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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
ARBITRATION PETITION (L) NO. 130 OF 2017**

PCC Infrastructure Pvt Ltd	...Petitioner
<i>Versus</i>	
Airports Authority of India	...Respondent

Mr D Merchant, with Gaurav Jangle and Digant Bhatt i/b IV
Merchant & Co for the Petitioner.
Ms Shilpa Kapil, for the Respondent.

CORAM: G.S. PATEL, J
DATED: 9th March 2017

PC:-

1. Heard. On behalf of the sole Respondent in the Petition under Section 9 of the Arbitration and Conciliation Act, Ms Kapil draws attention to the arbitration clause itself.

2. The contract in question between the Petitioner and the Respondent which related to resurfacing of a runway at Rajkot Airport is dated 9th December 2009. It was awarded pursuant to a tender dated 3rd November 2009. For the present purpose, I am not concerned with the actual disputes since what falls for immediate consideration is the effect and operation of the arbitration clause.

3. It is not in dispute that the contract provided for a dispute resolution mechanism, arbitration and applicable laws in Clause 57. It is also not in dispute that Article 4 of the Agreement (page 35) provides for jurisdiction in Mumbai.

4. The arbitration clause so far as it is relevant reads thus:

“57(a) Dispute resolution mechanism board:

(i) If a dispute of any kind, whatsoever, arises between procuring entity and contractor in connection with or arising out of the contract or the execution of the works, whether during the execution of the works or after their completion and whether before or after the repudiation or termination of the contract, including any disagreement by a third party with any action, in action opinion, instructions, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place be referred to the Dispute Resolution Board and as per Sr No.32(i) of the Schedule “E”.

(ii) When the disputes could not be resolved through the Dispute Resolution Board, the Arbitration clause may be invoked.

57(b) Except when otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising

out to or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitrator as may be appointed by the authority mentioned at Serial No. 32(ii) in Schedule “E”. There will be no objection if the arbitrator so appointed is an employee of AAI and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the appointing authority for arbitrator, as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the authority mentioned in Schedule “E”, should act as arbitration and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.

5. In addition, this clause also says that the venue of the arbitration will be at such place as the arbitrator may decide.

6. A threshold argument is that the Petitioner has not gone through the process contemplated in clause 57(a) at all and hence this Petition is premature. But that argument assumes that there is a

valid arbitration clause that will follow at all. This is important because clause 57(a)(ii) says that where the disputes cannot be resolved by the dispute resolution board under clause 57(a) then the subsequent clause for arbitration will apply.

7. The arbitration clause itself is clearly expansive at least in that it takes within its sweep all disputes and differences between the parties. It also provides for the appointment of an arbitrator. This clause says that the disputes are to be referred to a Sole Arbitrator appointed by the Authority mentioned in Sr No 32 (ii) of Schedule “E” to this contract. That schedule is at page 58. The relevant portion is at page 60. It references the Authority for appointing an arbitrator as being the Executive Director (Engineering). Now clause 57(b) says that it is this person who will appoint the arbitrator and there will be no objection by the Petitioner if the arbitrator appointed is an employee of the Respondent or he has had to deal with the matters to which the contract relates or that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. If he is unable to act, the appointing authority may appoint another person in his place. The successor can continue arbitration from where his predecessor stopped. Then comes the last clause which says that no person other than one appointed by the authority mentioned in Schedule “E” may act as such arbitrator. If for any reason, that is not possible then the clause itself says the disputes are not to be referred to arbitration at all. Obviously this entire clause means that the appointing authority may have the choice of various persons to act as an arbitrator. He may under this clause appoint an employee of the Respondent. This portion of the clause is, however hit by the amended provisions of

the Arbitration and Conciliation Act 1996 and specifically Section 12(1), 12(5) and Schedules V and VII to the Act. On any reading of those Schedules, the appointment of an employee of the Respondent would be unlawful and no employee is eligible to be appointed as an arbitrator. The first item of the VIIth Schedule says that the arbitrator may not be an employee of one of the parties to the arbitration. This is also to be found at the first item in Schedule 5. The result consequently would be that if the appointing authority chose to appoint none other than an employee, there would be no arbitration clause at all.

8. At this stage, the question of appointing of an arbitrator has not yet arisen and this is for two reasons. The first is that none have invoked arbitration. More fundamentally, and this is the second reason, the Petitioners have not even been through the process contemplated in 57(a) of the clause. The arbitration clause does not operate until that dispute resolution mechanism is completed. Clause 57(b), which is the arbitration clause, only operates where disputes cannot be resolved under Clause 57(a).

9. *Prima facie* the Arbitration Petition does not lie at this stage. The arbitration clause cannot properly be invoked at this stage. The Petitioner cannot presume that the dispute resolution mechanism will be a failure or that the conclusion is foregone. The Petitioner is bound by the dispute resolution procedure and mechanism.

10. For these reasons, it is not possible to grant any ad-interim or interim orders in this Petition. If the dispute resolution mechanism,

once properly invoked, fails, then and only then will the arbitration clause begin to operate. If, at this stage, the appointing authority nominates a person as an arbitrator consistent with the provisions of Act as amended, then the arbitration may continue. If however, he declines to do so, then there is no arbitration clause at all and the Petitioner must pursue its remedies elsewhere.

11. For these reasons this Petition is dismissed with no order as to costs.

(G. S. PATEL, J.)