

Ravindranath Rao Sindhia &Anr. Vs Amway India Enterprises Private Limited

Court: Delhi High Court

Date of Decision: Dec. 3, 2020

Acts Referred: Arbitration And Conciliation Act, 1996 " Section 2(1)(f), 2(1)(f)(i), 2(1)(f)(iii), 11, 11(4)(b), 11(6)

Hon'ble Judges: V. Kameswar Rao, J

Bench: Single Bench

Advocate: Manmeet Arora, Sampika Biswal, Priya Kumar, Shailabh Tiwari

Final Decision: Disposed Of

Judgement

V. Kameswar Rao, J

1. This petition, has been filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 (Act of 1996), for

short)for the appointment of a Sole Arbitrator.

2. The facts of the case, as noted from the petitionare, in the year 1998, the petitioners were appointed as Distributor for respondent for undertaking

sale, distribution andmarketing of its products in Indiaand were registeredas Amway Business Owner (ABO)/ Amway DirectSeller (ADS), in the

name of the sole proprietorshipSindhia Enterpriseswith ABO No. 141935. According to the petitioners, they have set up a vastLine of

Sponsorship in the respondentCompany, and nurtured and supported close to 1500ADSs, who have now set up their own networks, andare in the

category of Silver/ Gold/ Platinum/ Sapphire/Emerald. From 2015, the renewal process for existing ADSs becameautomatic, each year, without

payment of any fee.The respondent issued a Code of Ethics and Rules ofConduct in 2015 to govern the terms of the relationship between the

respondent and the ADSs. The respondent also startedpromoting 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 andconditions of the distributorship, and to inter-aliaconfirmthe Code of Ethics and Rules of Conduct,Legal Entity Authorization 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 re-classified as a PC account, since they have not

complied with the criteria of a recorded 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, 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, 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 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 endeavor 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 therefrom 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 hereto.

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.

6. No reply has been filed by the respondent.

7. Ms. Priya Kumar, learned counsel appearing for the respondent states that no reply is required to be filed and she will orally argue the matter. She

has taken an objection on the maintainability of the petition before this Court since the proposed arbitration proceedings would qualify as an

international commercial arbitration as defined under Section 2(1)(f) of the Act of 1996. As per her, the power to appoint an arbitrator in an international

commercial arbitration lies with the Supreme Court, more specifically in terms of Section 11(4)(b) of the Act of 1996. In support of her submission,

she has drawn my attention to Section 2(1)(f) of the Act of 1996, which defines international commercial arbitration.

8. It is her submission that the petitioners are individuals and they were appointed as Distributor in 1998. They were registered as an ABO in the name

of sole proprietorship Sindhia Enterprises and are proprietors of an enterprise run in the name and style of Sindhia Enterprises, which

does not have its own identity in law. The PAN number on the Distributor Application Form is that of petitioner No.1. According to her, even the

Legal Entity Authorisation Form clearly shows that the sole proprietor and sole proprietorship are treated as one and it is the sole proprietor who is

responsible for compliances under the Amway Distributor Agreement.

9. In substance, it is her plea that the petitioners are individuals who are nationals of or at least habitual residents of USA, i.e. a country other than India.

In this regard, she has drawn my attention to various documents. That apart, they are also holders of Overseas Citizen of India (OCI) cards, for

short) card which has been tendered as an Identification Document. The OCI cards of both the petitioners state their nationality as USA. As per the

Bureau of Immigration, Ministry of Home Affairs, Government of India, OCI Scheme covers inter-alia person, who is a citizen of another country but

was a citizen of India at the time of or any time after, the commencement of the Constitution. This further shows that the petitioners are now not

only habitual residents of USA but are no longer Indian citizens. She also stated that the petitioner No.1 in a self-declaration form has declared his

residency status as non-resident. In an undated letter at page 66 of the document, the address of Sindhia Enterprises is stated to be in

the USA in addition to an address in Bangalore. Therefore, the petitioners before this Court are covered by the definition of international commercial

arbitration as defined in Section 2(1)(f)(i) being individuals who are nationals of or habitually resident in any country other than India. If an applicant

before a Court is habitually a resident outside India, which is established from pleadings, documents before the Court as also the address in the petition,

such a case would constitute an international commercial arbitration and a petition under section 11(6) will not be maintainable before this Court. To

buttress her submission, she has relied upon a Bombay High Court judgment in the case of Aslam Ismail Khan Deshmukh v. ASAP Fluids Pvt. Ltd.,

2019 SCC OnLine BOM 304.

10. Ms. Kumar, also states that the central management and control is being exercised in a country other than India as the petitioners are in control and

management of Sindhia Enterprises and both are residing in the USA. Thus, even under Section 2(1)(f)(iii) of the Act, the proposed arbitration

would be an international commercial arbitration. In this regard, she has relied upon a Supreme Court judgment in the case of TDM Infrastructure

Pvt. Ltd. v. UE Development India Pvt. Ltd., 2008 14 SCC 271.

11. That apart, it is her submission that if the arbitration is an international commercial arbitration, the seat or governing law is of no relevance and only

the nationality / residence of the parties is relevant. She stated the stand of the petitioner relating to the mailing address of the petitioners being in India

and communications having been addressed to such postal address, Sindhia Enterprises maintaining an account in Bangalore and primarily

operating in Bangalore are not relevant for the purposes of determining whether the arbitration is an international commercial arbitration. Even

international commercial arbitrations can have a seat in India and can relate to business conducted in India. The reliance placed by the petitioner on the

Business Starter Guide to contend that it is permissible for a Distributorship to be taken up as a sole proprietorship concern by NRIs or OCI status

persons is also of no assistance to the petitioner. In fact, it establishes that the sole proprietorship, *Āçâ, ÆœSindhia Enterprises*, has no independent

legal identity in the eyes of law rather is only a vehicle of business for the petitioners who have an OCI status. This is further established from the

covering letter of the document dated January 15, (Page 11 of the document) wherein the Identity cards issued to the petitioners show the individuals,

i.e. petitioner No. 1 and petitioner No. 2 as the Distributors.

12. She further states, the reference by the petitioner to Clause 3. 17 requiring husband and wife to hold a single Distributorship is also of no relevance

to the status of arbitration being an international commercial arbitration. On the contrary, she claims, the said clause lends support to her contention

that *Āçâ, ÆœSindhia Enterprises* is only a name and style of business and the status of petitioner Nos. 1 and 2 is covered by Section 2(1)(f)(i) of the Act

of 1996. She also states that the contention of the petitioner that the business of the Distributor is in India by relying on the Arbitration Clause, bank

account maintained at Bangalore and the mailing address at Bangalore is also of no relevance to the issue of international commercial arbitration, which

is to be tested against the anvil of the specific definition in the Act of 1996. According to her, none of the factors relied upon by the petitioners would

bestow the jurisdiction to this Court or grant the right to the petitioner to maintain this petition and as such seeks its dismissal.

13. On the other hand, Ms. Manmeet Arora, learned counsel for the petitioners would submit that the petitioners are proprietors of *Āçâ, ÆœSindhia*

Enterprises, which was appointed in 1998 as a Distributor for respondent for undertaking sale, distribution and marketing of its products in the

territory of India. The Distributorship was registered in the name of the concern *Āçâ, ÆœSindhia Enterprises* for carrying on business in India as per the

own Code of Ethics & Rules of Conduct of the respondent. The sole business of the concern was the operation of Amway Distributorship and no other

business was permitted to be conducted by the petitioners. According to her, the respondent also recognizes the petitioners, both husband and wife, as

a single Distributorship in the name of *Āçâ, ÆœSindhia Enterprises*, registered in India and having its place of business in Bangalore, India. In fact, having

an office in India and an Indian rupee denominated bank account was the express condition of the respondent, as is evident from the documents. The

payment of commission from the respondent to petitioners is to their HDFC bank account in Bangalore, which is clear from page 10, 57, 60-61, 65, 66,

67, 68 and 221 of the documents. She also heavily relied upon page 87 of the documents, which is a communication dated September 28, 2019 written

by the petitioner No.1 in the name of Sindhia Enterprises by way of meetings in India and sales made to customers in India has been explained.

14. According to her, the Act of 1996 does not define the term domestic arbitration, whereas the term international commercial

arbitration is defined under Section 2(1)(f) of the Act of 1996. By implication, if the arbitration is not covered by the definition under Section 2(1)

(f), then it is automatically a domestic arbitration wherein this Court would be the jurisdictional forum for exercising powers under Section 11 of

the Act of 1996. In substance, it is her plea that the respondent in fact permits Proprietorship with Indian citizens, NRI/PIO/OCI to be appointed as

Distributor. The business, which forms the substratum of the contract is also situated and based in India. Therefore, the petitioners cannot be said to be

covered by either of the categories mentioned under Section 2(1)(f).

15. Ms. Arora states, moreover the definition under Section 2(1)(f) is a restrictive and limited definition and not an inclusionary definition. The said

provision is applicable only where there is a foreign element involved in the agreement. It is therefore submitted by her that this Court may interpret the

same in a strict fashion and provide definite meaning to the phrases mentioned there under. It is submitted that further a decision as to whether a

particular entity/ person falls under categories mentioned under Section 2(1)(f), is to be decided on a totality of factors in the particular facts and not just

the presence or absence of one of the indicators.

16. According to her, the judgment relied upon by Ms. Kumar in the case of Aslam Ismail Khan Deshmukh (supra) is distinguishable on facts,

inasmuch as in that case, one party to the agreement was an individual, who was carrying out the services under the agreement in Dubai. Further, the

said individual received remuneration in USD in his bank account in Dubai. Therefore, there was a clear foreign element involved in the agreement in

the said case. Further, the respondent has failed to disclose that the said judgment has been impugned in a petition filed in the Supreme Court

wherein notice has been issued and the matter is pending for hearing.

17. Even the judgment in the case of TDM Infrastructure Pvt. Ltd. (supra), relied upon by Ms. Kumar is concerned, the test adopted by the Court

was holistic in nature relying upon all the factors prevailing in the particular contractual dispute so as to determine the nature of the arbitration. In

support of her submission, she has relied upon the following factors to contend that this petition is maintainable; (i) petitioners conduct the Amway

business via a concern registered in India with address in Bangalore; (ii) the scope of the agreement between the parties, for the distributorship, was in

respect of the territory of India; (iii) the entire factum of the dispute is entirely in India; (iv) the business dealings between the parties were in India (v)

the financial situs of the petitioner, i.e. the bank account through which the transactions of purchase, sale and commissions took place was in India. The

respondent being aware of the overwhelming domestic indicia in the present distributorship agreement designedly chose not to file a reply to the present

petition as the same would have evinced the obvious admissions on the part of the respondent. Ms. Arora has relied upon the judgment of the Supreme

Court in the case of Larsen and Toubro Limited v. Scomi Engineering BHD v. MMRDA, (2019) 2 SCC 271, wherein one of the parties was

a consortium of an Indian company and a Malaysian company. The Court took note of the fact that the office of the unincorporated entity, i.e.

the consortium was in Mumbai, as one of the factors for arriving at the conclusion that there was no international commercial arbitration. In the end,

she states that the present dispute being not an international commercial arbitration but a domestic arbitration, the present petition is maintainable in

this Court.

18. Having heard the learned counsel for the parties, the issue which arises for consideration is whether the present petition is not maintainable before

this Court being an international commercial arbitration, as contended by the learned counsel for the respondent. Suffice would it be to state that

Section 2(1)(f) of the Act of 1996 defines international commercial arbitration. The relevant provision is reproduced as under: -

“2(1)(f) - International Commercial Arbitration means an arbitration relating to disputes arising out of legal relationships whether

contractual or not, considered as commercial under the law in force in India and where at least one of the parties is

i. an individual who is a national of, or habitually resident in, any country other than India; or

ii. a body corporate which is incorporated in any country other than India; or

iii. an association or a body of individuals whose central management and control is exercised in any country other than India; or

iv. the Government of a foreign country.

19. Insofar as the facts are concerned, there is no dispute that the petitioners had applied by filling up the Distributor Application (at page 66 of the

document) giving the address details as that of Bangalore, in the name of Sindhia Enterprises. The details of the bank account are also of

HDFC bank situated in Bangalore. The PAN number has also been given of the first applicant. It may be pointed out here that under Code of Ethics

and Rules of Conduct issued by the respondent, Clause 3.1 stipulates that a Distributorship can be taken up in an individual capacity or as a sole

proprietorship concern and the applicant can be a Non-Resident Indian, Person of Indian origin or overseas citizen of India. Clause 3.17 also stipulates

that a husband and wife can operate distributorship as a single entity. It is an undisputed fact that the respondent had recognized *Āçâ,~ËœSindhia*

Enterprises *Āçâ,~â,,ç* as their Distributor, as is clear from the letter dated October 15, 1999 annexed at page 10 of the documents; naturally so, because the

Code of Ethics and Rules of Conduct, as noted above contemplates, a husband and wife together can operate a single Distributorship and a

proprietorship can also be a Distributor. It is also a conceded fact that all the remittance pursuant to the distributorship was being credited in the

HDFC account maintained in Bangalore.

20. The plea of Ms. Priya Kumar that the petition is not maintainable being an international commercial arbitration is only on the basis of the fact that

(i) a proprietorship concern does not have a separate identity from its proprietor(s); (ii) the petitioners are individuals, currently residing in United States

of America, a country other than India and; (iii) the petitioners are stated to be having NRI/PIO/OCI as residency status, which gets them covered

under the definition of Section 2(1)(f)(i) being individuals who are nationals or habitually resident in any country other than India.

21. She *Ā*, has *Ā*, relied *Ā*, upon the *Ā*, judgment *Ā*, in the *Ā*, case *Ā*, of *Ā*, A shok Transport Agency v. Awadhesh Kumar and Another, (1998) 5 SCC

567, in support of her plea that proprietorship does not have a separate legal identity distinct from the sole proprietor. There is no dispute on the said

proposition but the fact remains that their own Code of Ethics and Rules of Conduct clearly contemplate a husband and wife can hold one

Distributorship and even a sole proprietorship can also apply for the Distributorship. It is pursuant to the said stipulation that the petitioners have

applied for grant of Distributorship and in fact, the application was in the name of *Āçâ,~ËœSindhia* Enterprises *Āçâ,~â,,ç*, which is admittedly registered with the

address in Bangalore, Karnataka. It is also a fact that the Distributorship is with regard to business to be operated in India, vide *Āçâ,~ËœSindhia*

Enterprises *Āçâ,~â,,ç*, whose principal office is situated in Bangalore, Karnataka. The bank account details are of HDFC situated in Bangalore, Karnataka

and the petitioners have conducted their business in the name of *Āçâ,~ËœSindhia* Enterprises *Āçâ,~â,,ç* in India and made customers in India as is clear from the

email dated September 28, 2019 of the petitioner No.1.

22. The reference made by Ms. Priya Kumar on the judgment of Aslam Ismail Khan Deshmukh (supra) is concerned, the same is clearly

distinguishable inasmuch as the party to the agreement was an individual, who was carrying services under the Agreement in Dubai. The individual

has received remuneration in US dollars in his bank account in Dubai and therefore, it was held by the Bombay High Court that there is a clear foreign

element involved in the agreement and hence, it was held to be an international commercial arbitration.

23. Even the judgment of the Supreme Court in the case of TDM Infrastructure Pvt. Ltd. (supra) 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 and Toubro

Limited Scomi Engineering BHD (supra), 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 recognizes 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.

25. The reliance placed by Ms. Kumar on the address given by the petitioners of USA would not mean that they are operating the proprietorship from

USA when for all purposes the respondent had recognized the proprietorship as being one registered in Bangalore, Karnataka in terms of their own

Code of Ethics and Rules of Conduct. I am of the view that the present petition is maintainable.

26. That apart, it is not the case of the respondent that the disputes between the parties are not arbitrable. That be so, I accordingly appoint Justice

Brijesh Sethi, a retired Judge of this Court as the sole Arbitrator, who shall adjudicate the disputes and differences between the parties. The fee of the

Arbitrator shall be governed by the Fourth Schedule to the Act of 1996.

27. The petition is disposed of.

28. Let a copy of this order be sent to Justice Brijesh Sethi (Retd.).