LETTERS PATENT.

Before Dawson Miller, C.J., and Jwala Prasad, J.

1926.

Nov., 15.

CHAUDHRY GURSARAN DAS

v.

AKHOURI PARMESHWARI CHARAN.*

Chota Nagpur Tenancy Act, 1908 (*Ben. Act VI of* 1908), *sections* 68, 71, 139 (*5*) *and* 139*A*—*dispossession of tenants by landlord— application for restoration dismissed—suit for declaration of title and possession, whether barred.*

In 1916 the defendants, the landlords, forcibly dispossessed the plaintiffs, their tenants. The latter then applied to the Deputy Commissioner under section 71, Chota Nagpur Tenancy Act, 1908, for restoration of possession. The application was rejected on the 24th January, 1918. The tenants instituted the present suit on the 11th January, 1924, for a declaration that they were occupancy raiyats of the land in suit and for recovery of possession. The suit was decreed by the Munsif and his decision was upheld in appeal by the Subordinate Judge.

The defendants appealed to the High Court and Adami J., reversed the decision of the lower Courts and dismissed the suit on the ground that the Civil Court had no jurisdiction to try the suit. The plaintiffs appealed under the Letters Patent.

Sections 68 and 71 of the Chota Nagpur Tenancy Act, 1908, enact that—

68. No tenant shall be ejected from his tenancy or any portion thereof, except in execution of a decree or an order of the Deputy Commissioner passed under this Act.

71. Any tenant ejected otherwise than as aforesaid may present an application to the Deputy Commissioner praying to be replaced in possession of his tenancy and the Deputy Commissioner may..... replace him in possession.

Section 139 (*5*), before its amendment in 1920, provided :

(*5*) All applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord.....

* Letters Patent Appeal no. 38 of 1926, from a decision of Adami, J., dated the 16th April, 1926, setting aside the decision of B. Amrita Nath Mitra, Subordinate Judge of Ranchi, dated the 13th January, 1923, affirming the decision of Babu Narendra Lal Bose, Munsif of Palamau, dated the 21st September, 1921.

shall be cognizable by the Deputy Commissioner and shall be instituted and tried under the provisions of this Act and shall not be cognizable in any other Court except as otherwise provided in this Act.

By section 36 of the amending Act of 1920 the words " all suits and applications " were substituted for the words " all applications " in clause (5). The amendment came into operation on the 1st March, 1924.

The amending Act also introduced into the Act section 139A which came into operation on the 5th November, 1920, and provides :

139A.....no Court shall entertain any suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139.....

Held, agreeing with Adami, J., that the present suit was not barred by section 139(5) as the amendment of that section did not become operative until after the present suit had been instituted.

Held, further, disagreeing with Adami, J., that the suit was not barred by section 139A, inasmuch as (*i*) section 139A and section 139(5) as amended, bar the jurisdiction of the Civil Courts only in summary suits for possession and not in title suits in which possession is claimed as a consequential relief; *Khetra Nath Ghatak* v. *Piru Bamri* (1), *Gooroo Das Roy* v. *Ramnarain Mitter* (2), *Jonardan Acharjee* v. *Haradhan Acharjee* (3) and *Asman Singh* v. *Shaikh Obeedooddeen* (4), referred to.

(*ii*) at the time when section 139A came into operation the plaintiff's cause of action had already accrued and there is nothing in the amending Act of 1920 to show that the Legislature intended to give retrospective effect to the new section. *Colonial Sugar Refining Company, Limited* v. *Irwing* (5), *Manjhoori Bibi* v. *Akel Mahamud* (6) and *Gopeshwar Pal* v. *Jiban Chandra* (7), applied.

Bhuplal Sahu v. *Bhekha Mahto* (8), dissented from.

Chote Lal Nand Kishore Nath Shah Deo v. *Tula Singh* (9), followed.

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(1) (1911) 13 Cal. L. J. 251.
(2) (1867) 7 W. R. 186, F. B.
(3) (1867) 9 W. R. 513 F. B.
(4) (1875) 23 W. R. 460.
(5) (1905) L. R. Ap. Cas. 369.
(6) (1913) 17 Cal. W. N. 889.
(7) (1924) 18 Cal. W. N. 804, Sp. B.
(8) *Ante*, p. 64.
(9) (1926) C. W. N. (Pat.) 293.

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Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

S. M. Mullick and *B. C. De*, for the appellants.

Sambhu Saran and *D. P. Sinha*, for the respondents.

JWALA PRASAD, J.—This is an appeal under the Letters Patent against the decision of Adami, J., dated the 16th April, 1926. The plaintiffs who are appellants before us brought a suit in the Court of the Munsif of Palamau for a declaration that they are ocupancy raiyats of the lands in suit and also for recovery of possession of the same on the allegation that the defendants 1-4, their landlords, had possessed them.

The lands in suit are situate in mauza Genda appertaining to the estate of the defendants in Palamau district. The estate had been under management under the Chota Nagpur Encumbered Estates Act and was released in 1913. The plaintiffs' case is that after the release of the estate the defendants tried to dispossess them claiming the lands as their zirait and actually succeeded in forcibly dispossessing them in 1323 Fasli (1916). The plaintiffs made an application to the Deputy Commissioner under section 71 of the Chota Nagpur Tenancy Act for restoring possession of the lands to them. On the 24th January, 1918, the Deputy Commissioner disagreeing with the view of the Deputy Collector refused their application. The plaintiffs thereupon instituted the present suit on the 11th January, 1921.

The defendants resisted the claim of the plaintiffs claiming the lands as their zerait, stating that the plaintiffs never acquired occupancy rights in the lands and had no right to possession. They also pleaded limitation and took objection to the suit being cognizable by the Civil Court.

The Munsif overruled the objections of the defendants and decreed the plaintiffs' suit. On appeal the Subordinate Judge upheld the decision of the Munsif. The defendants came to this Court in second appeal. The appeal was heard by Mr. Justice Adami, and the only question raised before him was whether the Civil Court has jurisdiction to receive and try the plaintiffs' suit. The learned Judge answered this question in the negative holding that the suit was not cognizable by the Civil Court. Accordingly, he allowed the second appeal, set aside the decrees of the lower Courts and dismissd the plaintiffs' suit.

The learned Judge has held that the suit is barred by section 139A of the Chota Nagpur Tenancy Act (Bengal Act VI of 1908). This section was inserted into the Act by section 39 of the Bihar and Orissa Act VI of 1920 and it came into force on the 5th November, 1920, by notification published in the Bihar and Orissa Gazette of the 10th November, 1920. His Lordship's view is that the suit having been instituted on the 11th January, 1921, after the new provision contained in section 139A came into operation, is barred and the Civil Court had no jurisdiction to entertain it. By the Amending Act section 139, clause (5), was also amended.

The section has 8 clauses. Whereas clauses (1), (3), (4), (6) and (7) all refer to suits and clauses (2) and (8) refer only to suits and applications, clause (5) refers to applications alone. A distinction has been drawn in the section between suits and applications which distinction is recognized over and over again in the Act itself. Hence the words "suits" and "applications" are not interchangeable terms. Clause (5) of the section expressly bars "applications" only, and not "suits".

Now section 68 of the Act enacts that—

"No tenant shall be ejected from his tenancy or "any portion thereof, except in execution of a decree or an order of the Deputy Commissioner passed under this Act."

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Under section 71—

"Any tenant ejected otherwise than as aforesaid may present an application to the Deputy Commissioner praying to be replaced in possession of his tenancy and the Deputy Commissioner may, if he thinks fit, after making a summary inquiry, replace him in possession in the manner prescribed by the rules made under section 262, sub-section (2), clause (*h*) of the Act."

Therefore, section 139, clause (5), of the amended Act VIII of 1908, relates only to an "application" under section 71 of the Act, by a tenant to be replaced in possession of the land from which he has been unlawfully ejected by the landlord, that is, in contravention of section 68 of the Act. It did not bar "suits" by tenants in the Civil Court for the same relief. Thus possessory suits under the Specific Relief Act (section 9, Act I of 1877) were held not to be barred under clause (5) of section 139 of the Act. [*Khetra nath Ghatak* v. *Piru Bamri* (1)]. The corresponding sections of the former Acts, clause (6) of section 23 of the Bengal Rent Act X of 1859, section 37B of the Chota Nagpur Landlord and Tenant Procedure Act (Bengal Act I of 1879) contained the words "suits and applications." It was held that only possessory suits under the Specific Relief Act were covered by those provisions, and not suits for possession based upon title. [*Goorop Doss Roy* v. *Ramnarain Mitter* (2), *Jonardaun Acharjee* v. *Haradhan Acharjee* (3) and *Asman Singh* v. *Shaikh Obeedooddeen* (4)].

By section 38 of the Amending Act VI of 1920 the words "All suits and applications" were substituted for the words "All applications" in clause (5) of section 139. But the amendment came into operation on the 1st of March, 1924 (Vide Government Notification of the 22nd February, 1924, published in the *Bihar and Orissa Gazette* of the 27th February, 1924), and, therefore, it does not affect the present suit instituted on the 11th January, 1921, and hence the learned Judge Mr. Justice Adami rightly held that the suit

(1) (1911) 13 Cal. L. J. 251.
(2) (1867) 7 W. R. 186, F. B.
(3) (1867) 9 W. R. 513, F. B.
(4) (1875) 23 W. R. 460.

is not barred by clause (5) of section 139 as amended by Act VI of 1920.

The new section 139A, which came into force on the 5th November, 1920, is thus the only provision which can apply. It bars a Court from entertaining a suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under section 139; in other words, a suit for recovery of possession for which an application is cognizable by the Deputy Commissioner under section 71 read with section 139, clause (5), cannot be entertained by any Court. The object of the new section 139A as well as of adding the word "suit" to clause (5) of section 139 is to bar the cognizance of purely possessory suits under the Specific Relief Act by Civil Courts and to restore the law as it stood prior to 1908. These new provisions in the Act do not in any way take away the jurisdiction of the Civil Courts to entertain suits for possession based upon the determination of title. Only summary suits for possession, and not title suits with consequential relief for possession, are barred by these provisions. The present suit, however, is saved from the operation of section 139A on still firmer ground.

No doubt, the suit was instituted after section 139A came into force, but the cause of action accrued to the plaintiffs in 1916 when they were dispossessed by the landlord. They had recourse to the summary procedure of recovering possession of the property available to them under section 71 of the Act and applied to the Deputy Commissioner to be replaced in possession of the land in dispute. The Deputy Commissioner by his order of the 24th January, 1918 refused to restore them to possession. The fact that they had made such an application to the Deputy Commissioner did not affect their right to seek a remedy by a regular suit. So at the time when the new section 139A was inserted in the Act their right to bring an action in the Civil Court for a declaration that they are the occupancy raiyats of the land and

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for recovery of possession had already accrued. There is nothing in the Amending Act VI of 1920 to show that the Legislature intended to give the new section 139A retrospective effect and to destroy the right which had already accrued prior to the section coming into force. The plaintiffs had a vested right to institute the present suit in a Civil Court and they had acquired this right before the amendment came into force. The right was not affected by the Chota Nagpur Tenancy Act, 1908, as it stood prior to the amendment of 1920 under which they merely had an additional remedy to recover possession by a summary proceeding before the Deputy Commissioner (Revenue Court) under section 71 of the Act. Section 8 of the Bihar and Orissa General Clauses Act, 1917, says that the "repeal of section 9 of the Code of Civil Procedure as aforesaid will not affect the plaintiff's right, privilege or remedy." It runs--

"Where any Bihar and Orissa Act repeals an enactment hitherto made.....

"Unless a different intention appears, the repeal shall not.....

"(*b*) affect the previous operation of any enactment so repealed,

"(*c*) affect any right, privilege.....accrued or incurred under any enactment so repealed,

"(*e*) affect any.....remedy in respect of any such right, privilege.....as aforesaid."

To the same effect are the provisions of section 6 of the General Clauses Act X of 1897 which apply to the Acts of the Governor General in Council and section 8 of the Bengal General Clauses Act I of 1899. These provisions embody the general principle that the repeal or amendment of an Act does not affect a right already in existence unless a contrary intention is made out expressly or by implication. If it were only a matter of procedure, the amendment might have retrospective effect, but the amendment in the present case does not relate merely to matters of procedure. The principle enunciated by Lord Macnaghten in the case of the *Colonial Sugar Refining Company, Limited* v. *Irwing* (1) fully applies to the

(1) (1905) L. R. Ap. Cas. 369, P. C.

present case. That was a case whereby the Australian Commonwealth Judiciary Act, 1903, section 39, sub-section (2), a right of appeal from the Supreme Court of Queensland to His Majesty in Council given by the order in Council of the 30th June, 1860, was taken away, and the only appeal therefrom under the Judiciary Act lay to the High Court of Australia. The plaintiffs' action against the Collector of Customs to recover a sum of money paid by them as excise duty was lodged on the 25th October, 1902, and was dismissed on the 4th September, 1903, by the Supreme Court of Queensland. In the meantime on the 25th August, 1903, the Judiciary Act passed in 1903 received the Royal assent. Under its provisions an appeal from the decision of the Supreme Court would lie to the High Court and not to His Majesty in Council. The Supreme Court granted leave to the plaintiffs to appeal to His Majesty in Council. The respondent filed a petition in the Privy Council disputing the right of the plaintiffs to appeal to His Majesty. It was contended on his behalf that the appeal was barred by the Judiciary Act of 1903. The appellants, on the other hand, contended that the Act could not have retrospective effect so as to defeat their right in existence at the time when the Act received the Royal assent. The contention of the appellants prevailed and the petition of the respondent was dismissed. Lord Macnaghten in delivering the judgment of the Judicial Committee observed as follows—

"As regards the general principles applicable to the case there was no controversy. On the other hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well-founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judi-

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ciary Act is not retrospective by express enactment or by necessary intendment. And, therefore, the only question is: Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

These observations apply to the present case. In the present case the plaintiffs' right to seek their remedy in a Civil Court is taken away and such a suit by the new section 139A is to be instituted before the Deputy Commissioner of Chota Nagpur. The right having accrued before the new provision came into force is not destroyed by it. The case is governed by the principle laid down by Lord Macnaghten. The Indian decisions also support this view [*Manjhoori Bibi* v. *Akel Mahamud* (1), and *Gopeshwar Pal* v. *Jiban Chandra* (2)]. Adami, J., therefore, took a wrong view in holding that the present suit is barred by section 139A of the Chota Nagpur Tenancy Act. This decision was delivered on the 16th April, 1926. The learned Judge took a similar view in *Bhuplal Sahu* v. *Bhekha Mahto* (3). But on the 13th July, 1926, in *Chote Lal Nand Kishore Nath Shah Deo* v. *Tula Singh* (4) in delivering the judgment of the Division Bench in which Bucknill, J., concurred, Adami, J., took a different view and held that an

(1) (1913) 17 Cal. W. N. 889. (2) (1914) 18 Cal. W. N. 804, S.B.
(3) *Ante*, p. 64. (4) (1926) Cal. W. N. (Pat.) 293.

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action in a Civil Court such as the present one is not barred by section 139A. I am in full accord with his Lordship's view expressed in that case.

On behalf of the respondent it was contended that the present suit is barred by section 258 of the Chota Nagpur Tenancy Act. That section has no application to the present case. It does not relate to an application under section 71 of the Act nor does the present suit seek to vary, modify or set aside any decision, order or decree of the Deputy Commissioner. The reliefs sought in the present suit are a declaration of the plaintiffs' right in the properties in dispute and for recovery of possession of the same not on the ground of illegal dispossession but on the ground of title. The scope of the suit is outside an application for recovering possession in a summary proceeding by an application under section 71 of the Act.

For these reasons I respectfully differ from the view taken by his Lordship Adami, J., in the case and would set aside his decision. I will, therefore, allow the appeal with costs and restore the decree passed by the Court below.

DAWSON MILLER, C. J.—I agree.

REVISIONAL CRIMINAL.

Before Jwala Prasad and Macpherson, J. J.

BASGIT SINGH

v.

KING-EMPEROR.*

1926.

Dec., 12.

Identification of Prisoner's Act, 1920 (Act XXXIII of 1920), section 5—Thumb impression of accused person, whether may be taken in Court for purposes of comparison—Registration Act, 1908 (Act XVI of 1908), section 82(c)—Charge

* Criminal Revision no. 699 of 1926, from an order of F. F Madan, Esqr., I.C.S., Sessions Judge of Shahabad, dated the 22nd September, 1926, confirming an order of Babu S. P. Sahai, Magistrate, 1st class, Arrah, dated the 11th September, 1926.