(1999) 05 DEL CK 0067

In the Delhi High Court

Case No : C.W.P. No. 1970 of 1995

Udaipur Phosphates and Fertilisers Ltd. APPELLANT

Vs

Union of India and another RESPONDENT

Date of Decision : 26-05-1999

Acts Referred:

Citation : (1999) 4 AD 484 : (1999) 50 DRJ 197

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : Mr. Prashant Bhushan, for the Appellant; Mr. Rakesh Tiku, for the Respondent

Judgement

C.M. Nayar, J.—The petitioner is a company registered under the Companies Act and is engaged in the manufacture of Fertilisers and Chemicals. It manufactures as one of its products Single Super Phosphate (for short SSP). The grievance of the petitioner is that the respondents by their impugned action revised the ex-works price of SSP on the basis of retrospective re-fixation of the installed capacity of the petitioner''s factory. The amount which is alleged to have been deducted is Rs.7,62,287/- from the subsidy amount as payable to the petitioner on the basis of original ex-works price fixed by the respondents.

2. The background of claim for subsidy is adequately explained in paragraphs 3 to 8 of the writ petition which may be reproduced as under:

"3. Single Super Phosphate is an important fertiliser manufactured in India and it is manufactured from rock phosphate and sulphur which have been and are largely imported into the country .

4. Prior to 1982, SSP was under informal price control which was made effective from 16th March, 1976. A flat subsidy of Rs.200/PMT was granted by the Government of India while the consumer price for individual unit was fixed by the Fertilisers Association of India in accordance with the formula agreed to with the Government of India after deducting the said subsidy. he individual units even

then were able to recover their costs.

5. In the year 1982, the Government of India brought SSP under formal price control known as the Retention Price and Subsidy Scheme (hereinafter referred to as RPS) for regulating the price and sale of SSP manufactured indigenously throughout the country. This scheme was introduced on the basis of a detailed study and recommendations of an Inter-ministerial Working Group appointed by the Government, which submitted its report to the Government in March, 1980.

6. Pursuant to the introduction of the Scheme, the Government sent a circular to all fertilizer units manufacturing SSP in the country informing them about the decision of the Government to work out a differential subsidy payable to different fertilizer units on the basis of their ex-factory cost price. It was on the basis of this promise of the Government to ensure that all fertilizer units manufacturing SSP would be allowed a subsidy to compensate them for the loss in selling at a low price fixed by the Government that several new units including those of the petitioners were established all over the country.

7. Under this Retention Price and subsidy scheme, each manufacturer of SSP was required to sell the SSP manufactured by him in designated sales areas at prices which were fixed by the Govern ment. Since the objective was to make this fertilizer available to the farming community at reasonable prices, the prices so fixed were invariably lower than the manufacturing cost of all manufacturers of this fertilizer.

8. In order to compensate the manufacturers for having to sell the SSP, at this low price, the Government would calculate the total cost of manufacturing and distributing (hereinafter referred to as total cost) SSP for each manufacturer and paid the difference as subsidy to the manufacturers so as to ensure that each manufacturer was able to get a reasonable return, if he operated his unit efficiently."

The calculation of subsidy on the basis of ex-factory price is referred to in paragraph 11 of the writ petition as follows:

"11. Thus it may be emphasised that the manner of calculation of ex-factory price now does not take into account the actual cost in fact incurred by the factory which may depend upon its operating efficiency. The total cost is calculated on normative basis by assuming that each unit will function efficiently and on the basis of 90% capacity utilisation. Despite this the total cost calculated by the Fertilizer Industry Co-ordination Committee vary from manufacturer to manufacturer mainly on account of :

(a) age of the plant affecting capital cost and related charges.

(b) location of the plant and source of the raw-material (including transport cost and local taxes which vary from State to State)."

The Fertiliser SSP was finally de-controlled in August, 1992 and hereafter various manufacturers were free to manufacture and sell SSP in the market at the market price.

3. On April 6, 1988 the Ministry of Industry issued a press note whereby various manufacturers of fertilisers were allowed to seek re-endorsement of their capacity on the basis of maximum production actually achieved by the Industrial undertakings in any of the financial years between April 1, 1988 and March 31, 1990. This Circular has been filed as Annexure ''B'' to the writ petition and the same reads as under:

"GOVERNMENT OF INDIA

MINISTRY OF INDUSTRY

DEPARTMENT OF INDUSTRIAL DEVELOPMENT

PRESS NOTE NO.9

(1988 Series)

Subject : Scheme of Maximisation of Industrial Production during the 7th Plan Period - Re-endorsement of capacity

In order to encourage industrial units to maximise their production , Government have from time to time been allowing re-endorse ment of licensed capacities on the basis of the capacity utilize corporation or modernisation achieved by them. The latest of such re endorsement schemes are contained in Press Note No.1 and 2 of January ,1986. While these schemes take cognizance of the production achieved by an industrial undertaking in the past, it is considered desirable to introduce a scheme that would give advance intimation to industrial undertakings to the effect that their best production in future will be recognised and licensed registered capacities will be automatically re-endorsed on the basis of the best production achieved by them in the coming years.

2. Accordingly, Government have decided to introduce a new scheme w.e.f. 1st April, 1988. The main objective of the scheme is to maximise industrial production from existing installed capacity of plant, machinery and equipment so that the asset\\stalled could be put to the utmost use. The salient features of the scheme are as follows :-

(a) The industrial licenses/registrations with technical authorities will automatically be re-endorsed with the maximum product corporation actually achieved by the industrial undertakings in any of the financial years between 1st April, 1988 and 31st March, 1990.

(b) There will be no restrictions of such re-endorsement of capacities except the following :-

(i) The undertaking should have a valid industrial license/registration for the item concerned ;

(ii) The item should not be reserved for small scale sector nor should it form part of Schedules IV and V of the exemption notification of 16th February, 1973 issued under the provisions of the I (D&R) Act as amended from time to time.

(c) As stated above, the main objective of the scheme is to maximise output from existing installed capacity. It is not the purpose of the scheme to create additional capacity by making new investments in the projects already in operation. There may, however, be cases where marginal additional investments may become necessary by way of balancing equipments, debottlenecking etc. in order to get the maximum production out of the existing plant, machinery and equipments. To take care of this possibility, additional investment, if any, in plant, machinery and equip ment should not exceed 10% of the existing book value of investment in plant, machinery and equipment related to that particular item of manufacture.

(d) The scheme will apply to all industrial undertakings including MRTP/FERA Companies as also to all items regardless of whether or not they are covered by the First Schedule of the I (D & R) Act/ Locational restrictions will also not apply to this scheme. In case of MRTP/FERA Companies, the scheme will be available to both Appendix-I as well as non-Appendix-I items.

(e) If the industrial undertaking carries an export obligation in respect of the item concerned, whether in industrial license/registration or in approvals for foreign collaboration and import of capital goods, the export obligation will equally apply to the enhanced production achieved by the undertaking under this scheme. In the event of non-fulfilment of export obligation, re-endorsement of capacity in accordance with this scheme will not be permitted.

(f) This scheme is in addition and not a substitution of the facilities already available under any existing scheme.

3. The procedures to be followed under the scheme are as follows :-

Since the purpose of this scheme is to recognise the best production actually achieved in any financial year between 1 April 1988 and 31 March, 1990, the applications for re-endorsement of capacity under this scheme should be submitted to the Government as soon as possible after 31.3.1990. While submitting applications, the actual production achieved should be given for each year from 1985-86 onwards. Such production statement should be certified by the company''s auditors...

4. Non-MRTP/non-FERA companies should submit their applications in the prescribed format to the administrative Ministry with 5 e copies or to the technical authority concerned (in the case of registrations) along with copy of the license/registration for re-endorsement of capacity on the basis of the maximum production actually achieved by that undertaking in any financial year between 1.4.1988 and 31.3.1990. The concerned Administrative Ministry should scrutinise the application with reference to the parameters of the scheme

mentioned ... capacity on the ... In the case of registration with technical authorities, the concerned industrial undertaking will directly apply to the technical authority concerned and such authority will re-endorse the capacities on the registration certificate.

5. In the case of MRTP companies, the following procedure will be adopted for approval required under thee MRTP Act.

(a) an MRTP undertaking will require no prior approval under the MRTP Act in the following cases :-

(i) If it makes no additional investment;

(ii) If the item concerned stands exempted in terms of notifications issued u/s 22A of the MRTP Act;

(iii) If the increase in production is achieved by replacement/renovation or modernisation of the whole or any part of the machinery or other equipment of the undertaking or by the installation of any balancing equipment , provided the increase in capacity is less than 50% of the existing licensed capacity of the undertaking.

(b) An MRTP undertaking will require prior approval u/s 21 of the MRTP Act in case it wishes to make additional invest ment (within, of course, the permissible ceiling of 10% mentioned in para 2(c) above). In such cases, it will make an application u/s 21 of the MRTP Act, 1969 to the Deptt. of Company Affairs prior to making the proposed investment provided, however , that a proposal making expansion in an Appendix-I item will not require publication of a notice as prescribed under the MRTP ACT, 1969. However, re-endorsement on the industry licence will be made by the Secretariat for industrial Approvals in the Department of Industrial Development after 31.3.1990 on the basis of the maxim production actually achieved by the undertaking between 1.4.1988 and 31.3.1990.

(c) Applications for re-endorsement of capacity on the industrial license made after 31.3.1990 will be submitted as per the procedure indicated in para 4 above.

6. In regard to companies covered by the provisions of FERA, the concerned industrial undertakings will obtain requisite clearances under those provisions wherever necessary, before the capacity is re-endorsed on their industrial license registration certificate in accordance with this scheme.

F. No.10/22/88-L.P. New Delhi, the 6th April, 1988 (P K S Iyer) Director The Principal Information Officer Press Information Bureau New Delhi."

4. In pursuance to the above circular the petitioner made an application o the Ministry of Industries for re-endorsing the capacity on the basis of actual consumption between April 1, 1988 to March 31, 1990. This application is dated August 8, 1990 and has been filed by the respondents along with the counter affidavit. The same reads as follows:

"Udaipur Phosphates

& Fertilisers Ltd.

Regd. Office : 53/57, Laxmi

Insurance Bldg., Sir P.M. Road,

Bombay-400001

Tel : 2860578-2864934, Telex :

011-2527 KOSN-IN Gram :

"UDAIFERT" BOMBAY

RVJ:SD:F:IL:1239:90 August 8, 1990 Ministry of Industry

Dept. of Industrial Dev.

Secretariat of Industrial Approvals

New Delhi.

Dear Sir,

Sub: Re-endorsement of capacity

Ref: Press Note No.9 (1988 series) dated 6th April, 1988.

We are submitting herewith an application for re-endorsement of our license capacity for the manufacture of Single Superphosphate and Sulphuric Acid in terms of Press Note No.9 (1988 series) dated 6th April, 1988. At present our licensed capacity per annum is for the manufacture of 66,000 MTs Single Superphosphate and 33,000 MTs Sulphuric Acid. A copy of Industrial License No. CIL:240(81) dated 21st August, 1981 and amendment letters No.CIL:240(81) Amend/LA-II/81 dated 10.12.1981 and No.CIL:240(81)

Amend/LA.II/82 dated April, 1982 are enclosed.

During the past four years of our operations, we have produced single Superphosphate always at more than 100% capacity and Sulphuric Acid above 90% for first three years but above 110% in the immediate previous year i.e. in 1989 - 90.

Year wise capacity utilisation from 1985-86 are as under:

Year Plant capacity utilisation Single Sulphuric Superphosphate Acid 1985-86 108.41% 93.19% 1986-87 107.72% 96.47% 1988-89 103.75% 90.21% 1989-90 112.26% 116.60% From the above information you will observe that it has been the Company''s policy to maximise its production. The Company has been able to achieve higher production from year to year from the existing installed capacity of Single Superphosphate and Sulphuric Acid Plants. The company has been able to achieve highest production of Single Superphosphate and Sulphuric Acid in the year ended 31st March, 1990. With the continuing increase in demand for fertilisers and Sulphuric Acid, the company has set a higher target to maximise its production than what it has achieved.

We Therefore submit an application in the prescribed proforma given in Press Note No.9(1988 series) dated 6.4.1988 for your favourable consideration for endorsing our Industrial License with the maximum capacity achieved by us in the year 1989-90. Please note that, original Industrial License will be presented to you for the re-endorsement of maximum capacity on hearing from you.

Thanking you,

Yours faithfully,

UDAIPUR PHOSPHATES & FERTILISERS LTD.,

R.V. JHAVERI

FINANCIAL CONTROLLER

ENCL: As above"

The respondents accepted the above said application and accorded approval of re-endorsement of capacity by a communication dated March 31, 1993 which reads as follows:

"NO.4-44/90/F&A/Part 321

Government of India

Ministry of Chemicals & Fertilizers

Department of Fertilizers

Office of Fertilizer Industry

Coordination Committee

8th floor, Sewa Bhawan, R.K. Puram,

New Delhi

New Delhi, the 31.3.1993

To

The Financial Controller,

Udaipur Phosphate & Fertilizer

Ltd.,53/57 Laxmi Insurance Building,

Sir P.M. Road,

Bombay-400001.

Subject : Application for re-endorsement of capacity in response to Ministry of Industry, Department of Industrial Development Press Note No.9(1988 series).

Sir,

Please refer to your office letter No.RVJ:SD;F:IL:1237:90 dated 8.8.90 Along with application for re-endorsement of capacity. The enhanced capacity of 74089 MT applied by you has been recognised on the basis of technical verification. On the basis of this higher capacity and the additional investment if any shown by you in your application, the fixed charges has been re-calculated from 1.4.90. The fixed charges have consequently been revised and this would result in a tentative recovery of Rs.26.55 lakh. The amount has been withheld from the claims in hand.

Yours faithfully,

Sd/-

(Mrs.B.Agnihotri)

Joint Director (F&A)"

5. The admitted case is that in case the petitioner manufactured more and achieved higher capacity the fixed cost will come down and the subsidy is educed accordingly. This is what has happened in the present case. The learned counsel for the petitioner has contended that the approval of higher capacity was only accorded on April 7, 1993 and, therefore ,it cannot operate for the earlier years as no retrospective operation is permissible in law. The discrimination is also alleged as for those units who did not apply for change in terms of the press note dated April 6, 1988 for maximisation of industrial production and re-endorsement of capacity as a result thereto ,price was not changed.

6. The learned counsel for the respondents has repelled the arguments on the ground that the approval of re-endorsement was a mere formality as the petitioner had already achieved maximum production. Paragraph 1 of the counter affidavit giving brief facts of the case states as under:

"Under the Press Note No.9 (1988 Series) issued by the Department of Industrial Development, the maximum duction actually achieved by the undertaking between 1.4.1988 and 31.3.1990 was to be taken into account for re-endorsement of the enhanced capacity after 31.3.1990. Accordingly, some of the SSP units including the petitioner unit applied for re-endorsement of their enhanced capacity under the Press Note No.9 (1988 Series). While submitting their application dated 8.8.1990 to the Ministry of Industry ,Department of Industrial Development, the petitioner unit had stated that in the past four years they have produced SSP at more than 100% of their capacity. In fact, the capacity utilisation of the SSP plant during 1989-90 was shown as 112.26%. The petitioner unit had indicated SSP production between 71,553 MT p.a. to 88,873 MT p.a. in the period 1985-86 to 1989-90. A photo copy of the petitioner unit''s letter is at Annexure A to the counter affidavit. It is, Therefore, not clear on what basis it is being stated that they had never produced in excess of their original licenced capacity of 66,000 MT per annum.

The re-endorsement of higher capacity applied for by the petitioner unit under Press Note No.9 (1988 Series) issued by the Department of Industrial Development was accepted w.e.f. 1.4.1990. Fixed charges are calculated both on the basis of the production capacity of the unit as well as the investment involved. In this case, going by the enhanced production capacity and the additional investment as shown by the unit in its application for enhancement, the fixed charges were revised w.e.f. 1.4.1990. In this context it may also be stated that under the Press Note No.9 issued by the Department of Industrial Develop ment, the Scheme was to maximise the output from existing installed capacity. Accordingly, additional investment if any, in plant, machinery and equipment was not to exceed 10% of the then existing book value of investment in plant, machinery and equip ment related to that particular item of manufacture. In the case f the petitioner unit the additional investment shown in the SSP plant was limited to 9.28%. After taking into account the enhanced capacity and the additional marginal investment as shown by petitioner unit the fixed charges were revised downwards and an amount of Rs.29 lakhs was recoverable from the unit as subsidy which had been overdrawn by it to that extent w.e.f. 1.4.1990."

Similarly, it is reiterated in the other paragraphs 2,3 and 4 that the petitioner unit had already been producing higher than its original capacity even for the period prior to April 1, 1990. The same read as follows:

"2. As is evident from the application of the petitioner unit which is annexed at Annexure A to the counter affidavit the unit was producing higher than its original capacity even in the period prior to 1.4.1990.

3. The petitioner unit had been informed vide letter dated 16.6.1994 to submit a claim for the amount due to them on account of the original fixed charges being taken into account for the year 1991-92 as the ECA allocation for this year in their case was less than the enhanced capacity. They were also informed that the claim would be admitted to the extent then due and a revised notification was being issued revising their fixed charges for the relevant period. Accordingly, on the basis of the notification corporation dated 12.9.1994 revising their fixed charges on the basis of the enhanced capacity for the period 1.4.1990 to 31.3.1991 and from 1.4.1992 to 24.8.1992, an amount of Rs.9.24 lakhs was further released to the petitioner unit against the total withheld amount of Rs.29 lakhs. Accordingly, an amount of Rs.21.37 lakh was refunded to the unit and an amount of Rs.7.62 lakh only finally recovered on account of revision of fixed charges due to enhanced capacity.

4. That some of the affected units and the Fertiliser Association of India represented to the respondents for reconsideration on account of the fact that

(1) the ECA allocation in some cases had been restricted in the year 1991-92 and 1992-93 to 125% of the original capacity and (2) the actual capital cost incurred up to 31.3.1988 and (3) up to maximum of 10% of the then existing book value of plant and machinery incurred during the period 1988-90 may be considered. It was decided to take into account the capital cost of the surplus capacity of the original sulphuric acid plant limited to the requirement for the enhanced capacity of the SSP plant and also to work out the fixed charges for the years 1991-92 and or 1992-93 on the basis of the original capacity in cases where the enhanced capacity exceeded the ECA allocation for these years. In the case of the petitioner unit the enhanced capacity being higher than the ECA allocation for 1991-92, the fixed charges on the basis of the original capacity only was recognised for this year and an amount of Rs.12.13 lakh was paid back to the unit on this account. The contention of the petitioner unit is, Therefore, not clear. Further an amount of Rs.9.24 lakh was also paid back to the unit after final revision of its fixed charges for the years 1990-91 and 1992-93 (upto 24.8.1993). An amount of Rs.7.62 lakh only has been fully recovered for the year 1990-91 and 1992-93 (upto 24.8.1992) when there was no restriction on the ECA allocation and the unit had applied for re-enhancement of higher capacity."

7. The above facts particularly as stated in the application of the petitioner dated August 8, 1990 for re-endorsement of capacity would sub-stantiate the stand of the respondents that the petitioner unit had already achieved maximum production and only needed ex-post facto approval in compliance to the press note dated April 6, 1988. This letter was not filed with the petition and was only attached with the counter affidavit filed by the respondents. It is, Therefore, clear that the petitioner produced more and it cannot be said that no opportunity to actually manufacturing in excess of the endorsed capacity was provided. The sanction of the respondents vide communication dated March 31,1993 is in the nature of ex-post facto approval and cannot be held to be discriminatory as the fixed cost obviously will come down while manufacturing more and subsidy has been correctly worked out on that basis.

8. For the aforesaid reasons the present petition is liable to be dismissed and it is ordered accordingly. Rule is discharged. There will be no order as to costs.

