INDIALAW

ARBITRATION AND CONCILIATION

When Fees Stop the Fight: Bombay High Court Upholds Tribunal’s Power to Terminate Arbitration for Non Payment

AUTHOR Supriya Bhosale, Rahul Sundaram

PUBLISHED 24 October 2025

On 3 October 2025 a single judge bench of Justice Manish Pitale at the Bombay High Court added another chapter to India's continuing debate on "what can go wrong when arbitrator fees are not paid". Marvel Sigma Homes Private Limited, a real estate company represented through its director Vishwajeet Subhash Jhavar, rushed to the court's original civil side with Writ Petition No. 3319 of 2024 praying that an arbitral order dated 19 January 2023 be quashed. The tribunal presided over by three former High Court judges had pulled down the shutters on the claimant's claims under Section 38(2) of the Arbitration and Conciliation Act, 1996 while allowing the respondents' counterclaim to proceed. The company owed each arbitrator Rs 9 lakh; the respondents wanted the trial of their counterclaim to move on. What followed was a crisp contest on maintainability, jurisdiction, party autonomy and the true reach of Supreme Court precedents such as Deep Industries and Afcons Gunanusa.

The dispute has its roots in a development agreement that soured. At the very first administrative sitting on 29 November 2018 the arbitral tribunal circulated a written schedule fixing pleading milestones and the deposits each side would have to make towards arbitrator fees and other expenses. Marvel Sigma paid in bits and pieces but never kept pace; shortfalls piled up, reminders turned into conditional orders, and undertakings were given yet broken. By late 2022 the gap had widened to Rs 9 lakh per member. On 7 November 2022 the respondents moved an application seeking termination of the claim side proceedings. The tribunal granted four weeks' last chance; nothing materialised by 28 December 2022. When the arbitrators met again on 19 January 2023 the claimant's counsel stayed away and only an employee, Mr Yash Jhawar, logged in to plead for another month. No part payment was offered. Convinced that the claimant lacked bona fides and that the counterclaimants were being prejudiced, the tribunal passed the impugned order: claims stood terminated under Section 38(2) with Rs 10 lakh costs; the counterclaim was told to go forward.

In the Writ petition, the petitioner framed the plea as a pure question of law. He argued that the Arbitration Act does not provide an immediate challenge to a Section 38(2) termination; therefore, the constitutional writ is the only door left open. He relied heavily on Deep Industries Limited v. Oil and Natural Gas Corporation Limited (2020) 15 SCC 706 where the Supreme Court entertained a writ when the tribunal had ended proceedings under Section 32(2)(c). He also placed emphasis on Oil and Natural Gas Corporation v. Afcons Gunanusa JV 2022 SCC OnLine SC 1122 to submit that arbitrators cannot thrust a fee regime on unwilling parties; party autonomy must prevail. According to him substantial payments had already been made and the drastic step of termination violated principles of natural justice.

Respondents' counsel resisted the petition at the threshold. He contended that a writ lies only for jurisdictional error or gross violation of justice, neither of which was made out. Section 38(2), read with Sections 31(8) and 31A, clothes the tribunal with express power to dismiss a party that refuses to meet the cost deposit direction. The minutes of 29 November 2018 showed that the fee schedule was settled after hearing both sides; the claimant had never protested the quantum. Multiple opportunities written and oral had been granted; the fault lay in the petitioner's pocket, not the tribunal's order.

Justice Pitale zeroed in on three precise questions: first, is a writ petition maintainable against a Section 38(2) termination; second, did the arbitrators exceed jurisdiction or breach natural justice; third, does the law laid down in Deep Industries and Afcons Gunanusa rescue the claimant?

Analysis and Reasoning

On maintainability the judge accepted that the Arbitration Act creates a vacuum: a Section 38(2) termination is not an "award" and therefore cannot be assailed under Section 34. Yet the vacuum is not filled by the writ route in every fact situation. The court noted that in cases of termination under Section 32(2)(c) both the Bombay High Court in Ramchandra Udaysinh Jadhavrao v. Girish Navnathrao Avhad 2023 SCC OnLine Bom 2470 and the Supreme Court in Lalitkumar V. Sanghavi v. Dharamdas (2014) 7 SCC 255 have indicated that an aggrieved party may approach the court under Section 14 of the Act a provision that empowers the court to remove an arbitrator or set aside an order if the mandate has terminated. The same route, the judge felt, is pragmatically available to a party aggrieved by Section 38(2); hence extraordinary writ relief is not warranted in the ordinary course.

As to jurisdiction the court read Explanation (1) to Section 31A which deems arbitrator fees to be part of "costs" and Section 31(8) which allows a tribunal to fix costs. The power to secure payment of those costs through deposit directions and to act under Section 38(2) when the directions are flouted is thus inherently vested in the tribunal. No excess of jurisdiction was therefore visible.

Natural justice was equally a nonstarter. The order sheet was replete with adjournments granted at the claimant's request; the last four week extension was not complied with; no token payment was offered on 19 January 2023. The tribunal could not be faulted for drawing an adverse inference about the claimant's intent.

Party autonomy, the court pointed out, was not compromised. The fee structure had been discussed and finalised in the very first session; no protest had been launched for over four years. Afcons Gunanusa, which dealt with a unilateral imposition, was plainly distinguishable.

Final Ruling

Finding that the petitioner had failed to make out even a prima facie case of jurisdictional overreach or gross injustice, Justice Pitale dismissed the writ petition. All pending applications were disposed of, leaving the claimant free if so advised to pursue the alternate remedy under Section 14 of the Act.

The judgment is a crisp reminder that arbitration, though private, is not cost free. Parties who agree to a fee schedule must either honour it or secure timely modification; repeated defaults invite the ultimate sanction of dismissal. The decision also subtly signals that while the Arbitration Act may contain interstices, the writ court will not ordinarily act as an appellate body when a parallel statutory path exists. For Marvel Sigma Homes the road to redress, if any, now lies through a Section 14 application; for the arbitration ecosystem the message is clear pay the piper or forfeit the hearing.

For further details write to contact@indialaw.in

Related Practice Areas

Arbitration