NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No.1569 of 2023
&
I.A. No.5606 of 2023

(Arising out of the Impugned Order dated 04.09.2023 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Allahabad Bench in Company Petition (IB) No. 06/ALD/2022]

IN THE MATTER OF:

M/s Kellton Tech Solutions Limited
Plot No. 1367, Phagan Plaza,
Road No. 45, Jubilee Hills,
Hyderabad – 500033

Also at:
404-405, iLabs Centre, Udyog Vihar
Phase III, Gurugram Haryana – 122016 **...Appellant**
Versus

M/s Actas Technologies Private Limited
Registered office at:
C-16, Sector-6, Noida – 201301, India

Also at:

A-38, Jalvayu Vihar, Sector – 21,
Gautam Budh Nagar,
Uttar Pradesh – 201301 **...Respondent**

Present:

For Appellant : Mr. Rakesh Kumar, Ms. Tanisha Kaushal, Advocates.

For Respondent : Mr. Parangat Pandey and Mr. Tuhin Batra, Advocates

J U D G M E N T

(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

This is an appeal under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter referred as "IBC") filed by M/s Kellton Tech Solutions Limited against the order (Impugned Order) passed by the National Company

Law Tribunal, Allahabad Bench (Adjudicating Authority) dated 04.09.2023 in Company Petition (IB) No. 06/ALD/2022, by which the Adjudicating Authority has dismissed the Application filed by the Appellant under Section 9 of the IBC, 2016 on the ground that there is a pre-existing dispute between the parties.

2. Heard the Counsels for both the parties and perused the documents placed before us.

Case of the Appellant viz. M/s Kellton Tech Solutions Limited

3. The Appellant is an IT company providing IT services such as development of software, technology consulting, outsourced product development etc. The Appellant had entered into a "Software Development and Service Agreement" (Agreement) dated 17.09.2020 with the Respondent namely, M/s Actas Technologies Private Limited for the development of customized e-wallet platform.

4. The Appellant submits that it provided the services as per the agreement and after the completion of the work, up to the User Acceptance Testing (UAT) stage, it duly raised the invoices for said services. Out of the total invoices raised by the Appellant, the Respondent failed to make the payment for the last two invoices of Rs 29,50,000 dated 11.12.2020 and Rs 1,46,32,000 dated 21.07.2021, even though it paid earlier three invoices dated 24.09.2020, 28.09.2029 and 29.10.2020. Appellant issued Demand Notice under section 8 the Code on 8.10.2021 which was replied to by the Respondent on 19.10.2021, but failed to raise existence of dispute within the statutory period.

5. On 12.11.2021 the Appellant filed an application under section 9 of the IBC 2016 before the Adjudicating Authority. The Appellant submits that the Adjudicating Authority has wrongly applied the e-mail exchanged between the Appellant and Respondent to arrive at a conclusion that there is a pre-existing dispute between the parties and therefore rejected the application filed by the Appellant under Section 9 of the IBC on 4.9.2023.

6. Appellant further claims that when the Operational Creditor and the Corporate Debtor had devised a mechanism by incorporating a clause in the agreement to raise a dispute regarding debt and no dispute as per the agreed procedure is ever raised by the Corporate Debtor, then whether it can be said that there is a pre-existing dispute. The Appellant submits that Clause 3.4 of the agreement provides for the mechanism for raising the dispute which reads as follows:

> *"3.4 Disputes. In case of any issue in the Services provided or error in the amount raised in the invoice, PAYMONK shall bring the same to the notice of the Service Provider within 15 (Fifteen) Business Days of receipt of the invoice ("Disputed Service Fees"). Both the parties shall then provide the other with such necessary information to enable them to reconcile the issues and upon amicable settlement, PAYMONK shall make payment towards the said disputed invoice within 5 (Five) Business Days thereafter ("Agreed Due Date"). In the event that a dispute in relation to the Disputed Service Fees has not been settled within 21 (Twenty One) days of the Service Provider being notified about the Disputed Service Fees by PAYMONK, the parties shall refer such disputes to Arbitration in compliance with Clause 16 of this Agreement. Notwithstanding the above, PAYMONK shall however make payments to the undisputed portion of the invoices, if any, within the Agreed Due Date."*

7. Appellant submits that in the light of the above, no pre-existing dispute can be said to be in existence either about the quality of the product or in the invoice raised unless the same has been raised in accordance with the second clause of the agreement.

8. Appellant further submits that the pre-existing dispute was raised after the issuance and receipt of Section 8 notice. Otherwise, also no mediation proceedings in terms of Section 12A of Commercial Courts Act, 2015 has been initiated or at least no proof of the same has been brought on record.

9. Appellant further submits that no suit could have been instituted as Section 12A is applicable in respect of Commercial Suits whereas in the present case "Agreement" contains Arbitration Clause and accordingly there was no need for mediation between the parties as envisaged under Section 12A of the Commercial Courts Act, 2015.

10. Appellant further submits that the product has been duly delivered and the no dispute about the quality of the product has ever been raised. Otherwise, also in case of software development, no product is final at the delivery itself, its working testing and commissioning always requires technical support and working on the software and this a reason that the entire amount was not claimed by the Appellant.

11. Appellant further submits that the issue regarding the quality of the product was raised by the Respondent after raising of the invoices. The same could have been raised when the product was delivered and not at the time of making payment. Appellant further submits that Section 8 notice was issued on 08.10.2021 and was delivered to the Corporate Debtor by

11.10.2021 and the Corporate Debtor had also replied to the same on 21.10.2021 but the "indemnity notice" was issued by the Respondent only on 29.10.2021 and the Corporate Debtor had not mentioned anything relating to that on 21.10.2021 in its reply.

12. Appellant further claims that the Respondent never raised any specific dispute prior to the service of demand notice under Section 8 of the IBC. It further claims that the product was delivered to the Respondent on 01.06.2021, receipt of the product is also duly acknowledged but there is no proof that the Respondent ever raised any dispute about the product.

13. The Appellant claims that it has delivered the product and raised the invoices as per the milestone, therefore, there is an existence of Operational Debt and as the Respondent had admitted the factum of completion of the work, therefore, there is an admission of debt by the respondent. Appellant claims that the end customer accepted the product and agreed to release 50% payment vide e-mail dated 02.06.2021.

14. It further claims that Respondent has initiated the mediation proceedings between the parties, not only after the service of the notice under Section 8 of the IBC, but also after the dismissal of the petition under Section 9 IBC filed by the Appellant. Appellant claims that the Corporate Debtor made a false statement about pendency of civil suit during pendency of Section 9 application before the Adjudicating Authority.

Case of the Respondent M/s Actas Technologies Private Limited

15. Respondent has claimed that there is a genuine pre-existing dispute regarding the failure of delivery of work as well as the quality of Non-usable

"Sample Programming Code", which was clearly evident from e-mail exchanged between the parties. Furthermore, the Appellant was conscious of the indemnity notice, which was issued on 29.10.2021 by the Respondent to the Appellant, which is also part of the record of the Adjudicating Authority and is also mentioned in the impugned order of the Adjudicating Authority. The said indemnity notice has recorded that the dispute is ongoing and the respondent has initiated the process for filing of claim before the Delhi High Court Mediation Centre as per Section 12A of the Commercial Courts Act, 2015. This clearly shows that there is a pre-existing dispute between the parties with respect to the claims and invoices of the Appellant.

16. Respondent submits that the Appellant has not made complete delivery of the services as per the software development agreement, which included e-wallet platform for the end client of the respondent i.e. THIMAR AL ARABIYA. The Services were to be completed in three phases, which were further divided into total of 15 (fifteen) milestones.

17. Respondent submits that on the one hand Appellant rejects pendency of any pre-existing dispute, while on the other hand they have accepted their participation in the pre-institution mediation proceedings under Section 12A of the Act.

18. Respondent further submits that there was no provision in the agreement to raise any invoices without approval and acceptance of corresponding work by the Respondent or to raise any consolidated invoice of all phases & their milestones as per Schedule III. In pursuance to Clause 3.2 of the Agreement, the Appellant followed the process of requesting the signing

of the acceptance form from the Respondent and the End Client, only until Milestone 4. Thereafter, the Appellant tried to seek the approval for Phase 1 on which the Respondent and End Client clearly communicated the highly bad quality of Phase I Sample Programming Code. This was also rejected by the End Client and the Respondent. The Appellant had failed to proceed beyond Milestone 4 as per Agreement.

19. Third party audit report of the programming code also showed that 95% of the code had to be re-written. Also, the Appellant never responded on the audit report which was shared with him on 05.07.2021.

20. Thereafter, Appellant raised a consolidated invoice on 21.07.2021 for all the remaining 11 milestones under schedule III of the agreement. Since there was no delivery of the services beyond milestone 4 there can be no obligation or liability to pay for the incomplete or abandoned work.

21. Respondent further claims that the pre-existing dispute is evident from various the e-mail exchanges, particularly dated 20.01.2021 and 11.12.2020. Further, Respondent submits that on 15.06.2021, the CEO of the End Clint raised a dispute, by conveying his concern for delay in the delivery of the project/software code. This was also brought to the notice of the Appellant in a WhatsApp communication which showed poor quality of the sample software coding provided by the Appellant company. The End Client also had conveyed its dissatisfaction on 04.07.2021 and 05.07.2021. Appellant has been able to achieve the completion of milestone 4 and no further deliveries as per the milestones have been done till date. The Respondent claims that

Section 9 proceedings under the Code before the AA are intended to cover up substandard phase 1 sample programming code of the Appellant.

22. Respondent further claims that pursuant to the Appellant's breach of obligations, representations and warranties under the agreement, the Respondent not only raised its concern over the quality and non-delivery of services on part of the Appellant, but also issued an indemnity notice on 29.10.2021.

23. Respondent further claims that the consolidated invoice dated 21.07.2021 raised by the Appellant for an amount of Rs 1,46,32,000 is invalid and is a tactic to circumvent the bar of Section 10A of the IBC. As per Clause 3.2 of the Agreement the Appellant would have to raise separate invoices only when they became due and accepted by the Respondent. In order to circumvent this and to increase the size of the claims above Rs. 1 crore at one go, the Appellant issued invalid consolidated invoice dated 21.07.2021, totally inconsistent with provisions of Agreement. Apparently, sole intention of Appellant was to harass and extort undue amounts from the Respondent through filing of bogus insolvency petition against the Respondent. Records clearly show that the monthly invoices were being raised between 24.09.2020 -11.12.2020 but thereafter the Appellant did not raise any invoice as the work was left incomplete after the 4th Milestone. The said act of the Appellant clearly establishes the fact that it did not raise any invoice until 21.07.2021 as there was no provision agreed under the Agreement for sending a consolidated invoice.

Issue before us

24. The short issue before this Tribunal is whether in the facts of this case, there is a pre-existing dispute or not and whether this Appeal can be allowed or not.

Findings and Conclusions

25. Appellant has claimed total outstanding unpaid balance to be Rs.1,82,36,619/- comprising of two invoices of Rs.29,50,000/- which was raised on 11.12.2020 and next one of Rs.1,46,32,000/- raised on 21.12.2021. Appellant, being the OC, had issued Demand Notice under Section 8 of the Code, 2016 on 8.10.2021. The former is barred by Section 10A of the Code and the Appellant is not entitled to initiate proceedings under Section 9 for this amount. The other invoice is for Rs.1,46,32,000/- and Adjudicating Authority has rightly decided to examine his claim to that extent only.

26. Prior to this Demand notice of 8.10.2021, many business events had happened, which are worth noticing, as they have a bearing on the decision of whether there is a pre-existing dispute or not. Some of them are noted as below:

i. On 20.01.2021, much before sending of notice u/s 8 IBC, 2016, an e-mail was sent by the Corporate Debtor to Operational Creditor stating that *"Little weird you are asking for the payment for which the delivery still pending. Can you please sync with your team before following up for payments? Also, there are enough escalations on the current project from the client regarding the quality of the project. Based on project delivery and quality will see the payment process accordingly."*

ii. On 15.06.2021 the end client "THIMR AL ARABIYA" through an e-mail exchange raised a concern of delay in delivery of the

project works. This concern and dispute were raised directly to the Applicant company by the End Client.

iii. On 21.06.2021 "Code Review Report" for the "Phase I Sample Programming Code" shared through WhatsApp by the Respondent herein with Mr. Gaurav Srivastava, an executive of the Appellant company regarding poor quality of the sample software coding provided by the Applicant company.

iv. On 04.07.2021 the end client "THIMR AL ARABIYA" raised a concern of the quality of the sample software codes supplied by the Applicant Company. This concern and dispute was raised directly with the Applicant company by the End Client through an e-mail exchange.

v. On 5.07.2021 the end client "THIMR AL ARABIYA" again raised a concern of the quality of the sample software codes supplied by the Applicant Company. This concern and dispute was raised directly with the Applicant company by the End Client through an e-mail exchange.

vi. On 21.07.2021 the Appellant raised a consolidated invoice for all other pending milestones for an amount of Rs.1,46,32,000/-. This was not paid by the Respondent as all other milestones as per the Agreement were not achieved by the Appellant and also the delivery of the product and service was not effected till that date.

vii. Applicant sent a demand notice under Section 8 of IBC Code on 11.10.2021.

viii. Respondent sent reply to the demand notice on 21.10.2021 in which it disputed the debt as extracted herein "..We hereby strongly deny the existence of any 'Operational Debt' and several 'Disputes' have been raised from our end to your Client, which your Client is fully aware of. The payment platform programming

code that was developed by your client was defective and highly risky to go live as a payment business platform, which can lead to withdrawal of a payment license of the payment platform programming code user. This was apparent from the code quality report that was shared with your client's employee's executive (Gaurav) through WhatsApp communication dated 21/06/21…"

ix. Indemnity notice dated 29.10.2021 from the Corporate Debtor/ Respondent was sent, seeking indemnity for failure to perform obligations as per the agreement. Before Delhi High Court Mediation Centre, mandatory pre-institution mediation proceedings under Section 12A of the Commercial Courts Act, 2015 are ongoing.

x. Appellant moved a Section 9(1) proceeding under the IBC Code 2016 on 12.11.2021 before the AA.

27. The Appellant and Respondent had entered into a "Software Development Agreement" dated 17.09.2020, as per which the Appellant was to provide its services of development of customised e-wallet platform for the End client of the Respondent i.e. THIMR AL ARABIYA. As per the Schedule of the Agreement, the services were to be completed by the Appellant and their corresponding payments were to be made in different phases, which were further divided into different milestones. But the above-mentioned events, particularly the e-mail exchange dated 15.06.2021, 21.06.2021, 04.07.2021 and 05.07.2021 brings out clearly that the End Client is very concerned about the delay and the delivery of the final product and services. The End Client had conveyed its dissatisfaction on 04.07.2021 and also on 05.07.2021- much before the issue of Demand Notice under section 8 IBC 2016 and the Section 9(1) proceedings under the IBC, 2016 initiated on 12.11.2021 and all

this is clear evidence that there is a dispute on the delivery of the product and services, in the form of e-wallet, which is part of the Software Development Agreement.

28. In the meantime, the Appellant raised a consolidated invoice of Rs 1,46,32,000/- dated 21.07.2021 for all the remaining 11 milestones under schedule III of the agreement. Since there was no delivery of the services beyond milestone 4, it is difficult to comprehend the issuance of this invoice and also adds to another dimension of the pre-existing dispute. It also gives credence to the argument of the Respondent that this invoice was filed with the sole intention to harass and extort undue amounts through filing of bogus insolvency petition - though we are not dwelling into that track in deciding this Appeal.

29. Later on, ignoring all the emails exchanged between the Appellant, Respondent and the End Client, which was clear evidence of the poor quality of the software programming and also the non-delivery of the product and dis-satisfaction of the End Client, for which the product was being made, which is much more than a feeble dispute, still the Appellant proceeded against the provisions of Section 8(2)(a) of the IBC and sent a demand notice to the Respondent on 08.10.2021.

30. It is worth noting that the Respondent had also sent an indemnity notice dated 29.10.2021 to the Applicant, mentioning about the ongoing dispute for faulty services, with payment platform programming code being defective and highly risky to go live as a payment platform. Further, Respondent had initiated the process for filing a claim petition before the

Delhi High Court Mediation Centre as per Section 12A of the Commercial Courts Act, 2015. This fact is part of the record before the Adjudicating Authority. Even the Appellant has accepted its participation in the mandatory pre-institution mediation proceedings under Section 12A of the Commercial Courts Act, 2015. This is also an evidence that the Appellant accepts the indemnity claims and is willing to mutually settle the disputes and the claims. And the indemnity notice is relying mainly on the same events which have been noted in aforesaid paragraphs. And all this is emanating from the events prior to the issue of Demand Notice u/s 8 of IBC, 2016. Therefore, on this count also pre-existing dispute cannot be denied.

31. Adjudicating Authority in this case tested Appellant's case as per the judgment of the Hon'ble Apex Court in ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 356*** and as per the facts in the present case, it has come to the conclusion that there is sufficient evidence of pre-existing which is prior to the issue of the demand notice under Section 8 of the IBC, 2016. We do not find any error in these findings.

32. Appellant has further claimed that the disputes need to be handled as per Clause 3.4 as per the Agreement and unless the same has been raised in accordance with the clauses of the agreement, any reference of the Adjudicating Authority to any e-mail is a wrong assumption of pre-existing dispute. To us, this is not a tenable argument for identifying a pre-existing dispute for the reasons that Adjudicating Authority is well within its rights to identify any pre-existing disputes, howsoever feeble it may be, basis the evidence available before it. It is all the more unacceptable argument in the backdrop that the Appellant themselves have agreed to participate in the pre-

institution mediation proceedings under Section 12A of the Commercial Courts Act, 2015 to settle the dispute.

33. When there is no proof of completion or delivery of the services or works in the appeal paper book or Application and with the afore-mentioned background, it can be safely concluded that with multiple events as discussed herein, there is sufficient evidence of pre-existing dispute regarding the product and services in the form of e-wallet and also incorrect raising of final invoice.

34. Adjudicating Authority has rightly held that pre-existing dispute regarding outstanding unpaid balance was raised by the Respondent before issuance of the notice u/s 8 of the IBC, and hence this application is liable to be dismissed u/s 9(5)(ii)(d) and accordingly the Company Petition (IB) No. 06/ALD/2022 filed by the Operational Creditor was dismissed. We do not find any error in these findings. Accordingly, we dismiss Company Appeal (AT) (Insolvency) No.1569 of 2023 & I.A. No.5606 of 2023.

[Justice Ashok Bhushan]
Chairperson

[Arun Baroka]
Member (Technical)

10th January, 2024

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