

REVISIONAL CIVIL.

1919
April, 1.

Before Mr. Justice Lindsay.

ABDUL GHANI (DEFENDANT) v. DIN DAYAL (PLAINTIFF)*

Civil Procedure Code (1908), schedule II, paragraph 5—Arbitration—Refusal of arbitrator to act—Appointment of fresh arbitrator by court—Notice.

The authority of a court to appoint a fresh arbitrator in the place of one who has refused to act does not arise unless and until the court has served on the non-applicant party the notice required by paragraph 5 (2) of the second schedule to the Code of Civil Procedure, 1908.

THE parties to a suit in the court of a Munsif agreed to refer the matters in dispute between them to arbitration. An arbitrator was appointed, but he refused to act and sent the papers of the case back to the court. This was on the 8th of December, 1916. The Munsif thereupon directed that the parties should be given notice of the refusal of the arbitrator to act. On the 12th of December, the plaintiff made an application to the court for the appointment of another arbitrator. The defendant was present; but the parties apparently could not come to any agreement as to the new arbitrator. In these circumstances the court of its own motion made an order appointing one Babu Kuar Sen to act as arbitrator. The defendant on the 18th of December took objection to this appointment, and took his stand on the provisions of paragraph 5 (2) of the second schedule to the Code of Civil Procedure. The Munsif passed no order on this application. Meanwhile the arbitrator issued notices to the parties to appear before him on a certain date and produce their evidence. The plaintiff appeared, but the defendant refused to admit the jurisdiction of the arbitrator and kept away. The arbitration then proceeded *ex parte*; an award was made and sent to the court, and the court issued notice to the defendant to show cause why the award should not be made a rule of court. The defendant again objected to the appointment of the arbitrator, but his objection was overruled and the court passed a decree in terms of the award. The defendant applied in revision to the High Court.

Dr. S. M. Sulaiman for the applicant.

Dr. J. N. Misra for the opposite party.

LINDSAY, J.:—This is an application in revision directed against an order of the Munsif of Bijnor passed in the course of a suit in which the parties originally went to arbitration. It appears that after the first arbitrator had been appointed and after he had been called upon to enter upon his duties he informed the court that he was not willing to act and returned the papers which had been sent to him. The date on which the papers were returned to the court with this intimation was the 8th of December, 1916. The Munsif thereupon directed that the parties should be given notice of the refusal of the arbitrator to act. On the 12th of December, 1916, it is made to appear that an application was made on behalf of the plaintiff direct to the court asking for the appointment of another arbitrator. The defendant was present on that occasion, and from the order-sheet it appears that the parties could not come to any agreement in the matter of nominating a fresh arbitrator. In these circumstances the Munsif recorded an order saying that he considered one Babu Kuar Sen to be a suitable person to act as arbitrator, and made an order appointing him accordingly. The defendant took objection on the 18th of December, 1916, to his appointment and took his stand on the provisions of schedule II to the Code of Civil Procedure, paragraph 5. It was pointed out that no written notice had been served upon him by the plaintiff as required by that paragraph, that the appointment was made before the expiry of seven clear days, and that the defendant had no opportunity of showing cause against the appointment of Babu Kuar Sen. The Munsif passed no order on this application. He merely ordered it to be filed with the record and to be put up on the date fixed. In the meantime Babu Kuar Sen had issued notices to the parties to appear before him and produce their evidence on a certain date. Before the date for taking evidence the defendant presented a petition to the arbitrator reiterating the objection he had already made in the court of the Munsif. The result was that the defendant, refusing to recognize the appointment of Babu Kuar Sen, declined to attend the inquiry and to produce any evidence. The plaintiff's evidence was taken and an *ex parte* award was drawn up, which was sent to the court. Notice

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then issued to the defendant to show cause why the award should not be made a rule of court. Again the defendant took objection to the appointment and pleaded that in the circumstances no decree should be made on the *ex parte* award. The court overruled the objection and, after expressing an opinion that the arbitrator had not been guilty of any misconduct, gave a decree in terms of the award.

It is argued here that the proceedings of the Munsif from the time the first arbitrator refused to act have been without jurisdiction and that, even if they were not without jurisdiction, they were at least tainted with illegality or material irregularity. On the other hand, it is argued that this is not a case for revision. It is pleaded that the provisions of the law regarding the appointment of the second arbitrator were substantially, if not literally, complied with. It is said that the court had jurisdiction to appoint a second arbitrator and that if there were any irregularities they were not material irregularities which this Court is called on to correct. It is not to be doubted that in certain circumstances the court is vested with jurisdiction to appoint a fresh arbitrator. But this authority to appoint does not arise unless the necessary conditions precedent have been fulfilled, and it is clear to me that, inasmuch as the plaintiff failed in this case to serve the notice required by paragraph 5, sub-paragraph 1, and to apply to the court in the manner laid down in paragraph 5, sub-paragraph 2, the court had no authority to proceed to appoint Babu Kuar Sen as an arbitrator. Even if it could be assumed in the Munsif's favour that he was acting within his jurisdiction, it is certain that he acted at least with irregularity which in the circumstances was material, for the result of his action was that an arbitrator was thrust upon the defendant against his will and without his being given any opportunity of showing cause against the appointment. I am satisfied, therefore, that the applicant has succeeded in making out the case sought to be established in revision. The proceedings were most irregular and must be set aside. The order is, therefore, that the application is allowed the decree of the Munsif's court is set aside and the case is sent back for disposal in accordance with law. The petitioner is entitled to his costs in this Court.

Order set aside,