A JAMMU & KASHMIR STATE FOREST CORPORATION

v.

ABDUL KARIM WANI

MARCH 31, 1989

B [R.S. PATHAK, CJ., SABYASACHI MUKHARJI AND LALIT MOHAN SHARMA, JJ.]

Jammu and Kashmir Arbitration Act 2002 (Smvt) Sections 8, 11, 20 and 41.

C *Arbitration Act, 1940—Sections 2(a), 18 and 20. Arbitration clause in Contract—How to be construed.*

Dispute between parties—Whether referable to arbitration or not—Court to refrain from expressing opinion on merits of dispute.

D *Jurisdiction of Court to make interim order—Only 'for the purpose' of arbitration proceedings—Not to frustrate the same.*

The appellant, a Corporation was created under the Jammu & Kashmir Forest Corporation Act, 1978. One of its main functions was to undertake the removal and disposal of trees and exploitation of the
E **forest resources entrusted to it by the Government.**

The Corporation took a decision for the extraction of timber of a total volume of 10.08 lakh c. ft. which included the work of felling and removal of trees. The respondent an approved contractor submitted his tender and was granted the works contract initially with reference to 4
F **lakh c. ft., and subsequently he was entrusted with an additional work for a further quantity of 2 lakh c. ft. The respondent completed the entire work under the contract. Thereafter, he claimed that he was entitled to the remaining volume of the work, namely, 4.08 lakh c.ft. as per the procedure, practice, custom and usage extended to him. The appellant denied any such practice, custom or assurance and said that a**
G **decision had been taken not to work the area further till the entire timber already extracted was removed to its destination. There was, therefore, no question of entrusting the remaining work to anybody.**

Paragraph 15 of the Tender Notice stipulated that: "Extension for the additional volume in the coupe will not be claimed as a matter of
H **right but may be considered by the Management where the achievement**

is 100 per cent." The agreement provided for arbitration which was contained in clause 42, and which stipulated: "that any dispute, differences or question that may arise was to be referred for arbitration to the Managing Director of the Jammur & Kashmir Forest Corporation." A

The respondent filed an application under sections 8, 11 and 20 of the Jammu and Kashmir Arbitration Act, 2002 (Smvt) in the High Court for a direction to the Corporation to file the agreement and to refer the dispute to an arbitrator. B

The High Court deprecated the attitude of the Corporation in not awarding the remaining work to the respondent. It held that the trees in question had already been marked and had, therefore, to be felled 'one day or the other', and as the contractor's achievement was 300 per cent he had all the right to claim the remaining work as provided in paragraph 15 of the Tender Notice. The High Court also found that as there existed a dispute touching the contracts executed between the parties, it referred the matter under clause 42 of the agreement to the named arbitrator, namely, the Managing Director of the State Forest Corporation. C D

The High Court went further and by an interim order directed that the contractor be permitted to do the remaining work of extraction of timber of standing marked trees and the rates be determined by the arbitrator after hearing both the parties pursuant to the said interim order. E

Aggrieved by the aforesaid orders of the High Court the appellant appealed to this Court by special leave.

On the questions: (i) whether there was any subsisting arbitration agreement in respect of the matters sought to be referred, and (ii) whether the interim order of the High Court directing the respondent to do the remaining work was without jurisdiction, and whether the respondent was entitled to any compensation for the work done. F

Allowing the appeal, the Court, G

HELD: [R.S. Pathak, CJ and L.M. Sharma, J. Majority-Per L.M. Sharma, J.]

1. The claim raised by the respondent in his application before the High Court is not covered by the arbitration clause and cannot be H

referred for a decision of the arbitrator. The order of reference passed by the High Court has therefore to be set aside. [390F]

2. If the foundation of the claim of the respondent be any alleged assurance or custom or practice, it cannot be said that such claim arises out of the written agreement between the parties; and so the prayer for reference has to be rejected. If the case pleaded is true, the appropriate forum for the respondent will be a Court of Law directly granting the relief in an appropriate legal proceeding [388A-B]

3. The language of the term contained in para 15 of the tender notice is explicit in declaring that the contractor would not be allowed to claim as a matter of right the additional volume of work. His right extends only to a consideration of his case by the management when the question of allotment of additional work is taken up. But by the application filed before the High Court the respondent did not ask for reference of a dispute as to whether he is entitled to consideration or not; the prayer is for reference of a higher claim of immediately getting the additional work, and this prayer has been allowed. This issue cannot be said to have any connection with the 15th term of the tender notice or any other provision thereof or of the agreement. [388D-E]

4. In the absence of a repudiation by the Corporation of the respondent's right to be considered, if and when occasion arises, no dispute can be said to have arisen which may be referred for arbitration. [390B]

5. In order that there may be a reference to arbitration, existence of a dispute is essential, and the dispute to be referred must arise under the arbitration agreement. [390C]

Seth Thawardas Pherumal v. _The Union of India,_ [1955] 2 SCR 48 relied on.

6. There was no justification for the High Court in deprecating the Corporation for not awarding the remaining work to the contractor when it was leaving the matter to be decided by the arbitrator. [387G]

7. A Court, while considering the question whether an alleged dispute between the parties has to be referred for arbitration or not, should refrain from expressing its opinion on the merits of the dispute which may embarrass the arbitrator. [387G-H]

8. Section 18 deals with the power of the Court to pass interim orders after award is actually filed in Court. So far as clause (a) of Section 41 is concerned, it makes only the procedural rules of the Civil Procedure Code applicable. The source of power to grant interim relief cannot be traced to clause (a), otherwise clause (b) would become otiose. So far as clause (b) is concerned, it circumscribes the Court's power within the limits indicating in the second Schedule, and further qualifies it by declaring in the Proviso that it cannot be used to the prejudice of any of the powers of the arbitrator. [391D-E] A B

H.M. Kamaluddin v. *Union of India,* [1983] 4 SCC 417 relied on.

9. Interim directions can be issued only 'for the purpose of' arbitration proceedings and not to frustrate the same. [391E] C

10. The High Court in the instant case, by granting the interim relief, not in the shape of an injunction in the negative form, but by a mandatory direction clothing the respondent—plaintiff with the right to do something which he could have been entitled to only after a final decision on the merits of the case in his favour committed a serious error. [391G-H] D

[*Per Sabyasachi Mukharji, J partly dissenting*]

1. There was a dispute in the instant case, whether the contractor was entitled to the grant of the additional volume of work. Such dispute was a dispute between the parties in respect of the 'works to be executed by the contractor'. In that view of the matter and in the light of clause 15 read with clause 17 of the Agreement the dispute was clearly referable to the arbitration of the Managing Director, Jammu & Kashmir State Forest Corporation. [397F-G] E F

2. Endeavour should always be to find out the intention of the parties, and that intention has to be found out by reading the terms broadly, clearly, without being circumscribed. [398B-C]

3. An arbitration agreement is one which is defined in section 2(a) of the Arbitration Act, 1940 as a written agreement to submit present or future differences to arbitration. There was, in the instant case, an arbitration agreement that is to say, the parties had been *ad idem*. The agreement was in writing. It was not a contingent or a future contract. It was a contract at present time to refer the dispute arising out of the present contract entered into by the parties as a result of which the G H

A contractor got a right or privilege to ask for consideration of grant of the further work. It was not a mere right to get the additional work. The amplitude of the arbitration clause was wide enough and should be so read. [397H; 398A-B, C-D].

B *Seth Thawardas Pherumal* v. *The Union of India*, [1955] 2 SCR 43 distinguished.

A.M. Mair & Co. v. *Gordhandass Sagarmull*, [1950] SCR 792 at 798 and *Heyman* v. *Darwins Ltd.*, [1942] Appeal Cases 356 at 368 referred to.

C 4. Though under section 41(b) the Court has power to pass an interim order or injunction or appointment of receiver, the Section does not empower the Court to direct execution of the contract, the extent of which is in dispute and is a matter referable to be adjudicated by the arbitrator. If the Court does so, then the decision of the dispute be-
D comes academic because the contract is executed. [399D-E]

5. Where the question is whether the contract was to be executed by the respondent, if the contract is in fact executed by the respondent by virtue of the order of the Court, then nothing remains of the dispute. There is nothing arbitrable any more and proceedings before the
E arbitrator cannot be forestalled by interim order by ordering execution of the contract before it is decided whether the contractor had any right to the contract for additional work in the grab of preservation of the property. [399E-F]

6. The interim directions given by the High Court that the con-
F tractor be allowed to do the remaining work of extraction of timber of standing marked trees was beyond the competence of the Court. [399F-G]

7. It would be unjust to deprive any party of its dues simply because the work has been done in view of a wrong order or incorrect order of the Court of justice when there was no stay. [400B]

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8. The work in the instant case, has indisputably been done pursuant to an order of the Court of law and the party who has done the work must be paid its remuneration. [400C]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2121
H of 1989.

From the Judgment and Order dated 4.6.1987 of the Jammu and Kashmir High Court in Application No. 180 of 1987. A

Altaf Ahmed and S.K. Bhattacharya for the Appellant.

S.N. Kacker, E.C. Agarwala and Ms. Purnima Bhat for the Respondent. B

The following Judgments of the Court were delivered:

SHARMA, J. The present respondent who is an approved contractor of the Jammu & Kashmir State Forest Corporation (appellant before us) filed an application under ss. 8, 11 and 20 of the Jammu & Kashmir Arbitration Act, 2002 (Smvt.), on the original side of the High Court of Jammu & Kashmir praying for a direction to the Corporation defendant to file an agreement between them fully described therein, and to refer the dispute mentioned in the application to an arbitrator. Jammu & Kashmir Arbitration Act is similar to the Arbitration Act, 1940, enacted in identical language. The Corporation objected, pleading *inter alia* that the entire work allotted to the plaintiff contractor under the agreement had been completed by him without any dispute, and the present claim of the plaintiff is not covered by the agreement in question or its arbitration clause A learned single Judge of the High Court allowed the prayer for reference to the dispute described in the respondent's application, and further granted an interim relief. This judgment is under challenge before this Court by the defendant Corporation. Special leave is granted. C D E

2. As stated in the affidavit of the plaintiff-contractor, the Corporation was created under the Jammu & Kashmir Forest Corporation Act, 1978 and its main functions are: (i) to undertake research programmes and to render technical advice to the State Government on the matters relating to forestry, (ii) to manage, maintain and develop forests transferred or entrusted to it by the Government, and (iii) to undertake removal and disposal of trees and exploitation of forest resources entrusted to it by the Government. In February 1986 the Corporation invited tenders for extraction of timber from an area described as Compartment No. 59-Marwa which included the work of felling and removal of trees. The plaintiff submitted his tender and was ultimately granted the work contract with reference to 4 lac cft. standing volume timber. Subsequently in 1987 he was also entrusted with an additional work contract for a further quantity of 2 lac cft. in the said Compartment 59-Marwa. Although a decision by the authorities had F G H

A been taken for extraction of a total standing volume of 10,08,000 cft., the plaintiff was entrusted with the extraction work of only 6 lac cft. Thus 4,06,000 cft. of standing volume remained in the area to be extracted later. According to his case the plaintiff was entitled to get this additional work in accordance with the practice prevalent in the Corporation and assurances given to him. It was alleged that since the B Managing Director of the Corporation was not agreeable to allow this additional work, the plaintiff approached the Chief Minister of the State who asked the Managing Director to allot him the remaining work. The Manging Director first agreed to issue necessary orders but later refused to carry out the Chief Minister's direction which necessitated the filing of the application before the High Court. The Corpo- C ration denied any such practice and refuted the allegation about any assurance given on its behalf as also the statement about the Managing Director agreeing at one stage to allot the additional work in question on the intervention of the Chief Minister. It was further stated by the Corporation that a large amount of extracted timber was lying in the area and had to be removed. Admittedly the timber had to be trans- D ported to a distant place through difficult terrain (as has been specifically mentioned by the contractor himself) and was, therefore, likely to take a considerable time. The Corporation said that a decision had been taken not to work the Compartment further till the entire timber already extracted was removed to its destination, and there was, therefore, no question of entrusting the remaining work to anybody for the E present. A decision as to how and when the additional trees will be felled and the timber removed is for the Corporation to make and it is under no obligation to the contractor in this regard. So far as the work allotted to the contractor under the agreement is concerned, it is already complete without giving rise to any difference between the F parties.

3. Reliance has been placed on behalf of the plaintiff before us on paragraph 41 of the agreement under which the work contract in respect to 6 lac cft. was obtained by him, and which says that the terms and conditions of the tender notice issued by the Corporation will be G terms and conditions of the agreement. The 15th paragraph of the tender notice reads thus:

> "15. Extension for the additional volume available in the coupe will not be claimed as matter of right. But may be considered by the Management where the achievement is 100%."

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The arbitration clause being Clause 42 of the agreement states thus: A

> "42. Any dispute, difference or question which may at any time arise between the parties in respect of the work to be executed by the second party under this agreement shall be referred for arbitration to the Managing Director, J & K. State Forest Corporation, whose decision shall be final and B binding on both the parties."

As it appears from the plaintiff's application before the High Court, his claim was founded on "procedure", "practice," "custom", and "assurances extended to the petitioner to that effect by the respondent Corporation through its functionaries from time to time." Although it C has been contended before us that since paragraph 15 of the tender notice refers to additional volume of work to be allotted in the future, the agreement between the parties including the arbitration clause must be interpreted to include within its sweep the present claim of the respondent to the additional work of extraction, the case for reference pressed before the High Court rested mainly on the alleged "practice" D and "assurances". The High Court has emphasized in its judgment the fact that the trees in question had already been marked for extraction and, therefore, have to be felled "one day or the other" and deprecated the attitude of the Corporation in the following words:

> "The contention of the learned connsel for the respondents E is that the respondents do not want the remaining timber to be extracted presently for unknown reasons and as such the corporation cannot be compelled for grant of sanction for extraction of remaining marked timber. I think the attitude of the respondent corporation is most derogatory to the facts and circumstances of the case when the petitioner is F prepared to accept all sorts of offers. It cannot be denied that the remaining timber is to be extracted one day or the other and simply to put the petitioner to loss would not be justifiable in any manner."

There was absolutely no justification for the Court to have commented G as above when it was leaving the matter to be decided by the arbitrator. A court, while considering the question whether an alleged dispute between the parties has to be referred for arbitration or not should refrain from expressing its opinion on the merits of the dispute which may embarrass the arbitrator. However, the main issue before us is whether the dispute mentioned in the contractor's application H

A could have been referred to arbitration at all.

4. If the foundation of the claim of the respondent be any alleged assurance or custom or practice, it cannot be said that such claim arises out of the written agreement between the parties; and so the prayer for reference has to be rejected. If the case pleaded is true, B the appropriate forum for the respondent will be a court of law directly granting the relief in an appropriate legal proceeding. It was, however, argued on behalf of the respondent before us that in view of paragraph 15 of the tender notice, quoted earlier, which must be treated as a part of the agreement, the respondent has a right to be considered for allottment of the additional work since his past performance has been C excellent. We are afraid, the impugned judgment of the High Court cannot be defended on this basis and the prayer of the respondent for reference of the dispute, as mentioned in his application before the High Court, cannot be granted under the 15th paragraph of the tender notice aforementioned. The language of the said term is explicit in declaring that the contractor would not be allowed to claim as a matter D of right additional volume of work. His right extends only to a consideration of his case by the management when the question of allotment of additional work is taken up. But by the application filed before the High Court the respondent did not ask for reference of a dispute as to whether he is entitled to consideration or not; the prayer is for reference of a higher claim of immediately getting the additional E work, and this prayer has been allowed. This issue cannot be said to have any connection with the 15th term of the tender notice or any other provision thereof or of the agreement. A reference to the decision of this Court in *Seth Thawardas Pherumal* v. *The Union of India,* [1955] 2 SCR 48, will be helpful. The appellant, a contractor, entered into a contract with the Dominion of India for the supply of bricks. A F Clause in the contract required,

> "..... all questions and disputes relating to the meaning of the specification and instructions hereinbefore mentioned and as to quality of materials or as to any other *question, claim, right, matter or thing whatsoever in any way arising* G *out of or relating to the contract,* specification, instructions, orders or these conditions, or otherwise concerning the supplies whether arising during the progress or delivery of after the completion of abandonment thereof ...."
> emphasis added)

H to be referred to arbitration. It was agreed that the bricks would be

prepared in lots and it would be the duty of the Government to remove the bricks as soon as they were ready for delivery. In order to keep to the schedule for delivery, the contractor had to prepare 'katcha' bricks and place them in his kilns for baking, and while this lot was baking he had to prepare another lot of 'katcha' bricks ready to take the place of the baked bricks as soon as the Government removed them. At a certain stage the Government department failed to remove the baked bricks in time which caused a jam in the kilns and prevented the contractor from placing a fresh stock of unburnt bricks in the kilns. Consequently the stock pile of katcha bricks kept on mounting up when the rains set in, destroying 88 lacs of katcha bricks. The contractor claimed the loss arising out of the neglect of the Government department in performing its duty in time. The Government denied the claim and a reference of the dispute was made to the arbitrator designated in the agreement who made an award and filed it in court. On the Constitution coming into force the Dominion of India was replaced by the Union of India as the defendant in the case and it was contended on its behalf that the katcha bricks did not form part of the contract and that the loss that was occasioned by the damage to them was too remote to be covered by the arbitration clause. The second ground of defence was based on Clause 6 of the agreement which absolved the Government from any liability for a damage to unburnt bricks. The stand of the contractor was that the chief reason of the destruction of the katcha bricks was the failure of the department to lift the monthly quota of the bricks in accordance with the written agreement; and, Clause 6 of the agreement referred only to such cases where the department had no control, and would not cover a case of its own default. The Supreme Court did not agree with him and set aside the award, *inter alia* observing, that if he chose to contract in the terms including Clause 6 of the written agreement he could not go back on his agreement when it did not suit him to abide by it. In the case before us, the plaintiff contractor is trying to connect the allotment of future work by a reference to paragraph 15 of the tender notice which specifically says that additional work could not be claimed as a matter of right. The High Court, therefore, was not correct in interpreting the aforementioned Clause 15 in the following words:

> "There was clause 15 in the tender notice according to which extension of additional volume available in the coupe would not have to be claimed by the contractor as a matter of right but he would have to be considered by the management where his achievement was 100%. In the present case the achievement of the petitioner was 300% and

A under such circumstances the petitioner had all the right to claim additional work in the said coupe."

Besides, if this view be assumed to be correct, what was there left for the arbitrator to decide? Further, it is not alleged or suggested that the Corporation has ever indicated its unwillingness to consider the B respondent when it takes up the question of allotting the additional work. In absence of a repudiation by the Corporation of the respondent's right to be considered, if and when occasion arises, no dispute can be said to have arisen which may be referred for arbitration. In order that there may be reference to arbitration, existence of a dispute is essential and the dispute to be referred to arbitration must arise C under the arbitration agreement. When in the future, the Corporation makes a decision for the execution of the additional work and takes up the question of executing a contract for the purpose, the stage for consideration of the plaintiff-respondent's claim would be reached and a dispute may then arise if the Corporation refuses to consider the claim. Neither the agreement nor the tender notice deals with the D question as to the conditions and time for grant of any additional work to the plaintiff and if his claim be interpreted as a demand for immediate allotment of any future work, the same cannot be connected with the agreement or the tender notice. We, therefore, do not agree with the observations of the High Court that the conduct of the Corporation in not taking up immediate deforestation of a part of E Compartment No. 59-Marwa is reprehensible, simply for the reason that the trees in the area concerned are "to be extracted one day or the other" or that the plaintiff has the right to claim the additional work on the ground that his achievement in the past has been more than 100%. We also hold that the claim raised by the plaintiff in his application before the High Court is not covered by the arbitration clause and F cannot be referred for a decision of the arbitrator. The order of reference passed by the High Court, therefore, has to be set aside.

5. By the interim order the High Court permitted the plaintiff to execute the additional work claimed by him without waiting for the award. On the quashing of the main order of reference, the interim G order automatically disappears, but we would, however, like to briefly indicate the scope of Court's power to issue interim orders at the time of reference of a dispute to arbitration, and point out how in the present case the High Court was in grave error in granting the interim relief. The relevant provision in the Jammu & Kashmir Arbitration H Act, 2002 (Smvt.) is in s. 41(b) which is quoted below:

"41. Procedure and powers of Court.—Subject to the main provisions of this Act and of rules made thereunder— A

(a) .....

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court: B

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any such matters." C

S. 18 deals with the power of Court to pass interim orders after award is actually filed in Court. So far as clause (a) of s. 41 is concerned, it makes only the procedural rules of the Civil Procedure Code applicable. The source of power to grant interim relief cannot be traced to clause (a), otherwise as was pointed out in *H.M. Kamaluddin* v. *Union of India,* [1983] 4 SCC 417, clause (b) would become otiose. So far as clause (b) is concerned, it circumscribes the Court's power within the limits indicated in the Second Schedule and further qualifies it by declaring in the Proviso that it cannot be used to the prejudice of any of the powers of the arbitrator. The interim direction can be issued only "for the purpose of" arbitration proceedings and not to frustrate the same. In the present case the plaintiff-contractor was allowed by the High Court to execute the extraction work which was the subject matter of the arbitration. Mr. Kacker, appearing for the plaintiff-respondent, argued that in pursuance of this part of the impugned judgment the plaintiff was able to cut down all the trees in question before this Court passed an order of stay. In other words it is claimed on behalf of the plaintiff-respondent that he was able to completely frustrate the arbitration proceeding in a very short time on the strength of the interim order. This statement of fact has been seriously challenged by the petitioner Corporation; but whatever be the factual position, the High Court by granting the interim relief, not in the shape of an injunction in the negative form, but by a mandatory direction clothing the plaintiff with the right to do something which he could have been entitled to, only after a final decision on the merits of the case in his favour, committed a serious error. Paragraph 1 of the D E F G H

A Second Schedule speaks of the preservation of subject matter of the reference and paragraph 3 also highlights that aspect. The 4th paragraph which mentions—"interim injunction or the appointment of a receiver"—has also to be interpreted in that light specially because of the language of clause (b) of s. 41 and the Proviso thereto. The second part of the judgment under appeal is also, therefore, set aside.

B

6. It has been averred before us on behalf of the plaintiff-respondent that all the trees in question were cut down, and so the plaintiff must be permitted to complete the remaining work including their transportation to the destination. The learned counsel for the Corporation placed reliance on the statements in several affidavits and contended that if the entire circumstances including the period which C could have been available to the respondent for the purpose of felling the trees, are examined, there is no escape from the conclusion that the respondent had felled the trees or majority of them after service of the stay order passed by this Court. We do not think it necessary to examine and decide this controversy as in our view the respondent, in D the facts and circumstances of this case, cannot take any advantage from or claim compensation for the hurried steps he alleges to have taken under the strength of the illegal order interim in nature, which we are setting aside.

7. In the result, the appeal is allowed. The impugned judgment E of the High Court is set aside and the respondent's application filed before the High Court for reference is dismissed. The respondent shall pay the costs of this Court and of the High Court to the appellant-Corporation.

SABYASACHI MUKHARJI, J. I have read the judgment pro- F posed to be delivered by L.M. Sharma, J. with which the learned Chief Justice has agreed. With great respect, I am unable to agree with them on the view that there was no arbitration agreement subsisting covering the dispute in question between the parties. It is, therefore, necessary to refer to certain facts, as I view these.

G This appeal by special leave is directed against the judgment and order of the High Court of Jammu & Kashmir, dated 4th June, 1987. The Jammu & Kashmir Forest Corporation is the appellant. The undisputed facts leading to this appeal are that one Abdul Karim Wani, the respondent No. 1, filed an application for referring certain matters alleged to be in dispute to an independent arbitrator; and that for the H last 15 years the respondent had been working as a contractor for the

appellant Corporation, namely, Jammu & Kashmir Forest Corpn. and was carrying on various activities in different forest areas in Jammu Province, including felling, machine sawing, pathroo, paccinali, rope span, mahan and transportation. A

It is stated that in February, 1986 the said Corporation issued tenders for felling, handsawing, pathroo, paccinali and mahan work of timber to be extracted from compartment No. 59 Marwah. In response thereto the petitioner to the original application being the respondent herein, submitted his quotation and offered the lowest rate of 11.74 per cft. and thereby secured the contract. A formal agreement was also executed between the parties. In October, 1987 after about 7 months from the issuance of first work order the appellant Corporation through its General Manager (Extraction) issued a sanction for further quantity of 2 lac cft. sawn volume in compartment No. 59 Marwah, on the same rates, terms and conditions as contained in the original contract. The sanction appears at pages 26 & 28 of the present appeal papers before us. B C

It appears that the total marking carried out in compartment No. 59 was 10,08,000 cft. standing out of which only 6 lac cft. was sanctioned in favour of the respondent. The compartment in question is at a distance of over 70 kms. from the nearest road point and the timber extracted from the compartment had to travel by pathroo, paccinali and mahan through Chenab river for a total distance of 80 kms. before it is collected at loading point of Dedpeth. D E

It is, further, the case of the respondent that "as per the procedure, practice, custom and assurances extended to the respondent by the appellant Corporation through its functionaries, from time to time," the entire marking conducted in a particular compartment for extraction *was required* (emphasis supplied) to be handed over to the respondent in compartment No. 59. As regards sale, it is suggested that as the compartment is situated in one of the remotest area of Jammu province where making arrangements for extraction of timber including cartage/carriage of foodgrains, saws, tools and implements is very difficult, it was never intended that the balance work remaining in the compartment for extraction would be given to any other contractor. F G

The case of the respondent is that acting upon the assurances and representations of the appellant Corporation that the entire work in the aforesaid compartment would be handed over to him, the respon- H

A dent had made adequate arrangement after investing Rs.5 lacs by way of provision for rations, saws, tools and implements etc. All these arrangements at that scale were necessary and were made just to extract entire marked timber from the compartment in question and not just initially tendered quantity. That would have been wholly uneconomical.

B

It was further asserted that there was also the practice in the Corporation that once a compartment was handed over to the contractor for work, it was taken back from him only after the entire available work in the said compartment stood concluded. The contractor further alleged that the appellant Corporation was not allotting rest of the work to him contrary to the policy adopted and assurances C extended, as mentioned hereinbefore. The respondent furnished instances where such conduct or procedure of making allotments, as alleged by the respondent, had been followed. We were referred to the sanction in favour of M/s. Ghulam Hussain, Sukhjinder Singh in respect of compartment No. 82 Lander on 28.4.87, Mst. Jana Begum D in respect of compartment No. 30-B, Dachhan and 62 Marmat dated 10.3.87, Sh. Rehmatullah Bhat for compartment No. 19A Paddar dated 5.5.87, Nassarullah Malik for compartment No. 16 Ramban on 12.5.87 and Irshad Ahmed Shah in respect of compartment No. 62 Sewa dated 4.2.87.

E On behalf of the Corporation and others, it was stated before the learned Judge of the High Court that there was no assurance and no practice regarding grant of the contract to the respondent contractor Abdul Karim Wani, in the manner alleged. Further, it was alleged that the respondent and the Corporation had decided not to work on the compartment till the entire extracted timber was removed to sale F depot. Once that decision was there the instances quoted by the contractor proved useless, according to the appellant. It, however, very clearly appears that in compartment No. 59 Marwah marked standing trees were to the extent of 10,08,000 cft. The second aspect emerging is that out of this volume only 6 lac cft. standing timber had been sanctioned in favour of the contractor on two different occasions, and G such timber had been extracted, removed and taken to the loading point. The only dispute subsisting was about the rest of the standing trees i.e., 4,80,000 cft. It is not disputed that *the said remaining cfts. have been marked.* These remained as marked timber which required to be extracted. *The respondent claims preference for grant of contract of extraction by way under the clause in the relevant sanction.* The only H contention of the appellant was that they had no intention to extract

the said timber till other extracted timber was taken to the depot. The case of the appellant as noted by the learned Judge in his judgment, was that the remaining timber to be extracted presently for 'unknown reasons' was not to be then extracted and, as such, the Corporation could not be compelled to grant or sanction extraction of remaining marked timber.

The learned Judge by his impugned judgment and order deprecated the conduct of the authorities concerned. He proceeded on the basis that inasmuch as the remaining timber had to be extracted one day or the other, the entire work should have been given to the respondent. In the present case, the learned Judge noted that the performance of the respondent contractor as 300%. The respondent was entitled to the grant of this contract even if his performance had merely been 100%. The learned Judge found that there were two different points to be examined. He found that there existed a dispute between the parties touching the agreement executed between them. The matter in dispute was referred to the named arbitrator, namely, the Managing Director of the State Forest Corporation, who was directed to adjudicate upon the same and submit his award within the statutory period of four months.

The learned Judge went further and as an interim measure directed that the petitioner before him, namely, the respondent herein be allowed to do the remaining work of extraction of timber of standing marked trees in compartment No. 59 Marwah and the rates were to be determined by the arbitrator, after hearing both the parties. This order is the subject-matter of the appeal.

The main question involved in this appeal is whether there was any subsisting arbitration agreement in respect of the matters sought to be referred. The second aspect involved herein is whether the learned Judge was justified in making the impugned order by directing that the petitioner be allowed to do the remaining work of extraction of timber of standing marked trees in compartment No. 59 Marwah, and the rates be determined by the arbitrator after hearing both the sides. It was contended on behalf of the appellant that the learned Judge travelled beyond the scope of his jurisdiction. It was submitted that there was no subsisting arbitration agreement covering the entire area of 10,08,000 cft. There were only two subsisting contracts one being a contract for felling trees of 4 lacs cft dated 6th March, 1986, and another for 2 lacs cft in addition, dated 28th October, 1986. The agreement dated 6.3.86 provided that dispute in respect of these

A should be referred to arbitration but there was, according to the appellant, no subsisting contract in respect of the remaining 4 lacs cft. The respondent had only a right to be considered in respect of the rest and yet no contract had been granted to him. Therefore, there being no subsisting contract there was no scope for reference to arbitration. In my opinion, it is not the correct way to look at the facts of this case. It B appears from the first agreement, which is at page 142 onwards of the present paper-book that it contained, *inter alia,* the following clauses.

> "The quantum of work under each activity/sub-activity is estimated and as such cannot be guaranteed and can be increased or decreased upto 25% by the General Manager Ext. East Jammu East on the contract rates subject to prior C approval of the Managing Director.
>
> Any subsequently marking carried out in a section/unit under work with the contractor shall be included in this increase of 25%."

D

It also contained clause 15 which was to the following extent:

> "Extension for the additional volume available in the coupe will not be claimed as matter of right. But may be considered by the Management where the achievement is E 100%."

Clause 17 of the said agreement which provided for reference to arbitration was the following:

> "Any dispute, difference, question which may at any time F arise between the parties in respect of the works to be executed by the contractor(s) shall be referred for arbitration to the Managing Director J&K SFC whose decision shall be final and binding on both the parties."

In respect of the second contract that similar terms were there, G was not disputed before us. Therefore, even though where the achievement of the contractor was 100% the contractor had a right only to be considered for grant of the additional work. In this case it was contended on behalf of the appellant-Corporation that the Corporation could not be compelled by the process of an application under Section 20 of the Arbitration Act to grant additional work to the con- H tractor. On the other hand, the contractor had pleaded that where the

achievement of the contractor in respect of the subsisting contract was 100% the contractor had a right to be considered for grant of the additional work, while in this case his performance was 300%. Additional volume available in the coupe was liable to be granted to him or, at least, he was entitled to be considered in accordance with equity and justice. The contractor has further alleged that while others in similar position had been granted this additional work, he had been wrongfully denied. His claim was that he having fulfilled 300% performance, was entitled to the remaining work of the additional work.

It was contended on behalf of the appellant before us that there cannot be any application for filing of an arbitration agreement for the arbitrator in respect of the contract which had not been entered into. I am unable to accept this submission. Clause 17 of the arbitration agreement provided that any dispute, difference, question which might at any time arise between the parties in respect of the *works to be executed by the contractor(s)* should be referred to the arbitration of the Managing Director of the Jammu & Kashmir State Forest Corpn. Therefore, it appears to me that dispute which had arisen between the parties in respect of the "works to be executed" by the contractor was a dispute which was referable in terms of the clause 17 and the dispute was, according to the pleadings, the custom, practice and procedure of granting additional volume of available coupe where the timber trees had been marked but not extracted to be considered by the Government for grant of the contract. The contract alleged if such proper consideration or lawful consideration in accordance with the principles of equity and justice had been made, the contract would have been granted to the contractor. Therefore, the contractor claimed that he was entitled to the grant of additional volume of work. In my opinion, there was a dispute whether the contractor was entitled to the grant of additional volume of the work. Such dispute was a dispute between the parties in respect of the "works to be executed by the contractor."

I am clearly of the opinion that the dispute in this case was a dispute between the parties in respect of the "works to be executed by the contractor". In that view of the matter and in the light of clause 15 read with clause 17, the dispute in this case was clearly referable to arbitration of the Managing Director, Jammu & Kashmir State Forest Corpn.

An arbitration agreement is one which is defined in Section 2(a) of the Arbitration Act, 1940 as a written agreement to submit present or future differences to arbitration. There was, in this case, an arbitra-

A tion agreement, that is to say, the parties had been *ad idem*. The agreement was in writing. It was not a contingent or a future contract. It was a contract at present time to refer the dispute arising out of the present contract entered into by the parties as a result of which the contractor got a right or a privilege to ask for consideration of grant of the further work. It was not as sought to be argued a mere right to get
B the additional work. Hence, in my opinion, it could not be contended that there was no agreement. Endeavour should always be to find out the intention of the parties, and that intention has to be found out by reading the terms broadly, clearly, without being circumscribed. This contention of the appellant cannot, therefore, be accepted.

C In the light in which I have read the facts, I am unable to accept the position that the claim raised by the plaintiff in this application before the High Court was not covered by the arbitration clause. The amplitude of the arbitration clause, in my opinion, was wide enough and should be so read for the reasons mentioned hereinbefore. If that is the position then the order of reference by the High Court was not
D bad and cannot be set aside. I am unable to agree that the decision of this Court in *Seth Thawardas Pherumal* v. *The Union of India,* [1955] 2 S.C.R. 48 indicated that in the facts of this case, there could not be reference to the arbitration. That was a case where the appellant, a contractor, entered into a contract with the Dominion of India as it then was for supply of bricks. A clause in the contract required all
E disputes arising out of or relating to the contract to be referred to arbitration. Disputes arose and the matter was duly referred. The arbitrator gave an award in the contractor's favour. It was held that it was not enough for the contract to provide for arbitration but something more was necessary. An arbitrator only got jurisdiction when either, both the parties specifically agreed to refer specified matters
F or, failing that, the court compelled them to do so under the arbitration clause if the dispute was covered by it. That case was mainly concerned with a specific question of law. This Court referred to the decision of this Court in *A.M. Mair & Co.* v. *Gordhandass Sagarmull*, [1950] S.C.R. 792 at 798 where this Court quoted a passage from Viscount Simon's speech in *Heyman* v. *Darwins Ltd.*, [1942] Appeal
G Cases 356 at 368. Here in this case the clause as I read it gave the respondent a right to be considered. The respondent's grievance was, if properly considered his performance being 300% achievement he was entitled in the facts and circumstances set out hereinbefore to the grant of the contract and further similarly placed persons had been so given. That right had not been duly considered. *That is the dispute in*
H *the present case* and *that dispute is clearly referable to the arbitration*

clause as mentioned hereinbefore. I am, therefore, unable to accept the position that the order of reference passed by the High Court is bad. A

The second challenge to the order of the High Court was that the order so far as it directed under Section 20 of the Arbitration Act that the petitioner be allowed to do the remaining work of extraction of timber of standing market trees in compartment No. 59 Marwah, was wholly without jurisdiction. For this reference may be made to Section 41 of the Arbitration Act which provides that for the purpose of and in relation to arbitration proceedings, the Court has such powers to pass interim orders for detention, preservation, interim custody and sale of any property—the subject matter of the reference for preservation or inspection of any property or thing—the subject-matter of the reference or as to which any question may arise therein for taking of samples and making observations and experiments; for securing the amount in difference in the reference; for granting an interim injunction and appointing a receiver as the Court has in relation to any proceeding before it. But though under Section 41(b) the Court has power to pass an interim order of injunction or appointment of receiver, in my opinion, the Section does not empower the Court to direct execution of the contract, the *extent of which is in dispute* and is a matter referable to be adjudicated by the arbitrator. If the Court does so then the decision of the dispute becomes academic because the contract is executed. Where the question is whether the contract was to be executed by the respondent, if the contract is in fact executed by the respondent by virtue of the order of the Court, then nothing remains of the dispute. There is nothing arbitrable any more and proceedings before the arbitrator cannot, in my opinion, be forestalled by interim order by ordering execution of the contract before it is decided whether it had any right to the contract for additional work in the garb of preservation of the property. B C D E F

In that view of the matter, I am clearly of the opinion that the interim directions given by the High Court that the "contractor be allowed to do the remaining work of extraction of timber of standing marked trees in compartment No. 59, Marwah" was beyond the competence of the Court. In this respect I agree with my learned brothers. G

But so far as the Court directed that the rates be determined by the arbitrator after hearing both the parties, this direction, in my opinion, was clearly within the jurisdiction provided this dispute was referred to the arbitration. In this case unfortunately after the order of the High Court was passed and before any order of stay could be H

A passed by this Court in a petition under Article 136 of the Constitution, the respondent had done the work of extraction of timer of standing marked trees in compartment No. 59 Marwah. Therefore, it would be inappropriate to interfere with this order. The events have overreached the decision of the Court. It would be unjust to deprive any party of its dues simply because the work has been done in view of a wrong order or incorrect order of the Court of justice when there was no stay. Would it be just to deprive a suitor of his dues in this manner under Article 136 of the Constitution? I have no doubt in my mind that it would be unjust. The work indisputably has been done pursuant to an order of the Court of law and the party who has done the work must be paid its remuneration. How would that remuneration be settled, would it be by a decree in the suit or would it be by adjudication of an award? In the view I have taken that there was a valid reference on the contention of the respondent, this question which was incidental thereto must be decided along with that contention. In any view of the matter, however, for determining the work done pursuant to the liberty or right given by the High Court which was not stayed by this Court arbitration undoubtedly is a better method of finding out the dues in respect of that work done. I would not, therefore, in any event alter this direction of the High Court.

In the aforesaid view of the matter, in my opinion, it would be inappropriate to interfere with the interim direction of the High Court though the direction was beyond jurisdiction. In the premises I would have disposed of the appeal by directing the arbitrator to determine the rates in respect of the extraction of the remaining timber of standing marked trees in compartment No. 59 Marwah.

In the aforesaid view of the matter, I would have made no order as to costs.

N.V.K. Appeal allowed.