

(1971) 08 PAT CK 0016

In the Patna High Court

Case No : A.F.O.D. No's. 248 and 304 of 1964

The State of Bihar and Another

APPELLANT

Vs

Saubhagya Sundari Devi and Others

RESPONDENT

Date of Decision : 17-08-1971

Acts Referred:

Bihar Land Reforms Act, 1950 — Section 10, 10A
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Succession Act, 1925 — Section 214
Transfer of Property Act, 1882 — Section 106, 111, 112

Citation : AIR 1972 Patna 200

Hon'ble Judges : Shiveshwar Prasad Sinha, J; Shambhu Prasad Singh, J

Bench : Division Bench

Advocate : R.P. Katriar, in F.A. No. 248 of 1964 and Sushil Kumar Mazumdar, in F.A. No. 304 of 1964, for the Appellant; R.S. Chatterjee, H.R. Das and Sushil Kumar Mazumdar, in F.A. No. 248 of 1964 and R.S. Chatterjee and H.R. Das, in F.A. No. 304 of 1964, for the Respondent

Final Decision : Dismissed

Judgement

Shambhu Prasad Singh, J.—These two appeals arise out of the same suit. Hence, they have been heard together and are being disposed of by a common judgment. F. A. 248 of 1964 is by defendant No. 2 the State of Bihar, which was added as a party to the suit on 11-12-1963 after its institution. F. A. 304 of 1964 is by defendant No. 1.

2. The plaintiffs-respondents claimed a decree for the following--

- (i) khas possession of the suit property;
- (ii) Rs. 44,791/- as arrears of royalty and cess etc., or higher amount if so found on accounting;
- (iii) dues of the plaintiffs were first charge on the suit property;
- (iv) damages; and

(v) costs and interest.

Their case was that during the minority Of the original plaintiff No. 1 (who died during the pendency of the suit and some of his heirs who were not already on record were substituted in his place) and the husband of plaintiff No. 4, when their estate was under the management of Court of Wards, its Manager granted a lease (Ext. 1) of coal and coal mining rights in and under the property mentioned in Schedule "A" to the plaint to the father of defendant No. 1 on 5th of September, 1914. In 1943, the original plaintiff No. 1 and the husband of plaintiff No. 4 brought Title Suit No. 17 of 1943 in the court of Subordinate Judge at Dhanbad for recovery of khas possession and royalty on the ground that on account of the breach of the terms and covenants of the lease and for non-payment of royalty etc., the lessee had forfeited his right to be in possession. This suit was compromised between the parties and the father of the present defendant No. 1, who was defendant in that suit, took a fresh lease of Schedule A properties with some modifications in the terms and covenants of the original lease. A decree (Ext. 4) was passed in terms of the compromise. On the death of -his father, the present defendant No. 1 as his successor-in-interest came in possession of the lease-hold property and committed the following breaches of the covenants and conditions of the lease:

(a) Royalties and commissions of the plaintiffs were not paid from September Kist, 1952, and Road Cess and Mines Board Cess from March Kist, 1945.

(b) The defendant No. 1 did not keep any weighing machine in the colliery though he was bound to do so under the terms of clause 10 of Part VII of the said Indenture of lease.

(c) The defendant No. 1 did not furnish, as required by the terms of the said lease, any statement of coal raised and despatched or sold or of coke manufactured and sold and despatched from the property from September Kist 1950 either to the plaintiffs or their Officer.

The plaintiffs then served a notice (Exhibit 3) dated 12th October, 1961 on defendant No. 1 by registered post. The notice informed defendant No. 1 about the breaches of the covenants and also about the plaintiffs' intention to determine the lease just on the expiry of 31st March, 1962. Defendant No. 1 got the said notice on 17-10-1961 but did not remedy thereafter any of the breaches nor paid the plaintiffs their dues. On the 1st day of April, 1962, the plaintiffs sent their officer to take possession of the property, but defendant No. 1 did not vacate the premises and has been in illegal possession of the same since then.

3. Defendant No. 1 in his written statement averred that the suit was barred by limitation and bad for nonjoinder of the State of Bihar which was a necessary party to the suit. The plaintiffs were left with no right, title or interest in the suit land after vesting of their estate in the State of Bihar under the Bihar Land Reforms Act and, therefore, the suit was not maintainable. He admitted that there was a lease in favour of his father dated 5th September, 1914 and a

compromise in Title Suit No. 17 of 1943, but challenged the correctness of the terms of the lease as stated in the plant. He denied to have committed any breach of the covenants and conditions of the lease. No royalty or commission payable under the lease was paid to the plaintiffs from 1952 September Kist because of the vesting of their estate under the Bihar Land Reforms Act. He also denied his liability to pay road cess and mines board cess etc. As all kinds of coal despatched from the colliery used to be weighed at Patherdih Railway Weigh Bridge, there was no necessity for keeping a weighing machine at the colliery. No colliery in the locality kept any weighing machine and no weighing machine was kept in this colliery since the very inception of the lease and it was to the knowledge of the lessor.

Therefore, the plaintiffs could not complain of this breach. They were also not entitled to have from this defendant statements about raising and despatch of coal since the date of vesting. Before vesting, the representative of the plaintiffs used to take copies of despatch from this defendant and his predecessor-in-interest. After vesting, the plaintiffs sent no representative to the colliery for that purpose. This defendant did not receive the notice dated the 12th October, 1961 alleged to have been sent through Shri M.N. Deogharia. No such notice was delivered or tendered by the postal peon to him. The alleged notice was illegal and invalid. The plaintiffs having lost their interest in the suit property after vesting of their estate could not determine the lease in favour of this defendant. No officer of the plaintiffs went to the colliery on 1st April, 1962 to take possession. The correctness of the accounts submitted by the plaintiffs in Schedule "B" to the plaint and the plaintiffs' right to receive that sum were also challenged. In time it was pleaded that the plaintiffs were not entitled to any of the reliefs they claimed.

4. After being added as a party, defendant No. 2 also filed a written statement alleging, inter alia, that the suit was bad for want of notice u/s 80 of the CPC and that since after the vesting of the Jharia estate, the superior landlord of the plaintiffs, is the State of Bihar with effect from 14-11-1951, the plaintiffs as mining lessees were directly under the State of Bihar according to the provisions of Section 10 of the Bihar Land Reforms Act. It was also averred that from 29th December, 1961, under a notification of the Central Government, both the plaintiffs and defendant No. 1 were jointly and severally liable to pay royalty at the enhanced rate (as per that notification) to this defendant and that the plaintiffs were not entitled to get any royalty from defendant No. 1 from that date. Reference was also made to a certificate case filed against defendant No. 1 by this defendant for realisation of dues with effect from the date of vesting after the date of the said notification by the Central Government.

5. The court below framed as many as 11 issues and answered most of them in favour of the plaintiffs. It, however, held that the plaintiffs were not entitled to re-enter on the ground of breaches of the covenants for keeping a weighing machine and furnishing statements of the coal raised and despatched or sold or

of coke manufactured and sold or despatched. It passed a decree for khas possession in favour of the plaintiffs on the ground of breach of the covenants regarding payment of royalties and commissions. It also passed a preliminary decree against defendant No. 1 for royalty and interest thereon and for cess and also for damages in accordance with the observation made in its judgment; the amount was to be ascertained by a Pleader Commissioner to be appointed by the Court in a subsequent proceeding.

6. Mr. Sushil Kumar Mazumdar appearing for the appellant in F. A. 304 of 1964, urged various points in support of the appeal. Of these, I take up first his contention that there was no notice to determine the lease served upon his client and, therefore, the decree for khas possession could not be passed. Ext. 3 is a copy of the notice which Mr. M.N. Deogharia, Pleader, sent on behalf of the plaintiffs to the appellant of this appeal. It is dated 12th October, 1961. Ext. 2 is the postal acknowledgment receipt. It purports to bear the signature of Jayantilal Keshavji, the appellant, dated the 17th October. The appellant has examined only himself on his behalf and has said in his evidence that the postal acknowledgment (Ext. 2) did not bear his signature and that he did not receive any notice with contents of the notice (Ext. 3). On behalf of the plaintiffs P. W. 1 Pashupati Banerjee proved the signature of the appellant on the postal acknowledgment receipt. In his cross-examination, he admitted that he was not present at the time when the notice was delivered to the appellant by the postal peon. The court below was not inclined to accept the evidence of D. W. 1 that the signature on the postal acknowledgment receipt purporting to be his was not his and notice was not served upon him. It has laid stress on the fact that there was a pre-sumption that the notice (Ext. 3), which was sent by registered post, must have reached the addressee, the appellant.

It was contended before us by learned Counsel for the appellant that that presumption stood rebutted by the appellant's denial in his evidence that the signature was his. In the circumstances of the case, I am not inclined to believe the evidence of the appellant that the signature on Ext. 2 was not his. He does not appear to have insisted that the signature on the postal acknowledgment receipt would be sent for comparison with his admitted signature. In cases, where the postal peon colludes with the party concerned, ordinarily he makes an endorsement "tendered to the addressee and refused"; the postal peon cannot dare to forge the signature of the addressee. I am, therefore, of the opinion that the notice (Ext. 3) was served on the appellant.

7. Mr. Mazumdar next contended that even if the notice (Ext. 3) was served on the appellant, that could not determine the lease. According to Mr. Mazumdar, the plaintiffs ought to have given at least 6 months' clear notice for determining the lease and as in the instant case the date on which the lease was to be determined, according to the notice, was less than six months, it would not be validly determined. He relied on Section 106 of the Transfer of Property Act which runs as follows:--

"In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months" notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days" notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party or to one of his family or servants at his residence or if such tender or delivery is not practicable affixed to a conspicuous part of the property."

He contended that the lease was for manufacturing purposes and, therefore, six months" notice expiring with the end of the year of tenancy was necessary. On the other hand, Mr. R.S. Chatterjee, for the plaintiffs-respondents, submitted that both the leases, the original one as evidence by Ext. 1 and the lease which came into existence by compromise decree as evidenced by Ext. 4, were for fixed terms and they could not be deemed to be leases from year to year to attract the application of Section 106 of the Transfer of Property Act. There appears substance in this contention of Mr. Chatterjee. Section 106 starts with the words "In the absence of a contract". The lease under which the appellant was in possession, as evidenced by Ext. 4, was for a term of 49 years from 1944. It could not, therefore, be a lease from year to year within the meaning of Section 106 of the Transfer of Property Act for determination of which a six months" notice was necessary. The relevant provision in Section 111(g) of the Transfer of Property Act, according to which, a lease of immovable property determines 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 the 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. Section 111 contains eight clauses.

Notice u/s 106 of the aforesaid Act appears necessary only if the lease is to be determined under Clause (h). When a lease is determined under Clauses (a) to ff) of Section 111, no notice at all appears to be necessary. When a lease is to be determined under Clause (g) a notice is necessary because that clause expressly provides for a notice but it need not be a notice as contemplated by Section 106 of the aforesaid Act. The statute does not provide for any definite period which must elapse between the date of the notice of service thereof and the date on which the lease is to be determined. The courts have only to see that the period intervening between the two dates is a reasonable one. In the instant case, the notice, as observed earlier, was dated 12th October, 1961. It was served on the

appellant on the 17th October, 1961 and the date on which the lease was to be determined was on the expiry of 31st March, 1962. The intervening period, which was over five months, cannot be said to be not reasonable.

8. It may be interesting to trace the history of Clause (g) of Section 111 of the Transfer of Property Act. Before 1929, the provision for notice was not there. No notice in writing was necessary but the lessor was to do some acts showing his intention to determine the lease. As this was causing inconvenience and harassment to the lessees, the amending Act, 1929, provided for a notice in writing in the case of forfeiture. If the legislature would have intended that notice under this clause should also be six months' notice, that would have either mentioned that fact in this clause itself or referred to Section 106 in this clause or amended Section 106 by including in it notices under this clause. As none of these was done, it is manifest that the legislature did not intend that notice under Clause (g) of Section 111 should be a six months' notice, as contemplated by Section 106 of the Act. In my opinion, therefore, there is no substance in the contention of Mr. Mazumdar that as notice (Ext. 3) was not six months' notice, it could not validly determine the lease.

9. Mr. Mazumdar also referred us to some of the clauses of the lease (Ext. 1) to show that the lease could not be forfeited by the notice (Ext. 3). The clauses referred to by him do not relate to notice for determining the lease by forfeiture on the ground of breach of any of the terms and covenants. Six calendar months' notice, as required by Clause 3 of Part IX of that document is a notice for lessor's intention to purchase all or any of the building or works above ground level set up or constructed by the lessee at the end or sooner determination of the lease. The notice required by Clause 4 (a) of the said Part is not to be given by lessor but by lessee, if he wants to determine the lease. These clauses, therefore, are of no help to the appellant in support of the contention that notice (Ext. 3) could not validly determine the lease.

10. Learned Counsel for the appellant also relied on some of the Rules of the Mineral Concession Rules, 1960 and 1949 in support of his contention that the lease could not be legally determined by the notice (Ext. 3). He firstly placed before us Clauses (iv) and (v) of Rule 45 of Chapter V of the Mineral Concession Rules, 1960. These rules are framed under the Mines and Minerals (Regulation and Development) Act, 1957, which defines "mining lease" as including a sub-lease for the purpose of undertaking mining operations. Chapter V of the Mineral Concession Rules, 1960 regulates terms and conditions of mining leases in respect of land in which minerals vest in a person other than Government and Rule 45 provides that every mining lease granted by such a person shall be subject to conditions mentioned in that Rule. The condition embodied in Clause (v) is that the lessee may determine the lease at any time by giving not less than one year's notice in writing to the lessor. This clause has got no application in the present case inasmuch as it is the lessor which claims to have determined the lease and not the lessee. Clause (iv) reads:--

"If the lessee makes any default in payment of royalty as required by Section 96 or commits a breach of any of the conditions of the lease, the lessor shall give notice to the lessee requiring him to pay the royalty or remedy the breach, as the case may be, within sixty days from the date of the receipt of the notice and if the royalty is not paid or the breach is not remedied within such period, the lessor without pre-judice to any proceeding that may be taken against the lessee determine the lease."

According to Mr. Mazumdar, as notice (Ext. 3) did not require the appellant to pay royalty or remedy the breach within 60 days of the receipt of the notice, the lease remained undetermined by such a notice. In reply to Mr. Chatterjee's submission that the Mineral Concession Rules, 1960, could not apply to the lease, be it taken as a lease of the year 1944 when it came into existence as a result of the compromise decree (Ext. 4) or a statutory lease of the year 1951, the date of the vesting of the landlord's interest in the State of Bihar under the Bihar Land Reforms Act, for, the Mineral Concession Rules, 1960 were not in force at the date of the creation of the lease, Mr. Mazumdar drew our attention to Mineral Concession Rules, 1949 and contended that these rules contained provisions similar to 1960 Rules. He placed before us Clause (iv) of Rule 47 of Chapter V of 1949 Rules, according to which, provisions of Clauses (i), (ii), (iii), (iv), (v), (vi), (viii), (ix), (x), (xi) and (xv) of Sub-rule (1) of Rule 41 would apply to mining lease by a private person with modification that in Clauses (ii), (iii), (iv) and (v) for the words "State Government" the word "lessor" was to be substituted. Clause (xv) of Sub-rule (1) of Rule 41 was as follows :--

"In case of breach by the lessee or his transferee or assignee of any of the conditions specified in Clauses (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix) and (x) of this rule, the State Government shall give notice in writing to the lessee asking him to remedy the breach within sixty days from the date of the notice, and if the breach is not remedied within such period, the State Government may determine the lease".

Clause (i) of this sub-rule provided for payment of royalty and, therefore, a notice as contemplated by Clause (xv) might have been necessary for determining the lease on the ground of breach of covenant for payment of royalty, if it is found that Mineral Concession Rules, 1949 do apply to the lease with which we are concerned in this case.

11. If the lease is considered to be of the year 1944, Rule 47 read with Rule 41 of the Mineral Concession Rules, 1949 could not apply to it, as it was created before these rules came into existence. Aforesaid Rules of Mineral Concession Rules 1949, could have no application even if the lease is considered to be a statutory lease under the Bihar Land Reforms Act of the year 1951 when the Mineral Concession Rules of 1949 were in force. Section 10 of the Bihar Land Reforms Act which creates a statutory lease in favour of the lessee and is relevant for the purpose lays down that the terms and conditions of the statutory lease shall, *mutatis mutandis*, be the same as the terms and conditions of the

original (subsisting) lease with one exception that under the circumstances mentioned in the section, the State Government could determine the lease. As the Bihar Land Reforms Act received the assent of the President, under Article 254(2) of the Constitution of India, the provisions of this Act shall prevail over the provisions of the Mineral Concession Rules, 1949 which were framed u/s 5 of the Mines and Minerals (Regulation and Development) Act, 1948, a Central Act which was in existence at the time the Bihar Land Reforms Act was assented to by the President.

12. Mr. Mazumdar also drew our attention to the proviso to Sub-section (2) of Section 10 of the Bihar Land Reforms Act, according to which, nothing in that sub-section shall be deemed to prevent any modification being made in the terms and conditions of the lease in accordance with the provisions of any Central Act for the time being in force regulating modification of the existing mining leases. Modification referred to in the proviso does not mean automatic modification. Modification could be made to any lease only in accordance with the provisions of the relevant Central statute, that is, the Mines and Minerals (Regulation and Development) Act, 1948 and the rules made thereunder, that is, the Mining Lease (Modification of Terms) Rules, 1956. According to 1956 Rules, certain procedure was to be followed for modifying the terms and, admittedly, no modification of the terms of the lease with which we are concerned was made.

13. The Mines and Minerals (Regulation and Development) Act was re-enacted in the year 1957. Section 16 (1) of this Act provides that all mining leases granted before the 25th day of October, 1949, shall, as soon" as may be after the commencement of this Act, be brought into conformity with the provisions of this Act and the rules made under Sections 13 and 18. In the Bihar Mines Ltd. Vs. Union of India (UOI), , it has been held that the terms and conditions of a statutory lease, which came into existence as a result of the provisions of Section 10 of the Bihar Land Reforms Act could not be modified under the Mines and Minerals (Regulation and Development) Act, 1957 and the rules made thereunder. According to the written statement of defendant No. 2 (State of Bihar), the plaintiffs themselves are lessees in respect of mines and minerals from Jharia Estate. Thus the lease by the plaintiffs to defendant No. 1 with which we are concerned is not a head lease but merely a sub-lease. According to the aforesaid decision of the Supreme Court, when the head lease becomes statutory lease and its terms cannot be modified, the terms of a sub-lease under that head lease, even if it was granted prior to the coming into force of the Bihar Land Reforms Act, too cannot be modified. It is apparent, therefore, that neither the terms of the lease with which we are concerned have been or stand modified nor could be modified in accordance with the provisions of the Mines and Minerals (Regulation and Development) Act and the rules made thereunder except, perhaps, with regard to the quantum of royalty payable and the notice (Ext. 3) cannot be held to be illegal because it is not in accordance with the requirements of the relevant rules of the Mineral Concession Rules, 1949 and 1960, referred to above.

14. Mr. Mazumdar referred us to the decision (Full Bench) of our High Court in Khas Karanpura Collieries Ltd. and Others Vs. State of Bihar and Others, . It has been held in that case that Section 30-A of the Mines and Minerals (Regulation and Development) Act, 1957, could apply to leases granted before the 25th day of October, 1949, but which became a statutory lease u/s 10 of the Bihar Land Reforms Act on the date of the vesting. Their Lordships were considering in that case the question of applicability of Section 9 of the Mines and Minerals (Regulation and Development) Act, 1957, after it had been made applicable to mining lease in respect of coal by a Notification of the Central Government. They were not dealing with the question of applicability of Section 16 of the said Act. Section 30-A refers to both Section 9 and Section 16 and it was urged before us by Mr. Mazumdar that the reasonings of the Full Bench did apply with same force to the question of applicability of Section 16 to leases which were, in fact, granted before the 25th day of October, 1949.

This argument need not detain us any further inasmuch as neither Mr. Mazumdar nor learned counsel for the State of Bihar, the appellant in the other appeal, could place before us any notification of the Central Government making Section 16 applicable to leases in respect of coal. Further, in my opinion, the question of applicability of Section 16 to such leases did directly arise for decision in the case of Bihar Mines Ltd. before the Supreme Court and it is not open to us to take a different view on that question.

15. Another contention of Mr. Mazumdar was that as the plaintiffs also claimed in the suit a decree for arrears of rent accrued due even after the date of forfeiture, they waived their right to forfeit the lease. It is not necessary to consider this contention of Mr. Mazumdar in detail inasmuch as the point is covered by recent Bench decision of this Court in Kedar Das Mohta and Others Vs. Nand Lal Poddar and Others, to which I was a party. It was held by me, another learned Judge of the court concurring, that a claim for rent in a suit for ejectment could not amount to waiver of forfeiture as the election to forfeit was complete and irrevocable when the suit for ejectment was instituted. I preferred the view taken in Padmanabhaya v. Ranga ILR (1911) Mad 161 to the view taken in Chowdhrair v. Mohd. Ebrahim ILR (1887) Cal 33. The Madras decision related to Transfer of Property Act whereas the Madras (Calcutta ?) decision to the Rent Act (Bengal Act 8 of 1869). I further observed:--

"Now, the second proviso to Section 112 expressly says that where rent is accepted after the institution of the suit to eject the lessee on ground for forfeiture, such acceptance is not a waiver. The rent claimed for the period subsequent to the forfeiture in a suit for eviction on the ground of forfeiture can be accepted by the landlord only after the institution of the suit. If the acceptance itself does not amount to waiver in my opinion, the mere claim acceptance in respect whereof can take place only after the institution of the suit cannot be said to be under the mischief of the clause "any other act on the part of the lessor showing an intention to treat the lease as subsisting" in Section 112

of the Transfer of Property Act. Once the election to forfeit is complete and irrevocable by institution of the suit, claim for rent in that suit cannot be taken as a waiver of the forfeiture. The act which may constitute waiver must be antecedent to the election and not an act simultaneous with the election or subsequent thereto".

16. Mr. Mazumdar contended that the plaintiffs claimed their right of forfeiture on another ground of claiming a decree that the dues of the plaintiffs be declared as first charge on the property. According to Mr. Mazumdar, the relief for khas possession on forfeiture and the relief for making the dues of the plaintiff a charge on the suit property were inconsistent, as the relief for making the dues of the plaintiff a charge on the suit property implied that the suit property even after the date of forfeiture belonged to the appellant. Mr. Mazumdar, therefore, submitted that it must be held that the plaintiffs having claimed a decree that the dues be made a charge on the suit property waived their right to forfeit the lease.

17. Mr. Chatterji, in reply to the above contention of Mr. Mazumdar, urged that the relief that the dues of the plaintiffs be made a charge on the suit property in the circumstances of the case was mere an alternative relief. The plaintiffs could not be definite on the date of the institution of the suit whether they would be granted a decree for khas possession on the ground of forfeiture. In case, they were not granted a decree for khas possession, but only a decree for arrears of royalties etc. it was necessary for them to pray for making the decree for royalties etc. a charge on the suit property, In my opinion, there is substance in this contention of Mr. Chatterjee and it cannot be held, as contended by Mr. Mazumdar, that because the plaintiffs claimed a decree that their dues be made a charge on the suit property, they waived forfeiture. Further, Mr. Chatterjee rightly urged that the appellant cannot be allowed to argue waiver because he did not plead waiver in his written statement. It has been held in the case of Kedar Das Mohta and Others Vs. Nand Lal Poddar and Others, referred to above, and another Bench decision of this court in Commissioner of Hazaribagh Municipality Vs. Fulchand Agarwala, that ordinarily plea of waiver cannot be allowed to be raised if it is not pleaded in the written statement. The contention of Mr. Mazumdar that the plaintiffs waived forfeiture must also fail.

18. Learned counsel for the appellant also referred to Section 214 of the Indian Succession Act and submitted that as the original plaintiff No. 1 died during the pendency of the suit, his heirs in absence of a succession certificate could not get a decree for arrears of royalties etc. When the suit was instituted, Sri. Janardan Kishore Lal Singh Deo was plaintiff No. 1. His sons Amardesh Kishore Lal Singh Deo and Samarsh Kishore Lal Singh Deo were plaintiffs 2 and 3 respectively. On the death of Sri Janardan Kishore Lal Singh Deo, his widow Saubhagya Sundari Devi and his daughter Aparna Devi were also brought on the record as plaintiffs 1 (a) and 1 (b) respectively. It was not the contention of learned counsel for the appellant that no decree for arrears of royalties etc. could be passed in favour of

plaintiffs 2 and 3, two of the heirs of original plaintiff No. 1 and plaintiff No. 4. Plaintiffs 2 to 4 were joint creditors along with original plaintiff No. 1 and members of joint family.

The law appears to be settled that a suit by one of the joint creditors who are members of a joint family, is maintainable on the death of the other and cannot fail for non-production of a succession certificate. Plaintiffs 2 to 4, therefore could get a decree as claimed in the plaint even without a succession certificate for arrears of royalties etc. Further, according to the recent decisions of the Supreme Court, when a person dies and some of his heirs are on the record, they represent his estate for the purpose of the suit and the suit does not become defective for bringing on the record other heirs of the deceased (vide *Dolai Molliko and Others Vs. Krushna Chandra Patnaik and Others*, , and *Mahabir Prasad Vs. Jage Ram and Others*, . The suit cannot, therefore, fail on the ground of want of a succession certificate.

19. As observed earlier, the original lease (Ext. 1) was dated the 5th September, 1914. The term of the lease was 30 years. It expired on 4th September, 1944. On the expiry of the lease, another lease was granted for a period of 49 years in accordance with the terms of the decree (Ext. 4) passed in T. S. 17 of 1943. The leasehold property was the same in both the leases is not in dispute. Mr. Mazumdar, however, contended that there was no clause for re-entry in Ext. 4 and, therefore, the plaintiffs could not get a decree for khas possession. Clause 2 of Part IX of the lease (Ext. 1) entitles the lessor to re-enter the lease-hold property if the lessee defaulted in payment of rent or royalty. Clause 1 (c) (v) of Ext. 4 makes all the clauses excepting clause 5 of Part IX of Ext. 1 applicable to the new lease which came into existence as a result of the compromise decree (Ext. 4). Obviously, therefore, there is no substance in this contention of Mr. Mazumdar.

20. Learned counsel for the appellant relied on Section 10 of the Bihar Land Reforms Act in support of his another contention that as a result of the provisions of this section, the interest of the plaintiffs had vested in the State of Bihar under the Bihar Land Reforms Act and, therefore, they could not maintain the suit for eviction of the appellant as well as for arrears of royalty etc. from the date of the vesting which took place before royalty and commission for September kist 1952 became due. In my opinion, the interest of the plaintiffs in the lease-hold property could not vest in the State of Bihar in such a way as to disentitle the plaintiffs to evict their sub-lessee and to realise royalty therefrom. As a result of Section 10 of the said Act, the plaintiffs themselves became lessees under the State of Bihar and as observed earlier, this position is also admitted by the State of Bihar (defendant No. 2) in its written statement. By Bihar Act 3 of 1965, the Land Reforms Act was amended and a new Section 10-A was added to it. Section 10-A runs as follows:--

"(1) The interest of every lessee of mines or minerals which is subject to a sub-lease shall, with effect from such date as may be notified in this behalf by the

State Government in the official gazette, vest in the State and thereafter the sub-lessee whose lease is not subject to any further sub-lease shall hold his lease directly under the State Government and the provisions of sub-sections (2) and (4) of Section 10 shall, mutatis mutandis, apply to his lease.

(2) No sub-lessee of mines or minerals holding under a lessee whose interest vests in the State Government under Sub-section (1) shall be entitled to claim any damages from his lessor on the ground that the term of the lease in respect of the mines or minerals have become incapable of fulfilment by the operation of this section".

It is by virtue of the provisions of Section 10-A that the interest of a lessee which is subject to a sub-lease vests in the State of Bihar with effect from such date as might be notified in this behalf by the State Government in the official Gazette. Could the interest of a lessee in mines and minerals, which was subject to sub-lease vest in the State of Bihar u/s 10, there would have been no necessity of amending the act and adding a new Section 10-A to it. Section 10-A has got no application to the present lease because as a result of the decree passed by the Court below, defendant No. 1 was a trespasser on the date of the said amendment and the interest of the plaintiffs as lessee was not subject to a sublease on the date. In my opinion, therefore, the interest of the plaintiffs as lessee has not vested in the State of Bihar and the decree of the court below granting to them the reliefs for eviction as well as for arrears of royalty etc, cannot be set aside on that ground. Ext. A-2, the Notification of the Central Government, dated the 20th December, 1961 making Section 9 of the Mines and Minerals (Regulation and Development) Act, 1957 applicable to mining leases in respect of coal does not make any difference.

As discussed earlier, in spite of the Bihar Land Reforms Act, the plaintiffs continued to be lessor and the appellant lessee in respect of the lease and that does not entitle the State of Bihar and disentitle the plaintiffs to realise royalty etc. from the appellant of this appeal. It has not been contended before us that the decree passed for royalty etc. for the period after 20th December, 1961 is in excess of what the plaintiffs could get from the appellant according to the Notification (Ext. A-2). Thus, I find no merit in F. A. 304 of 1964.

21. Taking for consideration now the other appeal (F. A. 248 of 1964) by the State of Bihar (defendant No. 2). I find that the appeal has been filed under misconception. The State of Bihar was not a plaintiff and could not get any decree in its favour. The relief portion of the Memorandum of Appeal runs as follows :--

"It is, therefore, prayed that this appeal be allowed with costs throughout and the decree passed by the Court below be set aside and it may be declared that the appellant is entitled to receive royalty from the plaintiffs and defendant No. 1."

The question of the State of Bihar getting any declaration in this suit does not

arise. As observed earlier, in its written statement, the State of Bihar admitted that the plaintiffs were mining lessees directly under the State with effect from the date of vesting according to the provisions of Section 10 of the Bihar Land Reforms Act. It did not claim and could not have claimed, for the reasons discussed while dealing with the other appeal, that the interest of the plaintiffs as lessees had vested in the State either before or on the date of the institution of the suit or the date of the decree. The claim made by the State that as a result of the Notification (Ext. A-2) not the plaintiffs but the State would get royalties directly from defendant No. 1 with effect from the date of Notification, that is. 19-12-1961 is not valid and tenable. I, therefore, find no merit in this appeal either.

22. In the result, both the appeals fail and are dismissed. The plaintiffs-respondents shall be entitled to costs in F. A. 304 of 1964. In the circumstances of the case, parties shall bear their own costs of this Court so far F. A. 248 of 1964 is concerned.

Shiveshwar Prasad Sinha, J.

23. I agree.