

(1928) 03 AHC CK 0009**Allahabad High Court****Case No:** None

Bhawani Prasad

APPELLANT

Vs

Joti Prasad

RESPONDENT

Date of Decision: March 20, 1928**Hon'ble Judges:** Mukerji, J**Bench:** Single Bench**Final Decision:** Allowed**Judgement**

Mukerji, J.

This appeal raises a nice point of law, but a point which, in my opinion, is not at all difficult to decide.

2. The litigants are brothers. It appears that the good sense that once prevailed with them has left them, and they have been fighting for a small bit of land which is of great use to the defendant and of little use to the plaintiff.

3. A partition of the village was pending in the revenue Court to which the brothers were parties. They referred the partition to the arbitration of (SIC)Daljit Singh. Before Daljit Singh (SIC)brothers made an application, a copy of which is on the record as 48C. In this application they said that the arbitrator was to divide the mahal, both cultivatable lands and lands forming the village site, and that in making this division the arbitrator might disregard the fact of possession on the part of any one of the two brothers. Being armed with this application, the arbitrator proceeded to make a division of the lands both cultivatable and forming the village site. He in the award made by him mentioned the application that had been made to him and read it as authorizing him to distribute lands in the village site irrespective of the provision of Section 118, Land Revenue Act. S 118 lays down that when, in making a partition it is necessary to include in the portion allotted to one cosharer the land occupied by a dwelling house or other building in the possession of another cosharer, the latter shall be allowed to retain it with the building thereon on condition of his paying for it a reasonable ground rent. The arbitrator stated in the

award that he was authorized by the brothers to make an award of the abadi land without fixing rent, and that each party had agreed to give up possession over all lands which might be allotted to the other party by the arbitrator. Having said so, the arbitrator made a division by means of a coloured plant. In the course of this partition, he gave the major portion of what was the defendant's courtyard to the share of the plaintiff. This is the subject-matter of the dispute in the present case. Believing that the arbitrator had given to the plaintiff the courtyard of the defendants' house the plaintiff launched this suit out of which this appeal has arisen for recovery of possession. The Court of first instance dismissed the suit, but the learned Judge of the lower appellate Court has decreed it. He held that the parties had waived the rights conferred on them and on the Court by Section 118, Land Revenue Act, and that in any case they were bound by the arbitration award. He pointed out that the defendants had contested the validity of the award in the revenue Court and was unsuccessful.

4. It is common ground that the land in question (see the plan on record) is surrounded on all sides by the defendant's wa(SIC). As I have already stated above it is a portion of the courtyard of the defendant's house. If the plaintiff be allowed to take possession of this land, his entrance to it will be barred on the east, west and south. He may have a possible access by the main entrance of the defendant's house. But even as to this it is not clear whether he has a right of way through the defendant's gateway. This description will make it abundantly clear that what has been given by the arbitrator to the plaintiff is a portion of the defendant's house. In the language of Section 118 the land given to the plaintiff is occupied by a dwelling house" of the defendant.

5. Now the question is twofold. The first question is whether the parties really agreed that the arbitrator should divide not only the village abadi, namely the sites occupied by themselves and their tenants and the vacant lands within the abadi but also what must be regarded as portions of their dwelling houses. The second point that has to be considered is whether, if the parties so agreed the arbitrators could make a division of the parties' houses, exercising, as he was, the jurisdiction of a revenue Court to make a partition under the Land Revenue Act of 1901.

6. On both points I am clearly against the plaintiff. I have read the application. I find nowhere any indication in it of the very wide interpretation given to it by the arbitrator. The parties simply say that the lands whether they be in the abadi or outside the abadi, should be divided without regard for possession. It is notorious that so far as possible partition is made maintaining the possession of the parties. Lands and sites which are in the possession of a party are given to that party so far as his legitimate share will permit: see for example Sections 123 and 125, Land Revenue Act, 1901. When the parties stated that the arbitrator could ignore the fact of possession of the parties, they said nothing, which might authorize the arbitrator to divide up what was the part and parcel of one party" building or which might

further authorize the arbitrator to award physical possession. The arbitrator in my opinion, exceeded his authority. But this finding will not be sufficient for the disposal of the appeal. Even if the arbitrator had no authority, the award stands good so far as the revenue Court is concerned.

7. The second point is whether, in making the award the arbitrator did not exceed the jurisdiction which the revenue Court held in the matter of partition. The revenue Court had no jurisdiction to divide the dwelling houses. In my opinion, it is not the case that Section 118, Land Revenue Act, is based on the ground of mere convenience. It is based on the more solid ground of jurisdiction. The revenue Court could not give to any of the parties before it what was a portion of another party's house, and that was the reason why it was enacted that, the site being divisible, the cosharer, whose house stands on the site, should be allowed to retain the building. The principle is very clear, and does not require any authority to support it. Mr. Asthana, however, has brought to my notice a case decided by Lindsay, J., of this Court, and it may be looked into as establishing the same proposition as has been laid down by me: see Gobind Pershad and Others Vs. Kalian and Others, In my opinion the arbitrator, in purporting to give to the plaintiff a portion of the defendant's house and directing delivery of physical possession over the same, exceeded the jurisdiction, which he possessed through the revenue Court, and this portion of the award is bad in law.

8. The arbitrator not having fixed any rent payable by the defendant the Full Bench case of Sarup Lal v. Lala [1917] 39 All. 707 applies, and the defendant is entitled to retain the portion of his house which is in suit without payment of any rent. The result is that the appeal succeeds. I set aside the decree of the Court below and restore that of the Court of first instance The appellant will have his costs throughout. Mr. Pandey, on behalf of the respondent, asks for leave to appeal, and it is hereby granted.