

in the section may be made either by an appeal against the order or may be taken in appeal against the final decree. It was held in *Ali Akbar v. Khurshed Ali* (1) that where an application for review of judgment was granted "for any other sufficient reason" the sufficiency or otherwise of the reason is not a good ground of appeal against the order. The same view was taken in *Muani Ram Chowdhry v. Bishen Perbush Narain Singh* (2). The principle of these decisions appears to us to be applicable to cases where the objection is taken in the appeal against the final decree notwithstanding the general provisions of section 584 and section 591. The contention that the decree of the District Judge is bad because the appeal in the first instance was heard by, and the order for review was granted by, the Subordinate Judge, does not seem to us to be sustainable. The case of *Kumarasami Reddiar v. Subbaraya Reddiar* (3) does not apply.

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AIYAR  
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RAMASWAMI  
SASTRIAL.

The second appeal must be dismissed with costs.

## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Miller.*

MOGERA NANDI (PLAINTIFF), APPELLANT

v.

PARAMESWARA UDPA AND OTHERS (DEFENDANTS),  
RESPONDENTS.\*

1907  
December 2.

*Limitation Act, Act XV of 1877, sched. II, art. 144—Suit for possession under an Arthamulgeni lease governed by art. 144.*

A suit to recover possession of land leased under an *Arthamulgeni* lease is not based on the contract to deliver possession contained in the lease deed, but on the completed title to possession acquired under the lease.

The period of limitation applicable to such a suit is that provided in article 144 of schedule II of the Limitation Act.

(1) I. L. R., 27 All., 695.

(2) I. L. R., 24 Calc., 878

(3) I. L. R., 23 Mad., 314.

\* Second Appeal No. 1048 of 1905, presented against the decree of H. O. D. Harding, Esq., District Judge of South Canara, in Appeal Suit No. 160 of 1904, presented against the decree of M. R. Ry. V. B. Ramaswami Ayyar, District Munsif, Kandapur, in Original Suit No. 60 of 1904.

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NANDI  
v.  
PARA-  
MESWARA  
UDPA.

THE suit, which was instituted on 4th February 1904, was for the recovery of land leased to plaintiff under an Arthamulgeni lease executed by defendants Nos. 1 and 2 on 17th December 1891. Defendants Nos. 3 to 5 were co-parceners of defendants Nos. 1 and 2, and the sixth defendant was the tenant in possession of the lands. The plaintiff prayed for a partition and delivery of plaintiff's share of the lands under the terms of the lease.

Defendants pleaded limitation and that question was tried as a preliminary issue.

The terms of the lease and the further facts will appear from the judgment of the Munsif on this issue which was as follows:—

*Supplemental issue 11.* "This suit is based on the plaintiff mentioned *Arthamulgeni* lease deed, Exhibit A of 17th December 1891, which runs as follows:—

"*Arthamulgeni* deed executed to Nandi (plaintiff) by Parameswara Udpa (first defendant) and his son Subraya Udpa (second defendant) on the 17th December 1891 in consideration of Rs. 320. We have given to you on *Arthamulgeni* that portion of our *Muli* property which has fallen to the share of the first amongst us (*i.e.*, Parameswara Udpa, first defendant). From the 30th Magha of the year Khara (28th February 1892) you are to get possession of and enjoy the property leased to you, etc. As plots Nos. 1, 5 and 6 (plaint items 1, 2 and 3) have not been separated by metes and bounds we shall get them separated by the 30th Phalguna of the year Khara (29th March 1892), and in the event of our failure to do so we shall be liable to pay you damages which you might incur in consequence thereof."

In this document defendants Nos. 1 and 2 undertake to get the plaintiff items of property separated by metes and bounds so that the plaintiff might take possession of the same and in default, to pay damages. The plaintiff's remedy, therefore, is to bring a suit against the defendants Nos. 1 and 2 for specific performance of the contract embodied in exhibit A, or to sue them for damages as stipulated therein. Both these remedies appear to have been time-barred (*vide* articles 113 and 116, schedule II of the Limitation Act). The wording of exhibit A makes it clear that so far as the plaintiff items are concerned there has only been a contract for lease. And a suit for possession of property in such a case is essentially a suit for specific performance of contract, because the right to possession springs out of the contract of lease, and the

relief by giving possession is comprised in the relief by specific performance. The main relief claimable in a suit for specific performance of a contract of the above nature is *possession of the property*, any other relief that may be sought for being only incidental and ancillary to such main relief. In the present case the partition sought for is only incidental to the main relief, viz, possession of the property, and the defendants Nos. 3 to 6 are only *pro formâ* defendants impleaded for the purpose of securing a relief ancillary to the main relief prayed for. The suit cannot therefore be governed by any but article 113, schedule II to the Limitation Act. Assuming the suit might, so far as limitation is concerned, be entertained, still, as the right to possession is dependent on the contract of lease, if the suit cannot be maintained for specific performance of contract by reason of the lapse of three years allowed by the said article it cannot be maintained for possession of the property agreed to be leased under that contract (I.L.R., 6 Allahabad, page 281)."

The suit was accordingly dismissed.

The Munsif's judgment was confirmed on appeal by the District Judge who held that the suit fell within article 113 or 116 of schedule II of the Limitation Act. The judgment of the latter Court was as follows:—

"Plaintiff's suit as regards specific performance of damages is long since barred by articles 113 and 116 of the Limitation Act, and clearly to sue for specific performance or damages is plaintiff's only remedy in such a case. He cannot sue for the land since the land is not known until the separation thereof is performed as per contract. That has not been done. Then he can claim damages. But he has come too late. Why he slept over his rights from 1892 to 1904 is not clear, but he did. The appeal must be dismissed with costs."

*B. Sitarama Rau* for appellant.

The respondent was not represented.

JUDGMENT.—We think that the Courts below are in error in applying articles 113 and 116 of the second schedule of the Limitation Act.

The suit is not a suit based merely on the contract in the Arthamulgeni lease to put the plaintiff in possession. The plaintiff by virtue of the Arthamulgeni lease acquired a completed title to the possession of the land. The suit is a suit for possession

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based on this title, and the article applicable is, in our own opinion, article 144—see the decision of the Privy Council in *Rani Meera Kuwar v. Rani Hula Kuwar* (1).

We therefore set aside the decrees of the Courts below based on these findings on this preliminary question, and remand the suit to the District Munsif for decision in accordance with law. Costs in this and in the lower Appellate Court will abide the result.

## APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice.*

1906.  
July 19, 20,  
24.

THE PRESIDENT OF THE TALUK BOARD, KUNDAPUR  
(PLAINTIFF), PETITIONER,

v.

1907.  
October 14.

BURDE LAKSHMINARAYANA KAMPTHI (DEPENDENT)  
RESPONDENT.\*

*Contract Act, Act IX of 1872, s. 74—Bond given for the performance of public duty, but not under the provisions of any law not within exception. to s. 74 of Contract Act—Right of suit—Civil suit maintainable in respect of act amounting to criminal offence—Limitation Act, Act XV of 1877, sch. II, arts. 6, 115—Local Board's Act (Madras), ss. 162-C and 162-D do not bar a civil suit on contract.*

\*An agreement between a contractor and a Local Board contained the following terms:—

As I have taken over under contract for Rs. 106 the right to collect the fees on the articles brought for sale in Udipi market from 1st April 1902 to 31st March 1903, I am bound to act according to the following conditions:—

I am not entitled to collect more than the undermentioned rate of fees from the persons seated and trading on the site of the fair.

			Rate of fees.			
				Rs.	A.	P.
Each head-load	...	...	...	0	0	2
„ cart-load	...	...	...	0	2	0

I am bound to put up a board with the rates of fees to be collected by me and my name in English and Canarese in a public place in the market.

If I, my agent, or servant were to act contrary to the above regulations, I shall be liable to pay a fine not exceeding Rs. 50 imposed by the President of

(1) 13 B.L.R., 312 at p. 322.

\* Civil Revision Petition No. 412 of 1905, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif of Udipi, dated 31st March 1905, in Small Cause Suit No. 170 of 1904.