ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 30191 OF 2021

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

AFR

B.K.D. Infrastructure
Pvt. Ltd., Super Class
Contractor, Sambalpur ..... Petitioner

-Versus-

State of Odisha and others ..... Opp. Parties

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

For opp. parties : Mr. P.P. Mohanty, Addl. Government Advocate

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR. JUSTICE MURAHARI SRI RAMAN

Date of hearing: 04.09.2023 : Date of judgment: 08.09.2023

DR. B.R. SARANGI, J. B.K.D. Infrastructure Pvt. Ltd., a company registered under the Companies Act, 1956, represented through its Managing Director Braja Kishor Das, has filed this writ petition with the following prayers:-

"It is therefore prayed that, this Hon'ble Court may be graciously pleased to issue Rule NISI, in the nature of any appropriate writ/writs and/or any other writ/writs and/or order/orders and/or direction/directions calling upon the opp. parties to show cause as to why:

i) The Office Memorandum dated 07.06.2021, (Annexure-11) modifying the office memorandum dated 19.11.2019 (Annexure-10) (which was effective from the date of issue) to be retrospective effect from 07.07.2012 to 18.11.2019 shall not declared illegal, arbitrary, unreasonable and same shall not be quashed being violative of Article 14 of the Constitution of India.

ii) The order dated 17.06.2021 of the Executive Engineer/Opp.Party No.4 under Annexure-8 refusing to make payment of Rs.63,31,965/- basing on the Office Memorandum dated 07.06.2021 and consequential demand shall not be declared illegal and arbitrary,

iii) The Opp. Party No.1 shall not be directed to release the amount as per the recommendation of Opp.Party No.2 under Annexure-7 and in terms of contract within a stipulated period along with interest.

And may pass any other order/ orders, direction/directions as this Hon'ble Court deems just, fit, equitable and proper in the facts and circumstances of the present case;"

2. Shorn off unnecessary details, the factual matrix of the case is that the petitioner-company is a Super Class Contractor registered under the P.W.D. Contractor's Registration Rules, 1967. Pursuant to tender call notice issued by opposite party no.2-Chief Engineer, (DPI &

Roads), Odisha for the work "Widening and Strengthening to Bolangir-Kantabanji Bangamunda-Chandutora Road (SH-42) from 6/00 km to 17/00 km & 18/600 km to 20/600 km under SHDP for the year 2014-15", the petitioner-company participated in the tender process and on being selected signed an agreement with opposite party no.4, vide Pl Agreement No.01 P1 of 2015-16. As per the agreement, the valuation of the work was for Rs.16,93,38,297.00 and the stipulated date of commencement of the work was 20.04.2015 and stipulated date of completion was 19.10.2016. The petitioner completed the work in time, but final bill was not paid.

2.1 During execution of the work, though price of cement, steel, bitumen, pipes, POL decreased and also minimum wage and other material increased, opposite party no.4 did not make payment towards increase in price of materials, but recovered differential cost of Rs.63,31,965/- from the bill of the petitioner. Prior to introduction of amendment of codal provision regarding price variation, the Works Department was following the

circular, vide File No.Codes-8/06-5608/W dated 03.04.2007, in which clause-31 provided for payment of differential cost due to decrease and increase of price of materials. Under clause-31(a)(ii) of the said circular, it was provided that "where original contract period is one year and above, increase/decrease of cost of steel, cement and bitumen are to be paid/recovered. Payments in case of increase are to be made with prior approval of the Government, when the total claim is more than Rs.50,000/-, and with prior approval of the Chief Engineer (as the case may be), when the claim is upto 50,000/-. Recovery in case of decrease shall be made by the concerned Executive Engineer from the contract". Under clause-31(a)(iii), the manner of determination of the cost of the materials was provided as per conditions (i) to (vi) mentioned therein, where the original period of contract is more than six months. Under condition no.(ii) of clause-31(a)(iii), it was provided that where cost of the project is more than Rs.50.00 lakhs, the differential cost on such materials may be paid to the contractor after deducting the

hike percentage amount in the tender for those materials from the calculated amount of differential cost.

2.2 The previous circular dated 03.04.2007, as referred to above, was challenged by the All Odisha Contractors Association in W.P.(C) No.11889 of 2009 (***All Odisha Contractors Association v. State of Odisha***, 2012 (II) OLR-586) and this Court, after hearing the parties, vide judgment dated 06.07.2012, allowed the said writ petition by quashing the circular dated 03.04.2007 and directed the Government to issue fresh guidelines for payment/refund of differential wages of labour and POL irrespective of period of contract. The relevant portions of the observation made by this Court in the aforesaid judgment are quoted below:

> *"10. It is understandable as to why similar conditions are not stipulated against clause No.31(a)(ii). Such a discrimination between original contract executed for the period of one year and above and contract executed for above six months and below one year, does not stand to any reason and is totally impermissible.*
>
> *11. Similarly under clause 31(a) of F2 contract, it is stipulated that vide works department letter No.21369 dated 25.09.1991, the*

reimbursement/refund on variation in price of materials except steel, cement and bitumen will be governed as per clause 31(a)(ii) and 31(a)(iii), labour and POL as per sub-clauses (a-i),(b) and (c) respectively of clause 31 shall be applicable in the prescribed manner.

12. There is no valid reason as to why where the period of completion of work in the agreement is less than one year, no escalation is admissible so far labour and POL are concerned. The only reason given in the counter is that in case of labour and POL the price usually increases annually. Such a plea even assuming to be correct, it has nothing to do with the works executed under any contract. A contract to execute any work is made on any date of a year. Neither the date of execution of contract nor the date of execution of work is same date on which price of POL, and wages of labour increases. Therefore, if after submission of tender and in the course of execution of the work there is only hike in the price with regard to wages of labourers and POL, the same should be taken into consideration irrespective of the period of contract and therefore the executing contractors/agencies are entitled to get the differential amount.

14. In view of the above, we are of the view that the guideline under challenge is discriminatory, unreasonable in the matter of granting differential price to the contractors/executing agencies on account of price hike in steel, Cement, Bitumen, labour and POL as a result of which they sustained loss in case of execution of the work. The same is liable to be quashed and accordingly we quash the guideline under Annexure-1. Opposite parties are directed to issue fresh guideline treating the contractors/executing agencies uniformly with regard to payment/refund of differential cost of material, wages of labour and POL irrespective of the period of contract, keeping in view the observations made hereinabove."

In the result, the writ petition is allowed to the extent indicated above."

2.3 Thereafter, opposite party no.1, without following due procedure, issued circular dated 24.12.2012, wherein observations made by this Court in the above noted case were not followed. Therefore, the petitioner, along with others, including the All Odisha Contractors Association, approached this Court by filing W.P.(C) No.11986 of 2018 and this Court, after due adjudication, vide order dated 16.07.2018, quashed the office memorandum dated 24.12.2012 and directed the authority to issue a fresh circular keeping in view the ratio decided/direction given in the case of ***All Odisha Contractors Association*** (supra) and further observed "it is made clear that any deduction made from the bills of the contractors or any payments made to the contractors in pursuance of the notification dated 24.12.2012 shall be refunded/adjusted by the opposite party-Department or the contractors, as the case may be."

2.4 Pursuant to order dated 16.07.2018 passed in W.P. (C) No.11986 of 2018, the petitioner, vide letter dated 25.07.2018, made a representation before the Executive Engineer for refund of the withheld amount in terms of the said order. Opposite party no.2, vide letter dated 12.11.2018, intimated opposite party no.1 that the petitioner has made agreement with the Kantababanji R&B Division for the work vide agreement No. 01Pl of 2015-16. The work has been completed on 19.10.2016 and the final bill has been paid to the contractors vide voucher no.85 dated 13.09.2017 with recovery of differential cost from the work value of Rs.61,31,964/- (Rs.52,06,471) adjusted from work value and balance amount of Rs.11,25,493/- deposited revenue head as per clause 31 of P1 agreement which was calculated basing on office memorandum dated 24.12.2012 and requested to issue necessary instruction for further course of action at his end.

2.5 Since the petitioner did not receive the lawful dues despite order dated 16.07.2018 of this Court and recommendation of opposite party no.2 for refund of the

differential cost withheld under Annexure-7, it filed Contempt Petition No.962/2019 and this Court issued notice to the opposite parties for non-compliance of the order of this Court.

2.6 Thereafter, opposite party no.4/Executive Engineer, vide letter dated 17.06.2021, intimated the petitioner that as per O.M No.8189/W dated 07.06.2021 of the Govt. in Works Department, Odisha, which says the OM No. 15847/W dated 19.11.2019 will be effective for the period retrospectively from 07.07.2012 to 18.11.2019, the price adjustment calculation was made and it was found that an amount of Rs.1,07,95,320/- is recoverable from the aforementioned work, out of which Rs.63,31,965/- has already been recovered from its final work bill and, thereby, directed to deposit a balance amount of Rs.44,63,355/- for which supplementary agreement is needed for any payment after final bill and to attend office on 21.06.21 to settle the matter of Contempt Case No.962 of 2019 before this Court.

2.7 Contempt Case No.962 of 2019 was finally heard on 09.08.2021 and this Court, vide order dated 09.08.2021, opined that the grievance made constitutes a fresh cause of action and such calculation of the dues by the opposite party no.1, which is to be paid/adjusted to the bill of the petitioner, cannot be considered as a deliberate and willful disobedience of the order of this Court and, by so observing, disposed of the contempt petition giving liberty to the petitioner to challenge the order of opposite party no.1, if so advised. Hence, this writ petition.

3. Mr. P.C. Nayak, learned counsel appearing for the petitioner vehemently contended that opposite party no.4, vide letter dated 17.06.2021 under Annexure-8 intimated that as per Office Memorandum No.8189/W dated 07.06.2021 of the Government of Odisha in Works Department, which says that the Office Memorandum No.15847/W dated 19.11.2019 will be effective for the period retrospectively from 07.07.2012 to 18.11.2019, the price adjustment calculation has been made and found that an amount of Rs.107,95,320/- is recoverable from the

aforementioned work, out of which Rs.63,31,965/- has already been recovered from its final work bill and, thereby, directed to deposit a balance amount of Rs.44,63,355/-, for which a supplementary agreement is needed after final bill, which is completely illegal, arbitrary and unreasonable, in view of the fact that the Office Memorandum dated 19.11.2019 under Annexure-10 shall be a part of the relevant clauses of the DTCN and Agreement and shall take effect from the date of issue, i.e., 19.11.2019. It is further contended that Office Memorandum dated 07.06.2021 under Annexure-11, which stipulates that Office Memorandum dated 19.11.2019 shall be effective for the period retrospectively from 07.07.2012 to 18.11.2019, is illegal, arbitrary, unreasonable and the said Office Memorandum dated 07.06.2021 modifying/amending the Office Memorandum dated 19.11.2019 will not apply in the present case being the contract was signed on 20.04.2015 and the work was completed on 19.10.2016. Thereby, the Office Memorandum dated 07.06.2021 cannot be sustained in the eye of law and the consequential demand so raised

by the authority cannot be admissible to be paid by the petitioner. It is further contended that the agreement for the work was executed on 20.04.2015 and the work was completed on 19.10.2016, when the present circular dated 07.06.2021 had not seen the light of the day and, therefore, as per the said circular, the Works Department circular dated 19.11.2019 cannot be given effect from 07.07.2012 to 18.11.2019 retrospectively, as the circular dated 19.11.2019 provides for an "Appendix to Bid", i.e., "Schedule of Adjustment Data" which was to form a part of the Bid Document and after technical sanction a part of the agreement. As the said circular dated 07.06.2021 has no application to case of the petitioner, the letter dated 17.06.2021, which has been issued basing on such circular dated 07.06.2021, is sought to be quashed. To substantiate his contentions, learned counsel for the petitioner has relied upon the judgments of the apex Court in the case of ***Bharat Sanchar Nigam Ltd. v. Tata Communications Ltd. etc***., 2022 SCC OnLine SC 1280; ***New India Assurance Co. Ltd. v. Ram Dayal***, (1990) 2 SCC 680 and

Polymat India (P) Ltd. v. National Insurance Co. Ltd., (2005) 9 SCC 174.

4. Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties contended that a fresh guideline with regard to price variation/escalation clause in the contract based on the recommendation of Codes Revision Committee and with the concurrence of the Law Department and the Finance Department as well as with the approval of the Government was issued vide Works Department Office Memorandum No.15847/W dated 19.11.2019 in compliance of the order dated 25.04.2018 passed in W.P.(C) No.330 of 2013. So far as payment of dues during the period from 07.07.2012 to 18.11.2019, the matter was discussed again in the Codes Revision Committee in its meeting held on 11.12.2019 and referred to Finance Department and Law Department for their concurrence. On the recommendation of Codes Revision Committee and with the concurrence of the Law Department and the Finance Department as well as with the approval of the Government, a guideline regarding price

adjustment/escalation in works contract for the period from 07.07.2012 to 18.11.2019 was issued vide Works Department Office Memorandum No.8189/W dated 07.06.2021.

It is contended that in compliance of the order dated 16.07.2018 passed by this Court, the Chief Engineer, (DPI & Roads), Odisha, in its letter No.22768 dated 17.06.2021, intimated that the price adjustment in accordance with the substituted clause issued for price adjustment vide Office Memorandum No.15847/W dated 19.11.2019 and Office Memorandum No.8189/W dated 07.06.2021 in conformity to the order of the above case has been calculated and communicated to the agency, i.e., the petitioner by the Executive Engineer, Kantabanji (R&B) Division to accept the calculation basing on the above memorandums in order to settle the case. As per the calculation made by the Executive Engineer, Kantabanji (R&B) Division, the calculation of price adjustment as per Office Memorandum No.15847/W dated 19.11.2019 read with Office Memorandum No.8189/W dated 07.06.2021

comes to Rs.107,95,320/- to be recovered from the petitioner and out of which, an amount of Rs.63,31,965/- has already been recovered and the balance amount of Rs.44,63,355/- is to be recovered from the petitioner. Therefore, there is no illegality or irregularity committed by the opposite party-authority by passing such order and it is contended that the claim made by the opposite party-authority cannot warrant interference of this Court at this stage.

5. This Court heard Mr. P.C. Nayak, learned counsel appearing for the petitioner and Mr. P.P. Mohanty, learned Addl. Government Advocate appearing for the State-opposite parties in hybrid mode and perused the record. Pleadings having been exchanged between the parties, the matter has been disposed of finally with the consent of learned counsel for the parties at the stage of admission.

6. The undisputed fact is that the Government of Odisha in Works Department issued an Office

Memorandum, vide File No.15847 dated 19.11.2019, under Annexure-10, which has been placed at page-81 of the writ petition, to the following effect:-

> *"**OFFICE MEMORANDUM***
>
> *File No.07556900242019-15847/w dt.19-11-19*
>
> *Sub:- Codal/ contractual provisions regarding Price Adjustment in work contract.*
>
> *Codal / contractual provisions regarding Price Adjustment in works contract was under active consideration of Government. After careful consideration, Government have been pleased to make the codal/ contractual provisions regarding Price Adjustment clause due to increase or decrease in rate and price of labour, materials, fuels & lubricants and plant & machineries spare component to be incorporated in DTCN/ condition of Contract as per Annexure-"A".*
>
> *1- This Office Memorandum shall be a part of the relevant clauses of DTCN and Agreement and shall take effect from the date of issue.*
>
> *2- This has been concurred in by Finance Department vide their File No. FIN-WF1-MISC-0031-2019 (OSWAS) dt.23.10.2019 and Law Department vide their UOP No.2218/L dt.29.10.2019."*

On perusal of the aforementioned Office Memorandum, it appears that the Government of Odisha in Works Department was pleased to make the codal/contractual provisions regarding price adjustment clause due to

increase or decrease in rate and price of labour, materials, fuels and lubricants and plant & machineries spare component to be incorporated in DTCN/condition of Contract as per Annexure-A. Annexure-A to Office Memorandum reveals that clause-31(a)(i) deals with adjustment of other materials component; clause-31(a)(ii) deals with adjustment of cement component; clause-31(a)(iii) deals with adjustment of steel component; clause-31(a)(iv) & (v) deals with adjustment of bitumen (VG-30) and pipes; clause-31(b) deals with adjustment of labour component; clause-31(c) deals with adjustment of POL (fuel and lubricant) component; clause-31(d) deals with adjustment of plant and machinery spares component; and clause-31(e) deals with escalation clause.

Appendix to Bid Schedule of Adjustment Data reads as follows:

> *"For all works, adjustment factor for Labour and POL shall be considered @ 5% each. Steel, Cement, Pipes, other materials and Machinery shall contribute to 90% of Price Adjustment and shall be calculated for each work separately during preparation of estimate, shall be approved by the authority during technical*

sanction as a "Schedule of Adjustment Data" and shall from part of the Bid Document."

On perusal of the above paragraph, it is made clear that the price adjustment shall be calculated for each work separately during preparation of estimate and shall be approved by the authority during technical sanction as a "Schedule of Adjustment Data" and shall form part of the bid document. Therefore, the use of word 'shall' puts a mandate, which requires that the said clause must form part of the bid document.

7. In ***Hiralal Agrawal v. Rampadarth Singh***, 1969 SC 244, the apex Court held that the question whether a particular provision of a statute is mandatory inasmuch as it uses the word "shall" or is merely directory cannot be resolved by laying down any general rule but depends upon the facts of each case. The purpose and the object of the statute in making the provision is the determining factor.

8. In ***Sainik Motor v. State of Rajasthan***, AIR 1961 SC 1480, the apex Court held that when a statute

uses the word "shall", prima facie it is mandatory but it is sometime not so interpreted if the context or the intention otherwise demands.

9. In ***State Inspector of Police v. Surya Sankaram Karri***, (2006) 7 SCC 172, while considering the provisions contained under Section 17 of the Prevention of Corruption Act, 1988, the apex Court held that the expression "shall" in proviso to Section 17 of the Act makes the provision mandatory.

10. In ***Hemalatha Garva v. C.I.T.***, (2003) 9 SCC 510, the apex Court held that use of word "shall" in a statute, ordinarily means that the statutory provision is mandatory.

11. In ***Biswanath Poddar v. Archana Poddar***, (2001) 8 SCC 187, while considering the provisions under Section 16(1) and Rule-4 of the West Bengal Premises Tenancy Act, 1956, the apex Court held that use of word "shall" in Section 16 of the Act and Rules indicates that the

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legislature intended the requirement of notice under Section 16 of the Act to be mandatory.

12. In the judgment rendered in the case of ***Bimal Chandra Pradhan*** (supra), in which one of us (Dr. B.R. Sarangi, J.) was a Member, this Court in paragraphs-8, 9,10 and 11 held as follows:-

> *"8. On perusal of the above mentioned pleadings it is made clear that the petitioners' case has been ignored by the authorities. While providing four employment to the nominees of two joint owners of the land namely, Iswar Pradhan and Jeevan Pradhan, they have refused to provide such employment to the nominees of two other joint owners namely, Deba Pradhan (father of the petitioners) and Laxmidhar Pradhan. This clearly indicates the arbitrary and unreasonable exercise of powers by the authorities in giving employment to four persons of two joint owners and not giving employment to other joint co-owners is absolutely a discriminatory one. Therefore, the action of the authorities in providing employment on the plea that there was no vacancy in Category 'D' cannot sustain in the eye of law. The Special Land Acquisition Officer-opposite party no.4 in his counter affidavit has categorically indicated the eligibility of the petitioners to get employment under the Rehabilitation and Resettlement Scheme evolved by the State Government in Annexure-A/4. As such, Sub-Clause-(d) of Clause-4 of the Scheme puts a mandate that in case of families who have lost 1/3rd of the total agricultural holding, one member from each family **shall** be provided with employment according to availability. The use of word '**shall**' in its ordinary import is obligatory. Inasmuch as considering the purport of the Scheme the use of word 'shall' puts a mandate to provide employment to the families of the displaced persons according to availability.*

*9. In **Land Acquisition Officer V. Karigowola,** (2010) 5 SCC 708, the word 'shall' in section 23(1) of the Act came up for consideration where the apex Court held that it would have to be construed as mandatory and not directory.*

*10. In **Pesara Pushpamala Reddy v. G. Veera Swamy**, (2011) 4 SCC 306 referring to the principles of statutory interpretation 12th Edn., 2010, pp. 406-07 (by Justice G.P. Singh), the apex Court has held as follows :*

> *"the use of the word 'shall' raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such as object and scope of the enactment and the consequences flowing from such construction."*

11. Therefore, taking into consideration the above mentioned interpretation of the word 'shall' as used in the present context though ordinarily it imports as a obligatory one, but in essence providing employment to one of the families for loss of 1/3rd of the total agricultural holdings, puts a mandate to provide employment to one of its member from each family according to the availability. Thus, denial of benefit on the ground that there is no availability of vacancy cannot sustain in the eye of law. In view of the fact that as per the pleadings available on record if four persons sponsored by two joint owners have been provided employment, the petitioners could not have been denied such employment being the two other co-joint owners of the land oustees."

13. In ***State of U.P. v. Manbodhan Lal Srivastava***, AIR 1957 SC 912, the apex Court held that the use of word "shall" is a presumption that the particular provision is imperative. As such, instances have been taken on rule-

57(2) of the Schedule-II to the Income Tax Act, 1961, which provides that the full amount of purchase of money payable "shall" be paid by the purchaser to the Tax Recovery Officer on or before the fifteenth day from the date of sale of property. Thereby, by using the word "shall", the apex Court held that it is mandatory on the part of the purchaser to pay the full amount to the Tax Recovery Officer. As such, following this principles, the apex Court time and again held similar view in various subsequent judgments and ultimately got approval in the case of ***Pesara Pushpamala Reddy v. G. Veera Swamy***, (2011) 4 SCC 306.

14. In ***C.N. Paramsivam and Anr. V. Sunrise Plaza and others***, (2013) 9 SCC 460, the apex Court relying upon the word "shall" as well as the earlier decision of the Court on *pari materia* provision in Order XXI of the CPC, held that making of the deposit by the intending purchaser is mandatory.

15. In ***State of U.P. v. Babu Ram***, AIR 1961 SC 751, Hon'ble Justice Subarao, observed that when a statute uses the word "shall", prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute.

16. In ***Vijay Dhanuka v. Najima Mamtaj***, (2014) 14 SCC 638, the apex Court, while interpreting Section 202 of the Cr.P.C, which provides that the Magistrate "shall" in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding, held that the word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. However, on looking at the intention of the Legislature, the Court found that the provision is aimed at preventing

innocent persons from being harassed by unscrupulous persons making false complaints, and therefore the inquiry or investigation contemplated by the provision before issuing summons was held to be mandatory.

17. Applying the above principles to the present case, it is made clear that the Office Memorandum dated 19.11.2019 shall be a part of the DTCN and the agreement and shall take effect from the date of its issue, i.e. 19.11.2019. Thereby, the Office Memorandum dated 19.11.2019 makes it clear that it will apply prospectively w.e.f. 19.11.2019. Admittedly, the petitioner executed the agreement on 20.04.2015 and completed the work on 19.10.2016. Therefore, the Office Memorandum dated 19.11.2019 has no application to the case of the petitioner, as the same shall apply prospectively.

18. So far as Office Memorandum under Annexure-11 is concerned, the same was issued by the Government of Odisha in Works Department on 07.06.2021 to the following effect:-

"No-:-07556900242019-8189/W., dated 7.6.2021

Sub- Codal / Contractual provisions regarding Price Adjustment in works Contract.

Codal/Contractual provisions regarding Price Adjustment in Works Contract was under active consideration of Government for some time past. After careful consideration, Government was pleased to make the codal/contractual provisions regarding Price Adjustment Clause due to increase or decrease in rate and price of Labour, Materials, Fuels & Lubricants and Plant and machineries. Spare Components vide Works Department Office vide Works Department Office Memorandum No. 15847/W dated 19.11.2019, which was effective from the date of issue of the said Office Memorandum.

2. Now, in continuation of this, Government have been pleased to order that the Price Adjustment clause due to increase or decrease in rate and price of Labour, Materials Fuels & Lubricants and Plant and Machineries, Spare Components issued vie Works Department O.M No.15847/W dated 19.11.2019 will be effective for the period retrospectively from 07.07.2012 to 18.111.2019 subject to the following stipulation;

(i) Administrative Department will have complete proof (including documentary proof) for cost escalation in terms of actual work done.

(ii) A certificate has to be signed by competent authority, if delay is not due to the actions of contractor concerned.

(iii) If there are avoidable administrative delays, responsibility has to be fixed on Government Servants concerned for cost escalation and a consolidated Action Taken Report in this matter be submitted to Finance Department.

> *3. This has been concurred in by Finance Department vide their OSWAS File No. FIN-WF1-MSIC-0031-2019."*

On perusal of the aforementioned Office Memorandum dated 07.06.2021, it appears that the said Office Memorandum modifies the Office Memorandum dated 19.11.2019 to the extent that it will be effective retrospectively for the period from 07.07.2012 to 18.11.2019 nullifying the effect of the judgment passed by this Court from time to time. Thereby, such action of the opposite party-authority is arbitrary, unreasonable and contrary to the provisions of law.

19. Similar question had come up for consideration before the apex Court in ***Bharat Sanchar Nigam Ltd.*** (supra), paragraphs-26, 29 & 30 of the judgment read as follows:-

> *26. The limited question which has been raised for our consideration is as to whether the rates prescribed by the appellant under the circular dated 12th June, 2012 could be applied retrospectively w.e.f 1st April, 2009 to be applicable from 1st April, 2013, as observed by the Tribunal and whether the appellant is entitled to claim 10% notional increase every year from 1st April, 2009 to be applicable from 1st April, 2013.*
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> *xxx xxx xxx*

> *29. It is a settled principle of law that it is the Union Parliament and State Legislatures that have plenary powers of legislation within the fields assigned to them, and subject to certain constitutional and judicially recognized restrictions, they can legislate prospectively as well as retrospectively. Competence to make a law for a past period on a subject depends upon present competence to make a law for a past period of a subject depends upon present competence to legislate on that subject. By a retrospective legislation, the Legislature may make a law which is operative for a limited period prior to the date of its coming into force and is not operative either on that date or in future.*
>
> *30. The power to make retrospective legislations enables the Legislature to obliterate an amending Act completely and restore the law as it existed before the amending Act, but at the same time, administrative/executive orders or circulars, as the case may be, in the absence of any legislative competence cannot be made applicable with retrospective effect. Only law could be made retrospectively if it was expressly provided by the Legislature in the Statute. Keeping in mind the afore-stated principles of law on the subject, we are of the view that applicability of the circular dated 12th June, 2012 to be effective retrospectively from 1st April 2009, in revising the infrastructure charges, is not legally sustainable and to this extent, we are in agreement with the view expressed by the Tribunal under the impugned judgment."*

On perusal of the above, it would be apparent that the power to make retrospective legislations enables the legislature to obliterate an amending Act completely and restore the law as it existed before the amending Act, but at the same time, administrative/executive orders or

circulars, as the case may be, in the absence of any legislative competence cannot be made applicable with retrospective effect. Only law could be made retrospectively if it was expressly provided by the legislature in the statute. Therefore, when in the Office Memorandum, which was issued on 19.11.2019 giving effect prospectively, there was no difficulty, subsequent Office Memorandum was issued on 07.06.2021 modifying the Office Memorandum dated 19.11.2019 giving effect retrospectively from 07.07.2012 to 18.11.2019, subject to conditions stipulated in clause-(i) to clause-(iii), when no such power has been vested with the authority to give such retrospective effect. Consequentially, the Office Memorandum dated 07.06.2021 issued giving retrospective effect to the Office Memorandum dated 19.11.2019 for the period from 07.07.2012 to 18.11.2019 cannot be sustained in the eye of law.

20. In ***New India Assurance Co. Ltd.*** (supra), the apex Court held that when a policy of insurance is taken on a particular date, its effectiveness is from the commencement of that date. Therefore, the apex Court is of

the opinion that the High Court was right in holding that the insurer was liable in terms of the Act to meet the liability of the owner under the award.

Applying the said ratio to the present case, when the Office Memorandum dated 19.11.2019 puts a specific date of its effectiveness, i.e., from the date of commencement w.e.f. 19.11.2019, issuance of Office Memorandum dated 07.06.2021 giving retrospective effect to the said Office Memorandum dated 19.11.2019 from 07.07.2012 to 18.11.2019 is absolutely arbitrary, unreasonable and contrary to the provisions of law.

21. In ***Polymat India (P) Ltd***. (supra), the apex Court, referring to the judgment in ***United India Insurance Co. Ltd. v. M.K.J. Corpn***., (1996) 6 SCC 428, in paragraph-23 held as follows:

> *"In this connection, our attention was invited to decision of this Court in the case of United India Insurance Co. Ltd v. M.K.J Corpn. Wherein it was observed as under: (SCC p. 431, para 7).*
>
> > *"After the completion of the contract, no material alteration can be made in its terms except by mutual consent.""*

22. The undisputed fact is that the petitioner entered into agreement on 20.04.2015 and completed the work on 19.10.2016. Therefore, after completion of the contract, no material alteration can be made in its terms except by mutual consent. As such, in the present case, neither any mutual consent nor any opportunity of show cause was given to the petitioner and the opposite parties, unilaterally and arbitrarily, have made a price adjustment and after calculation found that the petitioner is liable to pay Rs.107,95,320/- and when the Department has already recovered Rs.63,31,965/-, directed the petitioner to deposit balance amount of Rs.44,63,355/-, even though the work was completed on 19.10.2016, much before the Office Memorandum came into force. Therefore, the Office Memorandum dated 07.06.2021 under Annexure-11 giving effect of the Office Memorandum dated 19.11.2019 retrospectively for the period from 07.07.2012 to 18.11.2019 cannot be sustained in the eye of law. Therefore, the said Office Memorandum dated 07.06.2021 to the above extent is liable to be quashed.

23. In view of the above fact and law, as discussed above, the Office Memorandum dated 07.06.2021, by which the Office Memorandum dated 19.11.2019 has been given effect retrospectively for the period from 07.07.2012 to 18.11.2019, cannot be sustained in the eye of law and the same is liable to be quashed and is hereby quashed to the extent, as indicated above. Consequentially the order passed on 17.06.2021 under Annexure-8, basing upon the Office Memorandum dated 07.06.2021 under Annexure-11 giving effect to the Office Memorandum dated 19.11.2019 with retrospective manner and as a consequence of which price adjustment was again calculated and found that the petitioner is liable to pay Rs.107,95,320/- and, when the Department has already recovered Rs.63,31,965/-, directed the petitioner to deposit balance amount of Rs.44,63,355/-, even if the work had already been completed on 19.10.2016, cannot be sustained in the eye of law and, accordingly, the same is liable to be quashed and is hereby quashed.

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24. In the result, the writ petition is allowed to the extent, as indicated above. However, there shall be no order as to costs.

.....
DR. B.R. SARANGI,
JUDGE

M.S. RAMAN, J. I agree.

.....
M.S. RAMAN,
JUDGE

Orissa High Court, Cuttack
The 8th September, 2023, Alok

Signature Not Verified
Digitally Signed
Signed by: ALOK RANJAN SETHY
Designation: Secretary
Reason: Authentication
Location: Orissa High Court
Date: 08-Sep-2023 14:31:58