"most ample and convictive proof that the "increased rate of rent demanded is *fair* "*and equitable*," is that he means to say that they are fair and equitable when tried by the test of the rules for enhancement laid down in Section 17, because he had immediately prior to using those words, referred to Section 17, and he immediately afterwards goes on to affirm the judgment of the first Court which had proceeded, in his judgment, entirely upon that Section. We do not think, when the Judge used those words and referred to the Section, he intended to set up any standard of fairness and equity except that laid down under Section 17. We think, therefore, that this ground also fails, and the result is that this special appeal is dismissed with costs.

The 6th June 1870.

Present:

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

Usufructuary mortgage—Possession.

Case No. 70 of 1870.

Special Appeal from a decision passed by the Judge of Sarun, dated the 30th September 1869, *modifying a decision of the Sudder Moonsiff of Chuprah, dated the 31st December* 1868.

Shaikh Fyezoollah and another (Defendants) *Appellants,*

versus

Syud Kazim Hossein and another (Plaintiffs) *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Baboo Kalee Kishen Sein for Respondents.

A party who by paying off a mortgage debt becomes an usufructuary mortgagee in place of the original zur-i-peshgeedar does not need to sue for the amount due, but is entitled to remain in possession until the whole debt has been discharged by the usufruct.

Markby, J.—This is rather a complicated case, but we do not think it necessary to state the facts at very great length.

The suit was for possession of 11½ pie of Mouzah Kureem Chuck and 3½ cottahs in Mouzah Danawana. We may get rid of the 3½ cottahs at once, for it is admitted that no question arises in this appeal as regards those lands.

The 11½ pie may then be divided into two parts, *viz.*, 8 pie which is said to have come into the family of Bibun and 3½ pie which is said to be a share in the two annas which belong to Hessamoodeen. As to the 8 pie which came to the family of Bibun, it is found now beyond question by the lower Courts that the share of Hossein Ali and the share of Enayet Ali have been conveyed by a valid instrument to the defendant, and to that extent she has been successful. The only question before us rises as to the share of Kefait Ali which descended to Nuzur Ali. That share, whatever it was, went to Kaneez Fatima, the plaintiff's vendor, and the Lower Appellate Court has given him a decree for it. The objection raised in special appeal is, that the Lower Appellate Court has not disposed of the finding of the first Court, that whatever may have been the title of Kaneez Fatima, she never obtained possession, and therefore the claim of the plaintiff who derives through her is barred by limitation.

The first Court did in fact find generally that Kaneez Fatima never obtained possession of any share at all in this property. The Lower Appellate Court, when it reversed that finding, no doubt, had just been speaking, not of the share which came from Kefait Ali to Kaneez Fatima, but of the share which came from Mussamut Bibun to Kaneez Fatima; but seeing that that Court has reversed the judgment of the first Court on this point, we think that the proper inference is that it intended to find that which is far the more probable thing in point of fact,—that Kaneez Fatima did get into possession, not only of what came from Mussamut Bibun, but of all that which her father Nuzur Ali was entitled to—that is to say, what he obtained from both Kefait Ali and Mussamut Bibun. This disposes of the first point.

Then the other point taken is as to the 3½ pie share which came to Kaneez Fatima through Hessamoodeen. As to this the first attempt of the defendant was to set up a title to it under a will of Hessam's daughter Ameerun. That attempt however altogether failed, and that failing, he fell back upon a zur-i-peshgee lease originally executed by Hessamoodeen to which he said he had a title by paying off the debt and being from 25 years ago ever since in possession. Both the Courts below have found that in fact

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.