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are wholly distinguishable from the facts of this case. As in our opinion article 61 is the article applicable to the present suit, article 120 cannot apply. The court below was, therefore, right in dismissing the suit on the ground of limitation, though its reasons are not the reasons for which we hold the suit to be time-barred. We dismiss the appeal with costs.

*Appeal dismissed.*

*Before Justice Sir Pramada Charan Banerji and Mr. Justice Wallach.*

GANGA SAHAI (DEFENDANT) v. BANSI (PLAINTIFF).\*

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July, 22.

*Jurisdiction—Civil and Revenue Courts—Occupancy holding—Suit by one co-owner against the other for possession and mesne profits.*

One of two co-owners of an occupancy holding, upon the allegation that the other co-owner was in fact cultivating more than his proper share of the holding, sued him in a Civil Court, asking for a decree for possession of his half share of the holding and for mesne profits. The court, however, granted him a decree for a declaration of his right to a half share and also for mesne profits.

*Held* that there was no objection to such a decree being granted by a Civil Court. In such circumstances a Revenue Court could not grant a decree for mesne profits. *Asiq Husain v. Asghari Begam* (1) referred to.

THE facts of the case are set forth in the following order referring the case to a Bench of two Judges.

STUART, J.—The facts are as follows :—The plaintiff, Bansi, and the defendant, Ganga Sahai, are joint sharers in an occupancy holding. Bansi alleges that their shares should be half and half. They did not cultivate the holding jointly, but under a private arrangement they have divided the fields. Bansi cultivates one portion, Ganga Sahai cultivates the remaining portion.

Bansi's plea is that Ganga Sahai cultivates more than his half share. The courts below have found on the facts that this is a correct plea. Bansi instituted a suit for possession of sufficient land to make up his share to one-half and mesne profits, or for a declaration that he was entitled to one-half.

The learned Munsif gave Bansi a decree for a declaration and mesne profits. The learned Subordinate Judge in second appeal

\* Second Appeal no. 949 of 1917, from a decree of Abdul Haasan, Subordinate Judge of Meerut, dated the 17th of May, 1917, confirming a decree of Alakh Murari, Second Additional Munsif of Ghaziabad, dated the 12th of March, 1917.

raises the following point: He admits that the decree for a declaration is a good decree. It clearly is a good decree on the authority of *Ashiq Husain v. Asghari Begam* (1). He contends, however, that a decree for mesne profits cannot be given. His argument being that a relief for mesne profits is an ancillary relief that follows a decree for possession and that when a decree for possession is refused, no decree for mesne profits can be given. In this case it is of course clear, on the authority of *Ashiq Husain v. Asghari Begam* (1) in addition to many other decisions, that a decree for possession could not be given, and it was not given. In these circumstances he urges that a decree for mesne profits cannot be given. There seems great force in this argument, but it is quite clear that the Bench which decided the case in *Ashiq Husain v. Asghari Begam* (1) awarded a decree for mesne profits as well as a declaratory decree. The point now taken does not appear to have been argued before it, but as there is the authority of a Divisional Bench against the view advanced by the learned counsel for the appellant, I consider it necessary to refer the decision of this appeal to a Divisional Bench. It will be referred accordingly.

The appeal came on for hearing before BANERJI and WALLACH, JJ.

Pandit *Radhakant Malaviya* (for Pandit *Kailas Nath Katju*), for the appellant:—

On the findings arrived at in this case no mesne profits ought to have been awarded at all to the plaintiff. The parties are found to be co-sharers and in joint possession; under such circumstances, if one of them has been in possession of more than his share of the land or the receipts therefrom, such possession cannot be called wrongful within the meaning of the definition of the term 'mesne profits.' The proper remedy is by adjustment between the parties in a suit for accounts. A suit for accounts between co-sharers can be brought in the Revenue Court, and it is for that court and not the Civil Court to grant the relief.

In the case of *Ajodhya Singh v. Ram Dyal Upadhiya* (2) damages were granted for wrongful possession. That case was one of a trespasser; the appellant is a co-sharer. He never

(1) (1907) I. L. R., 30 All., 90. (2) (1907) 4 A.L.J., 769.

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denied the title of the other party. Section 32 of the Tenancy Act is a bar to the present suit. When the claim for possession is disallowed or cannot be granted, that for mesne profits, which is in the nature of a subsidiary relief, ought not to be granted by itself.

Munshi *Girdhari Lal Agarwala* (with him Babu *Piari Lal Banerji* and Babu *Har Sarup Gupta*), for the respondent was not called upon.

BANERJI and WALLACH, JJ. :—This appeal arises out of a suit in which the plaintiff claimed that he was entitled to a half share of a certain cultivatory holding. He alleged that he and the defendant were each entitled to a half share of the holding and that the defendant had taken possession of a larger share than that to which he was entitled. The plaintiff, therefore, claimed a declaration that he was entitled to a half share. He also claimed possession and mesne profits. The court below has granted him a decree declaring him entitled to a half share, but, in view of [the provisions of section 32] of the Agra Tenancy Act, has [refused to grant him possession of a half share, as this might amount to a partition of the holding. A decree for mesne profits has also been granted. In this appeal, which has been preferred on behalf of the defendant, it is not urged that the declaratory decree passed in the plaintiff's favour is not a proper decree, but it is contended that a decree for mesne profits should not have been granted in a suit for a declaratory decree. We think that this contention is without force. According to the findings of the courts below, the defendant was in possession of a larger share than that to which he was entitled, and he appropriated the profits of that share, thereby excluding the plaintiff from such profits as he was entitled to get from the property. The plaintiff has the right to recover from the defendant the profits which the defendant, who was wrongfully in possession, had appropriated; that is to say, he has the right to get mesne profits as defined in the Code of Civil Procedure. There is no reason why the plaintiff should not be compensated for the loss of the profits which the defendant has appropriated. Such profits could not have been claimed in the Revenue Court under any of the provisions of the Agra Tenancy Act. The

parties are not co-sharers in the zamindari, but are co-sharers in a cultivatory holding only. In our opinion there is no bar to a suit of this description. We see no reason to differ from the view taken in *Ashiq Husain v. Asghari Begam* (1), to which one of us was a party. We dismiss the appeal with costs.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Wallach.*

EMPEROR v. NIRMAL SINGH AND OTHERS.\*

*Criminal Procedure Code, section 103—Right of investigating officer to search a house—Search made without witnesses—Resistance on the part of householder—Act no. XLV of 1860 (Indian Penal Code), sections 332 and 503.*

A sub-inspector of police investigating a charge of theft requires no warrant to enable him to search a house which he suspects to contain stolen property. But in making such a search he is bound to comply with the provisions of section 103 of the Code of Criminal Procedure, and if he attempts to make a search without any search-witnesses being present, the owner or occupier of the house is justified in resisting the attempt so far as to exclude him from the house. The owner or occupier is not, however, justified in using any more force than is necessary for such purpose.

THIS was an application in revision against an appellate order of the Sessions Judge of Shahjahanpur dismissing the appeals of several persons who had been convicted of offences under sections 147 and 332 of the Indian Penal Code. The facts of case are sufficiently stated in the judgment of the Court.

Mr. J. M. Banerji, for the applicants.

The officiating Assistant Government Advocate (Babu Lalit Mohan Banerji) for the Crown.

WALLACH, J.:—A Magistrate of the first class convicted eleven persons under sections 147 and 332 of the Indian Penal Code, for rioting and causing hurt to a public servant in discharging his duties, and sentenced them to various terms of imprisonment and to fines. On appeal the learned Sessions Judge of Shahjahanpur allowed the appeal of one, Sukhdeo Singh, but dismissed the appeals of the other ten appellants, upholding the sentences passed on them. These ten persons have filed revisions

\* Criminal Revision no. 389 of 1919, from an order of Pratap Singh, Sessions Judge of Shahjahanpur, dated the 26th of June, 1919.

(1) (1907) I. L. R., 30 All. 90.

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