As regards the house, the plaintiff agreed to receive Rs. 500 in lieu of his share in the event of his refusing to live in the house. He is not entitled to a partition of it if the co-sharers are willing to pay him the Rs. 500.

We therefore set aside the decree of the lower Appellate Court, and modify the decree of the District Munsif by directing that the plaintiff do recover one-fourth share of the house unless the co-sharers or any of them deposit in Court for payment to the plaintiff Rs. 500 within three months from this date. In other respects we restore the decree of the District Munsif.

Plaintiff must have his costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1901. November 14, 28.

THE ZAMINDAR OF VIZIANAGRAM (DEFENDANT), APPELLANT,

v.

BEHARA SURYANARAYANA PATRULU (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 116—Breach of contract in writing registered—Lease of villages—Failure by lessee to put lessor in possession—Executory contract to deliver such possession as the nature of the property admits—Mere execution of lease of villages not a delivery of possession.

By a registered document, dated 11th November 1893, defendant leased certain villages to plaintiff for a term of seven years and eight months. On 5th December 1893, plaintiff applied to be put into possession of the villages but never obtained possession. On 11th November 1899, plaintiff brought this suit for possession and in the alternative for the damages which he had sustained by the failure on the part of defendant to put him into possession. On the plea of limitation being set up:

Held, that the claim for damages was not barred, it being governed by article 116 of schedule II to the Limitation Act. Both in the case of a sale and of a lease, the registered instrument by which such sale or lease is effected not only operates as a grant, but, in the absence of a contract to the contrary, is also

---

* Appeal No. 172 of 1900 against the decree of M. D. Bell, District Judge of Vizagapatam, in Original Suit No. 29 of 1899.

THE ZAMINDAR OF VIZIANAGRAM *v.* BEHARA SURYANARAYANA PATRULU.

construed and operates as an executory contract to deliver to the vendee or lessee such possession of the property as its nature permits; and the breach of such an obligation is a breach of a contract in writing registered within the meaning of the article referred to.

It was also contended by the defendant that inasmuch as the ryots were in actual occupation of the villages which formed the subject matter of the lease, the defendant had, in fact, by the mere execution and delivery of the lease, given plaintiff such possession as the subject matter of the lease permitted and that plaintiff could have collected the rents without any further act on the part of the defendant:

Held, that possession had not been given.

SUIT to recover possession of certain villages and for damages, and, in the alternative, for damages in lieu of possession. The following statement of facts is taken from the judgment of the High Court:—"Respondent, as the lessee under the late Maharajah of Vizianagram, the predecessor in title of the defendant, under a registered instrument in writing, dated 11th November 1893, for a term of seven years and eight months ending with June 1901, brought this suit on the 11th November 1899, alleging that he has not been put in possession of the villages let to him and that in February 1898 defendant had recovered possession of the villages from the vendor who, on the 23rd October 1893, executed a registered sale-deed in favour of the late Maharajah of Vizianagram, and praying that he may be put into possession of the villages for a term of eight years (meaning apparently seven years and eight months) either from the date of the plaint (11th November 1899) or from February 1898. He also claimed Rs. 2,000 for damages from February 1898 to the end of July 1899, presumably in the event of the term commencing from February 1898. He also claimed in the alternative that, in the event of the Court holding that he cannot recover possession of the villages for the said term, he may be awarded as damages a sum not exceeding Rs. 9,000, in addition to the Rs. 2,000 already referred to. The defendant, while admitting the lease sued upon, resisted the suit by alleging that the plaintiff, who was the manager of the vendor of the villages in question, instigated the vendor to contend that the sale-deed was false and inoperative and in collusion with the vendor prevented the vendee, the lessor of the plaintiff, from getting possession of the villages and that the plaintiff also forfeited the lease by his misconduct. The defendant also pleaded that, even if the lease is to be enforced, the

plaintiff can be put into possession only till June 1901 and that the claim for damages is unsustainable. The following issues were framed :—

"(1) Whether the lease in favour of plaintiff has become inoperative by plaintiff's conduct (collusion and denial of title) ?

"(2) Whether it is forfeited ?

"(3) Whether the plaintiff sustained any, and, if so, what damages ?

"(4) If the lease is valid and binding on defendant, whether the term of eight years can now be enforced ?

"(5) What relief is plaintiff entitled to ?"

The District Judge passed a decree directing defendant to deliver of possession of the villages to plaintiff for eight years from February 1898, together with profits for the year 1899–1900, and subsequent profits till delivery and Rs. 2,000 as damages.

Against that decree defendant preferred this appeal.

C. Sankaran Nayar and *T. Rangachariar* for appellant.

P. R. Sundara Ayyar, *C. R. Thiruvenkatachariar* and *V. Ramesam* for respondent.

The contentions raised and the material portions of the documents relied on are given in the judgment.

JUDGMENT.—[After setting out the above statement of facts the judgment continued ;—] On the 23rd April 1900, the District Judge passed a decree in favour of the plaintiff directing the defendant to deliver possession of the villages to the plaintiff for eight years from February 1898, together with profits for the year 1899–1900, and subsequent profits till date of delivery besides paying Rs. 2,000 on account of damages for the plaintiff having been kept out of possession from February 1898 to the date of the suit (11th November 1899).

Against this decree the defendant appeals and the chief contentions raised in support of the appeal are—

(1) that the decree for possession for eight years from February 1898 is in any event clearly wrong ;

(2) that it was owing to the plaintiff's obstruction that the lessor (the defendant) was unable to get possession from the vendor and put the plaintiff in possession of the villages ;

(3) that the plaintiff (respondent) has forfeited the lease by reason of his conduct both before and during the

THE ZAMINDAR OF VIZIA-NAGRAM *v.* BEHARA SURYA-NARAYANA PATRULU.

prosecution by the defendant of Original Suit No. 34 of 1894 instituted by the defendant against the vendor for the recovery of the villages; and

(4) that the suit is barred by the law of limitation.

The first contention is well founded and we are unable to see on what principle the District Judge converts a lease for a term of seven years and eight months ending with June 1901 into one for an equal period ending with February 1906. The fact that the lessor obtained possession from the vendor only in 1898 can be no reason for substituting a new lease in lieu of the one actually agreed to between the parties and given. The finding, therefore, of the District Judge on the fourth issue and the decree as given are manifestly untenable and the respondent's vakil is not able to support the same. So far as the plaintiff's prayer for possession is concerned, he can recover possession only for the unexpired portion of the term ending with June 1901; but as that also has expired during the pendency of this appeal—and the execution of the decree has been stayed until the disposal of this appeal—the real question to be determined in the case is whether the alternative claim advanced by the plaintiff, on which alone he now principally relies, is sustainable.

We agree with the District Judge in his finding on the first issue that no collusion between the plaintiff and the vendor, such as would make the lease inoperative, has been established, nor that the plaintiff prevented the vendee—his lessor—from getting possession of the villages. And we also agree with him in his finding on the second issue that no specific denial of the lessor's title by the plaintiff has been made out and that the plaintiff not having been put into possession, there has been no forfeiture, by him, of the lease. We cannot accede to the contention of the appellant's pleader that having regard to the peculiar terms of the lease sued upon, the legal relation between the plaintiff and the predecessor in title of the defendant should not be regarded as that of an ordinary lessor and lessee whose mutual rights and liabilities are regulated by the principles of law enunciated, among others, in sections 108 and 111 of the Transfer of Property Act. The transaction is essentially one of lease and it is not the less so because the lessee represented that he would be faithful to and merit the favour of the late Máharajah, and would give him information of things that take place and, among other things,

stipulated, in view to ensuring the punctual payment of rents to the lessor out of the actual collections, that he would hold his cutcherry in the building provided for the Sircar cutcherry in the principal village and secure the collections in a box under a joint seal of himself and the lessor's clerk and also undertook to give sub-leases only to solvent persons and to act as the lessor's agent in respect of certain repairs of tanks, &c., and in regard to certain descriptions of land not included in the lease, receiving a remuneration of 15 per cent. on the income derived from such lands. So far therefore as the lease of the villages in question is concerned—and the suit is only in regard to the lease—the plaintiff is, in the absence of any justification on the part of the defendant, clearly entitled to damages for not having been put into possession of the villages comprised in the lease although by his petition, exhibit III (*b*), dated 5th December 1893, he brought to the notice of the late Maharajah of Vizianagram that his Muktyar Jagannatha Raju Pantulu Garu and others were delaying the registration of the lease and did not put him into possession of the villages leased, but on the contrary were issuing orders directing the ryots and others in the villages comprised in the lease not to pay to anybody the rents due for the current year without the orders of the lessor's Sircar, and requested the Maharajah, immediately on receipt of the petition, to have the cowle registered, to put him in possession of the villages leased to him and to issue orders not to obstruct him in the collection of rents in the different villages leased to him. It is urged on behalf of the appellant that as the plaintiff was only an ijaradar or lessee under the late Maharajah, the ryots being in actual occupation of the land, the lessor by the mere execution and delivery of the lease, did put the plaintiff in such possession as the subject-matter was capable of and that without any further act on the part of the lessor, it was open to the lessee to collect the rents and recover the same, if necessary, by instituting legal proceedings against the ryots. This argument may seem plausible, but no more so than in the case of a lease of land itself, for even if the lessor does not put the lessee into possession of the land it would be open to the lessee to recover possession of the land by instituting, if necessary, a suit in ejectment against the person who wrongfully withholds possession from the lessee. The subject-matter of the lease was capable of delivery in a manner analogous to the mode indicated by sections 264 and

THE ZAMINDAR OF VIZIANAGRAM v. BEHARA SURYANARAYANA PATRULU.

319 of the Code of Civil Procedure. According to the common law of the land which specially prevails in Zamindaris and similar estates, the delivery of possession, when the owner transfers the estate or a portion thereof, by sale, gift, lease or otherwise, is by the issue of orders or notices to the karnams and other village officers whose duty it is to collect rents from the persons in occupation of the land and also, though not invariably, by a general proclamation addressed to the ryots and other persons in occupation of the land, giving intimation of the transfer in question and requiring them to attorn and pay rents to the transferee. It is really this customary law that is embodied in sections 264 and 319, Civil Procedure Code, and adapted for the delivery, by Court, to the decree-holder or purchaser in execution of a decree, of all descriptions of immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy. Admittedly no such notices or orders were issued to the village officers or ryots of all or any of the villages in question by the late Maharajah or his officials.

It is next urged that the plaintiff himself in conjunction with the vendor, whose manager he was, prevented the lessor from obtaining possession of the villages from his vendor. The argument on this part of the case proceeded tacitly on the footing that the lease was not one independent of the sale transaction, and that the vendor himself was really the lessee under the vendee, the plaintiff being merely the nominal lessee. If that were really so the argument would have been conclusive. The plaintiff, however, brought the suit as the real lessee and paragraph 3 of the written statement expressly treats the plaintiff as the person who applied for the lease and to whom the lease was given and intended to be given; and it is nowhere suggested, either in the written statement or even in the examination of the witnesses, that the plaintiff was only a benami lessee; and the issues proceed on the express footing that the plaintiff himself was the lessee. If he was the real lessee it would *primâ facie* be certainly detrimental to his interests that he should prevent his lessor from getting possession of the villages from his vendor and the onus lies very heavily on the defendant to establish that he really did do so and to suggest some motive for his doing so. The sale took place on the 23rd October 1893 and the lease was granted to the plaintiff almost

immediately thereafter on the 11th November following. If the lessee was taking steps to prevent the Zamindari officials from collecting the rents, in order that he might obtain possession and collect rents as lessee, the lessor cannot complain that he was prevented from obtaining possession from his vendor and that by reason of such conduct on the part of the plaintiff he was unable to deliver possession of the villages to him. It will not be enough for the defendant simply to show that the plaintiff tried to obtain possession. He must show that he actually assisted the vendor and in collusion with him prevented the late Maharajah of Vizianagram from getting possession and did so in order that possession might be retained by the vendor himself. The evidence on behalf of the defendant, such as it is, falls far short of this and is indeed very meagre.

[Their Lordships then dealt at length with the evidence.]

The plaintiff examined certain witnesses to show that the plaintiff did not prevent the late Maharajah from taking possession of the villages and some of them say that the plaintiff assisted the Maharajah's officials in taking possession and asked the tenants to execute muchilikas in favour of the Maharajah, but that it was the vendor who obstructed possession being taken. It is unnecessary to consider the evidence on behalf of the plaintiff on this point, as the defendant, on whom the onus lies, has entirely failed to establish, by any credible evidence, that the plaintiff, in collusion with the vendor, prevented his lessor—the vendee—from taking possession of the lands bought by the latter or that he wrongfully induced the vendor not to deliver possession of the villages sold by him.

The third contention that the lease has been forfeited and that the plaintiff is not entitled to any damages is equally untenable. If the lessor was in default in not delivering possession of the property let to the lessee, it is difficult to see what is the condition in the lease which the plaintiff has violated. The lease provides that in default of the lessee paying the different instalments of rent on the due date, the lessor may re-enter and either continue the lease in favour of the lessee or give a lease of the villages to others. The lease after imposing certain other conditions upon the lessee, every one of which presupposes that the lessee has obtained possession, provides as follows:—"If it should come to your notice and if it is proved positively that I have violated any of the aforesaid conditions or that I have proved faithless to Sircar and

THE ZAMINDAR OF VIZIANAGRAM v. BEHARA SURYANARAYANA PATRULU.

acted contrary to their interest and authority, the Sircar may lease out the taluk to others as it pleases without having anything to do with the conditions hereinbefore set forth." The appellant's pleader argues that the plaintiff deposed against the interest of the defendant, in Original Suit No. 34 of 1894, that his evidence was disbelieved and that therefore it must be taken that he has proved faithless to the defendant and acted contrary to his interest and authority. That was a suit brought by the defendant against the vendor. In that case, the vendor—the defendant therein—raised various pleas in answer to the suit, among others, that the sale-deed was really intended to operate only as a mortgage-deed and that the vendee did not pay the full amount of the consideration for the transaction. The vendor's minor sons also, who were joined in the suit, raised special pleas in resisting it. Eventually the suit was decided against the vendor and in favour of the plaintiff in that suit—the defendant herein. The condition in the lease that the plaintiff should be faithful to his lessor and not act contrary to his interest or authority, can be construed as having reference only to their relation as lessor and lessee of the villages comprised in the lease. The lessor not having done all that was in his power to deliver possession to the lessee, plaintiff cannot be charged with having acted contrary to the interest of his lessor in the matter of the lease, by deposing in favour of the vendor, whether falsely or truly, as a witness in Original Suit No. 34 of 1894. His deposition in that suit has been marked as exhibit II herein and he there distinctly stated as follows:—"Plaintiff's [lessor's] men prevented me from getting possession; plaintiff sent notices to the ryots not to pay rent either to first defendant [vendor] or to me; first defendant also issued notices not to pay either to plaintiff or to me. Thereupon I sent registered letters to the plaintiff saying that I had not been put in possession and that unless he put me in possession, he would be liable for any losses I sustained thereby. No reply was sent . . . . I did not try to collect rents on behalf of first defendant; I tried to collect rents on my own behalf. I don't know if my brother tries to collect any rent on behalf of the first defendant. About three months after the sale-deed, first defendant told me not to collect rents as renter. The plaintiff collected the rents of some villages in October 1893, first defendant also collected the rents of some villages." Even if the lessor had done all that he ought to have done to put the plaintiff

into possession, it has not been shown how the deposition of the latter in Original Suit No. 34 of 1894 would subject him to a forfeiture of the lease merely because his evidence was adverse to the contentions raised in that suit by his lessor. Even assuming for the sake of argument that the plaintiff incurred a forfeiture of the lease, either because he broke an express condition providing that on breach thereof the lessor may re-enter or the lease shall become void or because he renounced his character as lessee by setting up a title in a third person, there is nothing to show that the lessor did any act showing his intention to determine the lease. From the very commencement and before any forfeiture could possibly have been incurred by the lessee, the lessor completely ignored the lease. After recovering possession of the villages from the vendor in 1898, the defendant issued a notice to the plaintiff (exhibit B, dated 14th February 1898) informing him that the lease under which he was claiming to get muchilikas from the ryots ceased from the date that the estate was taken under management by the Government and warning him from further interference with the samasthanam and its ryots. This notice clearly shows that there was no forfeiture of a lease and that the same was not determined by reason of any such forfeiture. The plaintiff, therefore, is clearly entitled to damages on the alternative case set up by him in the plaint. He may elect to claim either profits of immoveable property to which he was entitled but which have been wrongfully received by the defendant or damages for breach of the obligation to put him in possession of the villages, subject of course to the law of limitation applicable to each.

The defendant obtained possession from the vendor only in February 1898 and the plaintiff can claim mesne profits against the defendant only from that date, until the expiration of the term of the lease in June 1901. The defendant no doubt obtained a decree, in ejectment, against the vendor, in Original Suit No. 34 of 1894, with mesne profits prior to February 1898 and if he did realize the mesne profits awarded, from the vendor who was wrongfully receiving the profits of the land, subsequent to the sale by him and to the lease by the vendee in favour of the plaintiff, the plaintiff may possibly be entitled to recover the same from the defendant. But it does not appear that the defendant did recover the mesne profits awarded to him in the decree in Original Suit No. 34 of 1894 or any portion thereof and the

THE ZAMINDAR OF VIZIANAGRAM v. BEHARA SURYANARAYANA PATRULU.

appellant's pleader states that the same has not been realized and there is no likelihood either of its being realized. However this may be, in any event, under article 109 of the second schedule to the Limitation Act, the plaintiff cannot claim mesne profits for any period prior to 11th November 1896 and the respondent's vakil, therefore, prefers that damages should be assessed on the footing of the lessor's breach of obligation to put the plaintiff into possession either on the 11th November 1893, when the lease was completed, or on the 5th December 1893 [the date of exhibit III (*b*)] when plaintiff requested to be put in possession. It is, however, contended on behalf of the appellant that the claim for damages on this footing is barred by the law of limitation and that article 116 of the Limitation Act prescribing a period of six years is inapplicable to the case and that the period of limitation applicable is only three years, though it is not specified under what article of the Limitation Act. In our opinion, the case is governed by article 116 and it is immaterial whether the period of six years is to be reckoned from the 11th November or the 5th December 1893, inasmuch as the suit was instituted on the 11th November 1899. The lease is in writing registered and the plaintiff's claim for damages is, within the meaning of article 116, one for compensation for the breach of a contract in writing registered. In *Coe* v. *Clay*(1), the defendant had agreed to let the plaintiff certain premises *per verba de praesenti* and the action was brought for the recovery of damages for not letting the plaintiff into possession, which, a preceding occupier having wrongfully refused to quit, the defendant was unable to effect. It was contended on behalf of the defendant that the plaintiff had shown no breach, in that, the agreement amounting to an actual demise of the premises, the plaintiff had an interest upon which he might have brought an ejectment, and it was no default in the defendant, if a person not claiming under him committed a wrong for which the plaintiff had a distinct remedy by ejectment. This plea was overruled and it was held that he who lets agrees to give possession and not merely to give a chance of a law suit. This decision was followed in *Jinks* v. *Edwards*(2) on the ground that the instrument in that case operated, as in *Coe* v. *Clay*(1), as a lease and not a mere agreement to give a lease. We may also refer

(1) 5 Bing., 440. (2) 11 Exch., 775.

to *Drury* v. *Macnamara*(1) which was distinguished from *Coe* v. *Clay*(2), on the ground that the instrument relied on in the case did not operate as a lease, but was merely an executory agreement. Section 108 (*b*) of the Transfer of Property Act simply lays down the law as it existed prior thereto in accordance with the above decisions.

Both in the case of a sale and of a lease, the registered instrument by which such sale or lease is effected not only operates as a grant but in the absence of a contract to the contrary, is also construed and operates as an executory contract to deliver to the vendee or lessee such possession of the property as its nature admits and the breach of such obligation is a breach of a contract in writing registered, within the meaning of article 116 of the Limitation Act. The present case is stronger as to the application of article 116 than *Krishnan Nambiyar* v. *Kannan*(3) which is relied upon by the respondent's pleader. The appellant's pleader relies upon *Vairavan* v. *Ponnaiyya*(4) and *Avuthala* v. *Dayumma*(5) and draws particular attention to section 55 (5) (*b*) of the Transfer of Property Act in connection with the latter case. The first of the two cases cited on behalf of the appellant has no bearing upon the question under consideration. In the second, it was held that article 116 was inapplicable to a personal claim against the vendee for payment of the purchase money, when it was sought to apply that article by reason of the registered sale-deed having acknowledged receipt of the payment of purchase-money, and the claim for purchase money was made not under the document evidencing the sale-deed but in spite of it. Referring to the case of *Krishnan Nambiyar* v. *Kannan*(3)—now cited on behalf of the respondent—the learned Judges observed as follows:—"The obligation on the part of the buyer to pay the purchase money is different from the obligation arising under a covenant for title, such as was in question in the case cited (*Krishnan Nambiyar* v. *Kannan*(3)). The obligation to pay arises from the contract between vendor and purchaser, whereas the covenant for title is implied or expressed in the conveyance." In a recent judgment of this Court (*Seshachella Naicker* v. *Varadachariar*(6)) the decision in *Avuthala* v. *Dayumma*(5) was considered and followed. It was there explained that a recital in a sale-deed that the consideration had been paid to and received by the vendor cannot be construed

(1) 5 E. & B., 612, 25, L.J.Q.B., 5. (2) 5 Bing., 440.
(3) I.L.R., 21 Mad., 8. (4) I.L.R., 22 Mad., 14.
(5) I.L.R., 24 Mad., 233. (6) I.L.R., 25 Mad., 55.

THE ZAMINDAR OF VIZIANAGRAM v. BEHARA SURYANARAYANA PATRULU.

as a contract to pay the consideration money; but that if the oral agreement or contract of sale which preceded the actual sale had also been reduced to writing, as is very often the case, in the registered deed of sale itself, the case might be different and article 116 might apply. The appellant's pleader argues that the decision in *Aruthala* v. *Dayumma* (1) governs this case because it was there held that article 116 did not apply to a suit for the recovery of purchase money notwithstanding that it is provided in section 55 (5) (*b*) of the Transfer of Property Act that the buyer is bound to pay or tender at the time and place of completing the sale, the purchase money to the seller or such person as he directs. The answer to this argument is furnished by section 55 (1) (*d*) of the Transfer of Property Act which provides that, in the absence of a contract to the contrary, the seller is bound to execute the conveyance only on payment or tender of the amount due in respect of the price. Though the payment of the purchase money has to be made at the time of completing the sale and in that sense the payment and the sale take place simultaneously, yet the payment immediately precedes the execution of the conveyance, whereas in the case of delivery of the property sold or leased to the vendee or lessee as the case may be, such delivery, in the absence of a contract to the contrary, has only to follow the completion of the sale or lease and not precede the same.

In our opinion, therefore, the claim for damages for breach of the obligation to put plaintiff in possession of the villages is not barred by the law of limitation, and the only question which remains to be considered is the amount of damages to be awarded. The measure of damages is the amount of profits with interest thereon at 6 per cent. per annum which would have accrued to the plaintiff if he had been put in possession of the villages and was in enjoyment of the same during the term of the lease.

As the parties do not agree as to the amount of damages to be thus assessed, the District Judge will try the following issue on the evidence already on record and such further evidence as may be adduced on both sides and submit his finding within six weeks from the date of receipt of this judgment:—

"What is the amount of net profits, with interest thereon, calculated as aforesaid, which the plaintiff would have derived from the villages leased to him, if he had been in possession of the villages during the term of the lease"?

(1) I.L.R., 24 Mad., 233.