ORISSA HIGH COURT: CUTTACK

W.P.(C) No. 3748 of 2020

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

AFR

S.B.M. Nirmaan Construction Pvt. Ltd.

..... Petitioner

-Versus-

State of Orissa and others ..... Opp. Parties

For Petitioner : M/s. Bibhu Prasad Das, A. Mohanty, C. Pattnaik, S. Samal, G. Mohanty and S. Nayak, Advocates.

For Opp. Parties : Mr. P.P. Mohanty, Additional Govt. Advocate

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HON'BLE MISS JUSTICE SAVITRI RATHO

Date of hearing and judgment: 29.03.2022

DR. B.R. SARANGI, J. The petitioner, which is a private limited company registered under the Companies Act, 1956 and carrying on business of construction in the State, has filed this writ petition seeking to quash the order dated

26.09.2019 under Annexure-16, whereby the claim of the petitioner-company for payment of bonus/incentive for early completion of the work, in compliance of the direction of this Court contained in order dated 20.10.2016 passed in W.P.(C) No. 17986 of 2016, has been rejected on the ground of absence of completion of the technical activities. The petitioner-company has further prayed for direction to opposite party no.1 to grant such consequential relief of bonus/incentive for early completion of the work, in terms of the OPWD Code read with the terms and conditions of the agreement executed between the parties, within a stipulated period.

2. The facts of the case, in brief, are that a Notice Inviting Tender (NIT) was published in local daily on 11.06.2014 inviting bids for the work "*Widening & strengthening of existing single lane carriageway to 2- lane from Km.159/200 to 167/200 of Kuchinda-Bamara road (SH-24) under SHDP for the year 2014-15*". Pursuant to such NIT, the petitioner-company participated in the tender process and ultimately having been qualified, the

tender was allotted in its favour. As a consequence thereof, an agreement was executed between the Executive Engineer, Sambalpur (R&B) Division, Sambalpur and the petitioner-company, vide agreement No. 1782 P1 of 2014-15, for an estimated cost of Rs.14,01,81,224.00 and agreement value of Rs.13,86,25,212.00. As per the terms of the agreement, the work was to be commenced from 09.01.2015 and completed on 08.01.2016.

2.1 The tender call notice for the work in question at clause 120 stipulates about the progress of the work and re-scheduling programme, extension of completion date, compensation for delay, bonus for early completion etc. Therefore, as per the conditions stipulated in the Technical Bid Documents/ Detailed Tender Call Notice, the tenderer is entitled to get bonus/incentive, if the work is completed within the stipulated period, and the amount of bonus/incentive is to be calculated taking into consideration the period within which the work is completed.

2.2 The petitioner-company started the work, in accordance with the terms and conditions of the agreement, with effect from 09.01.2015 and completed the same on 30.07.2015, though the same was scheduled to be completed by 08.01.2016. Thereby, the petitioner-company completed the work ahead of 131 days. Thus, the petitioner-company is entitled to get bonus/incentive in terms of sub-clause 2.4.1 of clause 120 of the agreement. The petitioner-company, through its Managing Director, intimated about the completion of the work to the Executive Engineer, (R&B) Division, Sambalpur-opposite party no.2, vide his letter dated 30.07.2015, that the assigned work has been completed more than five months ahead of the stipulated date of completion and, therefore, requested to finalize the work bill, including the bonus/incentive, at the earliest as per sub-clause 2.4.1 of clause 120 of the agreement. The Assistant Executive Engineer, (R&B) Sub-Division, Kuchinda on the very same day, i.e. on 30.07.2015 intimated opposite party no.2 that the work in question has been completed in all respect by the petitioner-company, by 30.07.2015, i.e. prior to the scheduled date of 08.01.2016. The Executive Engineer, (R&B) Division, Sambalpur-opposite party no.2, also while acknowledging the completion of the work prior to the five months from the scheduled date of completion by the petitioner-company, requested the Superintending Engineer, Northern Circle (R&B), Sambalpur, vide his letter dated 31.07.2015, to take necessary action in that regard. He had also acknowledged the fact that the petitioner-company is entitled to get bonus/incentive for early completion of work as per the amendment to Para 3.5.5 (V) Note III of OPWD Code, Vol-1, by its inclusion vide Works Department Memorandum No. 12366 dated 08.11.2013 and the provisions contained at sub-clause 2.4.1 of clause 120 of the agreement.

2.3 The Works Department of the Government of Odisha in its Office Memorandum dated 08.11.2013 has amended the OPWD Code and vide amendment to Para 3.5.5 (V) Note III of OPWD Code, Vol-1, the manner and procedure for computing bonus was inserted. According to the said provision, the petitioner-company is entitled to get 10% of the contract value as bonus/incentive for completing the work before 30% of the contract period. The Superintending Engineer, Northern Circle (R&B), Sambalpur along with the Executive Engineer, Sambalpur (R&B) Division inspected the work done by the petitioner-company on 04.09.2015 and observed that the said work has been completed in all respect. Subsequently, the Executive Engineer, Sambalpur (R&B) Division submitted a report to the Superintending Engineer, Northern Circle (R&B), Sambalpur on 23.11.2015 intimating that the petitioner-company has completed the work, 131 days prior to the scheduled time, which is 39.34% of total time and therefore, it is eligible to get 10% incentive of the contract value amounting to Rs.1,33,76,755.00 as per the provisions contained in Office Memorandum of the Works Department, read with sub-clause 2.4.1 of clause 120 of the agreement. It was also indicated in the said letter that the Executive Engineer, Sambalpur (R&B) Division and the Divisional Accounts Office of the Division computed the incentive to be paid to the petitioner-company. Pursuant to such letter dated 23.11.2015, the Superintending Engineer, Northern Circle (R&B), Sambalpur intimated the same to the Chief Engineer (DPI&R) Odisha, Bhubaneswar detailing the factual aspect of the case and recommended the case of the petitioner-company for disbursal of bonus/incentive as per the terms of the agreement and Office Memorandum dated 08.11.2013. In response to the same, the Chief Engineer (DPI&R), Odisha, Bhubaneswar issued a letter on 11.12.2015 to the Engineer-in-Chief-cum-Secretary to Government, Works Department, stating therein that the work has been completed in all respect as per the plan, design and specification, as stipulated in the agreement, before 30% of the contract period. Therefore, the petitioner-company is entitled to get the incentive @ 10% of the contract value amounting to Rs.1,33,76,755.00. The said amount is admissible to the petitioner as per sub-clause 2.4.1 of clause 120 the agreement and Office

Memorandum No. 12366 dated 08.11.2013 of the Works Department, Odisha.

2.4 In spite of above mentioned communications, the opposite parties did not take any step for making payment of bonus/incentive to the petitioner-company. Therefore, the petitioner-company approached this Court by filing W.P.(C) No. 17986 of 2016, which was disposed of on 20.10.2016 with the following order:-

> *"**W.P.(C) No. 17986 of 2016***
>
> *20.10.2016*
>
> *Heard Shri B.P. Das, learned counsel for the petitioner and Shri B.P. Pradhan, learned Addl. Govt. Advocate for the State-opp. parties and perused the record.*
>
> *2. In view of the nature of the order that we propose to pass, it is not necessary to cal l for counter affidavit from the other side.*
>
> *3. The case of the petitioner is that in response to an advertisement dated 11.06.2014 inviting public tender for certain works to be carried out in the Department of the opp. parties , the petitioner had applied and was selected in the tender process. The work was awarded in favour of the petitioner on 09.01.2015, which was to be completed within one year. A provision for incentive for early completion of the work was provided in the tender document itself, which condition was subject to subsequent amendment that may be made on the same.*
>
> *4. It is contended by the petitioner that the work was completed on 30.07.2015, which was within less than seven months, i.e., four months prior to the stipulated period. It is further contended that the incentive clause relegating to early completion of work was amended on 08 .11.2013 by an office memorandum and it was*

provided that in case the work is completed before 30 per cent of the contract period, 10% of the contract amount would be the incentive amount. On a claim made by the petitioner, the Chief Engineer has calculated the incentive amount at 10%, which comes to Rs.1,33,76,755/- and recommended the same to the Engineer-in-Chief-cum-Secretary, Works on 11.12.2015.

5. The submission of the learned counsel for the petitioner is that even though the petitioner is rightfully entitled to the said amount for which due recommendation has been made by the concerned Executive Engineer yet, even after more than nine months have passed, the incentive has not been paid to the petitioner.

6. In our view, no useful purpose will be served by calling for counter affidavit and keeping the writ petition pending. Learned Addl. Govt. Advocate states that opp. party no.1-Engineer-in-Chief-cum-Secretary to Government, Works Department, Odisha would be the competent authority to look into the grievance of the petitioner.

7. Having regard to the facts and circumstances of the case, we dispose of the writ petit ion with direction that in case, with regard to the grievance made in this petition, the petitioner files a comprehensive representation before opp. party no.1- Engineer-in-Chief-cum-Secretary to Government, Works Department, Odisha annexing therewith all the documents that the petitioner relies on within one month from today along with certified copy of this order, the same shall be considered and decided by a reasoned and speaking order in accordance with law by the Engineer-in-Chief-cum-Secretary to Government, Works Department, Odisha himself or any other competent officer duly authorized by him as expeditiously as possible but not later than six weeks from the date of filing of such representation. It is further provided that in case the petitioner is entitled to payment of any amount, the same may be paid to the petitioner with in three weeks from the date of decision by the opp. party no.1.

With the aforesaid observation/direction, the writ petition

Sd/-V. Saran, C.J.
Sd/ Dr. B.R. Sarangi, J."

2.5 As per the aforesaid order of this Court, the petitioner-company was to file a comprehensive representation before opposite party no.1, i.e. Engineer-in-Chief, Secretary to Government, Works Department, by annexing all the relevant documents, within one month from the date of passing of the order and the same was to be decided by a reasoned and speaking order in accordance with law by the said authority, within a period not later than six weeks from the date of filing of such representation. In compliance thereof, petitioner-company filed a comprehensive representation before opposite party no.1 on 05.11.2016, i.e., within the stipulated period, with a prayer to disburse the legitimate dues, i.e. bonus/incentive in its favour in terms of the agreement and provisions of OPWD Code. It was specifically directed by this Court in the aforementioned order that if the petitioner-company is entitled to payment of any amount, the same may be paid to the petitioner-company within three weeks from the date of decision of the opposite party no.1. But nothing was communicated to the petitioner-company in compliance to the order passed by this Court. However, on 18.11.2016, the petitioner-company was issued with a letter from the office of the Superintending Engineer, Northern Circle (R&B), Sambalpur, intimating therein that the petitioner-company had not completed the work entirely, and it was alleged that during verification and site inspection, certain works were found to be incomplete. In the letter it was further indicated that, during verification of documents, it was observed that items, such as, rough stone dry packing in aprons and revetments, stone pitching in the slope, gravel backing to apron and revetment with filter materials, floor protection to RCC slab culvert, were not executed as per the work agreement. It was also alleged that the petitioner-company had not completed the dressing work of the embankment to proper slope and earthen beams were not compacted at different stretches. Therefore, the work cannot be termed to be completed. It was also mentioned that on the date of inspection of the Chief Engineer (DPI&

R) on 02.07.2016 and 17.11.2016, it was seen that the work was not completed in all respect as per the agreement executed by the petitioner-company with Executive Engineer, Sambalpur (R&B) Division No.1, Sambalpur. Needless to say that such alleged inspection had been done, after expiry of more than one year period of the completion of work, though after completion of work, all the authorities had unequivocally and unanimously acknowledged that the petitioner-company had completed the work before time and was entitled to get bonus/incentive to the tune of Rs.1,33,76,755.00. Therefore, the denial to make payment of bonus/incentive is an afterthought. Accordingly, petitioner-company filed its objection on 25.11.2016 to the observation made by opposite party no.2 in his letter dated 18.11.2016 and requested to consider its case afresh and disburse the bonus/incentive at the earliest. Petitioner-company also communicated that it had not received any of the letters dated 03.07.2016 and 13.07.2016 from the opposite parties 2 and 3, prior to filing of the previous writ petition.

2.6 As no reply was received to the letter of the petitioner-company dated 25.11.2016 from the opposite parties, the petitioner-company was constrained to approach this Court again by filing W.P.(C) No. 2364 of 2017, praying for direction to the opposite parties to grant bonus/incentive which was legitimately due in terms of the agreement as also codal provision of the OPWD Code. This Court, vide order dated 29.04.2019, taking note of the previous order dated 20.10.2016 passed in W.P.(C) No. 17986 of 2016, directed that as because the representation made by the petitioner-company on 05.11.2016 has not been decided by the opposite party no.1, the same shall be decided by the said authority within a period of six weeks from the date of receipt of certified copy of that order. It was further observed that it shall be open for the petitioner-company to file a corrigendum to its representation dated 05.11.2016 within a period of two weeks from the date of passing of the order. In compliance to the same, the petitioner-company filed a corrigendum before opposite party no.1 on 26.05.2019 addressing all the inconsistencies on the part of the opposite parties, which included the sudden false plea of non-completion of work on the part of the petitioner-company by the opposite parties, who had themselves approved the work so done by the petitioner-company prior to filing of W.P.(C) No. 17986 of 2016. Consequentially, the petitioner-company claimed that steps should be taken for payment of legitimate bonus/ incentive amount to which the petitioner-company is entitled to, as per the agreement and the codal provisions of the OPWD Code.

2.7 In response to the same, an order dated 26.09.2019 was passed by opposite party no.1, stating therein that since some technical irregularities were observed by the Chief Engineer (DPI&R), Orissa-opposite party no.4, the work shall not be construed to be completed and, thereby, in absence of completion of the technical activities of work, the petitioner-company shall not be entitled to any bonus/incentive from the opposite parties. Challenging such communication dated 26.09.2019 made by the opposite party no.1 denying the entitlement of the petitioner-company with regard to payment of bonus/incentive for early completion of work before the schedule date, the petitioner–company has approached this Court by filing the present writ petition.

3. Mr. B.P. Das, learned counsel for the petitioner-company vehemently contended that the parties are bound by the terms of the agreement itself and also the codal provision of OPWD Code. For early completion of the work, clause 120 of the agreement read with provisions contained in OPWD Code, stipulate that the contractor is entitled to get bonus/incentive. More so all the authorities had unequivocally and unanimously accepted that the petitioner-company had completed the work 131 days prior to the schedule time and entitled to get 10% of bonus/incentive for such completion of work before 30% of the contract period. More so, an amount of Rs.1,33,76,755.00 was also determined to be paid as

bonus/incentive at the time of disbursal of the final bill. But after lapse of more than one year, as the petitioner-company approached this Court by filing writ petition for consideration of his representation, the opposite parties changed their stand and contended that the petitioner-company has committed some technical error, for which, it cannot be said that the work has been completed prior to the schedule date and, as such, the petitioner-company is not entitled to get incentive/bonus in terms of the agreement itself. Thereby, the opposite parties acted arbitrarily, unreasonably and contrary to the terms of the agreement and also codal provisions of the OPWD Code. If the benefit is admissible to the petitioner-company for early completion of work and the same having been acknowledged at the threshold, subsequently, the authority cannot turn around and deny the benefit admissible in terms of the agreement/codal provisions of the OPWD Code. Thereby, the order so passed, vide Annexure-16 dated 26.09.2019, denying the benefits of bonus/incentive, cannot sustain in the eye of law and the same is liable to be quashed. Thereby, the petitioner-company seeks for direction to the opposite parties to pay bonus/incentive as due and admissible to it in terms of the provisions contained in the agreement as well as codal provisions of OPWD Code, within a stipulated period.

To substantiate his contention, learned counsel for the petitioner-company relied upon the judgments in ***B.Majoj Kumar Rao v. State of Odisha***, 2018 (II) OLR 237; ***Bijay Kumar Mohapatra v. State of Odisha***, 2017 (I) OLR-41; ***Noble Resources Ltd. v. State of Orissa***, AIR 2007 SC 119; ***M/s Maa Santoshi Construction v. State of Odisha***, 2018 (II) ILR-CUT-638; and ***S.V.A. Steel Re-Rolling Mills Limited v. State of Kerala***, (2014) 4 SCC 186.

4. Mr. P.P. Mohanty, learned Additional Government Advocate appearing for the State-opposite parties admitted the fact that there was an agreement between the petitioner-company and the opposite parties for award of the work "*Widening & strengthening of*

existing single lane carriageway to 2- lane from Km.159/200 to 167/200 of Kuchinda-Bamara road (SH-24) under SHDP for the year 2014-15" at a contract value of Rs.13,86,25,212.00 with the date of commencement and completion as 09.01.2015 and 08.01.2016 respectively. He also admitted that for early completion of the work, the petitioner-company is entitled to get the bonus/incentive, but the same having not been received, the petitioner-company filed W.P.(C) No. 17986 of 2016, which was disposed of vide order dated 20.10.2016 permitting the petitioner-company to file a representation, which the petitioner-company did on 05.11.2016. But, however, referring to the counter affidavit, he vehemently contended that prior to processing the claim of the petitioner-company, the site was inspected by opposite party no.1 along with Superintending Engineer, Northern Circle (R&B) Sambalpur and Executive Engineer, Sambalpur (R&B) Division-II, Sambalpur on 02.07.2016. Basing upon the observation on inquiry by the opposite party No.1, intimation was given by the opposite party no.4 to the petitioner-company, vide letter dated 18.11.2016, that the work is not completed and the petitioner-company was requested to complete the same. Subsequently, opposite party no.4 had inspected the work on 18.11.2016 and submitted a report to the opposite party no.1, vide letter dated 27.11.2017, pointing out certain defects and reported that the work has not been completed prior to the schedule date and as such the petitioner-company is not entitled to get any bonus/ incentive as claimed in the writ petition. Therefore, he contended that the writ petition should be dismissed as the petitioner-company is not entitled to get any bonus/ incentive in terms of agreement and the codal provisions of the OPWD code.

5. This Court heard Mr. B.P. Das, learned counsel for the petitioner-company and Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties by hybrid mode. Pleadings having been exchanged between the parties, with the consent of learned counsel for the parties, the writ

petition is being disposed of finally at the stage of admission.

6. From the factual matrix, as delineated above, it is emerged that undisputedly the petitioner-company, for execution of the work in question, had entered into an agreement with the opposite parties. In terms of the said agreement, the work was to be commenced from 09.01.2015 and completed on 08.01.2016. The petitioner-company completed the entire work on 30.07.2015, which is 131 days ahead of the schedule date of completion, i.e. 08.01.2016, being allured by clause 120 of the agreement read with provisions contained in the OPWD Code that for early completion of the work, the petitioner-company would be entitled to get the bonus/incentive. But, when the petitioner-company laid its claim for bonus/incentive, for early completion of the work, the same was rejected on the ground that the petitioner-company had not completed the work in its entirety, though an amount of Rs.1,33,76,755.00 was determined by the opposite parties themselves to be paid as bonus/incentive to the

petitioner-company at the time of disbursal of the final bill.

7. In the above premises, the short question that arises for consideration in this writ petition is, whether action of the opposite parties in rejecting the claim of the petitioner is legally tenable and if so whether the petitioner-company is entitled to get bonus/incentive for early completion of the work in question in terms of sub-clause 2.4.1 of clause 120 of the agreement read with the provisions contained in the OPWD code.

8. Sub-clause 2.4.1 of clause 120 of the agreement, based on which the claim of the petitioner is founded, reads as follows:-

> "2.4 **Bonus for early completion**
> 2.4.1 *Amendment to Para 3.5.5(v) Note–III of OPWD Code Vol-I by inclusion.*
> *For availing incentive clause in any project which is completed before the stipulated date of completion, subject to other stipulations it is mandatory on part of the concerned Executive Engineer to report the actual date of completion of the project as soon as possible through FAX or e-mail so that the report is received within 7 days of such completion by the concerned Superintending Engineer, Chief Engineer & the Administrative Department. The incentive for timely completion should be on a graduated scale of one percent to 10 percent of the contract value. Assessment of*

incentives may be worked out for earlier completion of work in all respect in the following scale.

- *Before 30% of the contract period = 10% of the contract value.*
- *Before 20% to 30% of the Contract period = 7.5% of the contract value.*
- *Before 10% to 20% of the Contract period =5% of the contract value.*
- *Before 5% to 10% of the Contract period = 2.55 of the contract value.*
- *Before 5% of the contract period = 1% of the contract value.*

The amount of bonus, if payable shall be paid along with final bill after completion of work."

9. Similarly, clause 4 (B) of the Office Memorandum dated 08.11.2013, which brings about the amendment to Para 3.5.5 (V) Note III of OPWD Code, Vol-1, relying upon which the petitioner-company laid its claim, reads as follows:-

"4(B)-Amendment to Para-3.5.5(V) Note-III of OPWD Code, Vol-I by inclusion-

Note-III- For availing incentive clause in any project which is completed before the stipulated date of completion, subject to other stipulations it is mandatory on the part of the concerned Executive Engineer to report the actual date of completion of the project as soon as possible through fax or e-mail so that the report is received within 7 days of such completion by the concerned SE, CE & the Administrative Department. The Incentive for timely completion should be on a graduated scale of one percent to 10 percent of the contract value. Assessment of incentives may be worked out for earlier completion of work in all respect in the following scale.

"Before 30% of contract period = 10% of Contract Value
Before 20 to 30% of contract period = 7.5% of Contract Value
Before 10 to 20% of contract period = 5% of Contract Value
Before 5 to 10% of contract period = 2.5% of Contract Value
Before 5% of contract period = 1% of Contract Value".

10. In view of sub-clause 2.4.1 of clause 120 of the agreement read with the Office Memorandum dated 08.11.2013, which states about the amendment to Para 3.5.5 (V) Note III of OPWD Code, Vol-1, the tenderer is entitled to get the bonus/incentive for early completion of the work. In other words, a promise was held out by the State for giving bonus/incentive to a tenderer for early completion of the work. The reason/purpose behind such promise is that the tenderers will not cause any delay in executing the work, rather, they will be eager to finish the work before time, so that the bonus/incentive can be availed of by them. With the above objective of completion of work within time specified, without causing any loss to the government exchequer, the benefit has to be extended to the tenderers.

11. As per sub-clause-2.4.1 of clause 120, the meaning of 'bonus' reads thus:-

> "Bonus. A gratuity; a premium or advantage; a definite sum to be paid at one time, for a loan of money for a specified period, distinct from, and independently of, the interest; a premium for loan; a sum paid for services or upon a consideration in addition to or in excess of that which would ordinarily be given.

In ***Webster Dictionary***, "bonus" has been defined to mean:

> "something given in addition to what is ordinarily received by, or strictly due to, the recipient; specifically: (a) A premium given for a loan, or for a charter or other privilege granted to a company. (b) An extra dividend to the shareholders of a company, out of accumulated profits. (c) Money, or other valuable, given in addition to an agreed compensation (d) Life insurance. An addition or credit allotted to policy holders out of accumulated profits."

In ***Business Encyclopaedia Caxton***, "bonus" has been construed to mean:

> "as a gift, reward, or premium, granted voluntarily although theoretically only in many cases, as a matter of grace and without consideration or obligation. Thus, a payment to an employee in addition to his wages is called a bonus."

As per ***Great Encyclopaedia of Universal Knowledge***, "bonus" means:

> "something over and above what is the usual or regular payment. In the case of joint-stock

> companies it is a payment to shareholders, when profits are exceptionally high or have accumulated in the form of an extra dividend or new free shares. It may also be a payment for special services rendered or as an inducement to work."

The apex Court in ***Ghaziabad Zila Sahkari Bank Ltd. V. Labour Commissioner***, (2007) 11 SCC 756, has held that-

> "bonus" is a boon or gift, over and above, what is normally due as remuneration to be received.

12. Similarly, as per the Office Memorandum dated 08.11.2013 for early completion of work, the tender is entitled to get ‘incentive, in view of codal provision of the OPWD Code. The meaning of ‘incentive’ reads as follows:-

As per ***Oxford Dictionary***, "incentive" means:

> "1. A thing that motivates or encourages someone to do something.
> 2. A payment or concession to stimulate greater output or investment."

According to ***The Concise Oxford Dictionary***, the meaning of "incentive" is:

> "1.a Tending to incite, 2.n. Incitement (to action, to do, to doing), provocation, motive, payment or concession to stimulate greater output by workers."

As per ***Chambers Dictionary***, the meaning of "incentive" is:

> "In-sent'iv, adj inciting, encouraging; igniting(Milton). -n that which incites to action, a stimulus, esp to work more efficiently, productively, etc.

As per ***Collins Dictionary***, "incentive" means :

> "an additional payment made to employees as a means of increasing production, an incentive scheme.
> Wage incentive:- additional wage payments intended to stimulate improved work performance"

According to ***Dictionary.com*** "incentive" means:

> "1. something that incites or tends to incite to action or greater effort, as a reward offered for increased productivity.
> 2. inciting, as to action; stimulating; provocative."

As per ***Cambridge Advanced Learner's Dictionary & Thesaurus***, "incentive" means:

> "something that encourages a person to do something."

According to ***Merriam-Webster Dictionary***" incentive" means:

> "Something that incites or has a tendency to incite to determination or action. Incentive synonyms Boost, encouragement, goad, impetus, impulse, incitation, incitement, instigation, momentum, motivation, provocation, spur, stimulant, stimulus, yeast."

In ***P. Ramanatha Aiyar's Advanced Law Lexicon, 4th Edition***, "incentive" has been defined to mean:

> "something that aroused feeling or incites to action. Positive motive (something 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."
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> One of such example is ***Export incentive***-
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> "Government incentives to promote exports. They include direct-tax incentives, subsidies, favourable terms for insurance and the provision of cheap credit."

13. Applying the meaning of 'incentive", as discussed above, to Para 3.5.5(v) Note-III of OPWD Code Vol-I, the incentive is provided by the authority for early completion of the work, so that the authorities may be benefited by the efficient and proper action of the contractor. Thus, the purpose behind extension of benefit of bonus/incentive, being early completion of work by a tenderer, the same has formed part of the agreement and also the codal provision of OPWD Code.

14. In ***Bijay Kumar Mohapatra*** (supra), this Court at paragraphs-6 and 7 observed as follows:-

> "6. The aforementioned clause contained in Detailed Tender Call Notice also forms part of the agreement in terms of the OPWD Code (Vol.4). So far as OPWD Code is concerned, which is statutory in nature and as per the conditions stipulated therein, the petitioner is entitled to get refund of the earnest money deposit and also the security amount. Due to inaction of the authorities, under the compelling circumstances, the petitioner has approached this Court by filing this writ petition. On being noticed, the opposite parties have filed counter affidavit. In paragraph-8 of the counter affidavit, it has been stated as follows:-
>
> > *"That with regard to averments made in paragraph-8 of the writ petition, it is humbly submitted that one of the tenderer namely Sri Suryanarayan Mohanty was not qualified in Technical bid. So, he had filed one writ petition bearing no.16994/2014 before the Hon'ble Court to set aside the order of rejection of Technical bid. By judgment dated 25.11.2014, the Hon'ble Court has been pleased to dismiss the W.P.(C) No. 16994/2014. Challenging the judgment dated 25.11.2014, said Suryanarayan Mohanty has filed SLP (Civil) No.36506/2014 before the Hon'ble Supreme Court which is pending for adjudication. Present opposite parties have been impleaded as Respondent no.1, 2, 3 and 5 respectively in SLP (Civil) No.36506/2014. Present petitioner has been impleaded as respondent no.6. Due to pendency of aforesaid SLP before the Hon'ble Supreme Court, the present opposite parties are not releasing incentive amount in favour of the petitioner. However, present opposite parties undertake that soon after disposal of aforesaid SLP by the Hon'ble Supreme Court of India, incentive amount will be released in favour of the petitioner. Copy of SLP as well as copy of interim application for*

> *stop payment is annexed herewith as Annexure-A series."*

> 7. Even though in the counter affidavit the opposite parties have admitted that the petitioner is entitled to get the incentive, the reasons for non-releasing the incentive amount in favour of the petitioner has been shown to be pendency of the SLP before the apex Court. The opposite parties have, however, undertaken that soon after disposal of the aforesaid SLP the incentive amount would be released in favour of the petitioner. In view of the candid admission made by the opposite parties in their counter affidavit, nothing more remains to be considered so far as entitlement of the petitioner on the ground of clause-2.4 of the agreement is concerned."

By so observing, this Court, at paragraphs-13 and 14 of the said judgment, held as follows:-

> "13. However, considering the fact that the work has already been completed and the petitioner has already been paid the final bill, the incentive, to which the petitioner is admittedly entitled to as stipulated in the agreement (as has been accepted by the opposite parties in paragraph-8 of the counter affidavit) we would be of the opinion that the petitioner would be entitled to payment of the same. Besides this, since the contract has already been completed and the final bill has also been paid, the petitioner would also be entitled to refund of the Earnest Money and security amount deposited by him in terms of the contract agreement.
>
> 14. Accordingly, the writ petition stands allowed. The incentive, to which the petitioner is found entitled, shall be paid to him within four weeks from the date of filing of a certified copy of this order before opposite party no.4-Executive Engineer. The earnest money and security

amount deposited shall also be paid to the petitioner, in accordance with the terms of the agreement. No order to cost."

15. In ***B. Manoj Kumar*** (supra), this Court has taken into consideration in paragraph-11 as follows:-

> *"11. At this stage, it may be pertinent to note here that nothing has been brought on record to show that either the Executive Engineer, or the Superintending Engineer, had while intimating the Chief Engineer about completion of the work, had ever stated that there was change in the scope of work because of which the petitioner would not be entitled to any incentive. The ground of change in the scope of work has been taken by the opposite party at a very late stage, first at the stage of passing of the order dated 2.11.2017 without giving any details with regard to alleged change in the scope of work, and then in the counter affidavit by making such assertion, without supporting the same with any document."*

And relying upon the case of ***Bijay Kumar Mohapatra*** (supra), this Court, at paragraph-14, observed as follows:-

> "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.”

16. In ***M/s. Maa Santoshi Construction*** (supra) at paragraphs-19 and 20, this Court held as follows:-

> “19. The incentive for early completion of work is granted so that the contractors may be encouraged to complete the work early, which would benefit the State Government. The State Government, in its wisdom, had earlier provided for maximum 2% of incentive, but subsequently modified the same to be up to 10%, after giving various scales. Since the petitioner, having completed the work 21.56% prior to the contract period, falls in the category of having completed the work 20% to 30% prior to the schedule date, thus, as per the Office Memorandum dated 08.11.2013, the petitioner would be entitled to the incentive @ 7.5% of the contract value, which comes to Rs.41,87,829/-. A provision incorporated or amended for the benefit of the contractor giving higher incentive for early completion of work should be liberally interpreted so as it give its benefit to all such contractors who are found eligible to such benefit.
>
> 20. Thus, in our view, the petitioner has wrongly been denied such benefit and awarded incentive of only Rs.11,16,754/-, whereas he would be entitled to Rs.41,87,829/-. Accordingly, the petitioner shall be entitled to payment of the balance amount of Rs.30,71,075/-, along with six per cent interest from the date of completion of the work (i.e. 30.07.2014), till the date of payment of such additional amount.”

17. In ***Noble Resources Ltd***. (supra), the apex Court in paragraphs-25 and 26 ruled as follows:-

"25. In ABL International Ltd. (supra), this Court opined that on a given set of facts, if a State acts in an arbitrary manner even in a matter of contract, a writ petition would be maintainable. It was opined :

"It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the above said requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent…………"

26. Contractual matters are, thus, not beyond the realm of judicial review. Its application may, however, be limited."

18. In ***S.V.A. Steel*** (supra), the apex Court, in paragraph-30 held as follows:-

"30. Before laying down any policy which would give benefits to its subjects, the State must think about pros and cons of the policy and its capacity to give the benefits. Without proper appreciation of all the relevant factors, the State should not give any assurance, not only because that would be in violation of the principles of promissory estoppels but it would be unfair and immoral on the part of the State not to act as per its promise"

And taking into account the judgment of the apex Court in ***S.V.A. Steel*** (supra), the benefit was extended in the case of ***Maa Santoshi Construction*** (supra).

19. In view of the above settled position of law, once the State has held out a promise by entering into an agreement, by incorporating sub-clause 2.4.1 of clause 120 in the agreement and making amendment to Para 3.5.5 (V) Note III of OPWD Code, Vol-1 in terms of Clause 4 (B) of the office memorandum dated 08.11.2013, which are applicable to the petitioner-company, and in view of unequivocal and unanimous admission made by the authorities in various correspondences referred to the writ petition admitting the fact that the petitioner-company has completed the work in question on 30.07.2015, i.e. 131 days prior to the schedule date of completion, i.e. 08.01.2016, the petitioner-company is entitled to get the benefit of bonus/incentive. The same having not been extended, the petitioner-company had approached this Court by filing writ petition and this

Court directed for consideration of the same. However, after lapse of 15 months of the completion of the work, an inquiry was conducted on 18.11.2016 and the opposite parties came out with a new plea that the work has not been completed, which itself is an afterthought. Thereby, the entire action of the State opposite parties is hit by the principle of estoppel.

20. Section-115 of the Indian Evidence Act, 1872, which deals with *estoppel*, reads as follows:-

> *"115. Estoppel:- When one person has, by this declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."*
>
> *To bring the case within the scope of estoppel as defined in Section 115 of the Evidence Act;*
>
> 1. *There must be a representation by a person or his authorized agent to another in any form, a declaration, act or omission;*
> 2. *The representation must have been of the existence of a fact and not of promises be future or intention which might or might not be enforceable in contract;*
> 3. *The representation must have been meant to be relied upon;*
> 4. *There must have been belief on the part of the other party in its truth;*
> 5. *There must have been action on the faith of that declaration, act or omission that is to*

say, the declaration, act or omission must have actually caused another to act on the faith of it, and to alter his former position to this prejudice or detriment;

6. *The misrepresentation or conduct or omission must have been the proximate cause of leading the other party to act to his prejudice;*
7. *The person claiming the benefit of an estoppel must show that he was not aware of the true state of things. If he was aware of the real state of affairs or had means of knowledge, there can be no estoppel;*
8. *Only the person to whom representation was made or for whom it was designed can avail himself of it."*

21. In ***Black's Law Dictionary***, 7th Edn. at page 570 'estoppel' has been defined to mean a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.

22. The ***Law Dictionary*** expresses promissory estoppel to the following effect:-

> *"A promise by which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promise, and which does induct such action or forebearance. Such a promise is binding if injustice can be avoided only by enforcement of the promise."*

23. In ***Halsbury's Laws of England***, Fourth Edition, Vol.16 in Para-1514 at page 1017, the

"promissory estoppel" has been defined to the following effect:-

> *"Promissory estoppel: When one party has, by his words or conduct made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."*

24. In ***Central London Property Trust Ltd. v. High Treas House Ltd.***, (1956) 1 All ER 256, it has been held that a promise is intended to be binding, intended to be acted upon, and in fact acted upon is binding.

25. In ***Century Spg. And Mfg. Co. Ltd v. Ulhasnagar Municipal Council***, (1970) 1 SCC 582, it has been held that there is no distinction between a private individual and a public body so far as the doctrine of promissory estoppel is concerned.

26. In ***Gujurat State Financial Corporation v. Lotus Hotels***, (1983) 3 SCC 379, it has been held that the principle of "promissory estoppel" would estop a

person from backing out of its obligation arising from a solemn promise made by it to the respondent.

27. In ***Ashok Kumar Maheswari v. State of U.P.***, 1988 SCC LSS 592, it has been held that doctrine of "promissory estoppel" has been evolved by the Courts on the principle of equity to avoid injustice.

28. In ***Sharma Transport v. Govt. of A.P.***, AIR 2002 SC 322: (2002) 2 SCC 188, it has been held that the Government is equally bound by its promise like a private individual, save where the promise is prohibited by law, or devoid of authority or power of the officer making the promise. The equitable doctrine of promissory estoppel must yield where the equity so requires in the larger public interest.

29. In ***State of Rajasthan v. J.K. Udaipur Udyog Ltd.***, (2004) 7 SCC 673, it has been held that the "promissory estoppel" operates on equity and public interest.

30. In ***A.P. Steel Re-rolling Mill Ltd. v. State of Kerala***, (2007) 2 SCC 725, it has been held that where a beneficent scheme is made by the State, the doctrine of "promissory estoppel" would apply.

31. In ***State of Orissa v. Manglam Timber Products Ltd.***, (2003) 9 Scale 578, it has been held that to attract applicability of promissory estoppel a contract in writing is not a necessary requirement. This principle is based on premise that no one can take advantage of its own omission or fault.

32. In ***B.L. Sreedhar v. K.M. Munireddy***, (2003) 2 SCC 355 (365) it has been held by the apex Court that 'estoppel' is based on the maxim *"allegans contrarir non est audiendus"* (a party is not to be heard contrary) and is the spicy of presumption "*juries et de jure*" (absolute, or conclusive or irrebuttable presumption).

33. In ***H.R. Basavaraj v. Canara Bank***, (2010) 12 SCC 458, it has been clarified that in general words, '*estopeel*' is a principle applicable when one person

induces another or intentionally causes the other person to believe something to be true and to act upon such belief as to change his/her position. In such a case, the former shall be stopped from going back on the word given. The principle of estoppels is only applicable in cases where the other party has changed his positions relying upon the representation thereby made.

34. The principle of promissory estoppels has been considered by the apex Court in ***Union of India v. M/s Anglo, Afghan Agencies etc.***, AIR1968 SC 718; ***Chowgule & Company (Hind) Pvt. Ltd. v. Union of India***, AIR 1971 SC 2021; ***M/s Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh***, AIR 1979 SC 621; ***Union of India v. Godfrey Philips India Ltd.,*** AIR 1986 SC 806; ***Delhi Cloth & General Mills Ltd. v. Union of India***, AIR 1987SC 2414; and ***Bharat Singh v. State of Haryana***, AIR 1988 SC 2181 and many other subsequent decisions also.

35. In view of the law laid down by the apex Court, as discussed above, the principle of promissory *estoppel*

would estop a person from backing out of its obligation arising from a solemn promise made by it to the person. More so, the doctrine of promissory *estoppel* has been evolved by the Courts on the principle of equity to avoid injustice. As such, it operates on equity and public interest.

36. In view of the facts and law, as discussed above, this Court is of the considered view that the rejection of the representation of the petitioner-company vide Annexure-16, in compliance of the order dated 20.10.2016 passed in W.P.(C) No. 17986 of 2016, being an afterthought and hit by the principle of promissory estoppel, the same cannot sustain in the eye of law and is liable to be quashed and hereby quashed. The opposite parties are directed to extend the benefit of bonus/incentive admissible to the petitioner-company in terms of sub-clause 2.4.1 of clause 120 of the agreement bearing no. 1782 PI of 2014-15 under Annexure-2 read with amendment to Para 3.5.5 (V) Note III of OPWD Code, Vol-1 in terms of Clause 4 (B) of the Office Memorandum

No. 12366 dated 08.11.2013, for early completion of the work in question on 30.07.2015, which is 131 days prior to the schedule date dated of completion, i.e., 08.01.2016, as was unequivocally and unanimously admitted by them in their correspondences, within a stipulated period of two months from the date of communication of this judgment.

37. In the result, the writ petition is allowed. However, there shall be no order as to costs.

....

DR. B.R. SARANGI,
JUDGE

SAVITRI RATHO, J. I agree

....

SAVITRI RATHO,
JUDGE

Orissa High Court, Cuttack
The 29th March, 2022, Arun/GDS