

**(1924) 07 CAL CK 0008**

**Calcutta High Court**

**Case No:** None

Motaleb Khan and Others

APPELLANT

Vs

Idris Khan and Others

RESPONDENT

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**Date of Decision:** July 23, 1924

**Citation:** AIR 1926 Cal 414

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### **Judgement**

1. The plaintiff brought a suit for partition claiming 6 annas share in the properties in suit. The Munsif decreed the suit in respect of Plot No. 1 declaring their share to be 5 annas and 6 pies and dismissed it in respect of Plot No. 2. On appeal by the defendants the learned Subordinate Judge ordered partition of both the Plots Nos. 1 and 2, but held that the plaintiffs were entitled to only 3 annas share. The plaintiffs have appealed and the point raised is that the Subordinate Judge's decision with regard to the share of the plaintiffs is wrong and not supported by the evidence on the record. The lands belonged to one Dugu Khan and his brother Jalal Khan the predecessor-in-title of the defendants. Dugu had transferred his 8 annas share to his wife Atar Bibi. The Plaintiff No. 1 who is the son-in-law of Atar Bibi alleged that in consideration of his paying off certain debts owed by Atar Bibi she verbally transferred 4 annas share of the land in suit together with other lands to him. Subsequently he got his name registered in the zamindar's sherishta as a tenant in respect of that land. Atar Bibi had two daughters. She died leaving as her heirs these two daughters and her husband. The remaining 4 annas share of Atar was inherited by these persons the share of Dugu being 1 anna and those of the two daughters being 1 anna 6 pies each. The plaintiffs, however, ignored the share of Dugu and claimed 2 annas as the share of Plaintiff No. 1's wife and other of Plaintiffs No. 2. They thus calculated their shares as 7 annas. The Munsif accepted all these allegations, but finding that Dugu had a share in the property left by Atar Bibi declared that the plaintiffs had only 5 annas 6 pies share in the property in suit. The learned Subordinate Judge on appeal has dismissed the plaintiff's claim with regard to 4-annas share which Plaintiff No. 1 claimed to have got by transfer from Atar Bibi on the ground that the properties transferred were worth more than Rs. 100 and,

therefore, they could not be conveyed except by means of a registered document. This objection was not raised by the defendants in their pleadings before the Court below and there is no evidence on the record to support this view that the properties conveyed were worth more than Rs. 100. We asked the learned vakils to point to us if there was any evidence on the record. The only passage in the evidence which has any bearing on this question is a statement by Plaintiff No. 1 that he had paid debts of Atar Bibi to the extent of more than Rs. 300. This is not sufficient in our judgment to hold that the properties conveyed were worth more than Rs. 100, considering the relationship between the parties. As this question has been raised for the first time in the lower appellate Court, and it relates to the foundation of the plaintiff's title, we think that it ought to be enquired into by the Court of first instance. The result is that this appeal is allowed, the decree of the lower appellate Court set aside and the case sent back to the Court of first instance for the purpose of enquiring into the value of the properties conveyed orally by Atar Bibi to Plaintiff No. 1 at the time of transfer. The parties will be entitled to adduce evidence on this point alone. If the Court finds that the value of the properties was more than Rs. 100 the Plaintiff No. 1's claim in respect of the 4 annas share orally transferred to him by Atar Bibi will fail. If, on the other hand, it is found that the properties were worth Rs. 100 or less, the plaintiff's suit should be decreed and their share declared to be 5 annas 6 pies as found by the Munsif in respect of both the plots. Costs will abide the result.