
(1948) 05 CAL CK 0008
In the Calcutta High Court
Case No : L.P.A. Nos. 2 to 7 of 1946

The Naihati Jute Mills Co., Ltd.

APPELLANT

Vs

Kali Prosad Saha and others

RESPONDENT

Date of Decision : 14-05-1948

Acts Referred:

Citation : (1948) 05 CAL CK 0008

Judgement

1. The Naihatti Jute Mills Company, Limited (hereafter called the company), the appellant before us, had about the year 1906 constructed a jute mill in two adjoining villages, Hazinagore and Prosadnagore situate within Police Station, Naihatti in the District of Twenty-four Pergunahs. For the purpose of extending the jute mill it took in the years 1919 and 1920 three permanent leases of lands in village Prosadnagore by three pottas, Exs. 5 to 5 (b), granted by Raja Kishorilal Goswami, the Mitters of Hooghly and by Madan Mohan Dey, the proprietors of the said village. Those leases were for manufacturing purposes and so the status of the company in respect of the lands covered by those leases is that of a tenant governed by the provisions of the Transfer of Property Act.

2. Kaliprosad Shaha and his co-sharer Jiban Kristo Shaha, Bhagjogini Bibi and Nobi Rasul held between them six tenancies in Mouza Prosadnagore under the company. The lands comprised in those tenancies are some of the lands included in the permanent leases, Exs. 5 to 5(b), which the company took from the aforesaid proprietors of that village in the years 1919 and 1920. In the record of rights prepared under Ch. X of the Bengal Tenancy Act and finally published in the year 1933 those six tenancies were recorded as basat tenancies, that is to say, tenancies created for residential purposes. Those six tenancies are the subject-matter of the six appeals before us.

3. All the said persons, Kaliprosad Shaha and his co-sharer, Bhagjogini Bibi and Nobi Rasul held and still hold arable lands in villages adjoining Prosadnagore. In respect of those arable lands they have been recorded in the said record of rights as "settled rayats."

4. The company treated the aforesaid six tenancies recorded as basat tenancies in the record of rights as tenancies at will and served notices to quit on the said tenants requiring them to vacate on the expiry of the month of December 1938. On the expiry of the period of the notices it instituted six suits for ejectment and mesne profits against them on 21st April 1939. Suits Nos. 98 and 99 of 1939, Second Appeals Nos. 834 and 835 of 1941, Letters Patent Appeals Nos. 2 and 3 of 1946, were filed against Kaliprosad Shaha and his co-sharer and related to the lands of their two basat tenancies; Suits Nos. 96 and 97 of 1939, second Appeals Nos. 836 and 837 of 1941, Letters patent Appeals Nos. 4 and 5 of 1946 were filed against Bhagjogini Bibi and related to the lands of the two basat tenancies held by her; and Suite Nos. 100 and 101 of 1939, Second Appeals Nos. 838 and 839 of 1941, Letters patent Appeals Nos. 6 and 7 of 1946 were filed against Nobi Basul and related to the lands of the two basat tenancies held by him. All these six suits were heard together and decreed in part by the Court of first instance and also by the lower appellate Court. The prayers for ejectment were allowed but the claims for mesne profits were disallowed for want of evidence. The six second appeals preferred by the tenants defendants were heard by our learned brother Chakravartti J. and were allowed. He dismissed the company's suits against Kaliprosad Shaha and his co-sharer and against Bhagjogini Bibi in their entirety, but remanded the cases against Nobi Rasul for further hearing on a question of fact which we will indicate hereafter. The company has preferred these six appeals under cl. 15, Letters Patent, with leave of our learned brother.

5. The common defences taken in all the six suits were: (1) that the notices to quit were not sufficient in law to terminate the tenancies, and moreover they had not been served: (2) that even if the lands had been taken for residence, they were protected from eviction by reason of the provisions of S. 182, Bengal Tenancy Act.

6. The defendants in Suits Nos. 96, 97, 100 and 101 (Bhagjogini and Nobi Rasul) took the further defence that their tenancies were governed by the Bengal Tenancy Act as the lands had been taken for cultivation. The defendants Kaliprosad Shaha and his co-sharer also took a further defence which was that their tenancies were permanent ones.

7. Issues framed by the Court of first instance were as follows: (1) Are the tenancies governed by the Bengal Tenancy Act? (2) Are the defendants permanent tenants or tenants-at-will? (3) Are the suits barred under S. 182, Bengal Tenancy Act?

8. The other issues related to the other defences and need not be set out. The Courts below found that the lands in suit had not been settled for agricultural purposes, that the tenancies of Kaliprosad and his co-sharer were not permanent ones, that the notices to quit had been duly served, and, if the tenancies were governed by the Transfer of Property Act, they were sufficient in law to terminate the tenancies as from the 1st January 1939. Issues Nos. 1 and 2 being concluded by findings of fact were not further canvassed before our learned brother or

before us by the defendants.

9. Issue No. 3 was argued by both parties in the Courts below on the basis of S. 182, Bengal Tenancy Act, as it stood after its amendment by Bengal Act IV [4] of 1928. The defendants did not contend in the Courts below that the incidents of their tenancies had to be determined on the basis of S. 182, Bengal Tenancy Act, as it stood before its amendment, with the result that while discussing issue No. 3, the Courts below did not consider the evidence (1) as to when the defendants or their ancestors, as the case may be, had acquired the tenancies in suit and (2) what is of greater importance, as to when they or their ancestors acquired the agricultural holdings in the adjoining villages in respect of which they have been recorded as settled rayats. Only if they had acquired the tenancies in suit as also the rayati holdings before 1st January 1929, old S. 182 could, if at all, be invoked by them to their aid. No specific findings on those two points were recorded by the Courts below in that part of the judgments where issue No. 3 was dealt with. While reviewing the evidence for deciding issue No. 1 the Courts below, however, for the sole purpose of considering whether the evidence led by the defendants to the effect that the suit lands had been used in the past to raise crops observed that the lands of the four tenancies which were the subject-matter of the four suits Nos. 96, 97, 100 and 101 (namely those against Bhagjogini and Nobi Rasul) formed in the past the tenancy of one Amir Mean, and while discussing issue No. 2, the issue raised on the special defence in suits Nos. 98 and 99 (namely, those against Kaliprosad Shaha and his co-sharer), found that the defendants of those suits had inherited the tenancies in suit at least from their grand-fathers, Gopi and Gobinda. Our learned brother supplied the findings on these points. As the record of rights finally published in 1933 had recorded the defendants as "sthitiban rayats" in respect of their agricultural holdings in the adjoining villages he made the inference of fact that they had acquired rayati holdings in those villages before 1st January 1929, when the amended S. 182 came into force. No exception can be taken to this inference of fact.

10. On the other point he came to the conclusion that the lands of the four basat tenancies that were the subject-matter of suits Nos. 96, 97, 100 and 101 appertained in the past to a tenancy held by Amir Mean and that Amir Mean's tenancy had originated before 1929. That case was set forth by the defendants of those suits for the purpose of issue No. 1. Their evidence on this point was not contradicted by the company. The case of the defendants of those suits was further that some of the heirs of Amir Mean sold a portion of the lands comprised in Amir Mean's tenancy to Nobi Rasul, the defendant in suits Nos. 100 and 101, and the rest was retained by his heirs and that Bhagjogini, the defendant in suits Nos. 96 and 97, was the widow and heiress of one of the sons of Amir Mean. As the evidence led by the defendants on this part of the case was one-sided our learned brother accepted the same. Oral evidence was given by the defendants to the effect that Nobi Rasul's purchase was about 16 or 18 years before suit which would place the origin of his tenancies before 1929, but our learned

brother either overlooked that evidence or may not have considered it safe to rely upon it, as the witnesses who had said so had been disbelieved by the Courts below on other points material to the cases. His judgment, however, gives no indication either way. He accordingly remanded the cases against Nobi Rasul for further investigation as to whether he had acquired the tenant's interest in the lands of suits Nos. 100 and 101 before S. 182 was amended by Act IV [4] of 1928. Our learned brother also noticed the admissions made by the defendants in suits Nos. 98 and 99 that the lands held by them, though at one time had been used for residence, had no structures from some time past, that the house fell down a long time ago and soon after its construction, and the lands became covered with jungle, that one of the defendants, Kaliprosad Shaha, has been living at Bhowanipur and the other defendant, Jiban Krishna Saha, at Hooghly, and concurred with the findings of the Courts below based on those admissions, that the lands held by them were not being used for habitation and had long ago ceased to have the character of a rayat's homestead. He expressed the opinion that in those circumstances they could not invoke the provisions of S. 182, Ben. Ten. Act, to prevent eviction claimed on the basis of the notices to quit, but still dismissed those two suits on the ground that the point of law on which he had expressed the aforesaid opinion had not been argued by the plaintiff company's lawyers in the Courts below. We do not consider this to be a satisfactory way of disposing of these two cases, seeing that when he decreed all the six second appeals filed by the defendants, including those filed by these two defendants, on a point of law not only not raised by them in lower Courts but also not raised by them before our learned brother but which our learned brother himself raised for them. We propose to set out some portions of his judgment which is reported in *Kali Prosad v. Naihati Jute Mills Co., Ltd.*, 50 C.W.N. 50 : (A.I.R. 1946 Cal. 73). Dealing with the appeals arising out of suits Nos. 98 and 99 he made the following observations at p. 52 of the report:

With respect to the tenancies to which these appeals relate it has been found by the trial Court that although the land was used at one time for residential purposes, the house constructed thereon fell down shortly after its construction and the land has since been lying jungly and fallow. The lower appellate Court appears to accept this finding and further finds that the tenants of these tenancies are now living at Bhawanipore and Hooghly respectively. In the circumstances a question might well arise whether there was any homestead at all to attract the provisions of S. 182, Ben. Ten. Act. That section by its terms applies only to the homestead of a rayat or under-rayat which he may hold otherwise than as part of his rayati or under rayati holding and the language, to my mind, requires that the land should actually be used as a homestead or at least still be possessed of its homestead character when the section is sought to be used for its protection. No objection on this ground was however taken in the Courts below and none was taken before me. I must, therefore, proceed on the basis that the lands to which this group of appeals relate are homestead lands and they are not excluded from the operation of S. 182, Ben. Ten. Act, by any

special fact.

Then he went on to observe at p. 53 of the report that the argument addressed to him "was, in the case of both parties, solely by reference to S. 182, Ben. Ten. Act, as amended in 1928." He dealt with the arguments so addressed to him and came to the conclusion that under the amended section the position of the tenant must be judged by reference to the landlord (of the homestead) for the time being, except perhaps in cases where there has been a change in the landlord since the section became applicable and some such consideration as that a status once acquired by a tenant cannot be lost, intervenes.

Then he expressed agreement with the views of the Courts below on the section as amended in 1928 that if the landlord of the homestead had no status under the Bengal Tenancy Act that section does not attract the Bengal Tenancy Act at all. In spite of the reservation which he made in the passage just quoted he made the further observation that

if the superior interest in the homestead changes hands the tenant's status varying therewith may prove to be a fluctuating one, coming once to be governed by the Bengal Tenancy Act and again by the Transfer of Property Act and once again by the former. There may be means of avoiding this result or there may not be. But on the words in which the section is expressed the interpretation adopted above, seems inescapable (p. 57 of the report).

We are not concerned with the strong criticisms of these passages made by the advocates that the aforesaid two passages are somewhat contradictory or that cardinal rules of construction of statutes which require absurdities to be avoided, if possible, were not kept in view by our learned brother. What we feel is that in a matter of this nature the best effort should be made to construe the section and the law should be laid down in a definite manner, and it is for that purpose we propose to deal with the matter in a comprehensive manner, though in so dealing with the matter some of our observations would be obiter dicta.

11. After giving his interpretation of S. 182 as amended in 1928, our learned brother observed as follows at p. 57 of the report:

It is true that it was the defendants who pleaded the section in bar and the only question put in issue by them and tried by the Courts below was a question under the amended section. Nevertheless, all necessary facts have been found and if it appears from these facts that the rights of the parties must be governed not by the new section but by the old, I am not debarred from saying so in second appeal.

Then he recalled the facts and himself found for the first time that the rayati holdings had been held by the defendants from before the amendment of S. 182. There was no finding to that effect by any of the Courts below, but as we have already said, no exception can be taken to the correctness of his finding. The other fact which was necessary in order that the old section may apply was

whether the lands claimed as homestead had been acquired by the defendants before the amendment of S. 182 in 1928. He found that in four of the Suits Nos. 96, 97, 93 and 99 they had been, but remanded the other two Suits Nos. 100 and 101: "as it was not clear whether the defendant acquired the homestead during the currency of the old section or there after" as he considered it right that the matter should be further investigated (p. 59 of the report). It is thus clear that in his opinion in those two cases the necessary facts had not been found. The Learned Counsel appearing for company says, and we agree with him, that it is difficult to reconcile this with what he said before in support of his observation that he was at liberty to consider the point as to the applicability of the old section, a point raised for the first time in second appeal by himself. He contends that in these two cases at least this new point ought not to have been raised or considered for the first time in second appeal as necessary facts had not been found by the Courts below. His further contention is that his clients received discriminatory treatment in the second appeals. We see great force in most of his criticisms. He contends that two courses were open to our learned brother and are open to us and no third course, namely, (1) either to pin down the parties to the case they had put forward in the lower Courts and to dispose of all the second appeals on that footing, or (2) to proceed to decide all the second appeals on such questions of law as would arise on the facts. He says that if the first course had been adopted by our learned brother and be adopted by us all, the second appeals are to be dismissed on the construction of the amended S. 182 as adopted by our learned brother and, if the second course had been adopted or be adopted, second appeals Nos. 834 and 835 which relate to suits Nos. 98 and 99 are to be dismissed on the conclusions of law arrived at by our learned brother that S. 182 gave no protection to the tenants as the lands had ceased to be their homesteads, (and in this respect there is no difference between the wording of the old and the new section); that at most Appeals Nos. 836 and 837 (Bkagjogini's appeals) which relate to Suits Nos. 96 and 97 can be allowed and the point relating to the applicability of old S. 182 ought not to have been allowed by our learned brother to be raised for the first time in Second Appeals Nos. 838 and 839 (Nobi Rasul's appeals) which relate to Suits Nos. 100 and 101, as it would have involved an investigation into facts, and so these two appeals ought to have been dismissed by him.

12. In view of the special circumstances of these cases, we think we ought not to shut the parties out, either the plaintiff company or the defendants, from raising points of law which arise on the facts of the cases, either on the facts as found by the lower appellate Court or on facts on which we ourselves can record findings by going through the evidence, for, in a second appeal, this Court has the power under S. 103, Civil P.C., to determine an issue of fact, if the evidence on the record is sufficient, which has not been determined by the lower appellate Court, and to avoid a remand, should do so, where the evidence is not complicated or voluminous. The facts found by the lower appellate Court or by our learned brother are: (1) that the lands in suits Nos. 98 and 99 were at one

time used as residence, but the house fell down within a short time of its construction, that the lands became jungly and fallow and that the defendants of these suits are living far away-one in Calcutta (Bhowanipore) and the other at Hooghly. These findings which have been recorded by the lower appellate Court are binding on us in second appeals; (2) that the defendants in all the six suits had acquired rayati holdings in adjoining villages before the amendment of S. 182 in 1928. There was no finding by Courts below, but this is the finding of our learned brother and we agree with him. The entries in the record of rights support this finding. They raise a presumption of correctness and the plaintiff company has not challenged their correctness; (3) that the defendants in Suits Nos. 96 and 97 (Bhagjogini Bibi) had obtained the homestead in suit immediately by inheritance from Amir Mean who was the tenant thereof from before 1928. This is our learned brother's finding and we agree with him as the evidence is one-sided; (4) that the tenancies in the lands in suit in Suits Nos. 98 and 99 had been held by the defendants or their forefather from before 1928. This is the finding of the Court of appeal below and so binding on us; and (5) that the defendant of Suits Nos. 100 and 101 (Nobi Rasul) had purchased a portion of the lands which Amir Mean held from one of the latter's heirs. The lower Courts apparently believed the story that his purchase was 16 to 18 years before suit as deposed to by that defendant and his witnesses. This evidence was not challenged by the plaintiff company in cross-examination. On the evidence, we hold that Nobi Rasul came to hold the homestead as a tenant under the company during the currency of old S. 182, Bengal Tenancy Act.

13. We will proceed to discuss the law which arises on these findings, and will also consider the effect of S. 182 as amended by Act IV [4] of 1928.

14. The old section-S. 182 as it stood before the amendment of 1928-dealt with the rights of a rayat in respect of his homestead when it was held by him otherwise than as part of his agricultural holding. The section provided that the incidents of his homestead, so held, were to be governed by local custom and, in the absence of local custom, by the provisions of the Bengal Tenancy Act applicable to rayats. We would not refer to the case of custom any further, because that part of the section has been omitted in the amended section. When the old section was in force it was held uniformly that in order to attract the section: (1) the agricultural holding may be anywhere-need not be in the same village where the homestead was situated or in an adjoining or even in a nearby village; (2) that the agricultural holding and the homestead need not be under the same landlord; (3) that the word "homestead" occurring in that section is not "a generic term descriptive of a particular kind of land but it denotes land on which a rayat has a house where he lives," *Dina Nath Nag v. Sashi Mohan De Tarafdar*, 22 C.L.J. 219 at 222 : (A.I.R. 1916 Cal. 730); (4) that it is not necessary that the agricultural holding should have been acquired either before or simultaneously with the homestead land. It would attract the section to the homestead even if the agricultural holding had been acquired after he had acquired the homestead in which he is living: *Sukh Lal Shah Vs. Prosanna Kumar*

Shaha and Another, ; Pulin Chandra Daw and Others Vs. Abu Bakkar Naskar, . In both these reported cases and in other cases falling within this type the tenant was holding the agricultural holding and was living in his house standing on the homestead land at the time when the landlord filed the suit to eject him from the homestead; and (5) that when a person who had an agricultural holding in respect of which he was a rayat and has a homestead in which he is living sells the agricultural holding to another but retains the homestead he can still say that by reason of the provisions of S. 182 his homestead still retained the incidents of a rayati holding after he had parted with his agricultural holding: Haru Charan Manna v. Sourendra Nath Ghosh, 40 C.W.N. 182. The decision, however, is of a single Judge and though no reasons have been given in the judgment, it can be supported on the principle that a status once acquired cannot be lost in that manner. The correctness of this decision has to be determined for the purpose of deciding the two suits Nos. 98 and 99, instituted by the company against Kaliprosad Shaha and his co-sharer.

15. The decisions noted by us under the headings, (2) to (5) proceed upon the language of that part of the old section which has been left unaltered in the amended section. The alteration in the new section overrules the view expressed in the decisions falling within heading No. (1) by reason of the addition of the words "within the same village or any village contiguous to that village". The addition, however, gives some indication that a rayat should be allowed a greater amount of security of occupation than other persons occupying a house as a tenant, so that he may cultivate his lands without let or hindrance. It seems that it is one of the purposes for insisting on identity of the village or its contiguity.

16. The old section applied only to rayats. But by reason of the language employed in last part of that section it was possible to have a rayat under another rayat or even under an under-rayat, for the status of the tenant in respect of his homestead did not depend upon the status of his immediately superior landlord of the homestead. That militates against the fundamental scheme of the Bengal Tenancy Act dealing with gradation of tenants. In fact some of the learned Judges who had given their decisions in that way observed the anomaly of having a rayat under a rayat or under an under-rayat in respect of the land used by a rayat as his homestead but stated that could not be helped in view of the unambiguous language of the section. It was with the intention of avoiding this anomaly that the status of tenant in respect of his homestead holding agricultural land as a rayat under a separate engagement has been made to depend in the amended section upon the status of the landlord of his homestead. Under the amended section, he would be a rayat in respect of the homestead, when the landlord of his homestead is either a proprietor of an estate or a tenure-holder and would be an under-rayat if his landlord is either a rayat or an under-rayat. There can be no doubt that the intention of the legislature was to give him the rights of a rayat or under-rayat because of this contingency, for the section concludes with the words "as the case may be," but in trying to avoid an anomaly which resulted by reason of the words used in the

concluding part of the old section the legislature has employed language which has resulted in some cases in depriving a rayat of the security of occupation that he would have enjoyed in respect of his dwelling house under the old section. We will deal with this aspect hereafter.

17. The language of old S. 182, and in this respect there is no material change in the amended section, is that "when a rayat holds his homestead otherwise than as part of his holding." The use of the present tense "holds" cannot in our opinion be overlooked. That indicates that both the elements must be present at the time when the protection of the section is sought to be invoked by the tenant. He must be a rayat at that time, that is to say, have the arable lands and must be using the other land for his residence. It is the co-existence of these two elements that would bring in that section. This is what had been held in *Sukh Lal Shah Vs. Prosanna Kumar Shaha and Another*, and *Pulin Chandra Daw and Others Vs. Abu Bakkar Naskar*, . The tenant may have required the homestead before, but the moment he acquires later on a rayati holding he comes within S. 182. The incidents of tenancy of the homestead which had hitherto been governed either by contract or by the provisions of the Transfer of Property Act, would be changed and would be regulated by the provisions of the Bengal Tenancy Act dealing with rayats, where the old section applied and by the provisions of the Bengal Tenancy Act dealing with rayats or under-rayats, as the case may be, according to the status of the landlord of the homestead if the new section be applicable, subject to the condition (hereafter discussed) that such landlord has a status under the Bengal Tenancy Act. It would follow that if the afore-said two elements became dissociated later on, S. 182 would cease to be applicable from the moment when either of these two elements disappeared in relation to the tenant concerned. This logical result accords with the theory, which is to some extent indicated, as we have already noticed, by the addition of the words "in the same village where the homestead is situated or in a village contiguous thereto" occurring in the amended section, that the legislature in enacting S. 182 intended to give greater security of occupation in his dwelling house to a cultivator than to other people, so that he can conveniently carry on his avocation as tiller of the land, and so long as he followed that avocation, as the use of the present tense "holds" indicates. The question is, is there a compelling necessity to modify this logical result? We do not think that there is any. We therefore dissent from the decision of the single Judge given in *Haru Chandra Manna's case*, 40 C.W.N. 182, a decision which we sitting in Division Bench are not bound to follow. We hold that the moment when either the agricultural holding is sold away or when he, the tenant, abandons his residence in the homestead land, he goes out of the old and also of the amended S. 182 of the Act, for language of both the old and the amended sections in this respect is the same. On the findings of fact arrived at by the lower appellate Court which our learned brother had noticed and which we have set forth above, a finding binding on this Court in second appeal, we allow Letters patent Appeals Nos. 2 and 3 which arise in Suits Nos. 98 and 99. The decrees of trial Court passed in

these two suits are restored. The defendants of these suits, Kaliprosad Shaha and Jiban Kristo Shaha, must pay the costs to the plaintiff company throughout.

18. Section 182 as amended by Act IV [4] of 1928 makes the status of the landlord of the homestead the determining factor. The section says that the tenant of the homestead would be, to put it briefly, either a rayat or an under rayat according to the status of the landlord of the homestead. The provisions of S. 182 cannot, so to say, be taken to float in the air. The Bengal Tenancy Act is not attracted to the homestead tenancy simpliciter by the amended section. That section deals with a tenant who in respect of his arable lands may either be a rayat or an under-rayat.

19. In order that the incidents of his homestead tenancy may be governed by the provisions of the sections of the Bengal Tenancy Act dealing with rayats or under-rayats, as the case may be, it must be determined, by reason of the language used in the amended section, in the first instance whether he fills the character of a rayat or an under-rayat in respect of his homestead, and he will not answer the description either of a rayat or under-rayat, if the landlord of his holding is a person whose interest does not come within the purview of the Bengal Tenancy Act at all. Our learned brother has fully dealt with this question and there is very little scope for adding to the reasons given by him. We agree with his conclusion on this point. Only with regard to one observation which he made in dealing with this point we prefer not to agree. But that observation is not material for the decision of the point we are now considering. It is a cardinal rule of construction of statutes that absurdities should, if possible, be avoided. The absurdity of the frequent changes in the incidents of a tenancy of a tenant of a homestead, who holds other arable lands under a separate tenancy either as a rayat or as an under-rayat, would be avoided if it be held that the status of his landlord of his homestead at that moment of time when the two elements which we have mentioned above come together for the first time would determine the incidents of his homestead tenancy and those incidents would remain to be so as long as he holds the agricultural holding and uses the land of the other tenancy for his residence, that is to say, the said two elements co-exist in him. Such a construction of the section is possible and so should be adopted.

20. We have already recorded our findings in respect of the four other suits Nos. 96, 97, 100 and 101. In all these four suits, the defendants had acquired rayati holdings in contiguous villages before S. 182 was amended and they are still in possession of those holdings. They had acquired their tenancies in the lands in suit also before that time. They are still using these lands for their residence. They are living in some of the rooms, though they have let out many of them to mill hands. According to the provisions of old S. 182 they had acquired the rights of a rayat-in fact the rights of an occupancy rayat-in those lands before 1st January 1929 when the amended S. 182 came into force.

21. A statute which simply creates a new right, that is to say, which does not at the same time take away or curtail the vested right of another, may have

retrospective operation though it is not made so either expressly or by necessary implication. Cases of this type may be rare, for generally the creation of a new right in one bakes away or impairs the vested right of another. But the rule settled by a Special Bench of twelve Judges of this Court is that a statute which takes away or impairs a vested right, or which has the effect of so doing, cannot have retrospective operation unless the statute either expressly or by necessary implication gives it that operation (*Jogadanand Singh v. Amritlal Sircar*, 22 Cal. 767 F.B.).

22. The Learned Counsel appearing for the appellant company relies upon an observation made in the case of *Pulin Chandra Daw and Others Vs. Abu Bakkar Naskar*, for supporting his contention that S. 182 as amended in 1928 should be applied, as the ejectment suits had been instituted after the amendment, and as under the amended section the defendants cannot have either the status of rayats or under-rayats in respect of the lands in suit as his client, the company, has no status under the Bengal Tenancy Act, the decrees passed by the lower appellate Court should be maintained by us. The said observation which was made in reference to old S. 182 is as follows:

The word "holds" in the section seems to point to the time when the dispute about the incidents of the tenancy of the homestead arises.

23. In our opinion, the observation must be read in the light of the facts of that case which we have already noted in the earlier part of our judgment. It means that the tenant must be holding both the rayati holding and the homestead at that point of time when the suit to eject him from his homestead is brought and the order of sequence of the acquisition of the rayati holding and the homestead is immaterial, That observation in our opinion cannot be used in the manner contended for by the Learned Counsel appearing for the company. The amended section as construed by our learned brother and by us would have the effect of taking away the "occupancy right" of the defendants of these four suits, which they had acquired by the operation of old S. 182 before 1st January 1929, when the amended section came into force, on the ground that the company has no status under the Bengal Tenancy Act. So agreeing with our learned brother for the reason above stated we hold that the "occupancy right" which had been acquired by the defendants of these four suits by the year 1928 cannot be taken away by the application of S. 182 as amended.

24. Suits Nos. 96, 97, 100 and 101 are accordingly dismissed with costs throughout.