

## Kundan Singh And Ors. vs Hardan Singh on 20 November, 1951

**Equivalent citations: AIR1953ALL501, AIR 1953 ALLAHABAD 501**

### JUDGMENT

Malik, C.J.

1. This is a letters patent appeal by defendant 2 and the legal representatives of defendant 1, Mukhtar Singh. The plaintiff respondent Hardan Singh claimed that he was a son of Har Lal Singh who died in the year 1920, that he and his elder brother Mukhtar Singh were members of a joint Hindu family, that on Har Lal Singh's death in 1920 Mukhtar Singh was the head of the family and that on 20-12-1927, he had executed a mortgage in favour of Zabar Singh, defendant 3, which mortgage being without legal necessity was not binding on him (plaintiff). The plaintiff claimed that defendant 2, Tej Singh, had a simple money decree against Har Lal Singh, that in execution of that decree some property had been sold which was purchased by Tej Singh, defendant 2, and that as the plaintiff was not a party to the execution proceedings he was not bound by the same. On these allegations the plaintiff claimed possession of a half share in the property in suit.

2. The suit was contested by all the three defendants and it was alleged that Hardan Singh was not a son of Har Lal Singh. The defendants' case was that Har Lal Singh's wife Bhup Kuer had become unchaste and that Har Lal Singh had turned her out about the year 1895. Bhup Kuer thereafter filed an application for maintenance under Section 488, Criminal P. C. which was dismissed by the Magistrate on the grounds that she was living in adultery with one Umrao Singh and that Hardan Singh had been born of this adulterous intercourse on 1-3-1903. It was alleged in the alternative that the mortgage and the auction sale were binding on the plaintiff as they were for legal necessity to pay off antecedent debts.

3. The trial Court held that Hardan Singh was a legitimate son of Harlal Singh. It decided the other issues also against the defendants and decreed the plaintiff's suit.

4. The lower appellate Court disagreed with the finding on the first issue and held that Hardan Singh was not a son of Harlal Singh and dismissed the plaintiff's suit. It did not go into the other issues.

5. On second appeal a learned single Judge of this Court remitted the following two issues :

1. Was Bhup Kuer turned out by Harlal Singh and did she live with Umrao Singh?

2. Did Harlal Singh have no access to his wife during the period when Hardan Singh could have been begotten?

The learned Judge directed the lower Court to decide the other issues that it had left undecided

6. The lower Court answered the first issue in the affirmative and on the second issue its finding was that there was no evidence on the record that Harlal Singh had no access to his wife during the period when Hardan Singh could have been begotten. As regards the other issue that it had left undecided it held that the auction sale in favour of defendant 2 was binding on the family as the property had been sold to pay off the debts of the father Harlal Singh as that the mortgage in favour of defendant 3 was not proved to be for legal necessity.

7. The learned Judge on return of the finding held that in view of Section 112, Evidence Act, Hardan Singh must be presumed to be a son of Harlal Singh and that, as it was not established that Hardan Singh's claim was barred by limitation the suit must be decreed as against defendant but dismissed as against defendant 2. The learned Judge gave leave to appeal under the letters patent, and the defendants, other than defendant 2, have filed this appeal.

8. Mukhtar Singh, defendant 1, died during the pendency of the appeal, and Kundan Singh his son, and Sm. Lado, his wife, have been brought on the record as his legal representatives. The appellants before us are Kundan Singh and Sm. Lado, legal representatives of Mukhtar Singh and Zabar Singh, defendant 3.

9. Learned counsel for the appellants has urged that the facts clearly established non-access between Sm. Bhup Kuar and Harlal Singh as it was clear that Sm. Bhup Kuar had been turned out by Harlal Singh about the year 1895 and that she did not go back to his house till 1910 while the plaintiff was born on 1-3-1903, when Bhup Kuar was living with Umrao Singh Section 112, Evidence Act is as follows:

"The fact that any person was born during; the continuance of a valid marriage between in mother and any man ..... .. shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

We have no evidence as to the year when Sm. Bhup Kuar was married to Harlal Singh, but it is not disputed now that Mukhtar Singh was born in 1892 and was a son of Harlal Singh by Bhup Kuar. It can also be accepted that Harlal Singh and Bhup Kuar had fallen out and by 1895, Bhup Kuar had been turned out by Harlal Singh, that Umrao Singh was a neighbour who had his house just opposite to the house of Harlal Singh and that Bhup Kuar was a woman of bad character. In the case brought under Section 488, Criminal P. C. in 1895 Harlal Singh had disowned the paternity of even Mukhtar Singh and had alleged that he too was a son of Umrao Singh. Harlal Singh must have, therefore, suspected that Bhup Kuar had been carrying on with Umrao Singh from even before 1892.

In spite of the fact that he had turned out Bhup Kuar and she was living with Umras Singh it was admitted by Mukhtar Singh, defendant 1, that Bhup Kuar had come back to Harlal Singh and had lived with him for a number of years. He admitted in the witness-box that after living with Umrao Singh full a period of ten or fifteen years she had come back to Harlal Singh and lived with Harlal Singh for more than a decade before he died in 1920. The lower appellate Court held in the circumstances that there was no satisfactory evidence that even during the period that Bnup Kuar was living with Umrao Singn her husband Harlal Singh had nothing to do with her. Tne finding of the lower appellate Court that it was not proved that Harlal Singh had had no access to Bhup Kuar about the time when Hardan Singh could have been begotten is a finding of fact and it is binding on this Court. The learned Judge was, therefore right in coming to the conclusion that Hardan Singn must be presumed to be a son of Harlal Singh in accordance with the provisions of Section 112, Evidence Act.

10. The result of this finding is that when Harlal Singh died in 1920 he left two sons, Mukhtar Singh and Hardan Singh. There is no allegation that there was a separation between them. Hardan Singh as a matter of fact, was aged only seventeen at the time of Harlal Singh's death. There being no evidence and no suggestion that there was a separation between Mukhtar Singh and Hardan Singh, Mukhtar Singh could execute the mortgage dated 20-12-1927, in favour of defendant 3, Zabar Singh, only for legal necessity. The finding that there was no legal necessity is also a finding of fact.

11. As regards the plea of limitation, the learned single Judge held that the case was not governed by Article 142 and was governed by Article 144 and, as there was no evidence of ouster or of dispossession of Hardan Singh to his knowledge, the suit was not barred by limitation. The suit having been dismissed against defendant 2, Tej Singh, and he having submitted to the decree it is not necessary to consider the effect of the auction sale. But mortgage of 20-12-1927, was a usufructuary mortgage, and the mortgagee, Zabar Singh, was put in possession of the property and he had remained in possession for about fifteen years when the suit was filed on 4-7-1942. The plaintiff could not claim that he had no knowledge of this mortgage, and the mortgagee's possession from 1927 must be deemed to be adverse to the plaintiff. The plaintiff should not, therefore, have been given a decree for dispossession of Zabar Singh.

12. We, therefore, allow this appeal in part and modify the decree passed by the learned single Judge only to this extent that we give to the plaintiff a declaration that he was the owner of a half share in the property which was mortgaged to Zabar Singh, defendant 3, but the mortgage not having been challenged within twelve years and the mortgagee having been allowed to remain in possession for more than twelve years, the plaintiff has no right now to claim possession of the property in the possession of Zabar Singh without redeeming it.

13. So far as appellants Kundan Singh, Sm.

Lado and Zabar Singh are concerned, we modify the decree for costs passed by the learned single Judge and direct that they, the appellants, as well as the plaintiff shall bear their own costs in all the Courts. Our order shall not affect the order as regards costs in favour of defendant 2.