IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.03.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.24 of 2023

Aviagen India Poultry Breeding Company Private Limited,
Represented by D.Vijayakumar-Finance Director & Company Secretary,
A company registered under the
provisions of the Companies Act, 1956
Having its registered office at
Elayamuthur, PO Gandhinagar,
Udumalpet Taluk,
Tiruppur, Tamil Nadu 642 154.

... Petitioner

Vs.

R.Geetha Ranjani
Sole Proprietor of Global Vet Enterprises,
Having its registered office at
No.61A, Pound Street, RP Pudhur Road,
Namakkal District, Tamil Nadu 631 001

... Respondent

[***Respondent amended as per the order dated 16.03.2023 in Application No.1552 of 2023 in Arb.O.P.No.24 of 2023]

Arbitration Original Petition filed under Section 11(5) of the Arbitration and Conciliation Act, 1996 to appoint an arbitrator to adjudicate on the disputes *inter se* the petitioner and the respondent arising out of Bill of Supply/Invoice No.668 dated 30.04.2019, Supply/Invoice No.84 dated 10.08.2019 and Supply/Invoice No.276 dated 25.11.2019.

For Petitioner : Mr.Muthuccharan Sundresh

For Respondent : Mr.S.Senthil

ORDER

This Arbitration Original Petition has been filed to appoint an arbitrator to adjudicate on the disputes *inter se* the petitioner and the respondent arising out of Bill of Supply/Invoice No.668 dated 30.04.2019, Supply/Invoice No.84 dated 10.08.2019 and Supply/Invoice No.276 dated 25.11.2019.

2. The learned counsel for the petitioner would submit that the petitioner-company was incorporated under the Companies Act, 2013, which is engaged in the business of supplying day old grand parent and

parent stock chicks worldwide. The respondent approached the petitioner in May 2016 for the supply of the Parent Stock Chicks. From May 2016 to November 2019, the respondent placed several orders and the same was supplied by the petitioner. However, since 2019, the respondent started to delay the payments of the invoices raised by the petitioner. Thereafter, the respondent had completely stopped making the payments.

3. It was further submitted by the learned counsel for the petitioner that as per Clause 4.3 of the General terms and conditions of Sale, the respondent is liable to make payments for the invoices within 15 days from the date of delivery of the products. However, in spite of the several reminders made by the petitioner and repeated assurance made by the respondent, the respondent had not paid the pending overdue of a sum of Rs.40,53,500/- along with interest till date. Initially, the petitioner sent a letter dated 06.05.2021 as a reminder for the said debt. Thereafter, a demand notice was also sent by the petitioner on 30.06.2021. Since the respondent had not replied to the aforesaid letter and demand notice, the petitioner was constrained to issue a notice dated 06.09.2022, under Section 21 of the

Arbitration and Conciliation Act, 1996 (hereinafter called as "the Act"). Thereafter, the respondent, vide reply notice dated 15.09.2022, contested with regard to the validity of the arbitration clause. Hence, this present Arbitration Original Petition has been filed.

4. Per contra, the learned counsel for the respondent would submit that the petitioner assured to supply a greater number of parents stocks with good egg yielding performance. Despite following all the recommendation and suggestions made by the petitioner, the parent chicks did not lay maximum number of egg as assured by the petitioner and when the respondent decided to terminate their business with the petitioner, the petitioner had forced the respondent to purchase more batches of parent chicks, due to which the respondent had faced continuous loss in business. The respondent informed the petitioner about the huge monetary loss and business loss over those batches of parent flocks, which was forcefully supplied by the petitioner.

5. The learned counsel for the respondent would further submit that

after the receipt of the demand notice dated 30.06.2021 from the petitioner, the respondent personally met the decision making personnel of the petitioner and explained the loss faced by him. The learned counsel would also contend that since the petitioner promised to right off the outstanding amount of Rs.40,53,500/-, the respondent had no obligation to pay the amount under Invoice Nos.668, 84 and 276. Thereafter, when the petitioner sent a notice invoking arbitration proceeding, the respondent vide its reply notice dated 15.09.2022 refused the same and contested the validity of the arbitration clause. In this regard, he referred to the judgement rendered by this Court in ***NSK India Sales Company Private Limited vs. Proactive Universal Trading Company Private Limited,*** reported in ***2015-4-LW-417.*** Therefore, he would submit that this petition is liable to be dismissed.

6. Having heard the learned counsel for the parties and on going through the pleadings and materials placed on record, the issue arises for consideration is whether there is a valid and binding arbitration agreement between the parties providing for resolution of the dispute through the mode of arbitration?

7. The learned counsel for the petitioner would contend that the respondent placed several purchase orders on the petitioner, whereupon the petitioner raised invoices upon the respondent to the extent and value of the products supplied and along with Invoices, terms and conditions of sale were enclosed and served on the respondent, wherein, Clause 18 provides arbitration in case of dispute arises in regard to the transactions. He would also contend that the respondent acknowledge the receipt of the goods and made payments and therefore, once the respondent acknowledged the receipt of goods and the invoices which appended terms and conditions of sale, containing an arbitration clause, the same is binding upon the respondent. In this regard, he relied upon a decision of the Delhi High Court in "***Swastik Pipe Ltd versus Ms.Dimple Verma (Arb.P.No. 100/2021).*** He would further contend that the respondent never denied the placement of purchase orders, receipt of Invoices and goods and acknowledged the terms and conditions of sale appended to the Invoices, containing arbitration clause.

8. The learned counsel for the petitioner would refer to Section 7(4)(b) of the Act and contend that the arbitration agreement need not be in a particular form as alleged by the respondent, but it can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means and once having placed purchase orders and received the goods and Invoices including terms and conditions of sale, it is *prima facie* sufficient that the respondent is *ad idem* even though the respondent did not have signed the terms and conditions of sale which cannot absolve the respondent from the liability under the agreement. In this regard, he relied upon a decision of the Hon'ble Supreme Court in "***MTNL versus Canara Bank,*** reported in (2020) 12 SCC 767**.** Therefore, the learned counsel for the petitioner would contend that the respondent has been in receipt of multiple supplies, each containing the invoice along with the terms and conditions of sale forming part of the invoice and having never once raised any demur regarding the terms and conditions of sale and despite of notice and reminders, the respondent has not come forward with repayment of dues, which prompted the petitioner to issue the notice under Section 21 of the Act, invoking arbitration clause contained in the terms and

conditions of sale appended to each invoice, but the respondent has refused the same. Hence, the learned counsel seeks appointment of the Arbitrator.

9. On other hand, the learned counsel appearing for the respondent would contend that since the petitioner sustained huge loss in the course of business due to the sub standard quality of parent birds supplied by the petitioner, outstanding amount was assured to be set off by the petitioner, however, without keeping up his assurance, the petitioner issued arbitration notice dated 08.09.2022 to which, the respondent has issued reply notice dated 15.09.2022, refusing the arbitration for want of valid arbitration clause. He would contend that it is mandatory that every arbitration agreement must be in writing and signed by both parties, whereas in the present case, there is no declaration form signed by the respondent, binding upon the terms and conditions of sale and that Bills of Supply were never signed by the respondent. The learned counsel would further contend that the respondent has not given his express consent for arbitration of dispute through any other modes enumerated under Section 7 of the Act and the delivery challan signed by the staff of the respondent does not contain

arbitration clause. He would point out that absolutely, there is no document to show that both parties have agreed for arbitration to arbitrate the dispute between them and Clause 18 of the terms and conditions of sale relied upon by the petitioner does not constitute as a valid and binding arbitration agreement. Therefore, in the absence of arbitration agreement between the parties, the petitioner cannot invoke and seek the appointment of the arbitrator and if at all the petitioner is aggrieved of any claim against the respondent, it can approach the Civil Court in accordance with law. In support of his contentions, he relied upon the decisions reported in ***"NSK India Sales Company Pvt.Ltd., Chennai versus Proactive Universal Trading Company Pvt.Ltd., New Delhi"*** reported in 2015 SCC OnLine Mad 14146; "***Yogi Agarwal versus Inspiration Clothes"*** reported in (2009) 1 SCC 372; "***Alupro Building Systems Pvt.Ltd. Versus Ozone Overseas Pvt.Ltd."*** reported in 2017 SCC OnLine Del 7228; and ***"Concrete Additives and Chemicals Ltd. versus S.N.Engineering Services Pvt.Ltd."*** reported in 2022 SCC OnLine Bom 8034.

10. It is a settled proposition of law that the existence of a valid arbitration agreement under Section 7 of the Act is *sine-qua-non* for a Court to exercise its powers to appoint an arbitrator/arbitral tribunal under Section 11 of the Act.

11. The Arbitration and Conciliation Act, 1996, define “Arbitration Agreement” as an agreement referred to in Section 7 of the Act, which describes ‘Arbitration Agreement’ to mean an agreement by the parties to submit to arbitration all or certain disputes, which have arisen or which may arise between them, in respect of a defined relationship, whether contractual or not. An Arbitration Agreement may be in the form of arbitration clause, in a contract or it may exist in the form of separate agreement, the rider being it shall be in writing.

12. Sub-section (4) of Section 7 has expanded the scope of sub-section (1) in the following manner :

“(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and deface in which the existence of the agreement is alleged by one party and not denied by the other.

Sub-section (5) of Section 7 offer a further clarification as under :-

> “(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract”.

13. In fact, the Arbitration clause by itself constitutes an agreement and no strict format is prescribed as to what would contemplate an arbitration agreement. Though no particular form is needed to bring into existence an arbitration agreement, but one thing is certain that the words “must unequivocally” indicate the agreement between the parties to be referred for arbitration. The intention of the parties must be inferred from the terms of the contract, conduct of binding contract between the parties.

14. In the present case, the petitioner relied upon the Invoices and Bills of Supply, which were acknowledged by the respondent after receipt of the supply and made payments also, which accompanied terms and conditions of sale, wherein, Clause 18 refers arbitration in case any dispute arises between the parties. Therefore, by virtue of acceptance of Invoices and Bills of supply by the respondent which contained arbitration clause, it would clearly indicate the intention of the respondent that he is inclined to go for arbitration and thereby, it would clearly establish that the parties were *ad idem* and even though the respondent has not signed the document, it cannot absolve him from the liability under the agreement.

16. In this regard, it is worthwhile to refer the following judgments of the Hon'ble Supreme Court and other High Courts, which are summarized as follows:

a) In a judgement of the Hon'ble Supreme Court, in ***MTNL versus Canara Bank*** ((2020) 12 SCC 767), wherein, in para 9 to 9.5, the existence of a valid arbitration agreement, came to be reiterated:

"9. THE EXISTENCE OF A VALID ARBITRATION AGREEMENT: A valid arbitration agreement constitutes the heart of an arbitration. An arbitration agreement is the written agreement between the parties, to submit their existing, or future disputes or differences, to arbitration. A valid arbitration agreement is the foundation stone on which the entire edifice of the arbitral process is structured. A binding agreement for disputes to be resolved through arbitration is a sine-qua-non for referring the parties to arbitration.

9.1 Section 7 defines "arbitration agreement" and reads as follows :

7. Arbitration agreement. –

(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing. (4) An arbitration agreement is in writing if it is contained in-

(a) A document signed by the parties;

(b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) There reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

9.2. The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties.

9.3. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Act inserted the words "including communication through electronic means" in Section 7(4)(b). If it can prima facie be shown that parties are ad idem, even though the other party *may not have signed a formal contract, it cannot absolve him from the liability under the agreement.*

9.4. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence exchanged, to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad idem, and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract.

The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation.

9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An 'arbitration agreement' is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities."

A perusal of Clauses 9.3 & 9.4 of the above judgment, it is clear that if it is proved that parties are *ad idem,* even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement. In the present case, there is exchange of communication by way of Invoices and Bills of supply between the parties and every Invoice and Bill of supply accompanied with terms and conditions of sale, wherein, Clause 18 talks about arbitration in case any dispute arises between the parties. It is not in dispute that the respondent has received Invoices and Bills of supply and after receipt of goods, he has also made part payment towards sale consideration and thereby, it is clear that the respondent is well aware of the terms of conditions of sale including the arbitration clause contained therein, but never raised any objections as regards the reference of the dispute to the arbitration. Therefore, by means of exchange of Invoices and Bills of supply between the parties, it is clear that the parties are *ad idem* and though the respondent has not signed the formal contract, it cannot absolve him from the liability under the agreement and the intention of the parties is also clear that if any dispute arises, it shall be resolved by way of arbitration. Further, in Clause 9.5 of the above judgment, the Hon'ble Supreme Court has observed that a commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. In the present case, upon placing the purchase orders by the respondent, the petitioner supplied the goods in terms and conditions of the sale which were appended to the Invoices and Bills of supply and hence, it can be safely interpreted that the Invoices and Bills of supply along with terms and conditions of sale as commercial documents. In fact, upon placing the purchase orders by the other party, the supplier, having acceded to the request of the other party, used to supply the goods along with invoices. The general practice of the business world is that once the other party having received the goods along with Invoices attached with terms and conditions of sale, as long as no objection has been raised by him, it would mean that he accepted the terms and conditions and thereby, he shall abide by the same. Merely because the terms an conditions of sale were not signed by the other party though by implication, it is clear that he accepted the same, it cannot be interpreted in negative as it would be disastrous construction that may affect the business world and even the party who supplied the goods may suffer loss and face difficulties. A commercial document must be interpreted in such a way so as to give effect to the agreement rather than to invalidate it on technicalities.

Applying the above ratio laid down by the Hon'ble Supreme Court in the above judgment to the present case, no doubt, it is clear that there is valid arbitration agreement and Clause 18 contained therein, refers to arbitration if any dispute arises between the parties. Having regard to the proposition of law laid down by the Hon'ble Supreme Court in the above judgment, this Court is of the considered view that the reliance placed by the learned counsel for the respondent on the judgment of this Court in the case of "***NSK India Sales Company Pvt.Ltd.*** and in the cases of **Yogi Agarwal** and ***Alupro /building System Pvt. Ltd.*** (cited supra), will not be applicable to the present case as the same are not inconsonance with the law laid down by the Hon'ble Supreme Court in the above judgment.

b) In the case of "***Swastik Pipe Ltd versus Ms.Dimple Verma" (Arb.P.No.100/2021),*** the Delhi High Court, has held in para 11 as under:

> *"11. In the case in hand, it is not disputed by the learned counsel for the respondent that it had earlier received similar tax invoices from the petitioner against which the payments have been made to the petitioner. Leaned counsel for the petitioner has not disputed that the tax invoices for which claim has been made has not been received by the respondent. If that*

be so, respondent cannot disown the clear stipulation in the tax invoice with regard to any dispute being referred to arbitration. Even the Coordinate Bench of this Court in "Swastik Pipe Ltd. (supra) in a very detailed Judgement by referring to the various judgments including Scholar Publishing House Pvt. Ltd. (supra), Lewis W. Fernandes (supra) and other judgments has in Para 16 held as under and refer the matter for arbitration by appointing an arbitrator:

> *"16. As noted above, SRAPL has elected to stay away from the present proceedings. Despite service of notice, they have chosen not to appear, for reasons best known to them. They have not filed a reply to deny the assertion, both in response to the legal notice invoking arbitration, as well as to the present petition. The consequence of such non-appearance is that the assertion of existence of the arbitration agreement is unrebutted. Thus, prima facie, it can be inferred that the arbitration agreement exists between the parties."*

c) In the case of "***Swastik Pipe Ltd versus Shri Ram Autotech Pvt.Ltd." (Arb.P.No.241/2021),*** a Coordinate Bench of the Delhi High Court has held as under:

> *"15. It must also be noted that the commercial dealing between the parties is demonstrated from the documents placed before this Court by SPL. Copy of the ledger of SPL, as placed on record, exhibits that the parties have been transacting with each other for some time, and some of the invoices raised by SPL have been paid by SRAPL during the*

same time period as well. Now, if there is sufficient material on record to establish that the condition/clause in the invoices were accepted and acted upon, the parties would be ad idem, and arbitration agreement could be safely inferred....”

17. In present case, admittedly, the respondent, on several occasions, has placed purchase orders and acknowledged the receipt of the supplies and Invoices made by the petitioner and made payments thereof. It is not in dispute that along with the Invoices, the petitioner appended the terms and conditions of sale, wherein, Clause 18 refers to arbitration in case any dispute arises between the parties to be resolved by a sole Arbitrator. Clause 18 reads as under:

> “18. Dispute Resolution:
>
> 18.1 These conditions, the order and any dispute or claim arising out of or in connection with them of their subject matter or formation (including non-contractual disputes or claims) shall governed by and construed in accordance with the Indian Law. All disputes shall be subject to arbitration, by a sole arbitrator at Chennai. Subject to the arbitral remedy, the parties hereby submit to the exclusive jurisdiction of the Indian Courts. It shall be open to Aviagen to seek interim protection of its Day Old Chicks and to

> seek custody thereof, by way of interim reliefs, pending any arbitral proceedings.
>
> 18.2 In cases where dispute inter alia pertains to breach of Clauses 5.1, 5.2 or 5.6 hereof, Aviagen sha have the right to seek by way of interim protection, receivership of the establishment of the Purchaser, a well as restraining order to prevent any sale of chicks by Purchaser until the dispute is resolved through arbitration."

18. This was never disputed by the respondent, but only contended that there is no conscious agreement between the parties to refer the disputes for adjudication and merely because the tax invoice which was issued in respect of the purchase orders provided for an arbitration, such invoices would not bring about an arbitration agreement and further, he has not signed the document, expressing willingness to get the dispute resolved by way of arbitration.

19. However, in the light of the above discussion and having regard to the facts and circumstances of the present case and the relevant case laws rendered by the Hon'ble Supreme Court and other High Courts cited supra, and since the parties have acted upon the invoices and there was no denial

of the invoices and bills of supply raised by the petitioner, the clause contained in the terms and conditions of sale appended to the Invoices and bills of supply, which clearly stipulate a reference to arbitration, i.e. Clause 18, this Court is of the considered view that it deserves to be construed as an arbitration clause and thereby constitute a valid arbitration agreement binding on the parties, irrespective of the respondent not signed the document and the same would squarely fall within the ambit of Section 7 of the Arbitration and Conciliation Act, 1996. Accordingly, this Court has no hesitation to hold that there is a valid and binding arbitration agreement between the parties providing for resolution of the dispute through the mode of arbitration.

20. In fact, since the respondent refused to make payment of outstanding dues, the petitioner invoked arbitration Clause contained in the terms and conditions of sale appended to Invoices and Bills of Supply sent to the respondent upon placing the purchase orders by him. As regards the subject claim for a sum of Rs.40,53,500/- is concerned, the respondent never disputed the same, but as could be seen from the counter, it is the

version of the respondent that since the respondent incurred huge loss in the course of business due to the substandard quality of parent birds supplied by the petitioner, the petitioner promised to right off the outstanding amount of Rs.61,90,000/- in the AY 2022-23, but this was denied by the petitioner. These respective claims of the parties are subject to the arbitration, wherein, both the parties can establish their stands and this Court is not inclined to express any view in this aspect.

21. In the light of the above discussion, I am persuaded to exercise the powers under sub-section 6 of Section 11 of the Act and pass the following order :

> i) Mr.Hon'ble Mr.Justice N.Kirubakaran (Rtd.,), residing at No.36, 2nd Cross Street, Rayala Nagar, Ramapuram, Chennai 600 089, Contact No.9445025454, is appointed as sole arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties.
>
> ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period

of six months from the date of receipt of the Order. The learned Arbitrator shall pass award on merits without being influenced by any of the observations made in this order.

iii) The learned Sole Arbitrator appointed herein shall be paid fees and other incidental charges, fixed by him and the same shall be borne by the parties equally. In the event of non-appearance of the respondent, the petitioner shall bear the entire remuneration and other expenses and thereafter, the petitioner can recover the same directly from the respondent.

22. This Arbitration Original Petition is ordered accordingly, leaving the parties to bear their own costs. Since this Court has appointed an Arbitrator, it is open to the petitioner as well as the respondent to make all their claims under the provisions of Arbitration and Conciliation Act 1996 before the learned Arbitrator.

30.03.2023

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation: Yes / No
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KRISHNAN RAMASAMY.J.,
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Arb.O.P (Com.Div.)No.24 of 2023

30 .03.2023