this Court in *Dalichand Bhudar* v. *Bai Shivkor*[1] and *Desaippa* v. *Dundappa*[2] and under those rulings I do not think it is now open to the defendant to say that the particular application, on which the order of the 10th of February was passed, is not in accordance with law. I agree, therefore, in allowing the appeal with costs.

Appeal allowed.

R. R.

(1) (1890) 15 Bom. 242. (2) (1919) 44 Bom. 227.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

MULTANMAL JAYARAM AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BUDHUMAL KEVALCHAND AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

1920. *September* 30.

Indian Limitation Act (IX of 1908), Articles 97, 116—Breach of contract—Damages, suit to recover—Limitation.

In 1911 the plaintiffs bought two lands under a registered sale-deed, and went into possession. One of the lands was let to a tenant. The tenant claimed the land as his own ; and established his title to the land in 1913 ; the decree was confirmed by the High Court in 1916. In 1917, the plaintiffs sued their vendors for cancellation of the sale of 1911, and to recover the consideration money together with the amount spent by them in improving the land and the costs incurred by them in defending the suit brought by the tenant. The trial Court held that the consideration for the sale failed in 1913 when the tenant established his claim in a Court of law and that the suit was barred by Article 97 of the Indian Limitation Act. On plaintiffs' appeal :—

Held, that though the cause of action arose in 1913, the contract of sale having been registered, the suit was governed by Article 116 of the Indian Limitation Act, and was in time.

* First Appeal No. 222 of 1918.

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Subbaroya v. *Rajagopala*[1], *Hukumchand* v. *Pirthichand*[2], and *Martand Mahadev* v. *Dhondo Moreshwar*[3], followed.

PER MACLEOD, C. J.:—"It must specially be noted that it is not the case that the seller had no title at all so that it could be said that he was selling nothing, and that, therefore, the transaction was void *ab initio*, nor is it a case where the purchaser got no possession. Here undoubtedly at the time the sale deed was passed it was considered that the defendants had a good title to convey the free-hold, and it was only in 1913 when [the tenant] filed his suit that it was discovered that there was a claimant who asked to be allowed to redeem, and his claim eventually proved successful."

PER FAWCETT, J.:—"A distinction should be made between cases where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property, and other cases, such as the present one, where the sale is only voidable on the objection of third parties and possession is taken under the sale. I think it is only in the first class of cases that the starting point of limitation will be the date of sale."

FIRST appeal from the decision of H. V. Kane, First Class Subordinate Judge at Nasik.

Suit to recover a sum of money.

On the 1st February 1911 the plaintiffs purchased two lands bearing Survey Nos. 160 and 192 at Deolali from the defendants for Rs. 5,000 and were put in possession.

In Survey No. 192, the plaintiffs sank a well at a cost of Rs. 788-5-6, and let it to one Bhavani for one season on the 1st July 1911. The Survey Number was originally of the ownership of Bhavani's ancestors. In 1857, they had mortgaged it to one Nathu, who sold it as full owner to defendants in 1910. In course of time, Bhavani claimed the land as his own.

The plaintiffs sued Bhavani on the rent-note and obtained a decree for possession on the 7th August 1912.

Bhavani next filed a suit to redeem the mortgage of 1857 and to have accounts taken under the provisions of

(1) (1914) 38 Mad. 887. (2)(1918) 21 Bom. L. R. 632.
(3) (1920) 45 Bom. 582.

the Dekkhan Agriculturists' Relief Act, 1879. In that suit the trial Court passed a decree on the 3rd September 1913, declaring that the mortgage of 1857 was paid off and that Bhavani should remain in possession as full owner. This decree was confirmed by the High Court on the 28th November 1916.

On the 5th March 1917, the plaintiffs filed the present suit for cancellation of the sale of 1911 and for recovery of the consideration money of the sale, the expenses of sinking the well, costs incurred in defending the suit brought by Bhavani, and interest and damages.

The first Court held that the claim was barred by limitation on the following grounds :—

The point is governed by Article 97, and the cause of action arose on the date of the failure of the consideration. The present suit is not for compensation for the breach of any express or implied contract, or of warranty of title, or of possession under the sale deed passed by Amolak, Exhibit 19. Articles 115, 116 of the Indian Limitation Act have no application. The plaintiffs contend that the cause of action arose first on 3rd September 1913, the date of Bhavani's decree, but that as the matter was *sub-judice* on account of the subsequent appeals, it arose on the date of the High Court's decree, 28th November 1916. The plaint recites the latter date. Defendants contend that Bhavani's suit had nothing to do with the plaintiffs' failure of consideration, that the plaintiffs' consideration failed on the date 31st October 1913, on which the Court refused to put them in possession in execution of their decree, and that, as this suit is filed on 5th March 1917, *i.e.*, more than three years after 31st October 1913, it is time-barred.

I think the defendants are in the right. If Bhavani had brought this suit on the ground that the tenancy on which the plaintiffs had obtained their decree for possession had ceased to exist and that he was not liable to vacate, the matter would have been *sub-judice* and the cause of action would have arisen on the date of the High Court's decision. But his suit was a different one, *viz.*, for redemption, and he never made any prayer for possession. That had nothing to do with plaintiffs' right to take possession under their decree. They were right in waiting while the Court kept their application for possession pending. But as soon as it was struck off on 31st October 1913 they ought to have taken steps to keep their right of taking possession from Bhavani pending the result of litigation with him, or brought the present suit within

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three years from the date. The litigation between them and Bhavani was quite different, being, for redemption, from this failure of consideration, and I hold that the present suit is barred.

The plaintiffs appealed to the High Court.

Jayakar, with *S. S. Patkar*, for the appellants.

Bahadurji, with *D. R. Patwardhan*, for respondents Nos. 1 and 3.

MACLEOD, C. J.—On the 1st February 1911, the plaintiffs bought for a sum of Rs. 5,000 two lands under a registered sale-deed passed to them by one Amolak as manager of a joint family. The plaintiffs were put in possession. One of the lands, Survey No. 192, was leased to one Bhavani under a rent-note. When the period of the rent-note had expired Bhavani refused to vacate and the plaintiffs had to sue for possession. In a possessory suit they got a decree for possession and filed Darkhast No. 440 of 1912 for possession. Bhavani retaliated by filing Suit No. 31 of 1913 claiming the property as his own and got a decree in September 1913, and thereafter he remained in possession of Survey No. 192 as owner. An appeal was filed by the plaintiffs against the decree in Suit No. 31 of 1913 in the District Court which confirmed the decree of the lower Court on the 15th March 1915. The plaintiffs then filed a Second Appeal to the High Court, and that appeal was dismissed on the 20th November 1916.

The plaintiffs in this suit seek to recover from the brother and two sons of Amolak the amount they paid on the sale-deed on the 1st February 1911, together with the amount spent by them in improving the land by building a well, with interest and damages and costs incurred by the plaintiffs in conducting Suit No. 31 of 1913 making a total of Rs. 7,525.

All the issues have been found in favour of the plaintiffs, but the plaintiffs' suit has been dismissed

as barred by limitation. Two questions arise: (1) what Article of the Indian Limitation Act is applicable; and (2) when did time begin to run? The defendants say that Article 97 applies and time began to run from the date of the failure of consideration, that is to say, when a decree was passed in favour of Bhavani in September 1913. The plaintiffs contend that if Article 97 applies, the date of the failure of consideration must be taken as the date of the High Court decree when it was finally decided that Bhavani was entitled to possession of the property. That point arose recently in *Martand Mahadev* v. *Dhondo Moreshwar*[1]. In that appeal we followed the decision in *Hukumchand* v. *Pirthichand*[2], where it was held that failure of consideration occurs at the date of the decree of the first Court, and not at the date of the appellate decree confirming it. It appears from the evidence that Amolak was fighting the suit filed by Bhavani, no doubt in his own interest, but he must have been aware that if Bhavani succeeded the plaintiffs would make a claim against him for the return of the purchase money. Although he was a respondent in the plaintiffs' appeal, he was a respondent in the interest of the appellant, and was endeavouring to get the decree reversed, for he incurred expenses in instructing pleaders and counsel to support the appellant. It might be said, therefore, in a case where two parties now in opposition have previously combined in order to resist the attempts of a third party to get possession of property, the subject-matter of the transaction between them, either that there was an agreement between the opposing parties that it should not be considered that there was no failure of consideration until the final decree in the suit was passed, or that one party induced the other not to take proceedings by filing a suit for money paid on an existing consideration which afterwards failed,

(1) (1920) 45 Bom. 582. (2) (1918) 21 Bom. L. R. 632.

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until the question as to who was entitled to the property was finally decided. I think myself that it would be perfectly open to the parties to come to an agreement that the decision of the lower Court should not be treated as a failure of consideration. I do not think, speaking for myself, that that could be taken as a contract contrary to the provisions of the Indian Limitation Act. I also think that the combination of the plaintiffs and the defendants in this case against Bhavani might be considered as preventing time from running. That certainly was the finding of the appellate Court in the case which I have referred to in the argument which is not reported, where an auction purchaser at a mortgagee's sale filed a suit against the mortgagee because either he was unable to get possession or had been ousted by the mortgagor, but all the time the parties were combining in order to get possession of the property from the mortgagor, and the appellate Court expressed the opinion that the auction purchaser's suit against the mortgagee to recover what he had paid was premature. However that may be, those are very interesting questions which need not be decided in this case, because I think there is another answer to the defendants' argument that the suit was barred by limitation.

By the sale-deed of February 1911 the sellers under the provisions of section 55 (2) of the Transfer of Property Act must be deemed to have contracted with the plaintiffs that the interest which they professed to transfer to the plaintiffs subsisted and that they had power to transfer the same; and there can be no doubt that at the time of the transfer all the parties considered that the defendants had a good title and possession was given. If possession had not been given, then a different state of circumstances would have arisen and the case would have assumed an entirely different aspect.

What the remedies are of a purchaser who is dispossessed is discussed in *Subbaroya* v. *Rajagopala*[1]. That was a suit by purchasers to recover the amount paid by them to the defendants or their predecessors for a certain property on the ground that the consideration for the sale failed when the plaintiffs were deprived of possession. The learned Judge said (p. 889): "In the present case, the conveyance was *prima facie* unimpeachable, and I do not think the construction to which the release of Gnanammal lent itself in the eye of law, can be said to amount to a knowledge of the defect of title. On the second question as to when the cause of action for damages arose, a very large number of cases were quoted before me. These cases can roughly speaking be classified under three heads: (*a*) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property; (*b*) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale; and (*c*) where though the title is known to be imperfect, the contract is in part carried out by giving possession of the properties." This case now under consideration clearly falls under class (*b*). The learned Judge proceeds: "In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified." That judgment was confirmed on an appeal under the Letters Patent. It was argued by the defendants that where a seller has covenanted that he has a good title, and it eventually transpires that he has no title, then the covenant of title was broken immediately upon the

(1) (1914) 38 Mad. 887.

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execution of the assurance which contained it; and that is so stated in Dart on Vendors and Purchasers, Vol. II, p. 788 (7th Edn.). The authority for that proposition is *Turner* v. *Moon*[1]. In that case there was no question of limitation, although the case of *Spoor* v. *Green*[2] was referred to. In *Tulsiram* v. *Murlidhar*[3] the plaintiff never got possession, so the decision that Article 97 of Schedule I of the Indian Limitation Act applied to the case does not assist the defendant. While at the end of his judgment after referring to the facts of earlier cases Sir Lawrence Jenkins said : "We allude to these facts because we desire to guard ourselves against being taken to decide that where the Transfer of Property Act applies, there may not be remedies to which a different period of limitation would be applicable. No point of this kind has been made in the argument before us, or could be made, for the sale-deed here is dated the 22nd November, 1880."

The appellant relies upon Article 116 of the Indian Limitation Act which prescribes a period of six years for compensation for the breach of a contract in writing registered from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered. If we take it, then, that there has been a breach of the contract the cause of action for a suit for damages arose, under the authority of *Subbaroya* v. *Rajagopala*[4], when it was found that there was no good title to the property, the sale being only voidable at the instance of third parties. It would follow then that the cause of action arose on the 3rd September 1913, and the period of limitation would have been three years if the contract had not been registered. As the contract has been registered, then the period of limitation under Article 116 is six years, and, therefore, the suit is within time. It must specially be noted that it is not the case that the seller had no title at all so that it could be said that he

(1) [1901] 2 Ch. 825.
(2) (1874) L. R. 9 Ex. 99.
(3) (1902) 26 Bom. 750.
(4) (1914) 38 Mad. 887.

was selling nothing, and that therefore, the transaction was void *ab initio*, nor is it a case where the purchaser got no possession. Here undoubtedly at the time the sale-deed was passed it was considered that the defendants had a good title to convey the freehold, and it was only in 1913 when Bhavani filed his suit that it was discovered that there was a claimant who asked to be allowed to redeem, and his claim eventually proved successful, and it was only under the special provisions of the Dekkhan Agriculturists' Relief Act that Bhavani was allowed to redeem on the footing that the mortgage money had already been paid off. It appears to me, therefore, that this case can be distinguished from those cases in which it was discovered that the seller had no title whatever, and it certainly would be a very extraordinary consequence, if, in the case of a sale by A to B, both parties being under the impression that A had a good title to convey to B, where B remained in possession for a period of over six years and was eventually turned out by some one who had a better title than A, he should be debarred from any remedy against his vendor, assuming of course that he has been in possession all the time under his conveyance. In my opinion, therefore, Article 116 of the Indian Limitation Act applies. The cause of action arose in September 1913 when Bhavani obtained his decree. The result must be that the appeal must be allowed. We remand the case because the lower Court dismissed it on the plea of limitation, and has not considered finally what relief the plaintiff was entitled to. The Court will now continue the case as if it had decided itself that the plaintiffs' suit is not barred. Whatever costs the plaintiffs have incurred on taxation with regard to this appeal must be paid by the respondents. Costs of the appeal to be calculated on the final decree. No fresh evidence to be allowed in the lower Court on remand.

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FAWCETT, J.:—The lower Court has held plaintiffs' suit barred under Article 97 of the Indian Limitation Act on the ground that it was filed more than three years after the 31st October 1913, on which date the Court refused to put them into possession in execution of a possessory decree that they had obtained. It was first of all contended that, assuming that Article 97 was the proper Article to apply, yet there was conduct on the defendants' part which amounted to an estoppel, so that time really did not begin to run against the plaintiffs until the date of the High Court's decree upon the litigation instituted by Bhavani, namely, 28th November 1916. The lower Court held that no such estoppel by conduct arose, and I cannot say that I am satisfied upon the evidence that the defendants are proved to have made a representation amounting to an estoppel under section 115 of the Indian Evidence Act. I also feel very considerable doubts whether in any case there could be an estoppel, which would operate to let limitation run from a different time to that laid down in the Indian Limitation Act, contrary to the mandatory provisions of section 3 of the Act.

However, it is not necessary to decide the point in this particular case, because I think the appellants are entitled to succeed on another ground. The second question that arises is whether the Article of the Limitation Act to be applied is 116 or 97. On this point both the Allahabad and Madras High Courts are agreed that in cases where there is an implied covenant of title under the provisions of section 55, sub-section (2), of the Transfer of Property Act, and there is a registered conveyance, a suit of the present kind falls under Article 116; and in *Tulsiram* v. *Murlidhar*[1], the point was expressly left open in the judgment of Sir Lawrence Jenkins. I think that the terms of Article 116

[1] (1902) 26 Bom. 750 at p. 756.

are certainly wide enough to cover a case of the present kind, and that the words "express or implied" contained in Article 115 are also intended to be read into Article 116. To my mind considerable support is given to the contention that Article 116 should be considered to cover a case like the present by the decision of the Privy Council in regard to the question (upon which there was a difference of opinion) whether, when a lease was registered, a suit for arrears of rent should be held to fall under Article 110, which is a specific Article for arrears of rent, or under Article 116. The Allahabad High Court held that, in spite of there being a registered lease, the case should be held to fall under Article 110, while the Bombay and other High Courts considered that Article 116 was the proper Article. The question came up for decision by the Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*[1], and the Privy Council accepted the view of the High Court of Bombay and the other High Courts that agreed with it. The different considerations that arise were stated as follows: "On the one hand it has been contended that the provision as to rent is plain and unambiguous, and ought to be applied, and that in any case 'compensation for the breach of a contract' points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other it has been pointed out that 'compensation' is used in the Indian Contract Act in a very wide sense, and that the omission from Article 116 of the words, which occur in Article 115, 'and not herein specially provided for', is critical. Article 116 is such a special provision, and is not limited, and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail." Then after pointing out that the decisions had been almost

[1] (1916) 44 Cal. 759 at p. 767.

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universal in favour of applying Article 116 the Privy Council said they accepted that interpretation of the law. This means that Article 116 should be liberally construed, having regard to the favour evidently intended to be given to a registered contract. I think, therefore, that we are fully justified in following the view which has been taken by the Allahabad and Madras High Courts in the matter before us: see *Arunachala* v. *Ramasami*[1] and *Mul Kunwar* v. *Chattar Singh*[2].

The third question that arises is from what point of time limitation runs under Article 116 in the present case. The respondents have contended that it should be held to run from the date of the sale-deed, namely, 1st of February 1911, when the implied covenant of title was made; and reliance was placed on the English law on the subject which is referred to in *Tulsiram* v. *Murlidhar*[3]. I agree, however, that a distinction should be made between cases where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property, and other cases, such as the present one where the sale is only voidable on the objection of third parties and possession is taken under the sale. I think it is only in the first class of cases that the starting point of limitation will be the date of sale, and the distinction on this point made in *Subbaroya* v. *Rajagopala*[4] is supported by the decisions of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur*[5], and *Bassu Kuar* v. *Dhum Singh*[6]. Under Article 116 time runs from the period of limitation from which time would begin to run against a suit brought on a similar contract not registered. Assuming that

(1) (1914) 38 Mad. 1171.
(2) (1908) 30 All. 402.
(3) (1902) 26 Bom. 750.
(4) (1914) 38 Mad. 887.
(5) (1891) 19 Cal. 123.
(6) (1888) 11 All. 47.

the sale-deed had not been registered, then I think the Article applicable to the suit would be Article 97. That Article is one which in many cases has been held to apply to such suits and it is one which specially provides for the case within the meaning of Article 115, so that the latter Article does not apply,—cf. *Johuri Mahton* v. *Thakoor Nath Lukee*[1]. That being so, we have only to consider when the failure of consideration arose, and I think there is ample authority for holding that, in a case like the present, limitation runs only from the date of the judgment of the first Court declaring that the plaintiffs' vendor had not a good title. Accordingly I agree that the appeal on the point of limitation should be allowed.

Appeal allowed.

R. R.

[1] (1880) 5 Cal. 830.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

ESMAIL ALLARAKHIA CLAIMING UNDER THE PLAINTIFFS, APPELLANT *v.* DATTATRAYA RAMCHANDRA GANDHI CLAIMING UNDER THE PLAINTIFF NO. 1 AND OTHERS, RESPONDENTS*.

1920. *September* 22.

Sale—Suit to set aside sale—Suit decreed on plaintiff paying into Court certain amount—Mortgagee from plaintiff paying the money to save the suit from being dismissed—Assignment of plaintiff's interest—Mortgage paid off—Application by mortgagee to withdraw the money paid into Court—Mortgagee cannot be allowed to withdraw unless on an application by one of the parties.

One Banubai for herself and as guardian of her son Banemiya and daughter Putlabai, sold the property in suit to one Mahomed. Banemiya and Putlabai brought a suit to set aside the sale and it was decreed that the plaintiffs should, on paying into Court a certain sum of money within six months, take

* First Appeal No. 9 of 1919.