O.A.Nos.747 and 748 of 2019
and A.No.6677 of 2019

PUSHPA SATHYANARAYANA, J.

O.A.No.747 of 2019 is filed seeking for an order of interim injunction restraining the respondent, their men and agents and any persons claiming through them directly or indirectly in whatsoever form in preventing them from continuing with any construction activities and putting up construction on the scheduled property as mentioned in the schedule and from acting in any manner that would prejudice the applicant's interest over the schedule property.

The applicant also filed O.A.No.748 of 2019 seeking for an order of interim injunction restraining the respondent, their men, agents and all persons claiming through and under them in whatsoever manner or pursuant to the unregistered MOU and registered Lease Deed dated 05.05.2011, registered as Document No.1152 of 2011 on the file of Sub Registrar of Periamet, rectified by registered Rectification Deed dated 19.12.2012, regisered as Doc No.2464 of 2012, and POA dated 28.10.2014 (unregistered) and 17.03.2015, registered as Doc No.1049 of 2015 on the file of the Sub Registrar of Periamet, in creating any encumbrance or third party rights including sub lease or other arrangements on the scheduled property.

2. The applicant is a registered Society under the Indian Societies Registration Act, 1860 having registered on 01.03.1989. It is committed, *inter alia,* to preserve and suppress acts of cruelty carried out against the animals and to implement the provisions of the Prevention of Cruelty to Animals Act, 1960 (in short, "PCA Act") in Chennai. It owns a prime land measuring 24,000 sq.ft. bearing Old Door No.35, New Door No.69/1, Vepery High Road, Chennai-7, comprised in Resurvey No.691/2, Block No.17, Vepery Village of Tondiarpet Taluk, Chennai District, which was used for sheltering animals rescued under the PCA Act.

3. A purported Memorandum of Understanding dated 05.05.2011 (in short, "MoU") was entered into between the applicant and the respondent and a Lease Deed of even date for a period of 29 years from 01.05.2011 in favour of the respondent was also executed, with a renewal clause rider. According to the applicant, the said act is contrary to the interest of the applicant without the mandatory approval of the Executive Committee by certain members of the Sub Committee. As per the Lease Deed, the respondent was required to pay a meagre monthly rent at the rate of Rs.10,000/- per month from May 11, to April, 2014 and thereafter at Rs.60,000/- per month from May, 2014 to April, 2017. To the subsequent period, the respondent was required to pay 15% enhanced amount for a period of each three years on the last paid quantum of the monthly rent. According to the applicant, event such undervalued meagre monthly rents were not paid by the respondent regularly and cumulative rents for a few months were deposited belatedly in one lumpsum. As per the terms contained in the lease deed, if the respondent commits any default continuously for a period of six months, the lease deed shall stand terminated and if the said clause is invoked the lease deed got terminated automatically, as November 2016 rent was paid only on 04.08.2017, i.e., after eight months and similarly, there were delays for more than six months even thereafter.

4. Since there were several lapses and irregularities observed in the management by the erstwhile Executive Committee members, a Suggestive Committee was formed to investigate the irregularities concerning the lease deed entered into with the respondent, which decided to get a Valuer report. Accordingly, an Approved Engineer's Report was obtained on 11.08.2017. Subsequently, the Suggestive Committee, in the meeting held on 25.10.2017, observed certain defects with regard to the lease of the schedule mentioned property to the respondent. Further, it is alleged that the previous Secretary of the petitioner Society did not return the minutes books, accounts and other records, for which, a police complaint was lodged against him.

5. As indicated above, since the respondent commits default continuously, a notice dated 12.08.2018 was sent to the respondent intimating the same to it and calling upon it to vacate and handover the possession of the scheduled property. After receiving the termination notice, the respondent issued two cheques dated 01.09.2018 for Rs.3,10,500/- and Rs.62,100/-. The said amounts were received by the applicant as damages for the unlawful use and occupation after the termination of the lease. The applicant issued another notice dated 11.09.2018 informing the said fact and reiterating the termination, but the respondent vide notice dated 21.09.2018 refused to handover the possession of the schedule property.

6. Even as per the construction agreement, the same has to completed within three years, but till June 2019, no construction has taken place and such delay cannot be compensated to the applicant.

7. In the said backdrop, the applicant, invoking the arbitration clause 17 of the Lease Deed, nominated one P.S.Vasanthakumar as its nominee Arbitrator on 25.05.2019 and sought consent of the respondent. According to the applicant, the respondent, without nominating its Arbitrator, gave frivolous and threatening reply dated 15.07.2019. Hence, the applicant issued another notice dated 29.07.2019 calling upon the respondent to nominate its Arbitrator. It is, at this stage, the respondent in a war-footing basis to *camouflage* the illegal acts, commenced the construction to prejudice the interest of the applicant. Hence, the applicant is before this Court seeking for the abovestated reliefs.

8. This Court, while ordering notice to the respondent on 16.08.2019, granted an order of interim injunction as prayed for in A.Nos.747 and 748 of 2019, which was extended periodically.

9. Seeking to vacate the said interim order dated 16.08.2019 and to dismiss the said applications, the respondent filed A.No.6677 of 2019. In the affidavit filed in support of the said application, the respondent denied the allegations of the applicant. It is claimed that it paid Rs.2 Crores as Interest Free Security Deposit and another Rs.2 Crores as donation to the applicant to get the lease deed in its favour, besides agreeing to pay the monthly rents regularly, which was conveniently suppressed by the applicant. The rent fixed was a fair rent owing to the Security deposit and donation made by it. The intention of the lease to construct commercial or residential buildings is to augment income to the applicant society. The respondent claimed that it obtained planning permission from the CMDA on 12.09.2018 and the same is valid till 11.09.2023 and thereafter, building permission from the Chennai Corporation on 31.01.2019 to commence the construction by 30.07.2019. The respondent further stated that after the tendering process, a construction agreement dated 08.04.2019 was entered into with the successful bidder, who had completed major portion of the excavation work, majority of the piling works, STP, Fire fighting and water sumps. It was planned to complete the entire work by August 2021. At that stage, the respondent was served with the notice dated 04.06.2019 by the applicant making so many allegations, that too after 8 years of the entering into the MoU and the Lease Deed, with some ulterior motive in collusion of some third parties. Regarding delay in construction, it is claimed that there was a delay on the part of the applicant in providing the required documents and the scheduled property was classified as Industrial zone, which at the instance of the respondent was converted into commercial zone. Thus, the applicant is liable for suppression of the classification of the land, which also caused enormous delay.

10. The respondent alleged that the applicant leased out 2 grounds of its property, which was behind the schedule property, to another construction company for a paltry rent of Rs.20,000/- per month and received only Rs.2,00,000/- as security deposit. The respondent received a notice dated 26.06.2019 from the arbitrator appointed by the applicant contrary to Clause 17 of the Lease Deed dated 05.05.2011 fixing the date of hearing as 15.07.2019. Since the appointment is not valid, it sent reply notice dated 15.07.2019 to cancel the said hearing.

11. Denying the allegations of the respondent in the counter, the applicant filed rejoinder, to which, the respondent filed reply.

12. Heard the learned counsels on either side and perused the materials placed before this Court.

13. Admittedly, the MoU and Lease Deed came into existence between the parties. While the applicant questioned the authority of some of its own members to enter into such agreements, the respondent claimed that they are genuine and they acted upon based on those documents by incurring huge expenditure. Though the applicant claimed that its former Secretary colluded with the respondent to forge some of the documents to make the claim of the execution of the lease deed, the respondent denied the said allegation.

It is to be stated that the genuineness of those documents and the authority of the parties cannot be gone into by this Court in the applications filed under Section 9 of the Arbitration and Conciliation Act, 1996 (in short, “the Act”).

14. It is to be stated that subsequent to the filing of O.A.Nos.747 and 748 of 2019, the respondent in terms of Clause 17 of the Lease Deed vide letter dated 09.08.2019 nominated its learned Arbitrator and accordingly, it seems the applicant also replaced its nomination by appointing another learned Arbitrator. The learned Arbitrators so appointed by the parties appointed the Presiding Arbitrator constituting the Arbitral Tribunal in terms of Clause 17. The Arbitral Tribunal fixed its first hearing on 31.08.2019. However, the first sitting was held on 19.09.2019, in which, the time schedule was drawn and the parties were directed to deposit fees to the Arbitrators. At that stage, the applicant seems to have filed a petition on 15.10.2019 expressing their inability to pay the arbitration fees and expenses and seeking termination of the Tribunal to enable them to constitute a fresh Tribunal in accordance with the Act. Based on the same, the Presiding Arbitrator sent a letter dated 16.10.2019 to the other learned Arbitrators withdrawing himself from the Tribunal, while making it clear that the fee fixed in the first sitting was only as advance and the actual amount of fees will be fixed as per Fourth Schedule of the Act, after the pleadings are complete. The respondent filed a counter to the said petition seeking dismissal of the same. Consequent to the filing of the counter, the learned Presiding Arbitrator vide his letter dated 21.10.2019 withdrew his earlier letter dated 16.10.2019 expressing his willingness to continue to be the Presiding Arbitrator.

15. At this juncture, it is relevant to refer to Sections 14 and 15 of the Act, which are usefully extracted hereafter :

> "**14. Failure or impossibility to act.**—(1) The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if —
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> (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
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> (b) he withdraws from his office or the parties agree to the termination of his mandate.
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> (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
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> (3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

A reading of the above provisions makes it crystal clear that once the Arbitrator/Presiding Arbitrator withdraws from office for any reason, the mandate of such Arbitrator stands terminated and a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

17. Though learned counsel for the applicant vide e-mail dated 24.10.2019 sent to the learned counsel for the respondent suggested to go before a Senior Mediator attached to the Mediation Centre attached to this Court, the same was not accepted by the other side.

18. In such view of the matter, this Court substitutes Hon'ble Mr.Justice P.Shanmugam, a retired Judge of this Court, residing at New No.204, T.T.K. Road, Teynampet, Chennai-600 018, in the place of the erstwhile Presiding Arbitrator. Thus, the Arbitral Tribunal is reconstituted to the extent indicated above. The Arbitral Tribunal may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. The proceedings shall be conducted preferably in the Madras High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules. The appointment of the Arbitrators will be subject to the disclosure and declaration made, as per the Sixth Schedule to the Arbitration and Conciliation Act, 1996 coupled with the amendments made therein.

19. As indicated above, this Court granted the interim order of injunction as prayed for in these applications in O.A.No.747 and 748 of 2019 on 16.08.2019. In view of the aforestated legal and factual matrix of the case, the said interim order granted by this Court and extended periodically shall stand further extended for a period of eight weeks from today. It is open to the parties to move any application for interim relief before the Arbitral Tribunal in the manner known to law and the Tribunal is at liberty to confirm, vary, modify or vacate the interim order in accordance with law.

20. These applications are disposed of, in the above terms. No costs.

18.11.2019

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PUSHPA SATHYANARAYANA, J.

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& A.No.6677 of 2019

18.11.2019