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

Date of decision: 10th APRIL, 2024

IN THE MATTER OF:

\+ **W.P.(C) 15737/2022**

OSCAR TOURS AND TRAVELS ..... Petitioner

Through: Mr. Santhosh Krishnan, Ms. Sonam Anand and Ms. Deepshikha Sansanwal, Advocates.

versus

UNION OF INDIA ..... Respondent

Through: Mr. Farman Ali, SPC with Ms. Usha Jamnal, Mr. Krishan Kumar, Mr. Sumit Goel and Mr. Aditya, Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Petitioner has approached this Court challenging the Order dated 23.05.2022 passed by the Respondent No.1/MoMA, Haj Division whereby the Petitioner were found ineligible for registration as a Haj Organizer/HGO for Haj, 2022-2023.

2. The facts in brief leading to the filing of the instant writ petition are as follows:

   i. The Petitioner/Oscar Tours And Travels was established as a sole proprietorship by one Abdulla Kutty C.V. The proprietorship firm was engaged in business of providing Haj tours to pilgrims and was registered as an HGO for Haj 2009, Haj 2010, Haj 2011, Haj 2012, Haj 2014, Haj 2016, Haj 2018, and Haj 2019.

ii. A new 5 year policy for Haj titled "Policy for Haj Group Organiser for Haj 2019-23" was issued by the Ministry of Minority Affairs, Haj Division on 20.12.2018 and the Petitioner was considered eligible under the new policy as a category II Haj Group Organizer.

iii. Due to the advent of the COVID-19 pandemic, Haj tours were suspended by the Kingdom of Saudi Arabia due to which Haj tours were not undertaken by any HGOs registered under the HGO Policy 2019-2023. During the pandemic, the sole proprietor one Abdulla Kutty C.V passed away.

iv. Pursuant to the death of the erstwhile proprietor, the proprietorship firm was taken over by Noufal CV who is the son of the deceased.

v. In the year 2022, the Kingdom of Saudi Arabia started accepting Haj Pilgrims pursuant to which a circular was issued by the Respondents to all registered HGOs under the 2019-23 Policy to express their willingness for participating in Haj, 2022. The interested HGOs were required to submit relevant documents confirming their eligibility under the said policy and subsequent allocation of pilgrims to the HGO. A circular dated 18.05.2022 was also issued by the Respondents whereby additional clarifications were provided vis-à-vis Haj policy 2019-23.

vi. The Petitioner sent its willingness to operate as an HGO for Haj, 2022 along with supporting documents mentioned under annexure-I under 2019-23 Policy. Subsequently, the Respondents sought clarifications from the Petitioner regarding its prior experience of conducting Haj and it was also intimated to the Petitioner firm that they do not fulfil the criteria as required under the 2019-23 Policy. An undertaking was submitted by the Petitioner to the Respondents providing the required clarifications, pursuant to which the Impugned Order finding the Petitioner ineligible for registration as an HGO for Haj, 2022 was passed by the Respondents.

3. Notice was issued in the writ petition 15.11.2022. Counter affidavit has been filed by the Respondents.

4. During the pendency of the writ petition, a new policy titled "Registration of Haj Group Organisers (HGOs) for Haj-2023-registration and allocation of quota for Haj-2023" was issued by the Respondents whereby all HGOs regardless of their registration under the previous policy of 2019-23 were required to register once again as an HGO. Pursuant to the new policy being announced, this Court in the present writ petition i.e., W.P.(C) 15737/2022 on 20.03.2023 allowed the Petitioner to file a fresh application for registration as an HGO for Haj, 2023 and the Respondents were directed to file a status report after examining the applications. A report came to be submitted by the Respondents stating that the Petitioner had not provided details or documents against queries which were raised by the Respondents. It was also noted that the Petitioner failed to submit a proper break up of their GST filings or a copy of the GSTR-9 form.

5. Learned Counsel appearing for the Petitioner submits that it is undoubted that the legal identity of the proprietorship is intertwined with the proprietor but the law recognises the continuity of a business of the proprietorship through a new proprietor. He further states that once a firm is recognised as an HGO under the 2019-23 policy, it is not upto the Government to negate the experience garnered by the firm on the basis of

change in ownership of the firm.

6. Learned Counsel appearing for the Petitioner also submits that there is no explicit prohibition either in the 2019-23 policy or the Haj, 2023 policy which bars the transmission of the business to different proprietors. He, therefore, states that after the death of the erstwhile proprietor, the experience garnered by the proprietorship firm will continue to subsist even with the current proprietor.

7. It is the contention of the learned Counsel for the Petitioner that the Haj policy creates an artificial distinction between the transfer/conversion of business and transmission of business which ultimately discriminates small operators. The learned Counsel for the Petitioner places reliance on Ruby Tours Services Pvt. Ltd. vs. Union of India, **(2018) 9 SCC 537** to contend that if a proprietorship which is converted to a private limited company is allowed to continue with the experience garnered by it while it was a proprietorship firm, the same should apply to the proprietorship concerns upon change of the sole-proprietor as well.

8. The learned Counsel for the Petitioner while referring to the status report filed by the Respondents contends that the absence of experience related to Umrah or Haj with the current proprietor is not determinative of the absence of the proprietor of the business of the HGO. He states that the current proprietor of the firm visited KSA with the haj pilgrims in the year 2013, 2014, 2015, 2016 and 2018 with the erstwhile proprietor and it cannot be sated that the current proprietor has no individual experience in holding Haj as a proprietor himself. He places reliance on the Order dated 25.05.2023 in W.P.(C) 7120/2023 whereby a proprietorship firm consisting of sons of erstwhile deceased proprietors were found to be eligible for Haj,

2022 based on the experience garnered by the deceased proprietor. He states that the Petitioner is similarly placed and the same relief should be provided to the Petitioner herein.

9. The learned Counsel for the Petitioner lastly submits that the clarification letter dated 18.05.2022 issued by the Respondents stipulated a new requirement for HGOs wherein Munazzam Card of the proprietor is needed ultimately meaning that the proprietor/director/partner of the firm were supposed to be personally present during the Haj. He states that the 2019-23 policy as envisaged does not confer the same requirement on HGOs and the same is beyond the scope of the policy.

10. *Per contra*, the learned Counsel appearing for the Respondents states that the documents submitted by the new proprietor does not establish the requisite experience needed for HGOs under the 2019-23 policy. He states that as per the 2019-23 policy, HGOs registered under category II are supposed to have an experience of 1 or more Haj with an annual turnover of Rs.1 crores from Haj/Umrah operations in any of the two preceding years. He also submits that a new HGO is required to have a prior experience of conducting one *Umrah* consisting of 50 pilgrims in each of the previous five years. He states that since the son of the original sole proprietor was inducted as the sole proprietor of the Petitioner firm in the year 2021, the proprietor could not have the requisite experience to be registered as a category II HGO under the policy.

11. The learned Counsel for the Respondents also contends that proprietorship firms do not have perpetual succession which means that the business ceases to exist upon the death of the original proprietor. He places reliance upon S.A. Enterprises v General Manager, **2017 SCC OnLine Cal**

16988 and <u>Ashok Transport Agency v Awadhesh Kumar Agency,</u> **(1998) 5 SCC 567** to buttress his contention that sole proprietorship firms do not have perpetual succession.

12. The learned Counsel for the Respondents submits that no additional criteria has been introduced by way of the circular dated 18.05.2022 for existing HGOs. He submits that under clause 11 of the 2019-23 policy, the directors/proprietors/partners of the HGOs are supposed to provide a copy of a valid Munazzam Card which is proof of the presence of the proprietor in the KSA along with the Haj pilgrims. He states that what has been provided under the circular dated 18.05.2022 is merely a decision of the Ministry to strictly comply with the provisions of Munazzam for HGOs given in the Haj Policy.

13. Heard learned Counsel for the Petitioner and perused the material on record.

14. The Ministry of Minority Affairs, Haj Division has, from time to time, issued various policies and guidelines regarding Hajj Group Operators and Private Tour Operators which relate to Haj and Umrah pilgrimage to the Kingdom of Saudi Arabia (K.S.A) upon various bilateral agreements signed between the Government of India and Kingdom of Saudi Arabia for easing the plight of pilgrims. The Haj Policy 2019-2023 was envisaged to allow for experienced Haj Group organisers / Private Tour Operators to aid the pilgrims and allow them to undertake pilgrimage without having to face any trouble of organizing the required visa, stay and travel to and from the Kingdom of Saudi Arabia.

15. It is the case of the Petitioner that the Petitioner has been engaged in the business of providing organized Hajj Tours to pilgrims since 2002, and it

has undertaken 17 Haj operations prior to the issuance of the impugned order rendering the Petitioner ineligible. Material On record discloses that the Petitioner was established as a Sole Proprietorship which continued till the date of the proprietor, pursuant to which the son of the deceased became the sole-proprietor of the firm. Material on Record also discloses that the current proprietor of the firm had partaken in the activities of the Petitioner firm under the erstwhile proprietor, and that he had also accompanied the erstwhile owner for Haj operations undertaken in the year 2016, 2017 and 2019.

16. However, it has been vehemently contended by the ld. Counsel for the Respondent that merely because the proprietorship firm had engaged in multiple Haj operations under the erstwhile owner does not transfer the experience which was garnered to the new Proprietor, due to which the Petitioner will not be able to rely on the experience which was garnered by it under a different proprietor.

17. The only question which arises for consideration is as to whether the experience of a Sole-Proprietor during the course of business is transferable to a different proprietor concern.

18. The Hon'ble Apex Court in Vinayak Purshottam Dube v. Jayashree Padamkar Bhat, **2024 SCC OnLine SC 212**, while discussing the nature of sole proprietorship has held as under:

> "**22.** *In this regard, it is necessary to discuss the jurisprudential status of a proprietary concern. In a report of the Insolvency Law Committee submitted in February, 2020, the definition of 'Proprietorship Firms' reads as under:*
>
> ***"2. DEFINITION OF 'PROPRIETORSHIP FIRMS'***

2.2 Proprietorship firms are businesses that are owned, managed and controlled by one person. They are the most common form of businesses in India and are based in unlimited liability of the owner. Legally, a proprietorship is not a separate legal entity and is merely the name under which a proprietor carries on business. [Raghu Lakshminarayanan v. Fine Tubes (2007) 5 SCC 103.]

Due to this, proprietorships are usually not defined in statutes. Though some statutes define proprietorships, such definition is limited to the context of the statute. For example, Section 2(haa) of the Chartered Accountants Act, 1949 defined a 'sole proprietorship' as "an individual who engages himself in practice of accountancy or engages in services…". Notably, 'proprietorship firms' have also not been statutorily defined in many other jurisdictions."

*[**Source**: Report of the Insolvency Law Committee, Page No. 117-118, Government of India (Ministry of Corporate Affairs, February, 2020).]*

19. The Court further delved into the rights and obligations which would arise for the proprietorship in the event of demise of the sole-proprietor. The Apex Court held as follows"

"**36.** *But in the case of sole proprietorship, which is a common form of business in India, when a legal obligation arises under a contract which has to be discharged personally by the sole proprietor, who is since deceased, had entered into the agreement, such as, in the case of a Development Agreement in the instant case, can such obligations be imposed on his legal representatives or heirs who are not parties to the Development Agreement and where the obligations under such an agreement per se cannot be fulfilled inasmuch as they neither have the skills nor the expertise to do so and those obligations depend purely* *on the skills and expertise of the deceased sole proprietor?* ***In other words, where the decree or order is not against the estate of a deceased sole proprietor but based on the skills and expertise of the sole proprietor, we are of the view that in the latter case, the obligations which had to be performed by the sole proprietor would come to an end on his demise and the same cannot be imposed on his legal heirs or representatives.*** *We reiterate that such a position is distinguished from a position where the estate of the deceased sole proprietor would become liable to satisfy the decree in monetary terms. This is because a proprietorship firm is not a separate legal entity as compared to the proprietor and his estate would become liable only to satisfy a decree or an order in monetary terms on his demise.*"

(*emphasis supplied*)

From the aforementioned discussion, it is evident that any obligation which is to be performed by a proprietorship concern based on the experience of the sole-proprietor comes to an end upon the demise of the sole proprietor, and the same cannot be imposed on his legal heirs and representatives.

20. It is a well settled law that a Proprietorship, unlike a partnership, does not have perpetual succession. In S.A. Enterprise v. General Manager, **2017 SCC OnLine Cal 16988**, the following was held by the Calcutta High Court:

"**3.** *It appears that the M/s. S.A. Enterprise was a sole proprietorship firm of the deceased mother of the petitioner. The mother had died on September 3, 2017. With her death therefore, the sole proprietorship business of such person came to an end. Such person* *had participated in the tender process of the railways on the basis of the General Conditions of contract of 2014 particularly paragraph 9 of Annexure "P-1" thereof which provides, inter alia, that if a tenderer expires after submission of the tender or after acceptances thereof, the railway shall deem such tender as "cancelled". Such clause has been invoked for the purpose of considering tender obtained by M/s. S.A. Enterprise as "cancelled".*

***4.** A sole proprietorship does not have perpetual succession. The petitioner cannot claim to be the sole proprietorship firm upon the death of the mother.*

21. This court in <u>Sushila v. Delhi International Airport (P) Ltd</u>., **2022 SCC OnLine Del 3188** further held that there is no difference between a proprietor of a sole-proprietorship and the proprietorship itself. The relevant excerpt is as follows:

*"**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. v. 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. In Ashok Transport Agency v. Awadhesh [(1998) 5 SCC 567], this Court has clearly held that a sole proprietary concern is equated with the proprietor of the business as

follows:

> *"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.* ***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****. 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 of the proprietary business"*
>
> (*emphasis supplied*)

22. It is clear from the above mentioned discussion that a proprietorship concern is not a separate legal entity and differs vastly from other legal entities such as a partnership or a company. A proprietorship concern is undoubtedly intertwined with the identity of a sole-proprietor himself, and a proprietorship concern is only the business name in which the proprietor of the business carries on the business. It is well settled that the Assets and Liabilities of a proprietorship concern are transferable, and the same has been done in this case after the demise of the erstwhile proprietor. However, taking note of the above mentioned discussion, this court does not agree with the contention of the Ld. Counsel for the Petitioners that experience which has been garnered by a sole-proprietor of a firm is also transferable to a new proprietor of the firm.

23. In the present case, the Petitioner was registered as a Proprietorship

having a sole-proprietor for the purpose of carrying out the business of organizing Haj tours. The sole proprietor ran the business as a sole-proprietorship for more than a decade and undertook 8 Haj Operations. The sole proprietor passed away in the year 2021 during the advent of the Covid-19 Pandemic and the son of the deceased proprietor took over the business of his father as a new sole-proprietor of the firm. The material on record discloses that after the induction of a new sole-proprietor to the Petitioner firm, no Haj tours or Umrah tours were undertaken by the Petitioner under the new sole-proprietor. It has been stated by the Ld. Counsel for the Petitioner that the current proprietor had previously accompanied the erstwhile proprietor on Haj Tours for a few years, but no Munazzam Card has been provided by the Petitioner which confirms that he had travelled to the KSA for purposes of facilitating a Haj Tour with the erstwhile proprietor.

24. In the view of the above mentioned discussion and the decision of the Apex Court and various High Courts, this court agrees with the contention put forth by the Ld. Counsel for the Respondents that the previous experience garnered by the Petitioner firm of undertaking 8 Haj's under the erstwhile sole-proprietor cannot be appreciated while deciding its eligibility to be registered as an HGO under a new sole-proprietor.

25. Consequently, in the opinion of this court, there is no reason for interfering with the Impugned Order declaring the Petitioner firm as ineligible on the account of not meeting the requisite condition regarding previous experience garnered by the firm.

26. It is made clear that even though the experience garnered under the erstwhile sole-proprietor cannot be taken into account while deciding the

eligibility of the Petitioner firm under the HGO Policy of 2019-2023 and subsequent policies issued by the Respondents, the Petitioner has the right to undertake the necessary number of Umrah operation to be considered for registration as an eligible HGO for subsequent Haj's.

27. In light of the aforesaid, the present writ petition is disposed of, along with pending application(s), if any.

CM APPL. 1103/2024

1. The present application is for a direction to entertain the Petitioner's application for being registered as a Haj Group Operators for Haj-2024.

2. It is stated in the application that the Petitioner has deposited a sum of Rs.20 lakhs while making application for Haj-2023, which the Petitioner has prayed should be carried over for the application made for the year 2024.

3. In view of the fact that the writ petition stands dismissed, the Petitioner is entitled to claim for the refund of the sum of Rs.20 lakhs.

4. The Petitioner is at liberty to file an appropriate application for refund of the amount of Rs. 20 lakhs and the Respondents are directed to consider the same and dispose it of within a period of two weeks. If the Petitioner is entitled to the said amount then the Respondents are directed to refund the said amount within two weeks from the date of the decision.

5. The application is disposed of.

SUBRAMONIUM PRASAD, J

APRIL 10, 2024
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