

GAHC040001002016



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : RFA/2/2016

NHPC LTD AND 3 ORS.
FORMERLY KNOWN AS NATIONAL HYDROELECTRICAL POWER
CORPORATION LTD. A GOVT. IDNIA ENTERPRISE, REP. BY ITS CHAIRMAN
and MANAGING DIRECTOR, NHPC OFFICE COMPLEX, SECTOR-33,
FARIDABAD-121003, MOBILE NO. 97748879772: THE EXECUTIVE
DIRECTOR

Age:
Occupation :

3: THE GENERAL MANAGER

Age:
Occupation :

4: THE CHEIF EGINEER

Age:
Occupation

VERSUS

M/S M.S. ENTERPRISES
SORA BUILDING, PO. ALONG, WEST SIANG DIST.A P 2:SRI PAWAN KR.
JAIN

Age: 0
Occupation :

3:THE MANAGING DIRECTOR

Age: 0

Occupation :

4:THE DIRECTOR

Age: 0

Occupation :

5:THE PROJECT DIRECTOR

Age: 0

Occupation

Advocate for the Petitioner : MrsS Nag

Advocate for the Respondent : Mr. D. Panging

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 01.08.2023

Date of judgment & order : 11.08.2023

JUDGMENT & ORDER (CAV)

Heard Ms. S. Nag, learned counsel for the appellants. Also heard Mr. D. Panging, learned counsel appearing on behalf of the respondents.

2. This is an appeal under Section 96 of the Code of Civil Procedure, 1908, praying for setting aside the judgment & decree, dated 31.07.2015, passed by the learned Additional District Judge, Basar, West Siang District, Arunachal Pradesh, in Money Suit No. 161/2006.

3. The brief facts of the case is that the respondents/plaintiffs filed a money suit, being Money Suit No. 161/2006, stating that the respondents/defendants (i.e. respondent Nos. 3, 4 & 5 in the present appeal) placed an order for supplying 4,000 bags of cement @ Rs. 212/- per bags plus cartage @ Rs. 0.80 paise per quintal and also requested him to deploy minimum 04 trucks for carrying the said quantity of cement to the store site, i.e. at Kamba/Balak Store site, vide letter dated 09.07.2003. The respondents/defendants assured the respondents/plaintiffs that the payment shall be made within 20 (twenty) days after receipt of the material at the site.

4. It is stated that the present appellant, i.e. NHPC, assured the respondents/defendants that in case the respondents/defendants do not make the payment, NHPC will make the concerned payment. The respondents/defendants again, vide letter dated 26.07.2003, placed an order for supply of 10,000 bags of cement for the civil work of Kambang H E Project. After supply of 4,160 bags of cement, the respondents/ plaintiffs submitted the bill dated 23.07.2003 for an amount of Rs. 11,18,874/- for the cement @ Rs. 212/- per bag along with the transportation charges @ Rs. 0.80/- paise per quintal from Likabali to Kambang. The respondents/plaintiffs again submitted another bill, dated 04.08.2003, for an amount of Rs. 3,71,165/- with Arunachal

Pradesh sales tax @ 8% along with transportation charges. According to the plaintiffs, the respondent/defendants handed over a cheque of Rs. 1,00,000/- only with reference to letter dated 09.07.2003 and for further payment, Mr. Jitender Singh, the Project Manager of Prem Power Construction (Pvt.) Ltd. (in short 'PPCL'), sent a letter dated 20.08.2003 to the respondents/plaintiffs requesting them to submit the treasury challan along with the concerned bill to enable the release of payment. The respondents/plaintiffs, accordingly, complied with the said letter and furnished the requisite documents and a copy of the letter sent to M/S PPCL was also endorsed to NHPC. But, M/S PPCL did not make the payment despite reminder by respondents/plaintiffs and even after letter written to NHPC.

4. The respondents/plaintiffs kept on demanding the dues with interest @8% per annum, but as the payment was not made, the respondents/plaintiffs issued a legal notice under Section 80 of the Code of Civil Procedure to the defendants and the NHPC forwarded the said notice to M/S PPCL. It is further stated in the plaint that the NHPC wrote letters to M/S PPCL for early release of the payment. Finally, the respondents/plaintiffs filed a suit for recovery of Rs. 16,86,299/- with a prayer for decree of the suit against the defendants jointly and severally and also claimed interest @18% per annum upon the bill amount till final satisfaction of the decree.

5. On receipt of the notice, the appellants/defendants filed their Written Statement, wherein, it is stated *inter alia* that no verbal assurance was ever given by the appellant as stated in the plaint. Further, the alleged contract for

supply of cement was signed between the respondents/plaintiffs and M/S PPCL and therefore, the NHPC has no role to play in the said matter. However, in paragraph No. 13 of the Written Statement, it was mentioned that as per the contract entered between the NHPC and M/S PPCL, no payment out of running bills can be paid unless M/S PPCL gives consent. It was also mentioned that if today in case M/S PPCL give their full consent to NHPC, the payment can be released to the plaintiffs from RA Bills. Further, as per the agreement executed by the appellants with the respondent No. 3, i.e. M/S PPCL, it is clearly mentioned in Clause 9 of General Conditions of Contract that the contractor shall not sub-let, transfer or assign the whole or any part of the work under the contract. The other defendants also filed their written statement raising issues regarding the maintainability of the suit.

6. After considering the pleading of the parties and recording the evidences adduced by the parties, the learned Additional District Judge, Basar, West Siang, vide judgment and decree dated 31.07.2015, has held that the appellants/defendants jointly and severally liable for the payment.

7. On being aggrieved and dissatisfied with the judgment and decree dated 31.07.2015, passed by the learned Additional District Judge, Basar, in Money Suit No. 161/2006, the present appeal has been preferred on the following grounds:

- (i) That the learned Additional District Judge has erred in both law and facts and did not appreciate the evidence on record in its true

perspective and hence, the judgment and decree is liable to be set aside.

- (ii) That the learned Court below also failed to appreciate the law laid down in the case of **Tweddle vs. Atkinson**, wherein, it has been held that the Doctrine of Privity of contract meant that third party beneficiary could not enforce against the promisor the promise that the promisor had made to the promisee. The said rule was affirmed in **Dunlop Pneumatic Tyre Co. Ltd. Vs. Selfridge & Co. Ltd.** and also subsequently been reaffirmed in numerous cases.
- (iii) The learned Additional District Judge also committed grave error in not appreciating the fact that the respondents/plaintiffs and the other witnesses deposed before the learned Trial Court that the order of supply of cement was placed by the respondents/defendants and hence, they are liable to make the payments and in that case, the appellants/defendants is not at all liable to pay the dues on behalf of M/S PPCL/respondents/defendants.
- (iv) That the learned Trial Court also failed to consider the fact that the appellants had never given any assurance for payment to the respondents/plaintiffs on behalf of the respondents/defendants. In fact, whenever the appellants were reminded of dues of respondents/plaintiffs, the appellants promptly wrote letters to respondents/defendants for early release of payment in favour of the

respondents/plaintiffs.

- (v) That there is no any documentary evidence in record which prove the fact that the appellants had made a promise for payments of dues to the respondents/ plaintiffs.
- (vi) That the learned Additional District Judge also failed to consider the deposition of P.W.-2, wherein he clearly accepted that the cement supply bill was submitted to respondents/defendants and the liability of payment would lie with one who issued the work order, i.e. the respondents/defendants. He further deposed before the Court that the cement supply challans were received by the PPCL Authority only. But the learned Court below failed to consider the evidence on record in its right perspective and hence, arrived at a wrong decision and passed the judgment and decree accordingly.
- (vii) That the learned Trial Court has fastened the liability of the appellants/defendants only on the ground that in paragraph No. 13 of the Written Statement filed by the NHPC, it has been stated that if M/S PPCL gives full consent, NHPC can release the amount from running account bills. But no such document has been brought on record which can be construed as full consent of PPCL and as such, the conclusion of the learned Court below is unjustified and accordingly, the judgment and decree is liable to be set aside.
- (viii) That the learned Additional District Judge passed the impugned

judgment in utter disregard of the contractual provisions entered into between M/S PPCL and the NHPC Limited.

- (ix) That the learned Additional District Judge had passed the judgment and decree illegally and arbitrarily without considering the fact that the appellants are not at all liable for payment on behalf of the PPCL.

Accordingly, it is prayed that the impugned judgment and decree passed by the learned Court below is liable to be set aside and quashed.

8. The learned counsel, Ms. Nag, appearing on behalf of the appellants, also filed Written Argument and submitted verbally that the judgment and decree passed by the learned Court below is not tenable under the eye of law and is liable to be set aside and quashed. The appellants/NHPC never entered into any agreement or contract with M/S M.S. Enterprises, the respondent, and the said firm is also a stranger to the appellants and as per Privity of Contract, the third party beneficiary could not enforce against the promisor the promise that the promisor had made to the promisee. It is also under the common law principle that a contract cannot confer right or impose obligations upon any person who is not party to the contract. Neither the NHPC entered into any contract of supply of cements nor there is any agreement for making any payment on behalf of M/S PPCL. More so, in paragraph No. 19 of the impugned judgment, while discussing the issue No. 9, it is held by the learned Court below that there

is no evidence to prove that the Chief Engineer, NHPC, gave any verbal assurance for payment. The appellants are wrongly made party in the said money suit without any liability of the appellant to make any payment on behalf of M/S. PPCL, who entered into a contract with M/S M.S. Enterprises. Further it is submitted that the learned Additional District Judge failed to consider the fact that there was a contract for execution of all civil works in between the PPCL and NHPC and without getting any full consent from PPCL, the appellant shall not pay any amount out of the running bills. There was no consent given by the PPCL nor there was any direction from the Court to deduct from RA bills and without which, the NHPC cannot on its own accord violate the terms of the contract and deduct the amount from RA bills.

9. It is the admitted fact that the PPCL has placed the supply order and bills were raised to PPCL and the part payment was also made by the PPCL. But the PPCL has not challenge the impugned order and as such, the order has reached it finality against the PPCL and hence, the respondent Nos. 1 & 2 can also initiate the execution proceeding against the PPCL. Further it is submitted by the learned counsel for the appellants that the PPCL is very much alive and they have already filed arbitration proceedings against the NHPC which arise out of some contract pertaining to Kambang project which is pending for adjudication.

10. So basically, the appellant raised 2 (two) issues in the present appeal that the appellants have been wrongly made as party in the money suit without any agreement or contract with the respondent Nos. 1 & 2 and in the same time, also raised the issue that there is no document nor there is any consent from the PPCL to make any payment to the respondent- M/S M.S. Enterprises on

behalf of PPCL. The present appellants have no connection with M/S M.S. Enterprises and they only entered into an agreement with the respondents/plaintiffs. In this context, the learned counsel for the appellants also relied on the decision of Hon'ble Apex Court, dated 23.07.1969, passed in **M. C. Chacko Vs. State Bank of Travancore, Trivandrum**, reported in **1970 AIR 500**, and mainly stressed on the following paragraph, which reads as under:

"Even if it be granted that there was an intention to create a charge, the Kottayam Bank not being a party to the deed could enforce the charge only if it was a beneficiary under the terms of the contract, and it is not claimed that the Bank was a beneficiary under the deed Ex. D-1. The suit against M.C. Chacko must therefore be dismissed. The decree passed by the High Court is modified and it is declared that M.C. Chacko is not personally liable for the debt due under the letter of guarantee executed by K.C. Chacko, nor are the properties in schedule A allotted to M.C. Chacko under the deed dated June 21, 1951 liable to satisfy the debt due to the Kottayam Bank under the letter of guarantee."

10. The learned counsel, Ms. Nag, further relied on a decision of Hon'ble Himachal Pradesh High Court, which is reported in **AIR 2000 HP 108 (Harnam Singh & Ors. Vs. Smt. Purbi Devi & Ors.)**, wherein also, the Hon'ble High Court expressed the same view that a stranger cannot enforce a contract or he cannot make liable or he is not bound by the contract if he is not a party.

11. Accordingly, the learned counsel for the appellants submitted that the present appellants are not at all liable to make any payment on behalf of M/S PPCL in absence of any agreement or any consent from the M/S PPCL. Rather,

the PPCL, who is a party to the agreement with the respondent Nos. 1 & 2, are liable to make the payment and the M/S M.S. Enterprises is at liberty to initiate any execution proceeding against M/S PPCL.

12. In this context, the learned counsel, Mr. D. Panging, appearing on behalf of the respondents, submitted that though the entire appeal is based on the agreement of the appellants with the PPCL, but the said agreement was never exhibited or brought into record by the appellants even while adducing the evidence of D.W.-1. The D.W.-1 simply adduced his evidence that for execution of the civil works, the PPCL was entrusted with the construction under a MOU, but they never exhibited the said contract before the learned Trial Court. So, at this stage, the appeal cannot be based only on the said contract agreement which was never relied by the appellants, neither at the time of filing the documents nor at the time of adducing evidence by the D.W.-1.

13. The learned counsel for the respondents further relied on a decision of Hon'ble Apex Court reported in **(2010) 4 SCC 491 (Life Insurance Corporation of India Vs. Ram Pal Singh Bisen)**, wherein, it has been held that *"under the law of evidence also, it is necessary that the contents of the documents are required to be proved either by primary or by secondary evidence. At the most, admission of documents may amount to admission of contents but not its truth. Documents having not been produced and marked as required under the Evidence Act cannot be relied upon by the court. Contents of the documents cannot be proved by merely filing in a court."*

14. Relying the aforesaid judgment, it is submitted by the learned counsel for the respondents that the appellants had never relied on the said documents during the entire trial of this case or even at the stage of evidence of D.W.

15. Further it is submitted by the learned counsel for the respondents that the appellants as defendants never took any plea that they are not the necessary party in the said case as they are not the party of the agreement between the present respondents/plaintiffs and the PPCL. Rather, in paragraph No. 13 of their Written Statement, it is stated that the NHPC took the responsibility to pay the bill amount if PPCL give full consent to NHPC. Further, the judgment is also passed considering the statement made in paragraph No. 13 of the Written Statement, wherein, the present appellants took the responsibility to pay the bill on behalf of the PPCL subject to full consent from the PPCL. More so, from paragraph No. 10 of the Written Statement also, it reveals that earlier also they received the application from the present respondent for the payment of the dues and the same has been sent for consideration to PPCL Authority as per the deed of agreement for supply of cement. Thus, it was within the knowledge of the appellants that they are made party in the Money Suit and accordingly, the learned Court below passed the judgment considering the statement made by the present appellants in paragraph No. 13 of the Written Statement.

16. For ready reference, paragraph No. 13 of the Written Statement reads as under:

"13. That the averment made in Para-14 of the said money suit No-68 the respondents

on receipt of the aforementioned FAX Message from Minister, send a warrant letter to the PPCL authority for immediate payment to the plaintiff and it was further directed the PPCL authority to give their CONSENT (FULL) within two days failing which payment shall be made out of the PPCL Running Account Bill (R.A) but it is to inform that the PPCL has not given their full consent thereby respondents could not pay the same.

And it is pertinent to mention hereby that as per the contract for the execution of all civil work in between PPCL and NHPC, that without getting the full consent of PPCL, the respondents shall not pay any one out of their R.A (bill). And it is further states that if today also PPCL give their full consent to NHPC, the respondent is ready to pay the same out of the RA Bill."

17. Accordingly, it is submitted that the learned Additional District Judge had passed the order and directed that the respondents/defendants including the present appellants are jointly and severally liable to pay the bill amount of the present respondents/plaintiffs which amounts to Rs. 13,90,039/- with the interest @ 6% per annum w.e.f. 11.11.2004 till the date of realization of the amount with a further direction to pay an amount of Rs. 30,000/- as cost of the suit and therefore, it is submitted by the learned counsel for the respondents that the present appeal is not at all maintainable and is liable to be dismissed.

18. After considering the submissions made by the learned counsels for both sides, it is seen that the agreement for supply of cement was basically between the respondents/plaintiffs and the other defendants/respondents and there was also demand of payment of bill from time to time and the present appellants were not a party to the said agreement for supply of cement. But, from the statement made by the appellants in their Written Statement as defendants, it is seen that they took the responsibilities for payment of the bill provided full consent is given by the PPCL to pay the same out of the RA bill. More so, from

the paragraph No. 10 of the Written Statement also, it reveals that they used to send the bills received from the respondents/plaintiffs for consideration to PPCL Authority as per the agreement for supply of cement. Thus, though they were not directly a party to the agreement between the respondents/plaintiffs and the other respondents/defendants, but as per the contract between the appellants and the PPCL, they even took the responsibility to send the bills or dues of the respondents/plaintiffs to the PPCL authority and in the same time also took the responsibility to pay the bills on behalf of the PPCL subject to receiving full consent from the PPCL. More so, it is seen that the appellants never took the plea that they are not the necessary party in this case nor at the time of evidence they exhibited any documents to exonerate their responsibility from paying the dues to the respondents/plaintiffs. It is also seen from the judgment passed by the learned Court below that on the admission in paragraph No. 13 of the Written Statement, the judgment was passed making the present appellants as jointly and severally liable for payment of the bill amount. The learned Court below in the order portion of the judgment has observed as under:

"From the discussions made above, it is clear that the plaintiffs made the supply, but the main question is who is to make the payment for the same. It is not denied that the PPCL made the demands as supported by documentary evidences. From the records it is also revealed that in failure of the PPCL to make the payment, the NHPCL could make the payment of the plaintiff by the running account bill, provided the PPCL gave full consent to the defendants 1 & 4.

In the premises as discussed above, this Court hereby directs the defendants jointly and severally to pay the plaintiffs an amount of Rs. 13,90,039/- (rupees thirteen lakhs ninety thousand thirty nine) only with 6% interest per annum on it with effect from 11.11.2004 till date of realization of the amount. The defendants are further

directed to pay an amount of Rs. 30,000/- (rupees thirty thousand) as cost of the suit and the whole amount should be paid to the plaintiffs within 90 (ninety) days from the receipt of this order. The defendant no. 1 & 4 is further directed to make payment from the PPCL Running Account Bill also, if necessary."

19. So, from the discussion made above, it is seen that the appellants cannot exonerate themselves from paying the dues to the respondents/plaintiffs as they are jointly and severally liable to make payment for the supply of the order of cement and the judgment of the learned Court below is also passed on the admission of the present appellants in their Written Statement specially in paragraph Nos. 11 & 13.

20. In view of above, I find that the learned Additional District Judge, Basar, West Siang District, committed no error or mistake while passing the impugned judgment & decree, dated 31.07.2015, in Money Suit No. 161/2006, and hence, in my opinion, no interference of this Court is required. And, therefore, I find no merit in this appeal and accordingly, the same stands dismissed. However, there shall be no order as to costs.

21. Send back the case record.

JUDGE

Comparing Assistant