

**(1907) 11 AHC CK 0004**  
**In the Allahabad High Court**

Rikhai Singh and Others

APPELLANT

Vs

Indar Sen Singh and Kamar-un-Nissa Bibi and Others

RESPONDENT

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**Date of Decision :** 20-11-1907

**Acts Referred:**

**Citation :** (1908) ILR (All) 103

**Hon'ble Judges :** John Stanley, C.J.; William Burkitt, J

**Bench :** Division Bench

**Final Decision :** Allowed

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## Judgement

John Stanley, C.J. and William Burkitt, J.—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.