

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 92 OF 2023
WITH
INTERIM APPLICATION (LODGING) NO. 6790 OF 2023**

**PRIYA
KAMBLI**

G. A. Builders Private Limited ... Applicant/Petitioner
vs.

Mandir Darshan Co-op. Hsg. Society Limited ... Respondent

Mr. Nilesh Ojha, Mr. Vijay Kurle, Ms. Snehal Surve, Ms. Hania Shaikh, Mr. Sourav Khanna, Mr. Sanvidhan Nagrale and Ms. Pooja Shah, i/by. Dipashri Raorane for applicant/petitioner.

Mr. Rohan Rajadhyaksha a/w. Mr. Mohanish Chaudhari, i/by. Mohanish Chaudhari for respondent.

CORAM : MANISH PITALE, J

DATE : 28th MARCH, 2023

P.C. :

. By this application, the applicant (original petitioner) is seeking direction for recall of order dated 7th February, 2023, passed by this Court, whereby, Commercial Arbitration Petition filed by the applicant, under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996, was dismissed on merits.

2. Mr. Nilesh Ojha, learned counsel for the applicant, before addressing this Court on the application, handed over a *pursis* signed by the advocate on record Ms. Dipashri Raorane, stating that the counsel for the applicant Shri Nilesh Ojha has made a representation to the Hon'ble Chief Justice about his grievance against Justice Manish Pitale on 6th March, 2023. It is to be noted

that this Court is presided over by Manish Pitale, J.

3. It is further stated that under these circumstances, as per law laid down by the Hon'ble Supreme Court and this Hon'ble Court, in the cases of (i) *Gullapalli Nageshwar Rao Das vs. Andhra Pradesh* [1959 Supp (1) SCR 319], (ii) *State vs. Davinder pal Singh* [(2011) 14 SCC 770], (iii) *Santosh Chandrashekhar Shetty vs. Ameeta Santosh Shetty* (2017 SCC OnLine Bom 9938) and (iv) *Chandrashekhar Jagannath Acharya vs. Rohini Chandrashekhar Acharya* (2019 SCC OnLine Bom 104), it would be just and necessary that Manish Pitale, J recuses from the present matter.

4. It is further stated that anxiety has arisen in the mind of the applicant, for the reason that in the first half, when request was made for keeping back the matter, an observation was made that this was a delaying tactic.

5. This Court is of the opinion that the *pursis* moved at the stage, when the application was called out for hearing on the third occasion during the day, is nothing but an attempt to avoid this Court and also, to somehow keep this application pending. In the first half of the Court sitting, when the present application, listed at Sr. No.4, was called out, a request was made for keeping it back. Accordingly, the matter was kept back, to be called out at 12:30 p.m. Accordingly, when the application was called out at 12:30 p.m., again a request for keeping the matter back was made and accordingly, the application was fixed at 2:30 p.m. for consideration.

6. It is at this stage, when the application is called out at 2:30 p.m., that the aforesaid *pursis* is handed over, seeking recusal of Manish Pitale, J from hearing the application.

7. The circulation for listing of the present application was granted on a specific request made on a *praecipe* by the learned advocate for the applicant, on the basis that a Co-ordinate Bench had passed an order on 15th March, 2023 in Arbitration Petition No.496 of 2022, wherein it was recorded as follows:

“1. Heard Mr. Khandeparkar, learned Advocate for Petitioner and Mr. Ojha, learned Advocate for Respondent.

2. Dispute in question revolves around arbitration clause namely clause no.40 in the development agreement dated 29.02.2008 between parties which is at Page No.166 of the Petition. For reference it is reproduced hereunder:-

‘40. This agreement shall remain in force till the Developers complete construction 1 its entirely and the Developers shall have received the entire sales proceeds and the new purchaser have been admitted as Members of the Society Provided further that in case of default from one of the parties hereto shall be referred to arbitration under the provisions of the Arbitration & Reconciliation Act. 1996 or the law relating to arbitration for the time being in force in India and such arbitration shall be conducted in accordance with the said Act and the Arbitration award shall be final and binding on all the parties or the other party shall be entitled to seek for specific performance of this Agreement only, but shall not be entitled to cancel or terminate Agreement including the Irrevocable Power of Attorney.’

3. Mr. Ojha, learned Advocate for Respondent would submit that dispute raised by the Petitioner is non arbitral in view of the specific wording of said clause enabling the other party to seek specific performance only.

4. Mr. Khandeparkar, learned Advocate for Petitioner would

dispute the said position and has placed before me the decision of this Court dated 07.02.2023 in the case of **G. A. Builders Private Limited V/s. Mandir Darshan Housing Society Limited** wherein this Court after referring to an identical clause (infact verbatim) has accepted the interpretation put forth by Mr. Khandeparkar.

5. Incidentally, Mr. Ojha has also appeared for the Petitioner in the above Commercial Arbitration Petition of G. A. Builders Private Limited (*supra*).
 6. Mr. Ojha would submit that he has filed Application seeking recall of order dated 07.02.2023 before the same Judge and in that view of the matter, requested the Court to defer passing of any orders herein.
 7. At request of Mr. Ojha, two week's time is granted to obtain the order, failing which this Court shall pass appropriate directions / orders in the present Arbitration Petition in accordance with law and undoubtedly after hearing Mr. Ojha once again.
 8. Stand over to 29th March, 2023.”
8. Since the said order was specifically annexed to the *praecipe* and the present application was sought to be circulated urgently, this Court granted circulation for today (28th March, 2023).
 9. When the application was called out for hearing today, the sequence of events as they occurred, has been recorded hereinabove.
 10. This Court is also informed that an execution application bearing Commercial Execution Application (Lodging) No.27602/2021, for execution of the interim order, which was subject matter of the Commercial Arbitration Petition, is pending before another Co-ordinate Bench. It is stated that filing

of the present application and keeping it pending, is informed to the said Court, where the execution application is pending.

11. This Court is of the opinion that moving such a *pursis*, at the stage when the application is called out for hearing at 2:30 p.m. today, is only with a view to avoid hearing of the said application. No cogent reason is stated in the *pursis*, other than apprehensions expressed on behalf of the applicant.

12. The aforesaid request made on the basis of such a *pursis*, handed over to the Court is therefore, rejected.

13. At this stage, when this Court asked Mr. Nilesh Ojha to commence arguments on the present application, he refused to do so, stating that he would approach “the higher authorities”.

14. The learned counsel for the respondent submits that this Court may reject the present application, considering the background of the case and since, according to him, no ground is made out for entertaining such an application for recall of the order dated 7th February, 2023, passed by this Court.

15. Although the learned counsel appearing for the applicant has refused to make any submissions, this Court has perused the application seeking recall of the earlier order dated 7th February, 2023.

16. A perusal of the same shows that various portions of the order dated 7th February, 2023, have been quoted in the application. Reference is made to case laws, including judgments that were cited before this Court, when the order dated 7th February, 2023, was passed.

17. According to the applicant, the manner in which this Court dealt with the contentions raised on behalf of the applicant (original petitioner) was not correct. According to the applicant, the settled position of law was ignored and in some places, it is contended that the arguments of the learned counsel appearing for the original petitioner, were not properly recorded.

18. It is relevant to note that on 7th February, 2023, the learned counsel for the petitioner as well as learned counsel appearing for the respondent, were heard at length. The contentions raised on behalf of the original petitioner were considered and the petition stood dismissed on merits. The judgment and order of this Court was dictated in open Court and in the presence of counsel.

19. The nature of the present application, seeking recall of the order dated 7th February, 2023, is in the form of challenging the order on merits, which cannot be a ground for recall of the said order. The applicant is virtually seeking rehearing of the petition, which cannot be granted. This Court is not satisfied that any ground is made out for recalling the order dated 7th February, 2023.

20. If the original petitioner/applicant is aggrieved by the order dated 7th February, 2023, the same can be certainly challenged, in accordance with law.

21. In view of the above, the application is dismissed.

(MANISH PITALE, J)