APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha

Mr. Justice Md. Abdul Wahhab Miah

Mr. Justice Hasan Foez Siddique

Mr. Justice A.H.M. Shamsuddin Choudhury

CIVIL APPEAL NO.364 OF 2002.
(From the judgment and order dated 10.6.1999 passed by the High Court Division in Writ Petition No.2702 of 1996.)

Government of the Peoples Republic of Bangladesh and others:
.....Appellants.

Versus

Md. Kazemuddin Miah:
.....Respondent.

For the Appellants:
Mr. Ekramul Haque, D.A.G. Instructed by Mrs. Madhumaloty Chowdhury Barua, Advocate-on-Record.
For the Respondent:
Ex-parte.
Date of hearing: 12th March, 2014, 2nd April, 2014, 25th November, 2014 and 2nd December, 2014.
Date of Judgment: 2nd December, 2014.

J U D G M E N T

Surendra Kumar Sinha,J:

1. This appeal by leave is directed from a judgment of the High Court Division in Writ Petition No.2702 of 1996. The question involves in this appeal is whether the right, title and interest of the tenant or his successor-in-interest shall subsist in the land or a portion thereof which were diluviated prior to the substitution of section 86 of the State Acquisition and Tenancy Act, 1950, by the State Acquisition and Tenancy (Amendment) Act (Act XV of 1994) if the land re-appear *in situ* within thirty years of their loss, which came into effect on 13th July, 1994, or in the alternative, whether the right, title and interest of the tenant or his successor-in-interest shall extinguish in the said land in the process of loss by diluvion prior to the date of commencement of the substituted provisions of section 86 of the Act, 1950 but the said land re-appear *in situ* within thirty years from 13th July, 1994.

2. Short facts which are relevant for the disposal of this point are as under:

The respondent claimed that his ancestral land situated on the bank of Padma under Faridpur district were diluviated in 1947 and then he shifted to Mouja Charbhadrason, within

Faridpur District in 1948. Subsequently he shifted to Jhaukanda, Dohar, under Dhaka district by purchasing some land in 1956 due to diluvion of the said land. These land were also diluviated by the river Padma in 1991. He purchased some land in Dohar which were also diluviated in 1992. The Secretary of the Ministry of Land communicated a memorandum upon all the Deputy Commissioners directing them to take steps in respect of the land which were diluviated/reformed *in situ* stating that the substituted provision of section 86 by Act XV of 1994 would be prospective in operation and that the new provision would not be applicable in respect of those land which were diluviated and alluviated prior to that date, that is to say, the said land would be treated as khas land of the Government in accordance with the old provision. To appreciate the point, it is necessary to reproduce the said memorandum which is as under:

> "The State Acquisition and Tenancy (Amendment) Act, 1994 *msm` KZK.MpxZ AvBbwU 13B RyjvB ZwiL gnvgvb¨ ivócwZi m¤gwZ jvf K‡i‡Q Ges evsjv‡`k †M‡R‡U cKwkZ n‡q‡Q| D³ ZwiL †_‡K AvBbwU KvhKi e‡j Mb¨ Ki‡Z n‡e|*
> *ZvB, 13B RyjvB/94 Gi cÖ`b chš †h mg¯ Rwg wmKw¯/cqw¯ n‡q‡Q H Rwgi †¶‡Î GB AvBb KvhKi bq e‡j Mb¨ Ki‡Z n‡e| A_vr 13/7/1994 ZwiLi cÖe hLbB wmKw¯ ev cqw¯ †nvK bv †Kb †m ai‡bi Rwgi †¶‡Î GB AvBb c‡hvR¨ n‡e bv eis cÖZb AvBb †gvZv‡eK H Rwg miKv‡ii Lvm LwZqvb fz³ n‡e| Z`vbyhvv‡i mKj †Rjv ckvmK‡K KvhKi e¨e¯nv Mn‡bi wb‡`k †`qv n‡jv|*"

3. The respondent sought judicial review of the said memorandum. The High Court Division held that 'the impugned order in respect of land which re-appeared (alluviated) prior to 13th July 1994 will vest in the Government and that the Act XV of 1994 was not applicable to such land ..... the impugned order 'Annexure D' to that extent' and gave a direction that 'all lands diluviated prior to 13th July, 1994, will vest in the Governments and that the Act XV of 1994 was not applicable to such lands in diluvion to be illegal and without lawful authority.' However, in the operating part of the judgment the High Court Division declared that 'the order directing to treat all lands diluviated prior to 13th July, 1994 to have vested in the Government.' It appears to us that the High Court Division has made inconsistent observations and directions which require to be clarified for the interest of the riparian cultivators. The question involves is one of interpretations of section 86 of the State Acquisition and Tenancy Act, 1950 (the Act of 1950).

4. In defining the role of the court in interpreting a statute, Salmond on Jurisprudence, 12th Edn. page 132, stated:

> "The duty of the judicature is to discover and to act upon the true intention of the legislature-the *mens or sententia legis.* The essence of the law lies in its spirit, not in its letter, for the letter is significant only as being the external manifestation of the intention that underlines it. Nevertheless in all ordinary cases the courts must be content to accept the *lietera legis* as the exclusive and conclusive evidence of the *sententia legis*. They must in general take it absolutely for granted that the legislature has said what it meant, and meant what it has said. *Ita scriptum est* is the first principle of interpretation. Judges are not at liberty to add to or take from or modify the letter of the law, simply because they have reason to believe that the true *sententia legis* is not completely or correctly expressed by it".

5. Bennion on 'Understanding Common Law Legislation stated that the court is to read a provision of a statute in its context which includes other provisions of the statute and to see if on reading of the statute in its context the language appears to be vague, ambiguous or

equivocal needing interpretation. A statute should be given an informed construction taking into account its context and the court is to find the legal meaning of the provisions of the statute which corresponds to the original legislative intention. Where the literal construction would not further the purpose of the legislature literal meaning is to be departed from even though there is no ambiguity or vagueness and a construction which accords with the purpose of the legislation should be given. When the language of an enactment is ambiguous and admits of more than one meaning, then the court is to find out which one of the meaning is in accord with the legislative intent and that meaning is the legal meaning. But when the literal meaning is found to be contrary to the purpose of the legislation, the court is to give a purposive construction which accords with the purpose of the legislation and for that purpose modify the language used in the enactment.

6. In order to find out the object and purpose of an enactment, the courts are entitled to find the intention of the legislature and its purpose and give meaning of the words to further the same so as to suppress the mischief and further just and fair results. Statutes have to be construed in a manner so as to promote the purpose and its object, and not too literally so as to defeat the purpose or render the provision meaningless otiose. A statute is best interpreted when we know why it was enacted. In Holme V. Guy, (1887) 5 Ch.D. 901, Sir George Jessel MR. said, 'The court is not to be oblivious of the history of law and legislation.' Following a passage from Maxwell, Supreme Court of India in Kesavananda Bharati V. State of Kerala, AIR 1973 SC 1461 (1879) observed:

> "In this interpretation of statutes the interpreter may call to his aid all those external or historical facts which are necessary for comprehension of the subject matter, and may also consider whether a statute was intended to alter the law or to leave it exactly where it stood before. But although we can have in mind the circumstances when the Act was passed and the mischief which then existed so far as these are common knowledge ....."

7. The Supreme Court of India in this connection in Nasiruddin V. Sita Ram, AIR 2003 SC 1543 observed:

> "The Court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the Court can iron out the fabric. It cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of the provision is plain and unambiguous. It cannot add to or subtract words to a statute or read something into it which is not there. It cannot re-write or recast legislation. It is also necessary to determine that there exists a presumption that the Legislature has not used any superfluous words. It is well settled that the real intention of the legislation must be gathered from the language used".

8. The most fair and rational method for interpreting a statute is by exploring the intention of the legislature through the most natural and probable signs which are either words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law. In the court of law what the legislature intended to be done or not to be done can only be legitimately ascertained from that what it has chosen to enact, either in express words or by reasonable and necessary implication. When the legislative intent finds specific mention and expression in the provisions of the Act itself, the same cannot be whittled down or curtailed and rendered nugatory by giving undue importance to the so-called object underlying the Act. True intent of the legislature has to be gathered and deciphered in its proper spirit having due regard to the language used therein. (Keshavji Raviji V. Commissioner of Income Tax, AIR,

1991 SC 1806). The primary object in interpreting a statute is always to discover the intention of the legislature and the rules of interpretation developed in England can be relied on to aid the discovery because those whose task it is to put the intention of the legislature into language, fashion their language with those very rules in view. Crawford in his Statutory Construction at page 506 stated "The court should study it as a whole and even if it resorts to a reasonable or liberal construction, care should be taken not to defeat the intention of legislature".

9. Previous legislation may also be relevant to the interpretation of latter statute in two ways- (a) the course which legislation on a particular point has followed often provides an indication as to how the Act at present should be interpreted; and (b) light may be thrown on the meaning of a phrase in statute by reference to the specific phrase in an earlier statute dealing with same subject matter. Lord Halsbury in Eastman Photographic Co. V. Comptroller General of Patents (1898) A.C. 571(575) said 'To construe the statute now in question it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy'. In this connection the author of Craies on Statute Law, Seventh Edition, at page 126 said, the cause and necessity of the Act may be discovered, first, by considering the state of the law at the time when the Act was passed. In innumerable cases the courts, with a view to construing an Act, have considered the existing law and reviewed the history of legislation upon the subject. 'While we are to collect what the legislature intended from what it has said, we must look not at one phrase or one section only at the whole of the Act, and must read it by the light which the state of the law at the time ... throws upon it'. (SE RY V. The Railway Commissioners (1880)5 QB 217(240).

10. When a section is being added to an Act or a provision added to a section, the legislature commonly entitled the Act as an amendment. When a provision is withdrawn from a section, the legislature call the Act an amendment particularly when a provision is added to replace the one withdrawn. However, when a section is abrogated and no new section is added to replace it, legislature level the Act accomplishing the result a repeal. Southerland in this connection observed as under:

> "In interpreting an amendatory Act, the courts have followed the principles of construction used in the interpretation of an original Act, making special use of certain principles of interpretation particularly applicable to an amendatory Act; but in addition they have developed at least one principle of construction peculiar to an Act purporting to change an existing statute. Thus, as in the case of original Acts, the object in construing an amendatory Act is to determine the legislative intent. To do so, the court will read the amendment as a whole. Words of common use will be construed in their natural, plain and ordinary meaning. If possible, effect must be given to every word. The amendment will be given a reasonable construction: a literal construction which would lead to absurd consequences will be avoided. When the intent of the legislature is not clear from its language, the court will consider surrounding circumstances."

11. Crawford summarises the position thus:

> "Of course amendments or amendatory statutes are subject to the rules and principles of construction applicable to original enactments. For instance, the only legitimate recourse to construction is to ascertain the legislative intention. In ascertaining this intent the court may not only examine the body of the statute, but its caption. Statutes in pari materia may also be resorted to for

> assistance. Executive as well as judicial construction may likewise be of assistance. And the evil sought to be remedied by the amendment may be considered as some indication of the legislative intent."

12. Cooley in his Constitutional Limitations at page 771 stated, a retroactive is one which reaches back and gives to a prior transaction some different legal effect from that which it had under the law when it took place. Lord Hatherby in Pardo V. Bingham, (1870) LR 4 Ch. App.735(740) observed:

> 'Baron Parke did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was whether the legislature had sufficiently expressed that intention. In fact, we must look to the general scope and purview of the statute, and the remedy sought to be applied, and consider what was the further state of the law, and what it was that the legislature contemplated'.

13. Wright,J. in Re Athlumney, (1898) 2 QB 547, 553 pointed out the use of past tense i.e. 'shall have been' which might suggest an inference as to retrospectivity in former states, in common in modern drafting in cases where retrospectivity is clearly not contemplated.

14. The substance of the opinions of the authors is that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary. An enactment is presumed to be prospective unless the express provision in the enactment. The question of retrospective operation can never arise if the words of the statute make it clear that it should have prospective operation. Whenever the language of the legislature admits of two constructions, and if construed in one way results in too obvious an injustice, the court acts the view that such a result would never have been intended unless the intention has been manifested in the express words. Whenever the intention is clear that the Act shall have retrospective operation, it must unquestionably be so construed even if the consequences may appear unjust and hard. A retroactive statute contemplates the past and gives to a previous transaction by some different legal effect from that which it had under the law when it occurred or transpired.

15. Taking the above principles, it is pertinent at this juncture to explore the previous provisions on the subject matter for addressing the issue involves in this appeal. Diluvion and alluvion were common feature in this country because of the geographical location and the abundance of rivers flowing from Himalayas and its tributaries. There was no law for the protection of the land which were washed away by the tides of the river or the sea. The right on the land to reformation *in situ* was for the first time given statutory recognition in Alluvion and Diluvion Regulation, 1825 (Bengal Reg. of 1825) for the whole of Bengal covering Bangladesh. Clause 4 of the Regulation stated as under:

> 'when land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a Zaminder or other superior land-holder, or as a subordinate tenure, by any description of under-tenant whatsoever:
>
> Provided that the increment of land thus obtained shall not entitle to which the land may be annexed to a right of property or permanent interest therein beyond that

> possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II, 1819 or of any other Regulation in force.

16. Nor, if annexed to a subordinate tenure held a superior landholder, shall the under-tenant, whether a khudkas raiyat, holding a mourusi istimari tenure at a fixed rate of rent per bigha, or any other description of under-tenant liable by his engagements, or by established usage, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable.'

17. So, under this provision there was accrual of the right of a riparian landlord or raiyat (now tenant or malik) to the land gained by the recess of river or of sea, and there need no recognition of such right by the Government or the Revenue Officer subject, however, that he would not be exempted from the payment of rent and that such person could not claim a better right in the land added than what he had in the land to which the added land had been annexed. The underlying principle behind the promulgation of this provision has been lucidly explained by Lord Justice James in Felix Lopez V. Muddon Mohan Thakoor, 13 Moors I.A. 467, as under:

> 'Their Lordships, however, desire it to be understood that they do not hold that the property absorbed by a Sea or a River is, under all circumstances and after any lapse of time to be recovered by the owner. It may well be that it may have been so completely abandoned as to merge again like any other derelict land, into the public domain, as part of the Sea or River of the state, and so liable to the written law as to accretion and annexation..... .....

18. There is, however, another principle in the English Law, derived from the Civil Law, which is thus - that there is an acquisition of land from the Sea or River, by gradual, slow and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch or a feet or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land.'

19. The philosophy behind it, as appears from a plain reading of the provisions provided in Regulation 4 is that if the accreted land are not sizeable area, nobody else than the riparian owner to whose land the additional land had been annexed, could use the land. It was in the context of the behaviour of the rivers of this region, the legislature considered it necessary to give right of the accreted land to the riparian owners. The Rent Act, 1859, recognised the above principle that a landlord or raiyat was liable to enhancement of rent in case of increment of the area of the land of his tenancy by alluvion. So also, the landlord or the raiyat was entitled to abatement of rent in case of diluvion of the area of the land of his tenancy.

20. The Bengal Tenancy Act, 1885, repealed the Rent Act keeping similar provisions as to abatement and enhancement of rent in section 52 of the Act. No specific provision was made in it relating to the right of accreted land or right to the reformation *in situ* in those Acts. They were guided and regulated by the Regulation of 1825. There was a change in the Bengal Tenancy Act by way of amendment in 1929 by inserting section 86A by the Bengal Act IV of 1928. It provided that the tenant's right in the diluviated land could be deemed to have been surrendered and extinguished, if the tenant obtained any order of abatement of rent in respect of such diluvion. Sub-section (2) of section 86A provided, however, that such extinction of right would not affect the accrual of his right of accretion in respect of the said

land if it was available to him under any other law. This provision was substituted by new section 86A in 1938 enlarging the tenant's right in certain respects. This new provision provided automatic abatement of rent in the case of loss of land by diluvion ensuring the subsistence of the right of the tenant in the land lost by diluvion for a period of twenty years.

21. Then there was drastic change in the tenancy laws by the State Acquisition and Tenancy Act, 1950, (Act of 1950), which is more or less a confiscatory piece of law. The object of this piece of legislation is liquidation of rent receiving interests subsisting between the State and the tillers of the soil. However, there was no substantial change with regard to the diluviation and alluviation of land. The provisions relating to the abatement of rent due to diluvion and the subsistence of tenant's title in respect of such land had been kept similar to those in section 86A of the Bengal Tenancy Act, in section 86. It would be appropriate to reproduce the original provision as under:

> "86(1) Abatement of rent on account of diluvion and re-entry into lands which re-appear-If the lands of a holding or a portion of such lands are lost by diluvion, the rent of the holding shall, on application made be abated by such amount as may be considered by the Revenue Officer to be fair and equitable in accordance with the rules made in this behalf by the Provincial Government.
>
> (2) Notwithstanding anything contained in any other law the right, title and interest of the tenant or his successors-in-interest shall subsist in such lands or portion thereof during the period of loss by diluvion, not exceeding twenty years, whether partly before and partly after or wholly after the commencement of this Part; and the tenant or his successors-in-interest shall have the right to immediate re-possession on the re-appearance of such lands or portion thereof within twenty years of their loss by diluvion, and be liable to pay (arrears of rent without interest or damage in respect of the lands which has re-appeared for the period which it was lost or for 4 years whichever is less).

22. Provided that, when the lands or portion thereof which have so reappeared added to the total area of lands already in the possession of such tenant or his successors-in-interest exceed the area of lands which the tenant was allowed to retain in his possession under section 20, or the limit laid down in section 90, whichever be greater, such tenant or his successors-in- interest shall not have the right to repossession of such excess area of lands; and such excess area shall vest in and be at the disposal of the Provincial Government.

23. Provided further that allotment of lands, of which such tenant or his successors-in-interest are entitled to re-possession under the above proviso, shall be made according to the choice of such tenant or his successors-in-interest.

24. Provided further that the provision of this sub-section shall not apply to cases of re-appearance of lands caused or accelerated by any artificial or mechanical process as a result of development works undertaken by Government or by the East Pakistan Water and Power Development authority or by the East Pakistan Agricultural Development Corporation".

25. Part V of the Act contains section 86 which came into force in Dhaka on 1st August, 1963 and Faridpur on 5th August, 1963. Till such dates, in view of section 80 of the Act of 1950, the provisions of the Bengal Tenancy Act regulated the field of diluvion and alluvion of land in those districts. The deviation from the provisions of the Bengal Tenancy Act under the aforesaid provision is that there cannot be automatic abatement of rent in the case of loss of land by diluvion and there would be proportionate abatement of rent which might be

considered by the Revenue Officer on the application of the tenant. The subsistence of right on the re-appeared land of the tenant of such diluviated land shall continue within twenty years of loss or has re-appeared for the period which it was lost or for four years whichever is less subject to the condition regarding the total area of land that could be retained under sections 20 or 90 of the Act. If the total area of land in possession of the tenant exceeds the ceiling, his right of re-possession of the re-appeared land would be extinguished and the said land shall vest in the Government.

26. There was further change in the provisions by way of substitution of the said provision. The rights enjoyed by the riparian land owners on the accreted land was abrogated by the State Acquisition and Tenancy (Fourth Amendment) Order, 1972 (President's Order No. 135 of 1972) effective from 4th November, 1972, which substituted section 86 of the Act as under:

> "(1) If the lands of a holding or a portion of such lands are lost by diluvion, the rent of the holding shall be abated by such amount as may be considered by the Revenue Officer to be fair and equitable in accordance with the rules made in this behalf by the Government.
>
> (2) Notwithstanding anything contained in any other law for the time being in force, the right, title and interest of the tenant or his successors-in-interest shall be extinguished in such lands or portion thereof, whether the loss of such lands or portion by diluvion took or takes place before or after the commencement of the State Acquisition and Tenancy (Fourth Amendment) Order, 1972.
>
> (3) All lands, so lost by diluvion under sub-section (2), which re-appeared before the date of commencement of the said Order, but in respect of which the right of the tenant, whose land was so lost, or his successors-in-interest, to re-possession was not finally recognised or declared by a competent authority or Court under any law for the time being in force and also all lands, so lost by diluvion under the said sub-section, which may re-appear on or after the said date, shall vest absolutely in the Government free from all encumbrances and shall be at its disposal.
>
> (4) Notwithstanding anything contained elsewhere in this Act, in making settlement of any land vested in Government under sub-section (3), preference shall be given to a person who has been affected by diluvion provided the total quantity of land, if any, already held by him and the other members of his family is less than twenty-five standard bighas:
>
> Provided that the quantity of land so settled shall be such as, added to the quantity of land, if any, already held by such person and the other members of his family, does not exceed twenty five standard bighas.
>
> (5) All suits, applications, appeals or other proceedings in respect of any claim to the re-possession of any land lost by diluvion which has re-appeared or is alleged to have re-appeared pending before any Court or authority on the date of commencement of the said Order shall, not be further proceeded with and shall abate and no Court shall entertain any suit, application or other legal proceedings in respect of any such claim."

27. Sub-section (4) was substituted for the former sub-section (4) with retrospective effect from 4th November, 1972 by Ordinance No.LXI of 1975. The previous provision was that while making settlement of any land vested in the Government, preference shall be given to a person who has been affected by diluvion but he will not get such preference if the total quantity of land already held by him and other members of his family exceeds twenty standard bighas. Under the substituted provision a condition was attached in giving

preference to settlement to the effect that the re-appearance of the land must take place within twenty years from the date of loss. When the Regulation of 1825 was promulgated, the legislature explained in detail in the preamble which weighed in making the said provision. Whereas, the legislature was totally silent in substituting section 86 by P.O.135 of 1972.

28. Sub-section (1) of the substituted provision relates to abatement of rent in respect of the land lost by diluvion which does not bring about any change from the earlier one. It is similar to the one as was amended by the East Pakistan Ordinance No.XXI of 1969, which dispensed with the filing of an application by the tenant to the Revenue Officer for abatement of rent as was required under the Bengal Tenancy Act. On a plain reading of the provisions substituted by P.O. 135 of 1972, there is no doubt about its operation, that is, it is prospective and referred to the land which were diluviated or still subject to diluvion. It was said 'diluvion took or takes place before or after .....'. Sub-section (2) purported to extinguish the title of the tenant/malik which had been lost by diluvion whether before or after the commencement of P.O.135 of 1972. So this provision is prospective in view of the language used to the effect that if the loss has taken place 'after the commencement of the State Acquisition and Tenancy (Fourth Amendment) Order, 1972'.

29. However, sub-section (3) which purported to confer title upon the Government in respect of the land which were lost by diluvion under sub-section (2) but re-appeared before the date of commencement of the said Order seemed to be otherwise. The land which were lost by diluvion but had re-appeared before the commencement of the said Order and also the land so lost by diluvion which may re-appear on or after the said date shall vest in the Government if the re-possession is not recognized by the Government or declared by a court. As regards in latter part is concerned, there is no difficulty to infer it in prospective operation because of the use of the expression 'which may re-appear on or after the said date .....'

30. This provision has been substituted again by the State Acquisition and Tenancy (Amendment)Act, 1994 (Act XV of 1994) which in fact revived the provision which was substituted by Article 2 of the President's Order No.135 of 1972 with certain modifications as under:

> "86. Abatement of rent on account of diluvion and determination of right in land re-appeared on account of alluvion –(1) If the lands of a holding or a portion of such lands are lost by diluvion, the rent or the land development tax of holding shall, on application or intimation made by the tenant in the prescribed form to the Revenue Officer, be abated by such amount as may be considered by the Revenue Officer to be fair and equitable in accordance with the rules made in this behalf by the Government and the act of such loss by diluvion shall be recorded in accordance with such rules, which shall be treated as proof of title to the lands when the same re-appear in situ.
>
> (2) Notwithstanding anything contained in any other law for the time being in force, the right, title and interest of the original tenant or his successor-in-interest shall subsist in the lands of a holding or portion thereof during the period of loss by diluvion if such lands re-appear in situ within thirty years of their loss.
>
> (3) Notwithstanding the right, title and interest under sub-section (2), the right to immediate possession of the lands re-appeared shall first be exercised by the Collector, either on his own motion or on an intimation made in writing by the tenant or his successor-in-interest whose land was so lost or by any other person.
>
> (4) Notwithstanding anything contained elsewhere in this Act, the Collector or the Revenue officer shall, on taking possession of such lands give public notice of the

fact of his taking possession in accordance with the rules made in this behalf by the Government and cause a survey to be made to the lands so re-appeared and prepare maps thereof.
(5) .....
(6) .....
(6) .....
(7).....”

31. As observed above, the original provisions contained in section 86 of the Act, 1950 was similar to that contained in section 86A of the Bengal Tenancy Act. This new substituted provision enlarged the rights of the tenant in certain respects. This provision provided for abatement of rent or tax on the diluviated land on the intimation by the tenant by such amount to be fair in accordance with the Rules, that is, the Tenancy Rules, 1954. Under the said Rules, if the entire land of a holding is diluviated, the entire amount of rent payable for such holding shall be abated. When a part of a holding is diluviated, the amount by which the rent of the holding shall be abated shall bear the same proportion to the rent of the entire holding of the areas of the land diluviated bears to the area of the land comprised in the entire holding. Though these Rules were promulgated in 1954, sub-section (1) clearly provides that these Rules will be applicable since no new Rules have been framed thereafter. The only difference between these two provisions is that under the substituted provisions contained in 86A of the Bengal Tenancy Act in 1938, there was automatic abatement of rent in case of loss of land by diluvion but under the present provision, the abatement of rent or taxes on the diluviated land will take place on the intimation of the tenant proportionate to the land lost and if there is re-appearance within thirty years of loss, the order of the Revenue Officer on such intimation shall be treated as proof of title to the land.

32. So, this provision ensured the subsistence of the title to the land lost by diluvion on the re-appearance of the land within a period of thirty years notwithstanding the abatement of rent or tax. The other difference between these two provisions is that under the present provision the right of possession after re-appearance shall be exercised initially by the Collector who shall make a survey of the land so re-appeared and after completion of survey, he shall allot the land to the tenant whose land were lost provided that the quantity of land in his possession together with the land alluviated shall not exceed sixty standard bighas and the excess land shall vest in the Government.

33. Reading sub–section (2) of section 86, one may come to the conclusion that these provisions are also prospective in operation, inasmuch as, it has been provided that ‘the right, title and interest of the original tenant or his successor-in-interest shall subsist in the lands of a holding.....’ The subsistence of title of the tenant if the diluviated land ‘re-appear in situ within thirty years of loss’ that is to say, if the re-appearance takes place in future. If we compare the two provisions of sub-section (2), the earlier one substituted by P.O.135 of 1972 and the present one substituted by Act XV of 1994, we may come to a correct conclusion. Under the old provision the right, title and interest of the tenant or his successor shall be extinguished if the diluvion took or takes place ‘before or after the commencement of the State Acquisition and Tenancy (Fourth Amendment) Order, 1972’, i.e. till the date of substitution of section 86 by Act XV of 1994.

34. Apparently the right, title and interest of the tenant or his successor shall subsist in the land from the date of substitution of section 86 if the land diluviated re-appear within thirty years from that date. The legislature is totally silent as regards the operation of the substituted Provision by Act XV of 1994, whether this provision will have prospective or retrospective

effect but we find no ambiguity in the language used in it. It is said 'the right, title and interest of the original tenant or his successor-in-interest shall subsist.....' The legislature has used the word 'shall' that is, the right of the tenant shall subsist in respect of diluviated land if such land re-appear within thirty years of loss, that is to say, if the re-appearance of the diluviated land takes place in future. Under the previous provision limited retrospective operation was given to the loss of land by diluvion which 'took' place before the commencement of the substituted provision but under the present provision, such language was deliberately omitted.

35. The High Court Division reproduced section 86 substituted by P.O.135 of 1972 and then the next substituted provision by Act XV of 1994 while considering the commencement and operation of the law and formulated the point to the effect that "whether the petitioner's right on his lands diluvated 1991 and 1992 subsists under the State Acquisition and Tenancy Amendment Act, 1994" and then it considered sub-sections (2) and (3) of section 86 which were substituted by P.O.135 of 1972 and held that 'although by clause (sic) 2 of the article (sic) the right, title and interest of the tenant extinguished on diluvion the right, title and interest will vest in the Government in respect of such diluviated lands on its re-appearance' and then after consideration of sub-section (2) of the substituted provision by Act XV of 1994 held that 'the right, title and interest of the original tenant or his successor-in-interest shall subsist in the lands of a holding or portion thereof during the period of loss by diluvion if such lands re-appear *in situ* within thirty or their loss.' And then concluded its opinion by observing that 'the land which were in diluvion prior to 13th July, 1994, the right of the original tenant or his successors in these lands would continue if the land re-appeared in situ within 30 years. The Government can only claim such of those lands in diluvion which had re-appeared prior to 13th July, 1994 under the President's Order No.135 of 1972 but cannot claim such right in respect of land which is still in diluvion'. In respect of the impugned order, it was observed, in respect of the land 're-appeared (alluviated) prior to 13th July, 1994 will vest in the Government and that Act XV of 1994 was not applicable to such lands'. These findings are inconsistent with the operating part of the judgment. It is very difficult to follow the correct opinion expressed by the High Court Division.

36. This conclusion of the High Court Division is not only not sound but also contrary to the spirit of the law. When on a plain reading of the provision it is found that the tenant's right, title and interest shall subsist on the diluviated land if such land re-appear within thirty years of their loss, there is no scope for the courts to infer otherwise. They cannot enlarge and/or give a wider meaning of the words when they are clear and unambiguous. It is the fundamental rule of law that no statute shall be construed to have a retrospective operation unless such constitution appears very clearly in the terms of Act or arises by necessary implication. The use of the words 'shall' or 'hereafter' is taken to indicate an intent that the statute is to be construed as prospective only. It can be stated generally that an Act prima facie deals with future and not with past events.

37. There are three provisions in succession over the same subject matter. Under the original provision, the right of the tenant in the diluviated land or a portion thereof subsisted during the period of loss by diluvion not exceeding twenty years whether before and partly after or wholly after the commencement of Part-V and the tenant or his successor-in-interest was entitled to immediate re-possession on the re-appearance of such land or portion thereof within twenty years of loss by diluvion irrespective of the question whether any abatement of rent had taken place in respect of the land or not.

38. Under the substituted provision by P.O. 135 of 1972, the right, title and interest of the tenant or his successor-in-interest would extinguish with the diluvion of the land or portion thereof, whether the loss of such land by diluvion took/takes place before or after the commencement of the Order i.e. before or after 4th November, 1972. Then the present substituted provisions which came into force on 13th July, 1994, in which, the right, title and interest of the tenant or his successor-in-interest on the diluviated land or portion thereof during the period of loss by diluvion shall subsist if such land re-appear within thirty years of loss. The right of the tenant or his successor-in-interest to re-possession on the re-appeared land had altogether been taken away by P.O. 135 of 1972 and the interest of the tenant in respect of such diluviated land was extinguished. It was only if his re-possession was recognized by the Government or declared by the authority or the Court, he could claim right on such land. If there is reformation *in situ* before the commencement of P.O.135 of 1972, the right of the tenant or his successor-in-interest in respect of such land which were not recognized by the competent authority or court, the land so lost by diluvion even if re-appeared after the promulgation of the said Order would vest absolutely in the Government free from all encumbrances.

39. Again by way of addition of sub-section (4) by Ordinance LXI of 1975, there was departure from the original provision contained in sub-section (2), and a privilege has been given to the tenant that he or his successor be given the preference in respect of settlement of the land so lost subject to the land holding limitation. Sub-sections (2) and (3) of section 86 substituted by P.O.135 of 1972 would have limited retrospective operation from the date of coming into force of Part V of the Act in the particular district in which the land situate. Admittedly, the diluvion of the land in question in the present case took place between 1991 and 1992. The present substituted section 86(2) provides that the right, title and interest of the original tenant or his successor-in-interest shall subsist in the land of a holding or a portion thereof during the period of loss by diluvion if such land re-appear 'within thirty years of their loss'. This provision ensures the subsistence of the right, title and interest of the original tenant in the land lost by diluvion if the land so lost re-appear within thirty years of loss notwithstanding the abatement of rent of such lands.

40. In Syed Nizamuddin Mohsin V. Bangladesh, 41 DLR(AD) 141, the plaintiff instituted a suit in 1970 seeking declaration of title in respect of 12.40 acres of land on the averments that the said land gradually diluviated by the river in 1338 B.S. corresponding to 1931 and the land reformed *in situ* in 1352 B.S. The said land again sub-merged in 1362-63 B.S., which re-appeared in 1374 (1964) and thereafter, it was recorded in the name of the Government. Though the trial court decreed the suit but on appeal by Government the decision was reversed. On a second appeal, the High Court Division affirmed the appellate court's judgment on the reasonings that whatever title the plaintiff had which were extinguished by reason of sub-sections (2) and (3) of section 86 substituted by P.O. 135 of 1972. In the context of the matter, this Division on construction of sections (2) and (3) of section 86 of the Act substituted by P.O.135 of 1972 observed:

> "It is clear that clauses (2) and (3) as above get immediately attracted because the diluvion took place before the commencement of P.O.135 of 1972 and the lands also reappeared before the commencement of the said order. Under clause (2) the right, title and interest of the tenant get extinguished as soon as his land is diluviated. Clause (3) provides that all such lands which re-appeared before the commencement of P.O.135 of 1972 shall vest absolutely in the government free from all encumbrances and shall be at its disposal except those in respect of which the right of the tenant to re-possession was

> finally recognized or declared by a competent authority or Court, obviously after re-appearance."

41. Almost similar question came up for consideration before this Division in Mannan V. Kulada Ranjan, 31 DLR(AD) 195. While considering the right, title, interest of the tenant to the diluviated land after substitution of section 86 of the Act by P.O.135 of 1972 D.C. Bhattacharya, J. observed that 'the provisions of sub-sections (2) and (3) of section 86 of the Act cannot be given any retrospective effect beyond the date of coming into force of Part V of the Act in the area in which the diluviated lands were situated'. However, on the construction of section 87 which was substituted by P.O. 137 of 1972, it was observed in paragraph 38 that section 87 could have no effect before the provisions of Part V were brought into operation by the Government by issuing appropriate notifications under section 79 of the Act. Section 87 relates to the heading 'Right in land gained by accession from recess of river or sea'. Suffice it to mention here that both the provisions of sections 86 and 87 are cognate in nature.

42. It was observed that the intention of the law maker as to the extent of retrospectivity of section 87, from the use of the words "whether before or after 28.6.72" instead of using the more specific provision "whenever so gained" in sub-section (2), it may also very well be argued that had it been the intention of the law maker to give the widest possible retrospective effect to the provision of sub-section (1), it could have been very well expressed in sub-section (1) itself, instead of enacting sub-section (2), by inserting the words "nor shall be deemed to have been considered" in sub-section (1) after the words "it shall not be considered" and the words "and shall be deemed to have vested" after the words "shall vest" and by adding at the end of the said sub-section, the words of the latter part of sub-section (2) of section 87, which showed that section 87 could have no effect before the provisions of Part V were brought into operation. His Lordship concluded his opinion in the following manner:

> 'The past rights which have already accrued have not been sought to be affected by President's Order No.137 of 1972 retrospectively, but such rights were purported to be affected only prospectively. That is to say, the right of accretion which the riparian owner had acquired in respect of the lands added to his holding before 28.6.72 ceased to be operative and to remain in force only since 4.11.72, the date of the coming into force of the President's Order No.137 of 1972. In that sense also it would, no doubt, be destructive of some vested rights, though in a prospective sense'.

43. The new substituted sub-section (2) of section 86 clearly says that the right, title and interest of the tenant shall subsist during the period of loss by diluvion and the tenant or his successor can claim right to the said land if re-appear within a period of thirty years of loss. The meaning of this sub-section ensuring the right of the tenant or his successor is so clear that his right subsists if the diluvion and the alluvion takes place after coming into force of section 86 substituted by Act XV of 1994. There cannot be any explanation other than this. The Secretary of the Government gave the explanation of this substituted provision that if the land were diluviated prior to 13th July, 1994, the amended provision would not be applicable in respect of those land. It will be significant to note that in the introductory clause the words 'Notwithstanding anything contained in any other law for the time being in force' (emphasis supplied) have been used instead of using the words 'in the Act'. There is no reference to the law contained in the Act, 1950. The intention of the legislature is thus clear to come to the conclusion that if the land diluviated before 13th July, 1994, the tenant cannot claim right, title

or interest of the alluviated land even if the land re-appear within thirty years from 13th July, 1994. The tenant or his successor can claim title on the re-appeared land within thirty years of loss if the diluvion took place after 13th July, 1994.

44. The High Court Division has totally overlooked the views taken by this Division in Syed Nizamuddin Mohsin (Supra). Thus, the views taken by the High Court Division that the 'right, title and interest of the original tenant or his successor-in-interest shall subsist in the land of a holding or portion thereof during the period of loss by diluvion if such lands re-appear in situ within thirty years of their loss' and that the 'Government can only claim such of those land in diluvion which had re-appeared prior to 13th July, 1994 under the President's Order No.135 of 1972 but cannot claim such right in respect of land which is still in diluvion' are not only contrary to the letter and spirit of the legislature, but also inconsistent with the views taken by this Division. The High Court Division was totally confused of the language used in sub-section (2) of section 86. The observations of the High Court Division that 'the land which were in diluvion prior to 13th July, 1994, the right of the original tenant or his successors in these lands would continue if the lands re-appeared in situ within 30 years' is based on misconstruction of sub-section (2) of section 86.

45. This provisions carry one meaning other than that the right of the tenant shall subsist if the diluvion takes place after 13th July, 1994 and not in case of the diluvion which is in process prior to the coming into force of the substituted provision of section 86 by the Act XV of 1994. The tenant or his successor-in-interest can claim right in the said diluviated land if the said land re-appear within thirty years of loss from the said date. The High Court Division has unnecessarily endeavoured its effort on the question of vesting of the diluviated land in the Government instead of examining whether the tenant's right in the diluviated land or if the process of diluvion took place prior to 13th July, 1994, the tenant's right, title and interest shall exist or not.

46. In view of the use of the words, 'the right, title and interest of the tenant or his successor-in-interest shall subsist' during the period of loss if the land re-appear *in situ* within thirty years of loss is so clear and unambiguous that the legislature intended this provision to have prospective operation. The use of the word 'shall' is taken to indicate that the statute is to be construed as prospective only. The words 'within thirty years of loss' means if the diluvion takes place after 13th July, 1994, the tenant or his successor's right to re-possession shall subsist if the diluviated land re-appear within thirty years of loss and not otherwise. The amendment is prospective in operation and the High Court Division is not correct in giving retrospective operation of the substituted provision of sub-section (2) of section 86 of the Act of 1950.

47. We sum up as under:

(i) Land of a holding or a portion thereof is lost by diluvion prior to 4th November, 1972, the rent of the holding shall on application by the tenant would abate by such amount as would be considered by the Revenue Officer to be fair and equitable.

(ii) The right, title and interest of the tenant shall be extinguished if such land were lost by diluvion or the process of diluvion takes place before or after the date of coming into force of section 86 substituted by P.O.135 of 1972.

(iii) If the diluvited land or a portion thereof re-appeared after the commencement of P.O.135 of 1972 but in respect of which the right of the original tenant or his successor-in-interest whose land was so lost, to re-possession was not recognized

or declared by the competent authority or the court, all land so lost, which may reappear on or after 4th November, 1972, shall vest absolutely in the Government.

(iv) In making settlement of the said land, notwithstanding anything provided in paragraphs (ii) and (iii) above, the preference shall be given to the tenant or his successor-in-interest whose interest was lost by diluvion subject to the condition that such land or a portion thereof re-appeared within twenty years of such loss subject to the condition that the total area of land possessed by the tenant or his family does not exceed the ceiling prescribed by sections 20 or 90 of the Act of 1950.

(v) The rights which had already accrued to the tenant or his successor-in-interest on the day of coming into force of section 86 by P.O.135 of 1972 had not been affected but such rights were affected only prospectively.

(vi) If the land or a portion thereof is diluviated after 13th July, 1994, the rent or the land development tax of the holding of the tenant or his successor-in-interest be abated on his application, such amount as may be considered by the Revenue Officer and the act of such loss by diluvion shall be recorded by such Revenue Officer.

(vii) The right, title and interest of the tenant or his successor-in-interest shall subsist of a holding or a portion thereof during the period of loss by diluvion from 15th July, 1994, if such land re-appear *in situ* within thirty years of loss.

(viii) The Collector, either on his own motion or on the basis of application of the tenant or his successor-in-interest shall exercise the right of immediate possession of the land so re-appeared and shall give public notice of the said fact, prepare a map, make survey of the land and after forty five days of completion of survey, allot the land to the tenant or his successor-in-interest such quantity of land which together with the land already held by him shall not exceed sixty standard bighas.

(ix) Section 86 substituted by the State Acquisition and Tenancy (Amendment) Act, 1994 (Act XV of 1994) shall have prospective operation.

48. The appeal is, therefore, allowed without any order as to costs.