this was so and that the defendant had become the mortgagee of this property in the place of the original zur-i-peshgeedar; but the Lower Appellate Court finding this, does not dispose of the plaintiff's suit as to this 3½ pie share, but says "if the proportional "amount of the mortgage-money of Fyezoollah in respect of the share of Mussamut "Ameerun, mother of the vendor, had not been "satisfied by the proceeds of the mortgaged "property, then he (defendant) is at liberty to "recover the same by instituting a suit." It seems to us that this is just reversing the position of the parties. On the facts found by the Lower Appellate Court, the defendant is in possession as zur-i-peshgeedar, and he has a right to remain in possession until the plaintiff can show that the whole debt has been discharged by the usufruct. But the plaintiff in this suit made no such allegation, and no enquiry was held on this point. He failed to prove his title to possession, and until he can prove these, he cannot recover possession against the zur-i-peshgeedar, but can, if he thinks proper, institute legal proceedings in Court for that purpose.

As the facts have been enquired into and found in this case, the defendant has a right to retain possession against the plaintiff of the 3½ pie share. The result of our judgment, therefore, is that the decision of the Lower Appellate Court so far as it holds the plaintiff entitled to the 3½ pie share derived from Hossein Ali is reversed, and the plaintiff's suit as regards that share dismissed, and in all other respects the judgment of the Lower Appellate Court is held good and should stand. Each party should bear his own costs in this appeal.

The 6th June 1870.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Sale for arrears of rent—Absence of shareholder's name.

Case No. 11 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 23rd December 1869, reversing a decision of the Moonsiff of Arrah, dated the 25th February 1869.

Doorbijoy Mahtoon (Plaintiff) *Appellant,*

versus

Prithee Narain Singh (principal Defendant) *Respondent.*

Baboo Boodh Sein Singh for Appellant.

Baboo Prosunno Coomar Roy for Respondent.

Where a tenure is duly sold for arrears of rent under Act X of 1859 and Act VIII (B. C.) of 1865, the absence of a shareholder's name from the proceedings does not as a matter of law invalidate the sale as against him.

Markby, J.—THERE are five grounds of appeal taken in this case, but as they stand they none of them, except the first, raise any intelligible point of law, and we have not been informed in the course of the argument what the points are which are intended to be raised by them. As to the first ground, however, there does seem to arise this question, that whereas the name of the plaintiff does not appear in the decree which the zemindar obtained for rent, his share in the property has nevertheless been sold.

It is, however, established by the decision of the first Court, and that finding is not displaced by the second Court, that the plaintiff is a shareholder, and the Judge says that both parties admitted that the land in dispute was duly sold for arrears of rent under the provisions of Act X of 1859 and Act VIII of 1865 (B. C), and from this he infers that whether the plaintiff's name appeared in those proceedings or not, the sale of the tenure was good against him. There is no reason shewn to us why this conclusion of the Lower Appellate Court is not right. It does not follow as a matter of law that because the plaintiff's name did not appear in the proceeding, therefore the sale of the tenure is invalid. It may be that his name was not registered in the zemindar's sheristah as a shareholder, and that therefore the zemindar was not bound to recognize him as his tenant; or it may be that there was an engagement made between the zemindar and the other shareholders with his consent. Be that as it may be, it is sufficient here to say that the inference which the Lower Appellate Court has drawn is not shewn to be wrong.

The special appeal is dismissed with costs.