

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 280 of 2017

IN THE MATTER OF:

Software ONE India Pvt. Ltd.

...Appellant

Versus

Emkor Solutions Ltd.

...Respondent

Present:

For Appellant : **Mr. Sanjiv Dagar, Advocate**

For Respondent: **Mr. Ayush Kapur, Advocate**

O R D E R

06.03.2018 The appellant “Operational Creditor” has challenged the order dated 13th October, 2017 passed by the Adjudicating Authority (National Company law Tribunal), New Delhi Bench, New Delhi in Company Petition No.(IB)- 253(ND)/2017 whereby and whereunder the application preferred by the appellant under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “I&B Code”) has been rejected on the three grounds, that is:

- i) The certificate given by the Bank is not proper;
- ii) The defects have not been removed within seven days; and
- iii) There is an ‘existence of dispute’.

2. On 28th February, 2018 when the matter was taken up, this Appellate Tribunal observed as follows:

*“In view of the decision of Hon’ble Supreme Court in **‘Macquarie Bank Limited’ Vs ‘Shilpi Cable Technologies Ltd.’ in Civil Appeals No. 15135, 15481 and 15447 of 2017 on 15th December, 2017**, it may be accepted that the certificate given by the bank is enough to find out that there is default or not. Similarly, decision of this Appellate Tribunal for 7 days period for removal of defects is mandatory has already been reversed by Hon’ble Supreme Court.*

So far as existence of dispute is concerned, parties are allowed time to address the court on such issue giving list of dates of supply and may refer the document(s) of dispute, if any. The appeal may be disposed of on the next date.”

3. We have heard the learned counsel for the parties on the question of ‘existence of dispute’ and on perusal of record, we find that there is an ‘existence of dispute’ which has also been noticed by the Adjudicating Authority in detail in Paragraph 13 of the impugned order, as quoted below:

“13. *The other main objection of the respondent is that there are series of conversation made between the parties through e-mails, reflecting existence of dispute, which have been concealed by the applicant. It is emphasized that the said e-mails*

are sufficient to prove that there exist clear dispute in respect of the transaction in question. Some of the e-mails filed by the respondent company are as follows :

From Meetul Patel

Date : 09/08/2014 10:54 (GMT+5.30)

To Vikram Dham

+

Thanks for the time with Manva. I will check in with him and the team reviewing the facts around the licensing positioning and then look at what options we have with the existing contract.

We are committed to doing what is right and helping us move forward.

Will be in touch soon, and will look to meet you in person soon as well

Thanks

*Meetul B. Patel, Microsoft General Manager SMSP
India*

From : Vikram Dham

Date : 08/08/2014 6:56 P.M.

To Meetul Patel

I wanted to write to you and apprise you on some of the measures we've seen on this issue since we last interacted. I have had the opportunity to meet with Manav Bhatia who came over to our offices in the last week of July and we spoke at length about the issue at hand.

Manav understood our concerns and I am certain he will agree with our understanding that operational uncertainties like this need to be prevented in the future by way of every means possible. Issues like this lead to significant impairment of goodwill and trust between business partners like us and cause a lot of unwanted bad air. The take away from the meeting was the suggestion that Emkor move and build a new relationship through changes like probably new contact points for working together. Like any other progressive partner, we want to do business and we want to do it well. We are committed to growing our business responsibly and that is the reason we want to see this issue taken justly to its natural end.

*Emkor is certainly keen to move on and build a great working relationship however, **we will need assurance that the existing EA will be terminated and the chapter closed. The deal was a result of distortion of facts and manipulation of information and therefore not done in good faith nor done in a principled manner.** All of us at Emkor are quite sensitive to this and it will give us great comfort to know that this has been cleaned up as it should. I would be happy to meet with you some soon to discuss in in person*

We are keen to move forward and put this behind us and I hope we can continue doing some of the

great work we have done together as progressive business partners. I look forward to hearing from you.

Thanks

Vikaram Dham, MD & CEO

From Meetul Patel

Sent Wednesday July 23, 2014 1:59 AM

Date 09/08/2014 10:54 (GMT +5.30)

To Vikram Dham

Vikram – Wanted to let you know that we have passed your concerns around licensing on to the relevant channels in Microsoft and the right people are looking into them

Meetul B. Patel

From Vikram Dham [vikram.dham@emkor.com]

Sent Saturday July 19, 2014 6:48 PM

To Sunil Singh Solandk; Sushrut Parti

Cc : Amit Kumar (INDIA CA) Meetul Patel Sudhir Nayar; Tyler Bryson

Subject : AZURE EA Termination Escalation

Sushi and Sushrut

.....
*We we advised by you that the EA is mandatory for us to take our ISV product/services to the market- we've now understood and realized that this is not the case and that EA is in no way a requirement for partners to take ISV product/services to the market. **A huge breach***

of confidence happened here. This is clear case of mis-selling by you and the Microsoft Account Team.

We were promised a lot of support from Microsoft during the sale of the EA including promises that another Microsoft Partner, “Maclores” will be assigned to help us design and configure LIME infrastructure on Azure which gave us a lot of hope since we have tried and failed to do this same thing one and half years earlier by way of Foetron Inc. With his promise and with the incremental amount of pressure we were receiving because of it being the time of year-end closing, we finally signed up on 24th June & went ahead with the Enterprise Agreement – Azure subscription. Soon after we learned that signing up for an Enterprise Agreement was not at all a necessity for our requirement. Additionally after waiting for 3 weeks for Maclores to show up and help us with taking LIME infra on Azure we will have to support and no clue as to when this help will be available to us.

We tried to bring these issue up for resolution on numerous occasions but no one was interested in helping us especially after we had signed up and agreed to the EQ. This is frustrating since these issues are incredibly important and are important success factors for us but we did not see any urgency from the Azure team in helping us resolve them. Since these issues were going to lead to a

major setback to our plans we had to take the decision to cancel our movement to Azure, completely for now and setup our LIME on another data center infra for now.

This is in the second time this is happening with us (last time we were told that unused Azure usage could roll over to next year, which was'nt the case-see attached) and we are utterly upset with the way things are promised and then broken once we have engaged with an agreement. Considering the strategic nature of Microsoft – Emkor engagement, and the fact that Emkor has been selected as the only partner in Asia to take this new Dynamics NAV BPO on Azure to market, and also exclusive partner of Dynamics NAV subscription in India, this episode does lead potentially a bad partner experience.

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Vikram Dham
MD & CEO

From Sharma, Vikram, [mailto:
Vikram.sharma@Softwareone.com]

Sent : Friday, July 18, 2014 4:34 P.M.

Subject : RE : PO for Azure EA

Dear Mulesh,

PFA the copy of the contract document similar to what you have signed. Following are the extracts from the same [\[cid:image001.png@01CFA2A60603FFFO\]](#)

The Enterprise enrolment cannot be terminated midterm unless there is a material breach of the contract by Microsoft or the enrolled affiliate of the customer organization ceases to be an affiliate anymore) (then too at the Microsoft discretion).

Regards

Vikam

On 18-Jul-2014 at 15:06, "Mukesh Kumar Garg"> wrote Hi Sidharth,

The order has been cancelled. Hence to issue us a credit note for this order.

Regards

Mukesh Garg

08527595050"

4. Learned counsel appearing on behalf of the appellant submits that Mr. Meetul Patel is not the employee of the appellant but the employee of the Microsoft. Learned counsel for the appellant, however, accepts that the appellant has supplied the Microsoft software to the respondent – Corporate Debtor. The Corporate Debtor brought the matter to the notice of the Microsoft authorities that there is a defect, which suggests that the dispute is relating to the quality of the goods supplied and the services rendered by the appellant.

5. Learned counsel for the appellant further submits that the respondent has accepted the liability but that cannot be a ground to admit the application filed under Section 9 there being an existence of dispute.

6. For the aforesaid reason, we are not inclined to interfere with the impugned order. In absence of any merit, the appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

/ns/uk