As a matter of fact he did not recover it for many years afterwards. What then is the position? He is giving credit for Rs. 796-6-0 on the 24th November, 1907, and thereby depriving himself of his interest at the rate of 15 per cent. per year with compound interest, although he did get a decree as against the thikadar ultimately for all the rent due to him but with simple interest at the rate of Rs. 12 per cent. per year. The result is that the thikadar as a matter of fact lost a large sum of money by the mode in which he kept the account. That is all in favour of the minor defendants and in my opinion no point could be taken in the mortgage action in regard to the account upon which the mortgagee was suing.

In my opinion this suit is a frivolous one and the learned Subordinate Judge was right in dismissing it. I must dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Das and Adami, JJ.

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v.

SHAIKH NURUL HUQ.*

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Jan., 14.

Revenue sale—co-proprietor repurchasing the estate from auction purchaser, whether purchases subject to encumbrances —Revenue Sales Act, 1859 *(Act XI of* 1859), *section* 53.

*Appeal from Original Decree no. 134 of 1925, from a decision of Rai Bahadur Surendra Nath Mukharji, Subordinate Judge of Patna, dated the 25th July, 1925.

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A co-proprietor of an estate repurchasing it from the auction-purchaser after it had been sold for arrears of Government revenue, purchases it subject to all the encumbrances existing at the time of the revenue sale.

Mahomed Gazee Chowdhry v. *Pearee Mohan Mookerjee* (1), followed.

Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Das, J.

N. C. Sinha, *Janak Kishore* and *S. Gupta*, for the appellants.

Anant Prasad, *Rai T. N. Sahay*, *Aditya Narain Lal*, *Hasan Jan*, *Syed Ali Khan*, *Benoy Bhushan Mukharji*, *Ahmed Reza*, *Syed Izhar Hussain* and *B. N. Singh*, for the respondents.

DAS, J.—This appeal arises out of a suit instituted by the appellants to recover the mortgage money due to them in respect of a usufructuary mortgage executed by defendant no. 1 Shaikh Nurul Huq in favour of Bechan Kuer on the 19th February, 1903, or in the alternative for recovery of possession of the mortgaged properties. The usufructuary mortgage comprised a 6-annas 2-pies share in tauzi no. 669, a 1-anna 6-pies odd share in tauzi no. 227, 1-anna odd share in tauzi no. 178 and 4 bighas of Kharij Jama lands. There is no dispute that Bechan Kuer, who was the original plaintiff in the action and who is represented by the present plaintiffs since her death, obtained possession of all the mortgaged properties. It appears, however, that the separate account of defendant no. 1 consisting of 2-annas 8-pies share in tauzi no. 227 was sold for arrears of Government rent on the 9th January, 1912, and was purchased by Khairuddin. He sold the share to

(1) (1871) 16 W. R. 136.

Basashat Hussain and Basashat Hussain in his turn conveyed the properties to different persons represented in the appeal before us by respondents 4, 6 and 7. On the 7th June, 1920, the entire tauzi no. 669 was sold for arrears of Government revenue and was purchased by one Wahiduddin who conveyed it to Mussammat Alimunnissa, who is a co-sharer in that tauzi. So far as the other two mortgaged properties are concerned, it is the case of the defendants that the plaintiffs are still in possession of those properties. The plaintiffs say, however, that they have been dispossessed by defendant no. 1; but the defendant no. 1 claims no interest in these properties.

Now, there is no doubt whatever that the sales in question took place on account of the default of the mortgagees in possession. That being the position, the plaintiffs have not established a case under section 68 of the Transfer of Property Act, and in my opinion the learned Subordinate Judge was right in refusing to give the plaintiffs a decree for the mortgaged money.

But the question still arises whether the plaintiffs are not entitled to a decree for possession in resp of those properties. The solution of the question must depend on whether the purchasers at the revenue sale acquired the estates subject to the encumbrances existing at the time of the sale. So far as tauzi no. 227 is concerned, there appears to me to be no difficulty whatever. All that was sold was the separate account of the defendant no. 1 in that tauzi and in my opinion the case attracts to itself the operation of section 54 of Act XI of 1859. That section provides:

> "When a share or shares of an estate may be sold under the provisions of section 13 or section 14, the purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners."

Now, this being the position the purchaser merely acquired the equity of redemption which was in

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defendant no. 1. It was contended on behalf of the learned Advocates appearing for respondents 4, 6 and 7 that the shares purchased by them are outside the 1-anna 6-pies odd mortgaged to the plaintiffs. There is no dispute that only 1-anna 6-pies odd out of 2-annas 8-pies belonging to defendant no. 1 was mortgaged to the plaintiffs and that the entire 2-annas 8-pies belonging to the defendant no. 1 was sold for arrears of Government revenue on the 9th January, 1912. The learned Subordinate Judge in his judgment says:

> "There is nothing to show that the shares purchased by respondents 4, 6 and 7 are comprised within the 1-anna 6-pies share mortgaged by defendant no. 1 to the plaintiffs."

In my opinion this question must be reinvestigated by the learned Subordinate Judge. The plaintiffs are entitled to recover possession of the 1-anna 6-pies share mortgaged to them. If this share is in the possession of defendant no. 1, then the plaintiffs will be entitled to recover it from defendant no. 1. If, on the other hand, the learned Subordinate Judge comes to the conclusion that the share is in the possession of respondents 4, 6 and 7, then the plaintiffs will be entitled to recover it from those respondents.

It was contended on behalf of the respondents 4, 6 and 7 that the plaintiffs' suit is barred by limitation. The learned Subordinate Judge thought that the case is governed by the six years' rule of limitation. But this conclusion is, in my opinion, erroneous. The suit is for recovery of possession and in my judgment the twelve years' rule must apply to a case of this nature. Apart from this I am satisfied that the plaintiffs were actually in possession, at any rate, up to 1917. The plaintiffs have tendered in evidence in this Court a rent decree obtained by them in 1917 in respect of rent due to them from 1914 to 1917. I am satisfied that they were in possession up to 1917 and that the suit is within time.

Now, I come to the plaintiffs' case in regard to tauzi no. 669. The entire tauzi was sold on the 7th June, 1920, and was purchased by Wahiduddin, who conveyed it to Mussammat Alimunnissa, respondent no. 13. There is no dispute that Mussammat Alimunnissa has a share in tauzi no. 669 and this being the position she is in the position of a person who has by repurchase " recovered possession of the said estate after it had been sold for arrears under this Act ". Section 53 of Act XI of 1859 lays down that a proprietor or co-partner purchasing or repurchasing the estate after it had been sold for arrears under Act XI of 1859

" shall by such purchase acquire the estate subject to all its encumbrances existing at the time of sale."

It was laid down in *Mahomed Gazee Chowdhry* v. *Pearee Mohun Mookerjee* (1) that any co-proprietor purchasing an estate for arrears of Government revenue repurchases it subject to all its encumbrances existing at the time of sale, even if the purchaser is a non-defaulting proprietor and the encumbrances were made by defaulting proprietors. In that case it was contended that the share was first purchased by Mr. Delanny who was not one of the proprietors who subsequently conveyed it to one of the proprietors. The plaintiffs' case was that Mr. Delanny was in fact a benamidar of the proprietor in question. In dealing with the question Jackson, J. said as follows: " There was, in the first place, an allegation on the part of the defendant that the purchase which was in the name of Mr. Delanny was not made benamee for him, and there has been an argument in this Court that the grounds upon which both the Courts have come to the conclusion that such purchase had been benamee are not sufficient in law. But it is unnecessary to look to these grounds, because, under

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section 53, Act XI of 1859, the very fact that Mahomed Gazee was formerly a co-proprietor and has subsequently repurchased this property is sufficient to bring him within the purview of that law under which it is declared that such purchase is made subject to all the incumbrances existing at the time of sale."

The learned Advocate appearing on behalf of respondent no. 13 contended before us that the view taken in the case which I have just cited is not an equitable one; but it seems to me that we are dealing with an exceptional piece of legislation and what is termed an equitable construction of a statute is not applicable to a statute of this nature. If the case falls within section 53 or section 54 of the Act, then those sections must have operation however inequitable it may be on our part to give effect to those sections. On the other hand, if the case does not fall within either of those sections, then the case will be governed by section 37, however inequitable it may be. The question is a simple one, namely, whether the case falls within the rule as laid down in section 37 or within the provisos of section 53 or section 54 of the Act. In my judgment the plaintiffs are entitled to a decree for possession of the disputed properties.

I would, therefore, allow the appeal, set aside the judgment and the decree passed by the Court below and give the plaintiffs a decree for possession in respect of the disputed properties.

There will be no order for costs.

On the question whether the shares purchased by respondents 4, 6 and 7 are comprised within the 1-anna 6-pies odd in tauzi no. 227 mortgaged to the plaintiffs both parties will be entitled to adduce evidence in the Court below.

ADAMI, J.—I agree.