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no authority in the Civil Procedure Code for a Court to make such an order. Under s. 210 in all decrees for the payment of money the Court may for sufficient reason order that the amount shall be paid by instalments, but this section is inapplicable, for the decretal order is not for payment by instalments, and it is doubtful whether the section will apply to a decree of the nature of the decree made in this suit, which is for something more than the payment of money. Moreover, it cannot be held that any sufficient reason is shown in this case for allowing defendant time for payment. We decree the appeal with costs, and modify the decrees of the lower Courts, by cancelling that portion which allows two years within which the amount decreed is to be satisfied.

Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

GANGA PRASAD (PLAINTIFF) *v.* GAJADHAR PRASAD AND OTHERS (DEFENDANTS).*

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Mesne profits—Procedure on the hearing of appeal—Objection—Act X of 1877 *(Civil Procedure Code), ss.* 211, 561.

Where the parties to a suit for certain land and for the payment of mesne profits in respect of the same were co-sharers in the estate comprising such land, and the defendants had themselves occupied and cultivated such land, *held* that the most reasonable and fitting mode of assessing such mesne profits was to ascertain what would be a fair rent for such land if it had been let to an ordinary tenant and had not been cultivated by the defendants.

Both parties appealed from the decree of the Court of first instance, and both the appeals were dismissed by the lower appellate Court. The plaintiff appealed to the High Court from the decree of the lower appellate Court dismissing his appeal, whereupon the defendant took objections to the decree of the lower appellate Court dismissing his appeal. *Held* that such objections could not be entertained.

THIS was a suit in which the plaintiff claimed the possession of 37 bighas 5 biswas of land and Rs. 883-13-0 the mesne profits of the land for 1283 and 1284 fasli. The plaintiff claimed under an agreement for the partition of his share and that of the defendants in a certain mahal, under which partition the land in suit had fallen to the share of the plaintiff. The plaintiff estimated

* Second Appeal, No. 1151 of 1878, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 18th June, 1878, affirming a decree of Maulvi Muhammad Wajeh-ulla Khan, Subordinate Judge of Mirzapur, dated the 23rd April, 1878.

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the mesne profits for the years 1283 and 1284 fasli in manner following, that is to say, he stated the produce of the land for each year to be eight maunds per bigha, the total being 298 maunds for each year: he then deducted 37 maunds 5 seers on account of the seed, making the net produce for each year 260 maunds 35 seers: he then valued the produce for each year at Re. 1-8-0 per maund, which made the value of the produce for each year Rs. 391-2-0: he then added for each year Rs. 93-2-0 as the value of the straw, and then deducted the same sum on account of the expenses of cultivation, thus making the total value of the mesne profits for each year, without interest, Rs. 391-2-0. The defendants set up as a defence to the suit, amongst other things, that the land in suit was held by them before the partition as sír-land, and had been so held by them after the partition, and that under the circumstances they were entitled to remain in possession of the land, and the plaintiff could only claim rent from them in respect thereof. The Court of first instance held that under the terms of the agreement for partition any land held as sír by the one party was to be surrendered if it fell under the partition to the share of the other party, and gave the plaintiff a decree for the possession of the land claimed. With regard to the mesne profits the Court dismissed the claim observing as follows: "The Court finds that the evidence as to the produce claimed is not satisfactory: the witnesses are not unanimous in their statements, and are not trustworthy, and are also at enmity with the defendants." On appeal by the plaintiff from the decree of the Court of first instance the lower appellate Court observed as follows: "The appellant (plaintiff) claims for profits which he would have made had he not been kept out of the land the subject of suit: the lower Court has found that the evidence as to the produce of the land is not satisfactory, and this Court must agree with the lower Court: appellant has assumed the produce of 37 bighas 5 biswas to be eight maunds per bigha, and the value of the *bhusa* to be Rs. 90, and after deducting one maund per bigha for cost of seed, Rs. 93 for costs of cultivation, claims the balance: this account is most unsatisfactory: the Court cannot accept that wheat and barley only were sown, nor can it accept an account which makes the outturn the same of each field: on an area of 37 bighas the crops sown

would vary according to the crop and the soil, and the value of the crop according to its amount and kind: the appellant urges that if he is not to obtain a decree for the profits under his estimate he is at all events entitled to the rent recorded against the land: the Court finds that this has been deposited in the Collector's treasury, and remains but to be claimed and taken by appellant: the Court is far from thinking that the rent deposited is a fair equivalent for the use of the land, but it rested with appellant to show what was a fair profit to have been derived from the land, and the Court cannot accept the appellant's account as a fair one, he having failed to show that it is such." The defendants also appealed from the decree of the Court of first instance, the lower appellate Court dismissing their appeal.

The plaintiff appealed to the High Court contending that the lower appellate Court should have determined what was a proper amount to allow as mesne profits, and have given him a decree for that amount. The respondents objected that they had acquired a right of occupancy in the land in suit and could not be dispossessed.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the appellant.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Lala *Lalta Prasad*, for the respondents.

The High Court (STUART, C. J. and SPANKIE, J.) remanded the case to the lower appellate Court for the trial of the issue stated in the following

ORDER OF REMAND.—Appellant appears to have claimed a larger share of profits than he was entitled to, or at least to have asked for the same out-turn from each field, which the Judge rightly regards as an unsatisfactory account of the profits. The defendants furnished no accounts. Mesne profits (*Explanation*, s. 211 of Act X of 1877) mean those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received, therefrom. Applying this rule to the particular circumstances of the case in which both parties are shareholders in the estate, and defendants themselves occupied and cultivated the lands in suit, the most reasonable and fitting mode of assessing the amount to which the plaintiff is en-

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titled would be to ascertain and determine what would be a fair rent for the land, if it had been let to an ordinary tenant and had not been cultivated by the respondents themselves. The rent recorded in the rent-roll is probably that paid by sir-lands, and if so the plaintiff seems to be entitled to the rent which the respondents could have obtained from a tenant, if they had not kept the lands in their own hands. We remand the case to the Judge to enable him to ascertain and determine what the rent should be. On receipt of his finding one week might be allowed for objections, and at the end thereof the appeal as regards appellant will be disposed of.

With regard to the objections put in by the respondents, they cannot be admitted. These objections are in fact an appeal from the decree passed against respondents in this case, on the appeal brought by themselves against the original decree of the first Court. Under s. 561 of Act X of 1877 a respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal. But in the case now before us the appellant lost his appeal, and there was no objection which respondents could have taken by way of appeal to this Court against the decree of the lower appellate Court. They might have appealed from the decree on their own separate case of appeal, but in the particular case before us the decree of the lower appellate Court was one dismissing the appeal of the present appellant. We may add that if the objections by way of appeal in their own case could be received, they would fail as they impugn the finding of the Court in that case on a matter of fact, and there are no legal grounds for a second appeal.

FULL BENCH.

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January 31.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

REFERENCE BY BOARD OF REVENUE, N.-W. P., UNDER ACT I OF 1879.

Stamp—Bond—Agreement—Act I of 1879 (*Stamp Act*) *ss.* 3, *cl.* (4), 7, *and sch. i, No.* 5, (c).

One of the clauses of an instrument by which one party to the instrument bound himself, in the event of a breach on his part of any of the conditions of