

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Revision No.184 of 2013

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Dinesh Kumar Yadav Son of Rejendra Prasad Yadav, Resident of Mohalla-
Azad Nagar, Ward No. 9. Madhepura, P.S- Madhepura, District-
Madhepura.

.... Petitioner/s

Versus

1. The Stare of Bihar, Through the Principal Secretary, Road Construction
Department, Govt. Of Bihar, Nirman Bhawan, Bailey Road, Patna.
2. The Executive Engineer, Road Construction Division, Madhepura.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Uma Shankar Tiwary

For the Respondent/s : Mr. Kundan Bhadur Singh

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL ORDER

10 14-10-2015

Heard the learned counsel appearing on behalf of the
petitioner and the learned counsel appearing on behalf of the
opposite parties.

This revision application has been filed under
Section 13 of the Bihar Public Works Contracts Disputes
Arbitration Tribunal Act, 2008 (hereinafter referred to as the
'Arbitration Tribunal Act) against the part of the award dated
12.07.2013 passed by the Tribunal whereby the claim of the
petitioner with regard to the payment for earth work by carriage
has been declined. The admitted fact is that there was an
agreement between the petitioner and the opposite party no. 2
Executive Engineer for the construction work consisting of



widening and strengthening of Alam Nagar Budhmarg Chowk Road in K.M. 1 to 16 for the year 2006-07. As the road was passing through populated areas in village where earth was not readily available, it is the case of the petitioner that upon the instruction of the opposite party no. 2-Executive Engineer, the petitioner completed the earth work by bringing earth by carriage which involved incurring substantial cost. It is also the case of the petitioner that the measurement of the earth work done by the petitioner by carriage was recorded by the Junior Engineer in the measurement book but the payment towards the said cost was refused on the ground that there was no such provision for extra work in the agreement. After the rejection of the petitioner's representation for payment of the extra work (earth work done through carriage), the petitioner took the matter before the Tribunal under Section 9 of the Arbitration Tribunal Act upon which the Reference Case No. 165 of 2010 was initiated. The petitioner claimed altogether five reliefs before the Tribunal out of which the relief no. 1 was for publishing an award directing the respondent-Executive Engineer to make payment against the earth work (earth work by carriage) amounting to Rs. 315375/-. The learned Tribunal passed the award on 12.07.2013 and has rejected the claim of the petitioners with regard to cost for carriage of earth

towards earth work. In this revision application the petitioner has assailed the said award to that extent alone.

The learned counsel appearing on behalf of the petitioner has submitted that the Tribunal has failed to exercise the jurisdiction vested in it while rejecting the claim of the petitioner for payment of cost of earth for the earth work. It has been posited that the learned Tribunal has acted with material irregularity in ignoring clause-11 of the agreement authorizing the competent authority to give direction for performance of extra work. It has been also submitted that the fact that the petitioner has done the extra work by the bringing earth at the sight incurring substantial cost has been admitted by the opposite party-Executive Engineer but the payment has been refused only on the ground that there was no provision for the same in the agreement. It has also been submitted that the Tribunal has not taken into notice the materials on record as well as settled principle of law while turning down the claim of the petitioner in this regard.

The learned counsel appearing for the opposite parties, however, supported the impugned award and has submitted that the petitioner is not entitled to the payment as claimed as the same is beyond the agreed terms of the contract.

From perusal of clause-11 of the agreement



(Annexure-1), it is apparent that the engineer in-charge has been empowered to make any alteration in addition to original specification, drawings and instructions that may appear to him necessary or indispensable during the progress of the work and any such additional work which has been required to be carried out by the contractor shall be taken as the part of the work on the same condition in all respects on which he has agreed to do the main work. It is, therefore, manifest that the agreement between the petitioner and the opposite parties has not altogether ruled out additional/extra work which the petitioner has claimed to have done on the direction of the Executive Engineer. The petitioner has claimed that the earth work done by him by bringing earth through carriage has been entered in the measurement book by the Junior Engineer and has also annexed the photo copies of such measurement book with this revision application. It has also been claimed by the petitioner that the entries in the measurement book done by the Junior Engineer was duly approved by the executive engineer. From the letter dated 20.07.2009 (Annexure-1) addressed to the Executive Engineer, Road Construction Department Division Madhepura, it further appears that the fact of carriage of earth by the petitioner has been admitted to have been done but the payment has been refused only on the ground that the

same was not approved by the department.

From the impugned order, it appears that the Tribunal has refused the claim of the petitioner in this regard on the ground that there was no provision for extra work in the agreement and absence of cogent evidence regarding the claim. However, the Tribunal does not appear to have taken into notice any of the evidence adduced in this regard by the petitioner before reaching to the conclusion that there is absence of cogent evidence. The learned Tribunal was required to scrutinize the evidence adduced by the parties in this regard and thereafter to arrive at the conclusion. If it is found as fact that the petitioner has done the extra work incurring cost, the same could not have been refused only on the ground that the said extra work has not been provided in the contract. The principle in this regard has been well laid down by the Apex Court in the case of **State of West Bengal Vs. M/s B.K. Mondal, A.I.R. 1962 S.C. 779** where their lordships have laid down that Section 70 of the Contract Act prevents unjust enrichment even by government. It would also be fruitful here to take into notice a Bench decision in the case of **State of U.P. Vs. Chandra Gupta, A.I.R. 1977 All. 28** where almost on identical facts, it has been observed as follows:-

“.....Another aspect of the matter which



deserves notice at this place is as to whether the plaintiff could recover the amount under section 70 of the Indian Contract Act, despite the fact that no formal document was executed between the plaintiff and the defendant for the extra work. The term 'extras' is generally used in relation to the works which are not expressly or impliedly included in the original contract and, therefore, not included in the original contract price, provided the work is done within the frame work of the original contract. Whether a particular work is extra or not will depend upon the terms and conditions of the contract, its specifications, plans, drawing, nature of the work etc.This work having been thus done within the framework of the contract is liable to be treated as extra work. Since, the defendant has received benefit by this extra work, it is liable to pay for the same. Section 70 of the Contract Act is not founded on contract, but embodies the equitable principle of restitution and prevention of unjust enrichment.....”

For the aforesaid reasons and discussions, this Court comes to the conclusion that the Tribunal has committed error of jurisdiction and has also acted with material irregularity in

refusing the claim of the petitioners with regard to the extra work done by him in the nature of carriage of earth work without taking into consideration the evidence adduced in that regard by the petitioner and also the settled principles of law as abovementioned.

This revision application, therefore, succeeds and the impugned award to the extent of refusal of the claim of the petitioner for extra work done by carriage of earth to the works earth is set aside. The matter is remanded back to the learned Tribunal which shall formulate the point for determination appropriately in accordance with the relief sought for by the petitioner in regard to the extra work done by him, as directed, in the nature of carriage of earth for the purpose of effectively completing the assigned work under the agreement, and pass a fresh award after considering the evidence on record and granting opportunity of hearing to the parties. As the matter has been substantially delayed, the learned Tribunal is directed to dispose of the matter expeditiously preferably within three months from the date of receipt/ production of this order.

(V. Nath, J)

Devendra/-

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