
(1994) 08 MAD CK 0099
In the Madras High Court

L.A. Builders Private Limited

APPELLANT

Vs

Shrilckha Theatres Private Limited, (Formerly known as Shri
Kanakadhara Theatres Private Limited)

RESPONDENT

Date of Decision : 12-08-1994

Acts Referred:

Arbitration Act, 1940 — Section 41

Citation : (1994) 2 MLJ 678

Hon'ble Judges : AR. Lakshmanan, J

Bench : Division Bench

Judgement

AR. Lakshmanan, J.—Heard Mr. R. Krishnamoorthy, Senior Advocate, for applicant and Mr. T.R. Rajagopalan, Senior Advocate for respondent. The plaintiff in the above suit is the applicant in the above application which is for an injunction restraining the respondent/defendant, his agents, servants etc., from interfering, in any manner, with the peaceful possession of the property described in the schedule to the Judge's summons.

2. The applicant filed the above suit for permanent injunction restraining the defendant, their agents, servants etc., from, in any manner, interfering with the peaceful possession of the applicant in respect of the property described in the schedule to the plaint. The suit was filed u/s 41 of the Arbitration Act.

3. Short facts are as follows : The applicant and the respondent entered into an agreement on 15.12.1993. Under the said agreement, the applicant was authorised to develop the property. The terms of the agreement agreed to between the parties have been incorporated under the said agreement. The applicant paid a sum of Rs. 10 lakhs as interest free security deposit and the balance amount is payable after the defendant obtains approval of the agreement from the Appropriate Authority of the Income Tax Department. According to the applicant, they were put in possession in part performance of the agreement dated 15.12.1993. Clause 16 of the agreement has not been relied on by the applicant for the purpose that the applicant has been authorised

to develop the property by constructing new buildings thereon in accordance with the plans and specifications to be sanctioned by the M.M.D.A and the Corporation authorities. In pursuance of the agreement, the applicant has taken possession of the property and has been in possession of the same ever since the conclusion of the agreement between the parties. The applicant has put up his name-board as developer of the property, in the suit property. The applicant as person in possession, has employed persons for safeguarding the property by employing security personnel. However, the Appropriate Authority of the Income Tax lodged the application for approval on the ground that in view of the land ceiling permission granted already, the land cannot be sold separately and that for the purpose of sale of undivided shares, the basement and the structure upto lintal level must be raised and that the agreement should be modified accordingly. Therefore, a revised agreement was prepared with regard to these terms. According to the applicant, the revised agreement was allowed to be forwarded to the authorities for obtaining approval. However, when the agreement was finalised, the respondent refused to sign the agreement on the ground that he has got higher offers. Apparently with a view to extract more monies from the plaintiff, the respondent has refused to sign the agreement. Apart from this, the respondent has been threatening to interfere with the applicant's possession relating to the property described in the schedule to the plaint. The applicant has always been ready and willing to fulfil their obligations. Under Clause 9 of the agreement it was agreed between the parties that the parties will co-operate in the matter of obtaining approval of the agreement the Appropriate Authority. Consequently, the respondent is bound to co-operate with the applicant in the matter of submitting a supplemental or revised agreement with a view to enable the parties to obtain approval of the agreement from the Appropriate Authorities. However, the respondent taking advantage of the position, is attempting to remove the name board already put up by the applicant over the suit property. Therefore, the applicant has filed the above suit for permanent injunction. It is also stated in the affidavit that the agreement provides for resolving the disputes by arbitration proceedings. However, with a view to defeat the rights of the applicant, the respondent is attempting to take possession by force by employing able-bodied men. Hence the applicant has to file the present suit for appropriate relief. The applicant has also reserved their right to file a separate suit for specific performance of the agreement, as according to them, the time for specific performance has not yet arrived and therefore, the applicant has filed the suit for permanent injunction.

4. On 11.7.1994, after hearing the senior Counsel for the applicant, I granted an injunction as prayed for. The respondent has now filed a counter affidavit and also filed a petition to vacate the interim injunction granted already. According to the respondent, the possession of the property still continues to be with the owner, viz., the respondent and only licence is given to the developer the applicant/plaintiff herein to put his name board and enter upon the property for the purpose of soil testing, surveying, measuring and marking of the boundaries

of the site. Other than the above, the applicant, company has no independent right of its own over the suit property. According to the respondent, the plaintiff herein was not put in possession of the property pursuant to the agreement and the respondent is in possession of the same continuously. It is the case of the respondent that the Appropriate Authority by their communication dated 29.3.1994 declined to issue No Objection Certificate on the ground that it would violate orders passed by the Competent Authority under the Urban Land Ceiling Act. Thereupon, the respondent called the applicant to receive back the advance as the agreement became unenforceable. It is the specific case of the respondent that the entire agreement which was entered into between the parties, is subject to the Appropriate Authority granting a No Objection certificate and reading of the agreement will show that every term is subject to granting of N.O.C. by the Appropriate Authority. The respondent also denied that the parties agreed to have a supplemental or revised agreement. According to the respondent, no such agreement was reached between the parties for effecting any supplemental or revised agreement, and as far as nameboard is concerned only a licence was given to the applicant to put up the nameboard and once the agreement becomes unenforceable, the applicant will have to remove the nameboard. In the circumstances, it is stated that the applicant is not entitled to seek any injunction against the respondent who is lawful owner and is in possession of the property.

5. I have carefully gone through the plaint, affidavit counter-affidavit and the counter-affidavit filed by the plaintiff in Application No. 3774 of 1994 and the agreement dated 15.12.1993 and other documents. Arguments were advanced by Mr. R. Krishnamoorthy, Senior Advocate and Mr. T.R. Rajagopalan Senior Advocate for the respective parties. Mr. R. Krishnamoorthy, learned Senior Advocate, would submit that the applicant is entitled for an order of injunction since they were put in possession of the property pursuant to the agreement dated 15.12.1993. In this connection, he invited my attention to Clauses 10, 11, 12, 13, 16, 17, 21 and 23 of the agreement, which are re-produced herein.

Clause 10 : Upon signing of this Agreement the Owner hereby grants an irrevocable licence and authority to the Developer to enter in, to and upon the said property, for the purpose of soil testing, surveying, measuring and marking the extent and boundaries of the site (said property) and for displaying the nameboard of the Developer with the detailed particulars of the commercial-cum-office Complex that is proposed to be built on the said property and for doing any other pre-construction job on the said property.

Clause 11 : The parties herein mutually agree that this Development Agreement is subject to the approval of the title of the owner to the suit property by the Advocate for the Developer. It is mutually agreed between the parties herein that the opinion of the Advocate for the Developer as to the title of the owner to the said property agreed to be granted for development shall be final and binding on the parties to this Agreement. The owner hereby agrees and undertakes to produce all the Original Title Deeds and other documents pertaining to the said

property before the Advocate for the Developer and furnish him with all the information required by him and obtain the signatures of such other parties in the Affidavits and other documents and deeds to be prepared by the Advocate for the Developer for enabling him to certify that the Owner's title to the said property is good and marketable.

Clause 12 : If the title of the Owner to the said property is not approved by the Advocate for the Developer or if the permission for development of the said property is not granted by the Appropriate Authorities appointing under the provisions of the Chapter XX-C of the Income Tax Act, the Owner hereby agrees and undertakes to refund the Security Deposit of Rs. 10,00,000 to the Developer immediately.

Clause 13: If after the approval of the title of the owner to the said property by the Advocate for the Developer and after obtaining the permission for development of the said property under Chapter XX-C of the Income Tax Act, the owner commits breach of all or anyone or more of the terms and conditions stipulated in this Agreement, the Developer shall have the right to sue for the specific performance, of this contract or in the alternative claim liquidated damages. If after the approval of the title of the owner to the said property by the Advocate for the Developer, and after obtaining the permission for development of the said property under Chapter XX-C of the Income Tax Act, the Developer fails to pay the balance of consideration and perform its part of the contract within the period and in the manner stipulated in these presents, the owner shall have the right to sue for the specific performance of this contract or in the alternative claim liquidated damages.

Clause 16: The owner shall immediately irrevocably authorise and empower the Developer to enter into and upon the said property and to carry out the development work and construction of the new buildings thereon pursuant to the terms and conditions stipulated in this Agreement. The owner confirms that the Developer shall be in quiet enjoyment of the said property for carrying out the purposes and objects of this Agreement and in part performance and implementation of this Agreement.

Clause 17: The owner shall irrevocably authorise and empower the Developer to develop the said property by constructing new buildings thereon in accordance with the plans and specifications to be sanctioned in the name of the owner or their Power Agent by the Corporation of Madras/M.M.D.A. and or the other concerned authorities in pursuance of this Agreement.

Clause 21: The owner or anyone else claiming under them shall not interfere with the construction work to be carried on by the Developer on the said property in pursuance of this Agreement, the Owner or anyone else claiming under them shall not interfere with the possession and enjoyment, by the allottees/purchasers of the adjacent office space, Show Rooms, Shops and Garages etc. constructed and allotted by the Developer to the various allottees of

their choice in the said Commercial-cum-office Complex.

Clause 23: The owner hereby agrees and undertakes to co-operate with the Developer for obtaining at the Developer's expense all certificates and or other documents pertaining to the said property including the Urban Land Ceiling Clearance Certificate. The Owner shall apply for and obtain Income Tax Clearance Certificates and furnish the Developer with the said Certificates periodically for enabling the Developer to register the sale deeds pertaining to the undivided shares in the said property in favour of the various allottees/nominees of the Developer in pursuance of the terms and conditions contained in this Agreement.

He also invited my attention the Clause 24 of the agreement which provides that the Developer/applicant shall be entitled to approach the concerned authorities and offices for and on behalf of the Owner to get the said amendments and variations duly sanctioned. Lastly he drew my attention to Clause 31 which runs thus:

Clause 31 In the event of any dispute/difference in regard to any matter relating to this Agreement including the interpretation of the clauses thereof the same shall, if not settled by mutual discussions between the Owner and Developer, be referred to Mr. R. Vijayaraghavan and Mr. P. Sivagnanav, Advocates, whose decision in this regard shall be final and binding on all the parties herein.

According to the learned senior advocate, the applicant has been authorised to develop the property by constructing new buildings thereon in accordance with the plans and specifications to be sanctioned by the M.M.D.A. and the Corporation authorities and the applicant in pursuance of the agreement has taken possession of the property and has been in possession of the same ever since the conclusion of the agreement between the parties. The applicant has put up his name-board as developer of the property in the suit property. The applicant has also paid a sum of Rs. 10 lakhs as interest-free security deposit and the applicant is ready and willing to perform their part of the obligations and also ready to pay the balance amount after the respondent obtains approval of the agreement from the appropriate authority of the defendant as party. It is also further contended that the Appropriate Authority of the Income Tax lodged the application for approval on the ground that in view of the land ceiling permission granted already, the land cannot be sold separately and that for the purpose of sale of undivided shares, the basement and the structure upto lintal level must be raised and that the agreement should be modified accordingly and hence it was agreed between the parties that a supplemental or revised agreement will be entered into between the parties with regard to be forwarded to the authorities for obtaining approval but, however, the respondent with ulterior motive, has now refused to sign the agreement for the reasons best known to them, apparently with a view to extract more monies from the applicant the respondent has refused to sign the agreement. As pointed out by Mr. R. Krishnamoorthy, learned senior Counsel, the agreement entered into between the parties provides for resolving the disputes by arbitration

proceedings as per Clause 31 of the agreement. Both parties have agreed in regard to the names of the arbitrators on their side and the respondent, with a view to defeat the rights of the applicant, is attempting to take possession by force by employing anti-social elements and hence the applicant has to file the present suit for appropriate relief, pending resolution of the dispute by arbitration. In fact, it is stated that the applicant issued a notice by registered post to both the arbitrators viz., Mr. R. Vijayaraghavan and Mr. P. Sivagnanam, dated 12th July, 1994, inviting their attention to the disputes and differences with regard to the construction of the meaning of certain terms and conditions in the agreement dated 15.12.1993 which have arisen between the parties and since the same could not be amicably settled by mutual discussion, they were obliged to refer the same to the arbitrators for Arbitration as they were named as Arbitrators in Clause 31 of the Development Agreement. The applicant has also stated that they are prepared to submit themselves to be examined by the arbitrators on oath in relation to the matters in difference and to produce before the arbitrators all the documents in their possession which may be required by the arbitrators for proceedings with the arbitration and for adjudicating upon the matters under dispute. In fact, the Arbitrators have, on 18.7.1994, commenced the proceedings and convened a meeting on 16.7.1994. But the enquiry could not take place on that date since one of the arbitrators Mr. R. Vijayaraghavan could not attend the proceedings due to ill-health. Therefore, the arbitrators gave notice to both parties that the arbitration enquiry shall commence on Friday the 22nd July, 1994 at 6 p.m. at the office of Mr. R. Vijayaraghavan, Advocate and called upon the concerned parties to attend the meeting and to file their statements of claims etc. in writing along with documentary evidence if any, in support thereof. Thus it is seen that the arbitration proceedings have commenced and the parties to the agreement dated 15.12.1993 have participated in the proceedings. According to Mr. R. Krishnamoorthy, the applicant reserves their right to file a suit for specific performance at a later stage, as the time for specific performance has not arrived at and since the matter is pending before the arbitrators, till the arbitration proceedings are over, the applicant's possession should be preserved and the respondent shall be restrained from interfering with the applicant's possession by force. The learned senior advocate also drew my attention to Section 41 of the Arbitration Act which reads thus:

Section 41 : Procedure and powers of Court: Subject to the provisions of this Act and of rules made thereunder:

(a) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the court and to all appeals under this Act: and

(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:

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 of such matters.

Section 41(b) provides that 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. Second Schedule also deals with the powers of court which reads as follows: The Second Schedule Powers of Court:

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.
2. Securing the amount in difference in the reference.
3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.
4. Interim injunctions or the appointment of a receiver.
5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

Hence, the learned senior advocate has contended that u/s 41, the court can make an order for interim injunction although an arbitration proceedings is not actually pending on the date of the plaint viz., 8th July, 1994 and under the 4th item in the Second Schedule (interim injunctions or the appointment of a receiver), this power is conferred on the Court for the purpose of, or in relation to, the arbitration proceedings. Further, where an application for injunction has been filed in a suit which is pending and which has not been stayed, the court has power, apart from Section 41 of the Arbitration Act, to make an order for interim injunction in a pending suit under the CPC as well as in the exercise of its inherent powers. Since the plaintiff has already invoked Clause 31 of the Agreement and has addressed a letter dated 12.7.1994 to the Arbitrators to enter upon the reference, it is contended by the learned senior advocate, that the applicants are entitled to seek injunction before this Court, so that the status quo could be maintained as otherwise, the applicant will be put to serious and irreparable loss and great hardship. Mr. T.R. Rajagopalan, the learned senior advocate appearing on behalf of the respondent, has contended as follows:

1. The remedy of the applicant is to sue for specific performance.
2. The suit filed u/s 41 of the Arbitration Act is not maintainable, since on the date when they file the suit 8th July, 1994 and obtain interim order, no

arbitration proceedings was pending.

3. As on date, no dispute claim has been referred or filed before the Arbitrators to decide and the suit filed by the applicant before the commencement of the arbitration proceedings, is not maintainable.

4. There is no clause in the original agreement about the supplemental agreement.

Mr. T.R. Rajagopalan, in support of his contention, has also cited T. Parameswari v. S.S. Investment Private Limited, Madras-18 (1993) 1 L.W. 109, Padmanabhan V.A. v. Narasimhan (1993) 1 L.W. 169, Krishnamoorthy Koundar Vs. Paramasiva Koundar, , Janardan Mohapatra v. Executive Engineer, Sambalpur Central Works Division, C.P.W.D. AIR 1989 Ori. 59, Baby Paul Vs. Hindustan Paper Corporation Ltd. and Another, .

6. It is also urged by Mr. T.R. Rajagopalan, that the owner of the property continues to hold possession of the property pursuant to Clause 2 of the agreement and that the irrevocable licence granted hereinafter to the developer is only to enter the said property for the purpose of soil testing, surveying measuring marking etc., and for displaying the nameboard of the Developer and therefore, the permission granted to the developer to enter upon the said property for the purpose of soil testing, surveying etc., shall not be construed as delivery of possession to the developer. It is further urged that the agreement in question was entered into on 15.12.1993 subject to the grant of No Objection Certificate u/s 269 of the Act by the Appropriate Authority under Chapter XX-C of the Income Tax Act, but the Appropriate Authority by their communication dated 29.3.1994 declined to issue No Objection Certificate and that therefore, the question of fulfilling all obligations under the agreement by the parties, does not arise as the initial condition of obtaining N.O.C., from the Appropriate Authority had failed.

7. I am unable to countenance the arguments of Mr. T.R. Rajagopalan, for the following reasons: It is specifically provided under Clause 16 of the agreement that the plaintiff is entitled to be in quiet enjoyment of the property and the same shall be in part performance and implementation of the agreement. It is also seen from the agreement that the applicants have been duly authorised and empowered to enter upon the property and to carry out the development work and construction. Consequently, I am of the view that the reference to Clause 10 of the agreement, by Mr. T.R. Rajagopalan is totally irrelevant. It is also not disputed that the applicants have spent large sums of money for employing security men to safeguard the property, by employing Architects for purpose of drawings and carrying out preliminary work for making the plot ready for construction, that they have also displayed their nameboard with detailed particulars and they are entitled to retain the board. As per Clause 11 of the agreement the title to the property has been approved by the applicant's advocate and No Objection Certificate was applied under the provisions of

Chapter XX-C of the Income Tax Act. When once the agreement is submitted for approval to the Appropriate Authority of Income Tax, they are either entitled to grant it or acquire the same for the value fixed and mentioned in the said agreement. In this case, the Appropriate Authority has simply lodged the application. In this context, a reference to Clause 23 will be useful. Under Clause 23 of the agreement between the parties, the respondent has agreed and undertaken to co-operate with the developer for obtaining all certificates, and other documents pertaining to the property including Urban Land Ceiling Clearance Certificate. According to the applicant, after the Appropriate Authority lodged the application for approval, the parties negotiated and agreed that a revised agreement should be submitted and in fact a supplementary agreement was prepared after negotiations to enable the parties to submit the supplementary revised agreement for approval by the Income Tax authorities. In fact, as stated earlier, the respondent under Clause 23 of the agreement, had agreed and undertaken to co-operate with the developer for obtaining all certificates and other documents pertaining to the property including Urban Land Ceiling Clearance Certificate. Under such circumstances I have also perused the order of the Appropriate Authority and in my opinion, the Appropriate Authority has no jurisdiction to say anything about the validity of the agreement entered into between the parties. Further, it will be significant to note that the Urban Land Ceiling Clearance Certificate is one to be issued by the State Government and the respondent is bound to co-operate with the applicant in the matter of obtaining the certificates including Urban Land Clearance Certificate, if necessary as already observed. In view of the above, I am of the view that it is not open to the respondent to say that the agreement is subject to grant of No Objection Certificate. The contention of Mr. T.R. Rajagopalan that the owner continues to be in possession of the property under Clause 2 of the agreement, is not correct. Likewise the allegation that the parties made it clear to the Authority that the entire agreement is subject to getting permission from the Appropriate Authority under Chapter XX-C of the Income Tax Act is again not quiet correct. As stated above, the Appropriate Authority has simply lodged the application. I am of the view that the respondent is bound to co-operate with the applicant in the matter of re-submitting the application if necessary with supplemental or revised terms on the aspects necessary for the purpose of obtaining approval from the Appropriate Authority and in view of the terms of the agreement entered into between the parties, this could be the only intention of the parties at the time of entering into the agreement. That is why, a clause has been provided in the agreement itself. However, the respondent did not choose to co-operate with the applicant, with the result the applicant has been compelled to urge this Court to get appropriate orders for safeguarding their rights. Even otherwise, if according to the respondent, the Appropriate Authority did not approve the agreement then there is no question of the respondent seeking to interfere with the possession of the applicant in respect of the property. The applicant is entitled to take steps to get the orders of the Appropriate Authority revised or quashed according to law in which event also, the applicant is entitled to continue in possession as

ultimately if the authority approves the agreement the further obligations of the parties will be fulfilled according to the terms of the agreement.

8. I reserved orders in the above matter on 26.7.1994, Mr. N.S. Varadachari learned Counsel appearing for the applicant, filed a memo dated 1st August, 1994, enclosing a xerox copy of the injunction order passed by a learned single Judge of this Court in W.M.P. No. 19457 of 1994 in W.P. No. 12815 of 1994 filed by the applicant herein as petitioner in the writ petition as against the Appropriate Authority, Income Tax Department and the respondent/defendant herein. It is seen from the memo that the applicant herein filed W.P. No. 12815 of 1994 against the Appropriate Authority, Income Tax Department, for issue of a writ of certiorarified mandamus quashing the order of the Appropriate Authority dated 29.3.1994 and for directing the Appropriate Authority to consider the 37(1) Statement in accordance with law and grant the necessary No objection Certificate as prayed for, relating to old Door Nos. 11 and 12, revised Door Nos. 25 and 26 and new Door Nos. 31 and 32, Commander-in-Chief Road, now known as Ethiraj Salai, Egmore, Madras-105. It is seen from the memo that the Hon''ble Mr. Justice Raju, has admitted the writ petition and has been pleased to pass an interim order of injunction restraining the Appropriate Authority, Income Tax Department, from entertaining considering of granting a claim for No objection Certificate under Chapter XX-C of the Income Tax Act in respect of the suit property. Along with the memo, a xerox copy of the order dated 27.7.1994 in the writ miscellaneous petition was also filed. Thus, it is seen that the order of the Appropriate Authority dated 29.3.1994 which is very heavily and strongly relied on by the respondent herein, is the subject-matter of the proceedings in the writ petition and hence the applicant's possession should be preserved in the meanwhile.

9. Moreover, Clause 31 of the agreement expressly provides that in the event of any dispute difference in regard to any matter relating to the agreement including interpretation of the clauses thereof, the same shall, if not settled by mutual discussion between the parties, be referred to two named Arbitrators and it has been agreed that their decision in this regard shall be final and binding on the parties to the agreement. As already stated, the applicant has already invoked Clause 31 of the agreement and has addressed a letter dated 12.7.1994 to the Arbitrators to enter upon the reference. It is also seen from the proceedings placed before this Court by Mr. N.S. Varadachari that the arbitrators have held one sitting on 18.7.1994 and adjourned the matter again to enable the parties to file their statements of claims etc., in writing along with documentary evidence if any, in support thereof. As such, pending Arbitration proceedings, the applicants, in my view, are entitled to seek injunction before this Court so that status quo could be maintained, as otherwise, the applicant will be put to serious and great hardship. As rightly contended by Mr. R. Krishnamoorthy learned senior advocate, the agreement between the parties is still valid and is in force and is perfectly enforceable in law and on facts. The contention of Mr. T.R. Rajagopalan learned senior advocate that the agreement is subject to

Appropriate Authority granting "No Objection" and that a reading of the agreement will show that every term is subject of grant of No Objection Certificate by the Appropriate Authority and because of the said condition, possession was not handed over to the applicant company, is not at all acceptable and not correct. I am unable to digest or accept the contention of Mr. T.R. Rajagopalan that the applicant was only given a licence to put up a nameboard. It is too late in the day for respondent to deny the solemn agreement entered into between him and the applicant herein. The allegation that no such agreement was reached, is not correct. In my opinion the respondent did not sign the agreement or co-operate with the applicant herein only with some ulterior motive and mala fide intention. The respondent, being a party to the solemn agreement, who signed the same with full conscience, cannot now go back on the terms of the agreement agreed upon or allowed to wriggle out of the obligations undertaken by him under the agreement. Both parties bound by the terms of the agreement. As rightly pointed out by Mr. R. Krishnamoorthy, the applicant, because of the dispute and difference between them in regard to the matter relating to this agreement including the interpretation of the clauses thereof, has already invoked Clause 31 of the agreement and the arbitrators have also issued notice for hearing. Under such circumstances, possession of the applicant shall be preserved and maintained till the arbitration proceedings are over. I am also unable to accept the contention of Mr. T.R. Rajagopalan that the applicant has no right to file a suit for permanent injunction and that they ought to have filed a suit for specific performance of the agreement. As contended by Mr. R. Krishnamoorthy, the applicants have not given up their right to file a suit for specific performance of the agreement, as according to them, the time for specific performance has not yet arrived and in view of the urgency of the situation, they have filed the suit for permanent injunction restraining the respondent from interfering with the possession of the applicant in respect of the property in question, pending arbitration proceedings. The explanation given by the applicant for reserving their right to file a suit for specific performance of the agreement and the reasons given for filing the present suit, are quite convincing. In my opinion the applicant is entitled to come before this Court by invoking Section 41 of the Arbitration Act and this Court is entitled to make an order of injunction although the arbitration proceedings was not actually pending on the date of filing of the suit under this section. In my opinion this Court has got ample power to grant interim relief pending suit u/s 41 of the Act. The grant of interim order, in my view, is not in terms of "pending arbitration proceedings". Further where an application for injunction has been made in a suit which is pending and which has not been stayed, this Court has ample power apart from Section 41 of the Act, to make an order for interim injunction in a pending suit under the provisions of the CPC as well as in the exercise of its inherent powers. Therefore, the contention of Mr. T.R. Rajagopalan with regard to the maintainability of the suit also fails.

10. The contention of Mr. T.R. Rajagopalan that as on date, no dispute or claim

has been referred or filed before the arbitrators for their consideration, cannot also be accepted. As already stated, the arbitrators have, on 18.7.1994, in their proceedings, directed both parties to file their statements of claims etc., in writing along with the documentary evidence, if any, in support thereof. Only after the commencement of the proceedings by the arbitrators and on their entering upon the reference, parties are expected to file their claim statements, documents etc., and hence it is premature on the part of the respondent now to contend that as on date, no dispute or claim has been referred or filed before the arbitrators. Hence this contention also has no merit.

11. There is no dispute or quarrel with regard to the proposition of law laid down by this Court in the judgment rendered by this Court in *T. Parameshwari and 4 Ors. v. S.S. Investments Private Limited, Madras-18 (1991) 1 L.W. 109*, *Padmanabhan V.A. v. Narasimhan (1993) 1 L.W. 169*, *Krishnamoorthy Koundar Vs. Paramasiva Koundar*, is a case wherein in a suit for specific performance of an agreement of sale by the prospective vendee, such vendee could not be granted temporary injunction to enable him to protect his possession only on the basis of the terms of the agreement. In the instant case, the facts are different. Admittedly dispute and difference of opinion have arisen between the parties in regard to the interpretation of the agreement and enforcing of the clauses in the agreement. It is also not in dispute that the arbitrators nominated by both parties, have entered upon the reference and commenced the proceedings and have directed the parties to file their claim statements, documents etc., The question which arises for considerations in this case is as to the grant of injunction pending arbitration proceedings, to a party who is admittedly in possession of the property in question. As pointed out by Basu I Edition, Arbitration Act, this Court u/s 41 of the Act, can make an order of interim injunction although an arbitration proceeding is not actually pending on the date of the suit under this section. It is also seen from the passage that this Court has power, apart from Section 41, to make an order for interim injunction in a pending suit under the CPC as well as in the exercise of its inherent powers. *Janardan Mohapatra Vs. Executive Engineer, Sambalpur Central Works, Division C.P.W.D. and Another*, and *Baby Paul Vs. Hindustan Paper Corporation Ltd. and Another*, were cited by the respondent's side to show that the arbitration proceedings do not commence from the stage of arbitration agreement but only on the arbitrator getting authority to arbitrate and act in that behalf and the Court cannot make order in respect of any of the matters set out in Clauses 1 to 4 in the second schedule to the Act before and in anticipation of a reference to arbitration. Citing these two decisions, Mr. T.R. Rajagopalan would contend that the arbitrator's authority to act arises by actual submission of particular dispute or disputes to the authority of a particular arbitrator by the parties, or by one of the parties to the arbitration agreement requesting the arbitrator to decide their dispute. I am unable to subscribe my acceptance to the above proposition, in view of the view taken by me that this Court u/s 41 of the Act, can make an order of interim injunction although the arbitration proceedings was not actually

pending under this section and under the 4th item in the Second Schedule and that this power is conferred on the court "for the purpose of or in relation to arbitration proceedings" and also for the other reasons stated by me in paragraphs supra in regard to the powers of this Court to grant interim orders under the provisions of the CPC as well as in the exercise of its inherent powers.

12. In my opinion the court, for the purpose of and in relation to arbitration proceedings, is vested with wide powers for passing interim orders for detention, preservation and sale of any property which forms the subject matter a Reference. Relief u/s 41(b) can be given during the pendency of the arbitration proceedings before the arbitrator. There appears to be two views about granting relief u/s 41(b) before making of a reference to the arbitrator, one view being that no relief can be given unless arbitration proceedings are pending before the arbitrator and the other view is that relief may be granted in anticipation of reference and before an order of reference is made. Sabyasachi Mukharji, J., as he then was, in *Maheswari and Co. Pvt. Ltd. and Another Vs. The Corporation of Calcutta*, , in an identical matter like this, opined as follows:

Even where the parties have chosen to proceed under Chapter II by appointment of the Arbitrator and reference to him in accordance with the arbitration agreement, an application u/s 20 can be made and relief can be sought u/s 41 and even where there is no application u/s 20 or the proceedings under Chapter III have not been taken, court has power u/s 41 to make order for interim protection.

Avadh Behari, J., of Delhi High Court, has expressed his view in the following terms in *Air Foam Industries Pvt. Ltd. Vs. Union of India*, :

Where the Union Government while a claim by the supplier of goods on account of breach of a certain contract and counterclaim by the Government on account of general damages in respect of that contract were pending arbitration, sought to recover its claim as to damages by withholding other bills due to the supplier under Clause 18 of the terms relating to such contracts which authorised only to "appropriate" and not to "withhold" other bills the court could restrain the Government from doing so u/s 41(b). It could not be said that the amount pending under other bills was not the subject-matter of arbitration proceedings in view of the power of the court to make orders in respect of the matters set out in the second schedule, "for the purposes of, and in relation to arbitration proceedings.

Sharma, J., in *Daulat Ram Phoolchand Vs. Shriram and Others*, , held as follows:

The powers of the court under the Second Schedule to the Arbitration Act can be exercised even in a case where the reference to arbitration has been made without the intervention of the Court, and no proceedings are pending in connection therewith in any court. The effect of the provisions of Section 41 (b) of the Arbitration Act is to clothe the court with the same powers in relation to arbitration proceedings to issue interim orders for the preservation and safety of

the subject-matter of the dispute as it would have in relation to proceedings pending before itself.

Section 41(b) read with the second schedule to the Act was intended to empower the court to pass interim orders for the preservation or safety of the subject-matter of the dispute during the pendency of arbitration proceedings. In a case where an application is filed before the court u/s 20(1) of the Act, or where the reference to arbitration is made through the intervention of the court, the court has seisin of the case and can undoubtedly pass interim orders. But there is no reason to suppose that the court has no power u/s 41(b) of the Act read with the Second Schedule to prevent the properties in dispute from being wasted during the pendency of the proceedings before the arbitrators. Such an interpretation would have the effect of depriving the successful party of the fruits of the decree which is eventually obtained by him on the basis of an award.

The expression arbitration proceedings was substituted in Section 41(b) Arbitration Act for the words "a reference" in order to cover the various kinds of proceedings which the Act contemplates. The intention of the legislature by effecting this amendment was to include within the scope of Clause (b) of Section 41 all those proceedings which are held in pursuance of an arbitration agreement whether with or without the intervention of the court. To hold otherwise would have the result of Tendering superfluous the words "as it has for the purpose of and in relation to any proceedings before the court" which occur in Section 41(b) of the Act.

The arbitrators have not been vested by the Act with any powers to grant interim orders for the protection and safety of the subject-matter of the dispute. Such powers had, therefore, to be vested in the court u/s 41(b) of the Act read with the Second Schedule. There is nothing in that section or in the Second Schedule to justify the view that the power to grant interim orders for the protection and safety of the properties in dispute cannot be exercised until proceedings under some other section of the Act are started.

I am also of the view that the effect of the provisions of Section 41(b) of the Act is to clothe the court with the same powers in relation to arbitration proceedings to issue interim orders for the preservation and safety of the subject-matter of the dispute as it would have in relation to proceedings pending before itself. This Court has ample power to pass interim orders u/s 41(b) of the Act read with the Second Schedule.

13. The applicant has got a prima facie case and the balance of convenience is only in their favour. If injunction is not granted as prayed for, the applicant's right will be greatly jeopardised. No prejudice will be caused to the respondent by granting an order of injunction pending resolution of the dispute difference by the arbitrators. Therefore O.A. No. 611 of 1994 is allowed. Interim injunction granted already is made absolute and Application No. 3774 of 1994 is dismissed.