Rajendra Construction Company vs Maharashtra Housing & Area Development ... on 12 August, 2005

Equivalent citations: AIR 2005 SUPREME COURT 3701, 2005 (6) SCC 678, 2005 AIR SCW 3992, 2005 (2) UJ (SC) 1259, 2005 (2) ARBI LR 637, 2005 UJ(SC) 2 1259, 2005 (6) SCALE 535, (2005) 4 ALLMR 1003 (SC), (2005) 5 CTC 150 (SC), (2005) 7 JT 388 (SC), 2005 (8) SRJ 181, 2005 (6) SLT 263, (2005) 33 ALLINDCAS 817 (HP), (2005) 6 SUPREME 292, (2005) 4 RECCIVR 16, (2005) 2 ARBILR 637, (2005) 4 CURCC 18, (2005) 2 SIM LC 15, (2005) 4 MAD LW 539, (2005) 6 SCJ 357, (2005) 4 ICC 645, (2005) 6 SCALE 535, (2005) 3 GCD 2292 (SC), (2005) 3 BLJ 60, (2005) 2 WLC(SC)CVL 398, (2006) 1 BOM CR 374

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Bench: C.K. Thakker, P.K.Balasubramanyan

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           CASE NO.:
Appeal (civil)  5045-5046 of 2005

PETITIONER:
Rajendra Construction Company

RESPONDENT:
Maharashtra Housing & Area Development Authority & Ors.

DATE OF JUDGMENT: 12/08/2005

BENCH:
C.K. Thakker & P.K.Balasubramanyan

JUDGMENT:
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J U D G M E N T (Arising out of S.L.P (c) Nos. 10963-10964 of 2003) C.K. Thakker, J.

Leave granted.

The present appeals are directed against the judgment and order dated June 4, 2003 passed by the Division Bench of the High Court of Bombay (Aurangabad Bench) in First Appeal Nos. 528 and 529 of 1996. By the said judgment, the High Court allowed the appeals filed by the Maharashtra Housing & Area Development Authority and set aside decrees dated August 25, 1996, passed by the Court of Civil Judge, (Senior Division), Aurangabad in Special Civil Suit Nos. 265 and 266 of 1991.

The relevant facts leading to these appeals may now be stated in brief; Appellant Rajendra Construction Company ('RCC' for short) is a partnership firm doing business in construction work.

Maharashtra Housing & Area Development Authority ('MHADA' for short) issued a Tender Notice No. 4/87-88 calling offers from registered contractors for the construction of 444 tenements under the Low Income Group Scheme (LIGs), near Scot Grini, Garkheda, Aurangabad and 192 tenements under Middle Income Group Scheme (MIGs), near Griha Nirman Bhavan, Aurangabad.

In November, 1987, work orders were issued in favour of RCC for an amount of Rs. 50,38,068/- in respect of the first work and for an amount of Rs. 74,56,972/- in respect of the second work. According to the appellant, the time limit within which the construction was to be completed was eighteen months for the first scheme and twelve months for the second scheme. However, the execution of construction work was delayed on account of variation in the existing and agreed items as also certain extra work as per the instructions of MHADA. Requests were, therefore, made by RCC for extension of time which was granted and within that extended period, the work was completed to the satisfaction of MHADA. MHADA, however, took no steps to prepare final bill on one pretext or the other and no payment was made to RCC. It was the case of RCC that its claim was not properly worked out. Still, however, RCC accepted the payment made by MHADA 'under protest'.

RCC then issued notice to MHADA on April 17, 1991 demanding additional amount of Rs. 19,01,600 for construction work in the first scheme and Rs. 21,08,100/- for the work in the second scheme. MHADA, however, refused to make payment. RCC filed two appeals before MHADA Board on May 06, 1991 under Clause 30 of the agreement claiming the above amounts with interest at the rate of 18 per cent per annum. On June 14, 1991, RCC requested the Board to decide its claim. On June 29, 1991, RCC issued notice to MHADA under Section 173 of Maharashtra Housing & Area Development Act, 1976 to settle the claim within a period of sixty days. As the claim was not settled, and payment was not made, RCC filed two suits in the Court of Civil Judge, (Senior Division); Aurangabad being Special Civil Suit No. 265 of 1991 for Rs. 19,01,100/- with running interest of 18 per cent per annum from the date of the suit till realization of the amount and Special Civil Suit No. 266 of 1991 for Rs. 21,08,100/- with running interest of 18 per cent per annum for the second scheme. The Civil Judge, (Senior Division), Aurangabad issued summons to MHADA. MHADA filed written statements in the suits. On September 3, 1993, the Court framed issues in Special Civil Suit No. 266 of 1991 and on October 27, 1993 in Special Civil Suit No. 265 of 1991. On January 5, 1995, RCC filed an application (Ex.

38) for appointment of sole arbitrator under Section 21 of Arbitration Act, 1940 for settling of the disputes/claims in the light of Clause 30 of contract giving the names of five officers. A copy was served on defendant MHADA immediately and the court passed the order "Call say other side". On March 10, 1995, MHADA filed application (Ex. 45) thereby giving no objection for appointment of sole arbitrator but suggested three different names. On April 3, 1995, RCC, vide its application (Ex. 47) agreed to the appointment of Mr. S.R. Wadekar as sole arbitrator as suggested by MHADA and to refer the dispute to the said arbitrator. In pursuance of the above agreement, the learned Civil Judge, (Senior Division), Aurangabad passed an order on April 6, 1995 vide ex. 48 and on April 7, 1995 vide Ex. 51. The order Ex. 47 reads as under :

> "Shri S.R. Wadekar, Ex. Chief Engineer is appointed as Sole Arbitrator who shall settle the terms of the agreement along with the record if any, relevant and necessary. The sole Arbitrator shall also collect the record from the Court and shall report and shall write the award within 60 days from the date of passing of this order, and without any further delay."

The Court then stated;

> "You are therefore hereby appointed as Sole Arbitrator in the matter. Accordingly the disputes and claims between the parties are referred to you for Arbitration. You are required to complete the proceedings as per provisions of Arbitration Act, 1940 and file your award in this Court within the time fixed by this Court. You may fix up terms of fees and expenses with the parties after entering on this reference. (Rs.2,000/- deposited in Court).
>
> Please notify the parties at the earliest. Please acknowledge receipt of this order."

On the same day, the Court communicated the decision to sole Arbitrator Mr. Wadekar. Mr. Wadekar sent his acceptance vide letter dated April 10, 1995. The Arbitrator then conducted the proceedings, called for record of the Civil Court and examined it. He also visited the site of construction. After going through all the documents, terms and conditions of tender agreement and other relevant records and after hearing the parties, he passed awards on August 17, 1995. He considered the claims under different heads and awarded an amount of Rs. 14,36,708.00 in respect of Scheme No.1 and an amount of Rs.11,80,935.00 in respect of Scheme No.2. The sole Arbitrator also awarded interest at the rate of 18 per cent per annum on the principal amount of the award from the date of the suit till the date of the awards as also from the date of the awards to the date of payment or the date of decrees, 'whichever is earlier'.

The Arbitrator issued notice to both the parties intimating them about passing of the awards. The Arbitrator also filed awards in the court. On 16th September, 1995, sealed envelope of award was opened in the court. MHADA raised objection against the awards under Section 30 of the Act, vide objections (Ex. 62 and 66) on October 13, 1995. RCC filed its objections (Ex. 63 and 67) on October 16, 1995 to the applications of MHADA. On the same day, RCC filed applications (Exs. 64 and 68) under Section 17 of the Act for making awards of the Arbitrator as rule of the court by pronouncing judgment. By final order dated April 25, 1996, the Civil Judge, (Senior Division), Aurangabad made Arbitrator's awards as "rule of court". He also passed an order to draw up decrees accordingly.

Against the above judgment of the Civil Court, MHADA filed two First Appeals. The Division Bench of the High Court, by the judgment impugned in the present appeals, allowed those appeals, set aside the order passed by the trial court and remitted arbitration proceedings to the sole arbitrator to pass fresh awards. According to the High Court, the awards passed by the sole Arbitrator were not speaking awards and, therefore, could not be said to be in accordance with law. The High Court concluded that the awards were vitiated under Section 30 of the Act.

The Court observed :

> "We are, therefore, of the view that the award of the sole arbitrator which has been made rule of the court by the trial court is unsustainable on the ground that it suffers from errors apparent on the face of the record and the sole arbitrator misdirected the proceedings, in as much as, he was required to adjudicate upon the issues framed by the trial court and give reasons thereof in respect of the claims allowed by him. In addition, the directions to pay interest at 18% per annum for the post- pendente lite period are not supported by any reasons, howsoever short they may be, and therefore, the said directions are also unsustainable. We, therefore, deem it appropriate to remit the arbitration proceedings to the sole arbitrator for fresh award and thereupon the trial court would examine the same for its decision under Section 21 of the Act.
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> In the result, the appeals are allowed and the decrees passed by the trial court in Special Civil Suit Nos. 265 and 266 of 1991 are hereby quashed and set aside. The arbitration proceedings initiated pursuant to the order passed by the trial court are restored to the sole arbitrator Shri S.R. Wadekar. He shall pass a fresh award within a period of 60 days from the date of appearance of the parties before him. The parties shall appear before the sole arbitrator on1 16.6.2003. No order as to costs."

The above judgment is challenged by RCC in the present appeals. We have heard learned counsel for the parties.

The learned counsel for RCC submitted that the High Court has committed an error of law in interfering with the order passed by the trial court and in setting aside the award made by the sole Arbitrator on the ground that the awards were not 'speaking' awards. The learned counsel submitted that the High Court was wrong in holding that an award passed by the Arbitrator must be a reasoned one. According to the counsel, under the Arbitration Act, 1940 (hereinafter referred to as 'the old Act'), there was no obligation on the Arbitrator to record reasons. He further submitted that admittedly the proceedings were governed by the old Act and the Arbitration and Conciliation Act, 1996, (hereinafter referred to as 'the new Act'), has no application and the provisions of the new Act could not be pressed into service by MHADA. Since it was not necessary for the Arbitrator to record reasons under the old Act and as there was no agreement between the parties nor the contract provided for recording of reasons by the Arbitrator, he was under no obligation to make reasoned awards. Setting aside of award by the High Court, therefore, was contrary to law. It was submitted that the Arbitrator followed the requisite procedure under the old Act. He conducted the proceedings by calling the parties and by affording opportunity of hearing to them. He also visited the construction-site. He perused the material documents, pleadings of the parties, relevant record and having applied his mind, passed awards which were in conformity with law. The counsel also submitted that the trial court before which the awards were produced to make them rule of the court, again considered the objections raised by MHADA. It negatived the objections and by detailed judgment, the awards were made rule of the court. The Court also ordered to draw decrees in terms of awards. In the circumstances, there was no reason for the High Court to interfere with the awards

passed by the sole Arbitrator as also the judgment and order passed by the trial court. The order passed by the High Court, therefore, deserves to be quashed and set aside.

The learned counsel for the respondent MHADA, on the other hand, supported the order passed by the High Court. He submitted that since there was dispute between the parties, RCC had approached Civil Court by filing two civil suits. In those suits, written statements were filed by MHADA raising several objections against maintainability of the claim and also the amount demanded by RCC. On the basis of pleadings of the parties, issues were framed and thereafter an application was made by RCC to refer the matter to sole Arbitrator. In the light of the facts and attending circumstances, it was clear that the Arbitrator was a "substituted forum". It was, therefore, incumbent on him to apply his mind to the rival contentions of the parties, to consider the issues framed by the trial court and to record findings on those issues supported by reasons and to make awards. Since the Arbitrator had totally overlooked those aspects and the facts and circumstances in which the matters were referred to him, the awards suffer from non-application of mind and the trial court was wrong in making such awards rule of the court and by directing to draw up decrees on the basis of the awards. The High Court was fully justified in setting aside such awards and also the judgment and order of the trial court by remitting the matter to the sole Arbitrator to decide the same in accordance with law. It was also submitted that even if there was no clause in the contract or agreement providing for recording of reasons, since the Arbitrator was to decide the question and to adjudicate the matter, he ought to have recorded reasons in support of such decision, finding and adjudication. The counsel, therefore, submitted that no case for interference with the order passed by the High Court has been made out and the appeals deserve to be dismissed.

Having given anxious and thoughtful consideration to the rival contentions of the parties, in our opinion, the appeals deserve to be allowed partly. The main question, according to us, is as to whether the sole Arbitrator was required to record reasons in support of the awards made by him. If that was the duty on the part of the Arbitrator, the contention of MHADA must be upheld by holding that the order passed by the High Court was in accordance with law and no fault can be found against the decision. If, on the other hand, there was no such requirement of law and Arbitrator was not bound to record reasons in support of the awards, they could not have been set aside 'merely' on the ground of non-recording of reasons and the High Court ought not to have interfered with the said awards and set them aside reversing the judgment and order passed by the trial court.

The learned counsel for RCC drew our attention to the relevant case law on the point. We would refer to only few of them. Raipur Development Authority & Others vs. M/s. Chokhamal Contractors & others, (1989) 2 SCC 721 is indeed the leading decision of this Court on the point. A Constitution Bench of this Court was called upon to consider an identical issue which has been raised before us, i.e. whether an award passed under the (old) Act was liable to be set aside under Section 30 or to be remitted under Section 16 of the Act "merely" on the ground that no reasons had been recorded by the Arbitrator in support of the award.

After considering the relevant provisions of law, legal position in England, America and Australia and after referring to leading decisions on the point, this Court held that an award passed under the

(old) Act was not liable to be set aside or remitted only on the ground that no reasons had been recorded in support of such award. The Court also referred to the Hand Book of Arbitration Practice by Ronald Bernstein wherein it was stated' "The absence of reasons does not invalidate an award. In many arbitrations the parties want a speedy decision from a tribunal whose standing and integrity they respect, and they are content to have an answer Yes or No; or a figure of X. Such an award is wholly effective; indeed, in that it cannot be appealed as being wrong in law it may be said to be more effective than a reasoned award." (emphasis supplied) The Court then proceeded to state;

> "It is now well settled that an award can neither be remitted nor set aside merely on the ground that it does not contain reasons in support of the conclusion or decisions reached in it except where the arbitration agreement or the deed of submission requires him to give reasons. The arbitrator or umpire is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or in the deed of submission he is required to give such reasons and if the arbitrator or umpire chooses to give reasons in support of his decision it is open to the court to set aside the award if it finds that an error of law has been committed by the arbitrator or umpire on the face of the record on going through such reasons. The arbitrator or umpire shall have to give reasons also where the court has directed in any order such as the one made under Section 20 or Section 21 or Section 34 of the Act that reasons should be given or where the statute which governs an arbitration requires him to do so."

In the opinion of this Court, it could not be disputed that in India, it has been 'firmly established' that it was not obligatory on the Arbitrator or Umpire to record reasons in support of the award when "neither any arbitration agreement nor any deed of submission" required reasons to be recorded. In that case also, it was urged, as has been done in the instant case, that if no reasons are disclosed by the Arbitrator, it would not be possible for the court to find out whether the award passed is in accordance with law. The Court, however, negatived the contention observing that if the parties wanted reasons to be recorded in support of the award to be passed by Arbitrator or Umpire it was open to them to make a provision in the agreement/contract itself to that effect. But in the absence of any stipulation in the contract, the court could not say that Arbitrator was duty bound to record reasons and if reasons are not recorded in support of the award, the award was vulnerable and liable to be set aside or should be remitted to the Arbitrator. According to this court, such an order would amount to virtually introducing by judicial verdict an amendment to the Act. No doubt, if the reasons are recorded by the Arbitrator or Umpire in support of the award, they can be considered by the court and if those reasons disclose an error apparent on the face of the record, the award can be set aside by a competent court of law. But in the absence of such requirement under the agreement itself, the party could not insist for reasons in support of the award nor a court of law can interfere with non speaking award.

It was, however, urged that recording of reasons in support of the order is part and parcel of 'natural justice' and on that count also, unreasoned award should be treated as null and void and ineffective. We are unable to uphold the argument. A similar contention was raised in Chokhamal and negatived by this Court observing that the said doctrine applies to Administrative Law field. In the decisions

pertaining to Administrative Law, this Court has always insisted for recording of reasons in support of the order or decision. The Court observed that it would apply to "public law" field and not to "private law" field like Arbitration agreement.

The Court stated:

> "It is no doubt true that in the decisions pertaining to Administrative Law, this Court in some cases has observed that the giving of reasons in an administrative decision is rule of natural justice by an extension of the prevailing rule. It would be in the interest of the world of commerce that the said rule is confined to the area of Administrative Law. We do not appreciate the contention, urged on behalf of the parties who contend that it should be made obligatory on the part of the arbitrator to give reasons for the award, that there is no justification to leave the small area covered by the law of arbitration out of the general rule that the decision of every judicial and quasi-judicial body should be supported by reasons. But at the same time it has to be borne in mind that what applies generally to settlement of disputes by authorities governed by public law need not be extended to all cases arising under private law such as those arising under the law of arbitration which is intended for settlement of private disputes." (emphasis supplied) This Court noted that a consistent view has been taken by all courts that an award was not liable to be set aside merely because reasons were not given except where the arbitration agreement or the deed of submission or an order made by the court under Sections 20, 21 or 34 of the Act or the statute governing the arbitration required the Arbitrator or Umpire to give reasons for the award.
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> In our opinion, the ratio in Chokhamal applies to the case on hand. The law laid down in that case has been reiterated by this Court in many cases. [See T.N. Electricity Board v. Bridge Tunnel Construction & Others, (1997) 4 SCC 121, Kundale & Associates v. Konkan Hotels (P) Ltd., (1999) 3 SCC 533, Build India Construction System v. Union of India, (2002) 5 SCC 433].

In T.N. Electricity Board, this Court considered the old Act as well as new Act and particularly sub-section (3) of Section 31 of the new Act which provides for recording of reasons by Arbitrator in support of the award unless (a) the parties have agreed that no reasons are to be given, or (b) the award is an arbitral award on agreed terms under Section 30. The Court noted that Parliament had expressed the legislative judgment that the award must state reasons upon which it is passed unless the parties have agreed otherwise or the award is on agreed terms.

The present awards are not under the new Act but under the old Act. It is, therefore, obvious that they could not have been set aside by the High Court on the ground that they were not supported by reasons and were not speaking awards.

The learned counsel for the respondent invited our attention to a decision of this Court in State of Punjab vs. Bhag Singh, (2004) 1 SCC 547 and contended that this Court has held that reasons must

be recorded in support of the order. That was a case wherein the High Court dismissed an appeal against an order of acquittal without recording reasons. The State approached this Court. Reversing the order passed by the High Court, this Court held that in an appeal against acquittal recorded by the Sessions Court, the High Court must record reasons as the High Court was obliged to undertake the exercise by application of mind and coming to the conclusion that an order of acquittal recorded by the trial court was or was not in accordance with law. The ratio laid down in Bhag Singh, in our opinion, does not apply to the facts of the present case.

The counsel relied upon the observations of Lord Denning, M.R. in Breen v. Amalagamated Engineering Union, (1971) 1 All ER 1148. There His Lordship observed; "The giving of reasons is one of the fundamentals of good administration". Reference was also made to Alexander Machinery (Dedley) Ltd. v. Crabtree, 1974 ICR 120, wherein it was indicated that failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision maker to the controversy in question and the decision or conclusion arrived at by him. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the inscrutable face of the sphinx, it can by its silence render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision.

As already observed by us, all these principles apply to Administrative Law and in the public law field. They would not get attracted in the field of private law. The court, in such matters, does not exercise appellate jurisdiction and cannot substitute its decision for the decision of the Arbitrator. Those principles, therefore, have no place when one is considering the legality of an award made by an Arbitrator with the consent of parties, which is otherwise legal and valid.

The learned counsel also placed reliance on a decision of this Court in Gora Lal v. Union of India, (2003) 12 SCC 459. The Court in that case held that when the Arbitrator was to give his findings, it was obligatory on him to record reasons. In Gora Mal, the relevant clause of arbitration was as under;

> "The arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of case and pleadings in defence.
>
> The arbitrator may, from time to time, with the consent of the parties, enlarge the time up to but not exceeding one year from the date of his entering on the reference, for making and publishing the award.
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> The arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with the sums awarded, separately on each individual item of the dispute."

Observing that the word 'findings' denotes 'reasons' in support of the conclusion 'on each item of dispute', the Court held that the Arbitrator was required to record reasons in support of his findings. The Court, however, added; "We make it clear that this order is confined to the facts of this case and our interpretation is confined to clause 70 of the arbitration agreement in this case". Gora Lal thus was decided in the fact-situation before the Court and the relevant clause in the agreement and the ratio of that case cannot make the awards in the present case illegal or unlawful in absence of a similar clause.

For the foregoing reasons, the awards passed by the sole Arbitrator cannot be held illegal or unlawful. In making such awards the rule of the court, the Court of Civil Judge, (Senior Division), Aurangabad had not committed any illegality which vitiated the awards and the High Court could not have set aside them.

The question then remains as to interest. The appellant had claimed interest in the suits. The Arbitrator awarded interest at the rate of 18 per cent per annum on the principal amount from the date of the suits to the date of awards and also from the date of the awards to the date of payment or up to the date of decrees, 'whichever is earlier'. This Court has dealt with the power of Arbitrator to award interest for (i) pre-reference period [Executive Engineer, Dhenkanal Minor Irrigation Division & Others v. N.C. Budhraj (Deceased) by LRs & Others (2001) 2 SCC 721]; (ii) pendente lite [Secretary, Irrigation Department, Government of Orissa & Others v. G.C. Roy (1992) 1 SCC 508]; and (iii) post-award period [Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir, (1992) 4 SCC 217]. In Bhagwati Oxygen Ltd. v. Hindustan Copper Ltd., AIR 2005 SC 2071 : JT (2005) 4 SC 73, one of us (C.K. Thakker, J.) had an occasion to consider the relevant decisions on the power of Arbitrator to award interest at all the three stages. It was held that the arbitrator had power to award interest. Keeping in view the facts and circumstances of the present case that the contract was entered into in 1987, the work was completed in 1990 after extension granted by MHADA and the Arbitrator passed awards in 1995, it would be proper, equitable and in the interest of justice if we reduce the rate of interest to 10 per cent per annum.

For the foregoing reasons, in our opinion, the order passed by the High Court deserves to be interfered with by partly allowing the appeals. We, therefore, allow the appeals in part confirming the awards made by the Arbitrator. We, however, direct the respondent MHADA to pay interest at the rate of 10 per cent per annum instead of 18 per cent per annum as awarded by the Arbitrator. The other directions in the awards are hereby confirmed. The appeals are allowed to the extent indicated above. There shall be no order as to costs.