SL.NO.1

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH
(Video Conference)

PRESENT: JUSTICE TELAPROLU RAJANI – MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING HELD ON 28.06.2023 AT 10:30 A.M.

TC/CP. Nos.	CA/IA No.	Section/ Rule	Name of Parties
CP(IB)/131/9/AMR/2022		9 of IBC	63 Moons Technologies Limited Vs. Dragonfly Data Factory India Private Limited

ORDER

Mr.V.V.S.N.Raju, Counsel for the OC present. Mr.Shaik Ghouse, PCS for the CD present. Orders pronounced. CP (IB)/131/9/AMR/2022 is dismissed, vide separate orders.

Sd/-
JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

RSN

NATIONAL COMPANY LAW TRIBUNAL
AMARAVATI BENCH AT MANGALAGIRI
*** *** ***

CP (IB)/131/9/AMR/2022

In the matter of a Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 Read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016

AND

In the matter of
M/s. DRAGONFLY DATA FACTORY (INDIA) PRIVATE LIMITED

Between:

63 Moons Technologies Limited
Formerly known as Financial Technologies (India) Limited,
having its Corporate Office
At FT Tower, CTS No.256 & 257, Suren Road,
Chakala, Andheri (East), Mumbai – 400 093

... Operational Creditor

AND

M/s. Dragonfly Data Factory (India) Private Limited,
Registered office at D.No.10-50-19/4,
3rd Floor, Panchvati Apartments,
Siripuram, Visakhapatnam, AP 530003

Also having Office Address at
Plot No.6, 5th Floor, Mahaveer Techno Park
Software Units Layout, Hitech City, Madhapur,
Hyderabad, Telangana – 500 081
And 4th Floor, Sri Sri Narayana Enclave,
Door No.9-28-5, Balaji Nagar, VIP Road
Visakhapatnam, Andhra Pradesh – 530 003

... Corporate Debtor

<u>Date of pronouncement of orders: 28.06.2023</u>

<u>CORAM</u>:

Justice Telaprolu Rajani, Member Judicial.

<u>Appearance</u>:

For Operational Creditor	:	Mr. V.V.S.N.Raju, Advocate.
For Corporate Debtor	:	Mr. Shaik Ghouse, PCS.

<u>ORDER</u>

1. This Petition is filed by M/s. 63 Moons Technologies Limited, i.e., the Operational Creditor ("in short OC") against M/s. Dragonfly Data Factory (India) Private Limited i.e., the Corporate Debtor ("in short CD") seeking to initiate Corporate Insolvency Resolution Process (CIRP) against the CD for the default committed in discharging the debt of Rs.**3,57,09,315/-** (as on 10.11.2022 along with interest @18% Per Annum form the date of dues and till realisation) that was due to the OC.

2. The facts as stated in the Synopsis are as follows:

   i). The CD and OC entered into a Software License Agreement dated 20.11.2015 whereunder OC desires to obtain the software on license basis in connection with the development of cloud services, including integration of the with cloud services for a total consideration amount of Rs.3.00 Crores for said services to be rendered by the CD. In lieu of the said Software License Agreement, OC paid an advance sum of Rs.2.00 Crores to the

CD and balance amount of Rs.1.00 Crore was to be paid on final acceptance and "Go Live" of the said software, pursuant to the said Software License Agreement.

ii). In terms of the Software License Agreement, OC and CD mutually terminated the said Software License Agreement vide Agreement of Termination dated 02.02.2017. In accordance with the Agreement of Termination, CD confirmed the receipt of Rs.2.00 Crores and further agreed to pay back an amount of Rs.2.00 Crores paid as advance to the CD by the OC. It was also agreed to pay back the advance amount of Rs.2.00 Crores on or before 30.06.2017 in consonance with the Agreement of Termination. The CD, through its Founder and CEO, Mr.Ram Pothula vide its email dated 07.11.2019, had acknowledged the liability of the CD towards OC and sought time to pay back the advanced amount on or before 30.12.2022 which is pending since 30.06.2017.

iii). In accordance with Clause 2.8 of the Software License Agreement dated 20.11.2015, where under CD and OC agreed that in case of termination of the said agreement, the Corporate Debtor shall refund the advance License Fee immediately after the termination of Agreement. Any delay in making refund will be subjected to interest @ 18% per annum. Rs.2.00 Crores paid in advance to the Corporate Debtor is due from 01.07.2017 in accordance with the Agreement of Termination dated

02.02.2017. The Founder and CEO of the CD vide email dated 07.11.2019 acknowledged the dues to the OC and the CD has also acknowledged in its Annual Report released on 03.12.2020.

iv). As on 10.11.2022, an amount of Rs.3,57,09,315/- is due and payable by the Corporate Debtor together with interest @ 18% per annum on the Principal Amount of Rs.2.00 Crores. Despite repeated follow up for payment the CD, neglected and failed to make the payment.

v). On 17.11.2022, OC issued demand notice under Rule 5 of the Insolvency and Bankruptcy (Application for Adjudication Authority) Rules, 2016 demanding payment of Rs.3,57,09,315/- from the CD and the same was delivered on 21.11.2022.

vi). The Cause of action for the Company Petition arose initially on 01.07.2017 in accordance with Clause 3 of the Agreement of Termination dated 02.02.2017 where under CD was required to refund back the advance money of the OC on or before 30.06.2017 and thereafter, when email/letter dated 07.11.2019 was sent by the CD acknowledging the debt payable to the OC. Finally on the 17.11.2022, when demand notice was issued to the CD and is still continuing with no payments made by the CD. Hence this Petition, seeking to initiate CIRP against the CD.

3. CD filed counter denying the facts mentioned in the Company Petition and contending that the instant application filed by the Petitioner is

not maintainable either under the provisions of the Code or on the facts, for the following reasons:

i). The relationship between the OC and the CD commenced when the OC promised the CD to make investment of INR 10 Crores in by subscribing to the securities of the CD and in this regard, the OC has also signed term sheet dated 30.10.2015, as per which the OC has promised to invest Rs.10 Crores by subscribing to the capital of the CD.

ii). In view of the ongoing investigations of the regulatory authorities like, CLB, CBI, ED and SEBI and group companies and their promoters viz., FTIL (now 63 Moons), National Spot Exchange Limited and other group entities in respect of the fraud played by them during the period 2013 to 2016, the OC was unable to honour their commitment made in the term sheet regarding investment in securities of the CD with Reserve Bank of India (RBI) approval, which they were unable to get it.

iii). The OC has proposed the alternative way of providing funds to the CD by creating document called "Software License Agreement" between the parties and in this regard the OC wrote an email dated 16.11.2015 to the CD with draft brief terms of the agreement and requested the OC to accept and sign the said Software License Agreement. Based on the assurances received from the OC through various calls and emails, the CD executed the Software License Agreement on 20.11.2015. Vide email dated 16.02.2016, CD enquired with the OC about the status of the project funding and also the status of RBI clearance for making an investment in to the CD and also presented to the OC about the launch and show case of the actual product and open the store for invite, to preview what to come in the second half of 2016.

iv). Vide email dated 24.02.2016 sent by the CD, he sought clarification and information about RBI approval. When things stood like that, on 28.06.2016, the petitioner sent an email to the Respondent, proposing the terms of mutual termination of software agreement dated: 20-11-2015 and also shared the draft along with an email, for the confirmation of the Petitioner. This shows that all these things happened at the behest of the Petitioner and the said Software agreement has been executed as per their advice. The petitioner also shared the draft Mutual Termination Agreement and suggested the Respondent to sign the same as the main intention of the Petitioner was not the Software Development Agreement but investment into the Respondent. The respondent sought clarification and information about RBI approval and informed about how Respondent has been strapped with the term sheet signed by the applicant and no progress in the RBI approval.

v). In response to the email received from the Petitioner proposing for mutual termination of the Software Agreement, the

Respondent vide email dated 12.08.2016 sent to the Petitioner, delivered the entire details of the software developed. The email dated 15.12.2016 sent by the Petitioner along with draft version of the Mutual Termination of Software Agreement would clearly establish that the said Software Development Agreement has been executed by the Petitioner to advance the amount of INR 2 Crore to the Respondent so that it will record in their books of account as advance till the date they get the RBI approval for the investment proposal and that after that they wanted to reverse this advance in the books and make investment in to the Respondent. It is pertinent to mention here that the applicant has to develop the software either in investment route or software development agreement and developed the same and delivered to the Petitioner, but the applicant wanted to have this software not on the basis of the development agreement but they wanted to own this software as investment made into the Respondent company.

vi). Respondent sent an email dated 19.12.2016 and informed the Petitioner that they will review the draft "Software License Agreement – Mutual Termination" and come back with the edits required to be made in the draft and sent another email to the applicant requesting for certain modifications to the draft shared. Accordingly, the parties have executed the "Software License Agreement – Mutual Termination" dated: 02-02-20107. By the agreement for Termination of Software License Agreement executed on 02-02-2017, the parties were relieved of their respective obligation/liabilities and as the per said agreement, the only liability of the Respondent is to pay the entire advance amount of INR 2 crore without any interest and that too on or before 30.06.2017. Therefore, as per the agreement for Termination of Software License, the debt has become financial debt and it is no more an operational debt, as the Respondent was relieved of its entire obligations of operational nature and liabilities except the liability of payment of INR 2 Crore as financial debt without any interest.

vii). The Petitioner sent an email dated 22.07.2019 to the Respondent along with draft letter by name "Acknowledgement of dues letter" and requested the Respondent to sign the same and send it back. The essence of this letter is that, the Petitioner allowed the Respondent to pay back the amount of INR 2 Crore not later than 31.12.2020 i.e., the due date mentioned in the Termination Agreement extended form 30-06-2017 to 31-12-2020 along with interest at the rate of 12% per annum.

viii). The Petitioner again sent an email dated 11.09.2019 to the Respondent along with draft MOU, for the perusal of the Respondent and requested the Respondent to come back with comments if any. The essence of this MOU is that, the applicant mentioned that "the applicant had advanced on 23.11.2015 a sum of INR 2 Crore to Respondent, for software to be developed and made available to the Applicant. Respondent has not delivered the software/development to the satisfaction of the Petitioner and hence the Respondent has agreed vide agreement for termination of Software License Agreement dated: 23.11.2015, executed between the Parties on 02.02. 2017, to return the advance paid by 63 moons by 30.06.2017. However, Respondent has defaulted in repayment of the said advance. Therefore, under the given circumstances the Petitioner is desirous of securing repayment of the advance, following which further understanding has been reached out by parties with this MOU. As per the said MOU, the Petitioner itself proposed the extension of time of another 3 years and also admitted the fact that the Respondent developed the software and both the parties intend to commercially market the said software and make revenue out of it.

ix). Respondent sent an email dated: 12-09-2019 to the Petitioner categorically informing that the software was ready for delivery from the Respondent side and it is not a fact that the Respondent failed to deliver the software and suggested the Petitioner to make necessary changes accordingly in the said MOU. Vide mail dated 05.11.2019 sent by the petitioner along with draft Extension of Agreement it was agreed between the parties for extension of the due date for payment of INR 2 Crore to the applicant to 31-12-2022 without any interest amount and the same is confirmed by the Respondent vide mail dated 07.11.2019.

x). There were couple of communications between the parties through emails and zoom calls and after that the petitioner sent an email dated 06.12.2021 along with draft MoU, in view of the discussions between the parties during Jan/Feb 2021 and also requested the Respondent to share the product material as agreed between the parties. The essence of this MOU is that, "After the review of the software functionalities and in view of the changed situation of the parties, it was mutually agreed on 02.02.2017 to cancel the software license agreement as per the terms given therein and the Respondent agreed to repay the advance of INR 2 Crore and further the repayment was extended until 30th December 2022 as per letter dated 7th November 2019 given by the Respondent and it was further agreed to extend the period of another 3 years from the date of this MoU. As per the said MOU, the Petitioner itself proposed the extension of time of another 3 years and also admitted the fact that they reviewed the functionalities of the software developed by the Respondent. The said MOU established that the said amount of INR 2 Crore shall be treated as money lent by the Petitioner and will be recovered through the marketing of the software developed by the Petitioner during the period of 3 years from 30.12.2022. Therefore, the said amount of INR 2 Crore is not an operational debt and it shall be financial debt which is due and payable only after the 3 years from the date of this MOU i.e., on 05.12.2024.

xi). The demand notice in Form 3 dated 17.11.2022 issued by the Petitioner was received by the Respondent on 21.11.2022 at the registered office and the Respondent had not replied to that demand notice as all the Directors were not available in India during that time and they were in USA for business purposes. The exchange of documents and correspondences between the parties as mentioned above, shows clearly that the purported operational debt claimed by the Petitioner is not at all an operational debt and even if it is assumed for the sake of discussion, without admission, as an operational debt, the Respondent has not defaulted on the date of issue of demand notice as the due date was extended to 30.12.2022 and in view of the MOUs offered by the applicant and accepted by the Respondent the parties have further agreed for settlement of INR 2 Crore for a further period of 3years effective from 06-12-2021 and it shall be treated as financial debt and not operational debt. Hence, this Petition is not maintainable and is liable to be dismissed.

4. Heard the arguments of both the counsel and perused the written submissions filed by either side. From the pleadings and the arguments, the primary point that falls for consideration of this Tribunal is whether this Company Petition is maintainable at this point of time. This Tribunal would proceed to deal with the above point in the foremost, depending on which the decision of the other points that would arise for consideration can be taken up.

5. According to the case of the Petitioner who is the OC, the CD defaulted in paying the advance amount of Rs.2 Crores and interest, which was given as advance for providing software programme to the OC as narrated in the agreement dated 20.05.2015. There is no dispute that the said agreement was mutually terminated. There is also no dispute that the amount taken as advance was agreed to be returned by the CD and the same is evident not only from the pleadings but also from the email dated 07.11.2019, wherein the Respondent admitted that as per the books of account, they acknowledge their liability for sum of Rs.2 Crores and the advance amount was agreed to be returned. But the only objection raised by the Respondent is that there was an agreement between the parties, extending the time line for payment of the said amount.

6. The Counsel for the Respondent draws the attention of this Tribunal to the copy of the email sent along with the attachment, which is the MoU draft final. The email dated 09.02.2023 sent by the Respondent encloses a draft MoU which was discussed during January/February, 2021. An email dated 13.02.2023 sent by the Respondent shows that the agreement duly signed was attached along with the said email. The said agreement was clearly termed as an extension of the agreement. The extension agreement clearly stipulates that the time for the advance to be returned to the Petitioner is extended to not later than 30.12.2022. This Petition is filed on 14.12.2022 which is prior to the stipulated date.

7. The counsel for the Petitioner contends that even as on date the Respondent did not make any payment, hence this petition can be ordered in order to avoid multiplicity of proceedings. He further contends that even if this Petition is dismissed, another petition would be filed with the same relief and hence this petition can be ordered. But that seems to be a strange argument. On the said ground, the Petitioner cannot be permitted to bypass the procedures. As on the date of filing the petition, the debt did not become due, as the due date for discharge of the debt has not reached. The contention that the Respondent did not file the agreement on which the signatures of the petitioner are to be found, does not appeal to the sense of any prudent person as he on one hand places reliance on an email which acknowledges the debt and on the other hand, he persuades this Tribunal not to rely on the email which acknowledges that the agreement of extension was sent duly singed. The petitioner does not deny the said email. Hence, in view of the above, I opine that the petition is premature and the petition is liable to be dismissed. Accordingly, CP(IB)/131/9/AMR/2022 is dismissed as disposed of.

Sd/- dated 28.06.2023

JUSTICE TELAPROLU RAJANI
MEMBER JUDICIAL

Swamy Naidu