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Prasanna S,

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No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 94896 71437 – info@iledu.in / Chairman@iledu.in



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"AFCONS INFRASTRUCTURE: PAVING THE WAY FOR ADR IN CONSTRUCTION DISPUTES" – A CASE COMMENT

AUTHOR – BERADAR AKASH, STUDENT AT CHRIST ACADEMY INSTITUTE OF LAW

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I. CASE NOTE

Case name: M/S Afcons Infrastructure Ltd. & Anr. v. M/S Cherian Varkey Construction Co. (P) Ltd. & Or's., (2010) 8 SCC 24,

Court: Supreme Court of India,

Bench: J.M. Panchal, R.V. Raveendran.

II. INTRODUCTION

This was a key point of precedent in Indian law relating to the scope and nature of arbitration clauses in construction contracts. *The Supreme Court held that when there is an arbitration clause, matters concerning contractual obligations, especially commercial contracts are to be referred to arbitration.* This decision, not to mention that it had a significant impact in India across the *Alternative Dispute Resolution (ADR)* mechanism and also defined those classes of disputes that could not be arbitrated and were also to be respected by the courts on the ground that the parties have contractually arranged for resolution of the disputes through arbitration. The facts, legal principles, issues, and analysis of that judgment are looked into in this comment and a critical analysis of the judgment is presented in the light of the rule of settlement in India, both in arbitration and other fora.

Since disputes in infrastructure and construction are common, the arbitral method has become very popular and an efficient way of settling these disputes in commercial contracts. Critical judicial clarification about the types of disputes that may be referred to arbitration was given in the *Afcons Infrastructure Ltd v. Cherian Varkey Construction Co. Pvt. Ltd. (2010)*. But in a country

with court delays that are the norm, arbitration provides a faster, less messy approach. Nevertheless, there is an equal need to detail the limits within which arbitration is concerned. This case was a landmark in defining these boundaries so that parties are carried towards arbitration when they should be, whilst recognizing exceptions where appropriate to the integrity of the judicial system.

III. FACTS OF THE CASE:

Cherian Varkey Construction Co. Pvt. Ltd. (Cherian) and Afcons Infrastructure Ltd. (Afcons) executed a contract for the construction of a highway. Cherian filed suit in the civil court to settle disputes over the execution of the contract. However, Afcons asked for a stay of civil proceedings, arguing it was based on the arbitration clause in the contract. The case ended up in the Supreme Court, and the trial court denied the stay. It said the civil court did not have jurisdiction and the matter was brought to arbitration because of the fact there was an arbitration clause in the contract.

IV. ISSUES:

- To what extent disputes under a construction contract with an arbitration clause should be forced into arbitration?
- Which disputes are non-arbitrable under Indian law in what categories?



c. Whether is there any procedure that a court has to follow when it is to put into effect Section 89 and Order 10 Rule 1A of the CPC?

d. whether the settlement in an ADR process binding in itself?

e. Whether reference to the ADR Process mandatory?

V. **LEGAL PRINCIPLES:**

It is based on several principles of arbitration law, such as:

- Under section 89 of the Code of Civil Procedure, 1908, settlement of disputes without the Court. (1) Where it is apparent to the court that there are issues that may be acceptable to the parties, the court shall formulate terms and provide them to the parties for their observations; and after receiving the observations of the parties, if the court finds it necessary, it may reformulate the terms of a possible settlement and refer the same to.

(a) arbitration;

(b) conciliation;

(ii) judicial settlement including settlement through Lok Adalat; or

(d) mediation

(2) But only when a dispute has been referred

The provisions of the Arbitration and Conciliation Act, 1996 shall apply for arbitration or conciliation as if the proceedings for arbitration or conciliation are referred for settlement under the provisions of that Act;

(b) such dispute shall be referred to the Lok Adalat in favor of which sub-section (1) of section 20 of the Legal Services Authorities Act, 1987, and all other provisions of that Act apply.

(c) The court, shall, in case of a dispute which is in respect of which a sum has already been assessed by the executive, refer the same to a suitable institution or person and the same shall be deemed to be a Lok Adalat and all provisions relating to Lok Adalat under the Legal Services

Authorities Act, 1987 shall apply as if the dispute was referred to a Lok Adalat under the said Act.

(d) the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed for mediation.

- **Non-Arbitrable Disputes:** The court examined the kinds of disputes that are by their very nature non-arbitrable, i.e., criminal matters, matrimonial cases, guardianship, insolvency, and testamentary.

- **The doctrine of Kompetenz-Kompetenz:** This means that the arbitral tribunal has the power to rule on the scope of that power, including the power to decide on its jurisdiction.

VI. **CONTENTIONS OF THE PARTIES:**

a. Contentions of Afcons Infrastructure Ltd. (Appellant):

Existence of an Arbitration Clause: Afcons said that the construction contract itself included an arbitration clause, which under the express terms of the contract any dispute between the parties, arising out of the contractual obligations, should be arbitrated.

Obligation of the Court Under Section 8 of the Arbitration Act: Arguing that once there was a valid arbitration agreement, Section 8 of the Arbitration and Conciliation Act, 1996 made the court bound to refer the matter to arbitration, Afcons argued. The Judiciary should only be vested with the role of determining the existence of the arbitration agreement, once agreed, the court had no discretion to proceed with the matter, they were emphatic.

Minimal Judicial Intervention: By promoting arbitration as a preferred method of resolution of the so-called 'shovel ready' commercial disputes, e.g. in the construction sector, (the policy purpose being to limit judicial intervention) Afcons also favoured minimal judicial intervention.

**b. Contentions of Cherian Varkey Construction Co. Pvt. Ltd. (Respondent):**

Dispute Non-Arbitrable: Cherian said that the dispute goes beyond the scope of the arbitration agreement. They argued that some disputes, notably such as fraud or that concerned public policy, should be outside the arbitral jurisdiction and fall to be heard by the civil courts only.

Jurisdiction of Civil Court: Cherian said that, despite the existence of an arbitration clause, the matter was arbitrable, which also brought it within the court's jurisdiction on the subject matter covered in the suit.

Request for Judicial Resolution: Cherian tried to resolve the dispute through the judicial system, claiming that certain demerits of the contract performance, particularly possible breach and fraud, were simply not susceptible to being resolved through arbitration alone.

VII. ANALYSIS:

A well-reasoned judgment was delivered by the Supreme Court holding that commercial disputes arising out of contractual obligations such as construction contracts are prima facie arbitrable provided an arbitration clause exists. The court made it clear that for commercial matters arbitration is a preferred dispute resolution method, which is also a trend in the global arena of ADR. While the judgment also offered guidance on what disputes are inherently non-arbitrable – matters of criminal law, public rights, and specifically statutory matters such as insolvency and guardianship – it was clear.

The interpretation of Section 8 of the Arbitration and Conciliation Act, 1996 was one of the aspects of judgement. The court held once again that civil courts must honor the parties' commitment to arbitrate, save in cases expressly excluded from the scope of the contract. The policy of minimum judicial intervention in matters of arbitration coverage was promoted which stimulated the growth of ADR mechanisms in India.

VIII. SIGNIFICANCE:

This case is no doubt a landmark for the law of arbitration in India. This helped to clear out extraneous judicial interference in commercial disputes and to streamline the referral process to arbitration. It is a judgment of significance to businesses involved in construction and infrastructure projects as they enforced arbitration clauses that had been previously enforceable by the law. It also was instrumental in encouraging ADR mechanisms in India, in providing litigants a quicker, more expedient means to resolve disputes without hogging the judiciary.

IX. CRITICAL COMMENT AND AUTHOR'S UNDERSTANDING WITH CONCLUSION:

The *Afcons Infrastructure Ltd v Cherian Varkey Construction Co* judgment is the reflection of the judiciary acknowledging arbitration as a substantial instrument for commercial disputes. The ruling strikes just the right balance between honoring the parties' contractual intent and keeping certain disputes, which are more appropriately in the court's domain, outside of the court. The judgment defends arbitration, but for matters that arbitration is ill-suited to decide.

The judgment also brings much-needed clarity as to the operation of *Section 8 of the Arbitration and Conciliation Act* from the author's perspective. That makes it even more important to respect provisions on arbitration and it coincides with the global effort to encourage the adoption of ADR mechanisms to handle commercial disputes. But one part that troubles me is that the court is a little too rigid in its articulation of what is arbitrable that could potentially take away arbitration in cases where parties may benefit even from ADR flexibility and efficiency. While progressive, the judgment could have explored a more nuanced approach to the classification of non-arbitrable matters, especially concerning emerging fields such as intellectual property and employment disputes.

Finally, *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co.* is a case of a milestone



in which India has established that ADR is part and parcel of Indian commercial litigation. The judgment not just provides clarity on the legal background of arbitration agreements but at large, it sets a precedent for future judgments set to master the contours of the arbitration law in India.

