IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 22.02.2024	*Delivered on 11.03.2024*

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

AND

THE HONOURABLE MR. JUSTICE P.D.AUDIKESAVALU

Rev.Appl.No.27/2023 & OSA.No.46/2023

and

CMP.Nos.1867/2023 & 4035/2023

Rev.Appl.No.27/2023-

1.M/s.Gemini Film Circuit
rep.by its Managing Partner
Mr.A.Manohar Prasad
28, New Bangaru Colony,
West K.K.Nagar, Chennai 600 078.

2.Mr.A.Manohar Prasad
3.Mrs.A.Sai Siva Jyothi
4.A.Lakshmi Anandi
5.A.Anand Prasad
6.Kovelamudi Bapaiah
7.A.Chandini
8.Mr.Kiran Parvataneni ... Petitioners

Vs.

1.M/s.Venkateswara Financiers Hyderabad
Private Limited, rep.by its Managing Director
Mr.A.Venkatesh Reddy
H.No.8-2-269/S/90, Plot No.90, Sagar
Cooperative Housing Society
Road No.2, Banjara Hills, Hyderabad 500034.

2.M/s.Gemini Industries & Imaging Limited
rep.by its Managing Director,
Mr.A.Manohar Prasad
28, New Bangaru Colony
West K.K.Nagar, Chennai 600 078. ... Respondents

Prayer : Review Application filed under Order 48 Rule 1 read with Section 114 of CPC to allow the review application and to set aside the order dated 22.10.2022 made in OSA.No.43/2020.

OSA.No.46/2023:-

1.M/s.Gemini Film Circuit
rep.by its Managing Partner
Mr.A.Manohar Prasad
28, New Bangaru Colony,
West K.K.Nagar, Chennai 600 078.

2.Mr.A.Manohar Prasad
3.Mrs.A.Sai Siva Jyothi
4.A.Lakshmi Anandi

5.A.Anand Prasad
6.Kovelamudi Bapaiah
7.A.Chandini
8.Mr.Kiran Parvataneni ... Appellants

Vs.

1.M/s.Venkateswara Financiers Hyderabad
Private Limited, rep.by its Managing Director
Mr.A.Venkatesh Reddy
H.No.8-2-269/S/90, Plot No.90, Sagar
Cooperative Housing Society
Road No.2, Banjara Hills, Hyderabad 500034.

2.M/s.Gemini Industries & Imaging Limited
rep.by its Official Liquidator,
High Court, Madras, II Floor, Corporate Bhavan
No.29, Rajaji Salai, Chennai 600 001.

3.Biju kumar Sudharsan Nair ... Respondents

****R3 impleaded vide order dated 13.09.2023 made in CMP.No.8982/2023 in OSA.No.46/2023**

Prayer : Original Side Appeal filed under Order 36 Rule 1 of Original Side Rules read with Clause 15 of Letters Patent Act against the judgment and decree of this Court dated 25.01.2023 in EP.No.70/2021 in CS.No.99/2018.

For Appellants in OSA.No.46/2023 & Petitioners in Rev.Appl. No.27/2023	: Mr.V.Prakash, Senior counsel for Mr.S.Bala Subramaniam
For R1 in both Review Application & OSA	: Mr.Krishna Ravendran
For R3 in OSA	: Mr.V.C.Janardhanan for Mr.Kavin Prabhu

<u>COMMON JUDGMENT</u>

<u>S.S.SUNDAR, J.,</u>

(1)Since both the Review Application and the Original Side Appeal arise out of same suit and parties are same, they are disposed of by this common judgment.

(2)Review Application in Rev.Appl.No.27/2023 is filed by the petitioners who are defendants 1 to 6, 8 and 9 in CS.No.99/2018 to review the judgment and decree of this Court made in OSA.No.43/2020 dated 22.10.2022.

(3)The Original Side Appeal in OSA.No.46/2023 is preferred by the appellants challenging the order of the learned Single Judge dated 25.01.2023 in EP.No.70/2021 in CS.No.99/2018, with a prayer to set aside the same.

(4)Brief facts that are necessary for the disposal of the Review Application and the Original Side Appeal are as follows:-

(5)The Review petitioners are the defendants 1 to 6 8 and 9 in the suit in CS.No.99/2018. The 1st petitioner is a Partnership Firm represented by its Managing Partner. Petitioners 2 to 8 are the partners in the Firm who are defendants 2 to 6, 8 and 9 in CS.No.99/2018. The 1st respondent is the plaintiff in the said suit.

(6)It is admitted by the petitioners that they had entered into a Loan Agreement dated 23.07.2012 with the 1st respondent / plaintiff for a sum of Rs.7.50 Crores in connection with the film produced by the petitioners "Madha Gaja Raja". The petitioners have offered their immovable property measuring an extent of 3 acres of land situate in Survey No.172, Manapakkam Village, Sriperumbudur Taluk, Kanchipuram District as security apart from executing a Deed of Hypothecation, hypothecating their right in respect of the said film. The 1st respondent filed a suit in CS.No.99/2018 for recovery of a sum of Rs.17,93,78,446/- with future interest at 27% per annum from the date of plaint till the date of realisation and for consequential reliefs based on the mortgage.

(7)Since written statement was not filed by the defendants/petitioners herein, an application was moved by the 1st respondent / plaintiff to pass summary judgment and decree in CS.No.99/2018. A learned Single Judge of this Court vide judgment dated 04.12.2019, decreed the suit in favour of the 1st respondent / plaintiff by directing the defendants to jointly and severally pay the plaintiff a sum of Rs.26,75,84,725.26p., with future interest at 27% per annum on the sum of Rs.17,33,78,446/- from the date of decree till the date of realisation. Further directions were issued to enable the plaintiff /1st respondent herein to realise the amount decreed by seeking appointment of a Receiver to sell the film and the mortgaged property.

(8)Aggrieved by the judgment and decree of the learned Single Judge dated 04.12.2019 made in CS.No.99/2018, the defendants have preferred an appeal in OSA.No.43/2020. In the meanwhile, the plaintiff filed EP.No.70/2021 to execute the judgment and decree made in CS.No.99/2018 dated 04.12.2019.

(9)It is to be noted that the petitioners have not disputed the transaction at any point of time during trial. From the proceedings recorded during the pendency of the appeal, it appears that the petitioners have expressed their willingness for settlement to reduce their liability towards the suit claim. A proposal for settlement came from the petitioners to pay a sum of Rs.15.30 Crores to the 1st respondent / plaintiff towards full and final settlement on or before 23.03.2020. A Memo was also submitted before the Bench in which the appeal was pending and the Division Bench has recorded the settlement proposal on 28.02.2020. Subsequently, the petitioners did not pay the money as promised. However, they managed to pay a sum of Rs.7.50 Crores in October 2020 and got release of property hypothecated and released the film "Madha Gaja Raja". Thereafter, there was no payment except the payment of a sum of Rs.50 Lakhs paid directly to the 1st respondent's account on 25.09.2021.

(10)It appears that when the appeal was taken up for hearing, the petitioners submitted a Demand Draft for the balance amount of Rs.7.30 Crores with a promise that the said Demand Draft would be handed over to the 1st respondent on 3rd or 4th October 2021, at the time of cancellation of mortgage. Since the Demand Draft was purchased from a Non Banking Financial Company, namely, Bharat Cooperative Bank

[Mumbai] Limited, it appears that the 1st respondent sought for confirmation from the concerned Cooperative Bank through its Banker to ascertain the genuineness of the Demand Draft. The Demand Draft was not in fact, handed over as it was promised and the excuse that was given was the sudden death in the family of the Financier. Thereafter, the 1st respondent also received a communication from the Bharat Cooperative Bank [Mumbai] Limited informing that they have not issued any Demand Draft. After disclosing the conduct of the petitioners, the 1st respondent / plaintiff withdrew from the settlement and prayed for dismissal of the appeal with cost.

(11)Thereafter, this Court, vide judgment dated 22.10.2021, dismissed the appeal in OSA.No.43/2020 filed by the defendants against the judgment and decree in CS.No.99/2018, after recording the fact that the petitioners have nothing much to show in the appeal as they have admitted the loan transaction and chose not to file a written statement. Since there is no dispute as to the quantum of money received and the rate of interest, the Division Bench, while holding that the appeal is devoid of merit, recorded the manner in which the petitioners have dragged the proceedings at various stages without *bona fides* for a long period.

(12)The petitioners have filed the present review application to review the judgment passed by this Court, dismissing OSA.No.43/2020 dated 22.10.2021.

(13)In the meanwhile, after the judgment and decree in CS.No.99/2018 dated 04.12.2019, the 1st respondent / plaintiff filed an Execution Petition in EP.No.70/2201 to execute the judgment and decree passed in CS.No.99/2018.

(14)The 1st respondent / plaintiff also filed an application in A.No.513/2022 for appointment of an Advocate Commissioner to identify the suit property and to carry out all necessary actions required to bring the mortgaged property for sale described in the Schedule through public auction.

(15)A Learned Single Judge of this Court, vide order dated 09.06.2022, appointed an Advocate Commissioner to identify and inspect the property described as Items No.1 and 2 in the Judge's Summons, i.e., the mortgaged property. The Advocate Commissioner, pursuant to the warrant issued by this Court, made an inspection of the property with the assistance of Surveyor assigned by the Revenue Department and the Village Administrative Officer. The 3 acres of land which was described in the Schedule was identified. On physical verification of the property, it was found by the Advocate Commissioner that the property mortgaged with the 1st respondent is situated in a land locked area and that access to the property is only through a pathway which is situated in S.No.167. Thereafter, a Report was filed expressing the inability of the Advocate Commissioner to execute warrant in view of certain special circumstances. Thereafter, this Court extended the time for execution of warrant after recording the full cooperation of judgment debtors to the Advocate Commissioner to execute the warrant.

(16)An objection was filed by the judgment debtors to the Commissioner's Report accusing that the Advocate Commissioner had not measured the land properly with reference to the boundaries shown in the documents and prayed for rejection of the Advocate Commissioner's Report dated 25.08.2022 and to direct the Advocate Commissioner, to measure the land with reference the FMB Sketch and other revenue records.

(17)A Valuation Report was also filed by a qualified valuer after identifying the property with the guidance of the Advocate Commissioner's Report. After satisfying with the report of the Advocate Commissioner that he had identified the land mortgaged in favour of the decree holder / plaintiff, the learned Single Judge held that the mortgaged property of the judgment debtors should be sold through auction. The plaintiff / decree holder was permitted to take out a paper publication giving details of the property for sale of the attached property through Court auction on 24.02.2023 with a specific direction that the paper publication shall be given by 06.02.2023. This Court also directed that the advertisement should be to inform the public that the sale would be on *"as is where is"* basis, with further instructions, how a participant could inspect the property and how the prospective buyers could inspect the documents.

(18)Aggrieved by the order passed by the learned Single Judge in EP.No.77/2021, directing Court auction to be held before the learned Master on 24.02.2023 at 2.15 p.m., OSA.No/46/2023 has been preferred by the defendants / appellants.

(19)This Court heard the submissions of the learned counsels appearing on either side and also perused the materials placed.

(20)After admitting the materials facts relating to the loan transaction, the review petitioners have raised a few grounds, not in terms of Order 47 Rule 1 of CPC but by focusing on the reasons around the failure of settlement, arrived at between the appellants and the 1st respondent / plaintiff. In other words, the petitioners have given some reasons justifying their conduct and the failure to pay the balance amount as per the settlement within the time agreed as per the settlement.

(21)Mr.V.Prakash, learned Senior Counsel appearing for the petitioners / appellants, referring to the dates and events, tried to impress this Court by focusing the lock down imposed by the Government and the financial constraints undergone by the film industry. The learned Senior Counsel then contended that the interest rate was exorbitant and the 1st respondent / plaintiff should waive such usurious interest and agree to receive interest at reasonable rate.

(22)After referring to the documents relied upon by the learned Senior Counsel for petitioners, this Court pointed out to the learned Senior

Counsel that the petitioners did not fulfil their undertaking as per the settlement before judgment. Even though the petitioners came forward to settle the 1st respondent's claim by paying a sum of Rs.15.30 Crores on or before 23.03.2020, the petitioners could only make a payment of Rs.7.50 Crores in October 2020 for releasing the film and failed to pay the balance.

(23)Except the further payment of Rs.50 lakhs, the balance was never paid. However, a Demand Draft issued by the Bharat Cooperation Bank Limited, Mumbai, drawn in favour of the 1st respondent for a sum of Rs.7.30 Crores was shown to the 1st respondent. Surprisingly, the said Bank informed the 1st respondent / plaintiff that they had not issued the Demand Draft. Subsequently, the Bank issued a clarification in the following lines:-

> *"We now wish to clarify that a bankers cheque for an amount of Rs.7,30,00,000/- [Rupees Seven Crores Thirty Lakhs only] was issued by our other Andheri [East] Branch in the favour of M/s.Venkateshwara Financiers Hyderabad Pvt Ltd., vide pay order No.109432 on 1st October 2021.*

However, the customer had also immediately given us a letter to cancel the same, effective after three working days value date and asked us to retain the instrument at out counters. Hence, this was not properly updated in our system. Thereafter, the instrument was also cancelled as per customer instructions. Therefore, at present there exists no valid instrument/pay order in favour of M/s.Venkateshwara Financiers Hyderabad Pvt Ltd. We are accordingly closing this matter at our end."

(24)The learned Senior Counsel appearing for the petitioners / appellants is unable to give an explanation or justification for the conduct of the petitioners. After purchasing the Bankers' cheque for an amount of Rs.7.30 Crores in favour of the 1st respondent / plaintiff vide Pay Order dated 01.10.2021, the Bank was asked by the petitioners to cancel the same, effective after three working days. This would only show the calculative attempt made by the petitioners to stage a drama with an intention to deceive the plaintiff.

(25)All the grounds raised in the review application are made to find fault with the Court to dismiss the appeal by projecting the terms of Agreement agreed between the parties and the consequences by which the appellants were forced to face heavy interest apart from the burden by way of suffering a decree as it is. The grievance of the petitioners is that this Court dismissed the appeal closing all options for the appellants / petitioners towards settlement by reducing the burden.

(26)The learned Senior Counsel appearing for the petitioners, through his submissions, reiterated the position that having agreed for a settlement and made the appellants to act on it, it was not proper for the Court to deprive the appellants/petitioners, the benefit of settlement, especially, when the 1st respondent / plaintiff had collected substantial amount under the settlement.

(27)First of all, the conduct of the petitioners is obvious from the communication received from the Manager, Bharat Cooperation Bank Limited, Mumbai, dated 07.10.2021. From the communication, as seen from the typed set filed by the petitioners, it is seen that there was a settlement by which the petitioners have promised to pay a sum of Rs.15.30 Crores on or before 23.03.2020. Even the first instalment of Rs.7.50 Crores was paid only in October 2020, that too, for the release of the film "Madha Gaja Raja" which was also the subject matter of hypothecation. Though the petitioners had paid a further sum of Rs.50 lakhs on 25.09.2021, there was no payment thereafter. It is stated by the 1st respondent / plaintiff that the petitioners have stated before this Court that a Demand Draft for the balance amount of Rs.7.30 Crores has been issued by a Bank in Mumbai and the same would be reaching Chennai over the weekend.

(28)From the communication received by the Bharat Cooperative Bank Limited, Mumbai, it is seen that a Demand Draft was purchased only for the limited purpose of showing its existence for a day without an intention to make payment with a fraudulent intention. There cannot be a different explanation to the conduct of petitioners as seen from the documents produced by the petitioners themselves, particularly, the communication dated 07.10.2021 received from the Bharat Cooperative Bank Limited, Mumbai.

(29)This Court, while dismissing OSA.No.43/2020, has referred to the admission of claim and the conduct and attitude of the petitioners which prompted this Court to impose a cost of Rs.25 lakhs payable to the 1st respondent / plaintiff in addition to the amount which is due in terms of the decree that has been upheld by the judgment in appeal.

(30)The question now to be considered is whether this Court can entertain the review application.

(31)The 1st respondent has obtained a valid decree in the suit. Any agreement or compromise pending appeal can be recorded and the appeal itself can be disposed of in terms thereof. In the present case, the essential condition was not fulfilled admittedly by the petitioners. Therefore, the appeal was heard and dismissed on merits. Review, by referring to the settlement proposal which failed pending appeal, is unsustainable.

(32)It has been consistently held by the Hon'ble Supreme Court and this Court that review should be confined to the scope of Order 47 Rule 1 of CPC. The power of review cannot be compared with the appellate power which enables only the superior Court to correct even the judgment of the Subordinate Court which is erroneous. In other words, review is not an appeal in disguise. A judgment can be reviewed only if there is a mistake or an error which is manifest on the face of the record. In a review application, it is not open to the Court to reappreciate the evidence and reach a different conclusion even if that conclusion is possible.

(33)In the instant case, this Court is unable to find any error or mistake which is manifest in the judgment in OSA.No.43/2020. Having regard to the facts and events admitted, this Court is not inclined to entertain the review application and therefore, it is liable to be dismissed.

(34)Coming to the grounds raised by the appellants in OSA.No.46/2023, this Court is unable to find any merits in any of the grounds raised. Since there is no interim order, it is also admitted that the property has been sold in auction. It is on account of the fact that the property which is mortgaged with the 1st respondent / plaintiff, does not have access from the remaining land of the appellants or from a public road, a person who could gain access to the property through his land, appears to have participated in the auction and became the successful bidder. Therefore, it is stated that no one could give a better offer.

(35)The successful bidder in the auction conducted by the learned Master on 01.03.2023, has filed a petition to implead himself as 3rd respondent and his application was allowed by this Court by order dated 13.09.2023.

(36)The learned counsel for the 3rd respondent has given particulars about the auction conducted on 01.03.2023 and the payment of 25% of the upset price as per the terms and conditions of the auction notice. The learned counsel for the 3rd respondent stated that the 3rd respondent has made substantial payment out of Rs.6.03 Crores.

(37)From the papers that is now available in the bundle and from the proceedings of the auction conducted by the learned Master, this Court is convinced that the property has fetched proper market price. Despite an attempt was made by the judgment debtors to stall the sale process by raising an issue regarding some discrepancy in the boundary description between the mortgage deed and the property described, this Court is convinced on seeing the papers and the submissions of the learned counsels on either side that the property which has been offered as security, had been brought to sale and there is no issue between the parties as regards the identity of the property which was mortgaged and brought to sale pursuant to the execution proceedings.

(38)When this Court wanted to know from the learned counsels, whether there is any dispute in relation to the identity of the property, which was actually mortgaged, the learned Senior Counsel appearing for the petitioners has not given a direct answer nor made an attempt to demonstrate before this Court that the property that was brought to sale is not the property mortgaged. The appellants have mortgaged 3 acres of land out of a larger extent.

(39)In such circumstances, this Court is unable to find any merits in the Original Side Appeal and the grounds raised by the appellants challenging the order in the execution petition are not substantiated by facts. Even during the pendency of the Original Side Appeal and the Review Application, this Court after hearing the arguments elaborately and being convinced that this Court is unable to find any merit either in the review application or in the Original Side Appeal, wanted to find out the possibility of settlement. The offer of the 1st respondent / plaintiff to not press the execution was also conveyed to the appellants who are also the review applicants. However, the learned counsel for the petitioners was unable to report settlement by accepting the offer. We noticed that the learned Senior counsel for the appellant started arguing the review on a question of law which is not even raised in the review or in the appeal.

(40)In such circumstances, this Court is of the view that the appellants have filed the Original Side Appeal and the Review Application only to gain time under the pretext of settlement.

(41)Having regard to the observations made by this Court in the above paragraphs, this Court is of the view that both the Review Application and the Original Side Appeal deserves dismissal.

(42)Accordingly, **Rev.Appl.No.27/2023 and OSA.No.46/2023 stand dismissed.** No costs. Consequently, connected miscellaneous petitions are closed.

[S.S.S.R., J.] [P.D.A., J.]
11.03.2024

AP
Internet : Yes
Neutral Citation: Yes

S.S. SUNDAR, J.,
and
P.D.AUDIKESAVALU, J.,

AP

Common Judgment in
Rev.Appl.No.27/2023 & OSA.No.46/2023

11.03.2024