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**(1927) 11 CAL CK 0023**

**Calcutta High Court**

**Case No:** None

Bibi Aimana Khatun

APPELLANT

Vs

Saburannessa Bibi and Others

RESPONDENT

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**Date of Decision:** Nov. 23, 1927

**Citation:** 107 Ind. Cas. 465

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

**Bench:** Single Bench

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### **Judgement**

Mukerji, J.

The plaintiff is the appellant in this appeal. The suit out of which this appeal has arisen was instituted by the plaintiff on the allegations that the lands in suit which are described at the foot of the plaint formed part and parcel of a jama of Rs. 32 which at one time belonged to two brothers, Kachimaddi and Madhu Molla, Kachimaddi having two-thirds share Madhu Molla the remaining one-third. The plaintiff's case was that there was a partition between Kachimaddi and Madhu Molla and that the disputed lands together with other lands fell to the share of the latter. Madhu Molla, it is said, died leaving three sons and four daughters and the plaintiff who is one of the daughters became according to the plaintiff, entitled to a twelfth share in the land owned by Madhu and the lands in suit fell in the plaintiff's share on a partition which took place amongst the sons and daughters of Madhu and the plaintiff, therefore, prayed for a declaration of her jote right to the said lands and for confirmation of possession therein. There was an alternative prayer in the plaint asking for a decree for joint possession with the defendant, in case it was found that there was no such partition as was alleged on behalf of the plaintiff. The contesting defendant in the suit was the defendant No. 3 who is in possession of the lands in suit. The trial Court made a decree in plaintiff's favour declaring her right to an one-twelfth share in the lands in suit and giving her a decree for joint possession with the defendant No. 3 who appears to have been the principal contesting defendant in the suit. The case of the defendant No. 3 in so far as it is necessary for the purpose of this appeal was that he had obtained a lease of the said lands from

the three sons of Madhu and that Madhu's daughters did not get any of the lands belonging to the latter inasmuch as Madhu had made a gift of his lands in favour of his sons. The parties thereupon preferred an appeal and a cross-appeal with the result that the plaintiff's suit has been dismissed in its entirety by the learned Subordinate Judge.

2. The contention that has been urged on behalf of the appellant here is that in view of the finding at which the learned Subordinate Judge has arrived she is entitled to a decree for joint possession to the extent of the share which has been found in her favour by the Court below. The learned Subordinate Judge found that the plaintiff owned one-tenth share in the property left by Madhu and that the story of partition that had been set up by the plaintiff was not true. It is contended on behalf of the appellant that under these circumstances there is no reason why the plaintiff should not get a decree for joint possession to the extent of her one-tenth share with the defendant No. 3 in the disputed lands. The reasons upon which the learned Subordinate Judge has dismissed the plaintiff's suit are mainly the following: (1) that in the suit which the plaintiff instituted she has not prayed for a decree for joint possession. So far as this reason is concerned the learned Subordinate Judge is not perhaps right, because the prayer kha in the plaintiff's plaint is not incapable of being construed as including such a prayer. In support of the learned Subordinate Judge's view it may no doubt be said that the words used in this prayer describing the lands in suit as being the lands marked X are indicative of a distinction which the plaintiff desired to make between the said lands and the entire quantity of lands which fell to the share of all the co-sharers which are intended to be meant by the words Mote Bandal. Any way this matter need not be pursued any further, because I am willing to proceed on this footing that the prayer included the claim for a decree for joint possession to the extent of the plaintiff's share in respect of plot X which forms the subject-matter of the suit. The other reasons are the following: (2) that the plaintiff had no-possession in the lands in suit and that the only possession which she could be said to have in the suit lands was through her co sharers, because the learned Judge below distinctly says that the story of the plaintiff's possession falls to the ground along with the story of partition; (3) that the lessors, that is to say, the plaintiff's co-sharers were in exclusive possession of all the lands left by Madhu but without any denial of the plaintiffs right; (4) that the said lessors let out a plot meaning plot X out of the Said lands to defendant No. 3 on receipt of a substantive selami; (5) that on a partition the lessors of defendant No. 3 would be entitled in respect of their share to more lands than what was settled with defendant No. 3, and (6) that so long as the lands were in possession of the sons of Madhu Molla the plaintiff did not object, but when the possession passed to the defendant, the plaintiff instituted a suit perhaps because the land lies adjacent to her homestead. These grounds upon which the learned Subordinate Judge has proceeded disclose equitable considerations which should not be lost sight of in a case of this description. I am clearly of opinion that in view of these grounds which the learned

Subordinate Judge has given, the plaintiff in the present suit when she failed to establish her case as to the partition, should not be allowed to have a decree for joint possession to the extent of her share--a decree which if passed would have the effect of disturbing the possession of defendant No. 3. The principles that should be applied to cases of this description have been discussed in a recent decision of this Court in the case of [Nabadwip Chandra Chakravarti and Others Vs. Bhagaban Chandra Choudhry](#), . It has been stated there on consideration of the case-law on the point that as a general proposition one co-sharer has no right to take exclusive possession of a joint property, but the question whether such exclusive possession amounts to an ouster or not depends upon the circumstances of each case and where the Court is unable to hold that there was an ouster, it would not be right to refuse the defendant who is in possession the benefit of the equitable principle that the mere fact of sole occupation by one co-sharer does not necessarily constitute an ouster of other co sharers, nor does it entitle the latter to a decree for joint possession. My attention has been drawn to a decision of this Court in the case of *Lakhan Chandra Malo v. Gopal Sheikh* 98 Ind. Cas. 912 : 31 C.W.N. 60. It will, however, be seen that there is a broad distinction between that case and the present one, because in that case a co-sharer gave a lease of the entire quantity of land belonging to all the co-sharers and in such a case it may be said that when such lease is granted by a body of co-sharers, their intention is to oust the other co-sharers who is not a party to the lease. I am of opinion that the reasons given by the learned Subordinate Judge for refusing to pass in plaintiff's favour a decree for joint possession are good and valid.

3. There is, however, one point in connexion with which, it seems to me, the learned Subordinate Judge has been in error. His finding being that the plaintiff owns one-tenth share in the property left by Madhu; and there being nothing to show that this title of the plaintiff has in any way been extinguished by adverse possession, there is no reason why the plaintiff should not have a decree declaring her title to a tenth share in the property. The learned Vakil who appears on behalf of the respondents concedes that it would be proper to allow the plaintiff a decree in respect of the said declaration.

4. The result then is that this appeal fails and is dismissed, subject to the modification in the decree passed by the learned Subordinate Judge, in this respect only, namely, that the plaintiff should be allowed a declaration that she is entitled to a tenth share of the property which forms the subject-matter of the suit.

5. I make no order as to the costs.