does not arise before us now. If I were sitting in Regular Appeal, I should allow the costs to be paid in the first instance by both defendants, with liberty to the mortgagee to recover them from the mortgagor; but it would be inequitable to leave the plaintiff without his costs, whilst the mortgagee is solvent.

NEWTON, J., concurred.

PER CURIAM:—The Court confirms the Assistant Judge's decree with costs.

Decree confirmed.

1867.
Jan. 30.

Special Appeal No. 296 *of* 1866.

AJURA'M MANIRA'M.........................*Appellant.*
KUSA'JI valad SHEKOJI and another......*Respondents.*

Mistake of Judge—Material issues—Remand.

In a suit to redeem land alleged to have been purchased by the special appellant at an auction sale, and then mortgaged by him to the respondents the District Judge reversed the Munsif's decree for redemption—being under a mistake as to what was necessary to be proved with reference to the dimensions of the land; and as the mistake was one which was likely to have affected his conclusions on other facts in dispute, and as other material questions had not been decided, the issues in the case were framed by the High Court, and the suit remanded for a new decree to be passed upon them.

THIS was a special appeal from the decision of A. St. J. Richardson, District Judge of Ahmednagar, in Appeal Suit No. 79 of 1866, reversing the decree of the Munsif of Sirúr in Original Suit No. 1582 of 1864.

The original suit was brought by the special appellant, who claimed to redeem certain land mortgaged to the defendants (the special respondents) in 1853.

The defendants denied the mortgage; and the Munsif, finding that the plaintiff had purchased the land in question at an auction sale, and subsequently mortgaged it to the defendants, passed a decree for redemption on payment by the plaintiff of Rs. 210.

On appeal by the defendants from this decree, the Judge laid down the following issues:—(1) Is the land that of which plaintiff had the hereditary, or any other valid pro-

1867. AJURA'M MANIRA'M v. KUSA'JI et al.

prietary right, over which they executed the mortgage deed on the 19th of November 1853; (2) under the condition of that deed, can defendants be called on to vacate.

The following judgment was recorded:—

"The Court has examined the exhibits from No. 1 to 55 inclusive. There is no certificate of sale by which it can be ascertained that Rattan Manirám (the deceased plaintiff) did purchase the portions of the fields Nos. 158 and 159 at auction, by order of the court, in satisfaction of a decree No. 21 of 1849, the judgment debtor being Yesu valad Desji Shelke. The name, number, and dimensions of the land in the exhibit No. 5 do not correspond with those of fields Nos. 158 and 159. * * *

"My finding on the first issue is that the land, Nos. 158 and 159, is not, on evidence, as that to which plaintiff Ajurám, or those from whom he derives, has either hereditary or any other title as proprietor, obtained by purchase, nor does any credible evidence substantiate execution by the said Ajurám valad Manirám of a deed of mortgage.

"My finding on the second issue is that on the evidence adduced, defendants cannot be called on to vacate.

"The decree of the lower court is reversed with costs on the respondent, Ajurám Manirám."

The special appeal came on for hearing this day before Couch, C.J., and Newton, J.

Reid (with him *Shántárám Náráyan*) for the appellant.

Nánábhái Haridás for the respondent.

Couch, C.J.:—There is some difficulty in arriving at a satisfactory conclusion in this case, owing to the way in which it has been dealt with by the District Judge in appeal: for—however erroneous his conclusion may have been, and however much we may lament that it has been made—we cannot on a special appeal interfere with his decision, unless we find that there was a substantial error or defect in law in the investigation of the case.

Now in this case there was one very material question of fact to be determined, namely, did the plaintiff become the

purchaser of the land in dispute at an auction sale. His allegation was that he first purchased the land and then mortgaged it to the defendants: whilst the defendants set forth their own anterior possession, and say that the land belonged to them before the alleged auction sale; but they afterwards alter their statement.

The Judge says that the name, number, and dimensions of the land in the exhibit No. 5 do not correspond with those of fields Nos. 158 and 159. It was a mistake on his part to suppose that they could correspond, as they had been altered in consequence of the introduction of the Revenue Survey into the District; and that mistake is such a one as may have materially affected his finding, especially when the plaintiff claimed to redeem portions only of those fields. Had the Judge come to the conclusion that the plaintiff had purchased the land, he would probably also have found that he had mortgaged it.

Another important question of fact is, whether the instrument (exhibit No. 29) was executed by the defendants. But the judgment is silent on that point.

As we cannot arrive at a satisfactory conclusion upon the issues as framed and the evidence already recorded, we must point out what the material issues are, and remand the case.

The following appear to be the material issues in the case:—(1) Whether the plaintiff purchased the land which is the subject of the suit at the auction sale; (2) whether the deed No. 29 was executed by the defendant; (3) whether the plaintiff mortgaged to the defendants the land which is the subject of the suit; (4) if it be found that the plaintiff became the purchaser at the auction sale, then, whether he had, at the time of the suit, lost his right to recover the land claimed, either absolutely, or as a mortgagor upon paying off the mortgage.

NEWTON, J., concurred.

The Court reversed the Judge's decree, and remanded the case, that a new decree might be passed upon the findings on those issues, awarding costs.

Case remanded.