
(1962) 05 PAT CK 0009
In the Patna High Court
Case No : A.F.O.D. No. 641 of 1958

Radha Govinda Rai and Others

APPELLANT

Vs

Khas Dharmaband Colliery Co. Ltd.

RESPONDENT

Date of Decision : 21-05-1962

Acts Referred:

Contract Act, 1872 — Section 10, 124, 125, 2
Transfer of Property Act, 1882 — Section 6, 8

Citation : AIR 1963 Patna 160

Hon'ble Judges : Ramratna Singh, J;Kanhaiya Singh, J

Bench : Division Bench

Advocate : R.S. Chatterji, for the Appellant; B.C. De and S.K. Mazumdar, for the Respondent

Final Decision : Dismissed

Judgement

Ramratna Singh, J.—The defendants are the appellants, The admitted facts are these. In 1908, Raja Banwsrilal Singha granted a mining lease to one Devendra Nath Ghosh for a period of 999 years in respect of coal lying subjacent to a block of mauza Dharmaband representing a share of fourteen annas in the mauza. In 1911, Devendra Nath Ghosh, in his turn, made a sub-lease of his interest excluding coal seams Nos. 17 and 18 to one Mr. Pringle, who also held a leasehold interest in respect of coal lying subjacent to a block of land (representing two annas share of mauza Dharamaband), adjacent to the block of fourteen annas. In April 1925 there was an agreement between Mr. Pringle and Raja Banwalilal Singha, father of Nilkantha Narayan Singha, under which for better facility of winning and removing coal from the said adjoining land Mr. Pringle obtained permission to work and remove the same by out-stroke agreeing, inter alia, to pay to Nilkantha Narayan Singha way-leave rent or royalty at one anna per ton and in respect of coal which would be won and raised by the sub-lessees from the adjoining land through the said block of fourteen annas share. The agreement further provided that the interest of the sublessee in the coal mining rights of the fourteen annas block would remain charged for the

payment of way-leave rent.

Sometime later, Mr. Pringle assigned all his right, title and interest in the coal and coal mining rights as well as the rights under the said way-leave rent agreement to the New Teturia Coal Co., Ltd. While this company was in possession of the lease-hold right, Niikantha Narayan Singha sold his underground coal and coal mining right in the block representing the fourteen annas share on the 4th January 1931 to Mahendra Nath Roy, the predecessor-in-interest and karta of the joint family of the defendants. A few years later, there arose a dispute between Niikantha Narayan Singha and the defendants (hereinafter to be referred to as Roys.) as to who would receive from the sub-lessee the way-leave rent payable in terms of the registered agreement of 1925 and both demanded the same from the company. The company ultimately agreed to make the payment of the way-leave rent to the defendants on the latter executing a deed of indemnity indemnifying the former and their representatives and assigns against all claims, demands, actions and other proceedings against all losses, acts, charges, damages and expenses whatsoever that the said company might sustain by reason of the payment of the way-leave rent to Roys. Accordingly, defendant No. 1 executed a deed of indemnity in 1935 as karta of the joint family or the defendants in favour of the company.

After some years, the company went into voluntary liquidation, and on the 6th October 1942 the liquidators assigned and conveyed to the plaintiffs all the right, title and interest of the company in the said fourteen annas block as also in the adjoining land together with the right of working and removing the coal of the adjoining land by out-stroke through the fourteen annas block as agreed under the way-leave agreement of 1925. In 1953 Nilkantha Narayan Singha instituted a suit for recovery of arrears of way-leave rent for the period from July 1931 to December 1942 and impleaded therein Mrs. Pringle, as Mr. Pringle was dead by that time, the New Teturia Coal Company Limited, which went into liquidation, the present plaintiffs, that is, Messrs. Khas Dharrnaband Colliery Company Limited, and the Roys as defendants. In spite of a serious contest by the defendants including the Roys, the suit was decreed by the trial court; and an appeal by the Roys up to the High Court was dismissed in February 1951. A final decree was passed in September 1951 and the decree-holder executed the decree with a prayer for realisation of the dues by sale of the charged block of land representing the fourteen annas share, which was then owned and worked by the present plaintiffs as sub-lessees; and the present plaintiffs paid a sum of Rs. 23,500 only to the decree-holder in full satisfaction of the decretal dues and the decree-holder filed a satisfaction petition on the 2nd June 1953. The plaintiffs instituted the present suit in 1954 for recovery of the said Rs. 23,500 with interest at six per cent. per annum thereon on the ground that the Roys are liable to pay the same to the plaintiffs according to the terms of the indemnity bond inasmuch as they were not entitled to the way-leave rent which they realised from the plaintiffs and their predecessor-in-interest, that is, the New Teturia Coal Company Limited.

2. The Roys, that is, the defendants, asserted in their written statement that the indemnity bond was void and without lawful consideration, inasmuch as it was executed by them under pressure and undue influence of the New Teturia Coal Company Limited. It was further alleged that the sub-lessees had not suffered any loss or damages on account of the payment of way-leave rent to the defendants. The next plea of the Roys was that, inasmuch as the contract in the indemnity bond was personal between them and the New Teturia Coal Company Limited, the latter had no right to transfer the benefit arising to it under the bond to the plaintiffs and, in fact, the right acquired under the bond was not transferred to the plaintiffs. It was further asserted that the plaintiffs are not entitled to recover any amount, inasmuch as the payment of the decretal dues by the plaintiff was voluntary. An alternative plea was that the plaintiffs were entitled to recover only Rs. 9,875/3/- which the defendants had realised as way-leave rent from them and the Teturia Coal Company Limited. The last plea was that the plaintiffs are not entitled to claim interest whatsoever.

3. The learned Subordinate Judge, who tried the suit, found that the indemnity bond was executed in the normal course of business without any pressure or undue influence and that the benefit arising to the New Teturia Coal Company Limited under the indemnity bond was in fact transferred to the plaintiffs and it could be legally transferred. The plea that the payment by the plaintiffs was voluntary was rejected and a decree for Rs. 23,500 without any interest was passed against the defendants.

4. During the hearing of the appeal, only the following points were pressed on behalf of the appellants.

(1) The indemnity bond was without consideration and, therefore, void.

(2) The interest acquired by the New Teturia Coal Company, Limited, under the said bond could not be assigned in law to the plaintiffs, inasmuch as it was a mere right to sue.

(3) The said interest or right was, in fact, not assigned to the plaintiffs.

(4) The payment by the plaintiffs of the decretal dues to Nilkantha Narayan Singha was voluntary.

(5) In any view of the matter, the defendants-appellants are liable only to the extent of Rs. 9,875/3/-.

5. I shall take up now the first point. Section 2(d) of the Indian Contract Act defines "consideration" in these words:

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

In other words in order to prove consideration, the promisee, that is, the New

Teturia Coal Company, Limited, must have done or abstained from doing, or promised to do or abstained from doing something at the desire of the promisor, that is, the Roys. In the present case, all these conditions are fulfilled. The New Teturia Coal Company, Limited, promised to pay the way-leave rent to the Roys at the desire of the latter. u/s 10 of the Act, one of the ingredients of a contract is that there must be a lawful consideration; and u/s 25, an agreement made without consideration is void. In the present case, it is admitted that the New Teturia Coal Company, Limited, agreed to pay the way leave rent to the Roys on their executing the indemnity bond, because both Nilkantha Narayan Singha and the Roys were demanding way-leave rent from the company (see evidence of Ragnunath Bhattacharjea, D. W. 1, an employee of the appellant). This fact is also mentioned in the indemnity bond. The mere allegation in paragraph 8 of the written statement that there was no dispute between Nilkantha Narayan Singha and the Roys regarding the right to receive the so-called way leave rent is of no effect in the absence of any evidence to support the same. The judgment in the appeal arising out of the suit instituted by Nilkantha Narayan Singha in 1953 shews that there was a keen contest between the plaintiff of that suit and the Roys as to who was entitled to the way leave rent; and the matter was decided in favour of Nilkantha Narayan Singha. The fact that, in spite of the demand of the way leave rent by both Nilkantha Narayan Singha and the Roys, the New Teturia Coal Company, limited, agreed to pay the same to the Roys amounts to a lawful consideration for the promise of the Roys to indemnify the company against all losses, charges, etc. on account of repayment of way leave rent to them in preference to Nilkantha Narayan Singha.

6. Reliance was placed on behalf of the appellants on a decision of the Judicial Committee in AIR 1948 150 (Privy Council) ; but the facts of that case were absolutely different as will appear from an extract from the placitum reproduced below:

"A, the plaintiff's father by a letter gave an undertaking to B, the defendant's natural father, that he would supply money for the litigation if the defendant's adoption was challenged. In pursuance of this undertaking A advanced moneys to the defendant from time to time for the expenses of the litigation and after the death of A the plaintiff also did the same thing subsequently the defendant on request of the plaintiff executed the suit promissory note for the total amount advanced for the litigation, and it was stipulated therein that if the litigation was decided against the defendant in the Privy Council, the plaintiff would not enforce the note. The litigation ended in favour of the defendant and therefore the plaintiff sued the defendant on the pre-note. The defendant denied his liability and contended that the promote was void for want of consideration.

Held that the advances of money were not made as the "desire" of the defendant within the meaning of Section 2(d) and therefore, the promote was without consideration.

Held also that Section 25(2) was not applicable to the case. To invoke the aid of

that provision it must be shown that there was a promise by the defendant to compensate the plaintiff or his father A, for something which had been already done by them voluntarily to him. The monies were not advanced "voluntarily" but because of the undertaking given by the plaintiff's father and in executing the promissory note the defendant was not promising to compensate the plaintiff for something which had been done for him voluntarily."

It will be noticed that in that case the advances of money were not made at the desire of the defendants. But, to the present case, the New Teturia Coal Company, Limited, agreed to pay and, in fact, paid way-leave rent at the desire of the Roys on their executing a proper deed of Indemnity, indemnifying the company and its successors or assigns. Hence, the agreement contained in the indemnity bond was for a lawful consideration resting in a valid contract. The plea of the appellants must, therefore, fail.

7. The second and the third points may be conveniently discussed together. In this connection it is necessary to refer to the sale deed (Ext. 5) dated the 6th October 1942 by the New Teturia Coal Company, Limited, in favour of the plaintiffs. The relevant portion of this document reads thus: The liquidators (of the New Teturia Coal Company, Limited)

"do hereby confirm unto the purchaser and those the mines, veins and the seams of coal in and under the sale lands and premises fully described in the First Schedule hereunder written together with all coolie sheds, machine and engine houses, workshops, offices, bungalows, godown, coke ovens, brick kilns and other buildings and erections thereon and all tram lines, roads, passages and paths and also all waters, water courses, drains, lights, privileges, easements, appendages and appurtenances whatsoever respectively appertaining thereto or used or enjoyed therewith. And also the benefits of the Railway sidings, agreement and of all existing contracts for the sale of coal and coke and all and singular the surface rights, if any, now vested in the vendor and all other "rights, privileges liberties and also all the right, title, interests, property claim and demand whatsoever of the vendor" into, out of and upon the said mines, veins and seams of coal in and under the sale lands and premises hereby transferred and assigned of intended so to be and every part thereof together with all deeds, documents and muniments of title exclusively relating to the same."

8. The significance of the underlined words (here into " ") is, in my opinion, sufficient to include the right and interest, which the vendor, the New Teturia Coal Co. Ltd., had acquired under the Indemnity bond (Ext. 4) under which the Roys undertook to indemnify the New Teturia Coal Company, Limited, against any demand of Nilkantha Narayan Singha. The recitals of the indemnity bond show that a dispute had arisen between the Roys and Nilkantha Narayan Singha regarding the right to receive way-leave rent; and the New Teturia Coal Company, Limited, agreed to pay the way-leave rent to the Roys as they agreed to

"indemnify the company, its representatives and assigns against all claims, demands, actions and other proceedings for recovery of or in relation to the said way-leave rent or any part thereof and also against all losses, costs, charges, damages or expenses which the company may pay or sustain by reasons or on account of the payment of the said way-leave rent or any part thereof".

In the said deed (Ext 5), no reservation or exception of any kind was made by the New Teturia Coal Company, Limited and their liquidators. The way-leave rent was payable admittedly on account of the mining operations conducted by the New Teturia Coal Company, Limited as sub-lessees of the coal and coal land. When the New Teturia Coal Company, Limited, transferred all its rights as sub-lessees to the plaintiff it is without any reservation or exception, the obligation to pay the way-leave rent was also transferred to the plaintiffs and, therefore, the right acquired under the indemnity bond on account of the payment of way-leave rent to the Roys was also transferred to the plaintiffs. Hence, it must be held that, in fact, the right acquired under the indemnity bond by the predecessor-in-interest of the plaintiff was transferred to the plaintiff.

9. Reliance was placed on behalf of the appellants on Section 6(e) and Section 8 of the Transfer of Property Act in support of the plea that the right acquired under the indemnity bond could not be assigned in law by the New Teturia Coal Company, Limited, to the plaintiffs. Section 8 lays down that, unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. It is further provided that such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth. This proviso is sufficient to include in the present case the right of the plaintiff to be indemnified by the Roys in pursuance of the indemnity bond. Section 6(e) lays down that a mere right to sue cannot be transferred. The use of the word "mere" is significant. In my opinion, Clause (e) means that a right to sue alone cannot be transferred, because such a right is personal to the party; but, when the right to recover anything is incident to the property transferred, it is not covered by Clause (e). In the present case, if merely the right of the New Teturia Coal Company, Limited, to be indemnified by the Roys was personal to the Company, then certainly it could not transfer the same in law as it would be a mere right to sue. But such a contract of indemnity is not to be treated as merely a personal covenant. The way-leave rent was payable in respect of the mining operations conducted by the company in the leasehold property and, therefore, the right to be indemnified against the payment of the way-leave rent to the Roys was a legal incident of the leasehold property. Hence, it was not a covenant personal to the company.

10. I shall now discuss certain decisions cited at the Bar. In the case of *British Union and National Insurance Co. v. Rawson* (1916) 2 Ch. 476, the plaintiff company recovered judgment against a married woman in respect of unpaid calls

on shares against which the defendant had indemnified her. Not having any separate property, she assigned the benefit of her right of indemnify to the plaintiff company, who, after written notice of the assignment, sued the defendant for the full amount of their judgment. It was held that, although the married woman had paid nothing nevertheless she was entitled to have the amount of the calls paid by the defendant either to the plaintiffs or to herself; that this right was capable of assignment; and that the plaintiffs as assignees were entitled to have it enforced by an order directing payment to themselves. The argument that the contract of indemnity was not assignable on the ground that it was a personal contract, which could not be assigned or enforced by anyone but indemnified was repelled; and it was Held that the contract could not be treated as a merely personal covenant not capable of assignment. It was further held that the measure of the liability of the indemnifies was the liability, not the capacity, of the indemnified to pay. In *Osman Jamal and Sons Ltd. Vs. Gopal Purshottam*, , some commission agents had incurred liability on behalf of their principals, who had agreed to indemnify them, and the agents having subsequently gone into liquidation, the Official Liquidator sued the principals for the amount of liability. It was held that he could recover the said amount even though the agents having gone into liquidation had not actually paid their vendor.

In *Khettra Mohan Das Vs. Biswanath Bera*, , it was held that a right to sue for accounts is not assignable in law, nor is the right to a sum of money found due on the taking of accounts so assignable, In that case, however, the plaintiff had purchased merely the right to take accounts from defendant No. 1 and to recover such sums of money as might be found due from him upon accounts being taken.

In *Jai Narayan Pande Vs. Kishun Dutta Misra*, , there was a gift of Immovable property and also an assignment of mesne profit which had accrued due to the doner, and the donee brought a suit for the recovery of the mesne profits; and it was held that, inasmuch as the mesne profits payable to the donor prior to the date of the gift were unliquidated damages, assignment thereof was hit by Section 6(e) of the Transfer of Property Act. The mesne profits subsequent to the date of the gift were, however, held to be assignable.

In *Jagannath Marwari Vs. Kalidas Raha*, , it was held that the word "mere" in Clause (e) of Section 6 of the Transfer of Property Act implies that this clause applies to a case where

"the transferee acquires no interest in the subject of transfer other than the right to sue. But in the present case what has been purchased is the tank and along with it any covenant running with the land has passed to the plaintiff and by virtue thereof the plaintiff brings this action. It cannot, therefore, be stated that what has been purchased is a mere right to sue."

That action was for the recovery of compensation for the subsistence of a tank purchased by the plaintiff. In both the aforesaid Patna cases, reliance was placed on the test laid down in *Glegg v. Bromley* (1912) 3 KB 474, which reads thus:

"The question was whether the subject-matter of the assignment was, in the view of the Court, property with incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity."

In *Jagannath Marwari Vs. Kalidas Raha*, it was held that what was assigned to the plaintiff was not merely a right to sue. In *Jai Narayan Pande Vs. Kishun Dutta Misra*, however, it was held, applying the same test, that mesne profits prior to the date of the gift could not be assigned. This decision has been doubted by Mulla in his book on the Transfer of Property Act. It is not, however, necessary for me to make any observation regarding its correctness or otherwise, because the facts are distinguishable from those of the present case, in *Jai Narayan Pande Vs. Kishun Dutta Misra*, the donor said in effect: "I am transferring by the deed a share of the property which is in me but of which I am not in possession. But in addition to the property, I am assigning to you my claim in regard to the mesne profits which have accrued due to me by right of my title to the property, which title vests in you as from the 21st February, 1916." Their Lordships then observed that a claim for mesne profits was not a claim to any debt; and, therefore, it was not an assignable claim within the definition of that term in Section 130 of the Transfer of Property Act. In the present case, however, the New Teturia Coal Company, Limited, was in possession of the leasehold property on which it transferred the same to the plaintiffs along with all its rights, privileges, etc. (which would include the right to be indemnified under the indemnity bond) with respect to the same. The right to be indemnified could not, therefore, be personal to the company. It is true that nothing about indemnity bond is mentioned in the sale deed dated the 6th October 1942 in favour of the plaintiffs. But the expressions regarding the transfer of right, interests, etc. in the sale deed do include the rights and interests acquired by the company under the indemnity bond. Hence, the principle laid down in *British Union and National Insurance Company's case*, 1916-2 Ch. 475 applied to the present case. Therefore, the transfer to the plaintiffs of the right or interest to be indemnified is not merely a right to sue; and it was assignable in law to the plaintiffs along with the leasehold property.

11. In support of the fourth point that the payment by the plaintiffs of the decretal dues to Nilkantha Narayan Singha was voluntary it was contended on behalf of the appellants that Nilkantha Narayan Singha was not entitled to the way-leave rent after he executed the sale deed Ext. 3) in favour of the Roys on the 4th July, 1931. In the previous litigation, the same plea had been raised by the Roys, but it was rejected, it is necessary here to reproduce the following relevant extracts from that sale deed;

"I announced to sell the -/14/- fourteen annas share of underground coal land situate at Mouza Dharmaband, as indicated (in map) specified in schedule (ka) below and you having agreed to purchase the same, under this Khos kebala 1 sell to you the underground coal of the -/14/- annas share, indicated (in map) in mauza Dharmaband..... From this day I have been wholly divested of all rights

to the vended properties". Whatever right, title and interest I have to the said vended properties shall devolve unto you. Be it stated that so long as the settlement of the underground coal of the said -/14/-annas share indicated (in map) in mauza Dharmaband under the aforesaid patta kabuliat as dated the 4th January, 1908 shall remain in force, you as well as your heirs and successors-in-interest shall hereafter be competent to realise from the aforesaid Devendra Nath Ghose and his representatives and assigns the entire dues e.g. the stipulated commission and annual minimum royalty of Rs. 6,000 (six thousand) etc. under the said settlement from the June kist of 1931 and shall be competent to institute suit etc., if necessary, for realisation of the same..... you shall have no concern with the surface land etc. of the vended coal land or with any other underground mineral except coal. Whatever area of surface land you may stand in need of for running the Colliery of the leasehold coal land, I as well as my heirs and successors-in-interest shall under the terms and conditions of the patta kabuliyat dated 4th January 1908 always be bound to give up the same on having obtained the fixed rent (and) damages. I hand over to you the aforesaid kabuliyat dated 4th January 1908 executed by the lessee.....

I shall continue to pay, as I am doing so long the Zamindari revenue which is payable to Government in respect of this vended properties. Should you suffer any loss for defect in (my) payment of the revenue in respect of the vended properties or the zamindari appertaining thereto, I shall be liable for the loss you suffer. I shall intimate, under registered post, Devendra Nath Ghosh, tenant in respect of the vended properties specified in schedule below about this khos kebala within seven days of registration of this dues, e.g. royalty etc. in respect of the said properties. Should Devendra Nath Ghosh, tenant of the vended lands or his heir or successor-in-interest surrender the vended land, you shall not have to pay to me any rent paid by him or for the surface land in possession of the tenant."

A reading of these extracts together leads to the only inference that the right that was transferred to the Roys was confined only to the coal land below the surface of the fourteen annas block of mauza Dharmaband; and the Roys would get after sale deed only the right to realise the dues under the mining lease of 1903 and not the way-leave rent under the way leave agreement.

12. Reliance was placed on behalf of the appellants on the decision in *Batten Pool v. Kennedy* (1907) 1 Ch. 256, wherein it was held that a payment under a supposed legal liability is a voluntary payment. There is no dispute about this principle. But, in the present case, the decretal dues in respect of the way leave rent were not paid under a wrong belief or a supposed liability. As stated earlier, the right to recover way leave rent remained with Nilkantha Narayan Singh even after the sale deed in favour of the Roys and the decree in respect of the way leave rent was obtained by him against the plaintiff in presence of the Roys. When Nilkantha Narayan Singh executed the decree and prayed for sale of the: leasehold property, which was admittedly charged for the payment of the way

leave rent, the plaintiffs had no option but to pay the same under a satisfaction petition dated the 2nd June 1953 (Ext. 13). Hence, the payment was not voluntary.

13. The only question that now remains to be considered is the amount to which the plaintiffs are entitled to recover against the appellants. Section 124 defines a contract of indemnify as a contract by which one party promises to save the other from loss caused to him by the conduct of any other person. Under this Section, an indemnifying person becomes liable when the promisee suffer a loss u/s 125 of the Contract Act, the promisee in a contract of indemnity, that is, the New Teturia Coal Company Limited and its successors-in-interest, is entitled to recover from the promisor, that is, the Roys, all damages which he may have been compelled to pay in any suit in "respect of any matter covered by the promise contained in the indemnity bond. I have already referred to the English decision in (1916) 2 Ch. 476, wherein it was held that it is the liability of the promisor, -- and not its capacity to pay --, that is material. Thus, the question is what loss the plaintiffs have suffered on account of the conduct of the Roys. The plaintiffs lose their case on the decree which they have paid in presence of the Roys. The latter contend, on the other hand, that the plaintiffs cannot recover from them more than what it has originally paid to them. According to Idem, they have realised from the plaintiffs only Rs. 9875/3/-from the 25th September 1935 to the 12th May 1944, I think, it is quite plain that in law the Roys have to indemnify the plaintiffs only to the extent of the loss sustained by them; and, therefore, they can recover from the Roys only the amount which they had to pay to Nilkantha Narayan Singha and also to the Roys.

Sri B. C. De, however, contended that by virtue of the indemnity bond (Ext. 4), the plaintiffs were entitled to recover the entire amount paid to Nilkantha Narayan Singha whether or not that amount had been paid to the Roys. Relying upon the satisfaction petition (Ext. 13) dated the 2nd June 1932, which shows that the plaintiffs paid Rs. 23500/- in full satisfaction of the decree for the way leave rent obtained by Nilkantha Narayan Singha for the years 1931-42, Sri De argued that, as the plaintiffs paid this amount after execution of the indemnity bond the Roys are liable to pay the same to them. But the indemnity bond does not support the larger proposition enunciated by Sri De. According to it, the Roys are liable to pay all claims, demands, losses, etc., "which the company may pay or sustain "by reasons or on account of the payment of the way leave rent or any part thereof to the Roys. From the underlined (here in " ") words, it is clear that the Roys were liable only to the amount which the company or its successors-in-interest had to pay because of the payment of the way leave rent to the Roys. In order, therefore, to take advantage of this contract, the plaintiffs have to show that they had to pay way leave rent twice over on account of the fact that they had once paid the same to the Roys. Admittedly, the plaintiffs or their predecessors-in-interest did not make any payment to Nilkantha Narayan Singha except the payment of his decree through the satisfaction petition. The liability to pay way leave rent was initially on the plaintiffs and their predecessors-in-

interest. Unless they show that they paid the same to Nilkantha Narayan Singha or to the Roys before the decree obtained by Nilkantha Narayan Singha, they did not sustain any loss, nor had they to make the payment twice over; and, in that case, there was no question of their being indemnified under the indemnity bond. On the other hand if the plaintiffs or their predecessors-in-interest had paid any amount to the Roys, and then they had to pay the decree of Nilkantha Narayan Singha, they were certainly entitled to be indemnified.

Now, the plaintiffs have not adduced evidence to prove payment to the Roys. They have suppressed their books of account.

(After discussion of evidence His lordship proceeded).

14. But the plaintiffs' burden has been greatly lightened by the admission of the Roys. Thus, the initial onus that lay on them has been discharged by the admission of the Roys in the suit by Nilkantha Narayan Singha. In paragraph 8 of their written statement, the Roys admitted that they had been "realising the way leave rent since the date of their purchase", that is, the 4th July, 1931, In the appellate judgment of the previous litigation it is, therefore, stated

"that way leave rent due under the agreement of 1925 has been recovered by the Roys. This fact was asserted by the Roys in paragraph 8 of their written statement, which statement was supported by defendant No. 3 in paragraph 8 of its written statement, and the evidence of Shibram Mandal (D. W. 1) regarding the realisation has not been challenged, the only suggestion in cross-examination being that the realisation was not made before execution of an indemnity bond, which indemnity bond was executed by the Roys in favour of defendants Nos. 2 and 3 on the 18th of May 1935."

The decree in that suit was for arrears of way leave rent for the period from 1931 to 1942; and the present plaintiffs paid the entire decretal dues through the satisfaction petition. There is no explanation on behalf of the Roys regarding their admission contained in paragraph 8 of their written statement, nor is there any reliable evidence on their behalf to show that they had realised Rs. 9875/3/- only. Therefore, the plaintiffs must succeed on the admission, of the Roys.

15. Hence, the plaintiffs-respondents are entitled to recover from the appellants Rs. 23500/-, which they paid through the satisfaction petition. They are not, however, entitled to any interest before the institution of the present suit. The findings of the trial court are, therefore, correct, the appeal is accordingly dismissed with costs.

Kanhaiya Singh, J.

16. I agree,