CIVIL REVISION.

Before Edgley J.

1939

Dec. 5.

DEBENDRA NATH MAJHI

v.

SARAT CHANDRA NAYAK.*

Landlord and Tenant—Nishkar *holding and holding at rate of rent fixed in perpetuity, Incidence of—Usufructuary mortgage of* nishkar *occupancy holding—Restitution—Bengal Tenancy Act (VIII of 1885), ss. 18, 26G.*

There is no essential difference between a holding at a rate of rent fixed in perpetuity and an ordinary *nishkar* holding, because in the latter case the rent which has been fixed in perpetuity is nil.

By operation of sub-s. (2) of s. 18 of the Bengal Tenancy Act, therefore, s. 26G of the Act does not apply to *raiyats* holding their lands *nishkar*, even though they have a right of occupancy in the holding, and they are not entitled to maintain an application under sub-ss. (5) and (6) of s. 26G for the restoration of possession of their mortgaged land.

CIVIL RULE obtained by the mortgagee under s. 115 of the Code of Civil Procedure.

The facts of the case and the arguments in the Rule sufficiently appear from the judgment.

Purushottam Chatterji for the petitioners.

Nripendra Chandra Das and *Dharmadas Sett* for the opposite party.

EDGLEY J. This Rule is directed against an order of the learned Munsif of Bankura, dated April 1, 1939, under which he directed that certain property should be returned to the mortgagors under the provisions of s. 26G of the Bengal Tenancy Act.

The petitioners in this case are the mortgagees and they contend that the order made by the learned Munsif was wrong owing to the fact that the property with which the order is concerned was not

*Civil Revision, No. 999 of 1939, against the order of Abdus Sobhan Chaudhuri, Munsif, Third Court, Bankura, dated April 4, 1939.

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covered by s. 26G of the Bengal Tenancy Act. In the mortgage bond the mortgagors' right was described as *nishkar* and it was on this basis that the mortgage transaction took place. The learned advocate for the petitioner contends that a *nishkar* holding should be regarded as being governed by s. 18 of the Bengal Tenancy Act and I consider that there is great force in this contention. In the case with which we are now dealing, it was apparently admitted by the mortgagors that their holding was a *nishkar* holding and rent-free in perpetuity. In a case of this sort there is, to my mind, no essential difference between a holding at a rate of rent fixed in perpetuity and an ordinary *nishkar* holding, because in the latter case the rent which has been fixed in perpetuity is nil. It is provided by sub-s. (*2*) of s. 18 of the Bengal Tenancy Act that certain provisions of the Act including s. 26G shall not apply to *râiyats* holding at fixed rates, even although such *râiyats* have a right of occupancy in the lands of their holdings. The mortgagors appear to have had occupancy rights in the holdings which are the subject-matter of this case and they must also be taken to be governed by s. 18 of the Bengal Tenancy Act. This being the case, I must hold that the provisions of s. 26G of the Bengal Tenancy Act do not apply and it follows that the order made by the learned Munsif dated April 1, 1939, must be set aside.

The Rule is, accordingly, made absolute with costs.

The hearing-fee is assessed at one gold mohur.

Rule absolute.

A. A.