

(2008) 10 AHC CK 0064
In the Allahabad High Court
Case No : Company Petition No. 35 of 2006

Cain Technologies (India) Pvt Ltd, New Delhi	APPELLANT
Vs	
Xerox India Ltd., Noida, Gautam Budh Nagar, U.P.	RESPONDENT

Date of Decision : 24-10-2008

Acts Referred:

Companies Act, 1956 — Section 433(a), 434(1)(a)

Citation : (2008) 10 AHC CK 0064

Hon'ble Judges : Sunil Ambwani, J

Final Decision : Dismissed

Judgement

Sunil Ambwani, J.—Heard Shri Rishi Chadha, learned counsel appearing for Cain Technologies (India) Pvt. Ltd. New Delhi. Shri Navin Sinha, Senior Advocate assisted by Shri Vipin Sinha appear for Xerox India Limitedthe respondent company.

2. The Court issued notices to the respondent company on 6.11.2006. The counter and rejoinder affidavits have been exchanged.

3. This creditor's company petition under Sections 433(a) and 434 (1) (a) of the Companies Act, 1956 to wind up Xerox India Ltd.the respondentcompany has been filed with the allegations that the respondentcompany has not made payments of commission to the petitioner in accordance with the "Canvassing Agency Agreement" dated 1.6.2001 of an amount of Rs. 4,37,500/ is still due and payable inspite of the statutory demand notice dated December 6, 2005 to the respondent company.

4. Brief facts stated in the company petition are that the petitioner company is primarily a consulting and marketing organization having capabilities to provide solutions from concept to business planning guidance on regulations, proposing technology, managing tieups, and providing value added service. It has a team of eminent professionals with vast experience. The expertise of the company is in building partnerships. The respondent company is engaged in the business of

manufacture, import, export, repairs etc. of all kind of computers, data processing machines, memory equipment and others. The respondent company entered into a "Canvassing Agency Agreement" dated 1.6.2001, engaging the services of petitionercompany to promote the sale and lease of products of the respondent company as detailed in the said agreement. The respondents were to compensate the petitioner in accordance with Clause4 of the said principal agreement and to pay commission calculated on the net invoice sale price of the products supplied against the orders procured by the petitioner and accepted by the respondents. The 50% of the amount of commission was to be paid within 15 days of receipt and acceptance of the order XMC from the customers and the balance was to be paid within 30 days of the receipt of XMC of the payment under the order from the customer.

5. It is stated that on September 3, 2001 a supplementary agreement was entered into between the parties which increased the base of products. It is stated that with the promotional effort of the petitioner, they were successful in getting business for the respondents worth over Rs. 10 crores by the end of March, 2002. A letter was sent by the petitioner to the respondentcompany on March 30, 2002 enclosing an accounts statement of the accrued commission of Rs. 7,037,346/out of which the petitionercompany had received a sum of Rs. 1,701,923/ as per contract and additional 2% commission was to be paid and that the total duty as on 3.3.2002 when the letter was sent with statement of accounts on 30.3.2002 was Rs. 42,55,473/. The principal agreement was expiring on 31.5.2002. It was extended by another year by a second supplementary agreement dated 8.8.2002. The petitioner duly intimated the respondentcompany for release of the commission and to honour its commitment. The extended orders were procured with the efforts of the petitioner to the tune of Rs. 19.33 crores. The respondent made payment of initial 50% of the commission in accordance with clause4.1 of the agreement and that they acknowledged the debt of remaining 20%. A communication was received from the respondentcompany on 21st April, 2004 regarding sales commission at the rate of 3.5% of collection of 100% payments towards orders of Rs. 16,32,000/amounting to Rs. 57,120/. Despite the regular follow up the petitioner did not get any valid reason for delay in payment. The letters dated 21.4.2004,15.3.2005 and 6.12.2005 were followed by statutory notice dated 8.3.2006 demanding a sum of Rs. 4 lacs with interest within 21 days and the cost of notice at Rs. 5,500/.

6. It is alleged that the respondentcompany gave an evasive reply on 15.5.2003 stating that the notice was misconceived and the claims raised are baseless. The payment of Rs. 1,39,49,304.27 was made to the petitionercompany from time to time on the basis of incorrect representation and that the amount was liable to be returned within 15 days. It was also stated in the reply dated 15.5.2006 that consigned confirmation may be sent confirming compliance of the obligation under the agreement including compliance of the clause 11.4 of the agreement.

7. The petitionercompany has preferred this company petition to wind up the respondentcompany for failure to pay the admitted dues for which a demand notice was duly sent by registered post on 15.5.2006 on the registered office of the company invoking Section 434 (1)(a) of the Companies Act, 1956.

8. Shri Rishi Chadha, learned counsel for the petitionercompany states that the execution of the agreement dated 1.6.2001; the first supplementary agreement dated 3.9.2001 and second supplementary agreement dated 8.8.2002, have not been denied. The petitionercompany procured business of Rs. 19.33 crores for the respondentcompany and continued to receive supplies. They paid the first tranche of the commission but that remaining amount was not paid. The demand of Rs. 4,37,500/ made on December 6,2005 was followed by the statutory notice. By the time the statutory notice was given a further sum of Rs. 4 lacs had already fallen due on account of confirmed orders received by the respondentcompany. It is submitted by him that the respondent company is liable to be wound up for failing and neglecting to pay the admitted amount of the commission under the agreement.

9. Shri Navin Sinha, on the other hand, submits that the company petition is baseless and is liable to be dismissed with heavy costs. He states that the liability given in the notice dated December 6, 2005 was denied. In the statutory notice the amount due is not quantified. Paragraph22 of the notice shows that the payment of Rs. 4 lacs is due. He submits that there is no acknowledgment of the dues and that demand for unascertained amount cannot be a ground to file a winding up petition. The respondentcompany invited the petitionercompany to settle the accounts by giving the details of the amounts claimed to be due. The petitionercompany has not come forward with the statement of accounts. He would submit that in the present case though he does not admit the dues, the recovery of which is also barred by limitation, the petitionercompany could have filed a suit for settlement of accounts. He would further submit that there are no pleadings with regard to the financial insolvency of the respondentcompany. The balance sheet of the respondentcompany has been annexed. It is stated in paragraph 3 of the affidavit of Shri Andrew Home, Managing Director of the respondentcompany that in the financial year 200607 the respondentcompany recorded a turn over of Rs. 50886.31 lacs and Rs. 1940.33 as profit before tax. In the financial year 200708 the turn over was recorded at Rs. 57,431.08 lacs and Rs. 3072.82 as profits before tax. The respondentcompany is in production and is meeting all its liability and financial obligation. It is financially wound, profitable, solvent running company.

10. From the arguments advanced by the parties, I find that the demand raised in the notices dated December6, 2005 and statutory notice dated 8.3.2006 is based on the "Canvassing Agency Agreement" under which 50% of the commission was payable within 15 days of the receipt and acceptance of the order from the customer and balance commission within 30 days of the receipt of the payment under the order from the customer. The accountsstatement has not

been annexed. It is stated in paragraph 11 of the statutory notice that the commission was receivable on representation made by the respondentcompany regarding the receipts of payments from the customer. The details of these receipts and the accounts statement was not enclosed. Learned counsel for the petitioner could not clarify as to how he had fixed the outstanding liability in paragraph20 for Rs. 17,77,576.00 and thereafter confined the admitted debts only Rs. 4 lacs. In such case the statement of accounts could be the best piece of evidence to show that the amount was due and payable by the respondentcompany. The petitionercompany could have forwarded the statement of accounts and invited the respondentcompany to settle the same failing which the parties could have invoked the arbitration clause in the agreement or filed a suit for accounting. In that case the question whether the dues are barred by limitation could also be decided.

11. A company is not liable to be wound up for the payment of unascertained amount. Further even if the petitionercompany establishes that the amount claimed is due and payable, it was required to establish that the respondentcompany is unable to pay the dues. There is no averment in the company petition nor there is any denial of the fact that the respondentcompany is in financially sound condition. It is a solvent running company and is earning profits.

12. The company petition is dismissed with costs quantified at Rs. 25.000/to be paid by the petitionercompany to the respondentcompany.