

possession on the 3rd Bysack 1277. The defendant immediately recovered possession by a summary proceeding under section 15 of Act XIV. of 1859, whereupon the plaintiff brought this suit.

Both parties claim the land as their separate property.

The first Court gave the plaintiff a decree for possession of an undivided 12-annas and 15-gundas share.

The second Court set aside that decree, and dismissed the suit *in toto*.

We are now satisfied that the view taken by the Moonsiff as to the nature of the plaintiff's interest was right; the question turns entirely on the construction of one document, and it is clear that upon that document the plaintiff is entitled to a 12-annas 15-gundas share.

The only doubt is whether the plaintiff having sued to recover exclusive possession of the whole property can recover an undivided share. But we think he can. In right of his share, the plaintiff could claim to be admitted to a joint possession of the property, and the defendant was guilty of a wrong in keeping him out. The plaintiff has a right, as against the defendant, to be restored to possession, although not to possession exactly of that nature to which he laid claim. We think it would be useless and unnecessary to put the plaintiff to a fresh suit. But, both parties having been in the wrong, we are not disposed to give any costs in this Court or the Courts below.

The case in 12 Weekly Reporter 248 has, we think, been misunderstood. We believe that decision to be in accordance with the prevailing opinion in this Court that a party, asking to have a right declared of a specific nature, must prove the right which he claims (see 6 Weekly Reporter 311). The case is quite different when the plaintiff proves a wrong done to him, though not exactly to the extent of which he complains, or that he is entitled to relief, though not exactly to the extent or on the very ground which he asks it. The stricter rule applied to declaratory decrees does not apply to all other cases. Possibly it escaped the attention of the Court in the case reported in 19 Weekly Reporter 195 that the decision in 12 Weekly Reporter dealt only with a suit for a declaratory decree.

The decision of the Subordinate Judge will be set aside, and that of the Moonsiff restored and affirmed. And each party will pay their own costs in this Court and the lower Courts.

The 23rd April 1874.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble W. Ainslie, Judge.

Mortgage prior to Registration Act.

Case No. 1438 of 1873.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 8th April 1873, affirming a decision of the Additional Moonsiff of that District, dated the 4th January 1873.

Sreemutty Fyezoonnissa (one of the Defendants), *Appellant*,

versus

Moulvie Sadutoollah (Plaintiff),
Respondent.

Baboo Bama Churn Banerjee for
Appellant.

Baboo Grish Chunder Ghose for
Respondent.

Where a complete title as mortgagee was acquired before the Registration Act of 1864, the mortgage, though not registered, was held to be good against a registered deed of sale executed after Act XX. of 1866 came into operation.

Couch, C. J.—IN this case the mortgage was in 1861, and it has been found that the money was advanced, and the mortgage completed by possession. The mortgagee, therefore, even before the Registration Act of 1864, acquired a complete title as mortgagee. We agree with the learned Judges who decided the case reported in Volume X., Weekly Reporter, page 65, in the reasons which they give for holding that section 50 of Act XX. of 1866 would not operate to invalidate that title. The mortgage, although not registered, would be good against the defendant's deed of sale, which was executed after Act XX. of 1866 came into operation, and which was registered.

The appeal must be dismissed with costs.