

Jagannath Sahu Vs. Chedi Sahu

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Court : Allahabad

Decided On : Dec-07-1928

Reported in : AIR1929All144

Appellant : Jagannath Sahu

Respondent : Chedi Sahu

Judgement :

1. This is an application for revision arising out of a suit brought by the applicant before the Subordinate Judge of Gorakhpur for a declaration of his right to certain property impugning a sale-deed executed by him in favour of the defendant. On 5th May 1928, parties agreed to refer their dispute to the arbitration of Babu Bhagwati Prasad, vakil. They moved the Court for an order of reference which was accordingly made. Babu Bhagwati Prasad, however, refused to act as arbitrator and by an application, dated 29th May 1928, the defendant nominated no less than nine persons, any one of whom, he desired to be appointed as an arbitrator in place of Babu Bhagwati Prasad. The plaintiff was not willing to have the case decided by an arbitrator. He, therefore, prayed that the arbitration be superseded and the case tried before the Court. The learned Subordinate Judge passed what appears to be a most extraordinary order, He appointed, Babu Ganesh Prasad, vakil, to act as arbitrator in place of Babu Bhagwati Prasad on payment of Rs. 100 by the parties half and half. The plaintiff expressed his inability to make any payment. The Court recorded an order dated 5th June 1928, in these terms:

The applicant will have to pay the fees otherwise it will be recovered by attachment of his property.

2. Aggrieved by the order of the Subordinate Judge insisting on the arbitration and on payment of Rs. 50 by the plaintiff the latter has applied in revision to this Court.

3. We are of opinion that the order of the learned Subordinate Judge cannot be sustained. That a Court can appoint an arbitrator in certain circumstances is laid down by Sch. 2, Rule 5, but this can only be done after certain formalities have been gone through by the party desirous of continuing the arbitration. Rule 5 provides:

'Where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator... any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or....

If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator... is appointed... the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator... or make an order superseding the arbitration, and in such case shall proceed with the suit.

4. Having regard to these provisions, the order of the Court, dated 29th May 1928, referring the matter in dispute to the arbitration of Babu Ganesh Prasad passed immediately on the application of the defendant, who desired to continue the arbitration, was in our opinion without jurisdiction or at least tainted with material irregularity. It should be borne in mind that an arbitrator is a Judge chosen by the parties themselves and a Court should not thrust an arbitrator on an unwilling party except under circumstances laid down in, the rule quoted above. It is obvious that the plaintiff was no longer willing to proceed with the arbitration and in any case seriously objected to payment of any fee to the arbitrator. In the original agreement of reference arrived at between the parties there was no provision for any remuneration being paid to the arbitrator. We think that it was irregular, to say the least of it, that the learned Subordinate Judge not only made the summary

appointment of an arbitrator, but also saddled the plaintiff with certain costs, which he could not be legally ordered to pay. If the learned Subordinate Judge felt that the services of a legal practitioner were necessary for the arbitration of the dispute before him and that no legal practitioner was willing to discharge the duties of an arbitrator without sufficient remuneration, his clear duty was to supersede the arbitration and proceed to try the suit himself.

5. The learned advocate, who appears on behalf of the opposite party, has raised a preliminary objection that an application for revision is incompetent. He maintains that no case' within the meaning of Section 115, Civil P.C., having been decided by the Court below no revision lies. We think this contention is not sound. On 29th May 1928, the controversy between the parties was whether the arbitration should be superseded or should be continued and another arbitrator appointed in place of Babu Bhagwati Prasad as desired by the defendant. The Court settled that controversy by its order of that date, which directed that the arbitration should continue and appointed Babu Ganesh Prasad to act as arbitrator. The controversy thus terminated. We think that the order of the learned Subordinate Judge in that connexion was clearly an order deciding a case within the meaning of Section 115, Civil P.C. We, therefore, overrule the preliminary objection.

6. In the view we take of the order dated 29th May 1928, of the lower Court, this revision must succeed. The only question is whether we should quash the order and direct that the procedure laid down by Sch. 2, Rule 5, Civil P.C., be followed in making the appointment of a new arbitrator. Having regard to the circumstances of the case, we do not think it desirable to prolong the matter any further. Since the defendant himself did not follow the procedure laid down by law and did not obtain the appointment of a new arbitrator in a regular manner, the better course is that the arbitration be superseded.

7. We, therefore, quash the order of the learned Subordinate Judge dated 29th May 1928, directing the appointment of Babu Ganesh Prasad to act as arbitrator in place of Babu Bhagwati Prasad and direct that the arbitration be superseded and the suit tried out by the Court, The plaintiff-appellant will have his costs of this

revision.

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