LETTERS PATENT.

Before Harries, C. J. and Fazl Ali, J.

1939.

September, 20, 21.

MUKHAN SINGH

v.

CHANDRIKA PRASAD SINGH.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 155 *and* 179—*permanent mukarrari lease—parties, whether can contract out of section* 155—*Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 114—*relief against forfeiture—principles underlying section* 114, *whether applicable.*

There is nothing in section 179 of the Bihar Tenancy Act, 1885, to prevent the parties to a permanent mukarrari lease from contracting out of section 155 of the Act or, in other words, entering into an agreement that if the lessee is to be ejected, he may be ejected unconditionally and independently of the provisions of section 155.

Nawabzada Syed Moinuddin Mirza v. *Sourendra Kumar Roy*(1) and *Muhammad Hasan* v. *Baidyanath Sahay*(2), relied on.

Where, however, the lessee sought to rely on section 114 of the Transfer of Property Act, 1882, for claiming relief against forfeiture;

Held, (*i*) that section 114 was not applicable because the case was governed by the Bihar Tenancy Act, 1885;

(*ii*) that the principle underlying section 114 was likewise not applicable for the reasons, first, that the principle was also embodied in section 155, Bihar Tenancy Act, which was virtually a counterpart of section 114 of the Transfer of Property Act; and, secondly, that if the Act itself which contained this provision enabled the tenant to contract out of the concession available to him under it, there could be no further room for the application of any equitable principle.

*Letters Patent Appeal no. 11 of 1939, from a decision of Mr. Justice Agarwala, dated the 13th January, 1939.

(1) (1933) I. L. R. 13 Pat. 231, F. B.
(2) (1939) S. A. no. 388 of 1938 (unreported)

1939.

MUKHAN SINGH v. CHANDRIKA PRASAD SINGH.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

Phulan Prasad Varma, for the appellants.

Baldeva Sahay, *Harinandan Singh* and *Harians Kumar*, for the respondents.

FAZL ALI, J.—This is a Letters Patent appeal from a judgment of Agarwala, J. in a second appeal arising out of a suit in ejectment.

It appears that on 17th November, 1912, the plaintiffs' predecessors in interest granted a permanent mukarrari lease to defendant no. 4 at an annual rent of Rs. 19 in which there was a clause to the following effect :—

"If any of the fixed instalments (of rent) remain unpaid the said proprietors (i.e., the lessors) and their heirs and representatives shall be competent to cancel this patta on their own authority and bring the mukarrari property into their own direct possession or to settle it with others, to which no objection by me or my heirs and representatives shall be entertained."

On the 29th of August, 1934, the defendant no. 4 transferred the mukarrari land to defendants nos. 1 to 3, and as neither these defendants nor defendant no. 4 paid the rent due for the years 1341 and 1342F. to the plaintiffs, the latter brought in 1935 the present suit for the ejectment of defendants nos. 1 to 3 on the ground that the lease had been forfeited. They also claimed compensation for use and occupation of the land by the defendants subsequent to the date of the alleged forfeiture.

The trial Court passed a decree in the following terms :—

"the suit be decreed on contest with costs against defendants 1 to 3 and *ex parte* against defendant no. 4. Defendants 1 to 3 are directed to pay to the plaintiffs the sum of Rs. 21-9-6 the amount claimed by them in this suit, as compensation and damages for 1342-F. along with full costs of this suit within fifteen days from this date. In case the money is paid to the plaintiffs or is deposited in court within

the aforesaid period, the lessee shall hold the property leased, as if the forfeiture had not occurred, but in case the order is not complied with, the plaintiffs will be entitled to eject the defendants from the holding and recover possession thereof. Defendant no. 4 will be liable for payment of Rs. 21-9-6 to the plaintiff on account of compensation and damages for 1341-F. Pleader's fee at 8 per cent. Future interest at 6 per cent."

FAZL ALI, J.

The plaintiffs appealed from the decree of the trial Court and the lower appellate Court, while maintaining the decree for compensation, gave them an unconditional decree for ejectment. The judgment of the lower appellate Court was upheld on second appeal and hence this appeal under the Letters Patent.

Section 179 of the Bihar Tenancy Act provides that

"Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently settled area from granting a permanent mukarrari lease on any terms agreed on between him and his tenant."

This section was construed by a Full Bench of this Court in *Nawabzada Syed Moinuddin Mirza* v. *Sourendra Kumar Roy*(1), and the view expressed in that case was as follows:—

"The true construction of section 179 is that it is a permission to landlords and tenants, in the case of a creation of a permanent tenure in a permanently settled area, to contract out of the Act and that whereas the general law created by the Bengal Tenancy Act as applicable to the relationship of landlord and tenant will apply to a permanent mukarrari lease, the parties are at liberty to make a specific provision for the elimination of such terms as may be imposed by the Act as they may select to eliminate."

The same view has been expressed by this Bench in *Muhammad Hasan* v. *Baidyanath Sahay*(2), decided on the 4th September, 1939. In that case it

(1) (1933) I. L. R. 13 Pat. 281, F. B.
(2) (1939) S. A. no. 388 of 1938 (unreported).

1939.

MUKHAN SINGH v. CHANDRIKA PRASAD SINGH.

FAZL ALI, J

was contended that there can be no ejectment for non-payment of rent under the Bihar Tenancy Act by reason of sections 10, 65 and 178, sub-section (*1*), clause (*c*), but this contention was negatived and my Lord the Chief Justice pointed out in his judgment that section 179 is by its terms an exception to the law as laid down in the earlier sections and, therefore, those sections of the Act would not prevent the parties agreeing to whatever terms they thought proper.

Now, the point raised in this appeal is not that the plaintiffs cannot claim ejectment by reason of any specific provisions of the Bihar Tenancy Act. On the other hand, it is conceded that they have a right to sue for ejectment in the present case. What is really contended is that before suing for ejectment it was incumbent on the plaintiffs to follow the procedure laid down in section 155 of the Bihar Tenancy Act, and the decree passed in that suit must conform to that section. It is argued that section 155 merely provides the procedure which must be followed in all suits for ejectment and so there is no conflict between this section and the right to claim ejectment which may be provided for by any special covenant in a mukarrari lease between a tenant and a proprietor or holder of a permanent tenure in a permanently settled area. As this point was neither raised nor decided in *Muhammad Hasan* v. *Baidyanath Sahay*(1), it is necessary to deal with it specifically in this appeal.

Section 155 provides among other things (*1*) that a suit for the ejectment of a tenant, on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment, shall not be entertained unless the landlord has served in the prescribed manner, a notice on the tenant specifying the particular misuse or breach complained of, and, where

(1) (1939) S. A. 388 of 1938 (unreported).

the misuse or breach is capable of remedy, requiring the tenant to remedy the same, and, in any case, to pay reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with that request: and (2) that a decree passed in favour of the landlord in any such suit shall declare the amount of compensation which would reasonably be payable to the plaintiff for the breach, and whether, in the opinion of the court, the breach is capable of remedy, and shall fix a period during which it shall be open to the defendant to pay that amount to the plaintiff, and, where the breach is declared to be capable of remedy, to adopt the same.

The first question to be decided is, whether there is anything in the Tenancy Act to prevent the parties to a mukarrari lease from contracting out of this section or, in other words, entering into an agreement that if the lessee is to be ejected, he may be ejected unconditionally and independently of the provisions of this section. In my opinion the answer to this question must be in the negative. The words " any terms agreed on between him and his tenant " which occur in section 179 are very wide and show that the parties to a mukarrari lease to which that section applies can contract not only out of sections 10, 65 and 178 as was held in *Muhammad Hasan* v. *Baidyanath Sahay*(1) but also section 155 of the Bihar Tenancy Act. As was pointed out by Agarwala, J., if the provisions of section 155 are examined it will be found that the right of ejectment which the landlord may have, is qualified by them in two particulars: first, the landlord is required to give a notice in the prescribed form specifying the breach of contract; and, secondly, the landlord is compelled to accept compensation in lieu of forfeiture in the event of tenants choosing to pay such compensation. But, as has already been pointed out, there is nothing in section 179 to prevent the landlord from entering into a

(1) (1939) S. A. 388 of 1938 (unreported).

1939.

MUKHAN SINGH v. CHANDRIKA PRASAD SINGH.

FAZL ALI, J.

contract with the lessee to the effect that the right of ejectment which he shall have under the agreement shall not be subject to any such qualifications as are imposed by section 155.

The next question to be considered is whether there is any such contract in the mukarrari lease upon which the title of the defendants is based. In my opinion the relevant clause in this document, which has already been referred to, gives the landlord an absolute and unqualified right of re-entry. This is clear from the use of the expression " on their own authority " and also by the provision that no objection to the right of re-entry shall be entertained if any objection is put forward by the lessee or his heirs. The vernacular expression which has been translated to mean " on their own authority " is " *Ba-ikhtiare-khud* ". In my view the use of this expression makes it clear that the right of re-entry which the landlord was entitled to exercise under the lease was subject to none of the qualifications laid down in the Bihar Tenancy Act.

It was lastly contended by the learned Advocate for the appellants that the appellants are in any event entitled to a relief under section 114 of the Transfer of Property Act. This section runs as follows :—

" Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred."

The lower appellate Court has in its judgment clearly shown that section 114 can be of no avail to the appellants, because the conditions laid down in this section have not been fulfilled in the present case. But apart from that fact it is quite plain that neither section 114 nor the principle underlying it can be

1939.

MUKHAN SINGH v. CHANDRIKA PRASAD SINGH.

applied to the present case. Section 114 is not applicable because this case is not governed by the Transfer of Property Act but by the Bihar Tenancy Act. As to the principle underlying that section it is enough to point out, first, that this principle is also embodied in section 155 of the Bihar Tenancy Act which is virtually a counterpart of section 114 of the Transfer of Property Act; and, secondly, that if the Act itself which contains this provision enables the tenant to contract himself out of the concession available to him under it, there can be no further room for the application of any equitable principle.

FAZL ALI, J.

In my opinion the case was correctly decided by Agarwala, J. and I would dismiss this appeal with costs.

HARRIES, C. J.—I agree.

S. A. K. *Appeal dismissed.*

APPELLATE CIVIL.

Before Agarwala and Meredith, JJ.

1939.

September, 29.
October, 5, 10.

RAJENDRA NARAYAN

v.

HARGOBIND CHOUDHURY.*

Co-sharers—one co-sharer in sole possession of joint property under private arrangement for convenience—raiyati settlement in ordinary course of management, whether binding on other co-sharers—implied authority—test—collectorate partition—co-sharers, whether entitled to eject the tenant—Estates Partition Act, 1897 (Bengal Act V of 1897), section 99, whether applicable—settlement, whether is an "encumbrance" within the meaning of section 99—lands subject to

*Appeal from Appellate Decree no. 663 of 1938, from a decision of Rai Bahadur R. L. Chatterjee, District Judge of Darbhanga, dated the 28th of May, 1938, confirming a decision of Babu Shibnandan Prasad Singh, Munsif of Samastipur, dated the 7th of December, 1936.