

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/FIRST APPEAL NO. 3078 of 2013****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J. C. DOSHI**

Approved for Reporting	Yes	No
		No

RAJENDRASINH GYANSINH BHARDWAJ

Versus

SUGAM CONSTRUCTION -PVT LTD & ANR.

Appearance:

MR KG SUKHWANI(871) for the Appellant(s) No. 1

KEDAR B BINIWALE(3030) for the Defendant(s) No. 2

REFUSED SERVED (N)(10) for the Defendant(s) No. 2

CORAM:**HONOURABLE MR. JUSTICE J. C. DOSHI****Date : 10/08/2026****JUDGMENT**

1. By way of this appeal under section 96 of Code of Civil Procedure, 1908 (for short "**the CPC**"), unsuccessful plaintiff questions legality and propriety of the judgment and decree dated 25.07.2013 passed in Special Civil Suit No.12 of 2001 by the learned 4th Additional Senior Civil Judge, Kheda at Nadiad (for short "**the Trial Court**") by which plaintiff's suit was dismissed with cost to be paid to the defendants.

2. For convenience the parties are referred as per their status before the learned Trial Court.

3. Brief facts are that plaintiff - Rajendrasinh Gyansinh Bhardwaj filed Special Civil Suit No.12 of 2001 before the learned Trial Court seeking recovery of Rs.10 lakhs with 12% interest from the date of suit till realization jointly and severally from defendants; inter-alia the plaintiff pleaded that plaintiff carries business of constructing buildings, bridges and infrastructure in the name and style of Shri Bhardwaj and Sons at Nadiad. Defendant no.2 National Building Construction Corporation Ltd. (for short "**NBCC**") is Government of India enterprise engaged in constructions of roads, bridges and building. Government of Gujarat by entering into contract with NBCC granted work of construction of express highway. Contract was divided into four parts. One of the part was assigned by NBCC to defendant no.1 - Sugam Constructions Pvt. Ltd. by executing sub contract. According to plaintiff, in turn Sugam Constructions Pvt. Ltd. entered into agreement with plaintiff on 26.09.1995 assigning part of original contract and to carry out work. According to plaintiff, Sugam Constructions Pvt. Ltd. stopped doing its work and therefore, on recommendation of NBCC, said work was carried out. As pleaded by plaintiff, NBCC made payment to the plaintiff directly and as and when work is completed to the tune of Rs.46,69,158.76/-. Out of this amount, the appellant - plaintiff received Rs.39,21,481/- and outstanding amount of Rs.7,47,677.76/- was payable to plaintiff. According to plaintiff, NBCC has paid outstanding amount of Rs.7,47,677.76/- to Sugam Constructions Pvt. Ltd. The

plaintiff was deprived of said amount.

3.1. In line of aforesaid bundle of facts, the plaintiff pleaded that amount of Rs.7,47,677.76/- is payable to the plaintiff. He is entitled to receive amount of Rs.1,34,385/- towards difference in price and Rs.1,17,964.24/- towards loss due to increase in price at 12% aggregating to Rs.10 lakhs.

4. Notice were issued to both, Sugam Construction Pvt. Ltd. and NBCC, however, notice were not replied.

5. In background of aforesaid facts, plaintiff filed Special Civil Suit for recovery of amount. In the suit, Sugam Construction Pvt. Ltd. appeared and filed written statement at Exh.11 and raised multiple objections including objection of jurisdiction, bar of limitation and misjoinder of parties and also denied agreement dated 26.09.1995. NBCC though was served did not appear before the learned Trial Court and suit proceeded against NBCC. The plaintiff filed documentary evidence. The plaintiff was not cross examined by Sugam Construction Pvt. Ltd. or NBCC; plaintiff instead of filing further evidence filed closing purshish. Consequently, appellant filed application Exh.48 to delete Sugam Construction Pvt. Ltd. from suit proceedings, it was allowed. Sugam Construction Pvt. Ltd. was deleted.

6. Learned Trial Court in absence of NBCC passed ex-parte decree and directed NBCC to pay Rs.6,47,677.76 ps. with compoundable interest @ 12% from the date of suit. During

execution proceedings, NBCC came to know about ex-parte proceedings and decree. Hence, having remained unsuccessful before the learned Trial Court and District Court, NBCC preferred Special civil Application No.8956 of 2010 before this Court to challenge ex-parte decree, whereby, ex-parte decree was quashed and set aside on condition that NBCC shall deposit decretal amount and file its written statement within 30 days. Pursuant to the order passed by this Court, NBCC deposited decretal amount before the learned Trial court, and filed written statement (Exh.99), in which they raised contention including non-existence of privity of contract between plaintiff and NBCC in as much as Exh.34 agreement did not bear signature of NBCC's authorized officer. The evidence in the restored proceeding was taken again, and ultimately, learned trial Court did not believe execution of Exh.34; believed non existence of privity of contract and consequently, dismissed the suit.

7. Being aggrieved, the plaintiff has filed present appeal.
8. Learned advocate Mr. Paras Sukhwani for the appellant filed written submission, which is taken on record.
9. Learned advocate Mr.Kedar Beniwal appearing for NBCC, however, more than once, he did not remain present, therefore, notice was issued and served to NBCC, yet non remain present to argue the matter.
10. Short and substance of argument of learned advocate

Mr.Sukhwani reads as under :-

- (a) That learned Trial Court erred in believing that plaintiff has failed to prove agreement Exh.34.
- (b) That learned Trial Court erred in believing that Exh.34 could be held to be proved document in view of not following procedure laid down in section 65 of the Indian Evidence Act to lead secondary evidence.
- (c) That learned Trial Court erred in believing that no privity of contract existed between plaintiff and NBCC.
- (d) That appellant's oral evidence remained unchallenged and that unchallenged evidence has not been accepted by the learned Trial court, therefore, the finding is erroneous on facts.
- (e) That the learned Trial Court wrongly relied upon the, testimony of NBCC's witness at Exh.103.
- (f) That the learned Trial court wrongly relied on the decision in reported in AIR 2007 SC 1721 and 2011 (1) GLH 586 for the proposition that secondary evidence is inadmissible without proper foundational proof.
- (g) That Exhibit 34 (agreement) was in the custody of NBCC and Sugam Construction Pvt. Ltd. and therefore, filing of the copy of Exhibit 34 which remained in hand

of the, plaintiff should not be treated as filing of secondary evidence but was required to consider as primary evidence.

(h) That finding of learned Trial Court is wrong on the aspect that without examining the authorized officer of Sugam Construction Pvt. Ltd., plaintiff cannot prove Exhibit 34. The, Sugam Construction Pvt. Ltd. was deleted with the leave of the Court and therefore, it is wrong on the part of the Trial court to find a fault of the plaintiff, for not examining the witness of Sugam Construction Pvt. Ltd., who is already deleted from array of defendants.

(i) That the learned Trial Court failed to understand that NBCC has directly made payment to the plaintiff and also issued a TDS certificate in favor of plaintiff. The payment made to the plaintiff, directly from NBCC clearly establish a contractual relationship between plaintiff and NBCC, which in turn, also, raises the liability of NBCC to pay, outstanding amount. The TDS certificate issued by NBCC produced in evidence at Exhibit 66 to 68, sufficiently establish that contractual relationship existed between, plaintiff and NBCC, as TDS certificate are independent primary evidence, created by the NBCC itself, therefore, it is reliable evidence and thus even if plaintiff has failed to prove Exhibit 34 - the contract, the TDS certificate issued by NBCC, Exhibit 66 to, 68 are sufficient to infer and establish contractual

relationship between the plaintiff and NBCC, however, learned Trial Court failed to notice this legal proposition.

(j) That the learned Trial Court wrongly interpreted word “sub-contractor” appearing in TDS certificate. It is submitted that the description “sub-contractor” in TDS certificate identifies plaintiff's position in contractual chain and not the identity of the party with whom the plaintiff entered direct relationship for the purpose of payment.

(k) That NBCC has made direct payment to the plaintiff, the fact which is undisputed, and, yet, the learned Trial Court did not consider the same and wrongly believed that in absence of privity of contract, NBCC cannot be held liable to pay any outstanding amount.

(l) That learned Trial Court committed serious error in giving undue weightage to the, NBCC's witness by discarding appellant's unchallenged evidence.

(m) That the learned Trial Court wrongly interpreted notice Exh. 35, by which plaintiff not only called Sugam Construction Pvt. Ltd., but also NBCC to pay the outstanding amount, but, by erroneous interpretation, the learned Trial Court, held plaintiff sought recovery only from Sugam Construction Pvt.Ltd. thereby, the learned Trial Court, committed serious error in not

believing the concept of joint promise as far as section 37 of the Contract Act.

- (n) That the plaintiff can recover the outstanding amount from NBCC or Sugam Construction Pvt. Ltd. as Sugam Construction Pvt. Ltd. and NBCC are joint promiser and plaintiff can enforce its right against any of the joint promisers.

10.1 Mainly on above arguments, learned advocate, Mr. Paras Sukhwani, submitted to allow the appeal and set aside the judgment and decree and grant relief as prayed for in the suit.

11. As observed herein above, non remain present for the respondent.

12. I have heard learned advocate for the appellant. I have also applied mind to impugned judgment and decree as well as Record and proceedings of the suit.

13. The question that arise for consideration in this appeal is Whether the appellant/plaintiff has successfully establish the existence of a legally binding contract or privity of contract between the plaintiff and the National Buildings Construction Corporation (NBCC)? Whether the appellant/plaintiff has successfully discharged the burden of proof to establish that Sugam Constructions Pvt. Ltd. and NBCC were joint promisors? and if yes, whether plaintiff in a position to enforce contractual obligation against any of the joint

promisers?

14. Before I discuss the dispute raised by the party, and evidence led by the parties in that regard, in order to understand the, plaintiff's claim, it is necessary to refer plaintiff's pleadings. In para 2 of the plaint, it is pleaded by plaintiff that NBCC has executed contract with Sugam Construction Pvt. Ltd. and in turn, Sugam Construction Pvt. Ltd. has executed the contract with plaintiff. Crux of the pleadings is in para 2 to 5 of the plaint which are relevant which reads as under (it is in Gujarati, for better understanding it is translated in English):

“(2) In the present case, Defendant No. 2 is a construction limited company. They were awarded a contract No. 4 for the Bridge on Express Highway project by the Government of Gujarat. As the work was substantial, they sub-divided it and entered into an agreement with Defendant No. 1 to execute a portion of the work. Since Defendant No. 1 also had a vast volume of work, they entered into an agreement with us, the Plaintiff, on 26-09-1995 at Nadiad.

(3) At a certain stage, Defendant No. 1 halted the work as stated above, which was undertaken from Defendant No. 2. As a result, if the work remained incomplete, the payments would not be released. Therefore, upon the recommendation of Defendant No. 2, Defendant No. 1 entrusted the completion of the said work to the Plaintiff.

(4) As we, the Plaintiff, progressed with the execution of the work, Defendant No. 1 made payments to us in installments. We executed total work amounting to Rs.46,69,158.76, out of which we received Rs.39,21,481/-. Since the original contract was executed between Defendant No. 1 and Defendant No. 2,

Defendant No. 1 collected the outstanding balance of Rs.7,47,677.76 from Defendant No. 2, which rightfully should have been remitted to us.

(5) The aforementioned outstanding amount of Rs.7,47,677.76, along with the price escalation difference post-agreement, interest, and damages is recoverable from Defendant No. 1 as detailed below. Furthermore, since the principal work pertained to Defendant No. 2, they are equally responsible for ensuring the full payment for the work executed by us. Therefore, both the Defendants are jointly and severally liable, necessitating the institution of the present suit against both of them to recover our outstanding dues of Rs. Ten Lakhs as detailed below."

15. It is plaintiff's own pleading that NBCC has entered contract with Sugam Construction Pvt. Ltd. and in turn, Sugam Construction Pvt. Ltd. entered into contract with plaintiff. Sugam Construction Pvt. Ltd. had stopped construction work and on recommendation of NBCC, work was handed over by Sugam Construction Pvt. Ltd. to the plaintiff. Out of total work of Rs.46,69,158.76, total amount of Rs.39,21,481/- was paid and remaining amount of Rs.7,47,677.76 was paid by NBCC to Sugam Construction Pvt. Ltd. According to plaint, said amount has been usurped and not paid to the plaintiff.

16. In view of the aforementioned pleadings, the plaintiff's suit lies principally against Sugam Construction Pvt. Ltd., whereas even from pleading it is proved that NBCC has no privity of contract with the plaintiff. The pleadings clearly and unambiguously establish that no contractual relationship ever

existed between the plaintiff and NBCC. The sub contract was executed solely between the plaintiff and Sugam Construction Pvt. Ltd. Furthermore, the claimed outstanding amount of ₹7,47,677.76 has already been paid by NBCC to Sugam Construction Pvt. Ltd. Consequently, even if the plaintiff proves the existence of the outstanding dues, liability rests solely with Sugam Construction Pvt. Ltd. to pay outstanding amount to plaintiff. Surprisingly, Sugam Construction Pvt. Ltd. has been deleted from the array of parties on own by the plaintiff vide Exhibit 48. During cross-examination, the plaintiff's witness (Exhibit 30) admitted that Sugam Construction Pvt. Ltd. paid ₹1 lakh toward the outstanding dues, resolving all disputes against them. Thus, plaintiff has deleted Sugam Construction Pvt. Ltd. from the suit. Thus on legal conspectus, following the deletion of the principal defendant, the plaintiff retains no cause of action to continue the suit against NBCC, who is merely joined as formal party.

17. The learned counsel for the appellant made two-fold submission: first, that privity of contract exists between the parties as NBCC issued the TDS certificates directly to the plaintiff; and second, that Sugam Construction Pvt. Ltd. and NBCC acted as joint promisors, thereby enabling the plaintiff to enforce liability against either party under Sections 37 to 44 of the Indian Contract Act, 1872. Firstly, upon an examination of Exhibit 34, even if this Court assumes the document to be duly proved, it is only agreement executed by NBCC pursuant to a tender process. It is not the plaintiff's case that it participated or bid in the tender floated by NBCC,

nor did NBCC at any point awarded the express highway contract directly to the plaintiff. Consequently, even if Exhibit 34 is held to be proved, it fails to help the plaintiff's case or establish contractual privity.

18. Suit notice on record demonstrate that plaintiff has claimed amount from Sugam Construction Pvt. Ltd.

19. Insofar as the TDS certificates produced as Exhibits 66 to 68 are concerned, on perusal I find that the plaintiff's argument of inferring privity of contract between plaintiff and NBCC has no substance. The said TDS certificates were issued to the plaintiff solely at the instance of Sugam Construction Pvt. Ltd., notwithstanding that the corresponding payments were disbursed directly to the plaintiff by NBCC. Under the provisions of the Income Tax Act, 1961, statutory deduction of tax at source is mandatory while making specified payments. Adhering to these statutory rules, NBCC directly released the amount to the plaintiff at the instruction of Sugam Construction Pvt. Ltd. thereby issuance of TDS certificate directly in name of plaintiff at the most prove payment to plaintiff, it has nothing to do with concept of privity of contract. Mere payment to plaintiff cannot signify or validate existence of contractual relationship. Consequently, the issuance of the TDS certificates justly establishes the status of the plaintiff as a "sub-contractor" and does not create any privity of contract between the plaintiff and NBCC.

20. Learned advocate Mr. Sukhwani, submitted that the plaintiff's status as a "subcontractor" merely reflects a chain of contracts. This argument fails to impress the Court. The plaintiff remains a "subcontractor" strictly under Sugam Construction Pvt. Ltd., and any liability arising therefrom is confined solely to the relationship between the plaintiff and Sugam Construction Pvt. Ltd. Plaintiff having voluntarily deleted Sugam Construction Pvt. Ltd. from the array of parties, cannot now maintain the present suit against NBCC.

21. As far as argument of joint promisors are concerned, let refer Section 42, 43 and 44 of the Indian Contract Act. They read as under :-

"42. Devolution of joint liabilities.—

When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

43. Any one of joint promisors may be compelled to perform.—

When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any 'one or more of such joint promisors to perform the whole of the promise.

44. Effect of release of one joint promisor.—

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint

promisors, neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors."

22. When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons are jointly with survivors are liable to fulfill the promise. In case of joint promisors, any of the promisor may be compelled to perform and one of the joint promise is released, liability can be enforced against other promisor. However, in order to invoke the principle of joint promise, the plaintiff is required to prove that a contract was executed, whereby NBCC was joint promisors along with Sugam Construction Pvt. Ltd. A person cannot be subject to obligation of the contract to which he is not a party. The logical sequence is that a stranger cannot be held liable under the contract if he was not a party to it. In the present case, the plaintiff totally failed to prove that NBCC was a joint promisor and has promised to pay the amount for the work carried out by plaintiff.

23. Noteworthy that pleadings reproduced herein above alone are sufficient to discard plaintiff's suit. Moreover, evidence strengthen the view of Court.

24. In light of the aforesaid reasons, the Court finds no reason to interfere with impugned judgment and decree. The appeal sans merits and accordingly, stands dismissed. Impugned judgment is confirmed. No order as to costs. Interim relief granted earlier, if any, stands vacated. Decree

be drawn. Record and proceedings be send back to learned Trial Court concerned.

25. Co-ordinate Bench vide order dated 17.06.2014 in Civil Application No.4135 of 2014 has released the amount of Rs.14,44,178/- deposited by NBCC subject to outcome of the main appeal. As the appeal is dismissed said order dated 17.06.2014 is made absolute.

(J. C. DOSHI,J)

SATISH