Chandrikah Singh(1) and *Jasimuddin Biswas* v. *Bhuban Jelini*(2) was relied on in favour of the appellants. But that case is distinguishable. There, a decree was passed against the defendant for the amount agreed upon as the proper rent by an unregistered compromise. The defendant was bound to execute a *solenama* according to the terms of the compromise, agreeing to pay that rent. He remained in occupation of the plaintiffs' land, but failed to execute the *solenama*. It was held that the plaintiff was entitled to the rent fixed by the compromise. The plaintiff would be entitled to recover the amount from the defendant as for use and occupation though that was not the exact ground on which the decision was based.

The defendants in their written statement did not put forward any title to the land except under the compromise referred to above. That is therefore the only root of their title and as it is unregistered they cannot rely on it as affecting the immoveable property comprised therein.

The Second Appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Spencer.

1911, August 4, 7, 8 and 14.

D. DEVALRAJU AND TWO OTHERS (LEGAL REPRESENTATIVES OF THE FIRST PLAINTIFF), APPELLANTS,

v.

MAHAMED JAFFER SAHEB (DEFENDANT), RESPONDENT.

Landlord and tenant—Indian Evidence Act (I of 1872), sec. 116—Estoppel.

A purporting to be *dharmakarta* of a temple gave a lease of the temple properties to *B*. During the tenancy *C* and not *A* was declared, in a separate suit, to be the rightful *dharmakarta*.

B had not attorned to nor been evicted by *C*.

Held, that the tenancy had not been determined and that in a suit by *A* for rent, *B* was estopped by section 116, Indian Evidence Act, from denying *A*'s title.

SECOND APPEAL against the decree of T. GOPALAKRISHNA PILLAI, the Subordinate Judge of Kistna at Ellore, in Appeal Suit No. 292 of 1906, presented against the decree of S. RANGANADA

(1) (1909) I.L.R., 36 Calc., 193. (2) (1907) I.L.R., 34 Calc., 456.

* Second Appeal No. 1143 of 1909.

AYLING AND SPENCER, JJ.

DEVALRAJU v. MAHAMED JAFFER SAHEB.

MUDALIAR, the District Munsif of Ellore, in Original Suit No. 71 of 1905.

The facts of this case are fully stated in the judgments.

P. Narayanamurthy for appellants.

A. Krishnaswami Aiyar for respondent.

AYLING, J.—The Subordinate Judge has reversed the District Munsif's decree on two grounds: (1) that as a competent court has decided in Original Suit No. 139 of 1901 that the second plaintiff and not the first plaintiff (appellant) is the *dharmakarta*, the appellant cannot maintain a suit on the basis of a rent deed executed to him as *dharmakarta*; (2) that the defendant has discharged the claim in full.

The second contention is undoubtedly inadmissible. Not only was no plea of discharge set up by the first defendant, but it is clear that the Subordinate Judge's view that the payments noted on the foot of the deed Exhibit A, operated as a full discharge of the rent to the end of the lease is based on a mistaken view of that document. It is distinctly stated in Exhibit A that the last payment is only for faslis 1309 and 1310.

The other point is more difficult of decision. On the whole I am inclined to think that it must be governed by section 116 of the Evidence Act, which prevents a tenant during the continuance of his tenancy from denying his landlord's title at the commencement thereof. In this case there is nothing to indicate that the tenancy under Exhibit A has terminated. The first defendant has not attorned to the second plaintiff in any way nor has he been evicted. It is argued with some plausibility that the decree in Original Suit No. 139 of 1901 is tantamount to a determination of the tenancy; but after careful consideration I do not think this plea can be accepted in the peculiar circumstances of this case. The second plaintiff got a decree for possession and for mesne profits, but he has not executed the former portion and has entered into a compromise with the first plaintiff by which he accepted certain money payments in full satisfaction of his claim for mesne profits. Even apart then from the second plaintiff's being joined in the present suit and acquiescing (as he appears to have done) in the first plaintiff's claim there is no reason why the first defendant should not be held bound by the ordinary rule of estoppel or should be allowed to escape payment of the rent due by him in accordance with the terms of the lease.

In my opinion the decree of the Subordinate Judge must be set aside, and that of the District Munsif restored with costs throughout.

AYLING AND SPENCER, JJ.

DEVALRAJU v. MAHAMED JAFFER SAHEB.

SPENCER, J.—This is a suit between landlord and tenant. The lease deed upon which the first plaintiff (appellant) sues is Exhibit B; its term is six years from fasli 1307 to fasli 1312; and the present claim is in respect of rent for faslis 1310, 1311 and 1312.

The suit was decreed in the Court of First Instance. In the Subordinate Judge's Court, the District Munsif's decision was reversed and the suit was dismissed on the grounds (1) that the first plaintiff could not maintain the suit when it had been declared in a separate suit (Original Suit No. 139 of 1901) that not he but another named D. Sivaramayya who was added as second plaintiff was the rightful *dharmakarta* of the Onkara Visveswaraswami temple, (2) that he had received Rs. 900 and odd from the defendant in full discharge of the rent due up to fasli 1312.

On the second point the Subordinate Judge was clearly wrong in deciding the case upon a plea of discharge which the defendant did not set up in his written statement. Further he based his opinion upon the entries of payment made at the foot of the lease deed and these entries do not show that anything was paid for any fasli subsequent to 1309 and 1310.

On the first point the short answer is the provision of section 116 of the Evidence Act, which lays down that a tenant cannot during the *continuance of the tenancy* be permitted to deny that his landlord had a good title at the beginning of the tenancy. The relation of landlord and tenant continues until it is proved to have ceased (*vide* section 109, Evidence Act). But it is argued that in this case the landlord's title has determined by notice of the decision of a competent court in a suit to which he was a party, and that justice requires that the tenant should be permitted to raise this plea as he is liable to the person who has the real title and may be forced to make payment to him. The answer to this is that the tenant does not allege in his written statement that he has surrendered possession to his landlord, or has been evicted by title paramount, or has attorned thereto, or that at least he has given notice to his landlord that he intends to claim under another and more valid title. In "Bigelow on the Law of Estoppel," 5th edition, page 520, it is stated that it is settled law that a tenant in possession cannot, even after the expiration of his lease, deny

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his landlord's title without adopting one of these four courses. Here the lease did not expire till the end of fasli 1312, and as between the first plaintiff and the defendant it must be treated as in full force and effect till the close of its period of six years. Here I may note that I agree with the Subordinate Judge that the second plaintiff was not a necessary party to the suit. For the theory that the establishment of a subsequent paramount title does not absolve a tenant from payment of rent during the continuance of the tenancy where enjoyment continued, reference may be made to "Everest and Strode's Law of Estoppel," 2nd edition, page 277, where the following observation occurs:—

"A tenant may dispute his landlord's title, if he has been evicted by title paramount, and by a party entitled to the immediate possession of the premises; or if under threat of eviction by a party having a title paramount and entitled to the immediate possession of the premises, he has attorned tenant." A note is appended that the eviction must, it appears, be actual and not merely constructive, and authorities are cited. An unexecuted decree for possession would not, I think, amount to eviction. In the present case also there seems to be no danger of the tenant having to pay the rent twice over as the defendant has not attorned to the second plaintiff. It was only from the present first plaintiff that the second plaintiff as the rightful *dharmakarta* got a decree for the recovery of mesne profits in Original Suit No. 139 of 1911. The present defendant was *ex parte*.

The decree of the Lower Appellate Court is set aside and that of the Original Court restored with costs against the respondent in both Appellate Courts.