

1938

RAGHUBIR  
SINGH  
v.  
SECRETARY  
OF  
STATE  
FOR INDIA

damage is concerned is one which cannot be executed by the execution court.

In the result we hold that the order of the learned Civil Judge in the execution court has been rightly set aside. The appeal is accordingly dismissed with costs.

Before Sir John Thom, Chief Justice, and Mr. Justice  
Ganga Nath

1938  
March, 30

SURAJ PATISH NANDAN (PLAINTIFF) v. ATUL BIBI AND  
OTHERS (DEFENDANTS)\*

*Transfer of Property Act (IV of 1882), section 108—Lessee's suit for possession against lessor—Not a suit for specific performance of a contract but one to enforce a right in property—Limitation—Limitation Act (IX of 1908), articles 113, 144.*

Where a lease is made by a registered instrument it effects an actual demise or transfer and the right to possession becomes vested in the lessee, which he can enforce by a suit for possession against the lessor or against a third person who may be in possession. Such a suit is one to enforce a real right of property and not one for specific performance of the contract of lease. Article 113 of the Limitation Act, therefore, does not apply to such a suit, but article 144 applies.

In cases where a lease may validly be made by an oral agreement accompanied by delivery of possession, the lease is not effective and there is no demise or transfer if possession has not been delivered; and in such cases a suit for possession would be one for specific performance of an agreement to lease.

Dr. N. P. Asthana, for the appellant.

Mr. Harmandan Prasad, for the respondents.

THOM, C. J., and GANGA NATH, J.:—This is a Letters Patent appeal by the plaintiff against the decision of a learned single Judge of this Court. On the 9th of October, 1918, one Muhammad Khan, the deceased husband of defendant No. 1, executed a perpetual lease in favour of the plaintiff of certain plots described by him as sir which were in his possession as zamindar.

\*Appeal No. 35 of 1935, under section 10 of the Letters Patent.

1938

SURAJ  
PATISH  
NANDAN  
v.  
ATUL BIBI

Two days later, on the 11th of October, 1918, Muhammad Khan executed a mortgage of his zamindari in this khewat with possession to Brij Patish, who was a cousin of the plaintiff and who was held by the trial court to be joint with him. The possession of the sir was never transferred by Muhammad Khan. The mortgage referred to above was later redeemed by a subsequent mortgagee. The plaintiff brought the present suit for possession under his lease on the 27th of June, 1930. The defendants contended that the suit was barred by limitation under article 113 of the first schedule of the Limitation Act. The plaintiff's case, on the other hand, was that article 144 applied to the suit. Both the lower courts held that article 113 of the Limitation Act applied and the suit was barred by limitation. This decision was confirmed by the learned single Judge.

The only question in this case is whether article 113 of the Limitation Act applies to the suit. This article applies to a suit for specific performance of a contract and the time from which the period of limitation would run is the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. Whether article 113 applies or not depends upon whether the suit is for specific performance of the contract of lease or for the enforcement of the right which had been acquired by the plaintiff under the lease. Under section 107 of the Transfer of Property Act a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument. All other leases of immovable property may be made either by an instrument or by oral agreement accompanied by delivery of possession. In cases where a lease may be made by an oral agreement accompanied by delivery of possession, if possession has not been delivered to the lessee the lease is not effective and there is no demise or transfer. Consequently the right to possession is not vested in the lessee. In order to make it

1938

SURAJ  
PATISH  
NANDAN  
v.  
ATUL BIBI

effective it is necessary that the lessee should obtain possession over the property leased. In such a case a suit for possession would be one for specific performance of an agreement to lease. In all other cases where a lease is made by a registered instrument it effects an actual demise and the right to possession becomes vested in the lessee. Section 108 of the Transfer of Property Act lays down the rights and liabilities of the lessor and the lessee. One of the rights of the lessee is to obtain and remain in possession over the property leased. This right may be enforced by the lessee as well as by any transferee of his in whom the lessee's right is vested from time to time.

If the lessee had no right to enforce his right to obtain and remain in possession which he acquired under the lease, he would have no remedy against a third person who happens to be in possession over the leased property and against whom the lessor does not choose to take any action. There can be no doubt that the lessee has a right to bring a suit for ejectment against such third person. In *Achayya v. Hanumantrayudu* (1) it was held that the lessee was entitled to maintain a suit for ejectment against the party in possession notwithstanding the fact that at the date of the lease his lessor was not in possession of the property. This case was followed in *Hakim Mohd. Fazihuzzaman v. Anwar Husain* (2). There the defendant obtained a lease of a house for a period of ten years. A few months before the expiry of the lease the lessor executed another lease in favour of the plaintiff for a further period of ten years. The second lease was to take effect a few days after the expiry of the first lease. As the first lessee, whose lease determined by efflux of time under section 111(a) of the Transfer of Property Act, was holding over, the second lessee brought a suit for ejectment of the first lessee from the house. It was held:

"Section 108 provides that the lessor is bound on the lessee's request to put him in possession of the property, and further provides that the benefit of such contract shall be annexed to

(1) (1891) I.L.R. 14 Mad. 269.

(2) [1932] A.L.J. 126.

and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested. There can therefore be no doubt that the lessee is entitled to enforce his right to obtain possession of the land leased to him so that he may enjoy its usufruct. There seems to be no reason why he should not be allowed to enforce his right against another person who is holding under his lessor who is bound to put him in possession. The defendant's lease terminated automatically. A Bench of the Madras High Court in *Achayya v. Hanumantrayudu* (1) came to the same conclusion on general grounds and independently of the express provisions of the Transfer of Property Act."

1938

---

SURAJ  
PATISH  
NANDAN  
v.  
ATUL BIBI

In *Ahamadar Rahaman Chaudhuri v. Jamini Ranjan Barua* (2) a lessor did not put the lessee in possession of the property. The lessee brought a suit for possession against the lessor. The lease contained the following two stipulations: "(1) I shall not be competent to raise any objection on the ground of drought, inundation, etc., and possession or dispossession of any kind; (2) I shall not claim any *dags*, etc., which may have been included in this lease, but which are owned or possessed by anybody else." It was held that the two stipulations did not take away from the lessee the ordinary rights that he had, viz., of being put into possession and, in default thereof, claiming a rescission of the contract.

All these cases show that the lessee acquires under a registered lease a right which he can enforce by a suit for possession over the leased property against the lessor as well as against a third person who might happen to be in possession over it.

In *Ranjit Singh Bahadur v. Maharaj Bahadur Singh* (3) the respondent was a *patnidar* of half and a *darpatnidar* of the other half of the village of Gopalpur, and *patnidar* of six other villages within the zamindari of the appellant. Some of the lands in this village included in the *patnis* and *darpatnis* were formerly held as *chaukidari chakaran* lands, but in June, 1898, these lands were all

(1) (1891) I.L.R. 14 Mad. 269.

(2) (1929) I.L.R. 57 Cal. 114.

(3) (1918) I.L.R. 46 Cal. 173.

1938

SURAJ  
PATISH  
NANDAN  
v.  
ATUL BIBI

resumed by the Collector under the Bengal Act VI of 1870 and then transferred to the appellant. On resumption of the lands by the Government and their transfer to the zamindar as provided by the Bengal Act VI of 1870, the *patnidar* or the *darpatnidar* was entitled under section 51 to possession of the *chaukidari chakaran* lands. The contention of the *patnidar* was that the plaintiff's suit being one to enforce contractual rights, it was one for specific performance and article 113 applied. Their Lordships of the Privy Council observed (page 181):

"It does not follow that because the rights originally arose by virtue of a grant declared to be a contract within the meaning of section 51 they are therefore rights, contractual in the sense that the contract by its terms creates and regulates the personal obligations and duties of the grantor in the circumstances that have arisen. At the time when the *patni* grants were made the resumption of the *chaukidari chakaran* lands was not even contemplated, and the grant necessarily contains no reference whatever to the circumstances that would arise and the relationships that would exist in the event of the Government resuming possession. Upon resumption of such possession the rights of the *patnidar* were those conferred on him by the estate and interest created by the *patni* leases, and it was these rights that were kept alive by section 51 of Act VI of 1870 of the Bengal Council. It is only necessary to examine the words which prescribe the date from which the period begins to run in article 113 of the second schedule of the Limitation Act to show the difficulties in the way of any contrary contention. This date, as has already been pointed out, is either the date fixed for performance or the date when the plaintiff has notice that performance has been refused, but no date whatever has been fixed for performance in such a case as the present, either by the original grant or by the terms of the statute, nor has there been any refusal to perform a contract, for there was no unexecuted contract which had to be performed. A suit for specific performance is essentially a suit for enforcing a stipulated obligation relating to property. The word 'contract' itself primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that the word was used in section 51, and the rights thereby reserved to the *patnidars*, comprehensively included in the word 'contracts', are

real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession, and it is this which, in their Lordships' opinion, is the character of the suits in the present case."

1938

---

SURAJ  
PATISH  
NANDAN  
v.  
A TUL BIBI

These observations of their Lordships of the Privy Council fully apply to the present case. The rights acquired by the plaintiff under the perpetual lease are real rights which may be enforced by a suit for possession and not by a suit for specific performance.

Reliance was placed on *Charna v. Bans Lal* (1). It was a case of a lease of agricultural lands, and no authority has been referred to in the judgment for the proposition that the suit for possession was one for specific performance of a contract and fell within article 113. The fact that on the execution of a valid lease an actual demise or transfer is effected and the lessee acquires a right which he can enforce by a suit was not at all considered. With all deference to the learned Judges who decided the case we are unable to agree with the decision.

We are therefore of opinion that section 113 of the Limitation Act does not apply to the present case.

It is therefore ordered that the appeal be allowed with costs, the decree of the learned single Judge be set aside and as some of the points have not been decided the case be remanded to the learned Civil Judge to re-admit it under its original number and to dispose of it according to law.

(1) (1908) 5 A.L.J. 529.