

ORISSA HIGH COURT: CUTTACK

W.P.(C) No.31673 of 2021

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

AFR

M/S. SBM NIRMAN CONSTRUCTION PETITIONER
PRIVATE LIMITED, SAMBALPUR

-Versus-

STATE OF ODISHA & OTHERS OPP. PARTIES

For Petitioner : M/s P.C.Nayak, S.K.Rout,
R.K.Rout, Advocates.

For Opp. Parties : Mr. P.P.Mohanty, A.G.A.
[O.P. Nos. 1 to 5]

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
HONOURABLE MR. JUSTICE G. SATAPATHY**

Date of hearing: 02.11.2022: Date of judgment: 10.11.2022

G.SATAPATHY, J.

The petitioner by way of this writ petition
under Articles 226 & 227 of the Constitution of India seeks
for quashing of order passed on 14.07.2021 by opposite
party No.1 under Annexure-7 refusing to grant incentives to

the petitioner as illegal, arbitrary and unreasonable as well as violative of Article 14 of the Constitution of India and consequently, directing opposite party No.1 to approve incentives in favour of the petitioner in accordance with the recommendation made by the authority under Annexure-8 within a stipulated time along with interest @ 18% with effect from the date of completion of the work.

2. The facts under which the petitioner has filed this writ petition are that the petitioner is not only a private limited company registered under the Companies Act but also is a Super Class Contractor under the P.W.D. Contractor Registration Rules, 1967 and it has also executed number of works satisfactorily in different departments of Government of Odisha including the opposite parties. Pursuant to a notice inviting tender by the Superintending Engineer, Northern (R&B) Circle, Sambalpur-opposite party No.4 vide Detailed Tender Call Notice (D.T.C.N.) in e-Procurement Notice Bid Identification No. SENC(R and B)/21/2013-14 No. 3872 dated 19.10.2013 in respect of four numbers of works, the petitioner

successfully bided and executed the work stated at serial No. 2 of the tender for S/R to Rampur-Govindapur road from 0/0 km. to 6/500 km. for 2013-14 in the district of Sambalpur with approximate value of work at Rs.396.04 lakhs with date of commencement of work from 17.12.2013 to stipulated date of completion on 16.09.2014 by signing the agreement on 17.12.2013 at an agreement value of Rs.3,67,92,061/-. In the course of execution of work, the Government revised the agreement value by deducting 19.70% as per OPWD Code to Rs.2,95,43,535/- which was approved on 16.09.2016 in terms of Clause 3.5.5.(v) and 6.3.17 of the OPWD Code but the said revision was not for the fault of the petitioner. Despite completion of work before the stipulated date and recommendation made by Executive Engineer, when the authority did not release the incentive the petitioner has approached this Court in W.P.(C) No. 5910 of 2020 which was disposed of on 18.02.2020 by this Court giving liberty to the petitioner to file a representation before opposite party No.1 and in such event, the opposite party No.1 shall consider and dispose of the same by a

reasoned order within a period of thirty days of receipt of representation but as Opposite Party No.1 did not comply, the petitioner filed CONTC No.4636 of 2020, which is still pending though the representation was disposed of on 14.07.2021 refusing to allow incentives to the petitioner on the ground that the revised contract value of the road work is less than Rs.3 crores and as such, the petitioner does not qualify for incentives as per addendum to Note No.1 to Para-3.5.5.(v) of OPWD Code Volume-I but such refusal to pay incentives to the petitioner is illegal, arbitrary and unreasonable as well as violative of Article 14 of the Constitution of India. It is further stated by the petitioner that the authority has failed to consider the recommendation of the Chief Engineer in favour of the petitioner in terms of Clause-47 of D.T.C.N. vide letter No. 19947 on 19.05.2021 for payment of incentives for completing the work within 183 days as against the revised time to execute the work within 220 days which was proportionately calculated for the revised contract value at Rs.2,95,43,535/- and as such, the petitioner is entitled to

5% incentives of the revised contract value in terms of revised guidelines of Works Department vide letter No. 12366 dated 08.11.2013 which was issued pursuant to the direction of this Court. According to the petitioner, the refusal to grant incentives to the petitioner is not only illegal, arbitrary but is also violative of principle of equality and the same needs to be interfered by this Court in exercise of power under Articles 226 & 227 of the Constitution of India for granting appropriate relief.

2.1. In response to the claim of the petitioner, opposite party Nos. 1 to 4 has resisted the claim of the petitioner for incentives by filing a counter affidavit relying upon the addendum to Note-1 to Para-3.5.5.(v) of OPWD Code and stating therein that since the revised value of contract for road work issued in favour of the petitioner being for Rs.2,95,43,535.00 which is less than Rs.3 crores, the petitioner is not entitled to incentives as per Clause-54 of D.T.C.N.

3. In course of hearing of the writ petition, Mr.P.C.Nayak, learned counsel for the petitioner submits

that the admitted agreement for executing the work being at Annexure-2 was valued at Rs.3,67,92,061/- against approximate value of work at Rs.396.04 lakhs as advertised with stipulation for completing the work by 16.09.2014 but in the course of execution of work, the Department in exercise of power under Clause-6.3.17 of OPWD Code reduced the agreement value in deviating some items to Rs.2,95,43,535/- which was not for the fault of the petitioner, rather the same was unilateral decision of the opposite party and taking into consideration such facts, the opposite party Nos. 3 and 5 have rightly recommended incentives in favour of the petitioner for early completion of original work in terms of Clause-3.5.5.(v) of OPWD Code but the authority without taking into consideration such facts has illegally refused incentives to the petitioner. It is further submitted that there appears no dispute for granting of incentives for early completion of work but the authority concerned taking undue advantage of the provisions of the OPWD Code which was in fact not applicable to this case for the work being admittedly agreed between the parties to be

executed at Rs.3,67,92,061/-, has subsequently scaled down the value of work to less than Rs.3 crores to refuse incentive to the petitioner without any valid reason, especially when the petitioner was not at all at fault for reduction of the contract value for the work which was admittedly executed at contract/agreement value for more than Rs. 3 crores and the petitioner, therefore, eligible to incentives for executing the work proportionately 37 days before the schedule date and thereby, is entitled to 5% of the revised contract value as incentives. It is further submitted that the petitioner had earlier approached to this Court seeking a direction to opposite party No.1 to grant incentives in W.P.(C) No. 5910 of 2020 which was disposed of granting liberty to the petitioner to file representation for incentives and the same was directed to be considered by opposite party No.1, who after prolonging the matter disposed of by refusing to grant incentives to the petitioner by erroneously applying the aforesaid provisions of OPWD Code but fact remains that the petitioner is clearly entitled to the incentives. In relying upon the decision in **M/s.**

Santosh Kumar Vrs. State of Odisha and others, W.P.(C)

No. 5454 of 2017 disposed of on 22.09.2021, learned counsel for the petitioner submits that this Court by taking into consideration the aforesaid provisions of OPWD Code in a matter of execution of work valued at Rs.1.5 crores had directed the opposite party-State to pay the incentives to the petitioner therein by rejecting the contention advanced on behalf of the State-opposite party in that case for aforesaid provisions of OPWD Code to be unacceptable and violative of Article 14 of the Constitution of India. In summing of his argument, learned counsel for the petitioner has also relied upon the decision of this Court in ***M/s. Maa Santoshi Construction Vrs. State of Odisha and others; 2018 SCC OnLine Orissa 357*** to grant incentives to the petitioner and it is accordingly prayed to allow this writ petition.

4. In reply, Mr.P.P.Mohanty, learned Addl. Government Advocate appearing for opposite party Nos. 1 to 5 by drawing attention of the Court to Clause-54 of the agreement submits that as the work in question having admittedly executed for less than Rs.3 crores, the petitioner

is not at all entitled to any incentives and he, accordingly, prays to dismiss this writ petition on that score alone.

5. Heard Mr.P.C.Nayak, learned counsel for the petitioner as well as Mr.P.P.Mohanty, learned Addl. Government Advocate and perused the record. The pleadings having exchanged and with consent of the parties, this writ petition is disposed of by this order at the stage of admission.

6. A careful perusal of undisputed facts involved in this case would go to indicate the real dispute between the parties revolving around the payment of incentives which is claimed by the petitioner for early completion of the work and denied by the opposite parties for not fulfilling the conditions enumerated in Clause 54 (Condition of Contract) and 122(2.4.1.) of the D.T.C.N. and addendum to Note-1 appended to 3.5.5.(v) of the O.P.W.D. Code Volume No.I which are extracted below for just and proper adjudication of the dispute involved between the parties:-

Clause 54 (Condition of Contract):**“Addendum to Note-I to para-3.5.5.
of the O.P.W.D. Code, Vol.-I**

Incentive should be paid in respect of individual project for new construction/substantial additional or improvement works, the minimum value of which is mentioned below.

<u>Name of work</u>	<u>Minimum Value</u>
1. Building works/P.II. work	Rs.40.00 Lakhs
2. Road work	Rs.3.00 Crores
3. Irrigation work	Rs.10.00 Crores.

Incentive will be paid with approval of next higher authority of tender accepting authority on completion of original work before original time schedule. (Works Department No. 8310, dated 17.05.2006).

122(2.4) Bonus for early completion

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 whichever 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.”

7. In order to clarify the dispute between the parties, Note No.III appended to Para No. 3.5.5.(v) of the

O.P.W.D. Code Volume-1 is very relevant to resolve the dispute which is quoted below:-

“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 completion by the concerned S.E.C.E. and 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 the work in all respects 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**.”*

8. Indisputably, the opposite parties have taken the umbrage of the ground that the value of the work done by the petitioner being Rs.2,95,43,535/- is less than the minimum requirement of Rs.3 crores, but it is admitted fact that the agreement was made between the parties for doing work at agreement value of Rs.3,67,92,061 against approximate value of work at Rs.396.04 lakhs as advertised which was subsequently scaled down by a revised estimate

of Rs.2,95,43,535/- arrived at basing on the estimation taking into consideration actual site condition with approval of competent authority but admittedly, without any amendment/modification of the agreement. A casual reading of Note-III appended to Para-3.5.5(v) of the OPWD Code would go to indicate in unambiguous terms for payment of incentives against the percentage of days before the completion of the contract period in a graduated scale on contract value of the work to the beneficiary for its early completion but the opposite parties in this case has resisted the claim for incentives to the petitioner for early completion of work on revised estimated value of work to be less than Rs.3 crores and that too, without any amendment/modification to the agreement between the parties. In a contract matter, the dispute between the parties are to be resolved in strict adherence to the terms of contract of agreement signed between them which in this case has been signed between the parties for a contract value of Rs.3,67,92,061. In ***Maa Santoshi Construction (supra)***, while going through the meaning of bonus by taking into

consideration its literal meaning from different Dictionaries and law laid down by Apex Court in some cases, this Court has come to observe that 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 to give its benefit to all such contractors who are found eligible to such benefit. In addition, bonus as a term is meant as any extra consideration given for what is received, or something given in addition to what is ordinarily received by, or strictly due to the recipient. Moreover, in the decision **M/s. Santosh Kumar(supra)** as relied by the petitioner, this Court at paragraph-10 has held as under:-

“Moreover, we do not find any justification in including only persons, who have executed road work of Rs.3.00 crores or above. In fact, it is violative of principles of equality as enshrined both in the Preamble of India as well as under Article 14 of the Constitution. A reference to the Preamble of India reveals that the constituent assembly took up the equality of status and opportunity, as one of the basic principle on which the welfare State of India provides that the State shall not deny to any person equality before law or the equal protection of law within the territory of India. In fact, Article 14 of the Constitution provides two essential equalities, one is equality before law and the second is equal of law. So, we

do not understand why the State should prefer to give incentive only to rich contractors, who execute road work, the value of which is more than Rs.3.00 crores and why a person, who has executed a work of Rs. 1.5 crores before time, should not be given incentive.”

9. True it is that the opposite parties have taken into consideration the revised value of the work to be less than Rs.3 crores without amending or modifying the contract to deny the incentives to the petitioner in terms of the relevant provisions of OPWD Code for contract value but that *per se*, is not only violative of the principle of equality as enshrined in Article 14 of the Constitution of India but also an exposition of inequitable discrimination. The claim of the petitioner in this matter would have been probably different, had there been any modification/amendment of contract with insertion of such fact about granting incentive to the petitioner to be impossible for reason of scaling down the contract value since the petitioner executing the contract has legitimate expectation of incentives which is provided for giving encouragement by way of extending extra benefits. It is also not inconsonance with D.T.C.N. and

legally equitable to unilaterally modifying the contract to deny the benefit of incentives as contained in the agreement earlier entered into by the parties taking advantage of position is not only unreasonable but also unfair.

10. It is also not disputed that in response to the DTCN which was issued on 19.10.2013, the petitioner successfully bided and was selected for carrying out the work by entering into the agreement. According to the agreement at Annexure-2, the date of commencement of work was 17.12.2013 and the date of completion of work was 16.09.2014 but the petitioner claims to have completed the work 37 days before the period of completion calculated proportionately for execution of the work at a revised contract value which was never disputed and thereby, the petitioner has completed the work before 16.81% of the contract period which entitles him to a incentives of 5% of the contract value, which is of course claimed by the petitioner on revised estimated value. It is also not disputed by the opposite parties that the case of the petitioner for grant of incentives was recommended by the Executive

Engineer to Superintendent Engineer vide letter No. 3552 dated 20.06.2014 under Annexure-3 and the same also recommended by the Chief Engineer to F.A.-cum-Additional Secretary to Government vide letter No. 19947 dated 19.05.2021 at Annexure-8 stating therein the entitlement of the petitioner to incentives @ 5% of the revised contract value. The provision for grant of incentives for early completion of work included in O.P.W.D. Code is not a mere formality but the same was included in the Code to encourage/allure the contractors to complete the work early for the benefit of general public as also to increase the efficiency and transparency in respect of infrastructure development of the State. Admittedly, D.T.C.N. was issued for a value of Rs.396.04 lakhs but agreement was entered into between the parties for a contract value of Rs.3,67,92,061/- but the opposite parties admitted in their counter affidavit that the Technical Committee under the Chairmanship of Engineer-in-Chief(Civil) revised the contract value to Rs.2,95,43,535/- by submitting its report on 27.05.2021 which is much after the completion of the

work. Bonus is normally a financial incentive which is above and beyond the normal payment/award as incentive/reward for good performance and in this case, a reasonable construction of the word bonus/incentive is meant for early completion of work. Is it not unreasonable, when there appears a contract clearly stating the terms of bonus/incentive payout, the opposite parties revised the contract value of the work without modifying/amending the terms of the contract and without providing opportunity to the petitioner much after the date of completion of the work to deny incentive/bonus to the petitioner as per agreed agreement.

11. In view of the above facts and discussion made hereinabove and taking into consideration the fact that the agreement was admittedly entered into between the parties at contract value of Rs.3,67,92,061/- which was subsequently scaled down to Rs.2,95,43,535/- without modifying the terms of the agreement and keeping in view the Note-III appended to para-3.5.5.(v) of the OPWD Code making it clear that incentive is payable on graduated scale

on contract value and taking into consideration that the petitioner has admittedly completed the work 37 days before the schedule date of completion of the work calculated proportionately at the revised value of the contract and the law laid down in **M/s. Santosh Kumar(supra)** , this Court is of the considered view that the rejection of claim of the petitioner for incentives by opposite party No.1 for early completion of the work on the ground that the value of work is less than Rs.3 crores to push the petitioner to be ineligible to incentives is unreasonable, arbitrary and without any justification and the same order is unsustainable in the eye of law as well as liable to be set aside. Consequently, the petitioner is found entitled to incentives @ 5% of the revised value for completing the work 37 days before which is calculated at 16.81% before the completion period of contract. Accordingly, the order passed on 14.07.2021 by opposite party No.1 at Annexure-7 refusing to grant incentive to the petitioner being unsustainable in the eye of law is hereby quashed and the authority concerned is hereby directed to pay the incentive

to the petitioner @5% of the revised value of the contract which is Rs.2,95,43,535/- along with simple interest @4% per annum within a period of six months hence, failing which the petitioner is entitled to recover the same with penal interest @12% per annum.

12. In the result, the writ petition stands allowed with aforesaid directions indicated above but in the circumstance without any costs.

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G.SATAPATHY,
JUDGE

DR. B.R.SARANGI, J.

I agree.

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DR. B.R.SARANGI,
JUDGE

Orissa High Court, Cuttack
The 10th November, 2022, Kishore