# Moti Lal Ghosh Vs Girish Chandra Ghosh and Others

**Court:** Calcutta High Court

**Date of Decision:** Dec. 15, 1909

## Judgement

1. In this appeal, we are invited by the plaintiff, in an action for partition of joint family properties, to set aside the final decree on the ground that

the proceedings of the Commissioners, who were appointed by the preliminary decree to effect a partition, were irregular, and ought not to have

been made the foundation of the judgment of the Court. We are also invited, if this fundamental objection fails, to modify the final decree on four

subsidiary grounds, namely, first, that the valuation of the tank included in plot No. 35 has been determined upon an erroneous principle, secondly,

that each of the plots Nos. 35 and 37 should not have been divided between the plaintiff and the third party defendant, but one plot might have

been given to each of these contesting parties; thirdly, that the partition of the dwelling house is not complete inasmuch , as certain walls common to

two adjacent rooms have been left joint; and fourthly, that plot No. 60 has not been properly valued. It has finally been suggested that the order for

costs is ambiguous and that clear directions ought to be given in this respect.

2. In so far as the substantial question of law raised in the appeal is concerned which goes to the root of the matter, we are of opinion that the

appellant cannot possibly succeed. Our attention has been invited to the statement in the judgment of the Subordinate Judge that it was conceded

before him that one of the two Commissioners was not present at the time of the measurement of some of the plots, and on this basis it has been

argued that the proceedings before the Commissioners were vitiated in their entirety. An attempt has also been made, for the first time in this Court,

to show that on other occasions also, the Commissioners did not act jointly. For instance, it has been argued that their proceedings and diary show

that evidence was on certain dates recorded by one of the Commissioners alone. We are unable, however, to hold that there is any force in this

last contention. The presumption is that the Commissioners acted jointly and regularly, and if their proceedings are sought to be invalidated on the

ground that in any particular matter they did not act jointly, the allegation ought to be specifically made and established. [Browe v. Kingsley 1

Johnson 334; Yates v. Russell 17 Johnson 461].

3. The proper course for the appellant was to have the Commissioners examined so that the Court might ascertain beyond, the possibility of

dispute the manner in which the evidence was taken and the proceedings were generally conducted. We must, therefore, deal with the case on the

assumption that the only irregularity which has been proved is that one of the Commissioners was absent when some of the plots were measured

by his colleague. The learned Vakil for the appellant has contended that this is sufficient by itself to vitiate the entire proceedings; and in support of

this view, he has relied upon the cases of Little v. Newton 9 Dowling 437, and In re Plews and Middleton 6 Ad. & E1. (N.S.) 845. These cases

affirm the doctrine that where more arbitrators than one are chosen, even though a majority may decide, each must act personally in the

performance of the duties of his office as if he were the sole arbitrator; in other words that all of them must be present throughout every meeting

during the proceedings until the award is made because the parties are entitled to the benefit of the judgment and influence of each one, and, a

neglect or refusal on the part of any one to act renders the award, made by the others, invalid. The respondent has not controverted this position

which is, indeed, supported by cases of the highest authority. [In re-Beck and Jackson (1857) 1 C.B.N.S. 695, Morgan v. Bolt (1863) 7

L.T.N.S. 671 : 11 W.R. 265, Goodman v. Sayers 2 J M.W 249 : 22 R.R. 112, Stalworth v. Inns (1844) 13 M. W. 466 : 2 D. & L. 428 : 14 L.J.

Ex. 81 : 9 Jur. 285, In re Lord and Lord (1855) 103 R.R. 535 : 5 E. & B. 404, Dalling v. Matchett Wilbs 215, White v. Sharp (1844) 12 M.

&W. 712 : 1 D. 4 L.1039 : 10 CK. 348 : 13 L.J. Ex. 215 : 8 Jur. 344 and Peterson v. Ayre (1855) 15 C.B. 724 : 23 L.J. C.P. 129 : 2 C.L.R.

722 : 2 W.R. 373. But it has been argued on behalf of the respondent that there is a clear distinction between acts which partake of a judicial

nature and acts of a ministerial character, and that in so far as acts of the latter description are concerned it is open to one of the arbitrators or

Commissioners, appointed to effect a partition to delegate his functions to his colleague and in fact to a stranger. In support of this position reliance

has been placed upon the cases of Stalworth v. Inns (1844) 13 M. & W. 466 : 2 D. & L. 428 : 14 L.J. Ex. 81 : 9 Jur. 285, Battye v. Gresley 8

East 319, and Buta v. The Municipal Committee of Lahore 29 C. 854 : 7 C.W.N. 82 : 4 Bom. L.R. 673 : 87 P.R. 1902 (P. C.). In our opinion

the argument advanced on behalf of the respondents is well-founded and must prevail. In the cases last mentioned, their Lordships of Judicial

Committee observed that there is no doubt that an arbitrator may delegate to a third person the performance of acts of a ministerial character, and

it follows that if it is competent to him to do so, there is no reason why a Commissioner appointed to effect a partition should not delegate to his

colleague the performance of a ministerial act of similar nature. To put the matter in another way, as Pollock, C.B. observed in Stalworth v. Inns

(1844) 13 M. & W. 466 : 2 D. & L. 428 : 14 L.J. Ex. 81 : 9 Jur. 285, when a joint judicial act is to be done, it ought to be done by the parties

jointly; but this principle has no application when the act is of a ministerial character. In the case before us the accuracy of the measurements, taken

by one of the Commissioners and accepted as correct by his colleague, has not been challenged. We are unable to hold under these circumstances

that the proceedings before the Commissioners were vitiated in their entirety by reason of the failure of one of the Commissioners to be present

when measurements were taken in respect of some of the plots. The learned Vakil for the respondent has further contended that the irregularity, if

any, in the proceedings of the Commissioners, has been waived and in support of this proposition he has referred to the case of Nadiar Chand

Shah Bomik v. Gobind Chandra Shah Bomik 2 C.L.J. 61. The records make it manifest that the parties were represented before the

Commissioners throughout the proceedings. If on any occasion one of the Commissioners was absent, it was open to them to take exception to the

proceedings held by the other. They evidently took their chance and when the proceedings terminated against the plaintiff, he turned round and

argued that the proceedings were invalid. It is evidently too late now for him to urge an objection of this character. The ground, therefore, upon

which the validity of the proceedings in their entirety is challenged must be overruled.

4. In so far as the minor objections to the decree are concerned, we are of opinion that there is no force in any of them except one. The first

ground urged is that the valueof the tank included in plot No. 35 has been erroneously determined. The Commissioners appear to have held that

the value of solid land was Rs. 300 per bigha and the value of the land covered by water that is the value of the tank was Rs. 150 a bigha. As the

area of the tank is three bighas, its value in ordinary course would be Rs. 450. The Commissioners have, however, proceeded to add to this sum

Rs. 1,350 which in their opinion represent the costs of excavation of the tank. On this footing they valued the tank at Rs. 1.800. This mode of

valuation of the tank obviously cannot be supported, and its value has to be determined for the purpose of the present appeal. The plaintiff valued it

at Rs. 600 and this seems to be a reasonable estimate, if we remember that the annual income of the tank is only Rs. 30. The re-suit, therefore, is

that the value of the tank must be reduced from Rs. 1,800 to Rs. 600 and the decree amended accordingly.

5. The second ground urged is that it was not necessary or desirable to divide each of the plots Nos. 35 and 37 into two portions and that owe

plot might have been given to each of the two contesting parties. This, however, is impossible. The parties are not agreed as to which plot either

should take. In fact both of them seem very anxious to retain plot No. 36. The plots are fainly large in area and it has not been suggested that the

effect of the division of each of the plots has been to diminish the value of the property or to render it useless to the parties. Under these

circumstances, the only reasonable course open to the Commissioners was to divide each of the two plots as they did.

6. The third ground urged is that the partition of the dwelling house is not complete inasmuch as some of the rooms have been divided into two

parts by means of walls which are left joint property. The learned Vakil for the appellant has suggested that the proper course was to divide each

room into two portions by two adjacent walls, one to belong to each of the parties. This obviously is an unreasonable course as the only effect of

such a procedure would be to diminish the area of open space available for use. It may be pointed out that when partition of dwelling houses is

effected the common procedure is to divide rooms, if necessary, by means of walls which are kept joint and treated as ""party walls.

7. The fourth ground is that the valuation of plot No. 60 has not been properly made. We have examined the evidence on the point and we are not

satisfied that the value as determined by the Court below is erroneous or that there is any good reason for our interference.

8. The last point taken is that the order for costs is ambiguous and that a clear direction ought to be given in this matter. In so far as the costs up to

the stage of the preliminary decree are concerned, according to the well-settled rule which obtains in this Court, the parties must pay their own

costs. In so Tar as the costs subsequent to the preliminary decree and up to the stage of the final decree-are concerned, the costs must be borne

by the parties in proportion to their respective shares, Dildar Ali Khan v. Bhawani Sahai Singh 5 C.L.J. 642 : 34 C. 878. In determining the

amount of these costs only one set of pleader''s fees will be taken into account; in other words, the total costs incurred between the dates of the

preliminary and the final decrees have to be determined and to this sum is to be added the costs of the partition as also the hearing fee, and the

amount so obtained is to be borne by the parties in proportion to their respective shares.

9. The result, therefore, is that Subject to the amendment in the decree rendered necessary by the reduction of the value of the tank from Rs.

1,800, to Rs. 600, the decree of the Court below is affirmed and this appeal dismissed.

10. As the appeal has substantially failed the plaintiff must pay the costs of this appeal to respondents who have appeared. We assess the hearing

fee at Rs. 150 to be divided equally amongst the three parties represented by the different pleaders.