

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO.14147 OF 2013

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

Sanjaya Jain Petitioner

AFR

-Versus-

State of Odisha and Ors. Opp. Parties

For Petitioner : M/s. Prabodh Ch. Nayak &
D. Mohapatra, Advocates

For Opp. Parties : Mr. P.K. Muduli,
Addl. Government Advocate

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR. JUSTICE SANJAY KUMAR MISHRA**

DECIDED ON : 11.08.2022

Dr. B.R. Sarangi, J. The Petitioner, who is a Contractor, has filed this Writ Petition seeking direction to the Opposite Parties to pay the differential increase of wages of labourers, taking into consideration the voluminous work executed by the Petitioner in terms of the Contract, as per the rate of wages fixed for the

labourers vide Notification dated 06.10.2012 issued by the Labour & ESI Department in Annexure-4.

2. The factual matrix of the case, in brief, is that Opposite Party No.2 floated a Tender Call Notice, pursuant to which the Petitioner participated and his bid being the lowest, was accepted and he was awarded with the work "Periodical Renewal (P.R.) in Km. 132/080 to Km. 142/620 of NH-26 (erstwhile Km. 176/660 to Km.187/200 of N.H.201) Bid No.CE NH-11/12-13, Job No.Th-026-ORS 2012-13.878". The Petitioner-Contractor submitted his tender basing upon the estimated cost of work. Initially, Opposite Party No.2 had floated Tender Call Notice fixing the date of submission of the tender to 25.07.2012. But, subsequently a Corrigendum was issued fixing 12.11.2012 as the date of submission of the tender. In pursuance thereof, the Petitioner submitted his bid basing upon the cost estimated by the Department and taking into consideration the rate of wages of labourers as prevailing on or before 25.07.2012. The concerned

Department had estimated the cost of the work basing upon the rate of wages of labourers, as fixed by the Government of Odisha, prior to 25.07.2012. The rate quoted by the Petitioner was accepted and thereafter, he was called upon to execute the Agreement with Opposite Party No.3 after necessary compliance as per the Tender Call Notice. After necessary compliance, Petitioner executed F2 Agreement No.45, F2(P1) of 2012-13 with Opposite Party No.3 on 04.01.2013 for execution of the work, as mentioned above.

2.1 Pending execution of the work, the State of Odisha, vide Notification dated 06.10.2012, enhanced wages of skilled and unskilled labourers, which was published in Odisha official Gazette on 09.10.2012. Under Clause-3 of the Explanation to the said Notification, it was specifically mentioned that the minimum rates of wages are applicable to employees employed by the Contractors also. Therefore, the enhanced rate, which was fixed by the Government, is also applicable to the Petitioner, as he was continuing

with the Agreement executed on 04.01.2013, according to which the date of commencement of the work was 04.01.2013 and the date of completion of the work was 03.06.2013. Therefore, the Notification issued on 06.10.2012 with regard to enhancement of wages of skilled and unskilled labourer, which was published in the Official Gazette on 09.10.2012, is applicable to the Petitioner. Opposite Party No.3, being the executing Agency of the work, paid the running bills of the Petitioner from time to time, as per the rate quoted by him in the tender. When the Petitioner claimed the escalation price of the wages, as per the Notification dated 06.10.2012 issued by the Government, the same was denied. As a consequence thereof, the Petitioner approached this Court by filing this Writ Petition claiming differential enhanced minimum wages in terms of the Notification dated 06.10.2012.

3. Mr. P.C. Nayak, learned Counsel appearing for the Petitioner, vehemently contended that since the Agreement was executed after enhancement of the

wages, pursuant to the Notification dated 06.10.2012, and the Petitioner, while submitting the tender, had quoted the price as on 25.07.2012, he is entitled to get differential enhanced wages in terms of the Notification issued and denial of such benefit to the Petitioner is arbitrary, unreasonable and contrary to the provisions of law. To substantiate his contentions, he has relied upon the judgment of this Court in ***Mahesh Prasad Mishra v. State of Orissa***, 2012 (Supp.-I) OLR 1035, which has been upheld by the apex Court on 01.10.2012 in dismissing SLP (C)...CC No.11256 of 2012 preferred by the State.

4. Mr. P.K. Muduli, learned Addl. Government Advocate appearing for the State-Opposite Parties, contended that since the Petitioner had entered into an agreement for execution of the work in question on the price quoted by him, which was prevailing on or before 25.07.2012, he is bound by the conditions stipulated in the contract itself. Thereby, the claim made by the Petitioner for enhanced wages is not admissible.

Consequentially, the Authority is well justified in passing the Order impugned rejecting the claim of the Petitioner to release the differential wages in terms of the Notification dated 06.10.2012. Accordingly, it is contended that the Writ Petition should be dismissed on that score.

5. This Court heard Mr. P.C. Nayak, learned Counsel appearing for the Petitioner and Mr. P.K. Muduli, learned Addl. Government Advocate appearing for the State-Opposite Parties through hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned Counsel for the parties, the matter is being disposed of finally at the stage of admission.

6. The undisputed facts are that the Petitioner entered into an Agreement on 04.01.2013 pursuant to the Notice issued on 30.06.2012 inviting tenders. He quoted the price, basing on the rate of Minimum Wages prevailing as on 25.07.2012, as a consequence of which his bid was accepted and he was declared as the lowest

bidder. As such, the Agreement, which was executed on 04.01.2013, was based on the Minimum Wages as was prevailing on 25.07.2012 in terms of the Notification of the State Government. In the interregnum, when Notification was issued by the Government enhancing the rate of wages of labourers of different categories, the Petitioner was allowed to discharge his obligation to conclude the contract and his running bills were also paid. But fact remains, due to enhancement of wages, the Petitioner had to make payment to the labourers at such enhanced rates. Now, therefore, the Petitioner claims differential wages admissible to the Petitioner, pursuant to the Notification dated 06.10.2012, which was published in the official Gazette dated 09.10.2022.

7. At this juncture, it is of relevance to go through the F2 Agreement, Clause 31 (b) & (e) whereof reads as follows:

“31. xxx xxx xxx

(b) Similarly, if during the progress of work, the wages of labour increase as a result of increase in the Average Consumer's Price Index for Industrial Workers (wholesale price), and the

contractor thereupon necessarily and properly pays in respect of labour engaged on execution of the work such increased or decreased wages, then he shall be entitled to reimbursement or liable to refund quarterly as the case may be, such as amount, as shall be equivalent to the plus or minus difference in between the Average Consumer's price Index for Industrial Workers (wholesale price) which is operating for the quarter under consideration and that operated for the quarter in which the tender was opened, as per the formula indicated below, provided that the work has been carried out within the stipulated time or extension, thereof as are or not attributable to him.

xxx

xxx

xxx

(e) Price adjustment and reimbursement of claim for escalation of labour under 31(b) will be applicable only. If there is any increase decrease in the minimum wage, fixed by the State Government"

On perusal of the above clauses, it is evident that as per the Agreement executed between parties, the Contractor is entitled to get enhanced escalated labour cost. This fact has also been fortified under Clause-3 of the Explanation to the Notification dated 06.10.2012 issued by the Labour & E.S.I. Department of the Government of Odisha, which was published in the official Gazette on 09.10.2012. For better clarification, the said Clause-3 is quoted hereunder:

“3. The minimum rates of wages are applicable to employees employed by contractors also.”

8. In view of the terms and conditions contained in the Contract itself, the differential wages are admissible to the Petitioner, who has discharged his duty and responsibility as a Contractor, Therefore, the same should not have been denied by the Authority, particularly when the price quoted by the Petitioner in the bid was as per the wages prevailing prior to 25.07.2012 and the Notification enhancing the rate of wages had come on 06.10.2012, whereas the Agreement was executed on 04.01.2013.

9. While entertaining this Writ Petition, vide Order dated 26.03.2014, this matter was referred to the Larger Bench of this Court. On 28.06.2022, the Larger Bench has passed the following Order:

“1. It is seen that by the order dated 26th March, 2014, the issue referred to this Larger Bench was “whether the clause in question can be declared void particularly when the Petitioner willingly executed and acted upon the same without any challenge till filing of this Petition?”

2. It appears that there is actually no conflict of opinions among different co-ordinate Benches of

two learned Judges of this Court that warrants consideration of the above question by a Larger Bench of this Court.

3. Consequently, the matters are directed to be placed back before the regular Bench for consideration of the above question.

4. List on 8th August 2022 along with the connected matters before the regular Bench.”

Thereby, the matter has been placed before this Bench for consideration of the grievance made by the Petitioner.

10. Admittedly, in this case while passing the Order dated 26.03.2014, the Judgment of this Court in ***Mahesh Prasad Mishra v. State of Orissa***, 2012 (Supp.I) OLR 1035 was not placed before the Court for consideration. The said order dated 26.03.2014 was passed relying on the Judgment of this Court in ***Suryamani Nayak v. Orissa State Housing Board***, AIR 2005 Ori. 26 : 98(2004)CLT 737. In ***Mahesh Prasad Mishra*** (supra), this Court, in Paragraphs 7 and 8, held as follows:

“7. The aforesaid point is required to be answered in favour of the petitioner for the following reasons. Learned counsel for the Petitioner submits that the ITB read with

appendix to Part-I of General Condition of the contract at clause (f) mandates that the employer is today not less than the minimum wages fixed by the Government as per the provisions of Minimum Wages Act, 1948. It is an undisputed fact that under the agreement the Petitioner contractor was required to pay the statutory dues including the minimum wages to its workmen. That is the legal requirement. This relevant aspect of the matter must be kept in view to examine the claim of the Petitioner. The same is supported by the Division Bench decision of this Court in *Suryamani Nayak's case* (supra) upon which the Petitioner has rightly placed reliance. In the said case at paragraph 7, the Division Bench held as under :-

"The expression 'escalation' used in the agreement ordinarily means, an agreement allowing for adjustment up and down according to change in circumstances as in cost of material in a works contract or in cost of living in a wage agreement. The expression 'escalation' would not bring within its sweep higher rate of wage which a contractor is otherwise liable to pay in view of the notification issued by the State Government under the provisions of minimum wages act, failing which he may have to face criminal prosecution. No equitable reason is also there to give extended meaning, to the expression and bring such enhanced rate of wage within the area of compensation since payment itself made to the workers at higher rate is pursuant to a statutory notification issued under the provisions, of the Minimum Wages Act and the claim of the contractor On. that score is not for his own enrichment

In the aforesaid paragraph, the Division Bench referred to the decision in *Tarapore and Co.v. State of Madhya Pradesh* (supra) wherein the apex Court has clearly held that the payment of

wages as per the rate fixed under the Minimum Wages Act is a statutory obligation and although the terms of the contract is silent about payment of minimum wages, the contractor is statutorily bound to pay the minimum wages to the workers.

8. In view of the aforesaid statement of law which has been declared by the Supreme Court and followed by the Division Bench of this Court in *Suryamani Nayak* and another Division Bench in *Surendranath Kanungo v. State of Orissa*, and *M/s. Niligri Corporation Society Ltd. (supra)*, the claim of the petitioner is covered by the decision of the Division Bench. Therefore, the same shall be applied to the fact situation and relief be granted. In view of the clear pronouncement of the Supreme Court which has been followed by this Court in the aforesaid cases, the stand taken by the State justifying the impugned order cannot be accepted. Accordingly, the impugned orders rejecting the petitioner's prayer for payment of price escalation/enhancement of rate of wages of labour and materials vide Annexure-5 is liable to be quashed and is accordingly quashed. The writ petition is accordingly allowed. Direction is given to the opposite parties to pay the enhanced rate of wages of labour component under the agreement as per Government Notification dated 13.07.2009 under Annexure-2."

11. If we revert-back to the judgment passed in ***Suryamani Nayak*** (supra), the question raised herein was also considered and in Paragraphs 8, 9 and 10 of the said judgment this Court held as follows:

"8. In the present case, it is not disputed that the minimum wage of unskilled workers was Rs.12.83 when the contract between the petitioner and Opp.

Party No.1 was executed. It is also not disputed that during pendency of that contract, the minimum wages of unskilled workers was raised from Rs.12.83 to Rs.25/- per day with effect from 1.7.1990 by virtue of the notification of the State Government in Labour Department. It is further available from the Letter No.882 dated 10.1.1994 (Annexure-2) issued by the Chief Engineer, Opp. Party No.1 that payments to the unskilled labourers were made at the rate of enhanced minimum wage directly by Opp. Party No.2, the Project Engineer and such extra payments were adjusted from bills of the petitioner. If the contractor is made bound under law to pay higher wages to the labourers on account of the notification issued by the State Government, there will be no justification to deny proportionate compensation to the contractor on that score. We are, therefore, of the considered opinion that such extra demand has to be reimbursed by the contractor and endorsement made by the contractor-petitioner while seeking extension of time for completion of the work to the effect that he will not claim any compensation on account of escalation and the order of Opp. Party No.1 while extending time with stipulations that no compensation on account of escalation would be paid, will not debar the petitioner-contractor from claiming higher amount of wages which he has been made liable to pay because of the statutory notification of the State Government enhancing minimum rate of wages.

9. Regarding the claim relating to escalation of price index of the materials and POL etc., the plea of the petitioner is that when the Chairman, OSHB had approved escalation of price in respect of the work executed during the period 1.7.1990 to 31.12.1991 there is no good reason to refuse approval of such price escalation of the material and POL etc. for the period 31.5.1991 to 30.9.1994. The reply of the opposite parties in this regard is that since the dead line for completion of the work had been fixed to 31.5.1992 the escalation of the price in respect of the work executed by the petitioner up to that date was approved by the Chairman, OSHB. But such escalation cannot be approved beyond 31.5.1992 as delay in completion

of the work is attributable to the latches/inaction of the petitioner. It is the admitted case of the parties that when the contract was revived after discussion between the petitioner and the Chief Engineer, it was stipulated that the petitioner would complete the work by 31.5.1992 and accordingly, the Chairman, OSHB approved escalation of price in respect of the work executed up to 31.5.1992. Such escalation was refused beyond 31.5.1992 on the plea that delay occurred due to the latches on the part of the petitioner. The petitioner, on the other hand, has averred that due to non-clearance of site, erroneous estimation of the schedule item of work, non-supply of materials and irregular payments, the progress of the work was slowed down and so the allegation that delay occurred due to his latches is not acceptable.

10. The letter of the authorities to resume the work clearly stipulated that the work should be completed by 31.05.1992 letter dated 5.2.1993 the escalation clause was not allowed. In spite of absence of the escalation clause, the petitioner is now demanding the escalation price of the materials and POL on the plea that delay in completion of the work was not due to his fault, but due to the fault of the opposite parties and to substantiate this stand, he has placed reliance on Annexure-E, which is the recommendation of the Project Engineer-III. The opposite parties, on the other hand, have countered this plea by stating that prompt action was always there from the side of the contractor and the fault was always with the contractor-petitioner. In order to find out who was at fault and for whose lapses delay occurred, facts, evidence and circumstances are to be analysed. Ordinarily a Writ Court in exercise of extraordinary jurisdiction under Article 226 of the Constitution cannot entertain and issue a direction for enforcement of as claim, where the claim is based on disputed questions of fact. In *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd. and Ors.* Cited by Mr. Patnaik, Learned Counsel for the petitioner, the Supreme Court held that in appropriate cases, a Writ Petition as against the State or the instrumentality of the State arising out of contractual obligation is maintainable

and merely because some disputed questions of fact arise for consideration, the same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule. It was further held that writ petition involving consequential relief of monetary claim is also maintainable. However, the principle that the writ petition involving serious disputed questions of fact which requires consideration of evidence which is not on record will not normally be entertained by a Court in exercise of its jurisdiction under Article 226 of the Constitution was not denied. In the instant case, the petitioner claims that due to non-clearance of site, non-supply of materials, non-payment of dues in time and erroneous estimation of scheduled items of work, the work under the contract could not be completed in time. The opposite parties have denied these allegations in their counter affidavit. So, serious disputed questions of fact require adjudication and consideration of evidence, which are not on record will be necessary. In such a situation, the claim of the petitioner cannot be entertained and direction cannot be issued under extraordinary writ jurisdiction under Article 226 of the Constitution.”

12. It is not to be lost sight of that the case of ***Mahesh Prasad Mishra*** (supra) was challenged before the apex Court by the State in preferring SLP (C) CC No.11256 of 2012 and the apex Court dismissed the said SLP. Thereafter, the judgment of this Court in ***Mahesh Prasad Mishra*** (supra) has reached its finality.

13. In view of such position, the action of the Authorities in refusing to grant the benefit of escalated

labour cost to the Petitioner cannot have any justification and, as such, the Petitioner is entitled to get the differential labour cost, as per the Notification dated 06.10.2012 in Annexure-4. Therefore, the Opposite Parties are directed to calculate the differential labour cost and pay the same to the Petitioner as expeditiously as possible, preferably within a period of four months from the date of communication of this Judgment.

14. In the result, the Writ Petition is allowed. There shall be no Order as to costs.

(DR. B.R. SARANGI)
JUDGE

S.K. MISHRA, J. I agree.

(S.K. MISHRA)
JUDGE

Orissa High Court, Cuttack
The 11th August, Alok/Padma