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

Date of decision: 02nd September 2022

\+ ARB.P. 381/2021

M/S SUSHILA ..... Petitioner

Through: Mr. Natwar Rai, Advocate.

versus

DELHI INTERNATIONAL AIRPORT PVT LTD & ANR. ..... Respondents

Through: Mr. Abhinav Sharma, Advocate with Mr. Ashutosh Ranjan, Advocate for respondent No.1.
Mr. Anil Kathuria, Advocate for respondent No.2.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

(Judgment released on 12.09.2022)

ANUP JAIRAM BHAMBHANI, J.

The decision of this matter hangs on the devastating slash ('/') !!

By way of the present petition under section 11 of the Arbitration & Conciliation Act 1996 ('A&C Act' for short), the petitioner seeks appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen from License Agreement dated 19.06.2006 with respondent No.1/Delhi International Airport Pvt. Ltd. ('DIAL'); and from a prior License Agreement dated 20.07.2005 with respondent No.2/Airports Authority of India ('AAI').

2. Mr. Natwar Rai, learned counsel for the petitioner has drawn the attention of this court to clause 30 of agreement dated 20.07.2005 with AAI which contemplates reference of disputes between the parties to arbitration in accordance with the A&C Act; and clause 2 of agreement

dated 19.06.2006 with DIAL which also contemplates reference of disputes between the parties to arbitration in accordance with the A&C Act, with the venue of arbitration being at New Delhi.

3. For completeness, it may be recorded that a separate territorial jurisdiction provision is also contained in clause 31 of agreement dated 20.07.2005 with AAI, which states that jurisdiction over any disputes will lie with the court where the airport is located; and clause 3 of Annexure C of agreement dated 19.06.2006 with DIAL, which subjects the contract between the parties to the jurisdiction of courts of law at New Delhi.

4. As per the record, the petitioner invoked arbitration *vide* notice dated 23.09.2020.

5. Pursuant to notice on this petition issued on 17.03.2021, DIAL has filed its counter-affidavit dated 17.06.2021. The counter-affidavit on behalf of AAI, though filed,is not yet on record. Mr. Anil Kathuria, learned counsel appearing for AAI however submits that considering the nature of present proceedings, his oral submissions may be considered for disposal of the petition.

6. The principal objections raised by counsel for both respondents are:

   (i) That the petition is not maintainable, for the reason that it has been filed by a non-existent entity, namely ***<u>M/s</u>*** Sushila, which is admittedly the sole proprietorship concern of ***Mrs.*** Sushila, and is therefore not entitled to maintain a petition in law;

   (ii) That the affidavit of service/statement of truth in support of the petition has been filed, not by Mrs. Sushila but by her husband and authorized representative Mr. Kanwar Sain, on authority of a

Special Power of Attorney dated 28.09.2018, for which reason also the petition is not maintainable;

(iii) That the petition is bad for mis-joinder of parties, inasmuch as the petitioner is seeking appointment of an arbitrator in respect of disputes arising from 02 separate and distinct contracts, with two different parties *viz.* DIAL and AAI; and accordingly, a single petition seeking reference of disputes against two distinct parties, is not maintainable;

(iv) That the petition is bad for mis-joinder of causes of action, since the cause of action arising from agreement dated 20.07.2005 against AAI is separate and distinct from the cause of action arising from agreement dated 19.06.2006 against DIAL. Therefore, the disputes and causes of action cannot be clubbed in a single petition;

(v) That as per clause 2.1 of the agreement with DIAL, the amount of license fee to be paid *by the petitioner to DIAL* is to be exclusive of all applicable taxes payable thereon; and that therefore, the dispute sought to be raised at this stage is pre-mature, since a final decision on the levy of service tax is yet to be taken by the various forums/courts under the tax regime;

(vi) Lastly, that in view of the above, the invocation of arbitration against DIAL itself is pre-mature, since the claim for return of Fixed Deposit Receipts furnished by the petitioner, must await a final decision on who is liable for payment of service tax.

7. In response to the objections raised, learned counsel for the petitioner has furnished the following answers:

(a) That the sole proprietorship concern of Mrs. Sushila is called M/s. Sushila; and since the present petition has been filed by Mrs. Sushila's duly authorized representative appointed by executing a special power of attorney, for and on behalf of Mrs. Sushila, the petition is therefore maintainable. Counsel for the petitioner argues that the two agreements have been signed by Smt. Sushila (or by Mrs. Sushila, as it were) acting in the capacity of sole proprietor of M/s. Sushila. As is well settled, there is no difference between the sole proprietorship concern and its sole proprietor. It is further submitted that the mere nomenclature of the petitioner as 'M/s. Sushila' instead of 'Mrs. Sushila' cannot be ground for rejecting the petition as non-maintainable.

(b) That there is no merit in the submission that the two agreements in question dated 20.07.2005 and 19.06.2006 are separate and distinct contracts, since it is the admitted position between the parties, that after 2006 the operations and management of the Delhi Airport were transferred by AAI to DIAL; and in fact agreement dated 19.06.2006 between the petitioner and DIAL specifically recites as under:

> "*A. Pursuant to an agreement dated 20th July 2005 and entered into between the Airports Authority of India ("Authority") and the Licensee, the Licensee has been granted a license by the Authority for the purposes more particularly referred to under the abovementioned agreement: at the Indira Gandhi International Airport, Delhi ("Airport"). <u>A certified true copy of the abovementioned agreement alongwith the certified true copies of the</u>*

other documents comprising a part of the said agreement ***are collectively annexed hereto as Annexure "A" to this Agreement*** *(the abovementioned agreement along with the other documents comprising the abovementioned agreement are hereinafter collectively referred as the "Original Agreement").*

(emphasis supplied)

(c) That even the arbitration clause appearing in Annexure-C to the agreement dated 19.06.2006 recites as under:

"*2. ARBITRATION*

Notwithstanding anything contained in the Original Agreement, any and all disputes controversies or claims ("Dispute") arising out of or in connection with or in relation ***to the Agreement*** *as amended by* ***this Agreement*** *shall be referred to arbitration under the (Indian) Arbitration and Conciliation Act, 1996. The arbitration proceedings shall be conducted under a single arbitrator to be appointed for this purpose by the Managing Director of DIAPL. In the event that the Licensee shall require the reference of any Dispute to arbitration, then the arbitrator shall be appointed by the Managing Director of DIAPL within 30 (thirty) days of receipt of a notice by DIAL from the Licensee notifying the existence of such Dispute and requiring the same to be referred to arbitration. In the event that DIAPL shall require the reference of any Dispute to arbitration then the Managing Director of DIAPL shall appoint an arbitrator within 30 (thirty) days from the date of dispatch of a notice by DIAPL to the Licensee notifying the existence of such Dispute and requiring the reference of same to arbitration. The decision(s) of the arbitrator shall be final and binding on the Parties. The venue of arbitration shall be New Delhi. The governing law of the arbitration shall be the substantive Laws of India. The Parties do hereby agree that pending the resolution of any Dispute by arbitration in accordance with the provisions of this Clause, the Parties shall not approach any other forum for resolution of such Dispute. The Parties agree that pending the resolution of a Dispute they shall each continue to perform their respective obligations under this Agreement. The provisions of this Clause (2) shall* *survive the termination or expiry of this Agreement."*

(emphasis supplied)

And therefore it is clear that the arbitration clause specifically addresses and applies to disputes arising from "*the Agreement*" - which is a reference to the agreement with AAI - as amended by "*this Agreement*" - which is a reference the agreement with DIAL; and all such disputes have been agreed to be referred to arbitration. It is submitted that it has further been clarified that this would be the case *notwithstanding anything* contained in the original agreement, *viz.* the agreement between the petitioner and AAI. In view of the above, it is argued on behalf of the petitioner, that the second agreement with DIAL is in fact a successor agreement to the first agreement with AAI, since the management and operations of the Delhi Airport were handed-over by AAI to DIAL after 2006. The submission accordingly is that the earlier agreement with AAI has merged into the later one with DIAL; and there is neither mis-joinder of parties nor of causes of action;

8. Now, in so far as the objection as to mis-joinder of parties and causes of action is concerned, in the opinion of this court, as evidenced by documents on record, the agreement with DIAL is clearly a continuation of the agreement with AAI, by which the management and operations of the Delhi Airport were handed-over to DIAL by the AAI. On a plain reading of the provisions extracted above, it is clear that the original agreement between the petitioner and AAI along with all the

documents annexed with that agreement, were incorporated by reference and merged into the subsequent agreement with DIAL, by annexing them to the subsequent agreement as Annexure "A".

9. On a *prima-facie* view of the claims and disputes raised by the petitioner, it would appear that such claims and disputes relate to and arise from the agreement with AAI just as much as they arise from the agreement with DIAL; by reason of which, it cannot be said that the present petition suffers from the vice of mis-joinder of parties or of causes of action.

10. Insofar as the objection as to maintainability of the petition at the hands of M/s. Sushila above is concerned, it is seen that the agreement with AAI was signed with " *...Smt. Sushila as represented by M/s. Sushila ...* " (sic) while the agreement with DIAL was signed with "*M/s. Sushila a sole proprietorship firm ..... whose proprietor is Smt. Sushila...* ". As correctly pointed-out, the person to whom reference is contained in the agreement is not in doubt; and Smt. Sushila could well choose to describe herself as Mrs. Sushila. On point of fact therefore, the *objection hangs only on* the appearance of the "/" in the petitioner's nomenclature in the memo of parties instead of "r", namely the difference is in the mere description of the self-same person as <u>M/s.</u> instead of <u>Mrs.</u> Sushila. In fact and in law, since a sole proprietorship concern is nothing but the sole proprietor; and in this case, there is no confusion or doubt as to who is being referred to, nor is there any doubt that the petitioner before this court *is indeed the aggrieved person*, who is the contracting party with AAI and DIAL and is signatory to the arbitration agreement, it can hardly be said that the petitioner is a non-

entity in law. It is self-evident that Smt. Sushila or Mrs. Sushila has filed the present petition through her husband and duly authorised signatory, who she has appointed by a special power-of-attorney, which appointment is not challenged by the respondents. There is accordingly no doubt that the petition has been signed by the authorized signatory of Mrs. Sushila, and that Mrs. Sushila is the person who has presented this petition.

11. A brief reference to the concept of a 'sole proprietor' versus the 'sole proprietorship concern' may not be out of place at this point. A recent decision of the Hon'ble Supreme Court in ***Amway (India) Enterprises (P) Ltd. vs. Ravindranath Rao Sindhia***[1] gives a very lucid explanation of the concept, while relying on an earlier decision, in the following words:

> *"15. By way of contrast, we have seen how the respondents have themselves applied to become distributors of Amway products in India as a sole proprietorship concern under the relevant forms issued by the appellant, read with the Code of Ethics referred to hereinabove. <u>In Ashok Transport Agency v. Awadhesh</u> [(1998) 5 SCC 567], <u>this Court has clearly held that a sole proprietary concern is equated with the proprietor of the business as follows</u> :*
>
> > *"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order 30 Rule 1 CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm.* ***<u>A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business</u>****. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings*

[1](2021) 8 SCC 465

> *of the proprietary business.* ***The provisions of Rule 10 of Order 30 which make applicable the provisions of Order 30 to a proprietary concern, enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business****. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order 30 have no application to such a suit as by virtue of Order 30 Rule 10 the other provisions of Order 30 are applicable to a suit against the proprietor of proprietary business 'insofar as the nature of such case permits'. This means that only those provisions of Order 30 can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case"*

(emphasis supplied)

12. In the above view of the matter, dismissing the petition on this *uber* technical ground, *viz*. that the petitioner is described in the memo of parties as M/s Sushila instead of Mrs. Sushila, would not only defeat justice on a purely doctrinal approach but would also allow a party, in this case the respondents, to befool the whole purpose of Justice dispensation.

13. Accordingly, this court is of opinion that there is no merit in the respondents' contention that the present petition is not maintainable, since it has not been filed by the sole proprietor.

14. Upon a conspectus of the averments contained in the petition, the stand taken by the respondents and the submissions made, this court is satisfied that there is a valid and subsisting arbitration agreement between the parties; that this court has territorial jurisdiction to entertain and decide the present petition; and also that the disputes that are stated to have arisen between the parties as set-out *inter-alia* in

invocation notice dated 23.09.2020 do not appear *ex-facie* to be non-arbitrable.

15. Accordingly, the present petition is allowed and Ms. Mayuri Raghuvanshi, Advocate (Cellphone No. : +91 91 9717344186) is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
16. The learned Sole Arbitrator may proceed with the arbitral proceedings subject to furnishing to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
17. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.
18. Parties shall share the arbitrator's fee and arbitral costs, equally.
19. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.
20. Parties are directed to approach the learned Sole Arbitrator appointed within 10 days.
21. The petition stands disposed of in the above terms.
22. Other pending applications, if any, also stand disposed of.

ANUP JAIRAM BHAMBHANI, J

SEPTEMBER 2, 2022/Ne