

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.12.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

WP.No.32124 of 2018
and WMP No.37396 of 2018

M/s.Fumigation Services (Pvt.) Ltd.,
No.1, Buddu Street,
III Floor, Chennai - 1,
Rep. By its Authorised Signatory,
Mr.S.Anbalagan

Petitioner

vs.

1. The Union of India,
Rep. By its Principal Secretary,
Department of Agriculture, Co-operative
and Farmer Welfare,
No.120, First Floor, Dr.Rajendraprasad Road,
Krishi Bhavan, New Delhi - 110 001.
2. The Plant Protection Agency,
Directorate of Plant Protection,
Quarantine and Storage,
N.H.IV, Faridabad - 121 001.
Haryana.
3. Joint Director (E),
Quarantine and Storage,
N.H.IV, Faridabad - 121 001.
Haryana

... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of declaration, to declare Clause 2.5 of the NSPM-12 Guideline for Assessment, Audit and Accreditation of Fumigation Agencies for Undertaking Methyl Bromide Fumigation - December 2017, issued by the 1st respondent as null and void and consequent direction to revoke the order of suspension issued by the 3rd respondent dated 17.11.2018.

For Petitioner : Mr.G.Jeremiah

ORDER

(Order of the Court was made by S.MANIKUMAR, J)

Petitioner is a registered company, engaged in fumigation and pest control services to exporters. Directorate of Plant Protection, Quarantine and Storage, established under the Ministry of Agriculture is the authority for granting Accreditation of Fumigation Agencies for performance of fumigation treatments with Methyl Bromide under accreditation scheme.

2. In May 2010, guidelines have been issued for Assessment, Audit and Accreditation of Fumigation Agencies for undertaking Methyl Bromide Fumigation by the Directorate of Plant Protection, Quarantine and Storage, Ministry of Agriculture, Department of Agriculture and Cooperation, Government of India. Subsequently, in December 2017, guidelines have been revised. On 11.09.2018, when the petitioner company applied for Phytosanitary Certificate (PSC) at Plant Quarantine Station (PQS) Krishnapatnam, for a consignment, the same could not be obtained / generated due to the omission of the branch name i.e M/s.Fumigation Services Pvt. Ltd. (Nellor) from the Plant Quarantine Information System (PQIS) database. Immediately, the Managing Director of the petitioner company addressed an email to the Joint Director, Directorate of Plant Protection, Quarantine & Storage (PPQS) regarding the omission of the branch code from the PQIS database.

3. Responding to the email sent by the petitioner, Joint Director, Directorate of Plant Protection, Quarantine & Storage (PPQS) replied that the petitioner company was suspended from fumigation operations for a period of 3 months from the date of the issue of the said letter dated 21.08.2018.

4. Being aggrieved petitioner has filed W.P.No.35512 of 2018, before the High Court of Andhra Pradesh and obtained an interim stay of the order of suspension. Petitioner's operation at Tuticorin has been suspended by an order dated 17.11.2018, pursuant to the report from the European Union that a consignment exported to Slovakia by M/s. Marks Engineering Works, Coimbatore contained live, harmful, organisms in the wooden pallet. In terms of National Standards for Phytosanitary Measures-12 (NSPM - 12), accreditation of the petitioner has been suspended for a period of three months. According to the petitioner, order of suspension dated 17.11.2018, has not been communicated and petitioner has downloaded the same from the website of the respondents.

5. On the above facts, petitioner has challenged Clause 2.5 of the (NSPM - 12) the Guidelines for Assessment, Audit and Accreditation of Fumigation Agencies for undertaking Methyl Bromide Fumigation, December 2017, on the grounds inter alia that the amended guidelines do not provide an opportunity to the accredited agency to show cause prior to suspension unlike the earlier guidelines, issued in May 2010. Petitioner has also contended that when the guidelines, empower only the Plant Protection Adviser to suspend the accreditation, impugned order issued by the Joint Director (E), Quarantine and Storage, lacks competence and therefore, the said order has to be set aside.

6. Added further Mr. Jeremiah, learned counsel for the petitioner submitted that on the issue of competency, High Court of Andhra Pradesh in I.A.No.1 of 2018 in WP No.35512 of 2018, has already entertained a writ petition and granted stay of the operation of the suspension of the accreditation.

7. Though, after making submission, Mr.G.Jeremiah learned counsel for the petitioner sought or permission to withdraw the writ petition, going through the material on record, we find that there is no merit in the writ petition as regards the challenge to the guidelines and therefore, permission is not granted.

8. Heard Mr.G.Jeremiah, learned counsel for the petitioner and perused the materials available on record.

9. Directorate of Plant Protection, Quarantine and Storage, Faridabad, Department of Agriculture & Cooperation, Ministry of Agriculture, Government of India, have issued guidelines for Assessment, Audit and Accreditation of Fumigation Agencies for undertaking Methyl Bromide Fumigation.

10. Clause 2.5 of the said guidelines in May 2010, deals with Suspension and Reinstatement Protocols and the same is reproduced hereunder:

Directorate of Plant Protection, Quarantine and Storage, will undertake immediate suspension of the fumigation agencies and accredited fumigation operators that perform ineffective fumigation operations. The suspended fumigation company and the accredited fumigation operator will be served a show cause notice as to why they should not be removed from the Accreditation Scheme and will be subject to reinstatement audit.

If during an audit, one or more critical non-conformities and/two or more than two major non-conformities and/or more than four minor non-conformities are found, fumigation company and

accredited fumigation operator will be suspended immediately and will be subject to a reinstatement audit. Re-training of accredited fumigation operator may be necessary.

If during an audit, less than two major and less than four minor non-conformities are found the fumigation company and the accredited fumigation operator will be subject to an additional announced audit within six (6) weeks. If during the follow-up audit, the nonconformities have not been addressed, the fumigation agency and the accredited fumigation operator will be suspended immediately and will be subject to a reinstatement audit within six (6) weeks. Reinstatement audit will continue until the fumigation agency and the accredited fumigation operator demonstrate competency in fulfilling the requirements of the Methyl Bromide Standard. Re-training of accredited fumigation operator may be necessary. The registration granted to the fumigation agency and the accreditation granted to the fumigation operator will be cancelled, if:

- they are suspended on three separate occasions; or
- on a reinstatement audit, a critical or major non-conformity has been accrued.

Once an accreditation has been cancelled, before re-accreditation can take place, the accredited fumigation operator will be subject to additional accreditation training and the fumigation company and the accredited fumigation operator will be required to undergo the complete assessment process.

11. Clause 2.5 of the guidelines issued in 2017, reads thus.

2.5. Suspension and Reinstatement Protocols:

The Plant Protection Adviser shall immediately suspend for a period of three months the fumigation agency and accredited fumigation operator that perform ineffective fumigation operations which includes receipt of notification of noncompliance due to detection of live infestation from the consignment fumigated by the agency.

In case of other noncompliance, show-cause notice will be served as to why they should not be suspended and if satisfactory reply not received within 15 days the agency and operator will be suspended. Final decision will be subject to the outcome of investigation.

In the event of suspension thrice or more within 5 year period the branch/agency and operator will be black listed. Further provided that the Fumigation Operator will be suspended if two times in a year non-compliance

is received in his jurisdiction.

If during an audit, infrastructure & manpower of branch do not justify past fumigation activities or one or more critical non-conformities and/two or more than two major non-conformities are found, fumigation company and accredited fumigation operator will be suspended and will be subject to a reinstatement audit. Re-training of accredited fumigation operator may be necessary.

If during an audit, less than two major and less than four minor non-conformities are found the fumigation company and the accredited fumigation operator will be subject to an additional announced audit within six (6) weeks. If during the follow-up audit, the non-conformities have not been addressed, the fumigation agency and the accredited fumigation operator will be suspended and will be subject to a reinstatement audit within six (6) weeks. Reinstatement audit will continue until the fumigation agency and the accredited fumigation operator demonstrate competency in fulfilling the requirements of the Methyl Bromide Standard. Refresher training of accredited fumigation operator may be necessary.

The registration granted to the fumigation agency and the accreditation granted to the fumigation operator will be cancelled, if:

- on a reinstatement audit, a critical or two major and four minor non-conformities have been accrued or?
- they are suspended on three separate occasions within a period of five years.?

Once an accreditation has been cancelled, before re-accreditation can take place, the accredited fumigation operator will be subject to additional accreditation/ refresher training and the fumigation company and the accredited fumigation operator will be required to undergo the complete assessment process.

12. Though, Mr.G.Jeremiah, learned counsel for the petitioner contended that the erstwhile guidelines of the year 2010 contained a clause giving opportunity to the fumigation agency before suspension, careful scrutiny of the Clause 2.5 both in the guidelines May 2010 and December 2017, we are of the view that the guidelines do not provide for an opportunity of show cause at the time of suspension. On the other hand, Clause 2.5 in both the guidelines makes it clear that in the case of ineffective fumigation operations, Directorate of Plant Protection, Quarantine and Storage, shall immediately suspend the fumigation agency and accredited fumigation operators that perform ineffective fumigation operations.

13. May 2010 Guidelines state that the Directorate of Plant Protection, Quarantine and Storage, will immediately suspend the fumigation agency and accredited fumigation operators that perform ineffective fumigation operations. Whereas in 2017 guidelines the difference is the Plant Protection Adviser shall immediately suspend for a period of three months the fumigation agency and accredited fumigation operator that perform ineffective fumigation operations which includes receipt of the notification of noncompliance due to detection of live infestation from the consignment fumigated by the agency.

14. In May 2010 guidelines the period of suspension has not been specified, whereas, in 2017 guidelines, the Plant Protection Adviser shall immediately suspend for a period of three months the fumigation agency and accredited fumigation operator that perform ineffective fumigation operations.

15. Clause 2.5 of 2010 of the guidelines further states that if during an audit, one or more critical non-conformities and/two or more than two major non-conformities and/or more than four minor non-conformities are found, fumigation company and accredited fumigation operator will be suspended immediately and will be subject to a reinstatement audit.

16. Whereas in the case of 2017 guidelines in case of other noncompliance, a show-cause notice will be served as to why they should not be suspended and if satisfactory reply not received within 15 days the agency and operator will be suspended. Final decision will be subject to the outcome of investigation.

17. It is worthwhile to extract the meaning of the word, "suspension" given in the Dictionaries.

"Suspension, as per Wharton's Law Lexicon, 14th Edn., is a temporary stop or hanging up as it were of a right for a time, also a censure on ecclesiastical persons, during which they are forbidden to exercise their office or take the profits of their benefices.

'Suspension' means, "action of debarring or state of being debarred, especially, for a time, from a function or privilege; temporary deprivation of one's office or position, or again, state of being temporarily kept from doing or deprived of something.

Suspension as per Black's Law Dictionary: 7th Edn. Pg.1460 means, (1) to interrupt; postpone; defer (2) to temporarily keep a person from performing a function, occupying an office, holding a job or exercising a right or privilege.

As per Stroud's Judicial Dictionary, "Suspension' or 'Suspense' is a temporal, ie., temporary, "Stop of Mans' Right (Cowel). Suspension, as per Bauvier's Law Dictionary, Vol.II, means a temporary stop of right, of a law, and the like. As per the Ramanatha Iyer's Dictionary, suspension means temporary intervention or cession of something (as) office, work or labour.

The act of debarring for a time from a function or privilege". It means a temporary deprivation of once office or position. [K.J. Aiyar's Judicial Dictionary, 14th Edn.]

Suspension, according to Oxford Dictionary, means, "The action of suspending or condition of being suspended, the action debarring especially for a time from, a function or privilege, temporary deprivation of one's office or position or again, state of being temporarily kept from doing or deprived of something.

Suspension is, to defer; to debar from any privilege, office employment, et., for a time being. [Ref. Hemanth Kumar v. S.N.Mukherjee reported in AIR 1954 Cal. 1340]

18. In the case on hand, suspension has been invoked on the grounds that non compliance has been received from Slovakia due to live interception of harmful organisms in the consignment of wooden pallet (Eu Interception Nr.122341, SK/UKSUP/2018/PB0001; Dated 14.09.2018) exported by M/s.Marks Engineering Works, Coimbatore to Slovakia. Suspension order dated 17.11.2018 reads thus:

Date : 17.11.2018

Subject : Non-compliance received from Slovakia in Wooden Pallet - Suspension of agency to undertake MBr fumigation under NSPM-12 regarding

A non-compliance has been received from Slovakia due to live interception of harmful organisms in the consignment of Wooden Pallet (Eu Interception Nr.122341,SK/UKSUP/2018/PB0001; Dated 14.09.2018) exported by M/s.Marks Engineering Works, Coimbatore to Slovakia. Relevant documents provided by the Slovakia reveal that the consignment was treated with Methyl bromide by M/s.Fumigation Services Private Limited, Tuticorin (002/MB) and due to live interception of harmful Organisms indicates failure of treatment which is critical non-conformity under NSPM-12.

In view of the above non-conformity, by M/s.Fumigation Services Private Limited, Tuticorin (002/MB) is suspended under the provision of Clause 2.5 of NSPM-12 with immediate effect. Further, the agency is advised to provide a copy of Certificate issued for referred consignment, procurement of Methyl bromide, issuance of stock, fumigation record, calculation sheet, track report and other record for investigation and further necessary action. They are also asked as why the agency and the concerned operator should not be eliminated from the accreditation system under NSPM-12.

This issues with the approval of Plant Protection Adviser.

Encl: As above

(K.S.Kapoor)
Joint Director (E)
for Plant Protection Adviser

19. Needless to state that ineffective fumigation operations result in infectious diseases to human beings and animals. Government of India guidelines makes it abundantly clear that in those cases where there are critical / non-conformities and ineffective fumigation operations, immediate suspension is called for. Guidelines do not provide an opportunity before suspension.

20. Contention of Mr.G.Jeremiah, learned counsel for the petitioner that an opportunity of show cause was provided in 2010 guidelines and that the same has been taken away in 2017 guidelines, cannot be accepted for the reason that, no such opportunity was provided even in 2010 guidelines. In the light of the above discussion, we dismiss the writ petition in so far as the challenge to the guidelines clause 2.5 of National Standards for Phytosanitary Measures-12 (NSPM-12) Guidelines 2017.

21. Now what remains to be considered is on the competence of Joint Director (E) for Plant Protection Adviser to suspend the accreditation granted to the petitioner. High Court of Andhra Pradesh has already entertained a writ petition and granted stay of the operation of the order of suspension issued by the authority therein other than the plant protection Adviser. In such circumstances, when the petitioner has already filed a writ petition, we are not inclined to answer the prayer on the competence of the authority and clause 2.6 of the (NSPM - 12) the Guidelines for Assessment, Audit and Accreditation of Fumigation Agencies for undertaking Methyl Bromide Fumigation, December 2017, provides for an appeal and revisional protocol, which reads thus:

" 2.6. Appeal and Revision Protocol

If the fumigation company and the accredited fumigation operator believe that there were extenuating circumstances in respect to the occurrence of non-conformity, the fumigation agency and the accredited fumigation operator may appeal against the decision of PPA. Compliance action will remain in place, while the appeal is being considered. For this purpose, the fumigation agency and the accredited fumigation operator shall apply a memorandum of appeal against the decision to the Joint Secretary, in-charge of Plant Protection Division, Department of Agriculture, Cooperation and Farmers Welfare, Krishibhavan, New Delhi-110001, within seven working days of the communication of decision. The memorandum of appeal should clearly set out the grounds for appeal. Joint Secretary, in-charge of Plant Protection Division, shall acknowledge the receipt of the appeal within 3 working days and endeavour to make a decision on the appeal in writing within 30 working days of the receipt of all available facts relating to the matter.

Joint Secretary (Plant Protection) may call for all the records relating to the decision from the Plant Protection Adviser for the purpose of satisfying himself to the legality or propriety of any such decision passed by the PPA before any such order JS (PP) thinks fit shall be passed. Further, before any such order is passed, PPA shall be given a reasonable opportunity to be heard and no such order shall be passed after expiry of 30 working days. "

However, grant liberty to the petitioner to challenge the order of suspension dated 17.11.2018, passed by the Joint Director (E), for Plant Protection Adviser, Department of Agriculture and Cooperation, Ministry of Agriculture, Government of India, in the manner known to law. Accordingly, the writ petition is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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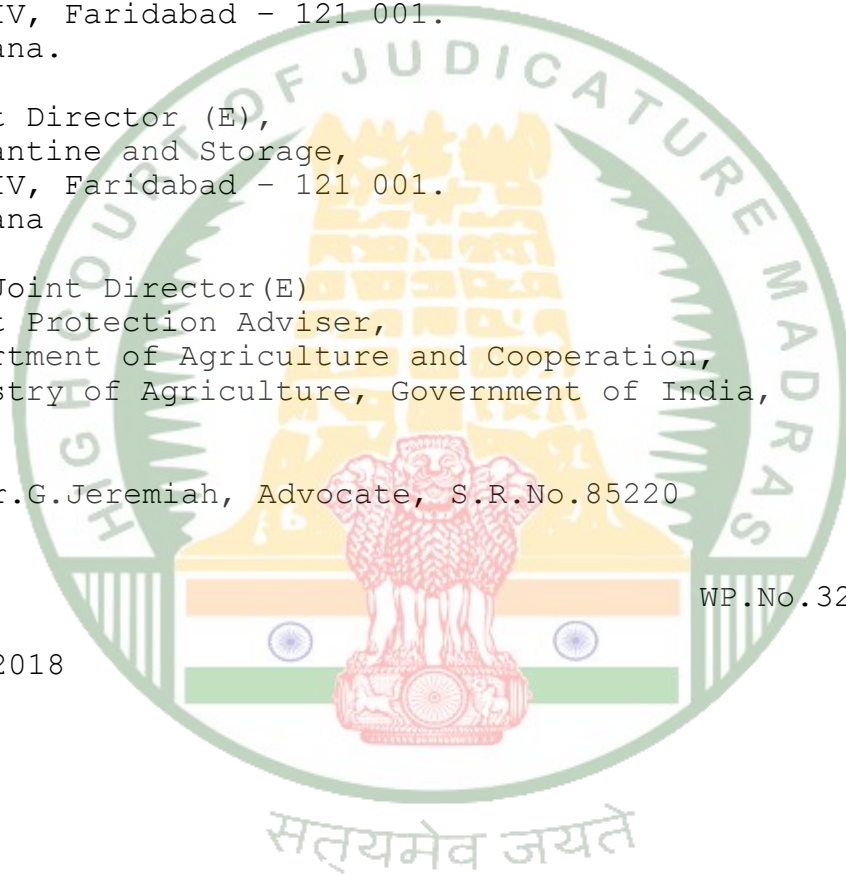
To

1. The Principal Secretary,
Union of India,
Department of Agriculture, Co-operative
and Farmer Welfare,
No.120, First Floor, Dr.Rajendraprasad Road,
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N.H.IV, Faridabad - 121 001.
Haryana
4. The Joint Director(E)
Plant Protection Adviser,
Department of Agriculture and Cooperation,
Ministry of Agriculture, Government of India,

+1cc to Mr.G.Jeremiah, Advocate, S.R.No.85220

WP.No.32124 of 2018

CS/18/12/2018



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