

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.01.2020

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.Nos.3656, 3657 & 3659 of 2019
and
C.M.P.Nos.20960, 20963 & 20970 of 2019

M/s.Shvedh, a Partnership Firm,
Represented by its Partner
Nitinsathya,
No.29, Bawa Road,
Abhiramapuram,
Chennai - 600 018. Appellant in all C.M.As

Vs.

M/s.Shraddha Entertainment,
Represented by its Partner
Mr.Badri Kasturi,
No.2, Seaface Road,
Palavakkam,
Chennai - 600 041. Respondent in all C.M.As

Civil Miscellaneous Appeals are filed under Order 37(2) of the Arbitration and Conciliation Act 1996, against the common order dated 16.09.2019 in A.Nos.1 to 3 of 2019 in O.P.No.573 of 2019 (hereinafter, referred to as the 'Impugned Order') passed by the Sole Arbitrator.

For Appellant : Mr.Sathish Parasaran
Senior Counsel
For Mr.Vijayan Subramanian

For Respondent : M/s.Rugan & Arya

Judgment

Today, i.e. on 31.01.2020, when the matter is taken up for pronouncing Judgment, the learned counsel for the respondent represented before this Court that the matter has been settled before the Learned Arbitrator. But no order copy or any memo has been produced before this Court to that effect. Hence this Court pronounces the following Judgment :

1. These Civil Miscellaneous Appeals have been filed against the common order dated 16.09.2019 passed in A.Nos.1 to 3 of 2019 in O.P.No.573 of 2019 (hereinafter, referred to as 'Impugned Order') by the Sole Arbitrator.

2. The brief facts of the case is that the respondent is a partnership firm engaged in the business of production of films. A partner of the appellant firm approached the respondent for producing a Tamil film called "Jarugandi" and sought for financial aid to the tune of Rs.2.75 Crores. It was agreed to complete the movie and release it by February 2019, but it was not completed by that time and the respondent claimed to have paid the entire sum of the agreed loan amount. The appellant firm required an additional loan of Rs.1 Crore to complete the said film and hence the respondent was constrained to advance such amount. The appellant also assured the respondent to repay such loan and further loan from the proceeds of the said film and in the event of any shortfall, then the same would be repaid from their next production. The respondent also financed a sum of Rs.1,58,80,454/- for publicity and release and thus, the total amount financed by the respondent came to Rs.5,38,15,455/-.

3. The parties entered into an agreement on 28.09.2017, and since there was a shortfall in repayment of the said sum, which led to certain disputes and the respondent filed O.A.No.548 of 2019 along with A.No.3620 of 2019 seeking for an interim injunction against the appellant from encumbering or alienating or exhibiting or causing the exhibition of the next film pending disposal of the proposed arbitration and for a direction to render true and proper accounts of the film "Jarugandi". The appellant resisted the applications disputing the quantum of amount financed by the respondent and the amount due to them. This Court after perusing the materials on record dismissed the applications and directed the parties to initiate Arbitral proceedings within a period of two weeks from the date of receipt of a copy of the order, and subsequently, the respondent filed O.P.No.573 of 2019 seeking for appointment of a Sole Arbitrator to resolve the disputes that have arisen with the appellant in terms of the agreement dated 28.09.2017. The learned counsels appeared on either side have agreed for appointment of a retired Judge of this Court as the Sole Arbitrator and hence this Court has allowed the said O.P. and appointed the Hon'ble Mr.Justice K.P.Sivasubramaniam, a retired Judge of this Court, residing at No.47, Pulla Avenue, Shenoy Nagar, Chennai - 600 030 (Phone No.26208788), as the Sole Arbitrator to enter upon reference and to adjudicate the disputes inter se the parties.

4. The respondent after the appointment of the Sole Arbitrator filed O.S.A.No.174 of 2019 before this Court against

the order passed by the Learned Single Judge in O.A.No.548 of 2019. This Court holding that the matter has been referred to the Learned Arbitrator disposed of the O.S.A. filed by the respondent by making it clear that the Learned Arbitrator would decide the issue without influences of the orders passed by this Court. Subsequently, the respondent filed three interim applications under Section 17 of the Arbitration and Conciliation Act 1996 in A.Nos.1 to 3 of 2019 seeking for the following reliefs :

"1) A.No.1 of 2019 : To direct the appellant to furnish security for a sum of Rs.4,16,15,455/- being the principal amount due to the respondent within a certain date to be fixed by the arbitral tribunal, failing which, to attach before judgment the untitled film produced by the appellant.

2) A.No.2 of 2019 : To grant interim injunction restraining the appellant and anyone claiming under the appellant from encumbering or otherwise alienating the Tamil cinematograph film produced by the appellant.

3) A.No.3 of 2019 : To grant interim injunction restraining the appellant or anyone claiming under the appellant from executing, exploiting and releasing the Tamil cinematograph film produced by the appellant."

5. The appellant also filed a counter affidavit denying the allegations of the respondent, and the Sole Arbitrator after perusing the entire materials on record has passed the following order under Section 17 of the Arbitration & Conciliation Act 1996 :

"I. The appellant shall furnish a Bank Guarantee from any nationalised bank for a sum of Rs.2.50 Crores (Rupees Two Crores and fifty thousands only) to be valid during the pendency of this arbitral proceeding.

II. Till the appellant complies with the above order under Para I, the appellant is restrained from encumbering, alienating, exhibiting, exploiting and releasing their Tamil Film "Kallam Kaarka" either by themselves, their agents or assigns pending the disposal of this arbitral proceeding.

III. In the event of the appellant complying with the directions under Para I above (furnishing of Bank Guarantee), the restraint order under Para II above will automatically cease to be operative."

6. Aggrieved by the above order, the appellant has filed this appeal before this Court submitting as follows :

1) The respondent agreed to produced a movie named "Jarugandi" based on the terms of the agreement. The role and responsibility of the appellant is to execute and to complete the movie up to censor of the film including fixing up artists, technicians remunerations shooting expenses, processing charges, outdoor unit hire charges, laboratory charges. The respondent after mutual discussions with the appellant had offered a fund Rs.2,75,00,000/- for the movie "Jarugandi" till censoring the film. As per clause D of the terms and condition, the appellant agreed to take the film production of the movie "Jarugandi" up to censoring of the film at the cost of Rs.2,75,00,000/-.

2) As per the clause under consideration heading, the respondent has agreed to extend funding to the extent of Rs.2,75,00,000/- for the production of the said film up to the completion of censoring, and as per clause 1 under the heading assignment of rights, the appellant has the full and sole responsibility to complete the film up to censor.

3) As per clause 7 under the heading assignment of rights, both the appellant and the respondent had agreed for profit ratio @ 30:70, and as per clause 8, both of them had agreed that the profit ratio shall be calculated upon after taking into account over and above realization of share from the sale proceeds of the rights up to Rs.2,75,00,000/-. Further, both the them had agreed that the Intellectual Property Rights (IPR) will be share @ ratio of 30:70.

4) Clause 9 states that in the event of the realization amount is below the investment amount from the sale proceeds of the exploitation rights of the film, then the respondent has agreed to forego the interest amount, and further, it was admitted by the respondent that he shall not claim the same from the appellant. The only duty imposed on the appellant is that he shall execute the next film to be produced by the respondent on professional terms.

5) Clause 8 states that in the event of the realization amount is below the investment amount from the

sale proceeds of the exploitation rights of the film, then both the appellant and the respondent have agreed not to claim or insist upon profit sharing, and as per clause 12, in the event of the realization amount is below the investment amount from the sale proceeds of the exploitation rights of the film, the respondent has agreed apart from foregoing the interest but also have agreed to whatever amount realized and paid by the appellant.

6) The censor for the movie "Jarugandi" was obtained on 03.08.2018. It is very clear from the averments made supra and from various clauses mentioned in the Agreement dated 28.09.2017 that the appellant's responsibility to execute the movie "Jarugandi" till obtaining censor certificate only. The below table will clearly show the expenses incurred till obtaining the censor certificate dated 03.08.2018 :

Summary of Jarugandi up to censor			
		Total Contribution of Respondent in the Production of "Jarugandi" till censor	3,22,67,141.00
		Sales Details :-	
		Overseas (Theatrical, satellite and digital rights)	35,00,000.00
		Hindi Dubbing	25,00,000.00
		Karnataka - Theatrical rights	3,00,000.00
		Kerala - Theatrical rights	2,00,000.00
		Tamil Nadu - Theatrical rights	2,50,00,000.00
		Total amount received by the respondent from the movie "Jarugandi"	3,15,00,000.00

7) It is very clear from the table that the total investment made by the respondent is till censor is Rs.3,22,67,141/- apart from the interest amount paid to money lenders. The actual investment made by the respondent is Rs.3,22,67,141/- and the same is demonstrated in the para mentioned supra. Rs.3,22,67,141/- was paid by the respondent towards investment of the movie " Jarugandi" till the censor of the movie. It is very clear from the above submission that the role of the appellant in executing the movie is only till censor and the censor was obtained on 03.08.2018. The appellant is

not liable for any expenses made by the respondent after the censor of the movie. It is very clear from the Agreement the role of the Appellant gets over once the censor has been obtained.

8) The respondent claims be a financier and not a producer of the film "Jarugandi". It is a misleading/false averment made by the respondent and the same can be proved as false ;

"a) The agreement dated 08.05.2017 for the dropped film "AGNIKA" they have mentioned them as producers.

b) The agreement dated 28.09.2017 executed between the parties was a draft prepared by the respondent and the same was confirmed in email dated 07.09.2017. They have mentioned them a producer of the movie.

c) The entire Agreement dated 28.09.2017 confirms that the respondent as producer.

d) The respondent has entered into a Distribution Agreement dated 03.10.2018 with S Pictures. The respondent has claimed him as producer of the film "Jarugandi". In the entire agreement, the respondent claims himself as producer of the movie and based on the said statement, he has received a sum of Rs.2,50,00,000/-

e) The censor certificate dated 03.08.2018 confirms that the respondent is a producer.

f) The declaration affidavit dated 14.07.2018 and 16.07.2018 filed by the respondent before the Central Board of Film Certification (CBFC) confirms respondent as the producer (Additional Typeset dated 28.10.2019).

g) The Agreement dated 28.09.2017, General Clauses confirms that the respondent will be given credits as the Producer of the film "Jarugandi" in all formats of publicities, including the film released prints and trailers as well."

It is very clear from the above submission that the respondent is trying to mislead the Hon'ble Tribunal by stating that they are only financier of the film "Jarugandi" and not the producer of the film.

9) As per Clause 9 of the Agreement, in the event of the realization amount is below the investment amount from the sale proceeds of the exploitation of the rights of the film "Jarugandi", the respondent has agreed

- a) to forego the interest amount
- b) to not to Claim from the Appellant
- c) the Appellant shall work on professional terms on the next film to be produced by the respondent.

10) As per Clause 9 of the agreement the only responsibility of the appellant is that he shall work on a professional basis to the next film of the appellant. The appellant hereby confirm to work with the respondent for his next film on professional terms.

11) The Hon'ble Single Judge had passed an order dated 09.07.2019 stating that the admitted outstanding amount finance according to the appellant herein is Rs.7,67,141/- which the appellant is liable to pay the respondent without any delay. The Hon'ble Single Judge in Para 14 had held that it is not the case of the respondent herein is that he had funded or co-produced the next film in question. If at all the respondent herein has got any right, it should be on professional terms, which is not available here.

12) It is a fact that both the appellant and the respondent separately have commenced production of their next film. The appellant had commenced his next production film starring Vaibhav, Venkat Prabhu and known film artists and the film is directed by Charless. It has come to the knowledge of the appellant that the respondent is producing a movie along with Director Pa.Ranjith. The appellant hereby confirm that he will work in executing the movie to be produced by the respondent on professional terms, as agreed by him in clause 9 of the agreement.

13) Any right pertaining to film "Jarugandi" cannot be enforced by injuncting to release of the next film produced by the appellant. The entire averments made in the Claim Petition would only indicate that the respondent is actually claiming the amount payable to him under the agreement dated 28.09.2017 which only concerns the film "Jarugandi". The appellant totally deny any such amount payable to the respondent. There is thus no prima facie case in favour of the respondent by which any relief can be granted against the next film of the appellant, which is totally unconnected with the film "Jarugandi". There is no material to indicate that the appellant had agreed not to

release any film. There is nothing to suggest that the next film is any way connected with film "Jarugandi. In the absence of any right over the next film of the appellant, the respondent is not entitled to any relief against the next film of the appellant.

14) With regard to the Publicity Expenses, even as per their own typeset, they have mentioned under the heading "Publicity Expenses" they have spent Rs.1,58,80,454/- (Rs.70,43,140 + Rs.51,38,154 + Rs.36,99,160). Publicity Expenses are done only after obtaining the censor certificate. The censor certificate has been obtained on 03.08.2018. It is very clear from their own admission that all the Publicity Expenses are done only after 03.08.2018. The question of requesting the appellant to pay a sum of Rs.1,58,80,454/- does not arise at all and the said Publicity Expenses goes beyond the agreement dated 28.09.2017.

15) The respondent has not transferred or paid the said sum of Rs.1,58,80,454/- to the appellant but as per the admitted fact of the respondent, they had transferred the said amount to the advertisement agencies directly.

16) The Arbitrator has not given any findings with regard to the outright purchaser (Flamingo Entertainment) of the film produced by the appellant. Even though the said Assignment Agreement has been filed before the Arbitrator and argued before the Arbitrator, no findings was given with regard to Flamingo Entertainment.

17) The appellant had commenced his next production film starring Vaibhav, Venkat Prabhu and known film artists and the film is directed by Charles. The said film was registered in the name of the appellant before the producer council. The pooja ceremony for the said movie took place in Gokulam House on 11.03.2019. The pre-production for the movie commenced on February 2019 and the film went for shooting during March 2019 and the film shooting completed during May 2019. The post production work got completed in the month of August 2019.

18) The appellant had entered into an Assignment Agreement dated 17.08.2019 with Flamingo Entertainment and the appellant sold the entire copyright, intellectual property rights (IPR) and negative rights of the said film including dubbing and remake rights of the film in any other language for the entire world for perpetual period to Flamingo Entertainment. The film is being sent to censor and the film proposed to be released during 2nd week of

November 2019 and the release of the movie is getting dragged due to the interim order passed by the Arbitrator.

The major exploitation rights such as TN theatrical rights, cable & satellite rights and digital rights are exploited only by the respondent. The appellant has not made a single penny as remuneration or profit in having spent its time and effort for the production of the film. The appellant spent almost one year in the making of the film for the respondent. The respondent had utter disregard in the exploitation of the film which resulted in the film not making the money as on date, and sought for setting aside the Arbitrator's order dated 16.09.2019 passed in A.Nos.1 to 3 of 2019 in O.P.No.573 of 2019.

7) Denying the allegations of the appellant, the respondent submits as follows :

a. The respondent lent money to the appellant for production of the film "Jarugandi".

b. Rs.4.16 crores remains due and payable by the appellant to the respondent.

c. Monies were given under the agreement dated 28.09.2017 (the subject agreement), which is at page 1 to 10 of Common typed set of papers dated 19.09.2019 filed by the appellant (Set A).

d. Pursuant to the arbitration clause in the subject agreement, this Hon'ble Court appointed the Sole Arbitrator.

e. The respondent filed three applications under Section 17 of the Arbitration and Conciliation Act 1996 :

- A.No.1 of 2019 for ABJ of the untitled film being produced by the appellant.
- A.No.2 of 2019 for injunction restraining the appellant from alienating or encumbering the said untitled film.
- A.No.3 of 2019 for injunction restraining the appellant from releasing the said untitled film.

f. A common order dated 16.09.2019 was passed by the Learned Arbitrator directing the appellant to furnish security by way of Bank Guarantee for Rs.2.5 crores and restraining the appellant from encumbering, alienating or releasing the said untitled film, subsequently titled as 'Kallam Karka' till they comply with the direction, the

said order being at page 66 to 92 of Set A.

g. The title 'Kallam Karka' was subsequently changed as 'Lock-up'

h. The appellant resisted the three applications mainly on two grounds, namely :

- that the appellant and the respondent were joint producers of the film ' Jarugandi' and
- that the appellant was not under any liability to repay any sum to the respondent and that as per their calculations, their liability, if any, was only Rs.7 lakhs.

i. The Learned Arbitrator found that prima-facie a harmonious reading of all the clauses in the subject agreement would show that the respondent financed the project and the appellant was a borrower and hence liable to repay the sums. He also found that the calculations given by the appellant were ex facie erroneous at least in one respect, namely, that they had deducted Rs.2.5 crores as revenue by sale of Tamil Nadu Theatrical Rights to one S Pictures by the respondent under an agreement dated 03.10.2018, holding that such sum of Rs.2.5 crores was only a refundable deposit and the same cannot be treated as an amount recovered by the Claimant with reference to the investment made by him. After recording such prima facie findings the Learned Arbitrator passed the order as stated above.

j. Before the Learned Arbitrator was appointed, the respondent had moved an application under Section 9 and the same was dismissed by the Learned Single Judge by order dated 09.07.2019. The respondent preferred O.S.A.No.174 of 2019 against the same. During the pendency of the appeal the Learned Arbitrator was appointed. Hence the O.S.A was closed with the observation "para 14"

"It is also made clear that the learned arbitrator would decide the matter without influenced by the orders passed by the learned single or by this Court"

k. The learned counsel for the appellant strenuously argued that in many places the respondent is described as producer and so they cannot claim to be the financier.

In reply, it is submitted that notwithstanding nomenclature, the relationship between the parties is gathered from the preamble portion a. to f. under the caption "Whereas". It is fortified by clause 5 at page 5 of Set A which stipulates that the appellant "shall repay the investment paid to them".

It is further fortified by Clause 11 on the same page stipulating that the appellant shall "repay the funded amount periodically".

The real question is not whether the respondent is a financier or producer but whether the appellant is liable to repay the sum advanced by the respondent in the manner envisaged under the subject agreement.

The appellant cannot deny his liability to repay to the respondent especially since such liability has been admitted by the appellant in the whatsapp communications at page 30 to 64 of the Common Typed Set filed by the respondent (Set D) and e-mail communications is at page 20 to 23 of Set B.

1. The learned counsel for the appellant has no answer to the point that Rs.2.5 crores received from S Pictures was only a refundable Distribution advance. The agreement with S Pictures is at page 26-33 in the additional typed set of papers dated 19.09.2019 filed by the appellant (Set B). Clauses 6 and 6C of the said agreement show that what was received thereunder was only Refundable Distribution Advance. Clause d. at page 29 of Set B stipulates that the refund must be settled within two weeks. In fact only a sum of Rs.57,99,649/- was collected by S Pictures from exploitation of the film 'Jarugandi' and Rs.1,91,95,351/- was to be refunded by this respondent to S Pictures and accordingly this respondent had also refunded nearly Rs.1 crore. This has not been denied anywhere by the appellant and the same has been recorded by the Learned Arbitrator.

m. The Learned Arbitrator had also referred to Clause 9 of the subject agreement at page 5 of Set A, which stipulates that "the Co-producer (the appellant) shall produce the next films of their for the producer (the respondent) on professional terms in order to assist in recovery of the losses". The Learned arbitrator held this obligation is mandatory on the Co-producer (the appellant)

to assist the recovery of the losses of the claimant (the respondent). The Learned Arbitrator further held "on professional terms" on which must stress is laid by the respondent (the appellant) is only incidental since no new production can be contemplated without specific agreement of terms and that is all the meaning that can be attached to the expression "on professional terms". He found that without doing so, the appellant has launched their next film, 'Kallam Karka', now retitled 'Lock-up'.

n. In the state of Jharkhand and Others Vs HSS Integrated SDN and another, the Hon'ble Supreme Court ruled in page 12 of its order as follows :

"As held by this Court in catena of decisions, the award passed by the Arbitral Tribunal can be interfered with in the proceedings under Sections 34 and 37 of Arbitration Act only in a case where the finding is perverse and/or contrary to the evidence and/or the same is against the public policy. (see Associate Builders V. DDA (2015) 3 SCC 49 etc.)"

o. In A.Jayakanthan Vs JRS Crusher, this Hon'ble Court held in para 27 and 28 as follows :

"27. I do not find any illegality or irregularity in the order passed by the Arbitrator. It is the trite position of law that the Appellate Court would not interfere with the discretion exercised by the Trial Court while passing order under Order 39 Rule 1 and 2. The same law would be applicable to the proceedings before Arbitrator under Section 17 also."

28. The above proposition is reiterated by the Hon'ble Supreme Court in the case of Wander Ltd. Vs. Antox India (P) Ltd. Reported in 1990 (Supp) SCC 727, wherein, the Hon'ble Supreme Court had categorically held that the Trial Court should be show to interfere with the discretion exercised by the Court of first instance, while granting interim orders of injunction."

p. Thus the balance of convenience is in favour of this respondent and any orders passed pending trial before the Learned Arbitrator would put this respondent to grave injustice and hardship. The appellant is now seeking to pre close the Arbitral proceedings without a proper trial. The appellant has not made out a prima facie case for granting any relief in this case. Thus this appeal is liable to be

dismissed with cost.

8. Heard the learned counsel for the appellant and the learned counsel for the respondent, and perused the materials available on record.

9. Mr.Sathish Parasaran, the learned Senior Counsel appearing for the appellant has raised the objection against the interim orders passed by the Learned Arbitrator especially the Arbitrator directing the appellant to furnish a bank guarantee to the tune of Rs.2,50,00,000/- to be valid during the pendency of the Arbitral proceedings and till such furnishing of bank guarantee, the appellant is restrained from encumbering, alienating, exhibiting, exploiting and releasing their Tamil film "Kallam Kaarka" either by themselves or by their agents. He argued before this Court on merits as well as on the legal issues on the footing of maintaining such applications before the Arbitrator when similar applications being dismissed under Section 9 by this Court, and the Division Bench having not set aside the order passed in Section 9 petition, dis-entitles the respondent/claimant from filing similar petitions before the Arbitrator.

10. The learned Senior Counsel Mr.Sathish Parasaran would vehemently argue that the petition filed before this Court under Section 9 is very much similar to the petitions filed under Section 17 before the Honourable Arbitrator. When this Court by order dated 30.07.2019 had dismissed the application filed under Section 9 and upon an appeal as against the order has not set aside the findings made in the orders passed in Section 9 applications, the Arbitrator ought to have dismissed the very same plea raised before him and ought not to have approached the plea under Section 17 and passed the Interim orders.

11. This Court is not in agreement with the arguments of the learned Senior Counsel especially on the maintainability of Section 17 Application before the Arbitrator with similar prayer made in under Section 9 before this Court, and having such petitions being dismissed, no doubt Section 9 application seeking interim relief before initiating Arbitration proceedings came to be dismissed on 30.07.2019, and an appeal as against that order has also not been set aside in the order passed in Section 9 Application. Merely because the prayer made in Section 9 Application was dismissed, the statute does not preclude the claimant or any other party before the Arbitration proceedings to file Section 7 petition seeking interim protection. Any party before the Arbitrator is at liberty to invoke Section 17 Application, which is more or like an application moved under Section 39 Rule 1 of CPC in a pending suit. Power vests to the Civil Court to grant an interim relief in a pending suit, the

Arbitration and Conciliation Act vests some certain power with the Arbitrator to grant interim relief pending the Arbitration proceedings. A party approaching the Honourable High Court under Section 9 seeking certain reliefs as interim protection before the Arbitration proceedings is initiated merely because such petitions as claimed under Section 9 before the Arbitrator under Section 17. If a contrary view is taken, then the purpose of Section 17, which is more or like or as same as Order 39 Rule 1 which empowers the Civil Court in granting interim injunction to protect the interest of a party seeking the same, pending the suit. Section 17 will become redundant and certainly will amount to rejection of a statutory relief which entitled the party before the Arbitrator. Hence, this Court do not agree with the arguments put forth by the learned Senior Counsel appearing for the appellant in this regard.

12. With regard to the interim orders passed by the Arbitrator, it is seen from the records that Application Nos.1 to 3 seem to have been filed under Section 17 of the Arbitration and Conciliation Act by the respondent in this proceedings seeking the following prayers.

"1) To direct the respondent to furnish security for a sum of Rs.4,16,15,455/- being the principle amount due to the applicant within a certain date to be fixed by the Arbitral Tribunal, failing which, to order attach before Judgment of the untitled film produced by the respondent.

2) to grant interim injunction restraining the respondent and anyone claiming under the respondent from encumbering or otherwise alienating the Tamil Cinematograph film produced by the respondent.

3) to grant interim injunction restraining the respondent or anyone claiming under the respondent from executing exploiting and releasing the Tamil Cinematograph film produced by the respondent."

13. Admittedly, the entire claim as well as the interim prayer made before the Arbitrator revolves around Clause 9 and 10 of the Assignment of Rights in the agreement entered into between the appellant herein and the respondent dated 28.09.2017. Both the parties had agreed that they entered upon an agreement dated 28.09.2017 for the production of a film named "Jarugandi", to which, the respondent agreed to finance Rs.2,75,00,000/- and it is obligated on the part of the appellant to complete the film till censorship of the film.

14. Mr.Ravi, the learned counsel appearing for the respondent contended that they had commenced the said film and completed the project as scheduled despite the respondent not adhering to the schedule of payments as agreed upon by the respondent in the schedule of payments annexed to the agreement dated 28.09.2017. However, after the release of the Movie, the Movie did not hit the box office and as expected did not yield any profit, instead it was lower than the production cost. It is the claim of the respondent before this Court that by way of Section 9 application in O.A.No.548 of 2019 sought for an order of injunction as against the appellant herein from encumbering or alienating the next film. Along with the above said application, the respondent filed A.No.3620 of 2019 seeking to render thorough and proper accounts from the appellant with respect to the Tamil Cinematograph film titled "Jarugandi". The application was dismissed by this Court and the respondent had filed an appeal in O.S.A.No.174 of 2019, which also came to be disposed of as the matter was referred to the Arbitrator.

15. The respondent had filed a detailed claim petition praying for an award to be passed directing the appellant herein to pay a sum of Rs.4,16,15,455/- towards the principle outstanding together with interest at the rate of 18%. Along with the Claim, three interim applications under Section 17 were also filed, in which, the Arbitrator had passed a detailed order by granting interim relief to the respondent, which is the subject matter of the present appeal.

16. No doubt that the respondent in the agreement entered between themselves and the appellant dated 28.09.2017 had agreed to finance a sum of Rs.2,75,00,000/- to complete the execution and production of the film and the appellant had also agreed to produce the film up to the stage of censorship by agreeing for the cost of production as Rs.2,75,00,000/- being financed by the respondent.

17. As per Clause 9 and 10 of the Assignment of Rights/Principle understanding of the said agreement is as follows :

"9. And in the event of the realization amount is below the investment amount from the sale proceeds of the exploitation of the rights of the film, then the party of producer has agreed to forego the interest amount and further agreed not to claim the same from the Co-producer. However, the Co-producer shall produce the next films of their for the producer on professional terms in order to assist in recovery of the losses.

10. And in the event of the realization amount is below the investment amount from the sale proceeds of the exploitation of the rights of the film, then both the parties here in have irrevocably agreed not to claim or insist upon profit sharing."

18. Admittedly, the film financed by the respondent whether as a financier or as a purchaser cannot be decided in the interim application filed by the respondent before the learned Arbitrator, which fact can only be decided and should be decided at the time of passing the award, thereby fixing the liability, if any, as against the appellant. Though the respondent has claimed that he has pumped in Rs.5,38,15,455/- as against the agreed amount of Rs.2,75,00,000/- only till censoring.

19. It is also an admitted fact that the picture was released after censorship on 26.10.2018. However, the film failed to hit the box office and it is alleged that the distributor has collected only Rs.57,99,649/- from exploitation of the said film in Tamilnadu area, which made the respondent/claimant to approach this Court earlier and later before the Arbitrator claiming a sum of Rs.4,16,15,455/- as principle amount due with interest of 18% based on the enforceability of Clause 9.

20. To sustain the interim application before the Arbitrator, the respondent has relied on Clause 9 of the Assignment of Rights/Principle understanding in the agreement dated 28.09.2017 which speaks about the responsibility of the appellant that in the event of realization amount being lower than the invested amount, the respondent has agreed to forego the interest amount and further agreed not to claim the same from the appellant. However, the appellant being a Co-producer shall only produce the next film of their for the producer on professional terms in order to assistance in recovery of the loss on the film Jarugandi.

21. It is clear from Clause 9 and 10 that the appellant is liable to make the loss by adjusting the profits from the sale of next film on professional terms. Though the respondent/claimant had claimed Rs.4,16,15,455/- as due from the appellant, the appellant has also filed their counter contending that the appellant never sought any further amount for completing the film and the actual amount invested by the respondent was only Rs.3,22,67,141/- and the respondent/claimant has already received a sum of Rs.3,15,00,000/- by way of entering into the distributorship for the film with "S" pictures and sold the exhibition and exparte rights for Rs.2,50,00,000/- and Overseas rights which is sold by the respondent/claimant to the tune of Rs.35,00,000/- and Hindi dubbing for Rs.25,00,000/-

and Karnataka and Kerala has been sold for Rs.3,00,000/- and Rs.2,00,000/- respectively, which all money that was received is stated as above were transferred to the claimant's account only difference payable to the respondent/claimant was Rs.7,67,141/- only.

22. On perusal of the interim order passed by the learned Arbitrator which is based on the claim made by the respondent/claimant and which is under challenge in the present appeal, this Court is unable to sustain the reasons for grant of the interim order, that too directing the appellant to furnish a bank guarantee to the tune of Rs.2,50,00,000/-.

23. The learned Arbitrator has come to a conclusion for issuance of such direction which is reflected in Para 39 of the order as follows :

"39. In Para 3(k) the Claimant has categorically stated that as on the date of release of the project picture, he has pumped in a total amount of Rs.5,38,15,455/- but had received only Rs.64 Lakhs. Though the respondent had put forth their own calculation in their counter and would state that the respondent owned only a sum of Rs.7,67,141/-, it is not known why there is no specific denial of the Claimant's averments as mentioned above in para 3(k) of the affidavit. In the counter, while providing comments of the respondent regarding the allegations contained in para 3 of the affidavit, there is no specific denial of the same. In para 37, the respondent had claimed to give para wise reply to the affidavit of the Claimant and also in para 37(g) the respondent has stated that comments on the sub paragraphs of para 3 are dealt with. But, there is no specific reference to the statement under sub para 3 (k) of the affidavit, much less, any specific denial. It is not known why such a positive assertion by the Claimant has not been specifically dealt with by the respondent."

24. Merely because the appellant has not made any specific denial of the amount as claimed by the respondent/claimant in an interim application, that too when the Arbitration proceedings in progress, the conclusion and the observation made by the learned Arbitrator is not correct.

25. The entire claim is based on the Clause 9 of the Assignment of Rights/Principle understanding of the agreement dated 28.09.2017, by which, the appellant can only be compelled to make the loss by adjusting with the proceeds from the sale of

the next film, it is only on professional terms. Admittedly, there is no agreement between the respondent/claimant and the appellant/producer regarding production and distribution of the next film. The obligation of the appellant is only under Clause 9 depends upon the possibility of the appellant producing the next film for the respondent/claimant, that too the alleged loss incurred by the respondent will be made good by producing the next film of the respondent/claimant by the appellant. Only when the claimant and the appellant besides to produce the next film on the professional terms arrived at. The alleged loss incurred by the respondent/claimant will be made good by producing the next film of the respondent/claimant by the appellant. There is no other condition in the Assignment of Rights in the agreement dated 28.09.2017 that the appellant is obligated to produce the appellant's next film only with the respondent/claimant. May be the respondent/claimant can make a claim if the appellant fails to produce the respondent's film in future if it is denied by the appellant.

26. The interim application filed before the learned Arbitrator and the manner in which the learned Arbitrator has dealt with has serious consequences, as the learned Arbitrator has in fact while deciding the interim application has in fact decided the original claim application before him. As if the final order leaving nothing to be agitated by the parties in the claim application. In fact the respondent/claimant had also accepted in Clause 12 of the agreement i.e. the Assignment of Rights under the agreement dated 28.09.2017 that in the event of sale proceed realized is below the invested amount, the producer has agreed apart from foregoing the interest component have agreed to whatever amount realized and paid to the producer by the Co-producer. When that being so, merely because the Movie did not hit the box office and have realised below the invested amount as alleged by the respondent/claimant and the fact remains that the appellant has also rebutted the same before the Arbitrator, that what exactly due is only Rs.7,67,141/- which has to be gone into by the Arbitrator after trial while passing the award upon examining the documentary and oral evidences to be produced before the Arbitrator. It is premature on the part of the Arbitrator to fix liability and the stage of interim application itself, that too when the respondent has not proved any violation of enforceable rights of substantiated character. No interim order need to be granted when the respondent/claimant can be compensated by way of damages in the event of succeeding the claim petition before the learned Arbitrator.

27. In the above stated facts and circumstances and on the foregoing reasons, this Court is of the view that the order passed in the Application Nos.1,2 & 3 which is under challenge in the present appeal has to be set aside.

28. Accordingly, the order passed by the Learned Arbitrator is set aside and it is made clear that the learned Arbitrator would decide the claim petition without being influenced by this order.

29. In the result, these Civil Miscellaneous Appeals are allowed. No costs. Consequently, the connected miscellaneous petitions are closed.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

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To.

The Section Officer,
VR Section, High Court, Madras.

+2 Ccs to M/s.Rugan & Arya, Advocate sr 8423.

C.M.A.Nos.3656, 3657 & 3659 of 2019
and
C.M.P.Nos.20960, 20963 & 20970 of 2019

BP(CO)
SP(11/03/2020)

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