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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 27th September, 2018

\+ LPA 371/2016 & CM Nos.21841/2018 (delay), 21842/2018 (stay)

UNION OF INDIA & ORS. ..... Appellants

Through: Mr.Vikram Jetly, CGSC with Mr.Sahil Sood, Mr.Kunal Dubey, Mr.Sachin Sinha, Advs.

Versus

FERTILIZERS ASSOCIATION OF INDIA ..... Respondents

Through: Mr.Arvind K. Nigam, Sr.Adv. with Mr.Dayan Krishnan, Sr.Adv. along with Ms.Kaveeta Wadia, Advs.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

Rajendra Menon, Chief Justice *(Oral)*

1. Seeking exception to orders dated 12th November, 2014 and 16th December, 2015 passed by the writ Court in W.P.(C) No.3050/2012, this appeal has been filed by the Union of India and there is a delay of 522 days in filing of the appeal. Apart from the aforesaid delay, it is seen that the respondents herein filed the writ petition and sought a direction to the Union of India and the concerned Department in the Ministry to include or recognize market margin as part of gas supplied to member fertilizer units of the respondent association for including the cost of production of urea in

order to correctly determine the fertilizer subsidy and reimbursement of the difference between the cost of production of urea and its sale price (MRP) using the NPS Pricing Policy and sought reimbursement of the same. When the matter came up for consideration before the writ Court on 12th November, 2014, the UOI did not dispute that the manufacturer represented by the respondent are entitled to subsidiary in respect of marketing margin on domestically produced gas including gas from KG-D6 basin. This was found to be the position based on the averments made in para-15 of the affidavit filed on behalf of respondent No.2, the Ministry before the writ Court. Based on this, the learned counsel representing the department made a statement before the Court that now he has received instructions to say that the process for determining the quantum of subsidiary payable including on account of marketing margin is underway and for the said purpose a Consultant is being appointed and 12 weeks' time was sought to take a final decision. Taking note of the aforesaid, the learned writ Court disposed of the writ petition after observing as under:-

> "The learned counsel for the respondent no.2 states that he has now received instructions that the process for determining the quantum of subsidy payable, including on account of the marketing margin, is underway and for that purpose a consultant is being appointed. **It is stated that within a period of 12 weeks, a final report would be available and a decision would be taken by the respondents as to the final quantum of subsidy that has to be paid including on account of the marking margin. He, however, submits that fixing a marketing margin @ Rs.200/MSCM would create complications and the subsidy would have to be reworked.** However, the learned counsel for the respondent no.2 has not been able to point out any complication that would result from releasing reasonable subsidy as an interim measure. **In the**

given circumstances, it is directed that the respondents shall consider including a marketing margin @ Rs.200/MSCM for domestically produced gas, including gas from KG-D6 basin, and an appropriate amount shall be paid as an interim measure. To avoid any complication, the said amount would not be considered by the consultant while computing the subsidy or by the Board while determining the quantum of subsidy and would be treated as an ad-hoc amount to be adjusted in future. After the subsidy has been fixed the said ad-hoc amount released to the manufacturers would be deducted from the subsidy payable to them in future. In the event the said payment is in excess of a manufacturer's entitlement, the respondents shall be entitled to recover the same. The said ad-hoc amount released to the manufacturers as an interim measure will be released to the manufacturers only on their furnishing an undertaking to the respondents to comply with the final adjustments that may be necessary after the final amount of subsidy is fixed.

In view of this unequivocal statement made by the learned counsel for the respondents that a final subsidy will be determined within a period of twelve weeks, no further orders are required to be passed in the present petition. The same is, accordingly, disposed of." *(emphasis supplied)*

2. After having done so, nothing was done for a period of about one year and thereafter in the writ petition, an application being C.M.No. 8017/2015 for extension of time was filed by the Union of India and when the said application came up for hearing on 16th December, 2015, the Joint Secretary, Department of Fertilizers made a statement that time be granted to release the payment and take a decision and to comply with the order passed on 12th November, 2014. It was indicated to the Court that the annual budget with the Ministry of Chemicals and Fertilizers is exhausted and, therefore, the payment can be released only after 1st April, 2016. The order passed on 16th

December, 2015 in the application for extension reads as under:-

> "2. At this stage Mr. Dharam Pal, Joint Secretary, Department of Fertilizers present in Court states that till the Cabinet Note is revised and the responsibility wherefor is of the Ministry of Petroleum & Natural Gas, it would not be possible for the Ministry of Chemicals and Fertilizers to release the payment. It is further stated that the Ministry of Chemicals and Fertilizers has exhausted its annual budget and would be able to release the payment only after 1st April, 2016.
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> 3. Mr. K.D. Tripathi stated to be Secretary, Ministry of Petroleum & Natural Gas is made personally responsible to ensure that the Cabinet Note is revised for compliance of the order dated 12th November, 2014 and Mr.Anuj Kumar Bishnoi stated to be Secretary, Department of Fertilizers, Ministry of Chemicals and Fertilizers is made personally responsible to ensure that the necessary sanctions including budgetary for making the payments in terms of the order dated 12th November, 2014 are obtained and the payment is made on or before 15th April, 2016.
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> 4. It is hoped that the high officials aforesaid would now not give any occasion to the Court to consider further the case made out by the petitioner of defiance of the orders of this Court.
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> 5. List on 26th April, 2016
> *Dasti* under the signature of the Court Master"

3. In the meanwhile, contempt proceedings were also initiated and finally in the contempt proceedings being Cont.Cas.(C) No.569/2015 on 29th January, 2016 on behalf of the Department statement was made that the order passed on 12th November, 2014 shall be complied with in terms of the order dated 16th December, 2015 and the statement was taken on record and the contempt petition was disposed of.

4. After having so represented in various proceedings, now this appeal has been filed challenging these orders and by referring to the notification issued by the Ministry on 24th November, 2015, it is stated that as the cabinet approval for the decision contained in the notification was granted on 18th November, 2015, it would be effective prospectively from 18th November, 2015 and retrospective benefit cannot be granted to the respondent association.

5. We are surprised that such a stand is now taken by the Union of India after having made submissions before the writ Court initially on 12th November, 2014 and thereafter while seeking extension of time on 16th December, 2015 in the manner indicated hereinabove. It was indicated to us that challenging the order in question passed by the writ Court, a Special Leave Petition was filed before the Supreme Court and on 22nd April, 2016, the SLP was dismissed as not maintainable with liberty to file the LPA and, therefore, now this LPA has been filed. The delay in filing the appeal is explained by pointing out that the Department was taking various action in the matter and there is no delay. It is contended that even if there is any delay it is on account of administration actions to be taken.

6. We are of the considered view that apart from the fact that the delay has not been properly explained when the writ petition was taken up for consideration on merits on 12th November, 2014, the Union of India made an unequivocal statement before this Court through their counsel that the final subsidy shall be determined within a period of 12 weeks. Thereafter on 16th December, 2015, they moved an application seeking extension of time to comply with the order and on 24th November, 2015, the notification

in question was issued making it prospectively w.e.f. 18th November, 2015. Thereafter, when the matter was being taken up in contempt on 29th January, 2016 a communication was made that the order of this Court would be complied with. Even after notification was issued on 24th November, 2015, the respondents on 16th November, 2015 in C.M.No.8017/2015 while seeking extension of time had indicated to this Court that compliance of the order would be made sofar as the respondents and their members are concerned and the appellants, at no point of time, showed any indication of challenging the order passed by this court or insisting that the decision will only have prospective effect from 18th November, 2015. When the application for extension of time was decided on 16th November, 2015 and when the contempt proceedings was also decided thereafter on 29th November, 2016, the appellants made this Court believe that with regard to the respondents and their members, the order would be complied with and they never indicated their intention to challenge the orders or to point out that the subsidy cannot be granted for the reasons which are being canvassed now before us for the first time in this appeal which has been filed after a period of more than 522 days of passing of the order on 12th November, 2014 and the extension granted on 16th December, 2015. Even when the contempt application was decided on 29th November, 2016, time was sought to comply with the order. It is only thereafter on 6th April, 2016 that for the first time the Special Leave Petition was filed in total disregard to and in violation to the submissions made before this Court on three occasions, that is, initially on 12th November, 2014 when the original writ petition was decided, thereafter again on 16th December, 2015 when the extension of time was sought for after the notification was issued on 24th November, 2015 and thereafter again when the contempt proceedings was decided on 29th January, 2016.

7. Apart from the aforesaid, it is tried to be indicated before us today that the notification issued on 24th November, 2015 granting the benefit w.e.f. the date cabinet approved the decision, that is, 18th November, 2015 is concerned, we find that when the proceedings for extension of time was under consideration, on 16th December, 2015 a Joint Secretary of the Department of Fertilizer who was present in the Court had indicated that till the cabinet note is not revised by the Ministry of Petroleum and Natural Gas, the Ministry of Chemicals and Fertilizers would not be able to release the payment. On this a Secretary of the Ministry of Petroleum and Natural Gas who was present before the Court was directed to ensure that the order passed on 12th November, 2014 is complied with and budgetary sanction is made and whatever administrative action is required to be taken, the same should be undertaken. From all these facts that have come on record, it is clear that when the application for extension of time and the contempt proceedings were pending, all along an impression was created that the order passed on 12th November, 2014 shall be complied with and having compelled this Court to dispose of the application for extension of time and the contempt proceedings after making such an assertion, now the act of the appellants in taking a somersault and denying the liability to implement the order dated 12th November, 2014 cannot be permitted.

8. Taking note of all these facts and the manner in which the appellants have presented the issue before this Court by indicating the subsidy would be given to the members of the respondent association as claimed by them in

the writ petition, we are not inclined to interfere into the matter.

9. Accordingly, the appeal stands dismissed along with the other pending applications.

CHIEF JUSTICE

V. KAMESWAR RAO, J

SEPTEMBER 27, 2018
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