

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on: 9th July, 2013*
Date of Decision: 11th July, 2013

+ **CO. PET. 37/2012**

M/S. SERVEL INDUSTRIES Petitioner
Through: Mr. Anoop Bagai, Sr. Advocate
with Mr. Amitesh Kumar,
Advocate.

versus

ALCOBREW DISTILLERIES
(INDIA) PVT. LTD. Respondent
Through: Mr. Amit Goel, Advocate.

CORAM:
MR. JUSTICE R.V. EASWAR

JUDGMENT

R.V. EASWAR, J.:

1. This is a petition filed by M/s. Serval Industries through its proprietor Puneet Soni, under Section 433(e) read with Section 434 of the Companies Act, 1956 for the winding up of the company by name M/s. Alcobrew Distillers (India) Pvt. Ltd. a company having its registered office in New Delhi. Notice was issued to the respondent company which took the objection that the claim of the petitioner stood settled when this Court passed an order on 16.05.2011 in Company Petition No.326/2010. This objection

was vehemently contested by the petitioner whose contention was that the present petition relates to a separate and distinct transaction and has nothing to do with the settlement in Company Petition No.326/2010. In order to examine this contention, the file of Company Petition No.326/2010 was requisitioned and the same has been placed before this Court.

2. The short question for consideration is whether the claim of the petitioner against the respondent company stood settled as contended on its behalf.

3. The learned counsel for the petitioner submitted that the respondent company deducted income tax of ₹74,184/-, but the net amount after deduction was never paid to the petitioner. The total amount originally payable to the petitioner was ₹32,67,975/- out of which a sum of ₹28,29,058/- was paid on 20.03.2009. The balance amount payable is ₹3,64,773/-. Though this amount was not paid, the respondent company deducted income tax of ₹74,184/- from the same which according to the petitioner amounted to the acknowledgement of the liability of the respondent company. My attention was drawn to the affidavit of Puneet Soni, sole proprietor of the petitioner and the annexures thereto. It is pointed out that the petitioner's wife was carrying on a business under the name and style of M/s. Innovations which entered into a settlement with a company called Focus Brands Trading (India) Pvt. Ltd.

(“Focus”, for short) according to which as against the total amount of ₹69,74,721/- due by Focus, the matter was settled on payment of ₹25,00,000/- in Company Petition No.326/2010, but this has nothing to do with the transactions between the present petitioner and the respondent company. It is contended that the objection taken by the respondent company to the effect that nothing was due by it to the petitioner is untenable. Reliance is placed on the order of this Court (Manmohan, J.) passed on 20.05.2011 in Company Petition No.326/2010 recording the Memorandum of Settlement between Innovations and Focus and it is pointed out that this settlement did not bind the present petitioner. It is further pointed out that even the respondent company was not party to the Memorandum of Settlement and, therefore, no reliance can be placed upon the same to contend that the petitioner’s claim also stood settled.

4. As against this, it is contended on behalf of the respondent that it had an agreement with Focus, which was marketing international brands of liquor, under which it acted as bottlers for Focus. My attention was drawn to the relevant clauses of the agreement, particularly clause 5.7 under which the respondent company was to pay the suppliers for all the material on the due dates under the respective invoices, but Focus shall be responsible for all consequences arising out of non-payment of dues to the suppliers. The actual clause reads as under: -

“5.7 ADIPL shall pay, from the Account, the suppliers of the Materials on due dates under the respective invoices raised therefor, FBTIL shall be responsible for all consequences arising out of non payment of dues to suppliers provided that the non payment is not due to any act or omission attributable to ADIPL under this Agreement.”

5. My attention was also drawn to two e-mails written by Puneet Soni on behalf of both the petitioner and M/s. Innovations. The first e-mail (Annexure-E to the Company Petition No.326/2010) reads as under: -

*“From: puneet soni (puneet_serve1@yahoo.com)
To: priyotosh_wali@focusbrands.in;
Date: Tuesday, August 11, 2009 15:53:39
Subject: Pleasure Meeting You!*

Dear Mr. Wali,

It was indeed a pleasure meeting you in your office today.

As mentioned by you, the payment plans of Focus Brands have now been put in place. I need to thank you & your team, especially Sumit & Anirban for initiating the process of clearing long overdue payments. Though a start has been made to clear my outstandings, by a payment of ₹24.5L, the outstandings are still upwards of 65L. In view of the inordinate delay in the payments, & as also appreciated by you in our meeting, these need to be cleared at the earliest within definite timelines. I'm sure, with you at the helm, this would be achieved.

As mentioned to you during the meeting, I've been in the business of supplying POS merchandise to various liquor companies for over 20 years, & have been associated with Focus Brands since its inception more than 8 years back.

The last year or so, has been a difficult year for Focus & subsequently due to it's cascading effect, these were very trying

times for me as well. But I'm positive that in times to come, our business association can only get bigger & better.

Looking forward to a renewed & more meaningful association with you & your team at Focus Brands.

*Regards,
Puneet Soni
SERVEL INDUSTRIES
INNOVATIONS"*

6. The second e-mail is at page 126 (Annexure-R) which reads as under: -

*"From: puneet soni <puneet_serve1@yahoo.com>
To: Hem Javeri <hemjaveri@yahoo.com>; Priytosh Wali
<priytosh_wali@focusbrands.in>; takesh mathur
<takesh_mathur@jepl.com>
Cc: Vishal Mahajan <vishal_mahajan@jepl.com>; Martin
Pala <martin.pala@compari.com>; Jean-Yves Laforet
<jeanyves.laforet@campari.com>
Sent: Monday, March 29, 2010 11:44:20*

Subject: Outstanding Payments!

Dear Mr. Javeri, Mr. Wali, Mr. Mathur,

This is further to our meeting of 2nd March, 2010 & our subsequent telecons on the subject of my outstanding payments (₹64,70,563.00)

During our meeting, you, Mr. Mathur had appreciated my patience & had advised me to exercise a little more patience while you address the issue in consultation with Mr. Javeri & Mr. Mahajan. Though patience is a much valued virtue in conducting ones business it also has it's limits & mine have been tested to it's full.

Though I've reiterated on numerous occasions, let me again tell you that out of the above amount, ₹63,08,563.00 (including ₹3,64,773.00 from Alcobrew) is for the financial year 2008-

2009 which also reflects in your audited books of accounts. Further, I've been issued TDS certificates for all this amount which is a clear, admission of your liability.

As my accompanying mails will show that I've repeatedly requested you to release my complete outstanding payments, but you have not done so on one pretext or the other.

In view of the above, if I do not receive my outstanding payments immediately, I'll be constrained to exercise my litigation options including filing for winding up of your company FBIL.

*Regards,
Puneet Soni
INNOVATIONS
SERVEL INDUSTRIES"*

7. Strong reliance is placed on the second e-mail which, according to the respondent, shows that the amount of ₹63,08,563/- due from Focus to the petitioner includes the amount of ₹3,64,773/- due from the respondent-company. The contention is that since the amount due from Focus has been settled at ₹25 lakhs, that settlement also covered the amount due by the respondent-company to the petitioner and therefore nothing is recoverable from the respondent-company. It is pointed out that the petitioner has written the e-mails on behalf of both his propriety concern and the proprietary concern of his wife and that he cannot deny any knowledge of the settlement arrived at between his wife's proprietary concern and Focus. It is thus contended that nothing is recoverable from the respondent-company by the

petitioner, and since no debt is due, the winding-up petition is not maintainable.

8. I have carefully considered the matter. I have also perused the file in Company Petition No.326/2010. It is true that in the Memorandum of Settlement dated 20.05.2011 arrived at between the petitioner (Serval Industries) and his wife (M/s. Innovations) on the one hand and Focus on the other, that a total outstanding of ₹69,74,721/- was settled at ₹25 lakhs. This amount consisted of the principal sum of ₹55,57,721/- and interest of ₹14,17,000/-. It prima facie appears that the Memorandum of Settlement was entered into only with reference to the amount payable by Focus to both the petitioner and his wife for material allegedly supplied to Focus. It refers to the fact that M/s. Innovations filed Company Petition No.326/2010 before this Court for winding up of Focus on the ground that it was unable to pay the aforesaid amount to it. There is no reference in the Memorandum of Settlement to the agreement dated 25.01.2007 entered into between the Focus and the respondent-company, clause 5.7 of which made Focus responsible for all consequences arising out of non-payment of dues by the respondent company to the suppliers. Further, the order of this Court passed on 20.05.2011 in Company Petition No.326/2010 refers only to “respondent’s debt to the petitioner”, which means the amount owed by Focus to Innovations. In the order passed on 16.05.2011 in Company Petition

No.326/2010, it was made clear that “in terms of the said settlement, respondent shall pay a sum of ₹25 lakhs in full and final settlement of the amount due and payable not only to the petitioner but also to M/s. Servel Industries Ltd.”. Thus it is more than clear that under the MoS dated 20.05.2011, it is only the amount due by Focus, both to the present petitioner and M/s. Innovations, that was sought to be settled. There is no mention in the orders of this Court in Company Petition No.326/2010 about the amount due by the respondent-company. If this factual position alone is taken note of, it would appear that the respondent-company has to fail in its contention.

9. But the contention of the learned counsel for the respondent-company is based on clause 5.7 of the agreement dated 25.01.2007 entered into between itself and Focus. I have already extracted the clause. This clause seems to suggest that though the primary responsibility for paying for the supplies of the materials on due dates would be that of the respondent-company, Focus shall be responsible for the consequences arising out of non-payment of the dues by the respondent-company to the suppliers, subject to the condition that such non-payment was not due to any act or omission attributable to the respondent-company. The absence of any reference to the dues of the respondent-company in the orders of this Court in Company Petition No.326/2010 and the fixation of the primary responsibility for the

payment in respect of materials supplied to respondent-company on it appears to clinch the decision in favour of the petitioner.

10. However, that does not seem to be the end of the matter. In the e-mail sent by Puneet Soni on behalf of his proprietary concern (Serval Industries) and on behalf of his wife's propriety concern (Innovations) on 29.03.2010 (Annexure-R to the Company Petition No.326/2010) he has confirmed that the amount of ₹63,08,563/- which is due for the financial year 2008-2009 includes an amount of ₹3,64,773/- from Alcobrew, which is the respondent-company. This e-mail shows that even according to the petitioner, the amount due from Focus, which was ultimately settled at ₹25 lakhs under the Memorandum of Settlement dated 20.05.2011, included the amount of ₹3,64,733/- due from the respondent-company. The fact that the e-mail was written by Puneet Soni both on behalf of his proprietary concern and on behalf of his wife's proprietary concern furnishes the link not only between them on the one hand and Focus on the other, but also indicates the link between Focus and the respondent-company on the other hand when it mentions that the amount outstanding from Focus includes the amount outstanding from Alcobrew, the respondent-company in the present proceedings. The agreement between Focus and the respondent-company entered into on 25.01.2007, particularly clause 5.7 thereof, becomes relevant for this reason that though it was the primary responsibility of the respondent-

company to pay for the materials supplied to it, the consequences of the non-payment would have to be met by Focus. This in turn means that if the respondent-company failed to pay the amount of ₹3,64,773/- due to the petitioner, it would be the liability of Focus to discharge the same. Thus all amounts which, for some reason, were not paid by the respondent-company became the liability of Focus which stood at ₹63,08,563/- for the financial year 2008-2009 and at ₹64,70,563/- on a subsequent date. Therefore, there can be no dispute that the amount of ₹3,64,773/- stood included in the amount of ₹69,74,721/- which was the total amount due by Focus. When this amount was settled by payment of ₹25 lakhs, it is obvious that the amount of ₹3,64,773/- was also part of the settlement and cannot be sought to be recovered again by the petitioner from the respondent-company. The settlement which was recorded by this Court in Company Petition No.326/2010 extinguished the debt of ₹3,64,773/- owed by the respondent-company to the petitioner. The petitioner has not succeeded in demonstrating that the amount of ₹69,74,721/- is distinct and separate from, and does not include the amount of ₹3,64,773/-. In the light of the statement made by the petitioner in the e-mail dated 29.03.2010, the petitioner cannot be permitted now to say, after the settlement has been arrived at, that the amount of ₹3,64,773/- due from the respondent-company was not part of the settlement. To permit him to do so would be contrary to the tenor of the Memorandum of

Settlement and the entire events leading up to it and would also amount to not giving due weight to the agreement dated 25.01.2007 entered into between the respondent and Focus, particularly clause 5.7 thereof.

11. For the above reasons, I am unable to accept the claim of the petitioner that an amount of ₹3,64,733/- is still outstanding from the respondent-company in respect of the supply of PoS merchandise by the petitioner together with a sum of ₹1,64,140/- claimed as interest on the principal amount at 18% per annum. I accordingly dismiss the company petition with no order as to costs.

(R.V. EASWAR)
JUDGE

JULY 11, 2013
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