APPELLATE CIVIL.

Before Suhrawardy and Garlick J J.

TINKARI MUKHERJI.

v.

1928.

July 19.

NIRANJAN CHAKRAVARTI.*

Patni—*Holder of a* patni taluk *who transfers his interest, when ceases to be liable for rent to the zemindar.—Patni Regulation (VIII of 1819), ss. 5, 6.*

The liability to the *zemindar* of a holder of a *patni taluk*, who transfers his interest continues till the date on which the transferee furnishes security and the alienation is registered by the *zemindar* either voluntarily or through court under section 6 of the Patni Regulation.

The liability for rent does not cease by the deposit of the fee by the transferee and the tender of the necessary security.

Robert Watson and Co. v. *The Collector of Zillah Rajshahye* (1) and *Petamburee Dossea* v. *Chukoo Ram Singh* (2) followed.

Kristo Jeebun Bakshee v. *A. B. Mackintosh* (3) and *Sasi Bhushun Raha* v. *Tara Lal Singh Deo Bahadur* (4) referred to.

SECOND APPEAL by the defendant No. 1, Tinkari Mukherji.

The plaintiff brought a suit for the recovery of rent of a *patni taluk* with cesses for the period from Magh *kist* of 1327 to Baisakh 1330, that is, from January, 1921 to April, 1923. The *patni* formerly belonged to defendant No. 1, who made a gift of it, by a registered deed, dated 8th Chaitra, 1328 (22nd March, 1922), in favour of his daughter-in-law, who was joined as defendant No. 2. The plaintiff having refused to recognise the transferee, she applied to the District Judge and it was ordered, on the 15th November, 1922, that she would be recognised on her paying the fee and depositing a certain sum as

* Appeal from Appellate Decree, No. 956 of 1926, against the decree of B. K. Basu, District Judge of Birbhum, dated Dec. 11, 1925, affirming the decree of Satis Chandra Basu, Subordinate Judge of Birbhum, dated Aug. 1, 1924.

(1) (1869) 13 M. I. A. 160.
(2) [1846] S. D. A. 372.
(3) (1864) W. R. Gap Vol. C. R. 53.
(4) (1895) I. L. R. 22 Calc. 494.

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security which she did on the 17th February, 1923, corresponding to 5th Falgoon, 1329. The defendant No. 1's defence *inter alia* was that the date up to which the defendant No. 1 was liable should be the date of the deed of gift.

The Subordinate Judge, who tried the suit, held that the defendant No. 1 was liable for the rent up to Magh *kist* of 1329, or 17th February, 1923, when security was deposited, and decreed the suit accordingly. The defendant No. 1 appealed to the District Judge and contended that on deposit of security and mutation of names in the landlord's books under Articles 5 and 6 of the Patni Regulations the latter was bound to recognise the transfer retrospectively from the date of the gift. The District Judge, agreeing with the Subordinate Judge, dismissed the appeal and the defendant No. 1 appealed to the High Court.

Mr. Bankim Chandra Mukerjee (with him *Mr. Hari Prasanna Mukherjee*), for the appellant.

Mr. Sitaram Banerjee, for the respondents.

SUHRAWARDY AND GARLICK JJ. The only point canvassed in this appeal is whether the appellant (defendant No. 1) is liable for the amount of rent decreed against him. The suit is for *patni* rent for the period from Magh *kist* of 1327 to Baisakh, 1330, that is, from January, 1921, to April, 1923. The appellant's contention is that his liability for rent has ceased from the 22nd March, 1922, the date on which he made a gift of this *patni* to his daughter-in-law. The trial court passed a decree against the appellant up to the Magh *kist* of 1329 or 17th February, 1923, that being the date when the security money was paid and the name of the transferee was registered in the *zemindar's sherista.* That decree was upheld by the District Judge in appeal. It is argued that the Patni Regulation invests the *patnidar* with absolute right of transfer and, therefore, as soon as the *patnidar* assigns his interest to any person his liability for rent ceases on and from that date. It is contended on the other side that the liability of the

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patnidar under the Regulation continues till the *zemindar* registers the transferee as a tenant and has removed the name of the original *patnidar*. In our opinion the respondents' contention must be upheld. Section 5 of the Regulation VIII of 1819 vests the right of alienation of a *patni taluk* in the holder thereof. It further says that it shall not be competent to the *zemindar* to refuse to register and otherwise to give effect to such alienations by discharging the party transferring his interest from personal liability. But he may demand his fee fixed at a certain percentage and may also demand security from the transferee or purchaser to the amount of one-half of the *jama* or yearly rent payable to him for the tenure transferred. Section 6 says that it shall be competent to the *zemindar* or other superior holder to refuse the registry of any transfer until the fee above stipulated is paid and until substantial security for the amount specified is tendered and accepted. Section 5 gives the *patnidar* a general right of transfer even without the consent of the *zemindar*, but section 6 protects the right of the *zemindar* and postpones the discharge of the *patnidar* from personal obligation till the *zemindar* is secured in his right to receive rent. So long, therefore, as the *zemindar* is not satisfied that the transferee may be looked upon for the rent reserved he has the right to refuse to recognize the transferee. But if he wilfully refuses to approve the security tendered by the purchaser he may be compelled to accept it and give effect to the transfer without delay. These two sections read together indicate that the *patnidar* has the absolute right of transfer; but the *zemindar* has the right to refuse to recognise the transfer and to hold the *patnidar* liable under the obligation created by the contract until the transferee gives substantial security which is accepted by the *zemindar* or which he is compelled by the civil court to accept. A great deal of argument has been wasted on what should be the general law in a matter like this or whether under other enactments liability of a lessee should continue after the transfer.

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These sections of the Patni law have been interpreted in several cases. In *Khettur Paul Singh* v. *Luckhee Narain Mitter* (1), the question was between the *patnidar* and the *darpatnidar*. It arose under sections 5 and 6 of the Patni Regulation. The suit was brought by the *darpatnidar* to recover from the *patnidar* certain sum which he had paid as rent to the *zemindar* in order to save the *patni*. The *darpatnidar*, however, had not got his name registered in the *zemindar's sherista*; and it was, therefore, objected that the payment of rent made by him was a voluntary payment. It was held that though the *darpatnidar* was not registered in the *zemindar's* record he had sufficient interest to protect it from sale. In coming to this conclusion the learned Judges observed: "In "all cases until the transfer is registered the old "tenant and the tenure itself are liable for the rent "due." The case was carried to the Privy Council (2). Their Lordships referred to several reported cases in which it was held: "The grantor of a "*darpatni taluk* is not bound to recognise the assignee "of the tenure until the transfer has been registered "in his *sherista*, and that, until such registry has been "effected, he may sue the original *darpatnidar* for "the rent, and sell the tenure in execution of a decree "obtained in such suit without notice to the assignee." Accepting this view, their Lordships proceeded to observe: "Until the assignment has been registered, "or the assignee has been accepted by the *patnidar* "as his tenant, the assignor is not discharged from "liability, and such liability may be enforced by the "sale of the *darpatni taluk* in execution of a decree "against him for the rent." In *Robert Watson & Co.*, v.*The Collector of Zillah Rajshahye* (3), the Judicial Committee considered the effect of sections 5 and 6 and at page 175 observed that it is to be considered, "that the *zemindar* has granted a tenure of a parti- "cular kind, the incidents of which are well defined "by law, to a tenant, and that he has a right to look to

(1) (1871) 15 W. R. C. R. 125.

(2) (1873) 20 W. R. 380.

(3) (1869) 13 M. I. A. 160.

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" the ostensible tenant, and is not bound to take notice " of the various interests which may be created other- " wise than by an authorized alienation." There can be no dispute that the liability of the *patnidar* does not cease with the transfer before the *zemindar* has accepted the transfer and registered the name of the transferee by removing the name of the *patnidar* from the record. Some support of this view is to be found in the old case of *Petumburee Dossea* v. *Chukoo Ram Singh* (1). The facts are not quite similar, but the observation made in that case is relevant. There the *patni* stood in the names of two persons. Subsequently there was a litigation with a third person and by partition the *patni* fell to the share of that third person. It was contended by the two persons whose names stood in the *sherista* of the *zemindar* that they were not liable for rent after the date of the allotment. It was observed by a Bench of three Judges of the Sudder Dewani Adawlat: " They deem the appel- " lants also responsible inasmuch as they have not " resorted to the easy remedy provided by section 5, " Regulation VIII of 1819, of relieving themselves by " compelling the *zemindar* to record the transfer and " erase their names."

Then it is contended on behalf of the appellant that his liability ought to cease from the date when the fee and the security were offered to the *zemindar* and he wrongfully refused to accept them. It appears that proceedings were started in the civil court with reference to this matter under paragraph 2 of section 6. Only a copy of the judgment of the District Judge relating to these proceedings has been filed. That judgment shows that the District Judge directed the *zemindar* to accept the fee mentioned in section 5 and he was further directed to advise the defendant No. 2 (the transferee) to furnish or tender the security mentioned in section 5. It does not appear from the judgment that any fee or security was offered and refused by the *zemindar* before the order made by the civil court. It is said on behalf of the respondent and

(1) [1846] S. D. A. 372.

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it seems to be very likely that the *zemindar* was unwilling to accept the transferee as a tenant because she was a *pardanashin* lady and the daughter-in-law of the original *patnidar*. The liability of the *patnidar* for rent does not cease by the deposit of the fee by the transferee and the tender of the necessary security. He must be ready if the *zemindar* refuses to accept the security and register his name to follow it by the procedure laid down in section 6. That was the view which was adopted in *Kristo Jeebun Bakshee* v. *A. B. Mackintosh* (1), where it was remarked: "We think, too, that it is not enough to ask for regis- "tration only, but that section 6 specifically provides "what is legally to be done if the request be refused; "and that this legal course was not adopted by the "appellant."

Several cases have been cited before us which relate to the provisions relating to tenures under the Bengal Tenancy Act. It has been held on the wording of section 12 of the Bengal Tenancy Act that the transfer is complete as soon as the deed is registered. This has no application to the present case. Then again several cases have been cited in which section 108 (*j*) of the Transfer of Property Act came under consideration. There too it has been held that the liability of the lessor does not cease before the landlord has accepted the transfer of the lease: *Sasi Bhushun Raha* v. *Tara Lal Singh Deo Bahadur* (2). In *Chintamoni Dutt* v. *Rash Behari Mondul* (3), which was a case under the Bengal Tenancy Act, it was observed that "although it certainly was the "case before the Bengal Tenancy Act was passed that "the courts always held that the landlord is entitled "to look to his recorded tenant for all rent until he "receives due notice of the transfer, the present law, "as explained by the decision in *Kristo Bulluv Ghose* v. *Kristo Lal Singh* (4), appears to have altered that "state of things." This observation goes to indicate

(1) (1864) W. R. Gap Vol. C. R. 53.
(2) (1895) I. L. R. 22 Calc. 494.
(3) (1891) I. L. R. 19 Calc. 17.
(4) (1889) I. L. R. 16 Calc. 642.

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the law outside the operation of the Bengal Tenancy Act.

Our conclusion on the facts and the law applicable to this case is that the decree passed by the courts below is correct in law and that this appeal should be dismissed with costs.

A A. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Rankin C. J. and Page J.

LINTON

v.

GUDERIAN.*

1928.

July 31.

Divorce—Jurisdiction—Domicile—Change of domicile—Onus of proof—Damages—Amendment of petition for divorce to one for damages alone or for judicial separation and damages—Damages, bases of—Collusion, what amount to—Indian Divorce Act (IV of 1869), ss. 2, 34.

Domicile in India at the time of the presentation of a petition for divorce under the Indian Divorce Act is an absolutely necessary condition of jurisdiction of Indian Courts so far as regards divorce.

Domicile of the parties to a marriage, in practice, means the domicile of the husband.

To establish change of domicile it must be proved that the change was made with a clear intention of settling there as a person whose ultimate and permanent home was to be in that country.

Winans v. *Attorney-General* (1) followed.

The entire burden of proving change of domicil lies on him who wants to establish it.

It cannot be said, in view of the plain provisions of section 34 of the Indian Divorce Act, that a Court cannot treat a petition for divorce as a petition for damages alone and award damages upon it, or as a petition for judicial separation and damages, simply because the Court has no jurisdiction to grant a decree for divorce.

Bernstein v. *Bernstein* (2) explained.

Monsell v. *Monsell* (3) referred to.

Damages suffered by a petitioner for divorce must be different according as he is getting a decree for divorce or is not to get a decree for divorce.

Collusion cannot be imputed from ordinary acts of parties which a solicitor would naturally regard as inoffensive and unobjectionable.

Churchward v. *Churchward* (4) and *Harris* v. *Harris* (5) referred to.

*Appeal from Original Decree, No. 30 of 1928, in Matrimonial Suit No. 3 of 1928.

(1) [1904] A. C. 287.
(2) [1893] P. 292.
(3) [1922] P. 34.
(4) [1895] P. 7.
(5) (1862) 31 L. J. Pr. (N. S.) 160.