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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 26th April, 2024
+ **O.M.P.(I)(COMM.)-127/2024**

**SBI CARDS AND PAYMENT SERVICES
PRIVATE LIMITED**

..... Petitioner

Through: Mr. Rajeev Nayar, Sr. Adv. with
Neeraj Sharma, Ms. Arpita Roy
Chowdhury, Ms. Archana Lakhotia,
Mr. Adhish Rajvanshi, Ms. Prachi
Jain, Mr. Agniwesh Singh & Mr.
Bikram Bhattacharya, Advs. (M:
9958182805)

versus

KONY INC. & ORS.

..... Respondents

Through: None.

**CORAM:
JUSTICE PRATHIBA M. SINGH**

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.

I.A. 9375/2024 (for exemption)

2. This is an application seeking exemption from filing originals/certified/cleared/typed or translated copies of documents, left side margins, electronic documents, etc. Original documents shall be produced/filed at the time of Admission/Denial, if sought, strictly as per the Commercial Courts Act and the DHC (Original Side) Rules, 2018.

3. Exemption is allowed, subject to all just exceptions.

4. Accordingly, the application is disposed of.

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5. The present petition under Section 9 of the Arbitration and



Conciliation Act, 1996, and has been taken up upon urgent mentioning in the morning and has been listed before the Court post-lunch. In the present petition, the Petitioner is seeking interim measures to ensure access to and operation of certain licensed software as also to prevent the Respondents from disrupting the utilisation of software licenses from Respondent No. 1.

6. The petition has been filed by the SBI Cards and Payment Services Pvt. Ltd. against the four entities who are stated to be connected to each other. The four parties which have been arrayed as Respondents and the relationship between the entities is set out below in the following table:

Respondent No.	Respondent Name	Relationship Between the Parties
Respondent No. 1	Kony, INC.	Developer and licensor of Software solutions used by the Petitioner
Respondent No. 2	Temenos India Pvt. Ltd.	Subsidiary and agent of Respondent No. 1
Respondent No. 3	Bahwan Cybertek LLC	Exclusive strategic partner and agent of Respondent No. 1 for specified regions
Respondent No. 4	Bahwan Cybertek Pvt. Ltd.	Subsidiary of Respondent No. 3 and agent of Respondent No. 1

7. The case of the Petitioner is that it is a publicly listed company on the Bombay Stock Exchange (BSE) and the National Stock Exchange (NSE) with the State Bank of India (SBI) as its single largest shareholder of the Petitioner. The Petitioner claims to be the largest and only pure-play credit card issuer in India, which is a listed company. The Petitioner offers credit cards for crores of customers across the country and also provides various value-added products and services. The Petitioner claims to have issued more than 18 million (1.8 crores), which have been issued by it, as of



December, 2023. The credit card services of the Petitioner are also enabled through the SBIC Mobile App, which has various self-service features.

8. The Petitioner, sometime in 2014 availed of IT services from the Respondent No.1 - Kony, INC. which has developed the platform called the Mobile Application Development Platform (MADP), which enables the Petitioner to develop client facing applications that work on mobiles and similar devices, for B2C users. For the said purpose, an agreement was executed between the parties including a license agreement dated 25th April, 2014. In terms of the said agreement, the Respondent No.1 gave to the Petitioner a license for use of the software, which is called Kony MADP consisting of two major components namely Kony Visualizer and Kony Mobile Fabric. As per paragraph 9 of the petition, Kony Visualizer is an integrated development environment (IDE) that serves as the front-end for Respondent No.1's API framework, enabling developers to develop mobile apps for a wide range of devices and operating systems. Further, it has been stated that Kony Mobile Fabric is a Mobile Backend as a Service (MBaaS) platform that supports developers in building native and web apps for mobile devices, offering backend integration for the applications built.

9. The said license agreement dated 25th April, 2014 was initially, executed between the parties as per which the Petitioner obtained license for the use of the said operating system in terms Clause 2.1. The said clause outlines the licensing and authorised use of Kony's technology solutions by the Petitioner, allowing the Petitioner to enable SBI Cards or its Service Providers to develop mobile banking applications for B2C needs across various devices and operating systems. The Petitioner was also permitted to undertake sub-licensing, transfer or permit the use of the license granted to



SBI Cards to any of its parent entity or any divested entity, as per the provisions of the agreement. An important clause in this agreement is Section 3, which contains the term of the license. The said clause is set out below:

“SECTION 3- TERM OF LICENSE

The term of the license(s) granted under this agreement shall commence on the Order Effective Date and continue for thirty-six (36) months ("Initial Term"), unless terminated earlier as provided in this Agreement.

Termination for Material Breach. If either party materially breaches in the performance of any of its duties or obligations set forth in this License Agreement and such breach is not cured within thirty (30) days after written notice of the same is given by the non-breaching party specifying the default, then the non-breaching party may by giving written notice thereof to the breaching party, terminate this License Agreement as of a date specified in the notice of termination.

Further, SBI Card may terminate this Agreement if (1) SBI Card determines that any of the representations or warranties Kony have made in relation to this Agreement are materially untrue; and (2) If Kony enters, will enter or threaten to enter into bankruptcy, liquidation or any other type of insolvency or if Kony cease to conduct business to properly give effect to this Agreement. In the event of termination for a material breach by Kony, SBI CARD shall, in addition to any other remedies available to it pursuant to this License Agreement or by law or in equity, receive a refund of pro-rated license fee, any pre-paid Annual Software Maintenance Fees and Annual Technical Support Fees pro-rated to reflect the period following termination for which such prepayment has been made.



Survival. Upon any termination of this License Agreement pursuant to this section or otherwise, the provisions and those rights and obligations, which by their nature are intended to survive termination, shall survive the termination of this License Agreement.

Transition Period and Support, *Upon payment of the license fees as agreed by the parties, SBI CARD may elect by notice to Kony to continue to Use the Licensed Program for a transition period to be specified by SBI CARD in its notice up to a maximum of twelve (12) months (the “Transition Period”) only for the purpose of transition by SBI CARD from Kony's License Program to SBI CARD's or a third party system, provided that SBI CARD fully complies with this License Agreement during the Transition Period. Any services which parties agree to be performed by Kony during such Transition Period will be performed at an agreed additional cost. It is agreed by the Parties that SBI CARD shall retain and continue to use all the copies of the Licensed Materials, software, documentation and Confidential Information in its possession or control during the Transition Period.”*

10. The agreement also consists of an arbitration clause 17 of the said license agreement. It is the submission of Mr. Rajeev Nayar, Id. Senior Counsel appearing for the Petitioner that the initial period of license was from 2014 to 2017 and the same was renewed from 2017 till 2020 and thereafter, for a further three years' period till 2023. Thus, till June, 2023 there was a proper license executed, which existed between the Petitioner and the Respondent No.1. Id. Sr. Counsel further submits that prior to the expiry of the agreement in 2023, negotiations had commenced between the parties for renewal of the agreement. The said correspondence has been placed on record, by the Petitioner, to show how a commercial proposal was,



in fact, given by the Respondent No.1 as on 3rd April, 2023 for the renewal in the following terms.

3. Temenos Quantum License Renewal

BCT is proposing the renewal commercial terms as per the below table:

Product Description	License Term	Annual Subscription Fee(s) in INR
Kony Quantum- B2C/B2B - Enterprise Edition - Single App <i>(includes Visualizer)</i>	2023-2024	63,00,000
Kony Quantum- B2C/B2B - Enterprise Edition - Single App <i>(includes Visualizer)</i>	2024-2025	67,00,000
Kony Quantum- B2C/B2B - Enterprise Edition - Single App <i>(includes Visualizer)</i>	2025-2026	70,00,000
Total		2,00,00,000

TERMS OF LICENSE

The term of the license(s) granted under this agreement shall commence on the Order Effective Date and continue for thirty-six (36) months ("Initial Term"). Unless terminated earlier as provided in this Agreement.

License model is subscription.

Payment terms:

100 % in advance Along with PO for year 1	
100 % in advance from year 2 onwards	

*-payment to be made along with the PO

11. After further correspondence between the parties, the above commercial proposal was modified as under:



3. Temenos Quantum License Renewal

BCT is proposing the renewal commercial terms as per the below table:

Product Description	License Term	Annual Subscription Fee(s) in INR
Kony Quantum- B2C/B2B - Enterprise Edition - Single App <i>(includes Visualizer)</i>	2023-2024	55,00,000
Kony Quantum- B2C/B2B - Enterprise Edition - Single App <i>(includes Visualizer)</i>	2024-2025	58,30,000
Kony Quantum- B2C/B2B - Enterprise Edition - Single App <i>(includes Visualizer)</i>	2025-2026	61,79,800
Total		1,75,09,800

TERMS OF LICENSE

The term of the license(s) granted under this agreement shall commence on the Order Effective Date and continue for thirty-six (36) months ("Initial Term"). Unless terminated earlier as provided in this Agreement.

License model is subscription.

Payment terms:

100 % in advance Along with PO for year 1	
100 % in advance from year 2 onwards	

***-payment to be made along with the PO**

12. It is the submission of Id. Sr. Counsel that this contract was agreed upon between the parties as the final commercial proposal for a 3-year further renewal. Id. Senior Counsel also submits that only the payments were to be made. A draft master service agreement was also sent by the Respondent No. 4, however the same was not yet executed. During this period, the Petitioner was also informed of the fact that the Respondent No.1 had entered into a strategic sales delivery partnership with the Respondent



No.4 - Bahwan Cybertek Pvt. Ltd. in India. The correspondence thereafter ensued and surprisingly, in the later correspondence sometime in October, 2023, the entire commercial proposal was changed and the proposal, which was given by the Respondents, is as under:

3. Temenos Quantum License Renewal

BCT is proposing the renewal commercial terms as per the below table:

Product Description	License Term	Total Unique Login Count in Last 1 year [Unique Customers]	Annual Subscription Fee(s) in INR
Kony Quantum-B2C/B2B - Enterprise Edition - Single App <i>(includes Visualizer)</i>	14 th June 2023-13 th June 2024	1.05 Cr	10,79,07,692
Total			10,79,07,692

TERMS OF LICENSE

The term of the license(s) granted under this agreement shall commence from 14th June 2023 and continue for twelve (12) months ("Initial Term"). Unless terminated earlier as provided in this Agreement.

License model is subscription.

Payment terms:

100 % in advance Along with PO for year	
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***-payment to be made along with the PO**

13. On this proposal, there was no consensus between the parties as the Petitioner had already, according to the Id. Senior Counsel, concluded a contract in terms of the earlier proposal and only the final agreement was to be executed. The new commercial was way steeper as compared to the agreed commercial proposal in May 2023. It is submitted that on 19th April, 2024, the Respondent No.1 has now been served a cease-and-desist notice, in effect, terminating the license agreement. It is submitted that the



termination of the license would have a damaging impact on the Petitioner as also its subscribers and customers.

14. The Court has heard Id. Sr. Counsel for the Petitioner and perused the record. Affidavit of service dated 26th April, 2024 has been placed on record by the Petitioner, however, there is no appearance on behalf of the Respondents.

15. A perusal of the Arbitration clause in the license agreement would show that the seat and venue of the arbitration, in case there are any disputes between the parties, is in New Delhi. A Sole Arbitrator is to be mutually agreed between the parties. In the absence of consensus, a three-member Tribunal is to be appointed. Section 17 of the license agreement reads as under:

“SECTION 17- GOVERNING LAW AND DISPUTES

17.1 All disputes or differences whatsoever arising between the parties out of or in connection with this contract or in discharge of any obligation arising out of the Contract (whether during the progress of work or after completion of such work and whether before or after the termination of this contract, abandonment or breach of this contract). shall be settled amicably. If, however, the parties are not able to solve them amicably, either party (SBI Card or Kony) has to give written notice to other party clearly setting out there in specific issues relating to dispute(s) and/or difference(s) and shall be referred to a sole arbitrator mutually agreed upon and the award made in pursuance thereof shall be binding on the parties. In the absence of consensus about the single arbitrator, the dispute may be referred to an Arbitral Tribunal consisting of three Arbitrators: one to be nominated by each party and the said arbitrators shall nominate a



presiding arbitrator, before commencing the arbitration proceedings. The arbitration proceedings shall be conducted in accordance with the provisions contained in the (Indian) Arbitration & Conciliation Act, 1996. The venue of Arbitration shall be at New Delhi (India) and language for all proceedings under the arbitration shall be in English. The award pronounced under Arbitration clause or any other dispute that may arise between the Parties in relation to or in connection with this Agreement shall be subject to the exclusive jurisdiction of the appropriate courts of Delhi.

17.2 Kony shall continue work under the Contract during the arbitration proceedings unless otherwise directed by SBI Card or unless the matter is such that the work cannot possibly be continued until the decision of the arbitrator is obtained.”

16. Advance copy of the petition has been served upon all the email addresses including upon the officials, who were corresponding with the Petitioner. The emails have been placed on record. However, there is no appearance on behalf of the Respondents.

17. The nature of services, which the Petitioner is providing, is credit card services to more than 1.8 crore people in the country. As on today, the operation of any credit card would require the requisite IT software and developer licenses to be in place and any apprehension that such the software, developer or IDE license could be disrupted, would result in enormous risks to the customers of the Petitioners.

18. Interim protection measures are crucial in the present case as the same involve a critical and sensitive aspect of providing financial services. Disruptions in software licensing or operational access could significantly impact the development and functionality of mobile banking applications



that underpin credit card services. Given the sensitive nature of these services, any interruption could pose risks to customer data, transaction processing, and overall service continuity. This, in turn, could lead to financial losses for the parties involved and erode consumer trust. Therefore, the interim protection measures are essential to maintain the smooth operation of credit card-related software, ensuring uninterrupted service delivery, customer satisfaction, and compliance with financial regulations.

19. A perusal of relevant portions of clause 3 & 17.2 of the license agreement would show that even if there is a termination or arbitration proceedings between the parties, the transition period of 12 months has to be given and if Arbitration proceedings commence, then the work of Respondent No.1 and other entities connected to it under the contract and license agreement has to continue. The relevant portions from the said two clauses are extracted below:

“ SECTION 3- TERM OF LICENSE

The term of the license(s) granted under this agreement shall commence on the Order Effective Date and continue for thirty-six (36) months ("Initial Term"), unless terminated earlier as provided in this Agreement ...

Transition Period and Support, Upon payment of the license fees as agreed by the parties, SBI CARD may elect by notice to Kony to continue to Use the Licensed Program for a transition period to be specified by SBI CARD in its notice up to a maximum of twelve (12) months (the "Transition Period") only for the purpose of transition by SBI CARD from Kony's License Program to SBI CARD's or a third party system, provided that SBI CARD fully complies with this License Agreement during the Transition Period. Any services which parties agree to be performed by



Kany during such Transition Period will be performed at an agreed additional cost. It is agreed by the Parties that SBI CARD shall retain and continue to use all the copies of the Licensed Materials, software, documentation and Confidential Information in its possession or control during the Transition Period.

“SECTION 17- GOVERNING LAW AND DISPUTES

17.2 Kony shall continue work under the Contract during the arbitration proceedings unless otherwise directed by SBI Card or unless the matter is such that the work cannot possibly be continued until the decision of the arbitrator is obtained.”

These two clauses of the license agreement would show that the parties fully appreciated the critical nature of services and the effect any disruption of services would have on the Petitioner as also its customers.

20. In view of the overall circumstances of the present case, the Petitioner has made out a prima facie case for grant of *ex-parte ad-interim* injunction. Accordingly, till the next date of hearing, the Respondent Nos.1 to 4 and anyone else acting for and on their behalf shall stand restrained from taking any action or steps, which would result in the disruption in the credit card services through use of the licensed software, which are annexed as Annexure A to the license agreement dated 25th April, 2014. The programmes, which have been licensed by the Respondents are contained in Annexure A to the agreement at page 76 of the paper book. It shall be ensured that no disruption is caused to the services, which are being provided in order to ensure that the large members of the public are not inconvenienced in any manner. The Respondents shall also stand restrained from taking any steps or change any credentials including passwords or the



software versions etc., which may result in disruption of the Petitioner's services, or cause disruption to the services of the users of the platform of the Petitioner.

21. The above order is subject to the condition that the Petitioner will deposit the sum of Rs.55 lakhs with the Registrar General of this Court within one week.

22. Compliance of Order XXXIX Rule 3 CPC be made within 48 hours.

23. List on 22nd May, 2024.

24. Order *dasti*.

PRATHIBA M. SINGH
JUDGE

APRIL 26, 2024/dk/am