

A AMWAY INDIA ENTERPRISES PVT. LTD.

v.

RAVINDRANATH RAO SINDHIA & ANR.

(Civil Appeal No. 810 of 2021)

B MARCH 04, 2021

**[R. F. NARIMAN AND B. R. GAVAI, JJ.]**

- Arbitration and Conciliation Act, 1996 – s.11(6) – Appointment of a sole arbitrator – The respondents were appointed as the distributors for the appellant – Contract for distributorship was executed between the parties – Dispute arose between the parties – Respondents filed petition u/s. 11(6) of the 1996 Act before the High Court - The High Court appointed a sole arbitrator – Before the Supreme Court, it was contended that respondents are husband and wife who are both nationals of and habitually resident in United States of America – It was further contended that once it is found that a party to an agreement is an individual who is a national of, or habitually resident in, any country other than India, then the case is governed by s.2(1)(f)(i) and the High Court has no jurisdiction – Held: The respondents had become distributors of the appellant in India as a sole proprietorship concern under the relevant forms issued by the appellant – An analysis of s.2(1)(f) would show that whatever be the transaction between the parties, if it happens to be entered into between persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by the Government of a foreign country, the arbitration becomes an international commercial arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country referred to in s.2(1)(f) carry on business in India through a business office in India – Therefore, the High Court had no jurisdiction to appoint an arbitrator – Now, the respondents would have to follow the drill of s.11(6) r/w. s.11(9) of the Act.*

**Allowing the appeal, the Court**

- HELD:** 1. A reading of the application form as filled in, together with the Code of Ethics, would show that a distributorship may be taken up either in individual capacity, a sole proprietorship

concern, partnership firm, or company. When it comes to a husband and wife's distributorship, they are entitled not to two, but to a single distributorship, it being made clear under clause 3.17 of the Code of Ethics that they are to operate only as a single entity. The form that was filled in made it clear that the respondents applied to become a distributor as a sole proprietorship, it being made clear that the husband was the sole proprietor/ "primary applicant", the wife being a "co-applicant". [Para 11][62-D-E]

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2. 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. [Para 15][65-E-F]

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3. The argument that there is no international flavour to the transaction between the parties has no legs to stand on. Indeed, an analysis of Section 2(1)(f) would show that whatever be the transaction between the parties, if it happens to be entered into between persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by a body corporate which is incorporated in any country other than India; or by the Government of a foreign country, the arbitration becomes an international commercial arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country referred to in Section 2(1)(f) carry on business in India through a business office in India. This being the case, it is clear that the Delhi High Court had no jurisdiction to appoint an arbitrator in the facts of this case. [Para 16][66-F-H]

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*Ashok Transport Agency v. Awadhesh Kumar, (1998) 5 SCC 567 – relied on.*

*Larsen & Toubro Ltd. – SCOMI Engineering Bhd v. MMRDA, (2019) 2 SCC 271 : [2018] 14 SCR 22 – distinguished.*

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*TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd., (2008) 14 SCC 271 : [2008] 8 SCR 775 – referred to.*

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- A                    **Case Law Reference**
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|------------------|---------------|-------------|
| [2008] 8 SCR 775 | referred to   | para 3      |
| [2018] 14 SCR 22 | distinguished | paras 3, 13 |
| (1998) 5 SCC 567 | relied on     | para 15     |
- B                    CIVIL APPELLATE JURISDICTION : Civil Appeal No. 810 of 2021.  
From the Judgment and Order dated 03.12.2020 of the High Court of Delhi at New Delhi in ARB.P. 448 of 2020.
- C                    Parag Tripathi, Sr. Adv., Ms. Priya Kumar, Shailabh Tiwari, C. D. Mulherkar, Ms. Mishika Bajpai, Chanakya Dwivedi, Ms. Mohna, Advs. for the Appellant.  
Ms. Manmeet Arora, Ms. Samapika Biswal, Rajat Mittal, Advs. for the Respondents.
- D                    The Judgment of the Court was delivered by  
**R. F. NARIMAN, J.**
1. Leave granted.
  2. This appeal arises out of a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 [“**Arbitration Act**”] by the respondents in the Delhi High Court for appointment of a sole arbitrator. The brief facts of the case are noted in the impugned order dated 03.12.2020 thus:
- F                    “2. The facts of the case, as noted from the petition are, in the year 1998, the petitioners were appointed as Distributor for respondent for undertaking sale, distribution and marketing of its products in India and were registered as Amway Business Owner (ABO)/ Amway Direct Seller (ADS), in the name of the sole proprietorship ‘Sindhia Enterprises’ with ABO No. 141935. According to the petitioners, they have set up a vast Line of Sponsorship in the respondent Company, and nurtured and supported close to 1500 ADSs, who have now set up their own networks, and are in the category of Silver/ Gold/ Platinum/ Sapphire/ Emerald. From 2015, the renewal process for existing ADSs became automatic, each year, without payment of any fee.
- G                    The respondent issued a Code of Ethics and Rules of Conduct in
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2015 to govern the terms of the relationship between the respondent and the ADSs. The respondent also started promoting registration of Preferred Customers (PCs) directly through the respondent's website, as customers of the concerned ADS.

3. On the requirement of the respondent, necessary documents were executed by the petitioners including contract for distributorship, setting out the terms and conditions of the distributorship, and to inter alia confirm the Code of Ethics and Rules of Conduct, Legal Entity Authorisation Form (LEAF) etc. Since then, the contract of the petitioners has been renewed from time to time. The petitioners recorded client volume/sales from their ABO account. The petitioners have also received income on the sales generated by them for the months of January to March, 2019 by the respondent. However, in April, 2019, upon logging into the respondent's website, the petitioners noted that they could not access their ABO account, or view their LoS. They could only access their account as a PC. Accordingly, between April, 2019 and December, 2019, the petitioners raised a query with their Major Accounts Manager, who informed them that their account had been reclassified as a 'PC' account, since they have not complied with the criteria of a corded re-sale related purchase in the last 12 months. The petitioners learnt that this was a criteria in the fresh set of Terms and Conditions issued by the respondent in December, 2016, which was mandatorily required to be accepted by all ADSs, by clicking on the 'By clicking here you agree to abide by the new Terms & Conditions' button, immediately upon logging in on the respondent's website, to proceed further to their account. According to the petitioner, this requirement was never communicated to the petitioners in the past, nor was any notice of termination issued by the respondent. This criterion is also in violation of the Direct Selling Guidelines dated September 09, 2016.

4. The petitioners made repeated requests to restore their ABO account. The petitioners attempted to resolve the aforesaid disputes and differences amicably by mutual discussions with the representatives of the respondent from April till December, 2019. However, the respondent has failed to consider the petitioners' request for restoration of their ADS account. On June 26, 2020,

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- A the petitioners referred the matter for redressal and review to Mr. Jon Sherk, Vice President and Deputy General Counsel of Amway Global in January, 2020. The petitioners were communicated about the rejection of their request for restoration of their ADS account on June 26, 2020. According to the petitioners,
- B the respondent has now, with effect from July, 2020 notified a new Code of Ethics & Rules of Conduct wherein the respondent has now been given benefit of a 2 year period for establishing sales, in accordance with the DSG, and carved a provision for restoration of the ADS account. Accordingly, the petitioners caused issuance of notice invoking arbitration dated July 28, 2020 to the
- C respondent invoking the arbitration clause, Clause 12 of the Terms and Conditions enclosed with the Amway Direct Seller Application Form (Form-SA-88-ID), which is reproduced as under:

- "12. Dispute Settlement. The parties shall endeavour to settle any dispute or difference arising out of or in connection with the Direct Seller Contract through mutual discussions within 30 days of such dispute arising. The Direct Seller agrees that in the event it is not satisfied by any decision of Amway, or in the event that any issue raised by the Direct Seller has remained unresolved for a period of more than two months, and / or during the subsistence of this agreement or upon or after its termination, any issue or dispute that the Direct Seller may have regarding the interpretation or operation of the clauses of this arrangement or any issues arising there from shall be referred to Grievance Redressal Committee set up by the company. Any dispute, difference or claim remaining unresolved post reference to the Grievance Redressal committee discussions shall be submitted to binding arbitration under the provisions of the Indian Arbitration and Conciliation Act, 1996. The venue of such arbitration shall be at New Delhi and the award of the Arbitrator shall be final and binding on all Parties. Subject to the above, courts at New Delhi shall alone have jurisdiction in relation to the Direct Seller Contract and matters connected here to."*
- H 5. The respondent replied vide letter dated August 20, 2020 wherein the respondent communicated that the name of the Arbitrator as

recommended by the petitioners was not acceptable by it and sought time to respond with the name of another Arbitrator. However, the respondent has till the filing of the petition failed to issue any follow up reply further to its reply dated August 20, 2020 even after expiry of 30 days' time.”

3. The main plea taken by the learned counsel appearing on behalf of the appellant, Amway India Enterprises Pvt. Ltd., in the Delhi High Court was that a petition before the High Court is not maintainable as the dispute relates to an international commercial arbitration, being covered by Section 2(1)(f)(i) of the Arbitration Act inasmuch as the respondents are husband and wife who are both nationals of and habitually resident in the United States of America. This plea was turned down by the impugned judgment stating:

“**23.** Even the judgment of the Supreme Court in the case of **TDM Infrastructure (P) Ltd. v. UE Development India (P) Ltd., (2008) 14 SCC 271** is not applicable in the facts of this case, which have been noted above. Rather, the learned counsel for the petitioners is justified in relying upon the judgment in the case of **Larsen & Toubro Ltd. – SCOMI Engineering Bhd v. MMRDA, (2019) 2 SCC 271**, wherein the Supreme Court was concerned with a consortium consisting of an Indian company and a foreign company and the Court took note of the fact that the office of an unincorporated entity, i.e. the consortium, being in Mumbai, as one of the factors for arriving at the conclusion that the arbitration proceedings would not be *international commercial arbitration*. No doubt a sole proprietorship has no separate legal identity but in the case in hand, two individuals, husband and wife, by joining together as a proprietorship have taken a single Distributorship. The Code of Ethics and Rules of Conduct issued by the respondent under Clause 3.17.1 contemplates and recognises that a husband and wife shall operate their Distributorship as single entity. The proprietorship is an association or body of individuals with central management in India.

**24.** The plea of Ms. Kumar that the petitioners being individuals and habitual residents of USA, the case shall be covered by Section 2 (1) (f) (i) of the Act of 1996 is not appealing in view of my conclusion in the above paragraph.”

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- A        4. It was held that since the central management and control of this association or body of individuals is exercised only in India under Section 2(1)(f)(iii), the dispute is not an international commercial arbitration, as a result of which the High Court has jurisdiction under Section 11(6) to appoint an arbitrator. Justice Brijesh Sethi, a retired Judge of the Delhi High Court was, therefore, appointed as sole arbitrator.
- B        5. Shri Parag Tripathi, learned Senior Advocate appearing on behalf of the appellant, has argued that his predecessor's plea in the High Court was incorrectly turned down in that this case is really governed by Section 2(1)(f)(i) and not by Section 2(1)(f)(iii). Once it is found that a party to an arbitration agreement is an individual who is a national of, or habitually resident in, any country other than India, it is not necessary to go to any other sub-clauses of Section 2(1)(f), and as it is clear that the respondents, who applied to the High Court under Section 11(6), are individuals who are nationals of and habitually resident in the USA, would fall under Section 2(1)(f)(i), the High Court would have no jurisdiction, such petition having to be filed only under Section 11(6) read with Section 11(9) to the Supreme Court.
- C        6. Ms. Manmeet Arora, learned counsel appearing on behalf of the respondents, has supported the judgment under appeal, and has referred to various documents which, according to her, make it clear that the respondents, husband and wife, would have to be pigeonholed under "association or body of individuals" under Section 2(1)(f)(iii) and not under Section 2(1)(f)(i).
- E        7. The question lies in a very narrow compass. As rightly contended by Ms. Arora, the documentary evidence in this case would be decisive of whether the requirements of sub-clause (i) to Section 2(1)(f) have been met, in which case it is unnecessary to go to sub-clause (iii), as under Section 2(1)(f), "at least one of the parties" must fall under sub-clauses (i) to (iv) of Section 2(1)(f).
- F        8. In a document entitled "Code of Ethics of Amway Direct Sellers", under "Rules of Conduct", it is stipulated as follows:
- G        **"2.1.17 Legal Entity Authorisation Form"** (LEAF) means the document that must, in addition to the Direct Seller Contract, be completed by a Direct Seller required to or electing to operate an Amway Business in the name of an applicable legal entity."
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**“3.1 Application and Starter Guide:** In order to be considered for an Amway distributorship, an individual(s) must, in his/her/ their own name(s) or on behalf of a legal entity, submit a signed, completed Direct Seller Application(in Form SA-88-ID), together with all required supporting documentation.

A distributorship may be taken up in individual capacity or as a sole proprietorship concern, partnership firm or company. Amway reserves the right to require that Applicants having Non-Resident Indian (NRI), Person of Indian Origin (PIO) or Overseas Citizen of India (OCI) status operate distributorships via certain types of legal entities.”

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**“3.14 Legal Entity Distributorships:** A Direct Seller may own and operate his or her Distributorship as a sole proprietary concern or registered partnership firm or limited liability company (LLC), provided it complies with certain requirements and conditions. …”

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**“3.14.5** The sole business of the legal entity must be the operation of an Amway Distributorship. No other business may be conducted by such an entity.”

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**“3.17 Husband and Wife Distributorships:** If both husband and wife wish to become Direct Sellers, they must be sponsored together for a single Distributorship. Husbands and wives may not be sponsored in different Lines of Sponsorship. Husbands and wives may not sponsor each other. If one spouse is already a Direct Seller, the other spouse, upon electing to become a Direct Seller, must join the same Distributorship as his or her spouse.

**3.17.1** A husband and wife shall operate their Distributorship as a single entity. Therefore, each is held accountable for the actions of the other so far as the Rules of Conduct are concerned regardless of whether a husband or wife is active in the distributorship or not.”

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- A      “**4.13 Franchises and Territories:** No Direct Seller shall represent to anyone that there are exclusive franchises or territories available under the Amway Sales and Marketing Plan.
- B      No Direct Seller shall represent that he or she, or anyone else has the authority to grant, sell, assign, or transfer such franchises or to assign or designate territories. No Direct Seller or Sponsor may state or imply that he or she has a given territory, nor that any other Direct Seller is operating outside his territory.
- C      Amway Direct Sellers have no territorial limits. They can operate anywhere within India.”
- D      “**4.16 Exporting Amway Products:** Amway Direct Sellers must sell Amway products and/or sponsor prospective Amway Direct Sellers within India only. No Direct Seller may export, or knowingly sell to others who exports, Amway Products from India, or from any other country in which Amway has established operations, into any country regardless of whether or not Amway is doing business in that country.
- E      For important legal reasons, including tradenames and trademark protections; local product registration, packaging, labelling, ingredient content and formulation, product liability; customs and tax laws; and literature content or language requirements. Amway must limit the resale of Amway Products by Direct Sellers to only other Direct Sellers or retail customers located within the country in which the Direct Seller legitimately buys the Amway Products and is authorised to do business. The term “products” includes, without limitation, all literature, sales aids, and any other items obtained by a Direct Seller from Amway or from his sponsor or Platinum.
- F      **4.16.1 Exporting Rule: Personal Use**
- G      Globally, Amway’s Rules and Commercial Principles include prohibitions on exporting and importing Amway products from one market to another. Amway Direct Sellers may, however, take Amway products across borders for personal use, with the following limitations:
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- The Amway Direct Seller is visiting another country and personally places the product order in that country. A
- The Amway Direct Seller physically picks up/receives the products in one country and personally carries the products to another country. There may be no couriers, shipping companies, or freight forwarders involved. B
- If the Amway Direct Seller has a Multiple Business in the country visited, the order cannot be placed as a customer order for an overseas customer. C
- The products are for the Amway Direct Seller's personal use only.
- The products may not be resold, distributed, or given away under any circumstances.
- The products ordered must not be available in the Amway Direct Seller's home market. D
- Durables (e.g. water treatment systems, air treatment systems) may not be carried from one market to another under any circumstances.
- The Amway Direct Seller order must not be for more than a reasonable amount of product: under 300 USD annually. E
- The personal use exclusion may not be used as a business-building strategy." F

9. In what is referred to as the "Legal Entity Authorisation Form", what was filled up was "Legal Entity Authorisation Form: Sole Proprietor". The said form which was filled in by the respondents reads as follows:

**"LEGAL ENTITY AUTHORISATION FORM:  
SOLE PROPRIETORSHIP**

Where an Amway Independent Business ("Amway Business") will be operated in India via a Sole Proprietorship (the "Entity") held by a Resident Indian, Non-Resident Indian ("NRI"), Person of Indian Origin ("PIO") or Overseas Citizen of India ("OCI"), the Sole Proprietorship must, through the sole proprietor (the "Sole Proprietor"), complete this Legal Entity Authorisation Form for G H

- A Amway Business Owners (the “Entity Agreement”) and submit it to Amway India Enterprises Pvt. Ltd. (“AIE”). The Sole Proprietor must agree to remain and ensure that the Entity remains in full compliance with the Rules of Conduct for Amway Business Owners. This Entity Agreement shall become effective if and when AIE signs the completed form. This Entity Agreement is incorporated into and forms an integral part of the Amway Distributor Agreement, which includes any and all documents incorporated therein (the “ABO Contract”). In the event of any conflict, the terms and conditions of this Entity Agreement shall prevail.
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In consideration for AIE's agreement to allow the undersigned Entity to operate the Amway Business identified by ADA No. [REDACTED], the undersigned agree as follows.

1. The Sole Proprietor and, if applicable, the Authorized Representative of the Entity is/are:

Name: RAVINDRANATH RAO SINDHIA

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Address: 443 4<sup>th</sup> MAIN, 12<sup>th</sup> CROSS  
W-C-R. II STAGE, BANGALORE  
560086

Phone Number: [REDACTED]

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Identification Document & Number: [REDACTED]

Name: INDUMATHI SINDHIA  
Address: 443 4<sup>th</sup> MAIN, 12<sup>th</sup> CROSS  
W-C-R. II STAGE, BANGALORE

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Phone Number: [REDACTED]  
Identification Document & Number: [REDACTED]

2. It is hereby certified that the following information about the Entity is true and complete.

- A. Full name of Entity:

SINDHIA ENTERPRISES

- B. Date when the Entity was organized: 31-JULY-1998

- C. Principal office address of the Entity:

443, 4<sup>th</sup> MAIN, 12<sup>th</sup> CROSS

W-C-R. II STAGE, RAJAJINAGAR

BANGALORE 560086, KARNATAKA

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“5. The Sole Proprietor agrees that :

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A. The sole purpose of the Entity is to own and operate the Amway Business identified above, unless AIE expressly allows the Entity to own and operate more than one Amway business. Neither the Entity nor the Sole Proprietor will own or operate any other business or business interest.

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C. Any NRI, PIO or OCI investment in the Entity, if and as applicable, has been made on a non-repatriatable basis in accordance with applicable foreign exchange laws of India.

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D. G. The Entity shall, in accordance with the laws of India and for all matters connected to the Amway Business, exclusively use a duly authorised Indian rupee bank account which, if applicable, operates on a non-repatriatable basis.

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E. H. The Sole Proprietor shall be responsible for his or her, and the Entity's, compliance with the Amway Rules of Conduct and the applicable laws with respect to the operation of the Amway Business by the Entity, including foreign exchange laws. Any violation of the aforesaid entitles AIE to terminate the ABO Contract and the Entity Agreement.

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G. 10. Under “authorised signature”, the entity's name was filled in as Sindhia Enterprises and the proprietor was filled in as Ravindranath Rao Sindhia (respondent no. 1 herein). This was done pursuant to an application again filed in a printed form, given by the appellant to the respondents, which reads as follows:

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**Amway India Enterprises Pvt. Ltd.,**  
First Floor, Elegance Tower, Plot No. II, Non Hierarchical  
Commercial Centre, Jasola, New Delhi - 110 025  
Contact No.: 080-5941-6600  
Website: [www.amway.in](http://www.amway.in)

**DISTRIBUTOR APPLICATION** Please fill in English. Applicants should be 18 years of age and above. All sections in red colour are mandatory. The application form shall not be accepted without complete information & documents.

**APPLICANT INFORMATION** (Mandatory Information) How would you be operating your Amway Distributorship?

Individual  Sole Proprietorship  Partnership Firm  Private Limited Company Please tick (-) your category. (max 250 characters)

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**SINDHIA ENTERPRISES**  
Please give the entity name desired entry for Amway Business. (Max 25 characters)

Name of the Primary Applicant / First Authorized Representative (In case of entity)  
**RAVINDRANATH RAO SINDHIA**

Name of the Co-applicant / Second Authorized Representative (In case of entity)  
**INDUMATHI SINDHIA**

Date of Birth of Primary Applicant Date of Birth of Co-applicant

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Name of the Primary Applicant as desired on ID card (Max 25 characters including space) Name of the Co-applicant as desired on ID card (Max 25 characters including space)

**RAVINDRANATH SINDHIA** **INDUMATHI SINDHIA**

Do you, the principal applicant, have your primary Amway business in another country, if (yes) please fill the following information.

Distributor Name Distributor Number Country

**RAVINDRANATH SINDHIA** **721523** **VISA**

11. A reading of the application form as filled in, together with the Code of Ethics, would show that a distributorship may be taken up either
- D in individual capacity, a sole proprietorship concern, partnership firm, or company. When it comes to a husband and wife's distributorship, they are entitled not to two, but to a single distributorship, it being made clear under clause 3.17 of the Code of Ethics that they are to operate only as a single entity. The form that was filled in made it clear that the
- E respondents applied to become a distributor as a sole proprietorship, it being made clear that the husband, Ravindranath Rao Sindhi, was the sole proprietor / "primary applicant", the wife, Indumathi Sindhi, being a "co-applicant".

12. However, Ms. Arora argued, from a reading of the Code of Ethics and correspondence between the parties, that there was no international flavour whatsoever to the transaction as the business that is to be conducted can be conducted only in India, an exception being made only for personal use under clause 4.16.1. Most importantly, the address of the so-called sole proprietorship in all the correspondence between the parties was the address of the Bangalore office of the sole
- G proprietorship.

13. Ms. Arora also strongly relied upon the judgment of this Court in **Larsen & Toubro Ltd.-SCOMI Engineering Bhd v. MMRDA**, (2019) 2 SCC 271. This Court was concerned with an agreement between the MMRDA, an Indian company, and a consortium of Larsen H and Toubro, an Indian company together with Scomi Engineering Bhd, a

Malaysian company. The argument that was pressed in the appeal before this Court was that since a Malaysian company was involved, it would be a body corporate which is incorporated in a country other than India, which would attract the provisions of Section 2(1)(f)(ii) of the Arbitration Act. This Court repelled the aforesaid argument, stating:

“**9.** Under the general conditions of contract, the “contractor”, in Clause 1.1.2.3 is defined as meaning an individual, firm, company, corporation, joint venture or *Consortium, whether incorporated or not*. “Bidder” is also defined under Clause 1.1.2.10 as meaning an individual, firm, company, corporation, joint venture or *Consortium* which could submit a bid. What is important to notice is that the contract was signed by the employer viz. MMRDA and by the contractor under the head sub-clauses (A) and (B) in which L&T India signed as ‘A’ and Scomi Engineering Bhd has signed as ‘B’. When we come to the consortium agreement that is entered into between the Indian company and the Malaysian company as aforesaid, we find in the definition clause that “Consortium” shall mean L&T and Scomi Engineering Bhd, acting in collaboration, for the purpose of this agreement and shall be called “the L&T-SEB” Consortium “unincorporated”. The contract is defined in Sub-Clause 6 as meaning, “the contract to be entered by the Consortium with the employer for the execution of the Project”. Under Sub-Clause 7, “the lead Member of the Consortium” or “Consortium Leader” shall mean L&T, that is, the Indian Company. Under Sub-Clause 8, the “Supervisory Board” (hereinafter referred to as “the SB”) shall mean a Board constituted under Clause 11 of the GCC. When we come to Clause 11.2, it is clear that the Members of this Supervisory Board will consist of four members, two appointed by each Member. One of the Members nominated by the Consortium leader and agreed to by all members shall then act as the Chairman of the Supervisory Board, which is, by Clause 11.5, to decide on various matters relating to the execution of the contract. Clause 21.1(g) provides that the Consortium leader shall lead all arbitration proceedings.

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**11.** It is important, at this juncture, to refer to an order made by the High Court of Bombay dated 20-10-2016 [*L&T Ltd. v. MMRDA*, 2016 SCC OnLine Bom 13348] which, as has

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- A      been stated earlier, arises between the self-same parties, under the same contract. An interim award made by the arbitrators qua different claims arising under the same contract had made it clear that the claim could be filed only in the name of the Consortium and not separately, as was contended by Shri Jain's client. The preliminary issue framed on this count was "whether the claimants are entitled to file this claim as Claimant 1 and Claimant 2 or only as the Consortium of L&T and Scomi Engineering Bhd?" The High Court of Bombay agreed with the interim award of the arbitrators, and held as follows: (*L&T Ltd. case [L&T Ltd. v. MMRDA, 2016 SCC OnLine Bom 13348]*, SCC OnLine Bom para 10)
- B      "10. Considering the terms and conditions of the contract as well as the decision cited by Mr. Ankhad, in my opinion, in the facts and circumstances of the present case, it is not open for the petitioners to rely upon their independent identities while dealing with the respondent and that they will have to deal with the respondent as a Consortium only. Therefore, there is no infirmity in the impugned order. For the same reason the present petition as filed would also not be maintainable. Hence, the same is dismissed."
- C      **12.** Shri Gopal Jain did not dispute the fact that this judgment was final inter-partes as no appeal has been preferred. Therefore, to stress the fact that it pertains only to "this claim" and would therefore, not apply to a different set of claims under the arbitration clause is not an argument that appeals to us.
- D      **13.** It is clear, as has been held by the judgment [*L&T Ltd v. MMRDA, 2016 SCC OnLine Bom 13348*] of the High Court of Bombay, and which is binding inter-partes, that it is not open for the petitioner to rely upon their status as independent entities *while dealing with the respondent* and they will have to deal with the respondent as a Consortium only.
- E      **14.** This being the case, it is clear that the unincorporated "association" referred to in Section 2(1)(f)(iii) would be attracted on the facts of this case and not Section 2(1)(f)(ii) as the Malaysian body cannot be referred to as an independent entity following the
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judgment [*L&T Ltd. v. MMRDA*, 2016 SCC OnLine Bom 13348] A  
of the High Court of Bombay.

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**18.** This being the case, coupled with the fact, as correctly argued by Shri Divan, that the Indian company is the lead partner, and that the Supervisory Board constituted under the consortium agreement makes it clear that the lead partner really has the determining voice in that it appoints the Chairman of the said Board (undoubtedly, with the consent of other members); and the fact that the Consortium's office is in Wadala, Mumbai as also that the lead member shall lead the arbitration proceedings, would all point to the fact that the central management and control of this Consortium appears to be exercised in India and not in any foreign nation.”

14. This case is distinguishable on facts, inasmuch as a final judgment between the parties made it clear that it would not be open for the consortium to rely upon their status as independent entities while dealing with MMRDA. This being the case, the consortium was held to be an association of persons falling under Section 2(1)(f)(iii), and that since the lead member is to lead arbitral proceedings, the central management and control of the consortium being exercised by Larsen and Toubro in India, it was held that Section 2(1)(f)(iii) would not be attracted on the facts of that case.

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 Kumar**, (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 XXX 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

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- A 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. The provisions of Rule 10 of Order XXX which make applicable the provisions of Order XXX 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 XXX have no application to such a suit as by virtue of Order XXX Rule 10 the other provisions of Order XXX 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 XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case.
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- E 7. In the present case A.C. Basu, Proprietor of Ashok Transport Agency, had died before the date of the institution of the suit and on the date of the institution of the suit, the proprietary concern was not in existence. Only the legal representatives of A.C. Basu could be sued with regard to any cause of action arising against A.C. Basu in connection with the proprietary business. We find it difficult to understand how the provisions of Rule 4 Order XXX CPC, could be extended to such a case."
- F 16. In this view of the matter, the argument that there is no international flavour to the transaction between the parties has no legs to stand on. Indeed, an analysis of Section 2(1)(f) would show that whatever be the transaction between the parties, if it happens to be entered into between persons, at least one of whom is either a foreign national, or habitually resident in, any country other than India; or by a body corporate which is incorporated in any country other than India; or
- G by the Government of a foreign country, the arbitration becomes an international commercial arbitration notwithstanding the fact that the individual, body corporate, or government of a foreign country referred to in Section 2(1)(f) carry on business in India through a business office in India. This being the case, it is clear that the Delhi High Court had no jurisdiction to appoint an arbitrator in the facts of this case.
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17. Ms. Arora made an impassioned plea to this Court to use its power under Article 142 of the Constitution to straightaway appoint an arbitrator, now that the matter is before this Court. We are afraid we cannot countenance such a suggestion as the respondents would have to now follow the drill of Section 11(6) read with Section 11(9) of the Arbitration Act.

18. The appeal is allowed, and the judgment under appeal is set aside.

Ankit Gyan

Appeal allowed.