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ordinary rate of interest, that is to say, at the rate of 12 per cent. per annum from the end of each quarter in which the instalment falls due.

With these observations we send the case back to the Court below so that the claim set up by the defendant and as covered by the decree of the Privy Council might be dealt with under section 111, Code of Civil Procedure, and a proper decree made.

In the circumstances of the case we think that each party should bear his own costs in all the Courts up to the present stage. Subsequent costs will abide the result.

Case remanded.

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[1071] APPELLATE CIVIL.

AFZUL HOSSAIN v. RAJBUNS SAHAI.\*

[20th March, 1903.]

*Revenue Sale—Act XI of 1859, ss. 13, 14, 28, 29, 37, 54—Share of estate, sale of—Mokurari lease—Rights of purchaser of share of estate—Merger—Encumbrance.*

The sale of a share of an estate for arrears of revenue, under the provisions of Act XI of 1859, does not affect, wholly or in part, a valid *mokurari* lease of lands comprised in the estate, notwithstanding the fact that the lease is held by some of the defaulting proprietors of the share sold, having a fractional proprietary interest therein.

*Kasinath Koovar v. Bankubehari Chowdhry* (1) and *Madhub Chunder Chowdhry v. Promotho Nath Roy* (2) referred to.

APPEAL by the defendants, Afzul Hossain and others.

Separate accounts having been opened at the instance of some of the proprietors of taluk Turwan, the remaining *ijmali* share remained liable for payment of Government revenue to the amount of Rs. 1,840. This *ijmali* share having fallen into arrears of Government revenue, it was put up to sale by the Collector and purchased by the plaintiff No. 1 on the 25th March 1897, and the said plaintiff was duly put in possession of the same.

The defendants are the heirs and legal representatives of one Syed Mahomed Hossain, who obtained a *mokurari* pottah of the entire taluk Turwan, dated the 3rd November 1838, from one Rani Amirunnissa, the original proprietress of the taluk whereby an annual profit of Rs. 216 only was reserved in her favour. Subsequently the defendants Nos. 1 and 2 and their brother, who was the predecessor in interest of the other defendants, acquired 5 annas 4 pies of the proprietary interest in some villages comprised in the said taluk. The defendants were thus amongst the proprietors for whose default *ijmali* share was sold.

[1072] It appears that the defendants and the other defaulting proprietors instituted a suit to set aside the revenue sale, but that the suit failed. In the course of the said suit, the defendants had set up the *mokurari* lease aforesaid.

The present suit was instituted for a declaration that after the revenue sale dated the 25th March 1897, the defendants had no valid, subsisting *mokurari* lease or other encumbrance within the purview of Act XI of 1859, the cause of action being alleged to have arisen on the 11th

\* Appeal from Original decree No. 387 of 1899, against the decree of H. Holmwood, District Judge of Gaya, dated November 6, 1899.

(1) (1869) 8 B. L. R. (A. C.) 446; (2) (1873) 20 W. R. 264.  
12 W. R. 440.

January 1898, the date of service of summons on the plaintiff No. 1 in the said suit brought to set aside the revenue sale.

The defendants contended that although the proprietary interest acquired by them in some of the villages comprised in the taluk no doubt passed to the plaintiff No. 1 by the revenue sale, yet the *mokurari* interest in the entire taluk belonging to themselves and their transferees was not at all affected by the sale, being an interest protected within the meaning of the revenue sale law.

The learned District Judge held that the *mokurari* set up by the defendants was legal and valid and that they held possession of the taluk under it on payment of rent. With reference to the question as to the effect of the revenue sale on the *mokurari*, he held that the *mokurari* was extinguished to the extent of 5 annas  $\frac{1}{2}$  pie share, but that the rest of it was not affected at all. With regard to the former share, he observed as follows:—

“ The only question that remains is, whether the 5 annas 1 dam odd of defendant's *mokurari*, which they held under themselves, does not cease to exist by operation of law, under the express terms of section 54 of Act XI of 1859. It would appear from that section and from the authorities cited that the purchaser does *incho facto* acquire any rights possessed by the previous owner or owners. That is to say, he steps into the shoes of the owners. Therefore as regards the 5 annas odd, he gets the *mokurari* to himself and it is extinguished by operation of law. This has nothing to do with the doctrines of merger under the Transfer of Property Act, since the transfer to plaintiff is not the act of parties, but is done by operation of law. He acquires the *mokurari* right in the 5 annas odd, but not being subject to the special exception of fractional interests under section 3 of the Transfer of Property Act, the *mokurari* interest lapses in his case, as he cannot hold a lease under himself nor under the Government which put him in possession, and he is not privy to any of the acts of the previous owners.”

[1073] “ It is argued by the defendants against this, that the Collector only sells the share or shares of an estate, and under the wording of section 13, the revenue sale is confined entirely to the proprietary right. But this would annul section 37 altogether and also the latter part of section 54. Certain penal consequences are attached to the sale of an entire estate by express law, and these are not confined to the mere proprietary right. Negatively, too, certain consequences, though not of penal nature, are attached to section 54. One of these consequences, is the exact co-extension of all the rights held by the former owner in the share sold with the rights of the new purchaser.”

The suit was accordingly partially decreed, it being declared “ that out of the entire 16 annas of the *mokurari* of the defendants held in their legal and lawful possession, 5 annas 1 dam and a fraction more share of which they were the proprietors, has been extinguished under the force of law.”

*Moulvi Mustafa Khan*, for the appellants, contended that there could be no merger in the present case, as the proprietary and *mokurari* rights were distinct: see *Womesh Chander Goopio v. Raj Narain Roy* (1), *Savi v. Punchanan Roy* (2) and *Jibanti Nath Khan v. Gokul Chunder Chowdhry* (3). Section 3 (d) of the Transfer of Property Act does not apply. See also Saroda Charan Mitra's Land Law of Bengal, Tagore Law Lectures, 1895, pp. 228-231. Besides the plaintiffs being owners of a fractional share of an estate, are not competent to sue to set aside the *mokurari*: see *Monohur Mookerjee v. Huromohun Mookerjee* (4), *Kasinath Koowar v. Bankubehari Chowdhry* (5) and *Madhub Chunder Chowdhry v. Promotho Nath Roy* (6). Sections 13, 14, 53 and 54 of Act XI of 1859

(1) (1868) 10 W. R. 15.

(2) (1876) 25 W. R. 503.

(3) (1891) I. L. R. 19 Cal. 760.

(4) (1864) 1 W. R. 26.

(5) (1869) 3 B. L. R. (A. C.) 446; 12 W. R. 440.

(6) (1873) 20 W. R. 264.

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show that in such a case only the proprietary right is sold and the encumbrances are unaffected by the sale.

No one appeared for the respondents.

GHOSE AND PRATT, JJ. The plaintiff is the purchaser at a sale for arrears of revenue which took place on the 25th March 1897. The sale was not a sale of the entire estate, but only of a share thereof under the provisions of section 13 of the Revenue [1074] Sale Law (Act XI of 1859). The defendants, or rather their ancestors, are persons, who, on the 3rd November 1838, had acquired a *mokurari* right over the entire estate from the then proprietor thereof. Recently, however, some of the *mokuraridars* purchased from two of the proprietors of the estate a 5 annas 1 dam share thereof. The present suit was instituted in February 1899 for the purpose of obtaining a declaration that the defendants had no valid subsisting *mokurari* lease in the property, and that after the auction sale, no right, title or interest in the share purchased by plaintiff remained with the defendants.

The Court below has, however, found that the *mokurari* set up by the defendants was really granted in 1838 by the then owners of the estate. It has further found that, upon the purchase by the defendants, or some of them of the 5 annas 1 dam share of the proprietary interest, the *mokurari* did not merge into the higher interest, but that having regard to the provisions of section 54 of the Revenue Sale Law, the defendants' *mokurari* must be taken to have come to an end to the extent of the 5 anna 1 dam share which they had in the *zemindari*. The suit has otherwise been dismissed. Against this declaration by the District Judge the present appeal has been preferred by the defendants.

The case depends entirely upon the construction of section 54 of the Revenue Sale Law. That section runs thus :—“When a share or shares of an estate may be sold under the provisions of section 13 or 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 the *mokurari* lease in favour of the defendants in November 1838 was unquestionably an encumbrance within the meaning of the section and the plaintiff, having purchased only a share of the estate under the provisions of section 13 of the Act, acquired it subject to this encumbrance. Let us then see how, though the plaintiff has purchased a share of the estate subject to the *mokurari* can he be entitled to treat the *mokurari* to the extent of 5 annas 1 dam share as having been extinguished, as the Judge has put it, by reason of the sale at which he purchased? It will be observed that the concluding words of section 54 are very significant as bearing upon the question which we have to consider, those words being— [1075] “and shall not acquire any rights which were not possessed by the previous owner or owners.” The section does not say “he shall acquire all the rights which were possessed by the previous owner or owners,” for, in that case no doubt, the position taken by the District Judge would be correct, because the defendants, at any rate some of them, being proprietors to the extent of 5 annas 1 dam share, and being also possessed of the *mokurari* interest in respect of the said 5 annas 1 dam share, it might be said that their rights, that is to say, all the rights they possessed, not only in the 5 anna 1 dam share of the *zemindari*, but also in the 5 annas 1 dam share in the *mokurari* interest passed to the plaintiff. But as we have already pointed out, the law does not give to the plaintiff such rights. As bearing upon the construction of

section 54, we desire to refer to the provisions of section 14 of the Revenue Sale Law. That section relates, amongst other matters, to a purchase by the share-holders other than the owner of the defaulting share, in the event of the sale of the share in default not fetching the full amount of the arrears due to Government and it provides as follows:—"The Collector shall declare that the entire estate will be put up to sale for arrears of revenue at a future date, unless the other recorded sharer or sharers, or one or more of them, shall within ten days purchase the share in arrear by paying to Government the whole arrear due from such share. If such purchase be completed, the Collector or other officer as aforesaid shall give such certificate and delivery of possession as are provided for in sections 28 and 29 of this Act, to the purchaser or purchasers who shall have the same rights as if the share had been purchased by him or them at the sale," that is to say, the owners of the share or shares in the event of their becoming purchasers in the circumstances contemplated shall acquire only the same rights as if the share had been purchased by him or them at the sale. We introduce the word "only" as indicating what the Legislature clearly means, that is to say, that the said purchaser acquires only the same interest which he would have if he had purchased it at the sale.

Reading section 54 by the light of section 14 of the Act, it seems to us that it could not rightly be held that the purchaser of a share at a revenue sale under section 13 acquires all the rights [1076] which were possessed by the previous owner or owners; and this is the position that has been taken by the District Judge. In this connection we may refer to the case of *Madhub Chunder Chowdhry v. Promotho Nath Roy* (1), the particular passage which we have in view being found at p. 266. That was a case of the sale of an estate in respect of which a separate account had been opened in the Collectorate; and the learned Judges, in delivering judgment, amongst other matters, observed as follows:—"It is, therefore, clear that the plaintiff is not the purchaser of an entire estate. Had he been so, he would have acquired the estate free from all encumbrances and would have been entitled to avoid and annul all under-tenures with the exception of such as are reserved under the provisions of section 37 of Act XI of 1859. The plaintiff being the purchaser of a share in an estate has acquired that share subject to all encumbrances and he has acquired no rights which were not possessed by the previous owners: see section 54 of Act XI of 1859." The question here arises, whether the previous owners of the estate or the owner of the share which the plaintiff has purchased at the revenue sale, had the right to annul the *mokurari* set up by the defendants. It is obvious that they had no such right; and it could not rightly be said that the plaintiff, having purchased that share subject to all the encumbrances which had been created by the previous owners thereof, is entitled to treat the *mokurari* to the extent of a 5 annas 1 dam share, as having been extinguished by the sale in question. A similar view was expressed in the case of *Kasinath Koowar v. Bankubehari Chowdhry* (2), the particular passage we have in view being at p. 450. Upon these grounds we think that the learned Judge has not taken a right view of the respective rights of the parties to the suit. We accordingly order that his decree be varied so as to dismiss the suit with costs.

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*Appeal allowed.*

(1) (1873) 20 W. R. 264.

(2) (1869) 3 B. L. R. (A. C.) 446; 12 W. R. 440.