

**(1992) 11 DEL CK 0054**

**In the Delhi High Court**

**Case No :** Civil Writ Appeal No. 73 of 1992

Ram Ganga Fertilizer and Others

APPELLANT

Vs

Union of India

RESPONDENT

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**Date of Decision :** 11-11-1992

**Acts Referred:**

**Citation :** (1993) 50 DLT 358 : (1992) 24 DRJ 643 : (1993) 1 ILR Delhi 397 : (1993) RLR 17

**Hon'ble Judges :** G.C. Mittal, C.J.; Sat Pal, J

**Bench :** Division Bench

**Advocate :** Shanti Bhushan and P. Bhushan, for the Appellant;

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## **Judgement**

Gokal Chand Mital, C.J.

(1) In this writ petition the petitioners have challenged the orders dated 1st November, 1991 and 9th January, 1992 issued by the Government of India, Ministry of Chemicals & Fertilizers, Department of Fertilizers & Chemicals fixing a ceiling on subsidy payable on single super phosphate, hereinafter referred to as "SSP".

(2) The facts of the case briefly stated are that the petitioners are manufacturers of Ssp which is one of the key fertilizers used for agriculture. Prior to 1982 Ssp was under informal price control which was made effective from 16th March, 1976. A flat subsidy of Rs.200.00 per tonne was granted by the Government of India while the consumer price for individual unit was fixed by the Fertilizers Association of India in accordance with the formula agreed to with the Government of India after deducting the said subsidy. However, different retail price was fixed for different manufacturers and for different marketing zones of the same manufacturers. The result was that there was no uniformity in the price of SSP.

(3) The working group of review of subsidy in respect of Ssp examined all the aspects and gave a report in the year 1980. The group suggested a formula for

determining the variable costs. While accepting the aforesaid recommendations, the Government of India made some changes in it. The new method of payment of subsidy and formula of working out the ex-factory price as suggested by the group and modified by the Government came into effect on 23rd May, 1982. Pursuant to the introduction of the new method of payment of subsidy, the Government sent a circular letter dated 19th June, 1982 to all manufacturers of Ssp informing them about the decision of the Government to work out differential subsidy payable to different fertilizers units. The said circular is reproduced herein below -

"CONSEQUENT upon issue of Government of India, Ministry of Agriculture, Deptt. of Agriculture & Co-operation, telegram No.1- 9/82-FA.(GP) dated 22nd May, 1982 fixing a uniform retail price of Single Super Phosphate with effect from 23rd May, 1982, it has become necessary to replace the scheme for payment of uniform flat subsidy of Rs.1,250.00 per Mt of P205 by a scheme for payment of differential rate of subsidy based on the ex-factory price worked out separately for each manufacturing unit. To enable this office to work out the ex-factory price in respect of Ssp manufactured in your unit, information in the enclosed proforma may please be furnished to this office urgently, latest by fifteenth July, 1982. The information should be furnished separately for the period 1.10.81-31.12.81 and 1.1.82-31.3.82 duly certified by a Chartered Accountant or your Statutory Auditors."

(4) It would be seen from the above mentioned circular letter that each of the manufacturing unit was informed that a scheme for payment of differential rate of subsidy in place of the earlier uniform flat subsidy was being introduced. The differential rate of subsidy was to depend upon the ex-factory price worked out by Fertilizers Industries Co-operative Committee of the Government (for short called "FICC") separately for each manufacturing unit. The method by which the ex-factory price was to be worked out for each of the manufacturing unit was not indicated in the circular letter.

(5) The Supreme Court in a recent judgment in Union of India and others Vs. Surya Phosphate Ltd. and another, , while interpreting the abovementioned circular letter dated 19th June, 1992, has held that the ex-factory price is not to be worked out on the basis of the actual cost shown by the manufacturers but on the basis of the method adopted by Ficc which was on a normative basis as recommended by the working group and accepted by the Government of India. It has further been held that manufacturing units cannot be paid the differential rate of subsidy on the basis of the unwarranted costs.

(6) Prior to the issue of the impugned orders, the petitioners were being paid the differential rate of subsidy on the basis of the method adopted by Ficc mentioned hereinabove. The Government of India, Ministry of Chemical & Fertilizers, Department of Fertilizers vide order dated 1st November, 1991 informed Ficc that the Government of India has decided that there shall be ceiling of Rs.790/ per tonne in respect of subsidy payable per tonne for the Ssp for the period from

25th July, 1991 to 13th August, 1991 and Rs.890.00 per tonne in respect of the period from 14th August, 1991 onwards. The said order was, however, superseded by another order dated 9th January, 1992 wherein it was stated that the Government has decided that there shall be ceiling of Rs.1226.00 per tonne in respect of subsidy payable for Ssp for the period 25th July, 1991 to 13th August, 1991 and Rs.1326/ per tonne from 14th August, 1991 onwards. In both the orders it was also mentioned that a premium of Rs.310.00 per tonne will be paid over and above the ceiling to compensate for the higher cost of manufacture of Sulphur Acid from the indigenous low group pyrites. The aforesaid orders dated 1st November, 1991 and 9th January, 1992 have been challenged in the present writ petition.

(7) Mr. Shanti Bhushan, learned counsel for the petitioners urged the following contentions:-

1.The fixation of ceiling of subsidy would cause a forcible loss to the petitioners by forcing them to sell the fertilizers at prices which are below their reasonable total cost and this clearly violates the petitioners fundamental right to carry on trade and business which are guaranteed by Article 19 of the Constitution. 2. The petitioners' units having been established on the basis of the promise held out by the Government in its circular letter dated 19th June, 1982 that the fertilizers units manufacturing Ssp would be allowed a reasonable return provided for performing efficiently on the basis of Retention Price and Subsidy Scheme (for short called "RPS"), the Government is now estopped from going back on this promise and imposing of subsidy which will result in a compulsory loss to the petitioners instead of 11% post tax return on investment at 90% capacity utilisation. It was submitted that a reasonable return on the capital employed in the business of manufacturing fertilizers has to be ensured to the industry. In this connection reliance was placed on the Supreme Court judgment in The Panipat Co-operative Sugar Mills Vs. The Union of India (UOI), . The ceiling on the price is arbitrary since there is no reason why a ceiling of Rs.1226.00 per tonne or Rs.1326.00 per tonne is to be imposed after reasonable total cost has been calculated by the Government of India on the basis of the method adopted by Ficc which was on a normative basis. 4. The imposition of ceiling of subsidy of Ssp becomes discriminatory and violative of Article 14 of the Constitution inasmuch as no ceiling of subsidy has been imposed in case of any other fertilizer product including phosphoric Dap which is also covered under RPS.

(8) The imposition of ceiling of prices is further discriminatory against the petitioners which penalises the petitioners whose reasonable total costs are higher because of age and locational factors. While the petitioners are penalised and made to suffer huge losses other units which are located close to the ports and whose costs of production are lower may continue to make a reasonable profit or less loss on the basis of their earlier scheme.

(9) In the counter-affidavit filed on behalf of the respondents, it has been stated that when the budget for the year 1991-92 was formulated, the Government

decided to reduce the financial burden by adopting certain methods, namely, price most of fertilizers was increased by 40% on an average with effect from 25th July, 1991 and this had the effect of reducing the subsidy to some extent. However, on the basis of representations, the Government decided to limit the increase in the price of fertilizers to 30% on an average with effect from 14th August, 1991. It was also decided to impose a ceiling on the subsidy payable per tonne on Ssp by an order dated 1st November, 1991. The ceiling of Rs.790.00 was imposed with effect from 25th July, 1991 and Rs.890.00 with effect from 14th August, 1991. However, on receipt of several representations by another order dated 9th January, 1992 the amount of ceiling was increased to Rs.1226.00 per tonne with effect from 25th July, 1991 and Rs.1326.00 per tonne with effect from 14th August, 1991. It was further stated that it may be possible that during the last quarter of 1991 Ssp produced by some of the manufacturers may have a higher retention price necessitating revision of ceiling Figure due to further increase in the cost- of rock phosphate and sulphur and it was admitted that the Government recognises the increase in the cost of imported raw material like rock phosphate and sulphur every quarter.

(10) It has also been stated in the counter-affidavit that Ficc advises the Government on the amount of subsidy payable from time to time and the retention price of Ssp fertilizer for each unit is fixed once in a quarter. The retention price is fixed on the basis of data furnished by the companies and as most of the companies have enriched data up to the quarter ending September 1991, the Ficc would be fixing the retention prices shortly. It is also stated that for the subsequent quarters as and when the data is received, it will be possible for Ficc to fix the price.

(11) Relying on the averments made in the counter-affidavit as stated hereinabove, Mr. Mahajan, the learned counsel for the respondents submitted that by imposing the revised ceiling not only substantial relief has been given to the fertilizer industry manufacturing Ssp on the prevailing rates but the said ceiling was also imposed almost equivalent to the difference between the retention price and the consumer price.

(12) There is no dispute that what held field for the payment of subsidy, is the circular letter dated 19th June, 1982. The rate of subsidy is to be based on the ex-factory price which has to be worked out separately for each manufacturing unit. As held by the Supreme Court in Surya Phosphate Ltd. (supra) it was implicit in the circular letter dated 19th June, 1982 that the ex-factory price would be worked out by Ficc and the method to work out the said price is to be on the basis of the recommendations of the Working Group as accepted by the Government.

(13) As stated earlier, price for the sale of Ssp is fixed by the Government. Further there is no dispute that the subsidy payable to each of the petitioners and other manufacturers of Ssp is based on the ex-factory price of each of the units which has been worked out by FICC. In view of the aforesaid facts there

cannot be any justification for the Government to fix any ceiling in respect of subsidy payable to the manufacturers for SSP. As held by the Supreme Court in the case of Panipat Co-operative Sugar Mills (*supra*), the Government cannot fix any arbitrary price which even does not secure a reasonable return on the capital employed in the industry.

(14) We, Therefore, uphold contentions 1,2 and 3 raised by the learned counsel for the petitioners. We may, however, point out that the ceiling may be made applicable to the units which would be established in future but it cannot be made applicable to the existing units which are manufacturing Ssp, keeping in view of the Government policy as enunciated in its circular letter dated 19th June, 1982.

(15) As regards contention No.5 urged by the learned counsel for the petitioners, we may point out that the said contention is untenable in view of the law laid down by the Supreme Court in the case of Surya Phosphate Ltd. (*supra*). No manufacturer can be allowed a higher rate of subsidy on the ground that its total costs are higher because of any factor. In terms of the law laid down by the Supreme Court, the subsidy payable to each of the manufacturer is to be based on the ex-factory price of each of the units which has been worked out by the Ficc and not on the basis of the actual cost shown by them. Since, we are allowing the writ petition on the basis of contentions 1, 2 and 3, we do not feel it necessary to examine contention No.4 urged by the learned counsel for the petitioners.

(16) In view of the above discussion, we allow the writ petition and quash the impugned orders dated 1st November, 199a and 9th January, 1992 fixing ceiling, in respect of the subsidy payable for Ssp for the person 25th July, 1991 onwards in so far as the petitioners and other manufactures which were established before the impugned orders came into being are concerned. However, these orders would hold the field in regard to the newly established units which have or would have come into being after the impugned orders were issued.

(17) We may, however, make it clear that the petitioners would be entitled to subsidy based on the ex-factory price of each of the units of the petitioners which would be worked out by the Ficc and not on the basis of actual ex-factory price or costs.