

IN THE HIGH COURT OF ORISSA AT CUTTACK

ARBA No.11 of 2021
(Through hybrid mode)

Sabitri Nayak and others *Appellants*

Mr. S.P.Mishra, Senior Advocate

-versus-

State of Odisha *Respondent*

Mr. P.C.Panda, Addl. Govt. Advocate

CORAM: JUSTICE ARINDAM SINHA

ORDER
17.02.2022

Order No.

01. 1. Mr. Mishra, learned senior advocate appears on behalf of appellants and submits, there was variation of the contract quantity by two and half times. The extra work was paid at contractual rates, by reason of supplementary agreement that his clients had entered into, bona fide. He relies on judgment of the Supreme Court in **National Fertilizers v. Puran Chand Nangia**, reported in **(2000) 8 SCC 343**, paragraph 28. He draws attention to a passage in the paragraph reproduced below.

“28. xx xx xx

In fact, if the said reasoning of the appellant is accepted and if, in a given case, the value of the increases in unprofitable items is 50% of the contract value and the value of the reductions of the remaining more profitable items is 50% of the contract value, it could still be contended for the appellant that the net variation was nil, even though that was a situation

where the contract had been substantially modified and was almost a different contract from the one stipulated. Such an unreasonable construction is to be avoided and was rightly avoided by the arbitrator.”

2. He submits further, the Supreme Court declared the law regarding extra works under contract to be that where there is substantial increase over the contractual quantity, market rate must be paid.

3. Mr. Panda, learned advocate, Additional Government Advocate appears on behalf of State and submits, there should be no interference with impugned order.

4. In **National Fertilizers** (supra), the Supreme Court was dealing with a contract clause which allowed for variation in the quantity to extent of $\pm 25\%$. It is this variation clause in the contract that was discussed and interpreted. The Court said that contractors usually bid by a package. They make a reasonable bid on the premise that some works are less profitable than others, to ultimately yield profit for the whole work. In this context was the discussion regarding the variation, whether it could affect profitability of the contract in executing the works, when there is addition or reduction, in excess of the variation provided in the contract.

5. In the case at hand, there was original contract on quantity and rates. A supplementary agreement was entered into, whereby appellants agreed to increase originally contracted for quantity of work. The increase was agreed by clause 11 in the supplementary agreement. The arbitrator extracted the clause in the award. Finding was that said clause in the agreement goes to show all kinds of variations and

deviations in the contract work. Appellants were paid between years 1983 to 1986 at original contractual rates in respect of the excess quantity of works. On such finding the arbitrator negated the claim of appellants.

6. The Court below by judgment dated 8th July, 2021 confirmed the finding on this aspect in the award and said further that appellants stood estopped from making the claim. That means the Court below found appellants, by signing the supplementary agreement had represented they would carry out additional works at original rates and, therefore, the employer took the position of getting executed the extra works, to bar appellants from claiming in excess of originally agreed rates.

7. As aforesaid, in **National Fertilizers** (supra), the Supreme Court was adjudicating whether variation in excess of the percentage provided in the contract between parties in that case, would affect integrity of the contract. In this case no variation was provided originally but appellants (contractors) agreed to execute additional works at originally contracted rates. Appellants did so and were paid. Subsequently, appellants made the claim on the premise that excessive quantity of extra work had affected integrity of the contract, since original rates had not been varied in the supplementary agreement. Therefore, the integrity thereof could not be sustained.

8. Appellants had agreed to get paid additional works at the same rate, The package logic, interpreted by the Supreme Court, when applied, means that appellants by agreeing to execute the additional works, had taken into account parts of it

to be more profitable than other parts. Therefore, appellants took the plunge and agreed to increase in the volume of work but at same rates. In the circumstances, **National Fertilizers** (supra) cannot be relied upon by appellants as in their aid.

9. There is no reason to interfere in appeal. Impugned order is confirmed. The appeal is dismissed.

(Arindam Sinha)
Judge

RKS

