

that where a suit is contentious in its origin and nature, it is not necessary that the summons should have been served in the suit in order to make it "contentious" within the meaning of section 52. Mr. *Chaudhri* relied upon the explanation to section 4 of the Indian Limitation Act as supporting his proposition that the suit is instituted in the case of a pauper when the application for leave to sue as a pauper is filed. This section, no doubt, gives support to his argument, but we think that there is no need to fall back upon it in view of the clear and specific language of section 52 of the Transfer of Property Act.

For the foregoing reasons we are of opinion that the Court below should have dismissed the plaintiff's claim *in toto*. We accordingly allow the appeal, set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

1907

ANBIKA
PARTAP
SINGH
v.
DWARAKA
PRASAD.

1907

November 20.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

INDAR SEN SINGH (DEFENDANT) v. RIKHAI SINGH AND OTHERS (PLAINTIFFS) AND KAMAR-UN-NISSA BIBI AND OTHERS (DEFENDANTS).*

Procedure—Relief granted which was not asked for by the plaintiffs—

Appeal—Court fee.

The plaintiffs in a suit for sale on a mortgage were granted by the first Court a relief for which they had not asked and which could not properly have been granted to them without an amendment of the plaint. On appeal by one of the defendants the appellant was made to pay an additional court fee corresponding to the relief granted to the plaintiffs. The plaintiffs respondents were also required to make good the deficiency in the court fee paid in the first Court. This the plaintiffs declined to do unless the decree was confirmed in its entirety. *Held* that the plaintiffs were not entitled to retain the full benefit of the first Court's decree nor liable to pay the additional court fee; and the appellant might on application to the proper authority obtain a refund of the excess court fee which he had been erroneously compelled to pay.

THE plaintiffs in this case sued to enforce a mortgage of the 10th of November 1897. The principal answering defendant Indar Sen Singh was a puisne mortgagee holding a mortgage of the 1st of November 1898, and he also claimed the right to set up as a shield against the claim of the plaintiffs an earlier mortgage of the 17th of September 1897. In the course of the

* First Appeal No. 186 of 1905, from a decree of Syed Zain-ul-abdin, Subordinate Judge of Jaunpur, dated the 15th of April 1905.

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suit it was discovered that there existed two prior mortgages affecting the whole or a portion of the mortgaged property, namely, one of the 1st of March 1888 and another of the 23rd of February 1891. The Court of first instance (Subordinate Judge of Jaunpur) found as to the main issue that the defendant Indar Sen Singh was not entitled to set up as a shield the earlier mortgage put forward by him. That Court accordingly granted the plaintiffs a decree for sale of the property covered by the mortgage in suit in default of payment of the mortgage debt. As to the two mortgages of 1888 and 1891, the Court held, notwithstanding that the plaintiffs had claimed no relief in respect thereof, that they were entitled in the present suit to redeem them, and passed a decree to that effect. The defendant Indar Sen Singh appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, Mr. *J. Simeon* and Babu *Mangal Prasad Bhargava*, for the respondents.

The Court (STANLEY, C.J., and BURKITT, J.), after a discussion of the main point in the case arrived at the same conclusion in respect thereof as the Court below had done and accordingly dismissed the appeal. As to the inclusion in the decree below of the two mortgages of the 1st of March 1888 and the 23rd of February 1891, their Lordships' judgment was as follows:—

There is a matter to which our attention has been directed. The suit is a suit to enforce payment of a mortgage of the 10th of November 1897 by sale of the mortgaged property, and for no other relief. In the course of the proceedings, however, it was discovered that there were two prior mortgages affecting the whole or portion of the mortgaged property, namely, a mortgage of the 1st of March 1888, and another of the 23rd of February 1891. No relief was asked in respect of these mortgages, but in the decree of the Court below it was provided that the plaintiffs, on payment of prior mortgages, should be competent to get the property sold by auction, a relief which was not sought. No provision is made in the decree for the sale of the property to satisfy these debts, if paid. The stamp officer of the Court has reported that the court fee paid by the plaintiff in the Court below, in view of the relief given to him, was insufficient, and that the court fee

paid on the appeal has already been made good, but the deficiency, if any, on the plaint has not been paid. It appears to us that in view of the relief claimed by the plaintiffs in their plaint, the court fees, which have been paid both here and below, are sufficient. Mr. *Sundar Lal*, on behalf of the plaintiffs respondents, expressed his willingness to pay the additional court fee, provided the Court gave his clients the supplemental relief to which the clients would be entitled if the plaint were amended and proper reliefs arising out of the existence of these prior mortgages be granted, but he objects to the payment of any additional court fees unless he gets those additional reliefs. We think his contention is right, and that the decree of the Court below went too far in providing for the redemption of the earlier mortgages, a relief which, we have said before, was not sought. We think that the best course is to modify the decree of the Court below by striking out the portion which deals with the prior mortgages. The directions contained in the decree from the words "if the plaintiffs pay" down to the words "Muhammad Mohsin" should be struck out of the decree. The decree will then be the usual mortgage decree for the sale of the mortgagee's rights in the mortgaged property, without prejudice to the claim of any prior incumbrancers. We direct a decree to be so framed, and we extend the time for payment of the mortgage debt up to the 20th of May 1908. On an application in the proper quarter the appellants may be able to obtain a return of the additional court fees which they have been required to pay.

Decree modified.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

BANARSI PRASAD (DEFENDANT) v. RAM NARAIN AND OTHERS
(PLAINTIFFS).*

Guardian and minor—Guardian ad litem—Civil Procedure Code, section 447—Necessity of formal discharge from the duties of guardian ad litem—Suit to set aside a decree.

Held that no suit will lie to set aside a decree where fraud is neither alleged nor proved and no specific relief is asked for save and except the setting aside of the decree. *Umrao Singh v. Hardeo* (1) referred to.

* First Appeal No. 18 of 1907, from a decree of Girraj Kishor Das, Subordinate Judge of Bareilly, dated the 30th of November 1906.

1907

INDAR SEN
SINGH
v.
RIKHAJ
SINGH.

1907
December 2.