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W.A.No.2584 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.11.2023

CORAM :

**THE HON'BLE MR.SANJAY V.GANGAPURWALA,
CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY**

W.A.No.2584 of 2022

1. Government of India,
Represented by its Secretary to Government,
Department of Fertilisers,
Ministry of Chemicals & Fertilisers,
Shastri Bhavan, New Delhi.
2. The Secretary to Government,
Department of Agriculture,
Government of India,
Shastri Bhavan, New Delhi.
3. The Joint Secretary,
Department of Agriculture and Co-Operation,
Government of India,
Shastri Bhavan, New Delhi. .. Appellants

Versus

M/s.Greenstar Fertilisers Ltd.,
"SPIC House",
No.88, Mount Road,
Guindy, Chennai - 600 032.
Rep by its Chief Financial Officer, J.Ravishankar .. Respondent



W.A.No.2584 of 2022

Prayer : Writ Appeal under Clause 15 of the Letters Patent to allow the Writ Appeal and set aside the dismissal order passed by this Court in W.P.No.25337 of 2017, dated 23.08.2022.

For Appellants : Mr.R.Rajesh Vivekananthan,
Deputy Solicitor General of India

For Respondent : Mr.A.L.Somayaji, Senior Counsel
for Mr.AR.Karthik Lakshmanan

JUDGMENT

(Judgment made by the Hon'ble Mr.Justice D.Bharatha Chakravarthy)

This Writ Appeal is directed against the order of the learned Single Judge, dated 23.08.2022, in and by which the learned Single Judge allowed the Writ Petition filed by the respondent herein on the following terms:-

“19. In view of the above, I am unable to sustain the recoveries made. The Writ Petition will stand allowed. The order impugned will stand quashed and there will be a direction to the Central Government to release the subsidy amount of Rs.107,82,17,592/- and interest of Rs.11,29,38,060/- within a period of six weeks from the date of receipt of a copy of this order. If the subsidy is not released within a period of six weeks, the amount of subsidy i.e., Rs.107,82,17,592/- will carry interest at 12% per annum from today till date of payment. No costs.”



W.A.No.2584 of 2022

WEB COPY

2. The case of the writ petitioner is that in order to supply fertilizers to the farmers belonging to various States, the writ petitioner imported a total of 59,770 metric tonnes of *Di Ammonium Phosphate* (DAP) by two ships from their Chinese counterparts through two vessels namely, *M.V.Citrus Venus*, and *J.S.Comet*. The vessel *M.V. Citrus Venus*, with a bulk cargo of DAP, reached Visakhapatnam Port on 22.08.2011. The discharge operations commenced on 24.08.2011 and the entire unloading of the cargo was completed and the ship left Visakhapatnam on 29.08.2011. During the discharge operations on 27.08.2011, the State Fertilizer Inspector-cum-Mandal Agricultural Officer, Andhra Pradesh drew up samples of DAP from the various hatches of the vessel for analysis by the Fertilizer Control Order Laboratory, Tadepalligudem. The Fertilizer Inspector, R.F.C.L, Kalyani, West Bengal drew up samples on 30.08.2011. Thereafter, the writ petitioner moved the imported DAP as per the distribution movement to the respective States and the fertilizers were supplied to the farmers. While so, on 26.09.2011, the Fertilizer Inspector, Parbhani Jilla, Maharashtra had drawn a sample of the fertilizers from a dealer for analysis at the Fertilizer Control Laboratory at Aurangabad. Similarly, the Fertilizer Inspector at Kanpur had drawn sample on 14.10.2011 for testing at Central Fertilizer Quality Control



W.A.No.2584 of 2022

WEB COPY

and Training Institute, Faridabad. Of the five samples taken, except the regional Fertilizer Control Laboratory, Kalyani, in all the other samples, the fertilizers were found to be in accordance with the specifications. In respect of Kalyani, West Bengal alone, the water soluble P_2O_5 was found to be at 0.76% lesser than the minimum required limit, of which, 0.5% is taken as tolerance limit and therefore, the sample was held to be non-standard for a fractional variation of 0.26%. Even in respect of the said variation, the said writ petitioner was sought for referee analysis. On referee analysis also, the Deputy Commissioner, Ministry of Agriculture had, on 07.12.2011, confirmed that the DAP was of non-standard. The fertilizer was held to be non-standard inspite of the fact that even in the year 2012, the Ministry of Agriculture has taken a decision that in respect of water soluble P_2O_5 , even 85% would be as good as 100%. As a matter of fact, there was administrative delay in implementing the said decision and in the year 2017, the standard itself has been lowered down to 39.5%.

3. Similarly, the writ petitioner imported DAP from its Chinese counterpart in the other vessel namely, *J.S.Comet*, which reached the Kandla Port in Gujarat on 13.10.2012. The discharge operations



W.A.No.2584 of 2022

commenced on 17.10.2012 and were completed on 20.10.2012. On 19.10.2012, the Fertilizer Inspector of Central Fertilizer Quality Control and Training Institute, Faridabad drew samples. On 26.10.2012, the Fertilizer Inspector-cum-Agricultural Officer, Gandhidham drew samples to be tested at the Fertilizer Testing Laboratory, Junagadh, Gujarat. Of the three samples drawn, the laboratory report of Fertilizer Testing Laboratory, Junagadh, Gujarat reported that the fertilizer is according to the specifications. However, the Central Fertilizer Quality Control and Training Institute, Haryana reported that there is a deficiency in water soluble P_2O_5 to an extent of 2.31%. The writ petitioner, by its letter, dated 30.11.2012, sought for referee analysis. On the reference, the Fertilizer Quality Control Laboratory, Kolkata analysed the sample and held that the water soluble P_2O_5 was 42.9%, while the original analysis report was 38.19%, but, however, the referee lab indicated that the sample failed by 0.7% in respect of total *Nitrogen* content.

4. Be that as it may, none of the States had any objection and the writ petitioner received proforma from the respective States. Towards the value of the above fertilizers, the writ petitioner recovered a sum of



W.A.No.2584 of 2022

WEB COPY

Rs.78,60,88,846/- from the buyers. The Government reimbursed the subsidy of Rs.107,82,17,592/-. However, in view of the above reports, holding that the sample is of non-standard quality, the entire sum, along with penal interest, totaling to a sum of Rs.119,11,55,652/-, has been recovered from the writ petitioner in the payments due to its in respect of subsequent supplies. When the writ petitioner made representation to release the amounts, it was refused by an order, dated 28.11.2016 citing quality issues. Therefore, the present Writ Petition was filed challenging the said order, dated 28.11.2016 and for a consequential prayer of releasing the aforementioned recovered amount with further interest.

5. The Writ Petition was resisted by the appellants by filing a detailed counter-affidavit. It is the case of the appellants that the fertilizer is an essential commodity as per Section 2(a)(xi) of the *Essential Commodities Act, 1955*. In exercise of the powers under Section 3(i) of the *Essential Commodities Act, 1955*, the Government of India had framed regulations namely, *Fertilizer (Control) Order, 1985 (FCO)* which provides for regulating sale, price, quality of fertilizers. The *FCO* 29, prescribed procedure for analysis including referee analysis. The referee analysis is



W.A.No.2584 of 2022

WEB COPY

binding on the parties. Accordingly, in the instant case, in respect of the first ship load, water soluble phosphate content was reported as 40.24% as against specified value of 41%. Even by providing tolerance limit of 0.5 units, the sample was non-standard on account of water soluble P_2O_5 . In respect of the second ship also, the second analysis reported the variation in *Nitrogen* content, but, by providing tolerance limit of 0.5 units, it was declared as per standards in *Nitrogen* content, but, was non-standard on account of water soluble P_2O_5 . Once the fertilizer was non-standard, there was no question of releasing the subsidy and therefore, the Writ Petition was without any merits.

6. The learned Single Judge considered the case of the parties, found that there is nothing in the *FCO* enabling the first appellant to effect recoveries of the subsidiary already paid to the writ petitioner. The learned Single Judge found that the modified procedure for payment of subsidy, dated 25.10.2012 makes it clear that the payment of subsidy would depend upon the certification of the States and once the States did not raise any objection within 180 days as per the procedure, the first respondent department had no *suo motu* power to effect the recoveries. The learned



W.A.No.2584 of 2022

Single Judge further considered the huge quantity of the fertilizers supplied and the fractional margin of deficiency complained. The learned Single Judge also took into account the differences in the outcomes and findings of the various labs including among the central labs themselves. The learned Single Judge also found that on the basis of one stray sample, the entire supply which was held to be non-standard cannot be countenanced and accordingly, allowed the Writ Petition on the terms extracted *supra*.

7. Heard *Mr.R.Rajesh Vivekananthan*, learned Deputy Solicitor General of India appearing on behalf of the appellants and *Mr.A.L.Somayaji*, learned Senior Counsel appearing on behalf the respondent.

8. *Mr.R.Rajesh Vivekananthan*, learned Deputy Solicitor General of India appearing on behalf the appellants submitted that as per FCO 19(a) no person can import or offer for sale or distribute any fertilizer which is not of prescribed standard. FCO 27 vests power both on the State and the Central Governments to appoint Inspectors of Fertilizers. FCO 29 prescribes the procedure of drawing sample by the Inspector and testing by the regional institute. The laboratories at Faridabad, Mumbai, Chennai and Kalyani



W.A.No.2584 of 2022

WEB COPY

(Kolkata) or any other laboratory notified for this purpose by the State Government with a prior approval of the Central Government are to be treated as referee laboratories. If any person is aggrieved by the analysis report of Central Quality Control and Training Institute or its regional laboratories, he has to only appeal under FCO 32(2) for a referee analysis and referee analysis shall be binding.

9. The learned Deputy Solicitor General of India would then take this Court through an office memorandum, dated 28.10.2012 to submit that all payments towards the cost as well as subsidy in respect of sub-standard fertilizers will be continued to be recovered from the bills of the Company pending with the department. Therefore, the same clearly confers the power on the appellants to effect recoveries. As per the Fertilizer Policy, the quality of the fertilizers imported in India is liable to be checked by the Inspector of Fertilizers appointed by the Central Government through the Fertilizer Quality Control Laboratory of the Government of India and therefore, there was no any infirmity whatsoever in drawing up of samples or testing in the laboratories or recovering the amounts paid. By drawing attention of the Court through the reports of the referee lab, he would



W.A.No.2584 of 2022

WEB COPY

submit that in both cases, the samples were found to be of non-standard quality. Even if it is of a minimum level, still the same is below the tolerance limit even by giving the benefit of 0.5% and therefore, the appellants were right in recovering the same due along with interest.

10. Per *contra*, *Mr.A.L.Somayaji*, learned Senior Counsel appearing on behalf of the respondent, taking this Court through the concerned Fertilizer Policy of the appellants, would submit that this is not any subsidy which is paid to the writ petitioner but to the farmers. As against the actual price of the DAP being Rs.1,000/- per bag, it is the directive of the Government to sell the same at Rs.250/- per bag and the difference of the cost being Rs.750/- is reimbursed by the Government. It is the subsidy which is paid to the farmers and only for convenience, it is routed through the writ petitioner. Secondly, the Policy of the Government of India clearly states that the Department of Fertilizers can make deduction along with penal interest on the quantity of fertilizers, for which the State Governments have reported to be of non-standard. The concerned State Governments have issued proforma to the writ petitioner. The concerned State Governments have claimed that the fertilizers to be of standard quality.



W.A.No.2584 of 2022

WEB COPY

11. The Learned Senior Counsel would further submit that it is to be further noticed that the entire cargo was carried in the vessel in different hatches and only in respect of one sample, lifted from a particular hatch alone, the laboratory report was negative, while four other laboratories reported that the samples were of standard quality. It can be seen even in respect of the second ship, one of the State laboratory at Junagadh reported that the fertilizer was of standard quality. It can be seen even from the reports of the central institutes, which reported that the fertilizers can be non-standard, that the parameters were different when they were tested originally and when they were tested in the referee lab. For example, in respect of the second ship load namely, *J.S.Comet*, while the Central Research Laboratory at Haryana reported water soluble Phosphate only at 38.29%, the same was found to be of 41.9% in the referee analysis. However, the *Nitrogen* level which was found to be normal in the original analysis of the other labs, it was found by the referee lab that it was lagging by 0.7%. This minor variation, firstly, is possible on account of the vagaries of time taken etc. This apart, in respect of water soluble Phosphate, as early as in the year 2012, the officials of the Department of Fertilizers and the



W.A.No.2584 of 2022

Ministry of Agriculture have taken a decision vide the minutes of the meeting, dated 09.03.2012 holding that the 85% of water soluble Phosphate itself is agronomically as good as 100% water soluble Phosphate content. On the basis of the same, in the year 2017, standard itself is lowered to 39.5% from 41%. In this background, when the writ petitioner had genuinely imported such huge quantity of DAP which is proper and the same having been distributed in all the destination States and the States having accepted as the standard fertilizer and the same having been used by the farmers, belatedly, by a solitary instance of sample analysis, which by itself is questionable, cannot unjustly and unreasonably recover the entire money which is nothing but the procurement price of the DAP by the writ petitioner from its counterparts that too with penal interest. He would submit that the learned Single Judge has rightly taken the various factors into consideration and allowed the Writ Petition.

12. We have considered the rival submissions made on either side and perused the material records of the case. The first point to be considered is that whether or not the first appellant department was right in effecting recoveries as the fertilizer being non-standard. In this regard, the concerned



W.A.No.2584 of 2022

WEB COPY

Policy is framed by the Government vide memorandum bearing Ref.No.15011/14/2014-MPR, dated 28.11.2016. The relevant portion of paragraph No.8 reads as follows:-

“The Government of India has declared fertilizer as an essential commodity under the Essential Commodities Act, 1955 (ECA) and has notified Fertilizer Control Order, 1985 (FCO) under this Act. Accordingly, it is the responsibility of the State Governments to ensure the supply of quality of fertilizers by the manufactures/importers of fertilizers as prescribed under the FCO under the ECA. As per the provision of the FCO, the fertilizers, which meet the standard of quality laid down in the order can only be sold to the farmers. There are 71 fertilizer testing laboratories including four laboratories of the Government of India at Faridabad, Kalyani, Mumbai and Chennai with an annual analyzing capacity of 1.34 lakh samples. The quality of the fertilizers imported in the Country is invariably checked by the fertilizer quality control laboratories of the Government of India. The State Governments are adequately empowered to draw samples of the fertilizers anywhere in the Country and take appropriate action against the sellers of Non-standard fertilizers. The penal provision includes prosecution of offenders and sentence if convicted up to seven years imprisonment under the ECA, 1955 besides cancellation of authorization certificate and other administrative action. The Department of Fertilizers make deductions along with penal interest on the quantity of the fertilizers for which the State Governments have reported to be Non-Standard. “

(emphasis supplied)



W.A.No.2584 of 2022

WEB COPY

13. Even though the learned Deputy Solicitor General of India had relied upon the office memorandum, dated 25.10.2012, the said office memorandum itself clearly prescribes that the States have to certify the quantity as per paragraph No.6 and quality as per paragraph No.7 in the proforma. Once the States certify the quality, the payments have to be made. The entire paragraph Nos.6, 7, 8 and 9 are extracted hereunder for ready reference:-

“ **6. State Certification for Quantity** – States shall send certificate w.r.t. the quantity (as per Proforma B1) and quality (as per Proforma B2), with the proviso that quantity will be certified on line within 30 days on the IT enabled system, and quality when once tested within six months. Short and sub-standard quantity as reported by the State will not be eligible for subsidy and the subsidy paid will be recovered from the companies. A 30 day window will be made available for the States on the transparency portal to report any discrepancies in the quantity of Fertilizers. In case State certification for quantity for P&K and Urea is not submitted within 30 days, it shall be deemed as no discrepancies on quantity reported by State agencies and the payments will be processed for manufacturers'/importers' balance claims. Proforma-B1 and Proforma-B2 will be sent shortly.

7. State Certification for Quality – Currently Proforma-B is required for P&K and



WEB COPY



W.A.No.2584 of 2022

SSP for quality certification from States. Now, two sets of Proforma i.e. B1+B2 will be used for all subsidized fertilizers. Considering the delays in getting requisite Proforma from States, a 180 day window will be made available for the States on the transparency portal to export any discrepancies in the quality of Fertilizers reported. The State Government/Union Territories concerned will have to certify the receipt of fertilizers within the stipulated time. In case they do not certify, the alert will be sent to the State Governments that the Proforma 'B2' certification has not been received and no allocation as per the supply plan for respective State Government/Union Territory for subsequent month will be made in the Fertilizer Monitoring System.

8. The balance claim in r/o P&K fertilizers, SSP and urea will be settled in two parts. In case of acknowledgement of the quantity by the retailers in mFMS is less than the receipts in the State / Districts indicated at the time of 'On Account' claim, the balance claim will be processed for payment on the basis of lesser quantity. However, later on, the retailer acknowledges the receipt of the remaining quantity in mFMS, the balance claim will be processed for payment taking into a/c the quantity indicated at the time of 'On Account' claim and quantity on which balance payment has already been claimed / released.

9. All other payments towards cost of imported urea as well as freight subsidy for all fertilizers shall also continue to be paid as per extant Freight subsidy policy and claim process at the time of processing claims. Recoveries from companies on account of short/sub-standard fertilizers will continue to be recovered



WEB COPY



W.A.No.2584 of 2022

from any bill of the company pending with the Department or through cheque / DD from the companies.”

From a reading of the above, it would again be clear that the release or recovery has to be made depending on the certification of the States. Therefore, we are not able to accept the contention of the learned Deputy Solicitor General of India that merely because it is mentioned that the department will effect recoveries from the subsequent bills, the same would vest the power in the department even in the absence of any complaint as to the sub-standard quality and in the teeth of the certification of quality by the concerned States as per the paragraph No.7. Therefore, we are in agreement with the learned Single Judge that the appellants' action in resorting to recovery of the amounts was not in accordance with law.

14. The next point to be considered is that whether the entire quantity of fertilizer which is said to be supplied by the writ petitioner can be held to be of non-standard. In this regard, it can be seen that *DAP* is a fertilizer widely used by the farmers in India as soil fertilizer. The standards are fixed as per the recommendations of the experts by notification under the *FCO*. It has to be seen that in respect of water soluble *Phosphate*, the standard is fixed at 41%, of which, 0.5% is held to be tolerable limit which



W.A.No.2584 of 2022

effectively makes it at 40.5%. Even the same was subsequently reduced by 39.5% and if 5% tolerance limit is to be considered, it comes down to 39%.

Even though the said standard is notified only in the year 2017, decision to the effect was taken in the minutes of the meeting, dated 09.03.2012. This apart, it can be seen that the standard which is complained as per the referee analysis is a very meagre fractional amount of 0.24% in respect of water soluble *Phosphate* in the first consignment and 0.7% of *Nitrogen* in respect of the second consignment. In this regard, the variation levels of both water soluble *Phosphate* as well as *Nitrogen* differs in respect of the samples tested at the various laboratories both Central and State. The samples were also taken at different points at different dates. Further, the entire question is to be considered in the context of the Scheme as such. The purport of the scheme is to provide subsidy to the farmers. The very fertilizer was distributed to the farmers. It was taken as Standard Quality and is purchased at the subsidised price by the farmers and used. The States have certified so. But after the entire amount has been released to the writ petitioner, merely on the basis of one analysis of one particular sample, that too when the original analysis and the referee analysis vary with each other, it cannot be said that the entire quantity of the fertilizers supplied were not of standard



W.A.No.2584 of 2022

WEB COPY

quantity. Even as per the minutes of the meeting, dated 09.03.2012 and the subsequent notification in the year 2017, the variation is within the permissible limit and no exception whatsoever can be taken in respect of the findings arrived by the learned Single Judge in this regard.

15. In the result, finding no merits, this Writ Appeal stands dismissed. There will be no order as to costs. Consequently, C.M.P.No.20388 of 2022 is closed.

(S.V.G., CJ.)

(D.B.C., J.)

02.11.2023

Index : yes
Speaking order
Neutral Citation : yes
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**THE HON'BLE CHIEF JUSTICE
AND
D.BHARATHA CHAKRAVARTHY, J.**

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WEB COPY



W.A.No.2584 of 2022

W.A.No.2584 of 2022

02.11.2023