
(1991) 01 PAT CK 0011
In the Patna High Court
Case No : C.W.J.C. No. 3095 of 1987

State of Bihar

APPELLANT

Vs

Sakti Chemicals and Fertiliser Ltd.

RESPONDENT

Date of Decision : 15-01-1991

Acts Referred:

Citation : (1991) 01 PAT CK 0011

Final Decision : Dismissed

Judgement

Aftab Alam, J.—What happens to be a fait accompli, so far as this Court is concerned, is sought to be reopened by this application on behalf of the State of Bihar. This application under Articles 226 and 227 of the Constitution seeking modification of order dated 28-4-1987 passed in C.W.J.C. No. 1179 of 1987 (whereby the earlier writ petition was allowed and finally disposed of by this Court), though registered as a separate writ case, is actually a petition for review of the order passed in an earlier writ case, allowing and finally disposing of that case. The learned Advocate General, appearing on behalf of the State, fairly accepts this position and invites this court to treat this application as a review petition and to subject it to the same rigour.

2. The order that is sought to be reviewed is dated 28-4-1987 by which this Court finally disposed of C.W.J.C. No. 1179 of 1987 allowing it at the time of admission itself. The order reads as follows :

"Heard learned counsel for the petitioner and Mr. K.K. Mandal, J.C. to S.C. I on behalf of the respondents.

"The grievance of the petitioner is of the same category as of the Phosphate Company Limited which had filed C.W.J.C. No. 3292 of 1983 disposed of on 13-8-1985. The Petitioner is also a manufacturing company like Phosphate Company Limited. The situation in the case of the petitioner also thus is exactly alike.

In the earlier case, H.L. Agarwal, J. had directed as follows :

"Keeping all the above facts in view, although the Advocate General is not present today, I direct the Government to make the payments of the claims made under the bills in question in two years even by instalments, beginning from today. It is further directed that the entire amount must be liquidated by the 14th of August, 1987. The petitioners would be entitled to interest for deferring the payment, from the date of the filing of the applications till the payments are made, that is, 28-2-1982 in C.W.J.C. No. 880 of 1983 and 1-8-1983 in C.W.J.C. No. 3202 of 1983 at the rate of nine percentum per annum. The Government will be at liberty to re-verify the claims of the petitioners or any one of them within the above stipulated time. The payment of the instalments must be made pro-rata to all the claimants."

"The observation and direction of Agarwal, J. in that case must be granted to the petitioner as well in this application.

"We allow this application on the same terms for compliance by the respondents by 14-8-1987. This application is allowed, accordingly. However, there will be no order as to costs."

3. It is manifest that this order follows an earlier order passed by this Court in C.W.J.C. No. 3292 of 1983 on the premises that the facts of the two cases were exactly similar. This takes us a step further back in the chain to C.W.J.C. No. 3292 of 1983 and its analogous case. It will be apposite, therefore, to begin at the beginning with C.W.J.C. No. 3292 of 1983 and its analogous case.

4. The petitioners in C.W.J.C. No. 3292 of 1983 and its analogous case were a registered company manufacturing chemical fertilizers for sale and a registered association of retail dealers of chemical fertilizers. They had come to this Court seeking a direction to the State Government to pay to them the amount of subsidy for the sale of chemical fertilizers during the period 1-8-1980 to 28-11-1980, in terms of a notice bearing No. 50512 issued by the Agricultural Department of the State Government on 31-7-1980. This notice made a public announcement that in all the districts of the State the prices of all kinds of chemical fertilizers had been reduced with effect from 1-8-1980 on the basis of subsidy given by the State Government. The subsidies given by the State Government were at the rate of 10 per cent on Nitrogen and at the rate of 25 per cent on Phosphate and Potash. This notice gave out the prices of different kinds of chemical fertilizers as on 31-7-1980 and the reduced prices effective from 1-8-1980, the difference between the two payable by the State Government. Save and except in respect of the stock already lying with the retail dealers on 1-8-1980 which was now liable to be sold at the reduced prices by the Government at the source, that is, to the manufactures of the fertilizers who were required to sell their produce to the retail dealers at the subsidised rates. This notice and the follow up communications to the parties concerned, namely, the different manufacturers of chemical fertilizers and the retail dealers directed them to sell their produce at the reduced and subsidised price and any failure to comply with the direction was liable to invite punishments.

5. C.W.J.C. No. 3292 of 1983 and its analogous case were, accordingly, filed in this Court with the grievance that the petitioners of the two cases having been made to sell their produce at the reduced rates were not being paid by the State Government the amount of subsidy, as promised in the Public Notice dated 31-7-1980 and the follow up communications.

6. After admission when the two cases were taken up for final disposal, the hearing of the cases was adjourned on several dates in an endeavour to bring about a negotiated settlement between the petitioners and the respondent State. The efforts in that direction having failed, however, the two cases were finally disposed of by a common order dated 13-8-1985. In this order, passed by a single Judge of this Court, it was noted that, "no counter affidavit has been filed in either of the case and thus the assertions made therein remain unrebutted. It can, therefore, be safely concluded that there remains nothing to be verified in respect of the bills that have been submitted for the claims of subsidy amount. In any view of the matter, if the Government wanted any further verification, a period of more than four years should have been sufficient for any instrumentality of the Government to check and verify the claims made in the bills in question." The learned single Judge, accordingly, proceeded to "direct respondent No. 2 to make all the payment in terms of the bills as early as possible." Keeping in view, however, the budgetary constraints indicated by the learned Advocate General when the matter was earlier heard, the learned single Judge further went on to direct as follows :

"Keeping all the above facts in view, although the Advocate General is not present today, I direct the Government to make the payments of the claims made under the bills in question in two years even by instalments, beginning from today. It is further directed that the entire amount must be liquidated by the 14th of August, 1987. The petitioners would be entitled to interest for deferring the payment, from the date of the filing of the applications till the payments are made, that is, 28-2-1982 in C.W.J.C. No. 880 of 1983 and 1-8-1983 in C.W.J.C. No. 3292 of 1983 at the rate of nine percentum per annum. The Government will be at liberty to re-verify the claims of the petitioners or any one of them within the above stipulated time. The payment of the instalments must be made pro rata to all the claimants.

"In the result, both the applications succeed and are, accordingly, allowed with the above observations and directions. The petitioners will be also entitled to costs. Hearing fee is assessed at Rs. 500/- in each case."

7. Thereafter the second writ petition C.W.J.C. No. 1179 of 1987 was filed on behalf of Sakti Chemicals and Fertilizer Ltd. (the sole respondent in the instant case). This petitioner also sought a direction from this Court to the State Government for the payment of the subsidy amount on the sale of its produce, a chemical fertilizer under the name of "Sada Bahar" during the period 1-8-1980 to 28-11-1980.

8. It is to be noted that C.W.J.C. No. 1179 of 1987 was filed in this Court on 3-4-1987 with prior notice, as required under the High Court Rules to the State of Bihar. The notice as required under the Rules, is in the manner of serving a copy of the writ petition complete with all annexures on the Advocate General's office. The application was taken up for admission, after more than three weeks of the service of the notice in the presence of the State counsel. Then, it appears to have been urged on behalf of the petitioner that this case was fully covered by the order passed earlier in C.W.J.C. No. 3292 of 1983. The State counsel did not say that C.W.J.C. No. 3292 of 1983 had been wrongly decided by this court, or that the facts of this case were not similar to those of the earlier case; or even that he wished to ascertain the facts by seeking instruments from his client. He seems to have acquiesced in the statement that the facts of this case were identical to those of the earlier C.W.J.C. No. 3292 of 1983 without raising any objection to the final disposal of this case at the stage of admission itself.

9. It was only after order dated 24-8-1987 was passed, finally disposing of C.W.J.C. No. 1179 of 1987 that the State seems to have realised that it is being made to pay large amounts to the petitioner where according to its belief it was not required to make any payment to the manufacturer at all. Even then it did not adopt the normal and common course of preferring an appeal before the Supreme Court against the order dated 28-4-1987 passed in C.W.J.C. No. 1179 of 1987. It chose to file a petition in the already disposed of case (C.W.J.C. No. 1179 of 1987) for modification of the order dated 28-4-1987. This petition was taken up on 20-5-1987 when a Bench of this Court directed that "the petition be treated as independent application under Articles 226 and 227 of the Constitution of India for review/modification of order passed on 28-4-1987 in C.W.J.C. No. 1179 of 1987." This is how this petition got an independent identity and was admitted by order dated 14-8-1987. By the same order the earlier order dated 28-4-1987 passed in C.W.J.C. No. 1179 of 1987 was also stayed. The application is now being disposed of after hearing all the parties at length.

10. It may be noted that laying down the parameters of the powers of review of judgments and orders pronounced and/or made under Article 226 of the Constitution, a Bench of this Court (to which my learned brother S.B. Goyal, J. was a member) in the case of Jamun Poddar v. The State of Bihar AIR 1988 Patna 314 held as follows at page 316 :

"The power of reviewing the judgments or orders pronounced and/or made under Article 226 of the Constitution is somewhat analogous to Section 151 of the Code of Civil Procedure, which confers no new right on Courts but furnishes legislative recognition of an age old and well established principle that every court has inherent power to act *ex debito justitiae* to prevent abuse of the process of the Court. This power is inherent in a Court which may be termed as a "procedural review" to correct orders passed under some misapprehension or inadvertently or in breach of principles of natural justice or on account of some false representation and or to prevent the abuse of the process of the Court. This is an

ancillary and incidental power necessary to discharge Courts function effectively and for the purpose of doing justice between parties. This power, however, cannot be invoked for reconsideration of the judgment on merits and/or for reconsideration of the judgment on merits and/or for rehearing or fresh decision of the case and/or routine review but a serious step only to be resorted to in very exceptional circumstance. A review petition is maintainable only in the above circumstances."

11. Bearing this in mind the learned Advocate General urged before us that he did not propose to press the instant application on the ground of merit. He, in fact, maintained that the earlier decision was not on merits at all but was made on the assumption that the facts in C.W.J.C. No. 1179 of 1987 were identical to those of C.W.J.C. No. 3292 of 1983. He, accordingly, sought modification of order, dated 28-4-1987, allowing and finally disposing of C.W.J.C. No. 1179 of 1987, on the ground that the order in question suffers from mistake and error apparent on the record. The error, according to the learned Advocate General, lay in following the earlier order passed in C.W.J.C. No. 3292 of 1983 and this was twofold. First, the order passed in C.W.J.C. No. 3292 of 1983 could not be followed as a precedent in as much as the adjudication in that case was, in absence of any counter-affidavit on behalf of the State, on the basis of unrebutted facts and hence was not a precedent forming adjudication. Secondly, this Court allowed itself to fall in error in assuming that the facts of C.W.J.C. No. 1179 of 1987 were identical to those of C.W.J.C. No. 3292 of 1983.

12. So far as the first point is concerned I do not find any substance in it. The State has to thank itself for not filing any counter-affidavit in C.W.J.C. No. 3292 of 1983 and allowing the case to be decided on unrebutted facts. And in case the facts of the later case (C.W.J.C. No. 1179 of 1987) are found to be similar to the facts that remained unrebutted in the earlier case there is no reason for this court for not following the orders and directions given in the earlier case.

13. This leads me to the second plea raised by the learned Advocate General that the facts of the two cases were quite dissimilar and hence the order passed in the earlier case could not be followed in the later case.

14. I may state at this stage that the learned Advocate General, all the while maintaining that it was not his intent to seek review on the ground that the earlier decision was erroneous on merits with great skill, took us through the entire gamut of facts of the case by raising the plea that the earlier case (C.W.J.C. No. 3292 of 1983) and the later case C.W.J.C. No. 1179 of 1987 were dissimilar on facts. At times I could not help feeling that we were being made to do precisely that what the learned Advocate General professed he did not invite us to do, that is, to reconsider C.W.J.C. No. 1179 of 1987 on its merits. I state this also with a view to point out that the first point, thus, loses practically all its significance, for in dealing with the second point we have gone through the entire facts of the case and it is no longer a question of simply following an earlier order.

15. As regards the facts of the two cases (C.W.J.C. Nos. 1179 of 1987 and 3292 of 1983) not being similar the Advocate General asserted that the subsidy for the period 1-8-1980 to 28-11-1980 in terms of notice bearing No. 50512 dated 31-7-1980 was not on all kinds or varieties of chemical fertilizers under different brand names. It was confined to certain specific fertilizers with their particular brand names mentioned in the said notice. The subsidy was subsequently extended to all fertilizers vide notification dated 20-1-1981 (effective from 29-11-1980). Here we are not concerned with the second notice as the claim for subsidy relates to the period between 1-8-1980 to 28-11-1980 in terms of the notice dated 31-7-1980 relating to which the Advocate General's assertion has been noted above. The Advocate General contended that this important fact was overlooked by this Court while passing the order dated 13-8-1985 finally allowing C.W.J.C. No. 3292 of 1983 and this rendered that order unfit to be followed. He further contended that the produce of the petitioners in the C.W.J.C. No. 3292 of 1983 and its analogous case might or might not have been covered under the notice dated 31-7-1980, there being no finding in this regard in that order. However, the produce of the petitioner in C.W.J.C. No. 1179 of 1987 under the brand name of "Sada Bahar" was certainly not included in the said notice and hence there is no question of payment of any subsidy amount to the petitioner in C.W.J.C. No. 1179 of 1987 for the sale of "Sada Bahar" fertilizer during the period in question, from the notice, contained in Annexure F(DI), it appears that it included fertilizers on the basis of their chemical names and compositions as also some fertilizers manufactured by some specified manufactaures. In addition to this, some fertilizers under particular brand names, such as "Hara Bahar", "Sufia", "Ifco" etc. were also included. The learned Advocate General pointed out that the fertilizers "Sada Bahar" was not included in the notice and submitted that the reason for including only certain brand names was that these were particularly popular with the consumers and the subsidy was intended to benefit the consumer agriculturists and not the producers or the traders. Later on, when considered necessary the subsidy was extended to cover all fertilizers with effect from 29-11-1980. It was, accordingly, submitted that "Sada Bahar" not having been covered by the notification dated 31-7-1980 there was no question of payment of any subsidy to its producers.

16. Mr. S.B.N. Singh, learned counsel appearing on behalf of the respondent Fertilizer Company, (petitioner in C.W.J.C. No. 1179 of 1987), on the other hand, contended that subsidy was on all kinds of fertilizers for the period 1-8-1980 to 31-3- 1981. He submitted that the subsidy notice covered all chemical fertilizers with the composition of Nitrogen, Phosphate and Potash in the ratio 18:18:6 and both the brand names Hara Bahar and Sada Bahar are chemical fertilizers exactly with this compo-sition. He further submitted that the second notice dated 20-1-1981 did not extend the subsidy to further varieties of fertilizers which were all covered by the earlier notice dated 31-7-1980 itself. The second notice only increased the amount of subsidy from Rs. 491.20/- per ton (under the earlier notice) to Rs. 502.55/- per ton.

17. Learned counsel for the respondent fertilizers company impugned as untenable the plea that no subsidy was payable on the fertilizer "Sada Bahar" for the period 1-8-1980 to 28-11-1980 as this brand name was not included in the list dated 31-7-1980 on the ground that all aspects of the trade in fertilizer was strictly controlled and prices of plant nutrients were fixed by the State and the raw material, namely, D.A.P. was allotted by the State at prices fixed by it, It was further submitted that all units in the State producing granulated mixture fertilizer of the same composition sold their produce at the same price and this fact was within the knowledge of the Agriculture Department which received periodical reports from all units relating to production of fertilizers and their prices. It was also asserted that the respondent company had been selling its produce N.P.K. 18:18:6 at the same price as that of "Hara Bahar" since 1978 and also during the relevant period of subsidy.

18. Learned counsel for the petitioner submitted that the non-inclusion of the brand name in the notice dated 31-7-1980 was not conclusive and invited our attention to a number of documents relating to the follow up actions and communications. Annexure-F(E) is a photo stat copy of the proceedings of a meeting held in the office of the Special Secretary, Agriculture on 19-8-1980 between the functionaries of the State Government and the representatives of different manufacturers of fertilizers. This document does not mention any brand name. But it appears that the subsidy was on Nitrogen, Phosphate and Potash fertilizers in proper proportion. The next important document is contained in Annexure-F(G), this is a photo stat copy of a circular letter dated 7-9-1980 issued by the Deputy Secretary to the Government and is significantly addressed to all manufactures. The respondent company asserts that this letter was sent to them also. This letter deserves to be reproduced in full :

"From,

Shri A. K. Singh,

Deputy Secretary to Government.

To,

All Manufacturers.

Sir,

I am directed to say that the State Government have decided to grant subsidy on fertilizers @ 10% on nitrogen and 25% on phosphate and potash. This subsidy will be given at source except for the opening balance of stock of retailers as on 1-8-1980 and the stock in pipe line not received by distributors or retailers as on 31-7-1980.

The agencies supplying pool fertilizers have also been included in the list of manufacturers while supplying fertilizers to Biscochaun will charge full amount from Biscochaun. But in case of supply made to private distributors and retailers

they should charge less from them @ 10% in the case phosphate and potash on the full amount, the balance to be claimed from the State Government of Bihar. The retailers' price, as fixed by the Central Government, has been reduced after the implementation of this subsidy scheme by the State Government from 1-8-1980.

You are, therefore, requested to submit your claims of subsidy after supply has been made to the Private distributors and retailers as mentioned above to the Chief Accounts Officer, Department of Agriculture, Government of Bihar, Vikash Sachivalaya, Patna with necessary supporting documents. I hope you will cooperate with the State Government in implementation of this subsidy scheme on fertilizers.

Yours faithfully,

Sd/- Illegible.

17-9-90.

Deputy Secretary to Govt."

19. Annexures F(H) and F(I) are copies of correspondence from the State Government to the respondent fertilizer company relating to the company's demand for payment of the subsidy amount on the sale of the company's produce during the months of October and November, 1980.

20. On the basis of the materials on record it is difficult to hold that the non-inclusion of the particular brand name in the notice dated 31-7-1980 disentitled the respondent company to the payment of subsidy on its produce, namely, "Sada Bahar". On the contrary I am inclined to hold that the respondent company having been obliged to sell its produce (Sada Bahar) at the same reduced price in terms of the notice dated 31-7-1980, is entitled to the payment of subsidy by the State Government in terms of that notice.

21. I would further wish to state that the submissions now being urged on behalf of the State ought to have been advanced in C.W.J.C. No. 3292 of 1983 or at any rate in C.W.J.C. No. 1179 of 1987. The insurmountable obstacle in the way of the State is that the submission is being canvassed for the first time in an application for review and even if it is held that the submission advanced represents one of the two possible views of the case (though I find it clearly less acceptable) it does not justify this Court to review or modify an earlier order passed in presence of all concerned.

22. Learned Advocate General wants this court to give a second thought over its earlier decision on merits which is not permissible in a review petition.

23. The reliance placed by the learned Advocate General on two decisions reported in AIR 1963, S.C. 1909 and Babboo alias Kalyandas and Others Vs. State of Madhya Pradesh, are to my mind of no help.

24. In the result, I do not find any merit in this application and it is dismissed with costs. Hearing fee quantified at Rs. 2,500/-.

S.B. Sanyal, J.

25. I agree.