(2001) 08 CAL CK 0002

Calcutta High Court

Case No: Appeal No. 352 of 1992 and Suit No. 272 of 1984

Union Bank of India		APPELLANT
	Vs	
Vithalbhai Pvt. Ltd.		RESPONDENT

Date of Decision: Aug. 6, 2001

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1(3), Order 6 Rule 17
- Contract Act, 1872 - Section 39
- Evidence Act, 1872 - Section 116, 117
- Specific Relief Act, 1963 - Section 34
- Transfer of Property Act, 1882 - Section 105, 108, 111
- West Bengal Premises Tenancy Act, 1956 - Section 13(3)(A)

Citation: AIR 2002 Cal 144 : (2001) 3 CALLT 484 : (2002) 3 RCR(Civil) 725

Hon'ble Judges: Pranab Kumar Chattopadhyay, J; Asok Kumar Ganguly, J

Bench: Division Bench

Advocate: P.K. Das and Dhruba Ghosh, for the Appellant; Hiranmoy Dutta, for the Respondent

Final Decision: Allowed

Judgement

This Judgment has been overruled by : Vithalbhai Pvt. Ltd. Vs. Union Bank of India, AIR 2005 SC 1891 : (2005) 100 CLT 297 : (2005) 2 CTC 582 : (2005) 3 JT 278 : (2005) 4 SCC 315 : (2005) AIRSCW 1509 : (2005) 2 Supreme 518

A.K. Ganguly, J.

This appeal has been filed challenging a judgment and decree dated 12.2.1992 passed by the learned single Judge in Suit No. 272 of 1984. By the said Judgment and decree the learned Judge decreed the suit in terms of prayers (a) and (b) of the plaint. The learned Judge also gave a decree for vacant possession of the suit

premises and also passed a preliminary decree appointing an Advocate for ascertaining the mesne profit on and from 25.6.84 until delivery of possession. It was also ordered that upon conclusion of the enquiry, the plaintiff-respondent will be entitled to apply for final decree for the amount found due. On this appeal being filed against such judgment and decree, the appeal Court granted stay of the execution of the decree for ejectment but did not interfere with the direction for enquiry into mesne profits.

2. The basic facts of the case, which are not in dispute, are stated here under:

3. Vithalbhai Pvt. Ltd., a company incorporated under the Companies Act became a lessee under a lease deed dated 25.6.1963 for a period of 21 years from the superior landlord, namely, M/s. Wachel Molla & Sons Pvt. Ltd., in respect of the suit property. In terms of the lease deed the said lease between the plaintiff respondent and the superior landlord was due to expire on 25.6.1984. On 1.4.1964 the defendant-appellant was inducted in the said leasehold property as a sub-lease at a monthly rent of Rs. 2975/- and possession was delivered to the defendant-appellant on and from 1.4.1964 but the lease was dated 17.4.1964. The lease was to expire on 24.6.1984.

4. It is not in dispute that the defendant-appellant was put in possession of the suit property on and from 1.4.1964.

5. Prior to the expiry of the said lease the Advocate of the Plaintiff-respondent wrote a letter to the defendant-appellant asking them to deliver vacant possession of the demised premises on the expiry of 24.6.1984.

6. To the said letter, the Advocate of the defendant-appellant replied by taking the stand of refusal to vacate the demised premises in terms of the request made in the latter dated 26.9.1983.

7. Before the expiry of the sub-lease and on 16.4.1984, the ejectment suit in question, namely 270 of 1984, was filed by the plaintiff-respondent claiming the following reliefs:

"(a) A declaration that the plaintiff is entitled to vacant and peaceful possession of the said premises to be delivered by the defendant to the plaintiff on the expiry of the term of the said Lease dated 17th July, 1964, i.e. on the expiry of 24th June, 1984.

(b) perpetual injunction restraining the defendant, its agents and servants from subletting, assigning of parting with possession of the said premises or any part thereof during the said term of the said lease and from giving possession of the said premises or any party thereof to any person other than the plaintiff on the expiry of the said Lease;

(c) A decree for vacant possession of the said premises on the expiry of the term of the said Lease as aforesaid.

(d) A decree for Rs.30,000/- for damages or alternatively, an enquiry into damages and a decree for such as may be found due to the plaintiff.

(e) Receiver;

(f) Costs;

(g) further and other reliefs."

8. The sub-lease of the defendant-appellant expired by efflux of time on 24.6.1984 and the lease granted by the superior landlord, namely. M/s. Wachel Molla & Sons Pvt., in favour of the plaintiff-respondent also expired on 25.6,1984 by efflux of time. Thereafter, admittedly M/s Wachel Molla & Sons Pvt. Ltd. filed a civil suit being suit No 493 of 1984 against the plaintiff-respondent as well as against the defendant-appellant for recovery of possession of the demised premises together with mesne profits and other reliefs. This Court has been given to understand that the said suit is still pending. Thereafter, on 12.2.1992 the suit filed by the plaintiff was decreed as aforesaid and against that this appeal was filed.

9. Apart from the aforesaid broad facts some ancillary facts may also be noted. It is not in dispute that after the filing of the suit the plaintiff respondent filed an application for amendment of the plaint trying to bring on record certain subsequent events namely that after the expiry of the sublease granted in favour of the defendant-appellant by efflux of time on 24.6.1984, the tenancy of the defendant-appellant stood determined and the defendant-appellant was continuing in wrongful possession. As it had failed to deliver up possession of the demised premises on 25.6.1984 in spite of demand, that the plaintiff-respondent Is entitled to claim mesne profits and damages @ Rs.6/-per sq. ft. per month, i.e. Rs. 595/- per day from June 1984 until recovery of possession of the said demised premises from the defendant-appellant. An additional written statement was also filed and in the said additional written statement the stand taken by the defendant appellant is that the lease granted by the superior landlord in favour of the plaintiff respondent has expired by efflux of time and therefore, the plaintiff respondent has lost its right to remain in lawful occupation of the demised premises. It was also placed on record that the superior landlord has filed an ejectment suit against both the plaintiff respondent as also the defendant appellant on the ground that the lease has run out its time. On the aforesaid state of pleadings, the issues were framed but of all those Issues the case was argued before this appeal Court primarily on two Issues:
(1) Was the suit pre-mature when it was instituted?

(2) Has the suit become devoid of any cause of action by reason of subsequent events?

10. The learned counsel for the appellant urged very strongly that on the date of the institution of the Instant suit, I.e., 16.4.1984 the sub-lease granted in favour of the defendant appellant by the plaintiff-respondent had not expired. Therefore, on that

date no suit could be filed. This, according to the learned counsel, has not been correctly appreciated by the learned single Judge in his Judgment. The learned counsel for the respondent submitted that the suit is not pre-mature inasmuch as on 8.11.1983 in reply to the letter dated 26.9.1983 written by the solicitor of the plaintiff-respondent, the solicitor of the defendant-appellant wrote back by saying that the defendant-appellant disclaims the right of the plain tiff-respondent to recover possession of the premises on the expiry of 24.6.1984. It has also made clear that the defendant-appellant will not vacate the premises in question. The learned counsel further pointed out by referring to Clause(5) of the lease agreement that it stipulates that the lessee shall deliver quiet, vacant and peaceful possession of the demised premises to the lessee on the expiry of the last day of the lease. The learned counsel further referred to Section 34 of the Specific Relief Act and contended that the plaintiff-respondent is entitled to a declaration in terms of prayer(a) to the plaint and by way of consequential relief, the plaintiff-respondent is entitled to perpetual injunction restraining the defendants and Its agents and servants from parting with possession of the suit premises or any part thereof during the said term of the lease and the plaintiff respondent is entitled to a decree for vacant possession. The learned counsel submitted that the prayer for vacant possession was made from the date of expiry of the said lease and the said prayer for vacant possession was not made from the date of the Institution of the suit. The learned counsel, therefore, stated that the suit is maintainable u/s 34 of the Specific Relief Act read with Section 39 of the Indian Contract Act. Learned counsel further submitted that in the said suit the plaintiff respondent by virtue of an amendment has Incorporated subsequent events and the suit was heard in February, 1992 on the basis of amended plaint.

11. It was urged by the learned counsel for the appellant that the principle of estoppel u/s 116 of the Evidence Act was not properly appreciated by the learned trial Judge. The learned counsel explained this submission by saying that the tenant is estopped from denying the landlord''s title but this estoppel is confined during the period when the tenancy continues and at the beginning of the tenancy. According to the learned counsel, this estoppel between the landlord and tenant is a limited one both in extent and in time. The learned counsel urged that in the instant case the denial of the title of the plaintiff-respondent has been made by the defendant-appellant after the tenancy of the plaintiff-respondent came to an end by efflux of time. It is contended that admittedly the lease of the immediate landlord under the superior landlord come to end and the plaintiff respondent lost his right or title to remain in lawful possession of the property. At this stage the defendant-appellant is not debarred u/s 116 of the Evidence Act from denying the title of the immediate landlord,

12. The learned counsel of the respondent on the other hand submitted that the appreciation of the scope of Section 116 of the Evidence Act was rightly made in the facts of this case by the learned trial Judge and the learned counsel further urged

that tenant''s estoppel in challenging the title of the landlord does not cease to run after the head lease expires by efflux of time. The learned counsel urged with reference to pages 5 and 6 of the Judgment of the learned trial Judge that this legal aspect has been conceded by the defendant-appellant before the learned judge and as such it should not be permitted to contend to the contrary before the appeal Court.

13. Another point was also urged by the learned counsel for the appellant in support of the appeal. The learned counsel urged that the learned trial Judge has not considered the Rule of eviction by title paramount. The learned counsel submitted that where there is a threat of eviction by a person claiming title paramount, i.e., the head-lessor, the sub-tenant is not estopped u/s 116 of the Evidence Act from challenging the title of his immediate landlord and also the right of the immediate landlord to maintain an eviction proceeding against the sub-lessee, the defendant-appellant herein. In support of the aforesaid contention the learned counsel for the appellant relied on three decisions of the Supreme Court in the case of D. Satyanarayana Vs. P. Jagadish, , and in the case of Tej Bhan Madan Vs. II Additional District Judge and Others, and also the decision in the case of S. Thangappan Vs. P. Padmavathy, .

14. The learned counsel for the respondent, however, controverted the aforesaid contention by saying that those decisions do not apply to the facts of this case and the learned counsel sought to distinguish those cases on the basis of factual differences. The learned counsel submitted that it is not the case of the appellant herein that they have attorned in favour of the title paramount or a direct tenancy has been created between the appellant and the head lessor or that they have been paying rent to the head lessor.

15. In support of his contention that there is no eviction by Title Paramount, the learned counsel for the respondent relied on a decision in the case of in Re: In Re: Ganesh Trading Co. Pvt. Ltd., , The learned counsel argued that ''In Re: Ganesh Trading Put. Ltd.'', a learned Division Bench of this Court held that in order to constitute eviction by Title paramount, it is necessary for the sub-lessee to establish that his relationship with the Immediate landlord stood disrupted not only de jure but also de facto and actual disposition is necessary. The learned counsel submitted, relying on those principles in Ganesh Trading that in the instant case there is nothing to show that the relationship of landlord and tenant between the appellant and the respondent stood disrupted either de jure or de facto.

16. The learned counsel for the respondent has also relied on two other decisions of the Supreme Court in order to contend that the pleading in the suit filed by M/s. Wachel Molla & Sons Pvt. Ltd., the head-lessee cannot decide the relationship of the parties in the instant case In support of this contention the learned counsel relied on the decision in the case of Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, . The learned counsel relied on the observation in para 22 at page 240 of the report.

In para 22 the learned Judges of the Supreme Court held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is always the case which has been pleaded that has to be found, and without an amendment, the Court is not entitled to grant any relief not asked for,

17. In support of the aforesaid contention the learned counsel for the respondent further relied on the decision in the case of Sheodhari Rai and Others Vs. Suraj Prasad Singh and Others, . In the said judgment the learned counsel relied on para 5 at page 760 of the report. The learned counsel by placing reliance on the said paragraph wanted to urge that where the defendant failed to prove its case on the basis of its written statement, the Court cannot, on the failure of the defendant to prove his case, make out a new case which is not made in the written statement and which is inconsistent with the title set up by the defendant.

18. These are the rival contentions on both the sides. The main question, which falls for consideration, in this case is whether the suit was maintainable Inasmuch as this was a suit Infer alia for recovery of possession in the ground of expiry of lease but on the date when suit was filed the lease did not expire. In support of the contention that the suit is not maintainable, the learned counsel for the appellant relied on several decisions. The first of such decisions was rendered in the case of Ramanandan Chetti v Pulikutti Servai and Ors, reported in Indian Law Reports XXI Madras, 288. In that case the suit was filed for ejectment of the trespassers during the pendency of the lease and the lease expired when the suit was pending. On those facts, the learned Judges held that the plaintiff was not entitled to the relief sought. It was also urged in that case that the appropriate relief in such circumstances would be a declaration. This is also the argument of the learned counsel for the respondent plaintiff in this case. But the learned Judges of the Division Bench in Ramanandan Chetti (supra) held that as the plaint was framed upon an erroneous view, the plaintiffs relief of a declaration could not be granted. The learned Judges held that the plaintiff suing for possession must show on that on the date of the suit that he was entitled for relief. The learned Judges held that to this general Rule an exception could only be made in case of partition suits. In partition suits events occurring after the commencement of the suit should be considered for determination of the rights of the parties. But such cases are an exception to the general rules that the rights of the parties must be ascertained on the date when the action was brought.

19. The next case cited on this point is the decision in the case of Purkhit Panda v. Ananda Gaontia, reported in 12 Calcutta Weekly Notes, 1036. It is a Division Bench Judgment of this Court in that case the decision of Madras High Court of Ramnadan Chetti (supra) was followed and the learned Judges held that Civil Court must adjudicate on the rights of the parties, as they existed when the plaint was filed.

20. Similar view has been taken in the Judgment of the Division Bench in the case of Molamal Illoth Krishnan Nambudri and Ors., v. The Secretary of State for India in

Council and Ors., reported in XIX Madras Law Journal, 347. In that case the learned Judges held relying on Ramanadan Chetti (supra) if the plaintiff seeks possession he must show that at the date of the suit he was entitled to such relief. Reference in this connection was also made to another single Bench Judgment in the case of (Mylavarapu) Rangayya Naidu Vs. Basana Simon and Others, . In that case it was held that if a suit is premature on the date of its Institution but not so on the date of decision, no decree can be granted and the only course in such a case is to dismiss the suit with liberty to the plaintiff to bring a fresh suit upon a proper cause of action. The suit in that case was a suit for redemption. But the aforesaid observation was made on general principles which can be followed in this case. The principles laid down in the case of Rangayya Naidu (supra) has been subsequently followed in a landlord-tenant dispute by a Division Bench of Calcutta High Court in the case of Geeta Bose and another Vs. Machine Tools of India Ltd, . While dealing with this aspect of the matter, the learned Judges in para 6 held that if a cause of action was premature when the suit was filed it could not be Included by subsequent amendment even if it matured during the pendency of the suit. The only course is to allow the withdrawal of the suit with a liberty to a file afresh. In Geeta Bose (supra) what happened was that a suit was filed by the landlord claiming for ejectment on the ground of reasonable requirements within three years from the date of purchase. Since that cause of action was not available to the landlord in view of the provisions u/s 13(3)(A) of the West Bengal Premises Tenancy Act, 1956, the learned Judges held that since the cause of action to file a suit matured during its pendency that should be a ground for allowing the plaintiff to withdraw the suit filed prematurely and to file a suit afresh under the provisions of Order 23 Rule l(3)(b) of the Code.

21. The submission of the learned counsel for the respondent to the contrary that in view of the stand taken by the appellant in the letter dated 8th November, 1983 and in view of the provisions of Section 39 of the Indian Contract Act, the said suit is maintainable is not acceptable to this Court. Section 39 of the Contract Act deals with the question on the effect of refusal of a party to perform promise wholly. Section 39 of the Contract Act is set out below:

"Section 39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."

22. In order to attract Section 39, the plaintiff-respondent must show that after the letter dated 8th November, 1983 of the appellant''s solicitor, he has take any step to put an end to the contract. This has not been done. Apart from that in the letter written by the solicitor of the plaintiff-respondent the request was to deliver vacant possession on the expiry of the 24th June, 1984 and the solicitor of the appellant-defendant by his letter refused to do so. So the cause of action in view of

those letters arises after 24th June. 1984. But the suit was admittedly filed before that day when cause of action did not accrue. So Section 39 is not attracted in this case.

23. This Court is also of the view that the suit is not maintainable in view of Section 34 of the Specific Relief Act. In order to obtain a declaration u/s 34 of the Specific Relief Act, the plaintiff respondent must file a properly maintainable suit on the basis of a proper cause of action. In the instant case, the cause of action being admittedly not there, the suit is premature and consequently the relief u/s 34 of Specific Relief Act is not available to the plaintiff respondent Section 34 confers a discretion on the Court in the matter granting a declaration. A mere declaration in terms of prayer would serve no purpose. In such a case, the settled practice of Court in exercise of its discretion would be not to grant a futile declaration. See the decision of the Court of Appeal in the case of Mellstorm v. Garner and others, reported in 1970(2) All ER 9 . A Division Bench of Allahabad High Court in the case of Budhu Singh and Others Vs. The Board of Revenue and Another, held that in suits for declaration, the Courts only determine the position as it stood on the date of the plaint. The exception to this Rule is to consider the effect legislation with retrospective effect. Here there is no such legislation. So there can be no declaration on the date the plaint was filed. A declaration with reference to a future date is hardly ever made by Court.

24. Reference in this connection has also been made in the case of Rameshwar and Others Vs. Jot Ram and Another, . In that case the learned Judge have held in para 8 of the Judgment that the right to relief must be Judged to exist on the date a suit is instituted. In other words, right of a party is determined by the facts as they exist on the date when the action was instituted. Of course, the said Judgment has also laid down that Courts can take note of subsequent events and mould the relief but this can be done only in exceptional cases.

25. A partition suit is an example where Court can mould relief on the basis of subsequent events. In a partition suit by reason of death and subsequent devolution of interest and acquisition of further properties, the Court may give a declaration of share of the parties in the properties available to them at date subsequent to the filing of the suit. But this is not the position here. Here it is a case of a suit for possession which admittedly cannot be filed on the date when the lease was continuing.

26. This question is sufficient to allow the appeal but since other points have been urged and our Judgment is subject to appeal, this Court proposes to decide other points too in view of the mandate of the Supreme Court in the case of Fomento Resorts and Hotels Ltd. Vs. Gustavo Ranato Da Cruz Pinto and Others, .

27. The next question is one of tenant''s estoppel u/s 116 of the Evidence Act. For a proper appreciation of the principles u/s 116 of the Evidence Act, the same is set out

below:

"116. Estoppel of tenant: and of licensee of person-in-possession.-No tenant of immovable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord or such tenant had, at the beginning of the tenancy, a title to such immovable property: and no person who came upon any immovable property by the license of the person-in-possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given."

28. This Section came up for Interpretation before the Judicial Committee of the Privy Council and the Supreme Court in connection with umpteen number of cases. In one of the early decisions in the case of Barabhai Coal Concern, (LXIV Indian Appeal 311) Sir George Rankin, speaking for the Judicial Committee and after considering analogous principles of English Law, explained the rationale behind the Section as follows in page 391 of the report:

"The Section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor any one claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise--which is the case before the Board on this appeal--the Section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease, and there is no exception even for the case where the lease Itself discloses the defect of title. The principle does not apply to disentitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion, though in such cases there may be other grounds of estoppel, e.g., by attornment. acceptance of rent, etc. In this sense it is true enough that the principle only applies to the title of the landlord who "let the tenant In" as distinct from any other person claiming to be reversioner. Nor does the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end."

29. In explaining the principles of Section 116 of the Evidence Act, the learned counsel of the appellant first relied on the decision in the case of D. Satyanarayana Vs. P. Jagadish, .

30. The facts of that case are that one D. Satyanarayana was a subtenant of the tenant-respondent. The superior landlord served a notice on D. Satyanarayana alleging that there was unlawful sub-letting by his Immediate landlord and that the landlord had decided to terminate the tenancy of the Immediate landlord with the expiry of one month. Thereupon, Satyanaryana attorned in favour of the Superior Landlord and started paying monthly rent to him directly. The Immediate landlord then commenced eviction proceedings against Satyanarayana u/s 10(3)(b)(iii) of A.P,

Building (Lease, Rent and Eviction) Control Act on grounds of default. Satyanarayana lost in High Court and appealed to Supreme Court.

31. In the background of these facts, the Hon''ble Supreme Court held in para 3 as follows:

"The appeal must be allowed on the short ground that there being a threat of eviction by a person claiming title paramount i.e. head lessor Krishnamurthy, the appellant was not estopped u/s 116 of the Evidence Act from challenging the title and his right to maintain the eviction proceedings of the respondent P. Jagadish as the lessor."

32. The learned Judges further explained what is meant by "during the continuance of the tenancy" by saying that it means during the continuance of possession that was received under the tenancy in question. This has been further explained towards the end of the same paragraph as follows:

"The Rule of estoppel is thus restricted not only in extent but also in time i.e. restricted to the title of the landlord and during the continuance of the tenancy: and by necessary implication, it follows that a tenant is not estopped, when he is under threat of eviction by the title paramount, from contending that the landlord had no title before the tenancy commenced or that the title of the landlord had since come to an end."

33. In para 4 of Satyanarayana, the learned Judges after considering various case laws including the decision in Barabani Coal (supra) pointed out at the exception to principle as follows:

"From this, the exception follows, that it is open to the tenant even without surrendering possession to show that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title holder or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he had attorned to the paramount title-holder. In order to constitute eviction by title paramount, it has been established by decisions in England and in India, that it is not necessary that the tenant should be dispossessed or even that there should be a suit in ejectment against him. It will be sufficient if there was threat of eviction and If the tenant as a result of such threat attorns to the real owner, he can set up such eviction by way of defence either to an action for rent or to a suit in ejectment."

34. The next decision cited on the principle of Section 116 was in the case of Tej Bhan Madan Vs. II Additional District Judge and Others, ..

35. In that decision, the learned Judges have held that the law of estoppel of a tenant u/s 116 of the Evidence Act is a recognition and statutory assimilation of the equitable principles underlying estoppel in relation to tenants. The learned Judges have also observed that the Section is not exhaustive of the law of estoppel. In para

11 of the said judgment, the learned Judges have held that the Rule of estoppel does not preclude a tenant from contending that the landlord''s title has since been terminated by transfer or otherwise or has been lost or defeated by title paramount. The learned Judges have also relied on the decision of the Privy Council in the case of Barabhai Coal. The learned Judges also held that there can be a denial of title of the landlord without the tenant renouncing his character as such where, for instance, he sets up a plea of Jus tertii''. (see para 16).

36. The next decision cited by the learned counsel for the appellant on this question was in the case of S. Thangappan Vs. P. Padmavathy, .

37. The admitted facts of the case are that the appellant, Thangappan, was the tenant of the suit premises since 1962. The landlady filed eviction proceeding against Thangappan on the grounds of default, demolition and reconstruction and also for sub-letting. The stand of Thangappan was that he believed the respondent to be the landlady initially but later on came to know that a Devasthanam is the actual landlord and he wrote to the Devasthanam for his recognition as a tenant and stopped paying rent to the landlady. On the landlord''s action against Thangappan eviction order was passed by the Rent Controller against him and his appeal was dismissed. Then a revision petition was filed by him in the High Court and during the pendency of that petition, Devasthanam filed a suit against Thangappan and others claiming paramount title and also eviction. High Court dismissed the revision petition Initially on grounds of default and then on merits. On appeal, the apex Court dismissed Thangappan''s appeal by holding inter alia that denial of title by him was not bona fide. The apex Court then explained the principles of Section 116 in para 14 of the Judgment holding thereby that the significant words in Section 116 are "at the beginning of the tenancy". But subsequent to such induction as tenant "If the landlord loses his title under any law to agreement and their is a threat to such tenant of his eviction by subsequently acquired paramount title-holder then any denial of the title by such tenant to the landlord who inducted him into the tenancy will not be covered by this principle of estoppel under this section".

38. Principles laid down in ''D. Satyanarayan'' to the above effect were referred to and relied on in para 15 of section Thangappan.

39. Mr. Dutt the learned counsel for the respondent in trying to controvert the aforesaid submissions of the appellant''s counsel pointed out that in all these there is an attornment by the tenant in favour of the Superior landlord and it is only on the basis of attornment and the payment of rent to the title paramount, the Courts held that there may be an eviction by title paramount. But in the Instant case, mere filing of a suit by the head lessor does not amount to an eviction by the title paramount inasmuch as in the instant case, admittedly there has not been any attornment of tenancy and nor any new jural relationship between the parties namely the sub-leasee and the head lessor.

4O. The learned counsel for the respondent cited a Division Bench Judgment of Calcutta High Court in the case of ''In Re: In Re: Ganesh Trading Co. Pvt. Ltd., . The learned counsel relied on the Judgment in order to point out that eviction by title paramount does not take place by a mere filing of suit. The learned counsel also relied on para 6 of the Judgment ''In Re: Ganesh Trading Co. Put. Ltd.'' and contended that even a decree or an order for possession by itself cannot constitute eviction by title paramount. The learned counsel pointed out that the learned Judges ''In Re: Ganesh Trading Co. Pvt. Ltd.'' have held that in order to constitute such eviction there must be actual dispossession, may be by delivery of symbolically possession in consequence to the decree or order for possession. So the learned Judges in Ganesh Trading have held in order to overcome the Rule estoppel it is always necessary for the lessee to establish that his relationship with his Immediate landlord stood disrupted not only de Jure but de facto.

41. In arriving at the aforesaid conclusion, the learned Judges relied on a passage in Spencer Bower and Turner''s "The Law Relating to Estoppel by representation, 3rd Edition". The passage which has been quoted by the learned Judges occurs against para 197 page 200-201 of the said treatise. Relying on the said passage the learned Judges of the Division Bench ''In Re: Ganesh Trading Co. Pvt. Ltd.'' held that in order to constitute eviction by title paramount "there must be actual dispossession may be by delivery of symbolical possession in consequence to the decree or order for possession".

42. This Court, with profound and deep respect to the learned Judges delivering the Judgment in Ganesh Trading, is unable to agree with the views of their Lordships expressed in paragraph 6 of the Judgment.

43. Possibly in Ganesh Trading the attention of the learned Judges was not drawn to the subsequent statement of principle by the learned author in the aforesaid treatise by Spencer Bower. In page 201 the learned authors have developed the principles of eviction by title paramount by stating that "actual physical dispossession or expulsion is the most obvious and ordinary form of eviction". But the learned authors stated that eviction "may be proved" by less than this and it is sufficient to prove facts and proceedings on the part of the third person reasonably and properly submitted to by the tenant, which may tantamount to actual dispossession by force. The learned authors gave illustration of such eviction by stating principles as follows:

"Such constructive or symbolic eviction is established by proof that there exists a third person claiming title paramount to the demised premises, that this third person has threatened to evict the tenant unless he attorns, or pays rent to, or makes a new arrangement with, himself, and that such an attornment, payment, or arrangement is thereupon made by the tenant in reasonable apprehension that the threats and demands of the tertius are warranted by a title paramount, and are not made gratuitously, or in collusion with the landlord."

[underlined for emphasis]

44. So even on the authority of Spencer Bower and Turner on the basis of which the learned Judges laid down the aforesaid proposition in para 6 of Ganesh Trading, actual dispossession from the demised premises is not necessary to constitute eviction by title paramount.

45. Similar views have been expressed in FOA''s General Law of Landlord & Tenant, 8th Edition. At pages 162 in explaining the true connotation of the term eviction by title paramount. The learned author stated as follows:

"Though it has been suggested that an eviction by title paramount must be actual and not constructive, it seems that it is not necessary for the tenant actually to go out of possession, and that if, upon a claim being made by a person with title paramount, the consent by an attornment to such person to change the title under which he holds, or enter into a new arrangement for holding under him, this will be equivalent to an eviction and a fresh taking."

46. Similar views have been expressed in Halsbury''s Laws of England. Reference in this connection may be made to Halsbury''s 4th Edition Volume 27,k para 238. The relevant passage is set out below:

"238. Eviction under title paramount. In order to constitute an eviction by a person claiming under title paramount. It is not necessary that the tenant should be put out of possession, or that proceedings should be brought. A threat of eviction is sufficient, and if the tenant, in consequence of the threat, attorns to the claimant, he may set this up as an eviction by way of defence to an action for rent, subject to his proving the evictor''s title. There is no eviction, however, if the tenant gives up possession voluntarily."

47. The aforesaid passage of Halsbury has been approved by Supreme Court in para 4 in D. Satyanarayana (supra).

48. So in view of the principles elaborated in ''Spencer Bower'', ''Foa'' and ''Halsbury'' which have been quoted above and the law laid down in para 4 of D. Satyanarayana (supra) we hold, with utmost respect to the learned Judges, that the principles laid down to the contrary in Ganesh Trading cannot be followed as a binding precedent. Those principles may be read as confined to the facts of that case. It may be noted that the subsequent judgment of Supreme Court in Section Thangappan (supra) has approved the ratio in D. Satyanarayana (supra).

49. But in order to show eviction by Title Paramount it is necessary to show attornment or some arrangement between the tenant in possession and the superior landlord. Here the said attornment or arrangement has not either been pleaded or proved. But the threat of eviction is there in view of the suit being filed by Watchel Molla, the head lessor.

5O. The main point which has been lost sight of by the learned trial Judge is that on the date when the decree was passed, the plaintiff had lost its right to be in lawful possession of the suit property because of two reasons. The lease granted in his favour by the head lessor has expired by efflux of time. Secondly as a result of Institution of the suit by the head lessor, the threat of eviction was very much there on the date the learned trial Judge gave the decree. It may be stated in this connection that all these materials were before the learned trial Judge. The head-lease dated 25th June, 1963 between the head lessor and the plaintiff-lessee was noted by the learned trial Judge in the Judgment under appeal. Apart from that the plaint filed by the Superior landlord against the plaintiff-lessee and the appellant sub-lessee was also before the learned trial Judge and the plea of estoppel was raised in the written statement (para 8) and also in the additional written statement (para 11 a). On these materials the learned trial Judge framed issue 6(b). Therefore, it should have been held by the learned trial Judge that the defendant-appellant is entitled to deny the title of the plaintiff-respondent in fact the appellant did not deny such title either at the beginning or during the continuance of the tenancy. But in view of subsequent events it is open to the appellant to deny the title of the plaintiff-respondent to the effect that the plaintiff lost Its right to remain in lawful possession of the suit property.

51. Therefore, the learned trial Judge should have held that suit has become devoid of cause of action in view of subsequent events. His judgment to the contrary, with respect to the learned Judge, cannot be affirmed.

52. The learned counsel for the respondent has cited certain decisions on the question of amendment.

53. The first of such decisions was cited in the case of Pasupuleti Venkateswarlu Vs. The Motor and General Traders, . In that case the learned Judges of the Supreme Court held that Court must take note of subsequent event even at the revisional stage. Another Judgment was cited in the case of Ragu Thilak D. John v. Section Rayappan and Others, reported in 2001(2) SCC 472. In that case the learned Judges of the Supreme Court while dealing with the principles of Order 6 Rule 17 of the CPC was considering the question whether by an amendment of plaint there may be a change in the nature of the suit. In dealing with the said question, the learned Judges held that the dominant purpose behind this Rule 17 of the CPC was to minimize litigation and in such a situation the prayer for amendment should be liberally allowed.

54. This Court has considered the aforesaid two decisions and the Court has also noted that in the facts of those cases amendment has been allowed. Amendment has been allowed here also but that does not improve the position. By allowing amendment to a plaint which is initially not maintainable and does not furnish a cause of action, the case does not become maintainable.

55. Therefore, in the instant case, even as a result of amendment the suit cannot succeed Inasmuch as it was filed with the prayer for recovery of the possession on a date when the lease did not expire.

56. Being faced with this difficulty, the learned counsel for the respondent urged that the cause of his client arises out of forfeiture under Clause (g) (2) of Section 111 of the Transfer of Property Act. But the facts here are otherwise. The plaint case is based on Clause (a) of Section 111 of the Transfer of Property Act which lays down that a lease of Immovable property determines by efflux of the time limited thereby. So far as clause (g) of the same Section is concerned, it is provided therein that a lease of immovable properly determines by forfeiture, that is to say, in a case where the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself. This position is not present in the facts and circumstances of the instant case because the plaintiff did not ever make out a case of forfeiture. Apart from that there cannot be any forfeiture unless there is a notice in writing by the lessor to the lessee of his intention to determine the lease. This is clear Clause (g) of Section 111 of the Transfer of Property Act itself. In the instant case, there is neither any notice, nor any intention to forfeit the lease nor does there exist any other fact so that Clause (g) may be attracted. This argument is, therefore, without any merit and is rejected.

57. The learned counsel for the respondent submitted that on the question of estoppel u/s 116 of the Evidence Act, the appellants are bound by their concession before the learned trial Judge and before the learned trial Judge they have conceded that the tenant cannot urge the question of estoppel. Therefore, before this Court they cannot argue to the contrary.

58. This Court is of the opinion that it is well settled that the Appeal Court is not bound by a concession on a point of law made before the first Court by the counsel of the parties. Reference in this connection be made in the judgment of Calcutta High Court in the case of Secretary of State for India tn Council v. Sibaprosad Jana, reported in XXVIII CLJ 447. Justice Sir Asutosh Mookerjee speaking for the Court held that an erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from claiming his legal rights in the appellate Court. To the same effect in the Judgment of the Privy Council in the case of AIR 1940 90 (Privy Council) . Lord Atkin speaking for the Judicial Committee of the Privy Council held in para 7 that if a counsel accepts a legal position, the same only amounts to an admission on a point of law which is not binding on a Court. The appellate Court is not in any way precluded from deciding the rights of the parties ''on a true view of the law''. In view of these celebrated authorities on this point this Court also does not feel bound by any concession on law made before the learned single Judge by the counsel of the appellant.

59. Therefore, considering the points Involved in this case, this Court of the view that the suit is bad and premature and having been filed without a cause of action

on the date when the suit was filed, no decree can be passed on the same. As such the suit is dismissed. The judgment and the decree of the learned single Judge is set aside. The appeal is allowed. All Interim orders stand dissolved.

There will be no order as to costs.

P.K. Chattopadhyay, J.

60. I agree.

61. Appeal allowed