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YUDHISTIR LAL v. FATEH SINGH.

Judge had jurisdiction to entertain the application for restoration of the previous application, we do not think we should interfere on the merits. The application is dismissed with costs.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

BAIJNATH (DEFENDANT) *v.* DHANI RAM (PLAINTIFF).*

1929 *April*, 26.

Arbitration by court—Review of judgement—Jurisdiction—Civil Procedure Code, schedule II, paragraph 14.

Parties to a suit before a Munsif agreed that the Munsif should decide the case on an inspection of the documents filed and of the locality, and they further agreed to accept his decision. The Munsif gave his decision and thereupon an application for review of judgement was filed before him by the defendant on the grounds, *inter alia*, that the decision was vague and indefinite and also incomplete, as all the matters in dispute were not decided. On the question whether the Munsif could not entertain the application for review, because he was an arbitrator,—

Held that the Munsif, in accepting the position of an arbitrator, had a two-fold capacity. He was an arbitrator, but he was also the court. If the arbitrator left anything undecided, the parties would be entitled to go to the court and to ask the court to remit the award to the arbitrator. The fact that the two capacities were constituted in the same person should not deprive a party of his right of having matters set right. *Baikanta Nath* v. *Sita Nath* (1), not approved.

The practice of a judicial officer accepting the position of an arbitrator without the previous sanction of his superior officer, and while the case remained pending in his court, was deprecated.

Messrs. *B. Malik* and *Baleshwari Prasad*, for the applicant.

Mr. *Satish Chandra Das*, for the opposite party.

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* Civil Revision No. 265 of 1927.

(1) (1911) I. L. R., 38 Cal., 421.

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BALNATH v. DHANI RAM.

MUKERJI and NIAMAT-ULLAH, JJ. :—In this case the defendant is the applicant before us. A suit was instituted by the plaintiff respondent in the court of the Munsif of Agra with respect to a wall which divided the houses of the parties. The prayers were, (*a*) a declaration that the wall belonged to the plaintiff, (*b*) an order for removal of certain encroachments, (*c*) a perpetual injunction. After the case went to trial, the parties agreed that the Munsif should decide the case on an inspection of the documents filed by the parties and on an inspection of the locality, and they further agreed to accept the decision of the learned Munsif. The result was that the Munsif was constituted, so to say, an arbitrator of the case.

The learned Munsif wrote a judgement and decreed the suit in part. There was an appeal by the defendant which was dismissed by the learned District Judge and we have today dismissed the second appeal (S. A. No. 1781 of 1927).

The defendant, although he filed an appeal, also filed an application for review of judgement before the learned Munsif. His grounds are stated at pages 5 and 6 of the paper book prepared in this revision case. The first point was that the decision of the suit was very vague and indefinite. "The rights of the parties have not been made clear and even the dispute has not been decided." The second point was: "The order is contrary to judgement and it does not decide the points which were to be decided." The third point was, "The judgement shows that the wall at some places belongs to the defendant, but the order is contrary to that."

There were also other points taken. The learned Munsif fixed the 26th of March for hearing of the case. In the meanwhile the record of the case went

before the District Judge before whom the appeal was, and nothing further was done in the matter of the review. On the 26th of March, 1927, the plaintiff appeared before the Munsif and filed his objection to the defendant's application for review of judgement. The record came back to the Munsif after the dismissal of the appeal, but it is not clear on what date. The order that we find below the appellate order on the order sheet is the order of the 10th of August, 1927, which is complained of. It does not appear at all that the counsel for the parties were given notice of this date or were heard.

The question before the learned Munsif was whether he should allow a review of his judgement. The learned Munsif, in dismissing the application, stated that he was an arbitrator, that his decision was binding on the parties. Having said so, he said: "Application for review does not lie as there is no sufficient cause for review." We are of opinion that the learned Munsif never applied his mind to the application at all. If he had looked into the application, he would have found that there was abundant matter to which his attention could validly be directed. His own decision is not reflected clearly in the concluding portion of the judgement, which is the operative portion. The decree as it stands does not make it clear as to what he found. In these circumstances we must hold and do hold that the Judge did not apply his mind to the application and too summarily dismissed it. He must now apply his mind and decide it.

The learned counsel for the respondent took the objection that it was not open to the Munsif to admit an application for review because he was an arbitrator. The learned counsel has relied on the case of

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Baikanta Nath v. *Sita Nath* (1). We have considered that case. It is not clear on what matter the learned Munsif had admitted a review of judgement. It may be, and very likely that was the case, that he admitted a review of judgement on the merits and gave a judgement which was, to some extent at any rate, contrary to the judgement which he had given at the earlier stage. If that was all that the case decided, we need not disagree with it; but if it really went further, we should, with all respect, disagree with that view.

The Munsif, in accepting the position of an arbitrator, had a two-fold capacity. He was an arbitrator, but he was also the court. If the arbitrator left anything undecided, the parties would be entitled to go to the court and to ask the court to remit the award to the arbitrator. The fact that the two capacities were constituted in the same person should not deprive a party of his right of having matters set right. We thoroughly deprecate the practice of some officers accepting the position of an arbitrator without the previous sanction of his superior officer. Vide paragraph 1292 of the Manual of Government Orders, chapter XLII, Part VII. The position that has been created by the learned Munsif's act is very awkward indeed. It tends to deprive a party of taking exceptions to the award on grounds enumerated in paragraph 14 of schedule II of the Civil Procedure Code. It makes or at least tends to make the provisions in paragraphs 12 or 15, besides paragraph 14, nugatory. The Civil Procedure Code does nowhere contemplate that a court may give up its own duties and take up those of an arbitrator in a suit before it. If an officer should accept such a position,

(1) (1911) I. L. R., 38 Cal., 421.

he should act after the case has gone to some other court. In that case, his own proceedings will be subject to all the rules in schedule II of the Civil Procedure Code and the arbitration will be regular and legal, and the anomalous position that now has arisen will never arise. We trust that our remarks will be borne in mind by the subordinate officers and they would refuse to be constituted the sole arbitrator, even where the parties want to constitute them the sole arbitrator.

We have considered the judgement of the learned Munsif and the operative portion of it and we do find that a good deal of what is said in the judgement is not to be found in the operative part of it. We do not say anything more, for we are remitting the whole matter to the learned Munsif himself. It may be that when the case goes back, it will be found that the officer has left the place. If that be the case, the fact that a notice was issued by the learned Munsif who decided the case will give his successor jurisdiction to hear the application when the case goes back. On the other hand, if the learned Munsif himself is still the presiding Judge of the Court, no difficulty whatsoever may arise.

We allow the application in revision, set aside the order of the learned Munsif dated the 10th of August, 1927, and direct him to take up the application afresh and consider it on the merits. Costs here and hitherto will abide the result.