

Sasken Communication Technology Ltd. Vs. Cellcast Interactive India Pvt. Ltd.

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SooperKanoon Citation : sooperkanoon.com/1129781

Court : Delhi

Decided On : Feb-28-2014

Judge : Vibhu Bakhru

Appellant : Sasken Communication Technology Ltd.

Respondent : Cellcast Interactive India Pvt. Ltd.

Judgement :

THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment delivered on:

28. 02.2014 CO. PET. 378/2013 SASKEN COMMUNICATION TECHNOLOGY LTD. versus Petitioner CELLCAST INTERACTIVE INDIA PVT. LTD.
Respondent Advocates who appeared in this case: For the Petitioner : Mr Tinu Moriyn. For the Respondent : Mr Dinesh Rastogi with Mr Bidit Deka & Mr Shruti Khound. CORAM:HONBLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J1 The petitioner has filed the present winding up petition under section 433(e), 434 and 439 of the Companies Act, 1956 (hereinafter referred to as the Act), inter alia, praying for winding up of the respondent company on the ground that the respondent company has been unable to pay a sum of `19,41,280/-, which is alleged to be due and payable to the petitioner against the

invoice dated 14.05.2010 raised on the respondent. The petitioner claims that this invoice remains unpaid despite a notice being served on the respondent under Section 434(1)(a) of the Act. The respondent has disputed the said amount and has claimed that the petitioner has been unable to perform its obligations under the agreement dated 13.01.2010 entered into between the parties and therefore, no amount is payable to the petitioner. According to the respondent, the petitioner is liable to refund the sum of `19,41,280/- which had been paid by the respondent to the petitioner, earlier.

2. The controversy to be considered in the present case is whether the dispute raised by the respondent is a bonafide dispute.

3. Briefly stated the facts are as under:- 3.1 The respondent company is engaged in the business of developing interactive and participative contents for interactive television participation. The petitioner is, inter alia, engaged in the business of designing computer applications and systems. The respondent and the petitioner entered into an agreement dated 13.01.2010 whereby the petitioner agreed to grant a perpetual licence to the respondent for right to use its software programmes and for customization of the same for requirements of the respondent. 3.2 Pursuant to the agreement, the respondent issued a purchase order dated 15.01.2010. The said purchase order is quoted as under:

PURCHASE

ORDER

DATED 15th JANUARY, 2010 1. Vendor Sasken Communication Technologies Ltd. having its registered office at 139/25 Domlur Ring Road, Bangalore 38.

2. Client Cellcast Interactive India Pvt. Ltd. having its registered office at B-1, Khaitan House, New Delhi-110024.

3. Address of 1406/15 Alfa Vista, Tower II, Off. the Premises Chincholi Bunder, Behind Inorbit Mall, Malad, Mumbai 40006.

4. Type of Both the parties have entered into a Agreement Business Agreement named IVR Delivery Platform Licence Agreement dated 13th January, 2010. In the

event of a conflict between this Purchase Order and the Business Agreement, the Business Agreement shall prevail.

6. Scope Services of Sasken to architect an IVR delivery platform for deployment on 144E1s scalable upto a total of 288 E1s over a period of next six months Amdale PowerConnect enabling a robust, reliable, scalable and yet simple application development and deployment environment.

6. Total cost Rs 32 Lacs towards Licensing of PowerConnect Software for deployment on 144E1s. Rs.12 Lacs towards Engineering Services spread over 10 weeks. Reference Proposal (CellCast_Proposal_v2

1) dated 22nd Sep.

2009. 7. Payment terms 40% Advance, 40% on User Acceptance Test (UAT) and the balance 20% after 3 months from the UAT.

9. Services and The Engineering Services envisaged AMC support beyond the UAT include a) Bug Support for 3 months beyond UAT. b) 6 Monthly Weekly Telecon with Architect from Sasken to address PowerConnect Software Platform and Deployment related issues. The above Terms and Conditions were accepted and agreed between Sasken Communication Technologies Ltd. and Cellcast Interactive India Pvt. Ltd. and the parties have entered into an elaborate Business Agreement named IVR Delivery Platform Licence Agreement dated 13th January, 2010. 3.3 A consideration of `32 lacs was agreed towards licensing of PowerConnect Software and Deployment of 144 EI and `12 lac was payable for Engineering Services. Thus in aggregate a sum of `44 lacs was agreed as the consideration for the purchase order. 40% of the entire consideration amount was payable in advance, further 40% of the consideration was payable on User Acceptance Test (UAT) and the balance 20% of the consideration was payable after 3 months from UAT clearance. The Engineering Services to be provided by petitioner included (a) a bug support for 3 months beyond UAT and (b) 6 monthly weekly Telecon with Architect from Sasken to address PowerConnect Software Platform and Deployment related issues. 3.4 The petitioner is stated to have provided the requisite licence and the respondent sent an e-mail on 07.05.2010

conveying the User Acceptance Test (UAT) clearance, which is reproduced below:

Pls treat this email as the UAT Clearance. We are thus approving the completion of M3- User Acceptance of deployed solution including Coverage of Bollywood Dhamal application through PowerConnect TM platform. Coverage of Bid2Win application through PowerConnect TM platform. Coverage of Astro application through PowerConnect TM platform. Ability to make outbound calls through PowerConnect TM platform. Ability to communicate Cellcast server through URLs. MIS display for number of IVR calls made per server, per application, region based, operator based. Complete MIS display. All applications were up & running during live shows. With the completion of the above, Cellcast hereby accepts completion of User Acceptance of deployed solution for Tulip project on 11-May-2010.

3.5 After the receipt of the UAT clearance, the petitioner raised a invoice dated 14.05.2010 for a sum of `19,48,280/- which was inclusive of service tax and other taxes. It appears that there were certain issues relating to the performance of the system and, accordingly, the respondent withheld the payments being claimed by the petitioner. By an email dated 21.06.2010, the respondent informed the petitioner that the payments had been withheld as the system had not been successful for the live shows. The relevant extract of the said email dated 21.06.2010 is as under:

We have held the payments on hearing from Alok and his team that the system has not been successful for our live shows and the load testing is still not happened still date. If this issue is not sorted out then I dont think we will be in a position to proceed further.

3.6 The said email was immediately disputed by the petitioner and in response, the petitioner sent an e-mail dated 21.06.2010 stating that the invoice dated 14.05.2010 was raised after the UAT Acceptance and, therefore, the reason that the system had not been successful could not be accepted. The relevant extract of the said e-mail dated 21.06.2010 sent on behalf of the petitioner to the respondent is as under:

Finally, all conditions/testing mandatory for milestone acceptance was done and certified - Acceptance available. The invoice was raised on May 14th post the acceptance - The reason that system has not been successful is not acceptable today, in spite of innumerable follow ups made in the last 5 Weeks. Why was this not communicated to Sasken as soon as the follow ups on the non-payment started 4 weeks ago?. 3.7 The learned counsel for the respondent has drawn my attention to various emails exchanged in the month of April, 2010 which indicate that there were certain issues with regard to working of the system that were pointed out by the respondent and were addressed by the petitioner. The learned counsel for the respondent has also pointed out e-mails dated 21.05.2010 which indicate that even after the grant of UAT clearance, the respondent was facing problems with the system which required to be rectified on urgent basis. One of the said emails dated 21.06.2010 indicate that the respondent had to withdraw deploying PowerConnect system since the problem of call not connecting had repeated twice. The said relevant extract of the said email is reproduced below:

Pls find the attachment pertaining to the existing issues on the PowerConnect System. Do check 2 issues that are marked in Red in the attached document. Of these the issue pertaining to the Live Shows is ABSOLUTELY CRITICAL and a complete SHOWSTOPPER. We have withdrawn deploying the PowerConnect System since this issue of Call not Connecting has repeated twice in the last 1 week itself. Pls note that this has forced us to redeploy our own system in the same Keygoe Switch arrangement and the Cellcast Solution has served the purpose of handing the calls in the Live Show. Hence this is an urgent request to maximize efforts in resolving this issue. We still do not have the confidence of deploying the Power Connect System on all our Live shows and this is affecting our Business very seriously.

3.8 The petitioner, by its letter dated 09.05.2011, demanded the payment for a sum of `19,41,280/- against the invoice dated 14.05.2000. The said letter was further followed by a reminder letter dated 10.08.2011. In response to the said letters, the respondent caused a legal notice dated 01.09.2011 to be served on the petitioner calling upon the petitioner to refund a sum of `19,41,280/- which was initially paid by the respondent to the petitioner pursuant to the purchase order.

The respondent had alleged by the said notice that there were series of defects in the software applications provided by the petitioner which had not been rectified by the petitioner. The relevant extract from the legal notice indicating the defects is quoted below:

2. It is pertinent to mention here that under the IVR Delivery Platform Licence Agreement dated 13th January, 2010, entered into between you and our above-named clients, you were to provide to our clients the software applications and were further required to customize the same as per the requirements of our Clients, apart from fulfilling other terms and conditions under the said agreement. The software applications provided by you to our above-named clients suffer from serious, patent and inherent defects. Some such defects are being mentioned herein below:- a) Echo Calls: These type of calls are such where agents get to hear their own voice; b) Conference: This happens when the phone rings and as soon as it is picked up, the customer is found already speaking to someone else; c) Blank Calls: Quite often our clients receive these calls and when these calls are picked up, there is no response from the other side; d) Disconnection: Most calls get automatically disconnected.

3.9 Thereafter, the petitioner issued a notice dated 25.03.2013 under Section 434(1)(a) of the Companies Act, 1956 calling upon the respondent to pay a sum of `19,41,280/- as well as a sum of `8,80,000/- along with interest pursuant to the agreement dated 13.01.2010. The learned counsel for the petitioner has contended that on a strict reading of the agreement, the amount of `19,41,280/became due and payable immediately on the UAT Acceptance. It is submitted that there is no dispute that the said UAT Acceptance had been granted and, therefore, the amount as claimed was, admittedly, due and payable to the petitioner. In response to the contention that there were certain defects with the software applications as provided by the petitioner, the learned counsel for the petitioner submitted that the email dated 21.06.2010 addressed by the petitioner in response to the complaints indicated that the issues that were being raised were outside the scope of work to be performed by the petitioner.

4. The learned counsel for the respondent has submitted that the exchange of emails clearly indicate that there were defects in the software applications provided by the petitioner and these defects had not been addressed by the petitioner. He submitted that although UAT Acceptance had been granted but the same was only a limited one. It is further submitted on behalf of the respondent that there were issues both prior to the issuance of UAT clearance as well as post issue of the said clearance. It is on account of these issues that the amount claimed by the petitioner had been withheld. The learned counsel also pointed out that the system provided by the petitioner has been discontinued on account of various snags and is no longer operational. In the given circumstances, it is claimed that the respondent is entitled to a refund of the amount initially paid to the petitioner.

5. The learned counsel for the respondent also submitted that the present petition was filed in July, 2013 and was, therefore, clearly barred by limitation. The invoice raised by the petitioner is dated 14.05.2010 and the exchange of emails in June, 2010 clearly indicates that the respondent had declined to make the payments as demanded by the petitioner. In response to the said contention, the learned counsel for the petitioner has submitted that the petitioner had been sending various reminders to the respondent and in view of the letters/emails sent by the petitioner, the present petition could not be considered as barred by limitation.

6. I have heard the learned counsel for the parties. The question that needs to be considered in the present petition is whether the defense raised by the respondent is bonafide or not. The Supreme Court in the case of Amalgamated Commercial Traders (P) Ltd. v. A. C. K. Krishnaswami and Anr.: (1965) 35 Comp. Cas. 456 (SC) has succinctly stated the law as under:

It is well settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court.

7. In a petition for winding up of a company on the basis that the company is unable to pay its debts, apart from the merits of dispute, the sincerity of the respondent company in raising the same is also relevant. In a situation, where the company disputes the claim and the said dispute is bonafide, it naturally follows that the company has declined to pay the claim on account of a dispute and not on account of its inability to pay the debts. The assumption that a company is unable to pay its debts can only be made in a situation where the debt is undisputed or an illusory and a sham defense is sought to be raised to avoid the liability. In both these cases, the company is liable to pay the debt and the fact that it has failed and neglected to pay the same despite a notice under Section 434(1)(a) of the Act would indicate that the company is unable to discharge its liability. However, in a case where the company sincerely believes that the amount is not payable and is able to establish that there are bonafide disputes, the question of failure and neglect to pay an admitted debt does not arise as the claim is neither accepted as a debt nor admitted to be payable. In such circumstances there can be no failure or neglect to pay a debt as contemplated under Section 434(1)(a) of the Act.

8. In the present case, there can be no two opinions that the dispute between the parties is extant and not illusory. The exchange of emails clearly indicate that the disputes raised by the respondent are bonafide and contemporaneous to the claim made by the petitioner in 2010. The respondent has stated in its reply that the software applications provided by the petitioner are not being used on account of the defects. This clearly would raise a substantial dispute and in the circumstances it cannot be held that the disputes raised by the respondent are not bonafide.

9. The Supreme Court in the case of M/s IBA Heath (India) Private Limited v. Info-Drive Systems SDN. BHD: (2010) 10 SCC553 has also explained that a dispute would be substantial if it is bonafide and not spurious, speculative, illusory or misconceived. The relevant extract from the decision is quoted below:

20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding-up for discharge of that liability?. In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed

debt?. A dispute would be substantial and genuine if it is bona fide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bona fide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding-up procedure. The Company Court always retains the discretion, but a party to a dispute should not be allowed to use the threat of winding-up petition as a means of forcing the company to pay a bona fide disputed debt.

10. Following the aforesaid decision, the winding up petition for non- payment of the invoice dated 14.05.2010 would not be maintainable.

11. There is also merit in the contention urged by the respondent that the claim of the petitioner is barred by limitation. The invoice against which the claim is made by the petitioner is dated 14.05.2010 while the present petition had been filed in July, 2013. The contention of the petitioner that the claim is not barred by limitation as the petitioner had been repeatedly sending reminders to the respondent is also without merit as a unilateral action by a claimant would not extend the period of limitation. The petitioner has not been able to point out any document after 14.05.2010 whereby the respondent has acknowledged the amount claimed as due and payable to the petitioner. In absence of any such document, the claim of the petitioner which is the subject matter of the present petition is, prima facie, barred by limitation. In any view, the contention that the claim is barred by limitation would provide the respondent a substantial defense against the petitioner. This court in *Gautam Electricals Co. Pvt. Ltd. v. Seth & Sons Pvt. Ltd.*:

29. (1986) DLT102has also held that a winding up petition for a time barred debt would not be maintainable. The relevant extracts from the said judgment are quoted below:

(4) But can a creditor seek a winding up order on the basis of the company's deemed inability to pay the debt which is barred by time ?. The answer to this question has to be in the negative. The debt could be a valid basis for the petition and the winding up order only if the debt that remains unpaid, notwithstanding statutory notice, is both "due" and recoverable..... xxxx xxxx xxxx xxxx xxxx (7) A winding up petition, solely based on a claim, which was barred by time at its inception, or which was allowed to be barred during its pendency would be a gross abuse of the process of this court, and would be a misuse of the special jurisdiction under the Companies Act created for an entirely different purpose.

12. Accordingly, the present petition is without merit and is dismissed. The parties are left to bear their own costs. VIBHU BAKHRU, J FEBRUARY 28 2014 MK

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