

2024:PHHC:122007



**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

103+210+105+216+249

Date of decision: 13.09.2024

210 (1)

CWP-13470-2021

M/S M.D. BIOCOALS PRIVATE LIMITED AND ANOTHER

.....Petitioners

VERSUS

STATE OF PUNJAB AND ANOTHER

.....Respondents

210 (2)

CWP-13537-2021

M/S BHARAT AGRO MOLECULES LIMITED AND ANOTHER

.....Petitioners

VERSUS

STATE OF PUNJAB AND ANOTHER

.....Respondents

210 (3)

CWP-5949-2023

M/S BHARAT AGRO MOLECULES LIMITED

.....Petitioner

VERSUS

STATE OF PUNJAB AND ANOTHER

.....Respondents

210 (4)

CWP-26113-2023

M/S DARA CHEMICALS AND OTHERS

.....Petitioners



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VERSUS

STATE OF PUNJAB AND ANOTHER

.....Respondents

216 (1)

CWP-1532-2022

M/S INDERJIT PESTICIDES THROUGH ITS PROPRIETOR SH. INDERJIT SINGH

.....Petitioners

VERSUS

THE SECRETARY OF AGRICULTURE, PUNJAB CIVIL SECRETARIAT, SECTOR 1, CHANDIGARH AND OTHERS

.....Respondents

216 (2)

CWP-2018-2024

INDIAN POTASH LTD. THROUGH ITS AUTHORIZED SIGNATORY RAHUL CHAUHAN

.....Petitioners

VERSUS

THE SECRETARY OF AGRICULTURE, PUNJAB CIVIL SECRETARIAT, SECTOR 1, CHANDIGARH AND OTHERS

.....Respondents

216 (3)

CWP-22909-2022

M/S BALBIR KHETI SEWA CENTRE

.....Petitioner

VERSUS

THE SECRETARY OF AGRICULTURE, PUNJAB CIVIL SECRETARIAT, SECTOR 1, CHANDIGARH AND OTHERS

.....Respondents



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216 (4)

CWP-2885-2024

M/S MANGAL MURTI TRADING COMPANY

.....Petitioner

VERSUS

THE SECRETARY OF AGRICULTURE, PUNJAB CIVIL SECRETARIAT,
SECTOR 1, CHANDIGARH AND OTHERS

.....Respondents

249

CWP-15864-2024

M/S HINDUKUSH FERTILIZER AND CHEMICALS PVT LTD
HARIDWAR

.....Petitioner

VERSUS

THE SECRETARY OF AGRICULTURE, PUNJAB CIVIL SECRETARIAT,
SECTOR 1, CHANDIGARH AND OTHERS

.....Respondents

CORAM : HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present: - Mr. Amarbir Singh Salar, Advocate
for the petitioner in CWP-13470-2021,
CWP-13537-2021, CWP-5949-2023 and
CWP-26113-2023.

Mr. Arun Chandra, Advocate
for the petitioner in CWP-1532-2022, CWP-2018-2024,
CWP-22909-2022 and CWP-2885-2024.

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Mr. Sukhandeep Singh, Advocate
for the petitioner in CWP-15864-2024.

Ms. Niharika Sharma, Asstt. A.G. Punjab.
Ms. Akshita Chauhan, DAG, Punjab.

VINOD S. BHARDWAJ, J. (Oral)**CM-14814-CWP-2024 in CWP-26113-2023**

For the reasons mentioned in the application, the same is allowed and reply by way of affidavit of Gurjit Singh Brar, Joint Director Agriculture (Inputs), office of Director Agriculture, Punjab on behalf of respondents No. 1 and 2 is taken on record.

CM-14797-CWP-2024 in CWP-2018-2024

For the reasons mentioned in the application, the same is allowed and reply by way of affidavit of Gurjit Singh Brar, Joint Director Agriculture (Inputs), office of Director Agriculture, Punjab on behalf of respondents No. 1 to 3 is taken on record.

CM-14898-CWP-2024 in CWP-2885-2024

For the reasons mentioned in the application, the same is allowed and reply by way of affidavit of Gurjit Singh Brar, Joint Director Agriculture (Inputs), office of Director Agriculture, Punjab on behalf of respondents No. 1 to 3 is taken on record.

MAIN CASES



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applications submitted by the petitioners for analysis of 3rd sample, the present batch of writ petitions has been preferred before this Court.

2. Counsel for the parties agree that all these matters can be decided by way of a common judgment.

3. For facility of reference, facts are however being extracted from CWP-13470-2021 “*M/s M.D. BIOCOALS Private Ltd. and another versus State of Punjab and another*”.

4. The petitioner in the present petition is a Private Ltd. Company incorporated under the Companies Act having its registered office at Sirsa and is the manufacturer of Fertilizers known as “Sulphur 90% (powder), for the last two decades. It claims that there has not been any adverse report against the quality of the product manufactured by the petitioner No.1. The Petitioner No. 2 is a dealer of the said fertilizer in District Gurdaspur (Punjab).

5. That on 21.04.2018, the Fertilizer Inspector had drawn sample of the above said fertilizer and the sample was sent to the Fertilizer Quality Control Laboratory, Ludhiana. A report dated 24.04.2018 with respect to the two quality parameters i.e. Moisture Percent by weight, maximum 1% and the Sulphur content was ascertained. The relevant extract of the report dated 24.04.2018 reads thus:-

<i>Sr. No</i>	<i>Specification as per FCO</i>	<i>Composition as per analysis</i>	<i>Variation</i>	<i>Permissible Tolerance Limit</i>
<i>1.</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>



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(i)	Moisture per cent by weight, maximum 1.0	0.69	--	0.3 Units
(ii)	Total Element sulphur (as S) per cent by weight, minimum 90.0	85.27	4.73	0.5 units

6. On analysis, the sample was found to be containing 85.27% Sulphur by weight, as against the specified requirement of minimum 90% Sulphur by weight. Due to this variation of 4.73%, the sample was declared sub-standard by the laboratory.

7. On receipt of the above said analysis report, the petitioner No.2 filed an appeal claiming that the manufacturing firm has a well equipped laboratory which is managed by the qualified staff and that there has been no defect or complaint of the material being sub standard at any earlier point of time and requested that the sample be sent to another laboratory.

8. On receipt of the above application, a second sample was sent to the referee Laboratory at Bangalore. An analysis report dated 30.10.2018 was sent by the referee Laboratory. While the moisture content was found to be same, the Sulphur element was found to have a composition at 87.67% showing a variation of 2.33% from the minimum requirement of 90% by weight. The test results reads thus:-

Sr. No.	Specification as per FCO	Composition as per analysis	Variation	Permissible Tolerance Limit
(i)	Moisture per cent by weight, maximum 1.0	0.67	--	0.3 Units
(ii)	Total Element sulphur (as S) per cent by weight, minimum 90.00	87.67	2.33	0.5 units

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9. Hence, the sample was stated to be found deficient, once again, in the nutrient content of Sulphur against the package declaration made.

10. An appeal under Clause 32 (A) of the Fertilizer Control Order, 1985 was thus submitted by the petitioner for a third sample analysis, however, the said application was rejected by the respondents vide order dated Nil (Annexure P-6) and conveyed vide letter dated 10.01.2020. The operative part of the said order read thus:-

“According to the notification SO No.3265(E) dated 05.07.2018, and the instructions issued under the Fertilizer Control Order, the samples can be retested third time only in the case where there is a wide variation in the first and reanalysis report. The arguments of the appellant and the respondent were heard. The first test report of the Zink Suphur 90% fertilizer kept for sale by the appellant got analyzed from fertilizer laboratory Ludhiana and the second test report got conducted from fertilizer testing laboratory Bangalore has been perused and is found that there is no much difference in both these reports, therefore, the applicant is not entitled to get the third sample tested.”

11. Aggrieved thereof, the present writ petition has been filed.

12. Learned Counsel appearing on behalf of the petitioner contends that the respondents have wrongly rejected the appeal preferred by the petitioner and had refused to send the sample for third analysis notwithstanding a specific statutory provision, by holding that there is no much difference in both the reports. He contends that the said finding is

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misplaced since Clause 32 (A)(3) provides for a third sample analysis in case of a 'wide variation' in the analysis report between the first sample and the referee sample. He contends that the variation as per the first sample was 4.73 and as per the second sample was 2.33. Hence, the percentage of variation in both the results was to the extent of more than 50% and such a difference in the two analysis report should be construed as a wide variation. He further submits that there is no shelf life of the aforesaid fertilizer, being a chemical fertilizer, and that no prejudice is likely to be caused to the respondents in the event of a third sample analysis being conducted.

13. Counsel for the respondent-State have on the other hand referred to the reply filed by the respondent-State and has vehemently argued that sub clause III of Clause 32 (A) comes into operation only if there is a wide difference between both the reports and that as against the prescribed minimum standard, the variation is not wide, hence, there is no occasion for referring the sample to a third analysis. The averment as contained in Para Nos. 4 and 5 of the preliminary submissions are extracted as under:-

“4. That the petitioner relies upon proviso added to sub clause 3 of clause 32A of the Fertilizer Control Order to say that if there is difference between both the reports, third sample be also sent to some National Test House Laboratory. Sub Clause 3 with proviso has been already reproduced in Para 6 of the writ petition.

5. That it is the case of the petitioner that his case falls under proviso added to sub clause 3 of clause 32A if the difference between both the laboratories is wide. However, it is

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submitted that from the perusal of both the reports above it is clear that there is no wide variation between both the analysis reports. Therefore, the present writ petition deserves to be dismissed. So far as moisture is concerned, the variation in both the reports is only to the extent of 0.02 and so far percentage of Sulphur content by weight is concerned it is merely 2.4%. Therefore, the third sample was not liable to be sent to the National Test House Laboratory.”

14. Learned State Counsel contends that the Appellate Authority/Government had been sending the third sample analysis only where the first and second sample hold the product to be sub-standard on different parameters or where the sample found sub standard in one test is found to be compliant in the second analysis. If it is found sub-standard on same content, it is not considered as a wide variation and sample is not sent for a third analysis.

15. On being asked as to whether the shelf life of the sample expires or not, they fairly submit that being a chemical fertilizer, it does not have an expiry date and samples can still be drawn. A further query was also put to the State Counsel as to whether the State is likely to be prejudiced on account of re-sample analysis being done, learned State Counsel fairly concedes that the State would not in any manner be prejudiced on account thereof.

16. No judgments have been cited by either of the parties.

17. I have heard learned Counsel appearing on behalf of the respective parties and have gone through the documents appended alongwith

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the present writ petition.

18. So far as the objection raised by the respondent-State that there is no much variance for the minimum requirement of Sulphur and therefore there is no necessity of sending the sample for third analysis, it would be necessary to first look into the statutory requirement and expression. For the appreciation of the same, it will be appropriate to extract sub clause 3 of Clause 32 (A) of the Fertilizer Control Order, 1985, which reads as under:-

“8. In clause 32 A of the said Order, after sub-clause (2), the following sub-clause shall be inserted, namely----

"(3) The report of reference analysis received from referee laboratory shall supersede the analysis report submitted first laboratory and shall be treated as final.

Provided that in case where the sample is declared as non-standard both in the first analysis report and referee analysis report but in different parameters or there is wide variation in the analysis report of first analysis and referee analysis, as the case may be, the aggrieved person may appeal to the appellate authority for third analysis within thirty days from the date of receipt of the report of referee analysis on payment of such charges as may be required for such analysis

(Emphasis supplied)

19. It is evident from a perusal of the proviso to sub Clause 3 of Clause 32 (A) that the necessity of having a third analysis may arise, on request of person aggrieved, under any of the following circumstances:-

- i) When sample is declared as sub standard in both analysis but on different parameters; or

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- ii) When there is a wide variation in the analysis report of both the samples.

20. The respondents have admitted that the samples are sent for a third analysis where the first situation arises but are not being sent for third analysis when second situation exists. Hence, by their own admission and conduct, the respondents have rendered the second condition/circumstance of the proviso as redundant. A legislative provision or intent is required to be given effect to in appropriate cases it would be inappropriate to justify disregard ignoring a statutory provision. A blanket approach declining all cases renders a statute as a dead letter and a consistent continuance of such a wrong would not lay down a new law. Such an act itself becomes arbitrary as it shows lack of application of mind and objectivity.

21. The clause being in the nature of a “Proviso” removes the special cases from the general enactment. For the proper construction of the proviso, apart from the sub clause or the provision to which it is added, even the general purpose of the clause or the Section may also be taken into consideration so as to derive the true meaning.

22. The proviso to sub clause (3) of Clause 32 (A) of the Fertilizer Control Order, 1985 aims to provide yet another opportunity to determine, before prosecuting any person for violation of law, whether the product is sub-standard or not. Hence, the legislature intended to assure itself of commission of the offence, before a person is prosecuted, and to grant him that opportunity of establishing his innocence, which may be indicated due

to “Wide Variation” in the sample analysis results.

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23. Once the aim & object is to reflect fairness in opportunity, the omission to exercise the statutory power becomes unjust to the accused or the suspect who may be compelled to undergo incarceration and agony of prosecution but may also suffer immense loss of goodwill and business leading to fiscal bleeding as well. The consequences may be immense. The legislature having vested a statutory power also creates a duty for the authority conferred with the power to exercise it in a befitting case to advance the object. This duty is not in the nature of a liberty and hence creates a corresponding right in the person aggrieved to seek invocation thereof. Refusal to exercise the power is not the same as rejection. While the former is an abdication of duties, the second is a considered decision.

24. Hence, on first principles, the inaction of the authorities does not find any approval from this Court. Having held so, the next challenge which comes up is the use of the expression “Wide Variation” in the contemplated second situation for invoking a proviso.

25. “Variation” is usually understood as a deviation or deference from the prescribed levels of perfection. There are however certain “standard deviation” which is permissible and acceptable. While results travelling beyond the “standard deviation’ or tolerance limit would be impermissible in law, the contours of the dispute herein is in reference to variation in the test results of two different labs.

26. Ordinarily, to determine whether a variation is wide or not, one is required to take stock of the prescribed standard and the permissible variance. As an illustrations from the case, moisture content to the extent of

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1% is permissible and deviance of 0.3 is standard. Hence the permissible variance to the standard is to an extent of 30%. Thus may pave way for categorizing what may be construed as a wide variance.

27. Viewed from the same, the “Variance” in the sulphur content in both results shows that the decline in the percentage of variation is from 4073 units to 2033 units against the permissible standard deviation of 0.5 unit against a requirement of minimum 90 unit.

28. Even though the sample fails in both the reports but the variation in results is more than 50%. Such a difference in two sample analysis results surely casts doubt on the finality of the test result and creating a need for the third sample analysis.

29. The aforesaid provision has to be invoked in the context of the variation in the outcome of the analysis and not in the context of variation when viewed from the prescribed standard since wide variation has been used in the context of test analysis and not product analysis. The use of the expression “wide variation in the analysis report of the first analysis and the referee analysis” is of much significance and import. Hence, the variation is to be seen in the context of the results of the first sample as well as the referee sample inter se. The parameter is hence being wrongly understood by the respondent-authorities.

30. Counsel for the petitioner as well as for the respondent-State fairly concedes that there are no guidelines/parameters that have been fixed by the State through office instructions/guidelines which would define or assign any meaning to “Wide Variation”. The duty thus be falls upon this

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Court to assign a workable interpretation to the expression “Wide Variation” as used in the proviso to the sub clause 3 of Clause 32 (A) of the Fertilizer Control Order, 1985.

31. The choice of expression “Wide Variation” as opposed to the expression “Slight variation”;/ “Any variation”;/ “noticeable variation”;/ “reasonable variation”; or “Substantial variation” is crucial. The legislature thus has chosen to provide this opportunity of seeking a third sample analysis (with respect to the sample being found sub-standard even on same content itself) only when there is a wide variation in the analysis report of the first sample as well as the referee sample. Such an exercise is primarily required to be undertaken by the State, which has sufficient subject expertise at its disposal, however, considering the totality of circumstances and also the fact that the State would not be prejudiced by testing a third analysis in circumstances similar as in the present case, I deem it appropriate to hold that a variation in the sample analysis report between the first sample as well as the referee sample exceeding 40% would surely be sufficient to hold that there is a wide variation in the test results of the first analysis as well as the referee analysis. The aforesaid percentage is just as a stop gap interim view till the Govt. takes a considered decision considering that there are numerous views on “Wide Variance” which vary from more than 30% to more than 50% to be necessary for concluding “Wide variation”. This Court has thus taken a middle percentage, as a safe parameter till a decision is taken by the State. Hence, under such variation in results, the Government should

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ordinarily allow the request of the person aggrieved for seeking a third sample analysis more so when the cost with respect to the third analysis is to be borne by the person who is aggrieved and he is the only person who is likely to suffer the biggest prejudice as in the absence of being afforded that fair opportunity, he is likely to undergo a prosecution under the Fertilizer Control Order, 1985 and to prove his innocence.

32. While advertent to the second argument of the circumstances in which the analysis report of the first sample showing the sample to be sub standard and the referee sample showing the sample to be compliant being a case for 3rd analysis, I feel that the approach of the respondent would even otherwise be arbitrary. It will be a travesty to hold that the State would send the sample for a third analysis when the results tilt in favour of the manufacturer/Dealer but would not allow a fair opportunity to the manufacture/dealer to establish his innocence despite the analysis report showing a variation of more than 40%.

33. This Court would refrain from carrying out the exercise as to what is the degree of variation in the analysis result of the samples in petitions brought before this Court and deems it at appropriate that the aforesaid exercise be undertaken by the respondent-authority itself.

34. **The present writ petitions are accordingly allowed.** The impugned orders are set aside. The matters are remanded to the Appellate Authority for passing an appropriate order, on case to case basis, in view of the observations recorded above till a decision is taken by the Government to decide 'Wide variation'. Let, **the parties appear before the Appellate**



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Authority on 21.10.2024 whereupon a decision shall be taken within a period of three months thereafter.

(VINOD S. BHARDWAJ)
JUDGE

SEPTEMBER 13, 2024
Vishal Sharma

Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No