

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 2682 OF 2013

In the matter of an application under Articles 226 & 227 of the Constitution of India.

AFR M/s S.K. Agarwalla Petitioner

-Versus-

State of Odisha & Ors. Opp. Parties

For Petitioner : M/s. Nilakantha Jujharsingh,
M.M. Satapathy & A.K. Bisoi,
Advocates

For Opp. Parties : Mr. J.P. Pattnaik,
Government Advocate

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR. JUSTICE S.K. PANIGRAHI**

Date of hearing & judgment : 07.01.2022

DR. B.R. SARANGI, J. The petitioner has filed this writ petition to quash the order dated 30.10.2010 under Annexure-17 passed by the opposite party no.1-A.F.A.-

cum- Under Secretary to Government of Orissa, Works Department, and to issue direction to the opposite parties to make payment of its dues towards incentive/ bonus stipulated in sub-clause-2.4.1 of clause-120 of the Detailed Tender Call Notice (DTCN) as well as special clause-20 of the Special Condition of the Contract arising out of and relating to the Contract Agreement No.11-P1/2008-2009.

2. The facts of the case, in brief, are that the opposite party/ Employer, Government of Orissa, Department of Works invited tenders from the intending tenderers/contractors for execution of the work i.e. "Improvement to Badakera Maidharpur Road from 0/0 Km. to 16/300 Km. in the district of Angul under NABARD Assistance (RIDF-XII)". In response thereto, the petitioner submitted its tender, which was accepted as per Works Department Letter No.15521 dated 09.09.2008. An agreement for performance of the said work was executed on 15.10.2008 between the opposite party no.5 and the petitioner which was registered as

P1 Agreement No.11-P1 of 2008-09, for an agreement value of Rs.11,84,99,289/- with the stipulated dates of commencement and completion of work as 24.10.2008 and 23.04.2010 respectively. The petitioner executed the work in terms of the conditions stipulated in the contract agreement as well as day to day instructions of the Engineer-in-Charge and Site Engineers and completed the work on 22.02.2010, i.e. two months before the scheduled time of completion of work.

3. Mr. Nilakantha Jujharsingh, learned counsel for the petitioner contended that Agreement No.11-P1 of 2008-09 for the work i.e. "Improvement to Badakera Maidhapur Road from 0/0 Km. to 16/300 Km. in the district of Angul under NABARD Assistance (RIDF-XII)" was executed on 15.10.2008 between the petitioner and the opposite party no.5- The Executive Engineer, Angul (R & B) Division, Angul with an agreement value of Rs.11,84,99,289/-. Though the petitioner has commenced the work and also completed the same two months before the stipulated time and intimated the

authority with regard to completion of the work and for that it is entitled to get the incentive/bonus in terms of sub-clause 2.4.1 of clause-120 read with special clause-20 of the Special Condition of Contract, but the same has not been paid to the petitioner and the claim for incentive/bonus has been rejected vide the impugned order dated 30.10.2010 under Annexure-17. Therefore, the petitioner has approached this Court by filing this writ petition.

4. Mr. J.P. Pattnaik, learned Government Advocate appearing for the opposite parties, on the other hand, contended that the reason for rejection of the claim of the petitioner has been indicated in the impugned order, that the completion certificate was not submitted by fax/telegram, which is a mandatory provision in Order No.10070/W dated 08.06.2007 of Works Department. Therefore, no fault can be found with the authority in rejecting the claim of the petitioner.

5. Heard Mr. N. Jujharsingh, learned counsel for the petitioner and Mr. J.P. Pattnaik, learned Government Advocate appearing for the State-opposite parties through hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, this Court disposes of this writ petition finally at the stage of admission.

6. In the above backdrop and rival contentions of the parties, it is to be decided whether the petitioner is entitled to get the incentive/ bonus for early completion of the work in question, and that whether the order dated 30.10.2010 in Annexure-17 denying such benefit to the petitioner is legally tenable.

7. The materials available on record reveal that pursuant to the agreement executed on 15.10.2008, the petitioner completed the work on 22.02.2010 before two months of the date of actual completion of the work, i.e., 23.04.2010. For early completion of the work, the petitioner is entitled to incentive/bonus as per sub-clause 2.4.1 of clause-120 read with special clause-20

of the Special Condition of Contract, which are extracted hereunder:-

“Clause-120. xxx xxx xxx

“2.4.1 In case, the contractor completes the work ahead of scheduled completion time, a bonus @ 1% (one percent) of the tendered value/ Agreement cost / actual value of work executed which ever is less per month computed on per day basis shall be payable to the contractor, subject to a maximum limit of 2% (two percent). The amount of bonus if payable shall be paid along with final bill after completion of work.”

xxx xxx xxx

“20. Amendment as per the letter No. 8310 dt.17.5.2006 of Works department, Orissa.

Incentive should be paid for this work.”

8. As per the conditions stipulated in sub-clause-2.4.1 of clause-120 of the DTCN, as quoted above, on early completion of the work, the petitioner is entitled to get bonus @ 1% of the tendered value subject to minimum of 2%. After completion of work on 22.02.2010 i.e. two months before the scheduled date of completion, i.e., 23.04.2010, the completion certificate was issued by the opposite party no.5 along with the Field Engineers.

9. The petitioner represented before the opposite party no.5 to pay the incentive/ bonus at the rate of 2% of the agreement value of the work for an amount of Rs.23,69,986/-. The opposite party no.6 also intimated the opposite party no.5 vide its letter no.491 dated 25.02.2010 stating that the work has been completed on 22.02.2010. Thereafter, the opposite party no.5 intimated the opposite party no.4, vide its letter no.1266(1) dated 25.02.2010 stating that the work has been completed by 22.02.2010 and the petitioner is eligible to get payment of 2% incentive as per special clause-20 of Special Condition of Contract and sub-clause-2.4.1 of clause-120 of the DTCN. As such, a request was made by the opposite party no.4, vide letter dated 03.03.2010, to the opposite party no.3 for payment of incentive as per the said special clause-20 and sub-clause-2.4.1 of clause-120 of the DTCN. Accordingly, the opposite party no.3 intimated the opposite party no.1, vide letter no.10391 dated 11.03.2010, recommending for payment of incentive/ bonus of Rs.22,59,281/- i.e., being 2% of the actual

tendered value/ agreement cost/ actual value of the work done by the petitioner. But the opposite party no.1, vide File No.II-T-Angul-28/2008-3669/W dated 20.03.2010, directed the opposite party no.3 to furnish information for taking further action for payment of incentive, in compliance of the points, namely,

- (i) *whether the final bill has been prepared for the work?*
- (ii) *whether the completion certificate has been prepared in consistent with Clause-5 of the agreement? and*
- (iii) *details of the funds position available for payment of incentive.*

In response to memo no.12113 dated 22.03.2010 of the opposite party no.3, the opposite party no.5, vide its letter no.1769 dated 23.03.2010, furnished the detail information as required. In spite of the aforementioned communications made, the petitioner has not been paid the incentive/ bonus and ultimately, vide letter dated 30.10.20210 in Annexure-17 the claim of the petitioner has been denied. Consequently, the petitioner has approached this Court by filing this writ petition.

10. Similar question had come up for consideration before this Court in the case of **B. Manoj Kumar Rao v. State of Odisha & others**, 2008 (II) OLR 237 wherein at paragraphs 12, 13 and 14 this Court examined the meaning of “incentive” to the following effect:

“12. The meaning of “incentive” attached to clause 19 of the DTCN is to be examined in the context of facts of the case in hand.

As per Chambers Dictionary, the meaning of “**Incentive** in-sent’ iv, adj inciting, encouraging; igniting (Milton).-n that which incites to action, a stimulus.-n **incentiviza’tion** or -s-vi **incent’ivize** or -ise to have or be given an incentive, esp to work more efficiently, productively, etc.[L *incentivus* striking up a tune, from *incinere*, from *in*, and *canere* to sing].

In Oxford Dictionaries “**incentive**” means a thing that motivates or encourages someone to do something.

The meaning of “**incentive**” in Cambridge English Dictionary is something that encourages a person to do something.

In Business Dictionary.com “**incentive**” has been defined to mean inducement or supplemental reward that serves as a motivational device for a desired action or behavior.

As per WIKIPEDIA an “**incentive**” is something that motivates an individual to perform an action”.

“**Incentive**” by Merriam-Webster means something that incites or has a tendency to incite to determination or action.

According to P Ramanatha Aiyar's *Advanced Law Lexicon* 4th Edition, "**incentive**" means something that arouses feeling or incites to action. Positive motive (sometimes artificially generated) for performing some task. It is not appropriate to limit the word '**incentive**' to the provision of incentives for employees only. An incentive scheme is a scheme which has the purpose of giving rewards in order to encourage performance of some description".

13. In **Bijay Kumar Mohapatra v. State of Orissa**, 2017 (I) OLR 41, this Court, while considering the similar clause 2.4 of Detailed Tender Call Notice which prescribes 'bonus' for early completion of work, taking into account the meaning attached to word 'bonus' relying upon the law laid down by the apex Court in **Ghaziabad Zila Sahkari Bank Ltd. v. Labour Commissioner**, (2007) 11 SCC 756 held that "bonus" is a boon or gift, over and above, what is normally due as remuneration to be received.

Similarly, the meaning attached to word "incentive" as per Clause 19 of the Detailed Tender Call Notice is a boon, over and above, what is normally due to the petitioner.

14. Incentive for early completion is provided in a contract to encourage the contractor to complete the agreed work early, which would go to the benefit of both parties. Denying the same on frivolous grounds would amount to breach of contract, as has been done in the present case where such incentive has been denied to the petitioner by raising the issue of change in nature of work as an afterthought, and that information was not given by the own officer of the opposite party, which was for no fault of the petitioner, when admittedly he had

completed the contract work 199 days before the scheduled date.”

Having so examined, this Court held that the petitioner is entitled to get incentive because of early completion of work as per clause-19 of the DTCN and also the Special Clause-20. The judgment passed in the case of **B. Manoj Kumar Rao** (supra) was assailed by the Government of Odisha before the apex Court in SLP which has also been dismissed.

11. The reason assigned in the impugned order dated 30.10.2010 that the petitioner has not intimated regarding completion of work or submitted the completion certificate by fax/ telegram has no meaning at all, as the opposite parties, under whom the petitioner was undertaking the work, have themselves certified that if the work is completed before two months of actual date of completion of work, i.e., 22.02.2010, the petitioner will be entitled to get the incentive/bonus and, hence, such reason cannot sustain in the eye of law. The opposite parties in the counter affidavit have assigned the reason as to why the petitioner is not

entitled to get the aforesaid benefit. Such reason, having not shown in the order impugned, this Court is not inclined to take the same into consideration which has been subsequently assigned by way of counter affidavit.

12. In ***Union of India v. Mohan Lal Capoor***, AIR 1974 SC 87, it has been held that reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject-matter for a decision whether it is purely administrative or quasi-judicial and reveal a rational nexus between the facts considered and conclusions reached. The reasons assure an inbuilt support to the conclusion and decision reached. Recording of reasons is also an assurance that the authority concerned applied its mind to the facts on record. It is vital for the purpose of showing a person that he is receiving justice.

Similar view has also been taken in ***Uma Charan v. State of Madhya Pradesh***, AIR 1981 SC 1915.

13. Reasons being a necessary concomitant to passing an order, the appellate authority can thus discharge its duty in a meaningful manner either by furnishing the same expressly or by necessary reference to those given by the original authority.

Similar view has also been taken in ***Patitapaban Pala v. Orissa Forest Development Corporation Ltd. & another***, 2017 (I) OLR 5 and ***Banambar Parida v. Orissa Forest Development Corporation Limited and others***, 2017 (I) OLR 625.

14. The affidavit filed by opposite parties justifying the reasons is not permissible because the order passed by the authority on 30.10.2010 (Annexure-17) is without assigning reasons. Therefore, the same is not tenable in the eye of law.

15. The apex Court in **Commissioner of Police, Bombay vrs. Gordhandas Bhanji**, AIR 1952 SC 16 held as follows:

“Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”

16. The Constitution Bench of the apex Court in **Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi**, AIR 1978 SC 851 held :

“ when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.”

Orders are not like old wine becoming better as they grow old.

17. In view of such position, the reason subsequently assigned in the counter affidavit cannot have any justification. Therefore, this Court is of the considered view that the petitioner is entitled to get the relief as sought. Accordingly, the opposite parties are directed to pay the incentive amount as per the special clause-20 of the Special Condition of Contract and sub-clause-2.4.1 of clause-120 of the DTCN for early completion of the work, as early as possible, but not later than three months from the date of production of certified copy of this judgment before the opposite party no.5-Executive Engineer, Angul (R & B) Division, Angul.

18. The writ petition is thus allowed. No order as to costs.

(Dr. B.R. Sarangi)
Judge

S.K. PANIGRAHI, J. I agree.

(S.K. Panigrahi)
Judge