IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Leave to Appeal under Section 5 C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006.

Rasnekgedara Jayathilaka,
Keppetipola,
Thembahena.

SC APPEAL 120/2013 **Plaintiff**
SC HCCA LA No. 195/2011

SP/HCCA/KAG/388/2007

District Court of Mawanella
Case No. 97/M

Vs.

1. H. G. Wijewardena Gunathilaka & Sons (Private) Limited,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

2. Hikkaduwa Gamage Wijewardena Gunathilake,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

3. State Mortgage and Investment Bank,
   Galle Road,
   Colombo 3.

Defendants

AND BETWEEN

1. H. G. Wijewardena Gunathilaka & Sons (Private) Limited,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

2. Hikkaduwa Gamage Wijewardena Gunathilake,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

Defendants-Appellants

Vs.

Rasnekgedara Jayathilaka,
Keppetipola,
Thembahena.

Plaintiff-Respondent

Jayasundara Mudiyanselage
Wimalawathie,
Keppetipola,
Thembahena.

Substituted-Plaintiff-Respondent

AND NOW BETWEEN

Jayasundara Mudiyanselage
Wimalawathie,
Keppetipola,
Thembahena.

Substituted-Plaintiff-Respondent-Petitioner

Vs.

1. H. G. Wijewardena Gunathilaka & Sons (Private) Limited,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

2. Hikkaduwa Gamage Wijewardena Gunathilake,
   No.11,
   D. S. Senanayake Veediya,
   Kandy.

Defendants-Appellants-Respondents

Before : **S. Thurairaja, PC, J**
A. H. M. D. Nawaz, J
K. Priyantha Fernando, J

Counsel :

Manohara De Silva, PC with
Ms. Nadeeshani Lankatilleka for
the Substituted-Plaintiff-Respondent-Appellant.

Dr. Sunil F. A. Cooray with Heshan Pietersz for the 1st and 2nd Defendants-Appellants-Respondents.

Argued on : 07.09.2023

Decided on : 16.11.2023

K. PRIYANTHA FERNANDO, J

1. The Plaintiff-Respondent-Petitioner (hereinafter referred to as the appellant) in this case, was aggrieved by the judgment of the Provincial High Court of *Sabaragamuwa* holden at *Kegalle* No. SP/HCCA/KAG/388/2007 dated 27.04.2011 and preferred an appeal to this Court against the 1st and the 2nd Defendants-Appellants-Respondents (hereinafter referred to as the 1st and the 2nd respondents) praying that the judgment of the learned Judges of the Provincial High Court be set aside, that the judgment of the learned Judge of the District Court be affirmed and for further costs and relief.

Facts in brief

2. The appellant in this case has been the owner of the land in question. The appellant has mortgaged the said land to the State Mortgage Bank by Mortgage Bond No. 3025. On 31.10.1986, the appellant has entered into a hand written agreement [P-1] with the 1st and the 2nd respondents, upon which the 1st respondent agreed to pay a sum of Rs. 160,000 to the appellant, and in exchange, the appellant has agreed to transfer the said land to the 1st respondent. According to the agreement, of the agreed sum of Rs. 160, 000, a sum of Rs. 110,000 was to be paid to the State Mortgage Bank (hereinafter referred to as the bank). This sum was owed by the appellant to the bank. The remaining sum of Rs. 50,000 was to be paid to the appellant.

3. The appellant states that, the 1st and /or the 2nd respondents have paid the sum of Rs. 110,000 to the bank. However, no further sum has been paid to the bank or the appellant. Further, the respondents have also cut down several trees on the said land causing a damage amounting to Rs. 300,000 to the appellant.

4. The appellant states that, as a result of non-payment of the monies due to the bank, the bank has informed the appellant that the land would be put up for auction to recover the monies due. The appellant further states that the bank has not gone ahead with the auction. Thereafter, the appellant has paid it off and settled all the money and interests due to the bank.

5. It is the position of the respondents that, the appellant has mortgaged the said land to the bank and has obtained a loan

facility. Upon failure to pay the monies due, the bank has decided to auction the land. Thereafter, the bank had entered into a contract to sell the land to one *Gamini Neththikumara* for Rs. 100,250.

6. According to the respondents, the appellant has informed the respondents that a sum of Rs. 160,000 as previously agreed according to the first agreement [P-1] is not sufficient and demanded that a sum of Rs. 200,000 in total be paid instead. The appellant and the 2nd respondent entered into a further agreement on 19.12.1987 [P-2] according to which the respondents were to pay a sum of Rs. 200,000 in total in exchange of the land in question.

7. The respondents state that, according to the terms of the second agreement, in addition to the Rs. 110,000 which was already paid to the bank, a sum of Rs. 75,000 has been paid to the appellant and thereafter, possession of the said land has been handed over to the 2nd respondent. The 1st and the 2nd respondents state that, the possession of the said land has been handed over in 1986 and they have prescribed to the said land.

Previous proceedings

8. The appellant in this case instituted action bearing No. 97/M in the District Court of *Mawanella,* praying for a decree that the 1st and the 2nd respondents have breached the contract between the appellant and the 1st and the 2nd respondents referred to in paragraph no. 9 of the plaint, a declaration that the appellant is the owner of the premises in suit, and an order restoring the appellant in possession of the same.

9. The respondents failed to file the answer and appear on the date that was provided. Thereafter, the case was decided *exparte* on 31.07.1997. The *exparte* order was vacated in the Court of Appeal. An amended plaint was filed by the appellant in the District Court and subsequently an answer was filed by the respondents.

10. The learned District Judge by judgment dated 28.04.2006 held in favour of the appellant. At the trial, three admissions have been

recorded by the 1st and the 2nd respondents, one of which is regarding the title of the appellant to the land in suit.

11. Being aggrieved by the judgment of the learned District Judge, the respondents appealed to the Provincial High Court of *Sabaragamuwa* holden in *Kegalle*. By judgment dated 27.04.2011, the High Court held in favour of the respondents.

12. Being aggrieved by the judgment of the Provincial High Court, the appellant preferred the instant appeal to this Court. At the hearing of this appeal, leave was granted on the following questions of law.

Questions of law raised on behalf of the Plaintiff-Respondent-Petitioner.

a) Was the High Court correct in holding that the petitioner failed to prove title when the title was admitted by all parties?

b) Did the High Court err in setting aside the Judgment entered in favour of the plaintiff in the District Court on the basis that parties have admitted title to the corpus and that they had not complied with the terms of the agreement?

c) Did the High Court err in admitting and considering document A2 which was not produced at the trial and which has been tendered to Court without proper notice to parties?

Questions of law raised on behalf of the 1st and the 2nd Defendants-Appellants-Respondents.

d) Has the petitioner fully set out the title to the property in the plaint and if not, can the plaintiff rely on the admission of paragraphs 2 to 8 in the plaint to establish his alleged title?

e) In any event can the plaintiff have and maintain this action in view of the certificate of sale issued in favour of *Neththikumara* as evidenced by document marked A2?

Written submissions on behalf of the appellant.

13. The learned President's Counsel for the appellant submitted that, the appellant who filed a declaration of title case need not prove title, especially where title has been admitted. It was submitted that the appellant has title to the land and was in possession thereof. Thereafter, the appellant has entered into an informal agreement with the 1st respondent upon which the 1st respondent has entered into possession of the land. However, the respondents have failed to pay part of the consideration that was agreed upon. The appellant being unable to seek specific performance on an informal agreement which was not notarially executed, filed a case for declaration of title and ejectment.

14. It was the submission of the learned President's Counsel that, unlike in a *rei vindicatio* action where the cause of action is based on the sole ground of violation of the right of ownership, in an action for declaration of title, the appellant need not strictly prove title but sues on the right of possession and ouster. The learned President's Counsel in bringing out the distinction between the burden of proof in a *rei vindicatio* action and a case for declaration of title, relied on the case of ***Luwis Singho and Others v. Ponnamperuma [1996] 2 S.L.R. 320*** and the case of ***Pathirana v. Jayasundara [1955] 58 N.L.R. 169*** and stated that, in the instant case, where the appellant has filed action for a declaration of title and for ejectment, the appellant need not strictly prove his title.

15. The learned President's Counsel for the appellant further submitted that, in any event, the 1st and the 2nd respondents have admitted the appellant's title to the land. It was submitted that, in paragraphs 2 to 8 of the amended plaint, the appellant has set out the manner in which he became entitled to the land in question by deed No. 3024 dated 16.02.1983 and deed No. 422 dated 27.10.1978. The 1st and the 2nd respondents have admitted the same.

16. The learned President's Counsel for the appellant, by relying on the case of ***Jayasinghe v. Kiriwanegedara Tikiri Banda [1988] 2 CALR 24*** submitted that, even in a *rei vindicatio* action, if the defendant admits the title of the plaintiff, the plaintiff is absolved of the duty to prove his title. Further, in the case of

Hameed v. Weerasinghe [1989] 1 S.L.R. 217 it was held that, in a vindicatory action, it is necessary to aver and prove title, but where title is not disputed, a plaintiff may sue for ejectment. It was submitted that, in the instant case, in a circumstance where the appellant's title has been admitted by the respondents, there is no requirement for the appellant to prove title and that he is entitled to an order ejecting the respondents.

17. It was further submitted that, in accordance with the provisions of the Evidence Ordinance, facts that are admitted need not be proved. As the admission in the instant case relates to a question of fact and not law, the tile which is admitted need not be proved.

18. It was submitted that the learned Judges of the High Court have failed to consider that, in an action for declaration of title and ejectment, the plaintiff (appellant) sues on the right of possession and ouster and need not prove title.

19. The 1st and the 2nd respondents in their appeal to the High Court have produced a document marked [A-2] which is an extract from the Land Registry, which purports to indicate that the State Mortgage and Investment Bank has auctioned the land in question to one *Gamini Neththikumara*. It was the submission of the learned President's Counsel that, the High Court could not have considered the document [A-2] as it was produced for the first time in appeal by the 1st and the 2nd respondents, without proper notice to the appellant or proper application made to Court. The respondents ought to have made an application for submitting fresh evidence under section 773 of the Civil Procedure Code read with Article 139(2) of the Constitution. The Honorable Judges of the High Court have failed to consider this fact and erroneously relied on the document marked [A-2] and held that, as at the date of filing this action, the appellant in this case was not the owner of the property.

20. It was further submitted by the learned President's Counsel that, the High Court misdirected itself and has fallen to error in applying the test of accepting fresh evidence in appeal as laid down in the case of ***Ratwatte v. Bandara [1966] 70 N.L.R. 231***. In the circumstances of this case, the 1st limb of the test laid down in *Ratwatte(supra)* is not satisfied, as the document [A-2] could have been obtained by the respondents with reasonable diligence

for use at the trial, especially because the respondents were well aware of the previous volume/folio it carries forward to. The Counsel contended that, the second limb of the test laid down in the case of *Ratwatte(supra)* is also not satisfied, as the document [A-2] would not have an important influence on the result of the case as subsequently the land has been transferred to the bank and in turn the bank has retransferred to the appellant as the monies due has been paid.

Written submissions on behalf of the Respondents.

21. The learned Counsel for the respondents submitted in his written submissions that, this action cannot be categorized as a mere action for declaration of title, because the prime requisite in a declaratory action is the ouster of the appellant. In the instant case, the possession has been voluntarily handed over to the respondents.

22. The learned Counsel further submitted that, if it is a *rei vindicatio* action, even though the respondents had admitted title, if it is transpired during the evidence that the appellant had no title at the time of filing action, the action has to fail.

23. The devolution of title on the appellant as pleaded in paragraphs 2 to 8 of the said amended plaint is not disputed. If the appellant did not have title, the respondents could get no title. It was the submission of the learned Counsel that, conceding to the devolution of title on the appellant, does not preclude the respondents from showing that subsequently the appellant has parted with such title.

24. The learned Counsel further submitted that, the position of the Honorable High Court Judges and as it was submitted in the case of ***Ahamadulevve Kaddubawa v. Sanmugam [1953] 54 N.L.R. 467,*** the plaintiff in a *rei vindicatio* action must show that he had title at the time of the institution of the action. As revealed at the hearing before the High Court, as at the date of institution of this action, the owner of the said property was not the appellant but one *Chandrathilaka Gamini Neththikumara.* This has been clearly set out in the document marked [A-2] which has been produced

and received at the hearing of the appeal in terms of section 733 of the Civil Procedure Code and Article 139 (2) of the Constitution. The High Court of Civil Appeal has properly received the document marked [A-2] as fresh evidence as it touches the main issue in the case, has an important bearing on the result of this case, and is of a decisive nature.

25. At the argument of this appeal, the main contentions were based on the difference in the standard of burden of proof with regard to a claim for a declaration of title and the admissibility of the document marked [A-2], and based on this document, whether the appellant had title to the land in question at the time action was filed and also on the grounds of estoppel.

26. The questions of law (a) and (b) will be answered together.

It was the position of the appellant that, where an action has been filed in respect of declaration of title, the appellant is not strictly required to prove title but sues on the right of possession and ouster. At the argument of this appeal, the distinction between a *rei vindicatio* action and a case for declaration of title in respect of the burden of proof each has to satisfy was discussed at length.

27. In the case of ***Luwis Singho and Others v. Ponnamperuma [1996] 2 S.L.R. 320*** at page 324 it was stated by *Wigneswaran J.* that,

> *"No doubt actions for declaration of title and ejectment (as is the present case) and vindicatory actions are brought for the same purpose of recovery of property. But in a rei vindicatio action, the cause of action is based on the sole ground of violation of the right of ownership. In such an action proof is required that ;*
>
> *(i) the Plaintiff is the owner of the land in question i.e. he has the dominium* ***and,***
>
> *(ii) that the land is in the possession of the Defendant (Voet 6:1:34)*
>
> *Thus even if an owner never had possession of a land in question it would not be a bar to a vindicatory action.*

In Punchihamy v. Arnolis[6] it was held that a purchaser who had not been placed in possession may bring a vindicatory action. Even a person who had a mere "nuda proprietas" (bare legal title) was recognized as a person entitled to file a vindicatory action. Allis Appu v. Endiris Hamy (supra).

But in an action for declaration of title and ejectment the proof that a Plaintiff had enjoyed an earlier peaceful possession of the land and that subsequently he was ousted by the Defendant would give rise to a rebuttable presumption of title in favour of the Plaintiff and thus could be classified as an action where dominium need not be proved strictly. It would appear therefore that law permits a person who has possessed peacefully but cannot establish clear title or ownership to be restored to possession and be quieted in possession. This development of the law appears to have arisen due to the need to protect de facto possession. It is different from the right of an owner recovering his possession through a vindicatory action. Our courts have always emphasized that the plaintiff who institutes a vindicatory action must prove title. (Vide Wanigaratne v. Juwanis Appuhamy.[7])

Withers, J., in Allis Appu v. Endiris Hamy (supra) when he referred to jus terttii as a defence to a rei vindicatio action, he no doubt took into consideration the fact that ownership or dominium is the essence of a vindicatory action and title being in the hands of a third party could be relevant in such cases.

But in an action for declaration of title and ejectment as in the present case, ***the Plaintiff need not sue by right of ownership but could do so by right of possession and ouster****. In fact in such cases the Plaintiff is claiming a possessory remedy rather than the relief of vindication of ownership."*

[Emphasis mine]

28. When considering the above extract, it can be observed that, it does not strictly say that a plaintiff in every action for a declaration of title need not prove title. It simply says that in an action for a declaration of title and ejectment, where a plaintiff has proved that he enjoyed previous peaceful possession and that he was later ousted by the defendant, it would give rise to a presumption of title

in favour of the plaintiff. One should be mindful that this presumption is rebuttable as well. In such an instance dominium, that is absolute ownership, need not strictly be proved.

29. It was pointed out by the Counsel for the respondents that, in the instant case, the possession has been voluntarily handed over to the respondents by the appellant and there is no ouster of the appellant. Therefore, whether a presumption of title would arise in favour of the appellant in the instant case is questionable.

30. However, in the case of ***Pathirana v. Jayasundara [1955] 58 N.L.R. 169*** which was a proceeding instituted against an overholding tenant where it was held that, a plaintiff was not entitled to amend the plaint so as to cause prejudice to the defendant's plea of prescriptive possession. In *Pathirana(supra)* it was stated that,

"... but the question of difficulty arises is whether the action thereby becomes a rei vindicatio for which strict proof of the plaintiffs title would be required, or else is one for a declaration (without strict proof) of title which the tenant by law precluded from denying."

31. When considering the above extract, I am in agreement with the position that, in an action for declaration of title, strict proof of title need not be established. Therefore, the appellant in the instant case need not strictly prove title as it relates to an action for declaration of title and ejectment.

32. It was the position of the learned President's Counsel for the appellant that, the 1st and the 2nd respondents have admitted the appellant's title to the land. It was his position that, in accordance with the provisions of the Evidence Ordinance, where the fact of title is admitted it need not be proved and the appellant is entitled to an order ejecting the respondents. However, the learned Counsel for the respondents contended that, merely conceding to the devolution of title on the appellant does not preclude the respondents from stating that subsequently, the appellant has parted with such title.

33. When considering the amended plaint dated 2001.02.12, paragraphs 2 to 8 of the plaint describe how the appellant became the absolute owner of the land in question. In paragraph 3 of the

answer of the 1st and 2nd respondents dated 05.09.2003 (at page 144 of the brief) the 1st and the 2nd respondents have admitted that the appellant became the sole owner of the land in question.

34. Section 58 of the Evidence Ordinance of Sri Lanka sets out that,

> *"No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings;*
>
> *Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."*

35. Section 58 of the Evidence Ordinance clearly sets out that, facts that are admitted need not be proved. I am in agreement that an admission as to title does in fact qualify as a question of fact. However, I am unable to agree with the appellant's position that what has been admitted by the respondents in their answer is an admission as to title. It is my position that, what has been admitted by the respondents in their amended answer is the devolution of title on the appellant. It is pertinent to note that, admitting that the land in question was devolved on the appellant in a particular manner by particular deeds is something completely different to admitting title. An admission such as this would not hinder the respondents from stating that subsequently the appellant parted with such title.

36. As I have found that the admission in the amended answer of the respondents does not qualify as an admission as to title, the position advanced by relying on the cases of ***Jayasinghe v. Kiriwanegedara Tikiri Banda [1988] 2 CALR 24*** *and* ***Hameed v. Weerasinghe [1989] 1 SLR 217*** are futile with regard to the instant case, and therefore will not be addressed.

37. In answering the question of law (a), it is my position that, the High Court has erred in stating that the title was admitted by the parties as the respondents merely conceded to the devolution of title and not to the title itself.

38. In answering the question of law (b), the District Court judgment has not been set aside by the High Court on the basis that parties have admitted title.

39. Now I will answer the question of law (c) that has been raised on behalf of the appellant.

This question of law is in reference to the admissibility of fresh evidence in the High Court. The appellant took the position that, the High Court could not have considered the document [A-2] as it was produced for the first time in appeal by the 1st and the 2nd respondents and was also tendered to Court without proper notice to parties or proper application made to Court.

40. It was the position of the appellant that, the High Court has erred in relying on the document [A-2] as it was produced contrary to section 773 of the Code of Civil Procedure read with Article 139(2) of the Constitution and without proper notice to the appellant or proper application made to Court. Further, that the High Court has erred in applying the test of accepting fresh evidence in appeal as laid down in the case of ***Ratwatte v. Bandara [1966] 70 N.L.R. 231.*** The respondents on the other hand contended that the High Court has not acted contrary to the provisions laid down in section 773 of the Code of Civil Procedure and Article 139 of the Constitution and has correctly applied the test laid down in *Ratwatte(supra)* and properly received the document [A-2] in fresh evidence.

41. Section 773 of the Code of Civil Procedure sets out that,

> *"Upon hearing the appeal, it shall be competent to the Court of Appeal to affirm, reverse, correct or modify any judgment, decree, or order therein between and as regards the parties, or to give such direction to the Court below, or to order a new trial or a further hearing upon such terms as the Court of Appeal shall think fit, or, if need be, to receive and admit new evidence additional to, or supplementary of, the evidence already taken in the Court of first instance, touching the matters at issue in any original cause, suit or action, as justice may require or to order a new or further trial on the ground of discovery of fresh evidence subsequent to the trial "*

42. Article 139(2) of the Constitution sets out that,

> *"The Court of Appeal may further receive and admit new evidence additional to, or supplementary of, the evidence already taken in Court of First Instance touching the matters at issue in any original case, suit, prosecution or action, as the justice of the case may require."*

43. *In the case of* ***Ratwatte v. Bandara [1966] 70 N.L.R. 231*** reference was made to the case of ***Ramasamy v. Fonseka [1958] 62 N.L.R. 90*** where *Weerasooriya J.* held that,

> *" fresh evidence would not be permitted to be adduced in appeal unless it is of a decisive nature; it must be such that, on a new trial being ordered, it would almost prove that an erroneous decision had been given."*

44. Further, reference was also made to the case of ***Ladd v. Marshall [1954] 3 All ER 745*** where *Denning L.J.* said that,

> *" In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although, it need not be decisive : third, the evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, although it need not be incontrovertible."*

45. When considering the test laid down in *Ratwatte(supra)* in reference to the facts and circumstances of the instant case, it is clear that the first requirement of the test is patently not satisfied as the document marked [A-2] which is an extract from the Land Registry, which indicates that the State Mortgage and Investment Bank has auctioned the land to one *Gamini Neththikumara,* could have been obtained and produced at the trial, if reasonable diligence had been used.

46. When considering the second requirement in the test laid down in *Ratwatte(supra),* I am in agreement with the position taken by the

learned President's Counsel for the appellant. When considering the evidence of witness *Thamara Kumari* who is a clerk at the State Mortgage and Investment Bank (page 240 of the brief) in her evidence has said that, although the land in suit was auctioned, it was subsequently transferred to the bank and that the monies due has been paid to retransfer the land to the appellant. Therefore, in this light, the document [A-2] would not have had an important influence on the result of the case, as the appellant has been the owner of the property as at the date of filing this action. Therefore, the second requirement in the test laid down in *Ratwatte(supra)* is also not satisfied.

47. The general rule is that, fresh evidence is not admitted in appeal. However, in exceptional situations, it has been allowed as provided under section 773 of the Code of Civil Procedure read with Article 139(2) of the Constitution . The test in *Ratwatte(supra)* serves as a filtering mechanism to allow parties to submit fresh evidence where the test has been satisfied. This test must be strictly adhered to. If this is not followed, it would have the effect of transgressing the general rule.

48. In answering the question of law (c), as the test laid down in *Ratwatte(supra)* has not been satisfied, the document [A-2] could not have been accepted in evidence at the High Court. The learned Judges of the High Court have erred in admitting and considering the document [A-2] which was not produced at the trial.

49. Now I will answer the question of law (d) that has been raised by the respondents.

    The respondents in their amended answer dated 05.09.2003 have admitted paragraphs 2 to 8 of the plaint. It is my position that, at the time the respondents entered into the informal agreement, they have accepted the title of the appellant. They have signed the agreement and accepted possession from the appellant on the basis that the appellant has title to the land.

50. Section 116 of the Evidence Ordinance sets out that,

    "… no person who came upon any immovable property by the licence 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 licence was given"

51. In the case of ***Ruberu and Another v. Wijesooriya [1998] 1 Sri.L.R. 58, U.DE.Z.*** it was stated that,

> *"…But whether it is a licensee or a lessee, the question of title is foreign to a suit in ejectment against either. The licensee (the defendant-respondent) obtaining possession is deemed to obtain it upon the terms that he will not dispute the title of him, i.e. the plaintiff-appellant without whose permission, he (the defendant-respondent) would not have got it. The effect of the operation of section 116 of the Evidence Ordinance is that if a licensee desires to challenge the title under which he is in occupation he must, first, quit the land. The fact that the licensee or the lessee obtained possession from the plaintiff-appellant is perforce an admission of the fact that the title resides in the plaintiff. No question of title can possibly arise on the pleadings in this case, because, as the defendant-respondent has stated in his answer that he is a lessee under the plaintiff-appellant, he is estopped from denying the title of the plaintiff-appellant. It is an inflexible rule of law that no lessee or licensee will ever be permitted either to question the title of the person who gave him the lease or the licence or the permission to occupy or possess the land or to set up want of title in that person, i.e. of the person who gave the licence or the lease. That being so, it is superfluous, in this action, framed as it is on the basis that the defendant-respondent is a licensee, to seek a declaration of title."*

52. The appellant has duly set out how the title was derived on him. However, as it has been elaborated in this judgment, para 2-8 of the plaint in itself will not establish that the appellant had title to the land in question at the time the action was instituted. However, by operation of section 116 of the Evidence Ordinance, the respondents are estopped from denying the title of the appellant.

53. <u>Finally, I will answer the question of law (e) that has been raised by the respondents.</u>

    According to the findings in paragraphs 39-48 of my judgment, it is my view that the document [A-2] has been wrongly admitted in the High Court.

54. For the reasons that I have elaborated in this judgment, the appellant in the instant case is entitled to a declaration of title for the land is question and an order ejecting the respondents from the land. The Judgment of the High Court is set aside. The Final determination of the District Court is affirmed. The appellant is entitled to costs in the cause.

The appeal is allowed.

JUDGE OF THE SUPREME COURT

JUSTICE S. THURAIRAJA, PC.

I agree

JUDGE OF THE SUPREME COURT

JUSTICE A. H. M. D. NAWAZ.

I agree

JUDGE OF THE SUPREME COURT