MANU/BH/0114/1964

**Equivalent Citation:** AIR1964Pat401

**IN THE HIGH COURT OF PATNA**

A.F.A.D. Nos. 467, 468 and 957 of 1959

Decided On: 28.04.1964

Appellants: **Niranjan Pal and Ors.**
**Vs.**
Respondent: **Chaitanyalal Ghosh and Ors.**

**Hon'ble Judges/Coram:**
*Vaidynathier Ramaswami , C.J., Kamla Sahai and N.L. Untwalia , JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: Lalnarayan Sinha, N.N. Roy and N.N. Mukherjee, Advs. In A.F.A.D. Nos. 467 and 468 of 1959, L.K. Chaudhuri andS.K. Chaudhuri, Advs. In A.F.A.D. No. 957 of 1959*

*For Respondents/Defendant: Mahabir Prasad, Bhabananda Mukherji and M.N. Banerji, Advs. In A.F.A.D. Nos. 467 and 468 of 1959, N.N. Roy andN.N. Mukherjee, Advs. In A.F.A.D. No. 957 of 1959*

**Overruled / Reversed by:**
V. Dhanapal Chettiar vs. Yesodai Ammal, MANU/SC/0505/1979

**JUDGMENT**

**Kamla Sahai, J.**

**1.** These three appeals have been placed before this Bench as common points of law, which are of general importance, arise in them. I shall first deal with Second Appeals Nos. 467 and 468 of 1959 which are both directed against one and the same judgment. The parties in Second Appeal No. 957 of 1959 are different, and the facts are also different. I shall deal with that appeal at the end.

SECOND APPEALS NOS. 467 AND 468 OF 1959:

**2.** These appeals by the tenant-defendant arise cut of two suits for his eviction from two parts of the' same house under Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 [hereinafter to be referred to as the Control Act). Under the section as it stands after amendment by Bihar Act 16 of 1955, a tenant can be evicted only in execution of a decree passed by the Court on any of the grounds mentioned therein. Before the amendment, the landlord had to apply to the Controller for a direction, evicting the tenant.

**3.** On the 4th May, 1954, the plaintiff-landlord, who is the respondent in this Court, started proceedings under old Section 11 of the Control -Act for eviction of the tenant on the ground of default in payment of rent from January to April, 1954. The Controller passed an order of eviction; but, by an order dated the 17th August, 1956, the Commissioner set aside the eviction order. Thereafter, the landlord instituted the suits, out of which these appeals have arisen, on the 30th August, 1956. His case is

that two parts of the house were separately "let out to the defendant on a rental of Rs. 507- per month for each part, and that he has defaulted in paying the rent for both parts from January, 1954 to the 30th August, 1956. Hence, the plaintiff has sought decrees for eviction of the defendant under Section 11 (1) (d) of the Control Act.

**4.** The defendant's case is that the agreement between the parties was that he would pay rent and charges for the electricity consumed by him on presentation of a bill by the plaintiff. As bills were not presented, he is not liable to be evicted on the ground of default in payment of rent. It may be mentioned that, on the 4th September, 1956, a few days after the final disposal of the control case, the defendant remitted a sum of Rs. 3,805/- to the plaintiff as the entire rent up to that date; but the plaintiff refused to accept it.

**5.** The Munsif, who tried the two suits, dismissed both of them on the finding that the defendant was not liable to eviction on the ground of non-payment of rent because rent was payable on presentation of bills by the landlord, and no such bills had been presented. The learned Subordinate Judge, who heard the appeals, upset the learned Munsif's finding, and held that rent was payable every month. He also held that the remittance of Rs. 3,805/- was not valid tender because the rent was long overdue He, therefore, allowed the appeals and decreed the suits. Hence, the tenant has filed these appeals.

**6 .** Appearing on behalf of the appellant, Mr. Lal narayan Sinha has urged the following three points;

> **1.** A contract, whereby a tenant has to pay rent in presentation of a bill by the landlord, is a clear and definite contract, and the lower appellate Court has erred in law in holding that such a contract is non-supported under Section 11 (1) (d) of the Control Act.
>
> **2.** Having regard to the fact that the landlord made a determined effort to evict the tenant, the tender of the entire rent due within about three weeks after the Commissioner's order constitutes valid tender.
>
> **3.** Unless the lease of a building is determined in accordance with Section 111 of the Transfer of Property Act (which will be hereafter referred to as the Act), a landlord has no right to get possession, and hence he cannot maintain an action under Section 11 of the Control Act for eviction of the tenant.

**7.** I propose to consider these points in the order in which I have mentioned them. I do not think that there is any merit in the first point. It is true that the learned Subordinate Judge has stated at one place in his Judgment that a contract of the kind propounded by the defendant is not contemplated by Section 11 (1) (d); but he has discussed the evidence, and has arrived at a finding that there was no contract between the parties to the effect that the rent was payable only on presentation of a bill by the landlord. This is a finding of fact, and cannot be challenged in second appeal.

**8.** The second point is equally without substance The tenant had no right not to pay the rent during the period that that eviction proceedings continued before the Controller and the Commissioner. The amending Act Bihar Act XVI of 1955) came into force on the 16th. August, 1955 i.e., long before the defendant remitted the sum of Rs. 3,8057- to the plaintiff. Section 11(l)(d) which was introduced by that Act, reads;

"11. Eviction, of tenants.-- (1) Notwithstanding, any, tiling contained in any contract or law to the& contrary but subject to the provisions of the Industrial Disputas Act, 1947 (Act XIV of 1947), and to those of Section 12, where a tenant is in possession of any building, he shall not be liable to eviction therefrom except in execution of a decree passed by the Court on one or more of the following grounds:-

x x x x x x x x x x x x x x x x x x

"(d) Where the amount of two months' rent lawfully (payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract or, in the absence of such contract, by the last day of the month next following that for which the rent is payable or by not having been validly remitted or deposited in accordance with Section 13;"

As I have already said, the defendant's allegation about the existence of a contract for payment of the rent on presentation of a bill has been negative. There is nothing else to show that there was a contract for payment of the rent otherwise than month by month. Even if it is assumed that there was absence of a contract, the tenant had to pay that rent of one month by the last day of the next month or to remit it or deposit it in accordance with Section 13 of the Control Act. There is nothing in the section which could enable the tenant to withhold payment of rent during the entire period.

**9.** Mr. Lalnarayan Sinhs has, however, argued that 'the defendant knew that, while the proceeding for his, eviction before the Controller and the appellate and the revisional authorities continued, it was fruitless for him to tender the rent because the plaintiff was not likely to accept it. On this ground, he has agreed that the defendant was not bound to make offers to pay rent without any chance of their being accepted. In support of his argument, he has relied upon Kunj Lal Marwari Brij Lal Kedia, 1959 BLJR 302.

In that case, their Lordships have approved of the principles that the law does not require the tenant

"to make useless offers and send money to the landlord by money-order which would without doubt be refused".

They have observed that there would be no non-payment of rent in such a case simply because the tenant did not tender the rent to the landlord, knowing full well that he would refuse to accept it.

**10.** It has to be remembered in this connection that there has been a change in the Control Act which bears upon this point. Before the amendment introduced by Bihar Act XVI of 1955, Section 13(1) stood as follows:

"13, (1), When- a landlord refuses to accept any rent lawfully, payable to him by a tenant in respect of any building, the tenant may, in the prescribed manner, deposit such rent and continue to deposit any subsequent end which becomes due in respect of such building, unless the landlord in the meantime signifies by notice. In writing to the tenant his willingness to accept."

After the amendment, the sub-section reads;

> "13, (1) When a landlord refuses to accept any rent lawfully payable to him by a tenant in respect of any building the tenant may remit such rent, and continue to remit any subsequent rent which becomes due in respect of such building, by postal money-order to the landlord."

Thus an easy method has now been provided for the ten-ant. If the landlord refuses to accept the rent, the tenant may send the same, and continue to send sub-sequent rent, by postal money-order. There is nothing in the section to show that, instead of following this method of making valid tender of rent, the tenant can, on his own withhold payment or remittance of rent merely in the belief that the landlord is not likely to accept it. As this section specifically provides what the tenant is to do in case of refusal by the landlord to accept rent, the tenant cannot altogether stop payment or even remittance of rent by money-order on the landlord's refusal to accept the rent.

**11.** In Purushottam Das Kapoor v. Baijnath Prasad Sah 1962 BUR 888, a Bench of this Court has considered the change in the law, and has observed;

> "In view of" the express language contained in Section 11 (1)(d) and Section 13(1) of Bihar Act 111 of 1947 after its amendment by Bihar Act XVI of 1955, the principle Said down in 1959 BUR 302 cannot be applied to the present case."

They have come to the conclusion that a tenant cannot Justify his omission to tender the rent in view of the amendment in the Control Act on the ground that he knew that the landlord would not accept the rent. I respectfully agree with the decision in that case on this point.

**12.** Reference has also been made at the Bar to Sameshwar Modi v. Harihar Bhagat 1963 BUR 370. A different point has been decided in that case, and it has of application in this case.

**13.** In the above circumstances, the second point argued, by Mr. Lalnarayan Sinha also fails. It is manifest that in tender of Rs. 3,805/- in September, 1956, was but legal lender.

**14.** In my judgment, however, there is substance in the third point. The preamble of the Control Act shows that the object of the enactment is to regulate the letting of buildings, to control rent and to prevent unreasonable eviction or" tenants. There is nothing in the Act which can be interpreted as repealing the entire existing law relating to leases of buildings. The observation of Megarry at page 171 of "Rent Acts" (7th Edition) applies fully, to the Control Act in question, and it may be quoted;

> "The Acts do not interfere with leases and tenancy zgremenis more than is necessary to carry out their supposes; they are facts for the protection of tenants, and not Acts for the penalising of landlords.' Looked at from the landlord's point of view, the Acts are restrictive, and not enabling, conferring no new right of action out restricting existing rights. Consequently, if apart from the Acts a landlord is Unable to evict his tenant or raise his rent, the Acts do not enable him to do either of these tiling. For example, if a landlord grants a tenant a lease of premises within the Acts for one year certain at L8 per annum, and the lease makes no provision either for raising the rent or for determining the lease' if the tenant breaks his covenants, then it is a 'basic rules' of the Acts that the landlord cannot during the lease raise the rent, or

> evict the tenant, even under the circumstances set out in the Act. The tenant holds under a contractual tenancy, and has no need to call upon the Acts for assistance; his lease is a sufficient protection,''

I may also mention that repeal by implication of an existing enactment cannot be lightly inferred. I may refer in this connection to Kutrier v. Phillips (1891) 2 GB 267 in which Smith, J. has stated at pages 271 and 272.

> "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, 'Leges posteriores contraries abrogant applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together; Thorpe v. Adams (1871) 6 C. P. 125."

**15.** The non-obstante clause in Sec. 11 of the Control Act also cannot have the effect of abrogating or re pealing all provisions relating to leases of buildings; it only gives the provision an overriding effect over a provision in any other enactment with which it is in conflict. So long as there is no inconsistency and the provisions of that Act and the Control Act can both be given effect to, and can stand together, the clause will not come into operation.

**16.** Section 2 (f) of the Control Act defines 'tenant'. The definition covers not only contractual tenancy, which comes into existence by contract between the parties, but also a tenancy which exists without any such contract The latter kind of tenancy, which has been called 'statutory tenancy' is a creature of the statute, and is not a real tenancy. In such a case, there is no question of determination of the tenancy. The landlord can straightway take action under Section 11 of the Control Act for eviction of the statutory tenant, if any of the grounds mentioned in that section exists.

**17.** The legal position in the case of a contractual tenancy is quite different. As Megarry has said at page 223 of the book, referred to above,

> "while the contractual tenancy still exists, the landlord cannot obtain an order for possession unless he is entitled to one both under the tenancy agreement and under the Acts."

He has further stated at page 224 that a defence which a contractual tenant may plead is 'that the tenancy has not been determined'.

**18.** There is nothing in Section 11 of the Control Act relating to determination of a tenancy. Section 105 of the Act provides, among other things, that a lease of Immovable property is a transfer of a right to enjoy such property. This means that the lessor parts with his right to enjoy the property or, in other words, to remain in I possession of the property. Section 111 of the Act lays down the methods by which a lease of Immovable property is determined. It is only when a lease is determined by any of these methods that the lessor gets back the right to possession of the property. As there is no provision in Section 11 of the Control Act for determination of a lease, there is no conflict between that section and Section 111 of the Act. Clause (h) of Section 111 provides that a lease may be determined on the expiration of a notice to determine the lease or to quit, or of intention to quit. Section 105

provides that a lease from month to month (like the lease in question in the present case) can be determined by fifteen days' notice expiring with the end of a month of the tenancy. The second paragraphs gives the method by which the notice is to be served. On the expiry of the notice, the lease is terminated. Clause (q) of Section 108 of the Act says that the lessee is bound to put the lessor into possession of the property on the determination of the lease. There is a conflict between this' provision and Section 11 of the Control Act because the latter section lays down that a tenant in possession of a building will not be liable to be evicted or, in other words, the landlord will not be card could immediately start an action for eviction of a decree passed by the Court on one of the grounds given in the section. In view of the non-obstante clause of Section 11, that section must prevail over Clause (g) of Section 108 of the Act. The result is that, while a landlord could immediately start an action for eviction of a tenant on expiry of the notice under Sec. 106 under the general law, he cannot start such an action in cases where the Control Act applies, unless he can prove the existence of one of the grounds given in Section 11. It seems to me to be manifest that Sec. 11 of the Control Act strikes at the stage not of the re-acquisition by the landlord of the right to possession on determination of the lease but as the state of recovery of possession of the building 1 in question from the tenant.

**19.** Another line of reasoning may also be considered. Clause (b) of Section 111 of the Act provides that, where the period of a lease is limited conditionally on the happening of some event, the lease will be determined in the happening of that event. So long as the event does not happen, the landlord has no right to possession of than property. 'According to Clause (c) of Section 11 (1) of the Control Act. a landlord will be entitled Io a decors for eviction if he requires the building reasonably end in good faith for his own occupation or for the occupation of any person for whose benefit the building is held by him. If this right is available to the landlord even before the lease is determined on the happening of the event agreed upon between the parties, it will be a case of unreasonable eviction rather than otherwise, and the object of the enactment will be frustrated. It seems, therefore, that, in the case of a contractual tenancy, the lease must be determined before the landlord can maintain an action for the tenant's eviction under Section 11 of the Control Act.

**20.** Appearing on behalf of that plaintiff-respondent, the learned Advocate General has argued that this point was not raised in the Courts below, and that the appellant should not be allowed to raise it for the first time in this Court. If 1 am right in the view which I have expressed above that the lease must be determined before the landlord can maintain an action for eviction of the tenant under Sec. 11 of the Control Act, it is for the plaintiff to mention in his plaint the fact of determination of the lease as one of the facts constituting the cause of action which he is required to give under Rule 1 of Order VII of the Code of Civil Procedure.He has also to prove the fact. If the plaintiff has not done that, it seems manifest that the defendant can take the point for the first time in second appeal. I may refer in this connection to Subba v. Nagappa ILR 12 Mad 353, withfore v. Dhondi ILR 15 Bom 407, Narayanan Nair v. A. Kutfiar Marmadiar AIR 1949 Mad 127 and Siddarama v. Kalapps. AIR 1950 Mys 63 in which it was held that a point of this kind could be before for the first time in second appeal.

**21.** Another point which the learned Advocate General has argued is that, in view of the decision of the Supreme Court in Brij Rai Krishna v. S.K. Shaw and Brothers. MANU/SC/0053/1951 : AIR 1951 SC 115 this Court cannot hold that determination of a tenancy is a pre-condition to 'the institution of an action under Sec. 11 of the'-Control Act. I am unable to agree with this argument. Firstly, there is nothing in that

decision as to the necessity or otherwise of determination of a tenancy before institution of an action for eviction under Sec. 11 of the Control Act

**22.** Secondly, there is a great difference between Section 11 as it stood before 1955 and Section 11 as it stands after the amendment. Under the "old section, an application had to be made to the Controller for an order of eviction. It was provided in Sub-section (2) of Section 11 that, if the Controller was satisfied, after giving a reasonable opportunity to the tenant to show cause against the application, that the tenant was liable to be evicted under Sub-section (1), he should make an order directing the tenant to put -the landlord in possession or otherwise he should reject the application. Section 16 provides for the power which the Controller may exercise for the purpose of any inquiry under the Control Act. Section 18 provides for an appeal against the Controller's order. Their Lordships, therefore, held in Brij Raj Krishna's case, MANU/SC/0053/1951 : AIR 1951 SC 115 that the Act provided a complete machinery for the investigation of those matters upon which the jurisdiction of the Controller to order eviction of a 'tenant' depended, and that it expressly made his order final and subject only to the decision of the Commissioner. Sections 5, 6, 7, 9 and 10 of the Control Act give power to the Controller to pass various orders. Sections 16 and 13 still apply to the matters referred to in those sections. The present Sec. 11, however, provides that a tenant can only be evicted in execution of a decree passed by the Court. The procedure for institution or trial of an action under Section 11 has not been given it? the Control Act, nor has any provision been made for apples. For all these purposes, the Code of Civil Procedure applies. It cannot, therefore, be said that the present Act provides a complete machinery for investigation or disposal of an action under Sec. 11.

**23.** Thirdly, the case went up in appeal from indecision of a Bench of this Court reported as S.K. Shaw and Brothers v. Brij Raj Krishna, MANU/BH/0069/1949 : AIR 1949 Pat 474. The ground on which eviction was sought in that case was non-payment of rent which came within Sub-section (1) (a) of old Section 11. Admittedly , rent for the months of March, April and May, 1947, had fallen into arrears. The tenants remitted by means of cheques the rent for these months along with the rent for June, 1947, on the 28th June of that year; but the landlords refused to accept it. Subsequently, the tenants sent the rent for the months of April to June on the 4th August, 1947, by a postal money-order; but the landlords refused to accept that also. The landlords filed their application before the Controller on the 12th August, 1947, for an order of eviction of the tenants. On the 30th August, 1947, the tenants deposited in the Court of the House Controller the entire amount of rent due up to August, 1947. In spite of that deposit, the Controller passed, on the 10th November, 1947, an order of eviction of the tenants.

Mahabir Prasad, J. referred to Sec. 114 of the Transfer of Property Act which provides for relief against forfeiture for non-payment of rent on payment of the en- ' "Sire arrears of rent together with interest thereon with full costs of the suit at the time of hearing of the suit of on giving security to the satisfaction of the Court 'for payment within fifteen days. On this basis, he held ''that, since the enacts deposited the rent before the Controller passed the order, the order of eviction was without jurisdiction. He also observed that it was really a case of irregular payment rather than one of non-payment. It may be noticed that non-payment of rent is Hot specifically given in Section 111 of the Act as one of the grounds for determination of a tenancy but it is specifically given in Sec. 11 of the Control Act as a ground for eviction. Fazl Ali, J., who delivered the judgment of the Supreme, Court, said;

> "Section 11 begins with the words 'Notwithstanding anything contained in any agreement or law to the contrary,' and hence any attempt to import the provisions deleting to the law" of transfer of property for the interpretation of the section would seem to be out of places." Thus, their Lordships expressed themselves against interpretation of Sec. 11 by importing the provisions of the Transfer of Property Act. In other words, they meant' that, when Section 11 provided that non-payment of rent war, a ground for eviction, the Court could not hold that that would not be a ground for eviction if the tenant paid the entire arrears with interest and costs at the hearing of the suit as provided for in Sec. 114 of the Act.

**24.** As I read the decision in Brij Raj Krishna's case, MANU/SC/0053/1951 : AIR 1951 SC 115, I do not find anything in it to the effect that a landlord can maintain an action for eviction under Sec. 11 of the Control Act before determination of the lease.

**25.** I propose now to consider the decisions which have been cited at the Bar. In AIR 1949 Mad 127, the 'case related to agricultural tenancy. It was held in a Full Bench decision of the Madras High Court in Krishna Shetti v. Gilbert Pinto ILR 42 Mad 654 : (AIR 1919 Mad 12) that, though the application of Section 105 to 116 of the Transfer of Property Act had been excluded by Section 117 of the same Act to agricultural tenancies, an agricultural lease, as mentioned in K.N. Nair's case, AIR 1949 Mad 127,

> "must be determined by some prescribed notice or at any rate by reasonable notice, that is to say, a notice giving a reasonable time to the tenant to vacate his holding".

No such notice was given to the sub-lessees. The plaintiff, who had purchased the interest of the forward, claimed possession under Section 14 of the Malabar Tenancy Act 'Which provided:

> "No suit for eviction of a cultivating verumpattamdar from his holding shall lie at the instance of his landlord except on the following grounds;
>
> **1.** denial by the tenant of the land-lord's title;
>
> **2.** wilful waste committed by the tenant;
>
> **3.** non-payment of rent;
>
> **4.** collusion with a stranger to encroach on the holding or a part of it adversely to the landlord;
>
> **5.** the holding being required by the landlord for his own cultivation, or for that of any member of his family, or for
>
> **6.** building purposes;
>
> **7.** failure by the tenant to pay an advance of rent or to give security when directed so to do by a Court pursuant to Section 13 (3).
>
> A proviso to Sec. 14 limits eviction to the part of the property encroached upon or required for building under Clause 4 and 6.
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> Gentle, C.J., with whom Rajmannar, J. agreed, observed about Section 14 of the Malabar Tenancy Act (XIV of 1930):

> "Section 14 does not change, or in any way interfere with the ordinary law, save to the extent to which it provides protection to the tenant. Before a landlord can sue for eviction of a tenant or for possession of the land occupied by the tenant, he must terminate the tenancy. That is done either by effluxion of time or by determination of a lease providing for a forfeiture or by a notice to quit in accordance with law. Section 14-in no way interferes with those provisions. Unless and until a tenancy or a lease is determined, a landlord is not entitled to obtain from a Court an order for eviction or possession."

Though there was nothing in the words of Section 14 to the effect that determination of the tenancy was necessary before a suit for eviction could be filed, their Lordships held that it was necessary.

**26.** The decision of Subba Rao, J. in Parthasarathy v. Krishnamoorthy AIR 1949 Mad 387 was reversed on Letters Patent appeal. The decision of the appellate Bench is reported as Krishnamurthy v. Parthasarathy AIR 1949 Mad 780. The provision which their Lordships had to construe was Section 7 of the Madras Buildings (Lease and Rent Control) Act XV of 1946. Omitting the provisos, Sub-section (1) of that section reads-;

> "A tenant in possession of a building shall not be evicted therefrom, whether in execution of a decree or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this section."

In spite of the words 'whether before or after the termination of the tenancy', Subba Rao, J. held that a lease had first to be determined before the landlord could start an action under Section 7. The appellate Bench held, mainly on the basis of those words, that determination of the tenancy was not a condition precedent to an application to the Controller under Section 7 for an order of eviction. After quoting Section 7(1), Her will, J., who has delivered the judgment of the Bench, has stated;

> "Although this does not make it quite certain that a tenant can be evicted if the provisions of this section are complied with, it is clear that a tenant can be evicted before the termination of the tenancy, in other words, before the tenancy is determined."

As the words quoted above or other words to that effect are not to be found in Sec, 11 of the Control Act, the decision of the appellate Bench is clearly distinguishable.

**27.** The provision which came up for consideration in Karsandas v. Karsanji, AIR 1953 Sau. 113 was Section 13 (1) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act (LVII of 1947). The first part of that Subsection reads;

> "Notwithstanding anything contained in this Act hut subject to the provisions of Section 15, a landlord shall be entitled t o recover possession o f any premises if the Court is satisfied."

Several clauses follow thereafter, and they give the 'grounds on which the Court can decree recovery of possession is favour of the landlord. It will be noticed that the words are positive because they provide that 'a landlord shall be entitled to recover possession.' There is no reference in the section to a prior determination of the

tenancy before the landlord can become so entitled. Their Lordships have, however, held that, in the case of a contractual tenancy, the tenancy has first to be determined before the landlord can take action under Section 13. Shah, C. J., who has delivered the judgment of the Bench, has stated;

> "Section 7 of the Madras Act puts it in a negative form, viz., that a tenant shall not be evicted except in accordance with the provisions of the section and then lays down the conditions..... However the fact whether the word's are couched in a negative form or in an affirmative form will not make any real difference. The form of expression is immaterial and it is the pith and substance of the section which required to be considered. In my view it cannot be contended with any justification that because Section 13 is in the affirmative form the landlord's rights are controlled only by the provisions of Section 13 and not by those of the Transfer of Property Act as well."

**28.** A similar question arose before the Supreme Court in Bhaiya Punjalal Bhagwandhin v. Dave Bhagwat Prasad, MANU/SC/0372/1962 : AIR 1963 SC 120. One of the provisions which their Lordships had to consider was Section 12 of the Bombay Rents, Hotel and Lodging House Rates (Control) Act (LVII of 1947). Sub-sections (1) and (2) of that section are as follows:

> "(1) A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the previsions of this Act."
>
> "(2). No suit for recovery of possession shall be instituted 'by a landlord against a tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served Upon the; tenant in the manner provided in Section 106 of the Transfer of Property Act. 1882."

Raghubar Dayal, J., who has delivered the judgment of the Court, has stated about Section 12;

> "The provisions of this section therefore will operate against the landlord after the determination of the tenancy by any of the modes referred to in Section III of the Transfer of Property Act. What this section of the Act provides is that even after the determination of the tenancy, a landlord will not be entitled to recover possession, though a right to recover possession gets vested in him, so long as the tenant complies with what he is required to do by this section. It is this extra protection given by this section which will be useful to the tenant after his tenancy has determined. We are therefore of opinion that where a tenant is in possession under a lease from the landlord, he is not to be evicted for a cause which would give rise to a suit for recovery of possession under Section 12 if his tenancy has not been determined already. It follows that whenever a tenant acts in a way which would remove the bar on the landlord's right to evict him, it is necessary for the landlord to serve him with a notice determining his tenancy and also serve him with a notice' under Sub-section (2) of Section 12 of the Act."

His Lordship has also observed :

> "The right to possession is to be distinguished from the right to recover possession. The right to possession arises when the tenancy is determined. The right to recover possession follows the right to possession, and arises when the person in possession does not make over possession as he is bound to do under law, and there arises a necessity to recover possession through Court. The cause of action for going to Court to recover possession arises on the refusal of the person in possession, with no right to possess, to deliver possession. In this context, it is clear that the provisions of Section 12 deal with the stage of the recovery of possession and not with the stage prior to it and that they come into play only when the tenancy is determined and a right to possession has come in existence. Of course, if there was no contractual tenancy and a person is deemed to be a tenant only on account of a statute giving him right to remain in possession, the right to possession arises on the person in possession acting in a manner which, according to the statute, gives the landlord right to recover possession, and no question for the determination-of the tenancy arises, as really speaking, there was no tenancy in the ordinary sense of that expression. It is for the sake* of convenience that the right to possession, by virtue of the provisions of a statute, has been referred to as statutory tenancy."

Another observation is:

> "We are therefore of opinion that so long as the contractual tenancy continues a landlord cannot sue for the recovery of possession even if Section 12 of the Act does not bar the institution of such a suit, and that in order to take advantage of this provision of the Act he must first determine the tenancy in accordance with the provisions of the Transfer of Property Act."

I may also mention that the decision in AIR 1953 Sau 113 has been referred to, and the following observation in that case at page 118 of that report has been quoted with approval;

> "a tenancy must be duly determined either by a notice to quit or by efflux of time or under one or the other of the clauses of Section III, Transfer of Property Act, before a landlord can sue to evict his tenant on any of the grounds contained in the clauses of Section 13 (1) of the Bombay Rent Act as applied to Saurashtra. Therefore a notice determining the tenancy and calling upon the tenant to quit was in this case a necessary prerequisite to the institution of the suit."

**29.** It seems to me to be manifest that the decision of the Supreme Court in Bhaiya Punjalai Bhagwan-ddin's -case AIR 1953 SG 120 has no longer left the matter in any doubt. That decision has finally laid down that determination of a tenancy is necessary before 3 landlord can take action under a Control Act for actual eviction of the tenant. This must prevail unless a contrary provision is made in any Control Act.

**30.** A Full Bench of five Judges had to consider a similar problem in Surya Properties Private Ltd. v. Birna-lendu Nath Sarkar, MANU/WB/0001/1964 : AIR 1964 Cal 1. The provision in Question in that case was Section 13 (6) of the West Bengal Premises Tenancy Act (XII of 1956). The question was whether a notice under Section 13 (6) was required in addition to a notice under Section 106 of the Transfer of Property Act or it was a notice in lieu of that. Section 13 (6) reads;

> "Notwithstanding anything in any other law for the time being in force, no suit or proceeding for the recovery of possession of any premises on any of the grounds mentioned in Sub-section (1) except the grounds mentioned in Clauses (j) and (k) of that sub-section shall be filed by the landlord unless he has given to the tenant one month's notice expiring with a month of the tenancy."

It may be pointed out, that there is a non-obstante clause in this sub-section also. Their Lordships held that this notice was required in addition to, and not in lieu of, the notice required under Section 106 of the Transfer of Property Act, which had also to be given for the purpose of determination of a contractual tenancy, though both notices could be combined in one document, Thus this decision also supports the view which I have expressed.

**31.** A contrary view has been expressed in Bhairo Lal Agarwala v. Samir Baran Ghose 19S4 BLJR 59 One of the Points taken before their Lordships was the same ES the one under consideration. Their Lordships negatived the contention and distinguished Bhaiya Punjalal Bhagwanddin's case, MANU/SC/0372/1962 : AIR 1963 SC 120 on the ground that it related to Section 12 of the Bombay Rents, Hotel 2nd Lodging House Rate (Control) Act. It seems to me that the decision of the Supreme Court cannot be distinguished because it proceeds upon general principles on the point of necessity of determination of a tenancy rather than upon on any particular words used in the Bombay Act. Besides, there is nothing in Section 11 of the Control Act to suggest that a landlord can start an action under that section for a decree for eviction of the tenant before terminating the tenancy. With great respect, therefore, am unable to agree with the conclusion of their Lordships in Bhaira Lal Agarwala's case 1964 BLJR 59, on this point, and, to that extent, that decision is overruled.

**32.** As the respondent in this case did not determine the tenancy by giving a notice under Section 106 of the Transfer of Property Act, his action under Section 11 of the Control Act is premature. The two second appeals ere, therefore, allowed, and the decrees for eviction of the appellant passed by the Court below are set aside. As the point in which the appellant has succeeded has been taken for the first time in this Court, the parties, will bear their own costs throughout.

Second Appeal No. 957 of 1959.

**33.** This appeal by the plaintiff, Tata Iron and Steel Co., Ltd., arises out of a suit for eviction of the defendant from shop No. 6 of Block No. 3 in Sakchi Market. Admittedly, the defendant is a monthly tenant of the plaintiff, and the monthly rental is Rs. 16/-.

**34.** The plaintiff's case is that there WES non-payment of rent because the defendant did not pay the rent from June, 1956, to November, 1956, the total amounting to Rs. 96/-. The defendant's case is that there was no definite time for payment of the rent, and that the rent was payable at irregular intervals on demand by the plaintiff-company.

**35.** The learned Munsif, who tried the suit, found that the plaintiff used occasionally to accept rent from the defendant for six to twelve months at a time, is came to the conclusion that there was no non-payment of rent within the meaning of Section 11 (1) (d) of the Control Act, and hence he dismissed the suit. The learned Subordinate Judge, who heard the appeal, agreed with' the finding of the trial Court, Relying upon the decision in Chiranjilal Poddar v. Madhifsudan Thakur, MANU/BH/0055/1957 : AIR

1957 Pat 160, he held that the tenant could not be evicted on the ground of non-payment of rent in such a case.

**36.** Mr. L.K. Chaudhuri, who has appeared in behalf of the appellant-company, has urged that, in view of the amendment of Sections 11 and 13(1) of the control Act by Act XVI of 1955, the decision in Chiranjila! Poddar's case, MANU/BH/0055/1957 : AIR 1957 Pat 160 is no longer good law.

**37.** 1 have already quoted Section 111(l)(d) which has been introduced- and Section 1 3(1) which has been substituted by the amending Act. The relevant part of Section 1 1(1) (a) as it stood before the amendment may now be quoted;

> "11. (1) Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of Section 1 2, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in executing of a decree or otherwise, except.-
>
> > (a). in the case of a month to month tenant, for non-payment of rent or breach of the conditions of the tenancy....."

**38.** The provision applicable to Chiranjilal Poddar's case., MANU/BH/0055/1957 : AIR 1957 Pat 160 was Section 11(1) (a) of the Control Act as it stood before the amendment. The landlord prayed for the issue of 3 writ under Article 226 of the Constitution in that case for quashing the order of the Commissioner of Tirhut Division, whereby the landlord's application for eviction of the tenants was ultimately dismissed. The tenants did not pay rent for the premises in question for a period of fourteen months, from 'he 28th June, 1353, up to the 14th August, 1954. The landlord filed his application before the Controller on the 18th August, 1954, for eviction of the tenants. Though receipts issued by the landlord contained a foot-note to the effect that the landlord would have the right to get the house vacated if rent was not paid for more than two months, it was held that, at times, he used to accept rent in one lump sum for four or five months. Raj Kishore Prasad, J., who delivered the judgment of the Bench, has observed:

> "The Act does not provide the time of payment. The point of time, from which, under the Act, the right of the landlord to apply for eviction of his tenant is to accrue, is when the arrear of rent becomes due, which would mean the date when there has occurred 'non-payment of rent."
>
> "In most cases, no doubt, the point of time at which rent becomes due is "the close of the period in respect of which it is to be paid. But this is not necessarily always the case. Special contract, either express or implied, may make a rent due at a point of time different from the close of the period in respect of which it is to be paid."

**39.** His Lordship has further observed that the very fact that the foot-note was to the effect that a tenant would be liable to be evicted only on non-payment of rent for two months showed that the landlord agreed to accept the rent not at the close of every month nor at the close of two months but later. Hence, there was no non-payment of rent within the meaning of Section 1 1(1) (a) of the Control Act.

**40.** it is manifest that the legal position has completely changed by virtue of the amendment of 1955. it can no longer be said that the Act does not provide- the time for payment. Section 11 (1) (d) clearly lays down that, if two months' rent computed

from 'the time fixed by contract' is in arrears, the landlord will be entitled to a decree for eviction of the tenant. If there is no contract, rent for one month will be payable by the last day of the next month. If the landlord does not accept the rent tendered to him by the tenant, the latter can, under Section 1 3 (1), rerrrit such rent to him by postal money-order, and may continue to remit subsequent rent in the same manner. These provisions seem to show that there must be an express contract as to the time for payment of refit, and then that will be considered for determination of the question of two months' rent being in arrears. It is difficult for a definite time to be so fixed by an implied contract. So far as the present case is concerned, the defendant's case is that rent for different periods used to be paid and accepted at irregular intervals. This cannot show that time for payment was fixed by contract; it rather shows that no time for payment was fixed by contract. That being so, it is clear that it should be treated as a case of absence of contract as to the time for payment of rent.

**4 1 .** I may now refer to 1962 BUR 883. Chiranji Lal Poddar's case, MANU/BH/0055/1957 : AIR 1957 Pat 160 was cited before their Lordships in that case, and, on the basis of the change made in Section 11 by the amending Act of 1955, their Lordships held that the principle laid down in that case could no longer be applied. They further observed:

> "Construing the language of Section II (I) (d) of the statute after its amendment in the context of Section 1 3 (1) of the Act it is manifest that the contract referred to in Section 11(l)(d) of the Act is an express contract between the parties and cannot refer to an implied contract which can be inferred from any course of conduct between the parties. The meaning of Section 1 11(l)d) of the Act is that if there is any express contract between the parties for payment of rent within, the time fixed therein, then the question of arrear of two months' rent lawfully payable by the tenant must be calculated with reference to that point of time. In the absence of any such formal contract, the latter part of Section 111 (l)(d) is attracted end the amount of rent must be paid by the last day of the month next following that for which the rent is payable."

**42.** I respectfully agree with the view expressed in the above observation, and I hold that the contract, referred to in Section 1 1 (1) (d) of the Contract Act, is an express and not an implied contract. I, therefore, agree with Mr. Chaudhuri that Chiranjilal Poddar's case, MANU/BH/0055/1957 : AIR 1957 Pat 160, is not good law after the amendment of 1955.

**43.** The plaintiff would have succeeded in view of the above conclusion end its appeal would have been allowed; but the learned Counsel for the defendant-respondent has raised the question that the plaintiff has not alleged or proved in this case that the defendant's tenancy has been determined by a notice under Section 1 06 of the Transfer of Property Act or by reason of any other ground referred to in Section III of that Act. I have already held that determination of a tenancy is necessary before a landlord becomes entitled to the right of accession and can institute an action under Section 11 of the Control Act for actual eviction of the tenant. I have also held that this is a point which can be raised for the first time In second appeal. That being so, the plaintiffs suit for eviction must be dismissed on this ground alone. As that Courts below have dismissed the suit, no interference is called for. The appeal Is, accordingly, dismissed.

**44.** As the respondent has succeeded on 3 point which was not raised in the Courts below, parties win bear their own costs throughout.

**Vaidynathier Ramaswami, C.J. (Concurring)**

**45.** I agree entirely with the judgment of my learned brother, Mr. Justice Sahai, and the reasonings and conclusions expressed therein,

SECOND APPEALS NOS. 467, 468 AND 957 OF 1953.

**N.L. Untwalia, J. (Dissenting)**

**46.** I have had the privilege and advantage of perusing the judgment prepared by my learned Brother Sahai J. I respectfully agree with his views and decision in regard to the first and second points urged on behalf of the appellant in second Appeals 467 and 468 of 1959 and also in respect of the point urged on behalf of the appellant in Second Appeal No. 957 of 1959. But I extremely regret my inability to agree with the decision of his Lordship that unless the lease of a building is determined in accordance with Section 111 of the Transfer of Property Act, a landlord has no right to get possession and hence he cannot maintain an action for eviction of his tenant under Section 1 1 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act Ml of 1947) hereinafter in my judgment called the Act.

**47.** In any opinion, the provisions contained in Section 1 1 of the Act are still self-contained and

> "It is wholly unnecessary to go outside the Act for determining whether a tenant is liable to be evicted or not, and under what conditions he can be evicted".

As has been held by the Supreme Court in MANU/SC/0053/1951 : AIR 1951 SC 115,

> "any attempt to import the provisions relating to the law o f transfer of property for the interpretation of the section would seem to be out of place".

The argument of the learned Government Advocate to distinguish this case in view of the amendments made in Section 1 1 of the Act by Bihar Act XVI of 1955, to my mind, is not correct and cannot be accepted. 1 shall briefly Indicate my reasons for venturing to take a dissentient view in this case.

**48.** The relevant provisions of Section 1 1 of the Act, as it stood prior to the amendment by Bihar Act XVI of 1955, are as follows:

> "(1) Notwithstanding anything contained in ' any agreement or law to the contrary and subject to the provisions of Section 1 2, where a tenant is in possession of any building, he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise, except-
>
> (a) in the case of a month to month tenant, for non-
>
> payment of rent or breach of the conditions of the tenancy, or for sub-letting the building or any portion thereof Without the consent of the landlord, or if he is art employee of the landlord occupying the building as an employee, on his ceasing to be in such employment; and

(b) in the case of any other tenant, on the expiry of the period of the tenancy, or for non-payment of rent, or for breach of the conditions of the tenancy.

Provided that where a servant of the Government in possession of any building as a tenant vacates such building, he shall within twenty-four hours of such vacation submit a report about such vacation to the District Magistrate who shall, within a period of fifteen days from the date of the vacation, either allot the building to any other servant of the Government whom the District Magistrate thinks suitable, subject to the payment of rent, and the observance of the conditions of the tenancy by such servant of the Government, or direct that the landlord shall be put in possession of the building.

(2) A landlord who seeks to evict tenant under subjection (1) shall apply to the Controller for a direction in that . behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied that the tenant is liable to be evicted under the provisions of Sub-section (1), he shall make an order directing to the tenant to put the landlord in possession of 'the building and if the Controiier is not so satisfied, he Khali make an order rejecting the application.

(3) (a) A landlord may apply to the Controller for an order directing the tenant to put the landlord in as session of a building if he requires it reasonably and in good faith for his own occupation or for the occupation "of any person for whose benefit the building is held by him:

Provided that where the tenancy is for a specified period agreed upon between the landlord and the tenant, the landlord Shall not be entitled to apply under this sub-section before the expiry of such period.

(b). The Controller shall, if he is satisfied that the claim of the landlord is bona fide, make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Controller in the order and if the Controller is not so satisfied, he shall make an order rejecting the application.

Provided that where the Controller has passed an 'order directing the tenant to put the landlord in possession of the building, the Controller shall give the tenant a reasonable time which shall be not less than two months and not more than three months for putting the landlord in possession of the building".

The relevant provision of Section 11 of the Act after amendment, with which we are concerned, is contained in sub-sec. (1) only, which provides:

"Notwithstanding anything contained in any contract or law to the contrary but subject to the provisions of the Industrial Disputes Act, 1947 (Act XIV of 1947), and to those of Section 1 2, where a tenant is in possession of any building, he shall not be liable to eviction therefrom except in execution' of a decree passed by the Court on one or more of the following grounds :

(a) for breach of the condition of the tenancy, or for sub-letting the

building or any portion thereof without the consent of the landlord, or if he is an employee of the landlord occupying the building as an employee, on his ceasing to be in such employment.

(b) where the condition of the building has materially deteriorated owing to acts of waste by, or negligence, or default of, the tenant, or of any person residing with the tenant or for whose behaviour the tenant is responsible;

(c) where the building is reasonably and in good faith required by the landlord for his own occupation or for the occupation of any person for whose benefit the building is held by the landlord;

Provided that where these Court thinks that the reasonable requirement of such occupation may be substantially satisfied by evicting the tenant from a part only of the building and allowing the tenant to continue occupation of the rest and the tenant agrees to such occupation, the Court shall pass a decree accordingly, and fix proportionately fair rent for the portion in occupation of the tenant, which portion shall thenceforth constitute the building within the meaning of Clause (aa) of Section 2, and the rent so fixed shall be deemed to be the fair rent fixed under Section 5;

Explanation : In this clause the word 'landlord' shall not include an agent referred to in Clause (d) of Section 2.

(d) where the amount of two months' rent lawfully payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract or, in the absence of such contract, by the last day of the month next following that for which the rent is payable or by not having been validly remitted or deposited in accordance with Section 1 3; and

(e) in the case of a tenant holding on a lease for a specified period, on the expiry of the period of the tenancy."

48a. The question for determination is as to whether the special provision of law enacted in the Act for eviction of the tenants which word, according to the definition in the Act, includes all kinds of tenants, in possession of a building either on the basis of a contract of tenancy or even after its termination, as statutory tenants, has abrogated the general law contained in the Transfer of Property Act for determination of lease and eviction of tenants. It is, no doubt, true, as the preamble of the Act indicates, that the special law has been enacted "to regulate the letting of buildings und the rent of such buildings and to prevent unreasonable eviction of tenants therefrom" in the State of Bihar, but 1 find no words in Section 11 of the Act to indicate that special protection has been given to the tenants as against their eviction over and above the protections which they enjoyed under the Transfer of Property Act. In the clearest language , if may say so with respect, the Supreme Court said in 1951 that the provisions relating to the law of transfer of property could trot be imported for the interpretation of Section 1 1 of the Act. Yet, the Legislature, in its wisdom, did not consider it advisable to use any expression in the Act or in Section 1 1 of it to express its contrary intention, if any, at the time of bringing about various amendments in the Act by Act XVI of 1955.

Learned Government Advocate pointed out that the two points of distinction, which have brought about the change in the law, are (i) that a self-contained complete machinery for passing an order of eviction had been provided for in Section 1 1 in the parent Act giving power to the Controller to pass such an order, but it is not so now after the amendment of 1955; the jurisdiction to pass a decree for eviction is in the Court having jurisdiction under the Code of Civil Procedure to entertain a suit by a landlord against a tenant for recovery of possession of a building; and (ii) that in the first paragraph of the section the words

> "he shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise, except"

have been substituted by the words

> "he shall not be liable to eviction therefrom except in execution of a decree passed by the Court on one or more of the following grounds".

In my judgment, the points of distinction made by the learned Government Advocate are more illusory than real. The change brought about in the procedural aspect of the law cannot lead to the conclusion that the substantive aspect of the law has been changed. If the substantive law as to the liability of the tenant to be evicted and the consequent right of the land-lord to evict, was to be found in the provision of law contained in Section 1 1 of the Act, as held by the Supreme Court, it will be found in the same manner in Section 1 1 of the Act even after the amendment of 1955. Some changes brought about by the amending Act of 1955 in Section 1 1 of the Act even in regard to the substantive law are noticeable, and 1 shall make reference to one such important change hereafter in my judgment.

**49.** I fail to appreciate even the second point of distinction made out by the learned Government Advocate. Prior to the amendment as the law stood, the section provided that a tenant in possession of any building was not liable to be evicted therefrom, whether in execution of a decree or otherwise, except in execution of an order passed by the Controller on any of the grounds mentioned in Clauses (a) and (b) of Sub-section (1) and Clause (a) of Sub-section (3). Some change in the first paragraph of Sub-section (1) was necessitated because of the change in the procedural aspect of the law and, according to the law as it stands now, a tenant in possession of any building is not liable to eviction therefrom except in execution of a decree passed by the Court on one or more of the grounds mentioned in Clauses (a) to (d) of Sub-section (1) of Section 1 1 and "in the case of a tenant holding on a lease for a specified period, on the expiry of the period of the tenancy", as provided in Clause (e).

**50.** I shall now examine very briefly the provisions of law contained are Section 1 1 of the Act with reference to some relevant provisions of the Transfer of Property Act. The manner of creation of a lease as contained in the provisions of the Transfer of Property Act, viz., Sections 105, 107, etc.,, has not been affected by the Act. Section 106 provides for duration of certain leases in absence of contract or local law or usage to the contrary and provides that the lease from year to year will be terminable, on the part of either lessor or lessee, by six months' notice and the lease from month to month will be; terminable, on the part of either lessor or lessse, by fifteen days' notice. Section 108 enumerates rights and liabilities of lessor and lessee in absence of a contract or local usage to the, contrary. Clause (J) of Section 108 enacts that a lessee may transfer by sub-lease the whole or part of his interest in the

demised property and he shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. Clause (1) says :-

> "the lessee is bound to pay or tender, at the proper time and place-, the premium or rest to the lessor or his agent in this behalf".

It is important to quote Clause (q) which says:--

> "On the determination of the lease, the lessee is bound to put the lessor into possession of the property". Section 109 deals with the rights of lessor's transferee and Section 110 provides for exclusion of date on which term of the lease commences. I shall now read some of the important clauses of Section 111 of the Transfer of Property Act, which are to the following effect:
>
> > "A lease of Immovable property determines-
> >
> > (a) by efflux of the time limited thereby.....:
> >
> > x x x x x x x x x x x x x x x x x
> >
> > (g) by forfeiture; that is to say, -- (1) in case the lessee breaks an. express condition which provides that on breach thereof the lessor may re-enter; or (2) in case that lessee renounces his character as such by setting up a title in a third person or by claiming title in himself, or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease.....:
> >
> > (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other...."

Section 112 says under what circumstances the forfeiture under Section 111(g) can be said to have been waived and similarly Section 113 mentions circumstances under which a notice given under Section 111(h) is waived. Then comes Section 114 which says :

> "Where a lease of Immovable 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 siren 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".

**51.** It would thus be noticed that, on determination of a lease of Immovable property in any of the manners or grounds mentioned in Sec. 111, the lessee is bound to put the lessor into possession of the property, and the lessor becomes entitled to possession of the property. If the lessee does not put the lessor in possession , the latter can recover possession under the general law by obtaining a decree in a Civil Court. In view of the special provision of law contained in Section 1 1 of the Act as it

stood prior to the amendment of 1955, it would be noticed that, even on the expiration of the period of notice to determine the lease, if any, given as provided in Section 105 of the transfer of Property Act, a tenant did not incur any liability to be evicted; he still continued to be a statutory tenant and could not be evicted except in the manner and on the grounds provided in the special law. What was provided in Clause (a) of Section 1 1 (i) of the Act prior to 1955 was that in the case of a month to month tenant his tenancy was to determine, if I may-use the expression "by forfeiture" within the meaning of Clause (g) of Section 1 M, although not exactly in the same terms, for non-payment of rent or for breach of the conditions of the tenancy or for sub-letting the building or any portion thereof without the consent of the landlord.

It was, however, not provided therein that on a breach of an, express condition of the lease, lessor would be exercising his right to determine the lease by forfeiture only upon two conditions, namely, (i) if the lease provided that upon the breach of condition the lessor may re-enter; and (ii) upon giving of a notice by the lessor of his intention to determine the lease. In such a situation, can't it be said that by necessary implication the special provision contained in Clause (a) of Section 1 1 of the Act repealed the general provision contained in Clause (g) of Section 111 of the Transfer of Property Act? It would be of use to emphasise here that the provision contained in Clause (g) that in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; which should be a ground for forfeiture under Clause (g) has not been made a ground of ' liability of the tenant to be evicted under Clause (a) of Section 11 of the Act for the simple reason that a lessee doing so would be surely not making payment of rent to the lessor and that would make him liable to be evicted within the meaning of Clause (a). Merely sub-letting the building or any portion thereof without the consent of the landlord was not a ground for eviction under the general law but that has been made a ground for eviction under the special law for the simple reason that the protection has been given to the tenant and sub-letting without the consent of the landlord has been made a ground for eviction to prevent him from making undue profit out of his lease. Under the general law, however, on the happening of such an event, a lease from year to year or from month to month could be determined by a notice under Section 106 of the Transfer of Property Act. But that being not permissible under the special law, a special ground for forfeiture has been provided in Clause (a) of Section 11 of the Act, In such a situation, I fail to understand now it is possible to fulfil the conditions of forfeiture as provided in Clause (g) of Section 111 of the' Transfer of Property Act as also those in Clause (a) of Section 1 1 of the Act, as was contended by the learned Govt. Advocate during the course of his argument.

**52.** Coming to the case, of fixed term tenancy, it would be noticed that under Clause (a) of Section Ill of 'he Transfer of Property Act, such a lease determines by efflux of the time limited thereby. And, subject to the provisions contained in Section 1 2 of the Act providing for extension of the period limited by the lease and a summary eviction by a Civil Court on termination of such a lease, a tenant holding a lease for specified period is liable to-be evicted on the expiry of the period of the tenancy under Clause (e) of Section 1 1(1) of the Act, as Sections 11 and 12 of the Act stand after the amendment of 1955, Before the said amendment, Clause (b) of Section 1 1 (1) merely provided "in the case of any other tenant" which expression included a tenant holding on a lease for specified period was liable to be evicted on the expiry of the period of tenancy or for non-payment of rent or for breach of the conditions of the tenancy. On the interpretation put by the Supreme Court in Brij Raj Krishna's case, MANU/SC/0053/1951 : AIR 1951 SC 115 a tenant holding on a lease for a

specified •period, say, for 15 years could be evicted merely on the ground of non-payment of rent or for breach of the conditions of the tenancy, even though under the general law neither of the grounds by itself would have mac!3 the tenant to incur the liability of eviction. And, that is the reason that the Legislature intervened in 1955 and has provided for eviction of the tenant holding on a lease for a specified period only on the expiry of the period of the tenancy under Clause (e) of Section 1 1 (1) or by a summary method in a case which is covered by Section 1 2 of the Act.

A tenant holding on a lease for a specified period is not liable to be evicted upon any of the grounds mentioned in Clauses (a) to (d) which, _ in my opinion, are applicable to the cases of other kinds of tenants, as for example, tenant from month to month or from year to year. In case a tenant holding on a lease for a specified period does not pay rent or commits breach of the conditions of the tenancy, the landlord may sue for rent or damages or for any other relief which he may be entitled to for breach of the conditions of the tenancy, but he is not entitled to evict the tenant. After having inducted such a tenant for a specified period, he cannot get a decree for his eviction even on the ground of persona necessity as provided in Clause (c) of Section 1 1(1).

**53.** Under Section 114-Aof the Transfer of Property Act, relief against forfeiture has also been provided in certain other cases and in the manner indicated therein. In Brij Raj Krishna's case, MANU/SC/0053/1951 : AIR 1951 SC 115, the High Court hac given relief to the tenant against forfeiture for non-payment of rent in accordance with the principles of law contained in Section 114 of the Transfer of Property Act. Even in that case, MANU/BH/0069/1949 : AIR 1949 Pat 474, Mahabir Prasad, J., had said at page 477 (column 1)--

> "It will be seen that sub-sec (1) of Section 1 1 of the Act abrogates Section 106 to the extent that 3 tenancy from month to month shall not be 'terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of month of tenancy".

But, while applying the provisions contained in Section. 114 of the Transfer of Property Act, it was said--

> "Regard being had to the circumstances in which the Act under consideration was enacted and its object, is stated in the preamble as being 'to prevent unreasonable eviction of tenants' from buildings, it would seem that the expression 'non-payment of rent' in Section 11 in the context in which it is used must be given an interpretation which would have the effect of enlarging the protection against determination of a tenancy enjoyed by a tenant under the ordinary law. The legislature, therefore, by enacting that a tenant shall not be liable to be evicted 'except for non-payment of rent' should be held to have intended to protect a tenant from being evicted from 3 building in his possession for being a defaulter in payment of rent, if he brings into Court all the rent due' from him before the order of his eviction comes to be passed."

The Supreme Court in its decision did not approve of this view of law as propounded by the High Court, and referred to the non-obstante clause in the beginning of Section 1 1. If that be the position of law with reference to the provisions contained in Section 114 of the Transfer of Property Act, as enunciated by the Supreme Court, the law cannot be said to be different in face of the Supreme Court decision merely because there is a change in the procedural aspect of the law. Supreme Court has

nowhere said that the relief against forfeiture under Section 114 could be given only by a- Civil Court in a suit for eviction and not by the Controller in a proceeding initiated on an 'application for eviction, I, therefore, find it difficult to appreciate how a tenant who incurs liability to be evictsd upon the grounds mentioned in Section 1 1 of the Act can ask for a notices for determination of the tenancy either under Clause (g) or Clause (h) of Section 111 of the Transfer of Property Act. As I have said above, the law relating to the eviction of a tenant in possession of a building -'tenant' within the meaning of the Act, which would include both contractual and statutory tenants, has been enacted in the special provision of Section 1 1(1) of the Act and a complete anomaly will prevail in the State of Bihar if it is now held after a lapse of about 13 years from the decision of the Supreme Court that a landlord must satisfy the requirements both of the Transfer of Property Act and the Act before he can ask the Court to pass a decree for eviction.

At the places in the State where the Act is not applicable, the landlord becomes entitled to possession, of the demised property in accordance with the provisions of law contained in the Transfer of Property Act and being so entitled he can recover possession in execution of a decree for possession obtained in a suit for eviction. Where the Act is in force, namely, in towns within the limits of municipalities and notified area committees, if the argument advanced on behalf of the tenant in these cases is accepted, the landlord will be entitled to possession only if the requirements of both the Acts are satisfied and then and then only be will be entitled to recover possession in execution of a decree passed in a suit for eviction, I am definitely of the view, and specially in view of the decision of the Supreme Court in Rai Brij Raj Krishna's case, MANU/SC/0053/1951 : AIR 1951 SC 115 that in so far as the law in the State of Bihar is concerned, at places where the Act is in force, the landlord gets a right to possession and the tenant becomes liable to be evicted only upon the fulfilment of the requirements of the law in the Act and he can enforce his right to possession, that is to say, car. recover possession in execution of a decree passed in a suit for eviction.

**54.** I do not think it will be of much use to discuss the various authorities of different High Courts in any dissentient judgment and to find out the differences in the language of the other State Statutes and the Bihar Act. It is, however, necessary to refer to the decision of the Supreme Court in MANU/SC/0372/1962 : AIR 1963 SC 120. The argument in regard to the service of notice for determination of the contractual tenancy was advanced before, and rejected by, a Bench of the' Patna High Court in 1964 BLJR 59 even after the decision of the Supreme Court in Bhaiya Punjalal's case, MANU/SC/0372/1962 : AIR 1963 SC 120. Although it was asserted by Mr. Lalnarain Sinha that the Bench decision of this Court overruling his argument was given before its final conclusion, even after hearing the argument of the learned Government Advocate in full, I am in respectful agreement with the Bench decision of this Court in Bhairo Lal Agarwala's case, 1964 BUR 59. The later decision of the Supreme Court has been given with reference to the provisions of Bombay Rents, Hotel and Lodging House Rates (Control) Act (Bombay Act 57 of 1947) and it was held that so long as the contractual tenancy continued, a landlord could not sue for recovery of possession even if Section 1 2 ,of the Bombay Act did not bar the institution of such a suit and that in order to take advantage of this provision of the Act, he must first determine the tenancy in accordance 'with the provisions of the Transfer of Property Act.

The decision of the Supreme Court in Rai Brij Raj Ksishsa's case, MANU/SC/0053/1951 : AIR 1951 SC 115 was distinguished on the ground that

Section 1 2 of the Bombay Act is differently worded and cannot, therefore, be said to be a complete code in itself, there being nothing in it which overrides the provisions of the Transfer of Property Act, as was held by the Supreme Court in Rai Bri] Raj Krishna's case 1951 SC 115 with reference to the provisions of Bihar Act. it was also contended by the learned Government. Advocate upon the basis of some observations in the Full Bench decision of the Calcutta High Court in MANU/WB/0001/1954 : AIR 1954 Cal 1 that in Rai Brij Raj Krishna's case, MANU/SC/0053/1951 : AIR 1951 SC 115 the Supreme Court was not concerned with the' question of determination of a tenancy on service of notice while in Bhaiya Punjabi's case, MANU/SC/0372/1962 : AIR 1963 SC 120 the Supreme Court has directly decided the point of notice. In my opinion, this distinction also does not stand scrutiny. Firstly, the Supreme Court did not distinguish its earlier decision on this ground. Secondly, the learned Government Advocate had to concede in. logical sequence that if the requirement of service of notice for determination of the tenancy under the Transfer of Property Act has to be fulfilled prior to the landlord's right to recover possession upon any of the grounds mentioned in Section 1 1(1) of the Act, there would be no principle or justification in excluding the other provisions of he Transfer of Properly Act in relation to the determination of a tenancy by forfeiture.

As a matter of fact, he submitted that a landlord can succeed in a suit for ejectment against the tenant if the tenancy has been determined by fulfilling the requirements of Clause (g) or (h) of Section 111 of the Transfer of Property Act and also if a ground for eviction of the tenant has been made out in accordance with 'the provisions of law contained in Section 1 1(1) of the Act. I then fail to see, pushing the matter a bit further logicality, as to which provision in Section 1 1 (1) of the Act takes away the protection of the tenant under Sections 114 and 114-A of the Transfer of Property Act. If that be not so, then giving effect to the point of notice with reference to the Bihar Act does not seem to me possible nor is it, in my opinion, either correct or advisable in face of that decision of the Supreme Court in Rai Brij Raj Krishna's case, MANU/SC/0053/1951 : AIR 1951 SC 115.

**55.** In the result, therefore, 1 would dismiss Second Appeals 467 and 468 of 1959 but without cosis. 1 would allow Second Appeal No. 957 of 1959, set aside that judgments and decrees of the Courts below and decree the suit of the plaintiff appellant against defendant respondent but, on the facts and in the circumstances of the case, would direct the parties to bear their own costs throughout.