention price to the FICC the Government of India gave the work to BICP. It is alleged that this was apparently done in order that a common retention price be determined for all the manufacturers of Ammonium Chloride instead of separate pricing for each factory as had been adopted by the FICC for the manufactures of urea. In paragraph 9 (b) it is alleged that although

BICP collected the actual cost data from all the producers of Ammonium Chloride individually but it fixed a uniform retention price at Rs. 3,375/ per MT whereas urea retention price was fixed on the basis of each plant. It is alleged that this resulted in discrimination against the petitioner since its cost of production was higher than that of PNFC and TAC.

6. It is alleged in paragraph 9 (b) of the writ petition that there were three ways of calculating the cost of production of Ammonium Chloride (a) on technical cost allocation basis, (b) on average cost basis and (c) by taking the total cost of production of both Ammonium Chloride and Soda Ash and reducing it by the sales recovery of Soda Ash. It is alleged that the Government arbitrarily adopted the third method and fixed the selling price of Ammonium Chloride at Rs. 3,215/ PMT which was wrong, discriminatory and arbitrary. It is alleged that this was done to force the retention price downwards so that it became approximately the same as given to the other two manufacturers. It is alleged that these two manufacturers enjoyed the advantage of receiving subsidized ammonia and had more modern plants and therefore, a lower production cost and were receiving free carbondioxide and power at a lower rate, whereas the petitioner had to produce carbon dioxide and generate its own power. It is alleged that all these additional expenses were ignored and by using a totally inequitable and false method of accounting, a selling price was determined for the petitioner which was so low that the petitioner suffered loss and had to close down its factory.

7. It is alleged that by taking the total cost of both the products and giving credit for sales recovery of Soda Ash, the profit of Soda Ash was being set off against the fair retention price which was due on Ammonium Chloride. This was unfair as Soda Ash was not price controlled. The respondents also did not neutralize the cost increases which the petitioner had to bear during the three year price period.

8. In paragraph 10 (d) of the writ petition it is stated that Soda Ash is manufactured in approximately the same quantity as Ammonium Chloride and has totally different structure. Whereas Ammonium Chloride was an essential and controlled product, Soda Ash was under no such control and was sold freely at market price. It is alleged that BICP recommended fixation of uniform retention price of Ammonium Chloride with a view to provide incentive to reduce costs and encourage economic production based on a single industrywise price system based on efficient levels of production. It is alleged in paragraph 10 (1) of the writ petition that in the pricing calculations respondent No. 2 used a capacity utilization of 85% whereas in respect of all other nitrogenous fertilizers prices were determined on a capacity utilization norm of 80%.

9. In paragraph 10 (g) of the writ petition it is stated that in the price calculation the respondent No. 2 assumed capacity of the petitioner's plant to be 29,700 tonne based on details of technical study. This was incorrect. It is alleged that the respondent No. 2 based this capacity on a maximum production on a single day during the year i.e., 90 MT per day in December when production is normally high. They then assumed that the factory worked for 330 days at this maximum

level. The capacity thus calculated at 29,700 MT per annum was far higher than the 22000 M.T. per annum earlier certified by the FICC vide Annexure 11 to the writ petition.

10. It is alleged in paragraph 10 (h) of the writ petition that the retention price given to the petitioner was inadequate, unfair and unjustifiably low. The petitioner made investments of Rs. 10 crores over a period of time for modernization of the plant and machinery but because of inadequate retention price suffered losses and had to close down its factory on 4/1/1989. In paragraph 11 it is stated that there were three ways of calculation and the one mentioned in paragraph 11 (c) was adopted which was discriminatory. It is alleged that sale of and profit on soda ash has should not have any bearing on the fixing of a retention price of Ammonium Chloride. Both Soda ash and Ammonium Chloride are altogether two different products. The respondents have set off the profit on soda ash against the cost of Ammonium Chloride to arrive at an extremely low retention price.

11. In the supplementary affidavit filed by the petitioner alongwith the amendment application which has been allowed, the petitioner has stated in paragraph 11 that the petitioner is not pressing its allegation of unfair determination of the petitioner's capacity by BICP, claim for subsidy on ammonia and carbondioxide granted to the other two manufacturers and claim for additional cost in producing its own power. Since the petitioner has given up this claim it is not necessary for us to adjudicate on it. In Paragraph 13 of the aforesaid amendment application the petitioner revised its claim in the manner stated therein.

12. A counteraffidavit has been filed by the Central Government. In paragraph 5 of the same it is stated that the Ammonium Chloride was brought under the retention price cum subsidy scheme from 1985. Initially the individual retention price of different units producing Ammonium Chloride were fixed purely on provisional basis till the BICP could complete its detailed study and submit the report with its recommendation to the Government. The BICP submitted its report alongwith its recommendation in 1986. The Government of India accepted the recommendation and fixed a common provisional retention price of Rs. 3,375/ per M.T. for all the three manufacturers of Ammonium Chloride, namely, the petitioner, TAC and PNFC. The retention price was fixed provisionally on the basis of single industry price valid for three years from 1/4/1985 to 31/3/1988. The retention price fixed for various periods has been stated in paragraph 6 of the counteraffidavit. In June 1991 the final retention price of Rs. 3,342/ per M.T. was fixed for the period 1/1/1988 to 31/3/1988 on all industry basis. For the period 1/4/1988 to 3/7/1988 the retention price for Ammonium Chloride was fixed at Rs. 3,641/ per M.T.

13. In paragraph 9 of the counteraffidavit it is stated that in compliance to the orders of the High Court in Writ Petition No. 8227 of 1991 the petitioner was given a personal hearing by Joint Secretary (Fertilizers) on 17/4/1996 as well as

an opportunity to put forth its claim in writing. Accordingly, the petitioner submitted a representation on 25/4/1996. All the aspects of the matter were considered in consultation with the BICP and the petitioner was informed by the Ministry letter dated 30/7/1996 that the retention price of the Ammonium Chloride has been correctly fixed at the policy followed by the Government and no revision was called for.

14. In paragraph 18 of the counteraffidavit it is stated that the petitioner manufactures Ammonium Chloride from coke whereas other two manufacturers viz. PNFC and TAC Manufacture it from Ammonia. All the three producers follow modified solvay process which result in production of joint products, Ammonium Chloride and Soda Ash. It is true that Naptha used for fertilizers use is priced lower than that used for other purposes, but the petitioner could have availed of this facility if they so liked. The BICP in its computation took into consideration the cost of production of individual manufacturers notwithstanding whether Ammonia was produced from coke or was purchased from other sources. In paragraph 19 it is stated that the decision of the petitioner to continue production of ammonia from coke in his unit was a business decision of their own. It was in existence before the retention price scheme was introduced for Ammonium Chloride. In fact according to the BICP report the price of Ammonium Chloride based on coke without concession was Rs. 3,215/ where as the price recommended by the Government as the retention price was Rs. 3,375 and this was applied to the petitioners also. In paragraph 20 of the counteraffidavit it is stated that the modified solvay process followed by all the three manufacturers results in production of Ammonium Chloride and Soda Ash in specified proportion by weight. Hence, the cost of production of these two products can be arrived at on joint cost basis and the respondent has followed the said course to determine the retention prices of Ammonium Chloride for all the producers.

15. In paragraph 21 of the counteraffidavit it is stated that it is open to the Government to fix subsidy for each product on all industry basis irrespective of the cost of production by single units. During the past few years both measures have been adopted. Since it was felt that individual retention pricing does not provide any incentive to reduce cost, a single industrywise system based on efficient levels of production and consumption norms was decided upon which would generally provide the basis for healthy growth of the industry and encourage economic production of Ammonium Chloride. In paragraph 22 of the counter affidavit it is stated that 85% utilization of capacity for estimation of normative costs was considered for all units following dual process and the prices computed accordingly. In paragraph 29 of the counteraffidavit it is stated that the methodology followed by the respondent No. 2 is to determine total cost including capital related charges of the two products viz. Ammonium Chloride and Soda Ash after taking credit for Soda Ash on the basis of realization. The retention price of Ammonium Chloride was recommended by the respondent No. 2 based on weighted average of retention price and was recommended as an industry retention price.

16. A supplementary counteraffidavit has also been filed and we have perused the same. In paragraph 7 it is stated that the cost of production of the petitioner was higher than PNFC and TAC due to higher input costs. For the purpose of determining the retention price for the petitioner the cost of ammonia was worked out by the BICP based on their existing technology of producing ammonia from coke instead of Naptha. In order to encourage production of fertilizers from proper feedstock and to ensure availability at a reasonable price it was the policy of the Government to supply Naptha at a subsidized rates to the fertilizer manufacturers. The petitioner could also have availed of this facility if they so liked. The decision of the petitioner to continue the production of ammonia from coke in their unit was a business decision of their own.

17. In paragraph 8 it is stated that the Government had to entrust the task of determination of retention price of Ammonium Chloride to an expert body viz. BICP. The Government can either fix subsidy for single unit or for entire industry. Both the methods have been adopted in the recent past two years. Since it was felt that individual retention price does not provide any incentive to reduce cost, it was felt by the Government that single industrywise system based on efficient levels of production and consumption norms would generally provide the basis for a healthy growth of the industry. Moreover, even if the individual unitwise retention price had been fixed the petitioner would not have any advantage as against its retention price of Rs. 3,215 per M.T. an all industry weighted average retention price of Rs. 3,375/ per M.T. was fixed and allowed to the petitioner also. In paragraph 12 it is stated that the petitioners are claiming a higher retention price for inefficiently managed plant. The treatment given to all the three units following modified solvey process in the matter of credit for Soda Ash and allowing return was identical. Hence, there was no discrimination or arbitrariness. The obsolete technology of the petitioners was a major factor for the higher cost of production. The retention price and incentive of subsidy was allowed on the basis of certain fixed norms regarding capacity utilization and combination of norms and actuals in regard to consumption of inputs and utilities. The crux of the retention price is efficient operation of the fertilizer units. The petitioner adopted very old process and its plant and machinery and technology were obsolete and not cost effective. Hence, the cost of production was very high because of which the unit cannot form the basis of calculation of retention price and subsidy by the Government. The petitioner could have taken action to modify his technology and reduce the high cost of its production but it did not do so.

We have also perused the rejoinderaffidavit.

18. On the facts of the case we find no merit in this petition. In *India Cement Ltd. v. Union of India*, AIR 1991 SC 724, fixation of uniform retention price for all producers in respect of cement industry was upheld by the Supreme Court. In that case also it had been argued by the petitioner that the fixation of uniform retention price for all kind of manufacturers would violate Article 14 of the

Constitution because it is treating unequals as equal, which results in discrimination. This submission was repelled by the Supreme Court relying on its own Constitution Bench decision in *Shri Sitaram Sugar Co. Ltd. v. Union of India*, AIR 1990 SC 1277. In this Constitution Bench decision in *Shri Sitaram Sugar Co. Ltd. case (supra)* it was observed (vide paragraph 59) :

?What is best for the sugar industry and in what manner the policy should be formulated and implemented, bearing in mind the fundamental object of the statute viz. supply and equitable distribution of essential commodity at fair prices in the best interest of the general public is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review.?

19. It was also held in that decision that even if some persons are at a disadvantage and suffered losses on account of formulation and implementation of the Government policy, that is not by itself sufficient ground for interference by the Court. In *India Cement Ltd. v. Union of India (supra)* the Supreme Court observed that fixation of a uniform price promotes efficiency and provides an incentive to cut down costs introducing an element of a healthy competition among the units. It was further observed that even if there was no price control the uneconomic units would be at a disadvantage. ?The cost plus? price fixation perpetuates inefficiency and is against the long time interest of the country. It was further observed that the principle of fixation of uniform price of industry is an accepted principle and this is done by fixing a uniform price on the basis of cost of a reasonably efficient and economic representative crosssection of manufacturing units, and not with reference to each unit. Such a practice is in the larger public interest and promotes efficiency in the industry and provides an incentive to reduce costs.

20. The aforesaid decisions of the Supreme Court in *India Cement Ltd. case (supra)* and *Shri Sitaram Sugar Co. Ltd. case (supra)* are the complete answer to the petitioner's contention in the present case. A uniform retention price has been fixed on the basis of the report of an expert body that is respondent No. 2 and this Court cannot interfere in such matters. Moreover, as observed by the Supreme Court in the aforesaid decisions and has rightly been stated in the counter and supplementary counteraffidavit of the respondents, the uniform retention price is in the larger public interest as it encourages modernization and introduction of new technology and efficient production. It appears that the petitioner was following obsolete technology and had not modified its plant. Hence, the petitioner itself is to be blamed and it cannot complain in this respect. Its cost of production was very high and the technology used by it was not cost effective. Moreover, even if a separate retention price for the petitioner had been fixed it would be lower than that actually allowed to the three manufacturers including the petitioner. Hence, also the petitioner can have no grievance. The petitioner was manufacturing Ammonium Chloride from coke which is obsolete technology as stated in the counteraffidavit. It could have adopted the new

technology but it did not do so.

21. We may mention that the respondent No. 2 is an expert body and the retention price fixed by the Government was based on its recommendation. This Court cannot sit as a Court of Appeal over the decision of the expert bodies. The Wednesbury principle referred to in para 98 of the aforesaid decision has to be followed in such cases. The judiciary must exercise restraint in such matters because the Judges are not technical experts. As long as the decision of the expert body is not totally unconstitutional, illegal and absurd this Court cannot interfere with it, vide *Tata Cellular v. Union of India*, AIR 1996 SC 11. In the words of Chief Justice Neely :

?I have very few illusions about my own limitations as a Judge, I am not an accountant, electrical engineer, financier, banker, stockbroker or system management analyst. It is the height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting his judgment for that of the administrator.?

22. In paragraph 113 of its decision in *Tata Cellular case* (supra) the Supreme Court observed that the modern trend points to judicial restraint in administrative action. The Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct administrative decisions. If a review of the administrative decision is permitted it will be substituting its own decision without the necessary expertise, which itself may be fallible. The decision of an administrative body can only be tested by the application of Wednesbury Principle but it must be free from arbitrariness.

23. In *Centre for Public Interest Litigation v. Union of India*, 2000 (8) SCC 606, vide paragraph 16 it was observed by the Supreme Court that price fixation is a highly technical and complex procedure and it would be very difficult for the Court to decide whether a particular price is fair and reasonable.

24. In *Secretary of Agriculture v. Central Roig Refining Co.*, (1949)338 US 604 (617) : 94 Law Ed. 381, 392, Mr. Justice Frankfurter of the U.S. Supreme Court observed :

?Congress was.....confronted with the formulation of policy peculiarly with its wide swath of discretion. It would be a singular intrusion of the judiciary into the legislative process to extrapolate restrictions upon the formulation of such an economic policy from those deeply rooted notions of justice which the Due Process Clause expresses....?

?Suffice it to say that since Congress fixed the quotas on a historical basis it is not for this Court to reweigh the relevant factors and, perchance, substitute its notion of expediency and fairness for that of Congress. This is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or

persons. This Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation.?

25. In *H.S.S.K. Niyami v. Union of India*, AIR 1990 SC 2128, it was held by the Supreme Court that price fixation is a legislative act and principles of natural justice are not applicable to it.

26. In view of the above decisions we are of the opinion that the decision of the Government and the impugned retention price cannot be said to be arbitrary or unconstitutional as they were taken on the basis of the recommendation of an expert body viz. respondent No. 2. Such a uniform retention price promotes efficiency and cost reduction and is in the larger public interest. Thus there is no merit in this petition and it is dismissed. No order as to costs.