

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
29~09~2021	08~10~2021

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

ORIGINAL PETITION Nos.500 & 898 of 2017

M/s.VGP Universal Kingdom,
Rep. by Mr.V.G.P. Ravidas,
Managing Director,
Having Office at VGP Square,
No.6, Dharmaraja Koil Street,
Saidapet, Chennai – 600 015.

... Petitioner in O.P.No.
500 of 2017 & respondent in 898 of 2017

.Vs.

M/s.K.K.Enterprises,
Rep. by its Proprietor Mr.Karthik
3rd Floor, Kundan Complex,
No.1 PP Street, Teynampet,
Chennai – 600 086.

... Respondent in O.P.No.
500 of 2017 & petitioner in 898 of 2017

Prayer: Petitions filed under section 34 Of the Arbitration and Conciliation Act,. 1996, O.P.No.500 of 2017 to set aside the impugned arbitral Award dated 27.11.2016 passed by the learned arbitrator and O.P.No.898 of 2017 has been filed to allow the claim made by the petitioner.

For Petitioner in O.P.No.500 of 2017
& respondent in O.P.No.898 of 2017 : Mr.V.Suresh
for Mr.Shivakumar

For respondent in O.P.No.500 of 2017
& petitioner in O.P.No.898 of 2017 : Mr.C.V.Shyam Sundar

COMMON ORDER

Aggrieved over the award passed by the sole arbitrator directing the respondent to pay a sum of Rs.17 lakhs with interest Original Petition in 500 of 2017 has been filed and Original Petition 898 of 2017 has been filed against the dismissal of the counter claim and also awarding of Rs.17 lakhs payable by the respondent.

2. As the two original petitions are arising out of the same award, this Court is inclined to dispose of the two original petitions by way of a common Order.

3. Brief facts leading to filing of the Original Petitions is as follows :

The claimant has entered into an agreement with the respondent on 29.06.2012 for running of a Food Court cum Bar in the respondent property. It was originally run in the name of Akshaya Food Court. The agreement period is for six years and three months period is given to make the premises ready. Six years period was to commence thereafter. The claimant paid a sum of Rs.15 lakhs as refundable security deposit and non refundable deposit of Rs.10 lakhs. It is agreed between the parties that after fit out period of three months is over, the license fee payable is Rs.2,50,000/- for the first six months and thereafter, Rs.3,00,000/- per month for the remaining 2 ½ years period. There has to be an upward revision of 15% in the license fee in the next three years. In addition to license fee, the claimant has to pay 10% of bar sales after taxes to the sister concern of the respondent. The claimant has to pay a sum of Rs.13,50,000/- to Akshaya Food Court, which is not refundable. Though several obligations agreed upon by the respondent, the respondent has not performed the obligations. In fact, the sewerage connection is not obtained. The license contemplated in the

agreement is also not obtained. Despite the claimant made investments for repairs and others, necessary license has not been obtained and did not make arrangement for 100 KV power and Air Conditioner provided by the respondent is not in working condition. In the meanwhile, the respondent terminated the license agreement. The claimant suffered a lot due to sudden termination of the license agreement. Hence, the claimant has made a total claim of Rs.1,96,65,000/- towards loss of profit, or in the alternative direct there respondent to refund the deposit a sum of Rs.80 lakhs with interest at the rate of 24% per annum.

4. The respondent denied the entire allegations and stated that on account of financial difficulty, the claimant could not invest any amount for the restoration of the bar cum restaurant. However, the claimant had been operating the bar from 22.09.2012 and orders were placed with TSMAC. The license fee has not been paid regularly and the license has not been paid from October 2012 to April 2013 and from April 2014 to and August 2014. After deducting the security deposit of Rs.15 lakhs, a sum of Rs.21,50,000/- was payable to the claimant towards license fee. In March 2014, when the claimant had raised the issue of repairing the roof and the first floor, a sum of Rs.5,00,000/- has been paid by the respondent. The

contention of the claimant that he was forcibly evicted is denied. The claimant has violated the contract and the contract was terminated and the claimant was evicted. Besides, the respondent has also claimed counter claim of Rs.70,88,000/- towards the outstanding sum towards arrears of license fee along with interest at the rate of 24% p.a.

5. On the basis of the above pleadings, the following issues have been framed :

i] Whether the claimant and respondent have performed their respective obligations under the License agreement dated 29.07.2012?

ii] By whom was the breach if any, committed of the license agreement?

iii] Whether the claimant is entitled to a sum of Rs.1,96,65,000/- towards loss of income?

iv] Alternatively, is the claimant entitled to refund from the respondent of a sum of Rs.80,00,000/- as set out in para 33 of the statement of claim?

v] Is the claimant entitled to interest 25% p.a. on sums claimed from the date of filing the claim?

vi] Is the respondent entitled to receive unpaid license fee of Rs.21,50,000/-

from the claimant?

vii] Is the respondent entitled to Rs.35,00,000/- towards loss of income on bar sales?

viii] Is the respondent entitled to receive Rs.3,00,000/- towards depreciated value of air conditioner?

ix] Is the respondent entitled to receive Rs.1,60,000/- from the claimant towards license fee?

x] Is the counter claimant entitled to interest 24% p.a. on sums claimed in the statement of counter claim from the due date of payment?

xi] Which party is entitled to costs of the proceedings?

xii] To what relief[s] are the parties are entitled to?

6. On the side of the claimant, the Manager of the Claimant Company was examined as C.W.1 and Ex.C.1 to Ex.C.32 were marked. On the side of the respondent, the Marketing Manager of the respondent company has been examined as R.W.1 and Ex.R.1 to R.19 were marked. After analyzing the entire evidence, the learned arbitrator has passed the following award :

7. The learned counsel appearing for the petitioner in O.P.No.500 of 2017 mainly submitted that as per the license agreement, it is the obligation on the part of the respondent to obtain license, which has not been done so. Sewerage connection has also to be obtained. As the respondent has failed to perform his part of the obligations, the claimant was not in a position to continue his business. However, the license was suddenly terminated and he was evicted. Hence, it is his contention that the deposit made towards various aspects to the tune of Rs.80,00,000/- has to be refunded and the learned arbitrator has not considered the same and prayed for allowing this petition.

8. Whereas, it is the contention of the learned counsel appearing for respondent in O.P.No.500 of 2017 and petitioner in O.P.No.898 of 2017 is that the tribunal has not considered the default of the claimant in not paying the license fee of Rs.2,50,000/- per month from April 2014 and admitted license fee has not been paid from October 2012 to April 2014. According to the respondent, the entire breach is on the part of the claimant. Therefore, the tribunal rejecting the counter claim and damages has to be set aside.

9. I have perused the entire award.

10. It is fairly submitted by the learned counsel for the petitioner in O.P.No.898 of 2017, the claim made towards the damages to the tune of Rs.1,96,65,000/- is given up and he is not making any submission in this regard.

11. Whereas, the only submission of the learned counsel for the petitioner in O.P.No.898 of 2017 is that he is entitled to withdraw the relief claimed in the claim petition and he is entitled to Rs.80,00,000/-. Whereas the respondent in O.P.No.898 of 2017 and petitioner in O.P.No.500 of 2017 submitted that because of the default committed by the claimant, the respondent could not induct any other party in the premises, which has caused loss to them. Besides, the admitted license fee has not been paid for several months. The learned arbitrator has not taken note of all these facts. Therefore, it is his contention that the award of the arbitrator in this regard is liable to be interfered.

12. It is not disputed by the parties the entering of the license agreement

dated 29.06.2012. It is the main contention of the claimant that as per the Contract, the respondent shall provide sewerage and water lines. However, the same has not been done. Therefore, the petitioner could not continue his business. Clause 4.3 of the agreement reads as follows :

“4.3 Nothing contained herein shall create or shall be construed to create any tenancy right or any interest, estate or rights in respect of the said premises and the said premises shall continue to be and shall be deemed to continue to remain in the possession of the party of the second part.”

13. It is also relevant to extract clause 7.2 in the agreement :

If the party of the second part shall omit to perform and observe any of the terms conditions, obligations herein contained which by this agreement are to be observed and performed by the party of the second part then it shall be lawful for the party of the first part any time thereafter to revoke the license and claim the refund of security deposit subject however the party of the first party having given to the party of the second part 60 days prior notice in writing to remedy or made good such breach and inspite of such notice the party of the

second part having failed to remedy the breach. The party of the second part will not be responsible for any indirect or consequential loss.

14. The learned arbitrator, after analyzing the entire oral and documentary evidence of the parties, has factually recorded that the claimant has entered into a license agreement after inspection of the premises and paying good will. Earlier one Akshya Enterprises was the licensee. The learned arbitrator also factually recorded that until the termination notice was issued, no grievance, whatsoever has been raised by the claimant for the alleged breach of terms by the respondent. Only for the first time in the reply, violation of the terms relating to sewerage connection has been raised, though the agreement was entered in the year 2012. The learned arbitrator also discussed about the performance of the claimant and the respondent and their obligations agreed upon in the contract. In the event of breach on either side, 60 days notice is contemplated for termination. Having found that, the learned arbitrator has recorded that a sum of Rs.17,00,000/- has to be refunded by the respondent. These facts are based on the admissions and documents produced before the learned arbitrator.

15. The learned arbitrator has in fact recorded a factual finding and not merely interpreting the contract and such a finding has been arrived on the analysis of the documents and appreciation of oral evidence of both sides. Therefore, when the arbitrator has arrived at a conclusion based on the oral and documentary evidence and the reasons appear to be plausible, merely because the parties are aggrieved by such a reasoning, as a matter of right, the award cannot be interfered for the sake of filing a petition under section 34 of the Arbitration and Conciliation Act. The learned arbitrator has specifically recorded a finding that even the respondent in the reply dated 24.06.2014, Ex.R.13, only two months rent is overdue. In the notice of termination, Ex.C.29, it is stated that the license fee from April 2014 has not been paid and specifically informed that after adjusting the security deposit of Rs.15 lakhs against the license fee payable, a sum of Rs. 15,000/- is payable and balance license fee payable is only from the month of April 2014. These facts have been reiterated by the respondent in the reply notice by their counsel dated 29.09.2014.

16. It is also found that as per the agreement, license fee was payable from

October 2012 and the parties for some reason agreed to commence the business from the month of May 2013 and that the license fee is payable from April 2014. Such a conclusion is arrived on the basis of the oral evidence and admission made by the witnesses. Besides replies issued and the letters sent by the respondent also substantiate the same. The learned arbitrator has also recorded that if the rent due is so high, the same would have been recorded or in Ex.C.16, Ex.R.13 and Ex.29 and Ex.C.31 other than claiming Rs.50,000/- towards arrears. No whisper whatsoever has been made claiming huge arrears towards license fee. These facts have been recorded by the learned arbitrator on the basis of the oral evidence as well as the documentary evidence and the learned arbitrator finally found that the petitioner is not entitled to any other amount, except Rs.17,00,000/- refundable deposit with interest and negated the claim as far as damages and towards loss of profit by giving adequate reasons. In view of the above, the learned counsel appearing for the applicant in O.P.No.898 of 2017 fairly conceded before this Court that they are not canvassing their claim made for loss of profit. Therefore, the award is based on the appreciation of oral as well as documentary evidence and this Court is of the view that as the scope under section 34 of the Arbitration and Conciliation Act is very limited, this Court cannot reappreciate the entire

evidence and supplant some other reason, which is highly impermissible. Hence, this Court do not find any ground made out to interfere the award and these petitions lacks merits and are liable to be dismissed.

17. Accordingly, both the original petitions are dismissed and the award passed by the learned arbitrator dated 27.11.2016 is confirmed.

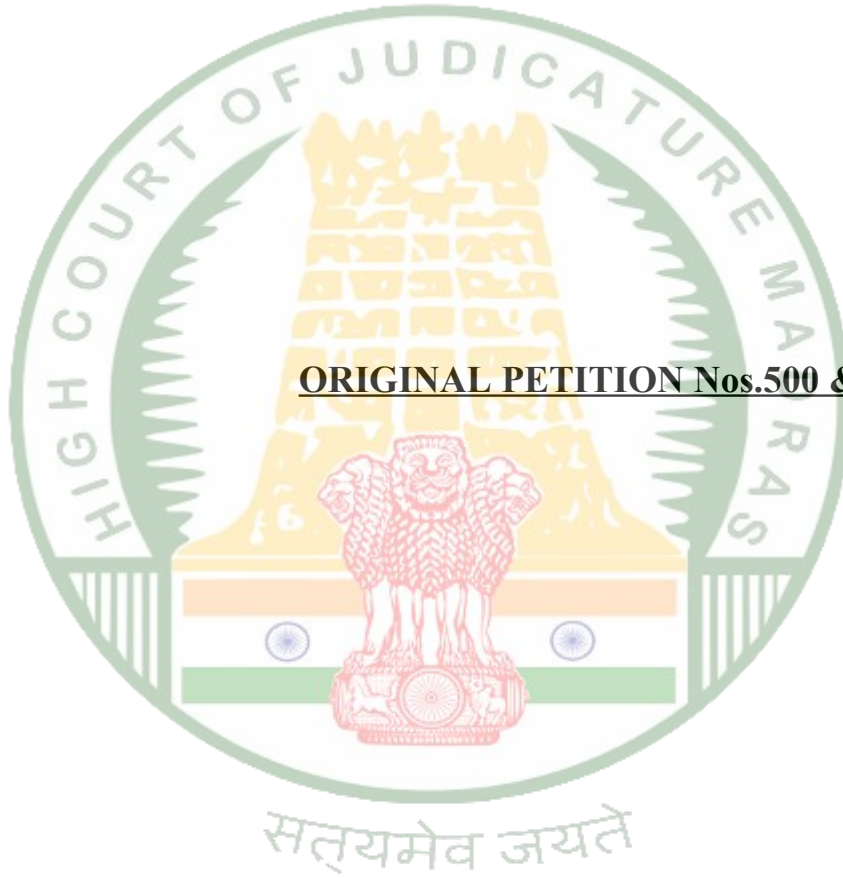
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N. SATHISH KUMAR, J.
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