IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3319 OF 2024

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| Marvel Sigma Homes Private Limited through its Director Vishwajeet Subhash Jhavar | … | Petitioner |
| **Vs.** | | |
| Sanjay Jasubhai Desai and others | … | Respondents |

Mr. Atul Damle, Senior Advocate i/b. Mr. Amit Gharte for Petitioner.
Mr. Shekhar Jagtap for Respondents.

**CORAM : MANISH PITALE, J.**
**DATE : OCTOBER 03, 2025**

**P.C.** :

. By this petition, the petitioner has approached this Court, challenging an order dated 19.01.2023 passed by an arbitral tribunal consisting of two arbitrators and one presiding arbitrator, all being former Judges of this Court.

2. By the impugned order, the arbitral tribunal has exercised power under Section 38(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the ‘Arbitration Act’), to terminate the arbitral proceedings as regards the claims of the original claimant i.e. the petitioner in this petition, with a further direction that the counter-claim filed by the respondents shall proceed in accordance with law.

3. The aforesaid order has been passed on the basis that the petitioner failed to make regular deposits in terms of orders passed from time to time by the arbitral tribunal, as a consequence of which, at the point in time when the impugned order was passed, the petitioner was admittedly in arrears of payment of fees to the extent of Rs.9,00,000/- per Member of the tribunal.

4. The documents placed on record show that as far back as on 29.11.2018, at the first sitting of the arbitral tribunal, the schedule for completion of pleadings as well as fees and expenses, including deposits to be made by the parties, was fixed and it was expected that the parties would abide by such directions. Record further shows that while certain payments were indeed made by the petitioner from time to time, there was a shortfall on many occasions and despite reminders being recorded in the orders passed by the tribunal, the petitioner fell short by the aforesaid amount per Member of the tribunal.

5. One of the questions that would arise for consideration in this proceeding is, as to whether the present petition is maintainable and as to what could be the remedy available to an aggrieved party like the petitioner when the arbitral proceeding stands terminated under Section 38(2) of the Arbitration Act.

6. In that context, Mr. Atul Damle, learned senior counsel appearing for the petitioner relies upon judgement of the Supreme Court in the case of *Deep Industries Limited Vs. Oil and Natural Gas Corporation Limited and another*, **(2020) 15 SCC 706**. He contends that since there is no remedy available in the Arbitration Act to challenge such an impugned order, the present writ petition is certainly maintainable.

7. In fact, the learned senior counsel appearing for the petitioner also relies upon judgement of the Supreme Court in the case of *Oil and Natural Gas Corporation Vs. Afcons Gunanusa JV*, **2022 SCC Online SC 1122**. By placing reliance on the said judgement, the learned senior counsel for the petitioner emphasized upon party autonomy contemplated in the Arbitration Act and that the arbitrators ought not to impose schedule of fees / deposit upon the parties. It was emphasized that substantial payments were already made by the petitioner and in such circumstances, the drastic impugned order passed by the arbitral

tribunal deserves to be set aside.

8. In the process of justifying the grounds raised in the present petition, the learned senior counsel for the petitioner referred to Sections 31, 31-A and 38 of the Arbitration Act.

9. On the other hand, Mr. Shekhar Jagtap, learned counsel appearing for the respondents submits that the present writ petition ought not to be entertained as the petitioner has failed to make out any exceptional circumstances for this Court to invoke writ jurisdiction. It is submitted that on a proper interpretation of Sections 31, 31A and 38 of the Arbitration Act, it cannot be said that the arbitral tribunal committed any error in passing the impugned order.

10. It is further submitted that the petitioner admittedly failed to deposit amounts from time to time, despite chances having been granted and undertakings having been given to the arbitral tribunal, and therefore, the petitioner cannot raise any grievance with regard to the impugned order passed by the arbitral tribunal. It is submitted that a proper interpretation of the judgements of the Supreme Court in the cases of **Deep Industries Limited Vs. Oil and Natural Gas Corporation Limited and another** *(supra)* and **Oil and Natural Gas Corporation Vs. Afcons Gunanusa JV** *(supra)* would show that the law laid down therein cannot come to the aid of the petitioner and that therefore, the present petition deserves to be dismissed.

11. Having heard the learned counsel for the parties in the present case, there is no serious dispute on the facts recorded in the impugned order. After referring to the minutes of meeting dated 29.11.2018, the arbitral tribunal, in the impugned order, proceeded to record the chronology of events, indicating the extent to which the petitioner fell in arrears in depositing the fees of the Members of the arbitral tribunal. The

order also records the opportunities granted to the petitioner from time to time to deposit the arrears of fees. It is also recorded that the petitioner failed to abide by directions issued by the tribunal and / or undertakings given by the petitioner itself. Thereupon, the impugned order recorded as follows:-

> "7. In the above circumstances, Tribunal was required to hear the Application dated 7-11-2022, seeking termination of the Arbitration proceedings vis-a-vis Claimant's non-payment of arrears. During the course of hearing, the arrears of the Claimant were quantified in the sum of 9 lakhs payable to each member of the Tribunal. The learned counsel appearing for the Claimant sought 4 weeks' time to pay arrears with the result, the Tribunal was pleased to grant four weeks' time and directed compliance of the order by 28th December 2022. It was made clear that in the event arrears are not cleared and the compliance of order dated 29-11-2022 is not reported, then on 19th January 2023, the Tribunal shall meet and pass necessary order.
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> 8. Tribunal accordingly met on 19th January 2023, virtually, since the arrears were not cleared and the order dated 29-11-2022 remained to be complied with. In the said meeting, advocate who was representing the Claimant did not appear. The Claimant appeared through one of its employees, one Mr. Yash Jhawar, who expressed Claimant's financial difficulties and indicated lot many difficulties in reporting compliance of the order though requested for further 4 weeks' time to clear arrears.
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> 9. The Tribunal has given more than sufficient time and shown indulgence more than expected. The proceedings were not proceeding further for want of compliance and payment of arrears. The Respondents / Counter-claimants were insisting for termination of proceedings, since the trial of the counter-claim was getting delayed because of non-payment.
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> 10. The Claimant did not show its bona-fides at least by making part payment. Claimant did not apply for additional time to pay well before expiry of deadline. The request made by Mr. Jhawar did not inspire judicial confidence that Claimants would comply with the order. In the above circumstances, the Tribunal is left with no option but to terminate the Arbitration proceedings vis-a-vis Claimant's claims are concerned with cost.
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> 11. In the result, the Arbitration proceedings vis-a-vis

> Claimant's claims stand terminated U/s.38(2) of the Act, with cost, quantified in the sum of Rs.10 lakhs to be paid to te respondents jointly and severally. The trail of the counter-claim shall proceed in accordance with law. Order accordingly."

12. There is indeed no serious dispute about the facts recorded in the above-quoted portion of the impugned order. Hence, it needs to be examined as to whether the petitioner can make any grievance in respect of the impugned order and that too while invoking writ jurisdiction of this Court.

13. On the question regarding maintainability of the writ petition, learned senior counsel appearing for the petitioner relied upon the aforementioned judgement of the Supreme Court in the case of **Deep Industries Limited Vs. Oil and Natural Gas Corporation Limited and another** *(supra)*, particularly paragraph 17 thereof. This Court is of the opinion that even if a writ petition was to be considered in the facts, such as those found in present case, the petitioner would have to convince this Court that the impugned order was passed without jurisdiction or that principles of natural justice were violated. It is not the case of the petitioner that the principles of natural justice were violated as ample opportunities were granted to the petitioner and upon hearing the petitioner, the impugned order was passed.

14. As regards the impugned order being without jurisdiction, the learned senior counsel for the petitioner tried to impress upon this Court that Section 38 of the Arbitration Act pertains to deposits and it is only upon failure of the party to pay a share of such deposits that the tribunal could have either suspended or terminated the arbitral proceedings. While reading Section 38(2) and particularly the second *proviso* thereof, this Court finds that reference to Section 31(8) and 31A of the Arbitration Act becomes necessary.

15. *Explanation* to Section 31A(1) of the Arbitration Act makes it abundantly clear that costs referred to therein, which also have to be read with Section 31(8) of the Arbitration Act, include the fees and expenses of the arbitrators. Therefore, it is evident that the arbitral tribunal, while exercising power under Section 38(2) of the Arbitration Act, can certainly pass an order in situations where a party fails to deposit amounts towards fees of the arbitrators. Therefore, it cannot be said that the impugned order passed by the tribunal is without jurisdiction. Consequently, the petitioner is unable to demonstrate why this Court should entertain the writ petition.

16. Another aspect could be non-availability of any remedy for the petitioner to knock the doors of the writ court, depending upon the facts and circumstances of the individual case. A perusal of the provisions of the Arbitration Act indeed shows that in situations where the arbitral proceedings are terminated, a remedy of Section 34 of the Arbitration Act is evidently not available and there appears to be a vacuum in the Arbitration Act while providing remedies in such situations. The arbitral tribunal can also terminate arbitral proceedings under Section 32(2)(c) of the Arbitration Act, wherein it finds that continuation of the proceedings has, for any reason, become unnecessary and impossible. This Court and the Supreme Court, while dealing with cases where arbitral proceedings were terminated under Section 32(2)(c) in *Lalitkumar V. Sanghavi vs. Dharamdas*, **(2014) 7 SCC 255** and *Ramchandra Udaysinh Jadhavrao Vs. Girish Navnathrao Avhad*, **2023 SCC OnLine Bom.2470**, found that remedy under Section 34 of the Arbitration Act was not available. In such a situation, after taking note of the legislative vacuum in such circumstances, it was laid down that the aggrieved party ought to invoke Section 14 of the Arbitration Act to raise a grievance with regard to such an order terminating the arbitral proceedings. This Court is of the opinion that even if the ground on which the arbitral proceedings stand

terminated under Section 38(2) of the Arbitration Act is distinct and different from the grounds on which power under Section 32(2)(c) of the Arbitration Act can be exercised by the arbitral tribunal, in the face of the fact that there is evidently no remedy available to the aggrieved party under the provisions of the Arbitration Act to challenge such an order under Section 38(2) of the Arbitration Act, the aggrieved party could knock the doors of the Court under Section 14 of the Arbitration Act. This is another reason why this Court is not inclined to hold in favour of the petitioner.

17. Even otherwise, the impugned order shows that the petitioner has admittedly failed to deposit huge amount of arrears of fees of the Members of the arbitral tribunal. The facts recorded in the above-quoted portion of the impugned order are not disputed on behalf of the petitioner. The judgement of the Supreme Court in the case of **Oil and Natural Gas Corporation Vs. Afcons Gunanusa JV** *(supra)* can also not come to the aid of the petitioner. The proposition of law laid down therein cannot apply to the facts of the present case, for the reason that there is nothing to indicate that the Members of the arbitral tribunal imposed their fees upon the parties. The records of the minutes of meeting dated 29.11.2018 show that schedule of fees and expenses were fixed upon hearing the parties. Till date, the petitioner did not raise any objection to the schedule of fees fixed by the arbitral tribunal. Even in this petition, there is no such ground raised. Therefore, the petitioner has failed to make out a case for this Court to exercise jurisdiction in order to interfere with the impugned order passed by the arbitral tribunal. Accordingly, the writ petition is dismissed.

18. Pending applications, if any, also stand disposed of.

**(MANISH PITALE, J.)**