IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 26.04.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.36 of 2022

Gopal Krishan Rathi ... Petitioner

Versus

R.Palani ... Respondent

Arbitration Original Petition filed under Section 34 (2) (a) (i) (ii) (iii) of the Arbitration and Conciliation Act, 1996 to set aside the impugned award dated 21.07.2021 passed by the Sole Arbitrator Mr.Prasanna Venkatesh at Chennai.

For Petitioner : Mr.Jayesh B.Dolia,
Senior Counsel for
M/s.Aiyar and Dolia

For Respondent : Mr.N.Muralikumaran for
Mr.Kumarpal R.Chopra

ORDER

The Arbitration Original Petition has been filed under Section 34 (2) (a) (i) (ii) (iii) of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 21.07.2021 passed by the Sole Arbitrator.

2.The claim made by the claimant/respondent before the Arbitrator is that he is a Teacher and Educationalist. He came to know that 8027 sq.ft. of commercial space was available with guaranteed lease through an advertisement made in the newspaper, namely, 'The Hindu' published by the HDFC Reality Pvt. Ltd. Based on the said advertisement, in order to invest certain proceeds of sale in a property, the respondent had contacted M/s.KDH Group of Companies, which was represented by the petitioner herein, who claimed to be the Director of the said group of Companies. While so, a term of Understanding was entered into between the respondent and the said group of companies, namely, M/s.KDH Investment Pvt. Ltd. and M/s.KDH Property Pvt. Ltd. As per the said terms, the total consideration for the property was Rs.8,42,83,500/- and the agreed rent for the consequential lease was Rs.85/- per sq.ft. per month with a rent escalation of 10% for every two years and lock-in period for six years. Based on the said understanding, two Sale Deeds dated 07.01.2015 were entered into by the respondent with M/s.KDH Investments Pvt. Ltd. and M/s.KDH Properties Pvt. Ltd. for 8027 sq.ft. In this regard, a registered Lease Deed dated 02.02.2015 was executed by the respondent to lease the property to M/s.KDH Investment Pvt. Ltd. for a period of 9 years with a lock in period of six years and the rent was agreed at Rs.6,82,295/- with escalation of 15% for every three years and ten months rent was paid as interest fee refundable security deposit. As there were certain requirements for the tenant namely, M/s.KDH Investments Pvt. Ltd. for interiors in the demised premises, the respondent, on the petitioner's request, gave a loan of Rs.3,25,00,000/- to the petitioner, namely, the Director of the Company. Therefore, a Memorandum of Understanding dated 28.08.2015 was entered into between the respondent and the petitioner, wherein the loan of Rs.3,25,00,000/- was acknowledged and the same was agreed to be paid, within a period of three years. Despite the above Memorandum of Understanding dated 28.08.2015, there was a default in rent after March 2016, which lead to the agreement for cancellation and termination of lease, cancelling the lease originally entered into between the respondent and M/s.KDH Investment Pvt. Ltd. and signed by the petitioner. In this regard, a legal notice dated 10.09.2017 was sent to the petitioner herein to pay the outstanding rent and the interest on the loan payable along with the principal amount advanced by the respondent, namely, a sum of

Rs.4,17,76,290/- jointly and severally. It is the claim of the respondent that the petitioner is liable to pay a sum of Rs.4,99,20,000/- inclusive of interest at Rs.7,40,000/- from the date of liability, namely, from March 2016 to the date of payment. Since an Arbitration Agreement dated 07.10.2018 was entered into between the parties to resolve the disputes amicably, the respondent has filed a Claim Petition before the learned Arbitrator to pay him the sum as per Appendix I, computed along with the interest until the date of repayment. The learned Arbitrator has passed an Arbitration Award in favour of the respondent directing the petitioner to pay the outstanding amount of Rs.2,55,00,000/- along with interest at the rate of 18% per annum.

3.It is the case of the petitioner that the respondent purchases two properties, namely, one from M/s.KDH Properties and another from M/s.KDH Investments. While so, on 07.01.2015, the respondent purchased undivided share of land, admeasuring to an extent of 2110 sq.ft. together with constructed office space of about 6520 sq.ft. along with four car parking in the building called 'KGN Towers' from M/s.KDH Investments

Pvt. Ltd. and the same was registered as Doc. No.41/2015 at Sub Registrar Office, Periamet, Chennai. On the very same date, the respondent purchased another undivided share of land, admeasuring to an extent of 596.70 sq.ft. together with constructed office space of about 1507 sq.ft. along with one car parking in the building called 'KGN Towers' from M/s.KDH Investments Pvt. Ltd. and the same was registered as Doc. No.40/2015 at Sub Registrar Office, Periamet, Chennai. After purchase of the above lands, a Lease Deed dated 02.02.2015 was entered into between the respondent and M/s.KDH Investments Private Limited and in this regard, the rent was fixed at Rs.6,82,295/-, being Rs.85/- per sq.ft. While so, on 04.03.2015, the respondent deposited a sum of Rs.25,00,000/- with the petitioner as their internal business arrangement. Thereafter, the respondent executed a Memorandum of Understanding dated 22.04.2015, namely MOU-1, which provides for a frame work of activities, roles and responsibilities to be carried on by both the parties. As per the above MOU-1, the capital contribution to the business and profit sharing were agreed at 50:50 between the respondent and the petitioner and the estimated project cost was Rs.6,50,00,000/-. Out of the same, Rs.2,51,00,000/- and Rs.1,65,00,000/-

have been already contributed by the petitioner and the respondent as of the date of MOU-1. The balance capital contribution to mark upto Rs.3,25,00,000/- by each of them would be contributed by the parties in due course of time. The above MOU-1 was entered into by the respondent and the petitioner with a view to record their partnership in the business, envisaged in the Health and Wellness Sector by both the parties. Subsequent to MOU-1, a Lease Deed dated 22.04.2015 was entered by the respondent and M/s.KDH Investments Pvt. Ltd., whereby the agreed notional rent was Rs.14,04,725/- per month, being Rs.175/- per sq.ft. and the escalation in lease rent was agreed to be 15% over the last paid rent at the end of every three years. Thereafter, a Memorandum of Understanding dated 13.05.2015 namely, MOU-2 was entered into between the respondent and the petitioner. Pursuant to the same, M/s.KDH Investments Pvt. Ltd, the lessee of the Lease Deed-1 would effect a sub lease of the premises to M/s.KGN Fitness and Developers Pvt. Ltd. and it was agreed that all the investments done by the respondent shall be transferred to the account of M/s.KGN Fitness and Developers Pvt. Ltd., which was acceded to by the respondent. Pursuant to the above, M/s.KDH Investments Pvt. Ltd., the lessee of the Lease Deed-1 entered into a Lease Deed dated 01.07.2015 with M/s.KGN Fitness and Developers Pvt. Ltd. for subleasing the leased property, together with another property in the same premises of KGN towers. In this regard, the sub lessee was required to pay monthly rent at Rs.175/- per sq.ft. and the escalation in rent was agreed at 15% over the last paid rent at the end of every three years. Thereafter, an amount of Rs.1,40,00,000/- has been returned to the respondent, which is evident from the respondent's email dated 16.07.2016. Subsequently, a Memorandum of Understanding dated 28.08.2015, namely MOU-3 was entered into by the respondent and the petitioner at the insistence of the respondent. As consideration for his share holdings transfer, the respondent has to pay the sum of Rs.3,50,00,000/- in monthly installments of Rs.50,00,000/- each starting from 15.06.2016 towards capital contribution. When the respondent had actually invested the money as his capital contribution into the business affairs of M/s.KGN Fitness and Developers Pvt. Ltd. and not as a loan to either the respondent or the Companies owned and promoted by him or his family members, on 10.09.2017, the respondent sent a Legal Notice to the petitioner calling upon him to pay a sum of Rs.4,17,76,290/-, within a period of 30 days from the date of receipt of the above notice. Since the respondent has concealed and suppressed the facts and transferred his 50% equity share to one Mr.Pradeep Kothari and Mr.Nikhil Dhruva for Rs.3,50,00,000/- and received an amount of Rs.70,00,000/- as part payment of the total consideration, no amount is liable to be paid by the petitioner to the respondent as claimed by him. Therefore, challenging the Award passed by the learned Arbitrator in favour of the respondent, directing the petitioner to pay the outstanding amount of Rs.2,55,00,000/- along with interest at the rate of 18% per annum, the present Original Petition has been filed by the petitioner.

4.The learned Senior Counsel for the petitioner submitted that 28 documents, marked as Exs.1 to 28 were not considered by the learned Arbitrator, while passing the Arbitral Award since the money was invested for the purpose of shares alone and not as a loan. In this regard, the learned Senior Counsel for the petitioner, heavily relying upon Exs.R4 and 6/ Memorandum of Understanding-MOU-1 and MOU-2 dated 22.04.2015 and 13.05.2015 respectively, entered into between the respondent and the petitioner, submitted that there was no mention about any loan in the said MOUs since the same have been entered into between the parties only for the purpose of business transactions. Referring to Ex.R12/Minutes of the Meeting dated 30.04.2016, learned Senior Counsel for the petitioner submitted that by virtue of the said Minutes, the amount has to be repaid not by the petitioner, but by one Mr.Pratheep Kothari. Relying upon Ex.R13/ Transfer of Shares, learned Senior Counsel for the petitioner submitted that the respondent, being the Share holder and Member of the Company of M/s.KGN Fitness and Developers Pvt. Ltd., transfers his 50% stake in KGN Fitness to the third party investors on 24.05.2016. Referring to Exs.R16 and 18/emails sent by the respondent to the petitioner, learned Senior Counsel for the petitioner submitted that when the respondent agrees that he held 50% shares in KGN Fitness as security against Rs.3.25 crores, the stand taken by the respondent that the share transfer transaction is unrelated, cannot be acceptable as the respondent has also received Rs.70,00,000/- from the third party towards consideration of transferring the shares and demands.

5.Learned Senior Counsel for the petitioner further submitted that the share transfer is not a separate transaction and the same is only divestment by the respondent towards his initial investment of Rs.3.25 crores as he re-transferred his shares to the third party for consideration of Rs.3.25 crores. Learned Senior Counsel further submitted that R8/MOU-3 dated 28.08.2015 was entered into between the parties by means of physical threat and coercion. Since the respondent felt about his unsecured investment of Rs.3.25 crores, he entered upon MOU-3 with the petitioner, wherein the above amount is termed as a loan and the same also mentioned that a prospective separate loan agreement to be entered in future to determine from what date the loan is payable, but the same was not done till date by the respondent. When there was no mention about any loan in MOUs 1 and 2, entered into between the parties only for the purpose of business transactions, MOU-3, which was made by means of physical threat and coercion, could be construed only as an attempt made by the respondent to convert the entire transaction into a loan and therefore, the same is non-est in the eye of law. Therefore, the learned Arbitrator failed to note that M/s.KDH Investments Pvt. Ltd. and M/s.KGN Fitness and Developers Pvt.

Ltd., which are private entities, are not added as parties either in MOU-3 and in the Arbitration Proceedings. The learned Arbitrator has also failed to note that the acknowledged payment of Rs.70,00,000/- received by the respondent from one Ms.Sandya Kothari was towards divestment of the respondent's shares in M/s.KGN Fitness and Developers Pvt. Ltd. and not repayment of any loan.

6.Learned Senior Counsel for the petitioner further submitted that though 28 vital documents were marked as Exs.1 to 28 by the petitioner in the Arbitration Proceedings, the learned Arbitrator has failed to give any reason whatsoever for not considering the documents filed by the petitioner. When allotment of shares and share transfer papers prove that the respondent was given equity shares equivalent to Rs.3.25 crores and the investment was only towards setting up of a gym in 50:50 split pattern by the respondent and the petitioner in M/s.KGN Fitness and Developers Pvt. Ltd. and that the money paid was towards the share contribution of the respondent for the purpose of setting the above Fitness Centre, despite existence of pleadings and number of documents, the learned Arbitrator did not take any effort to enquire into the above aspects. Under these circumstances, the Award passed by the learned Arbitrator is without any basis and the same is liable to be set aside.

7.In reply, the learned counsel for the respondent would submit that the learned Arbitrator, after taking into consideration all the aspects, has passed an Arbitration Award in favour of the respondent, directing the petitioner to pay the outstanding amount of Rs.2,55,00,000/- (being the loan amount of Rs.3,25,00,000/- minus the admitted receipt of Rs.70,00,000/- by the respondent) along with interest at the rate of 18% per annum and therefore, the same is liable to be paid by the petitioner.

8.In support of his contention, relying upon Ex.R4/MOU-1 and Ex.R6-MOU-2 dated 22.04.2015 and 13.05.2015, learned counsel for the respondent submitted that the respondent and the petitioner, being the first part and second part of the MOUs, have agreed to bear the capital contribution in the LLP at 50% and 50% and as per the said MOUs, shares have to be alloted to the respondent and the estimated cost of the operation and the amount spent towards the project cost have also been mentioned for the purpose of business.

9.Relying upon Ex.R8/MOU-3 dated 28.08.2015, the learned counsel for the respondent submitted that the petitioner has agreed to refund a sum of Rs.3,25,00,000/- along with interest to the respondent, who has received only a sum of Rs.70,00,000/- from the third party at the instance of the petitioner and therefore, the petitioner is liable to pay the amount as ordered by the learned Arbitrator. Learned counsel for the respondent requested this Court to confirm the Award passed by the learned Arbitrator.

10.I have given due consideration to the submissions made by the learned Senior Counsel appearing for the petitioner and the learned counsel appearing for the respondent and perused the entire materials placed on record.

11.It could be seen from records that the petitioner came forward with a business proposal seeking an investment of Rs.3,25,00,000/- assuring high business profit. Accordingly, two agreements, namely, MOU and lease agreements were entered into between them on 22.04.2015 for conduct of the business suggested by the petitioner and a LLP would be constituted under the name and style of 'Aura Health and Wellness Management'. As per the said MOUs, the respondent has made an investment of Rs.1,65,00,000/- as on the date of MOUs by two tranches of each Rs.70,00,000/- from the joint account of the respondent and his wife on 24.01.2015 and 09.02.2015 respectively to the petitioner's company M/s.KDH Investments Pvt. Ltd. Thereafter, a sum of Rs.25,00,000/- was transferred on 04.03.2015 from the joint account of the respondent and wife to the petitioner. In total, Rs.1,65,00,000/- was paid as per the business proposal that was envisaged in the MOU dated 22.04.2015. With regard to the assured monthly returns for the investment by the respondent, the petitioner offered to increase the rental income of the property by Rs.7,40,000/- in lieu of interest and thereby, a fresh lease agreement has been entered into between M/s.KDH Investment Pvt. Ltd. and the respondent on 22.04.2015, whereby the lease rent was re-fixed at Rs.14,04,725/- from Rs.6,82,295/-. Subsequently, MOU-2 dated 13.05.2015 was entered into between the parties and on the said date, out of the agreed sum of Rs.3,25,00,000/-, the remaining balance payment of Rs.1,60,00,000/- was made from the joint account of the respondent and his wife to the petitioner. Schedule-II to the MOU-2 dated 13.05.2015 would evidence the amount advanced by the respondent to the petitioner. Thereafter, a sum of Rs.1,40,00,000/- paid under MOU-1 to M/s.KDH Investments was returned to the respondent and his wife by M/s.KDH Investments on 24.07.2015 by 3 tranches of Rs.50,00,000/-, Rs.50,00,000/- and Rs.40,00,000/- and on the very same day, the said amounts were advanced to the petitioner in his personal name as loan.

12.With the above background, both the learned counsel have admitted the receipt of the above sum of Rs.3.25 crores by the petitioner from the respondent. The only issue to be decided in the present case is whether the above sum of Rs.3.25 crores has been paid by the respondent to the petitioner towards loan or invested towards share contribution for the business purpose.

13.Learned Senior Counsel for the petitioner submitted that the money paid was towards the share contribution for the purpose to set up the Wellness Centre. Though the petitioner has filed 28 vital documents to prove his case, the same have not been considered by the learned Arbitrator while passing the Award. If the Arbitrator would have taken into consideration all the documents filed by the petitioner, he would have rejected the claim of the respondent that the money paid towards loan and not towards contribution of shares.

14.In this context, learned Senior Counsel for the petitioner heavily relied upon Exs.R4, 6, 8, 12, 13, 16 and 18/Memorandum of Understanding-MOU-1, MOU-2 and MOU-3 dated 22.04.2015, 13.05.2015 and 28.08.2015 respectively, entered into between the respondent and the petitioner, Minutes of Meeting dated 30.04.2016, Transfer of Shares dated 24.05.2016 and emails sent by the respondent to the petitioner dated 15.06.2016 and 25.07.2016.

15.A perusal of Ex.R4/MOU-1, entered into between the petitioner and the respondent would show that a new LLP would be incorporated to carry on the activities of the fitness and wellness management and the capital contribution in the LLP would be 50% : 50% and the estimated cost of the operation is Rs.6,50,00,000/- and the respondent has advanced Rs.1,65,00,000/- as loan/investment to the petitioner and the said amount is for the purpose of the business.

16.Ex.R6/MOU-2 entered into between the respondent and the petitioner also shows that the same is in addition to the earlier MOU-1, entered into between them, setting out the additional terms, conditions and services of their newly proposed businesses and the respondent has agreed to advance an amount as mentioned in Schedule I to the petitioner and the amount advanced through the above MOUs would be introduced as capital for the incorporation of LLP.

17.Learned counsel for the respondent has produced email dated 08.12.2014 received from one Ravikrishnan, Director of the petitioner's

Company along with Term Sheet, Term Sheet sent by the respondent, Agreement for Arbitration dated 07.10.2018, Lease Deeds dated 02.02.2015 and 22.04.2015, entered into between the respondent and M/s.KDH Investments Pvt. Ltd., Letter dated 27.11.2016 addressed by the petitioner to the respondent, Lease Cancellation and Termination Deed dated 02.12.2016 and Legal Notice dated 10.09.2017 from the respondent's counsel to the petitioner, which are produced before the learned Arbitrator, to support the claim of the respondent.

18.Learned counsel for the respondent, relying upon Ex.R8/MOU-3, submitted that the petitioner has agreed to refund a sum of Rs.3,25,00,000/- along with interest to the respondent, who has, thereafter, received a sum of Rs.70,00,000/- from the third party at the instance of the petitioner and therefore, the petitioner is liable to pay the amount as ordered by the learned Arbitrator.

19.In this regard, a perusal of Ex.R8/MOU-3 would show that the respondent has remitted the sum of Rs.3,25,00,000/- to the petitioner towards loan amount in two tranches of Rs.1,85,00,000/- and Rs.1,40,00,000/- and in lieu of interest, an additional rent of Rs.7.40 lakhs per month shall be continued to be payable by the petitioner to the respondent towards cost of equipment, related to Gym at Floor 2A of KGN Towers and the same shall be repaid by the petitioner as and when the said amount is demanded by the respondent.

20.Learned Senior Counsel for the petitioner submitted that the above MOU-3 has been entered into between the parties by means of physical threat and coercion. But the petitioner has not filed any criminal case before any concerned Court against the respondent stating that the above MOU has been entered into between them under coercion and threat. Under these circumstances, the submission made by the learned Senior Counsel for the petitioner is not acceptable.

21.The learned Arbitrator taking into consideration Ex.R8/MOU-3 has come to the conclusion that the same forms the basis of the claim of the respondent and that the authenticity of the said document has been admitted by both the parties and that there is no dispute regarding the signatures therein and that clauses 1 and 3 speak about loan and interest respectively.

22.Considering the above aspects, this Court observes that the above sum of Rs.3,25,00,000/- is agreed to be treated as a loan and the rent of Rs.6,82,295/- per month for the leased out property and the interest of Rs.7,40,000/- per month as agreed upon for the loan of Rs.3,25,00,000/- were paid for the first one year and the same are evidenced by the document dated 28.08.2015, termed as MOU-3, entered into between the petitioner and the respondent. For the said loan, the petitioner agreed to give as security the terrace area of 5000 sq.ft. in KGN Towers, which is the open terrace area above the property, purchased by the respondent from M/s.KDH Investment Pvt. Ltd.

23.As far as R12, 13, 16 and 18/Minutes of Meeting dated 30.04.2016, Transfer of Shares dated 24.05.2016 and emails sent by the respondent to the petitioner dated 15.06.2016 and 25.07.2016 are concerned, the Tribunal has taken into consideration all those documents filed by the petitioner and passed the well considered Award and therefore, the same would not rescue the case of the petitioner. Therefore, the learned Arbitrator passed the Award in favour of the respondent directing the petitioner to pay the outstanding amount of Rs.2,55,00,000/- along with interest of 18% per annum to the respondent.

24.Since all those numerous documents filed by the petitioner have been well considered by the learned Arbitrator and the same would not ultimately prove the petitioner's case, I do not find any illegality or infirmity in the Award passed by the learned Arbitrator and therefore, the same needs no interference by this Court. Accordingly, the Original Petition stands dismissed. No costs.

26.04.2023

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation : Yes / No
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KRISHNAN RAMASAMY,J.
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