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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 420/2024**
KELLTON TECH SOLUTIONS LIMITED

.....Petitioner

Through: Ms. Deepali Aggarwal, Adv.

versus

ACTAS TECHNOLOGIES PRIVATE LIMITED

.....Respondent

Through: Mr. Tuhin Batra, Adv.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

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11.09.2024

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("*Act of 1996*") seeking appointment of an Arbitrator to adjudicate the disputes between the parties.
2. The petitioner is a Multinational Corporation (MNC) engaged in the business of Information and Technology and software development. On 17.09.2020, the petitioner and the respondent executed a Software Development and Service Agreement ("*Agreement*") wherein the petitioner was to provide its services for development of e-wallet platform and the respondent was to pay a sum of Rs. 2 crores plus GST.
3. As per the petitioner, the petitioner developed the software and raised invoices which the respondent failed to pay.
4. The petitioner filed a petition under section 9 of the Insolvency and Bankruptcy Code, 2016 before the NCLT seeking initiation of insolvency proceedings against the respondent. The NCLT *vide* Order



dated 04.09.2023 dismissed the said petition on the ground that there were disputed questions. Against the said order, an appeal was filed before the NCLAT which was also dismissed on 10.01.2024.

5. Thereafter, the respondent invoked pre-litigation mediation under section 12A of the Commercial Courts Act, 2015 (“*Act of 2015*”) and Delhi High Court Mediation and Conciliation Centre appointed a Mediator to settle the matter. However, the matter was not settled. Hence, the petitioner filed the present petition.
6. This Court *vide* Order dated 05.04.2024 issued notice to the respondent.
7. Mr Batra, learned Counsel appear for the respondent and has filed a reply wherein a preliminary objection has been taken with regard to the arbitration clause being vague and invalid.
8. Before going into the merits of the matter, it is pertinent to note that the petitioner in the present case has not invoked the arbitration clause by issuing notice under section 21 of the Act of 1996.
9. It is settled law that notice invoking arbitration under section 21 is a pre requisite condition before filing appointment petition under section 11 of Act of 1996. Reliance is placed on ***Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd., 2017 SCC Online Del 7228, BSNL v. Nortel Networks (India) Private Limited, (2021) 5 SCC 738*** and ***Arif Azim Co. Ltd. v. Aptech Ltd. (2024) 5 SCC 313***. Recently this Court in ***Kotak Mahindra Prime Ltd. v. Manav Sethi, 2024 SCC OnLine Del 4819*** has observed as under:-

“15. In any event, once the Supreme Court has spoken on the issue in Nortel Networks and Arif Azim Co. and this Court has



also held likewise in Alupro Building Systems, there can be no dispute about the fact that a Section 11(6) petition is not maintainable unless it is preceded in the first instance by a Section 21 notice, followed by failure, on the part of the opposite party, to agree to the appointment of the suggested arbitrator.”

10. Hence, in view of the settled position of law, the present petition is liable to be dismissed on this ground alone. However, I am proceeding to decide the objection taken by the respondent also.

11. Clause 3.4 of the Agreement reads as under:-

*“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 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.”*

Emphasis added

12. Clause 16 of the same Agreement reads as under:-

“16 GOVERNING LAW, JURISDICTION AND DISPUTE



RESOLUTION

16.1. *The Parties agree that this Agreement, any contractual or non-contractual obligations arising out of or in connection with it and the relationship between the Parties, shall be governed by, and interpreted in accordance with the laws of India. Unresolved disputes shall be referred to the courts of New Delhi, which shall have exclusive jurisdiction to deal with any and all disputes arising out of or in connection with this Agreement including any question regarding the existence, validity, interpretation and termination of the Agreement, and any interim reliefs that may be sought by the client regarding deficiencies in Services and/or deliverables, IP infringement, licensing and assigning of IP, etc.*

16.2. *The provisions of this Clause 16 (Governing Law, Jurisdiction and Dispute Resolution) shall survive any termination of this Agreement.”*

Emphasis added

13. Clause 3.4 clearly says that if there are any disputes with regard to the “disputed service fees” then the same shall be referred to arbitration in case not settled within 21 days. However, clause 16 says that any “unresolved disputes” shall be referred to the Courts of New Delhi.
14. In the present case, the above-mentioned clauses are overlapping with each other. One clause seeks to refer the disputes to arbitration, but the other clause says that unresolved disputes shall be referred to Courts. During the arguments, petitioner was unable to distinguish that whether the above noted dispute falls under “disputed services fees” or “unresolved disputes”.
15. This Court in ***Sara International Ltd. v. Golden Agri International (P) Ltd., 2010 SCC OnLine Del 2238*** has observed as under:-



“49. A perusal of the above quoted clause shows that the parties to the agreement were not sure or determined at the time of the sale contract about reference of the dispute to arbitration. While reading the words “Arbitration if any” in the clause it appears that the parties were yet to decide whether the future disputes between them were to be referred or not. Where there is merely a possibility of the parties agreeing to arbitration in future as contrasted with an obligation to refer disputes to arbitration, there would be no valid and binding arbitration agreement as per settled law. The words used in a said clause should disclose a determination and obligation to go to arbitration and not merely the contemplation of the possibility of going to arbitration. It appears that the said clause of arbitration is vague and uncertain and cannot be the basis for arbitration or binding on the parties as is clear from the language in which the clause is couched. The wording of the said clause does not leave room for any ambiguity inasmuch as it uses the words “Arbitration, if any”.”

Emphasis added

16. On perusal of the said judgment, it is evident that the parties intending to resolve their disputes through arbitration should disclose a determination and obligation to go to arbitration. The arbitration clause should be clear and on a plain reading, the intention of the parties should be clear to resolve their disputes through arbitration.
17. In the present case, whether parties had agreed to resolve their disputes



through arbitration or through Courts is unclear and ambiguous and therefore, the arbitration clause is vague to act upon.

18. Also, the parties herein before filing of the present petition had attempted to resolve their dispute through pre litigation mediation, the present petition is only filed when the said mediation was not fruitful.
19. In addition, the petitioner also participated in pre-institutional mediation process under Section 12A of Act of 2015 initiated by the respondent (a step contemplated under the Act of 2015 prior to filing of a Civil Suit).
20. For the said reasons, I am of the view that:
 - (a) the arbitration clause is unclear and vague;
 - (b) does not unequivocally mandate the Dispute Resolution Forum as Arbitration;
 - (c) the petitioner itself had participated in pre litigation mediation process under section 12A of Act of 2015;
 - (d) notice under Section 21 has not been issued.
21. In this view of the matter, the present petition is dismissed granting liberty to the petitioner to avail all legal remedies as available in law.

JASMEET SINGH, J

SEPTEMBER 11, 2024 / (MS)
(Corrected and released on 26.09.2024)

Click here to check corrigendum, if any