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**(1914) 06 AHC CK 0027**

**Allahabad High Court**

**Case No:** None

Sagwa and Another

APPELLANT

Vs

Ram Saran and Others

RESPONDENT

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**Date of Decision:** June 30, 1914

**Citation:** AIR 1914 All 442 : 25 Ind. Cas. 197(1)

**Hon'ble Judges:** Rafique, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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### **Judgement**

Rafique, J.

The suit which has given rise to this appeal was instituted under the following circumstances:

Banarsi Das, Dhanpat Rai, Sagwa and Kallu and some others were co-sharers in the village of Bijauli, Parganah Sarnwah, Tahsil Hapur. There was a partition of the village in 1316 fasli under which plot No. 364/1 with other lands fell to the lot of Banarsi Das and Dhanpat Rai. The said plot prior to the partition was in possession of Sagwa and Kallu. Subsequent to the partition Banarsi Das and Dhanpat Rai leased the said plot to one Ram Saran for building purposes. Ram Saran was resisted in his attempt to take possession of the plot in question by Sagwa and Kallu and a female relation of theirs, called Musammat Chhoni, who apparently lived with them. Thereupon Ram Saran instituted the present suit for the recovery of possession of the said plot impleading Sagwa, Kallu and Musammat Chhoni, and also his lessors as defendants. The lessors put in no defence. Sagwa and Kallu contested the suit on the ground that the plot in question had been in their possession for many years upon which they had certain constructions and all that Banarsi Das and Dhanpat Rai or their representatives could claim was the rent of the said plot. The learned Munsif in whose Court the suit was filed decreed it. Sagwa and Kallu appealed to the District Judge who affirmed the decree of the first Court. The learned Judge found that the plot in suit was at the time of the partition uftada land and that there was no house or any other building upon it then. He, therefore,

held that Section 118 of "the Land Revenue Act, to which reference was made by Sagwa and Kallu, had no application. The appeal was accordingly dismissed. Sagwa and Kallu have come up in second appeal to this Court. They challenge the decree against them on three grounds viz.:

(1) that the finding of the learned District Judge that no building existed on the plot in suit at the time of partition is erroneous;

(2) that the lower Courts should have waited for the decision of the application made by the appellants to the Collector u/s 118 of the Revenue Act, presumably after the institution of the present suit;

(3) that as the appellants were willing to pay rent for the plot in suit the claim for its possession should have been dismissed.

2. The first objection of the appellants attacks a finding of fact. They admit that a finding of fact cannot be questioned in second appeal. But they say that the learned Judge has based his finding on one piece of evidence only which he considers conclusive, viz., the entry in the partition papers. That entry is not conclusive, i.e., incapable of rebuttal and other evidence ought to have been taken into consideration also. I do not think that the learned Judge meant that the entry in question was conclusive in the sense that no Other evidence could be given in rebuttal of it. What he meant was that he preferred the evidence of the said entry to other evidence in the case. There is nothing in his judgment to show that he did not consider all the evidence on the record. He mentioned the entry in the partition papers because he considered that to be the most important evidence on the question of the existence or absence of a building on the plot in suit. The first objection for the appellants, therefore, fails. In support of the other two objections the learned Counsel for the appellants relied on the case of Iswar Parshad v. Jagarnath Singh (1906) A.W.N. 194. The present case is distinguishable from the case of Ishwar Prasad in that in the latter case it was admitted that some buildings did exist at the time of partition on the land-in dispute. Besides in a later case it was held that the provisions of Section 118 of the Revenue Act could not be urged in defence to a civil suit for possession of land allotted to the plaintiff under an order of partition, vide Nandan Pat Tewari v. Radha Keshun Kalwar 5 Ind. Cas. 664. I do not think that the lower Courts were bound to await the result of the application said to have been made by the appellants, u/s 118 of the Revenue Act, to the Collector or to have dismissed the claim on the offer of the appellants to pay rent for the plot in suit. The appeal fails and is dismissed with costs.