IN THE SUPREME COURT OF BANGLADESH

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.147 OF 2004.

(From the judgment and order dated 29.7.2002 passed by the High Court Division in Writ Petition No.358 of 1997.)

Wagachara Tea Estate Ltd.:	Appellant.
=Versus=	
Muhammad Abu Taher and others:	Respondents.
For the Appellant:	Mr. S.R. Khoshnabish, Advocate-on-Record.
For Respondent Nos.1-4:	Mr. Shafique Ahmed, Senior Advocate (with Mr. Syed Aminul Islam, Senior Advocate, Mr. A.F.M. Mesbahuddin, Senior Advocate), instructed by Mr. Md. Tanfique Hossain, Advocate-on-Record.
For Respondent Nos.5-17:	Not Represented.

Date of hearing: 12th, 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: This appeal by leave is at the instance of the writ respondent No.2 Wagachara Tea Estate Limited from a judgment of the High Court Division in Writ Petition No.358 of 1997 by which the High Court Division made the rule nisi absolute and declared an order

of the Land Appeal Board, the writ respondent No.1, to be illegal and without lawful authority.

Leave was granted to consider the questions which have public importance. The points are whether, the Land Appeal Board constituted under the provisions of the Land Appeal Board Ain, 1989 has jurisdiction to hear disputes arising out of judgment and order passed by the Deputy Commissioner and Divisional Commissioner in civil suits in exercise of powers under the Chittagong Hill Tracts Regulation, 1900 (Regulation of 1900). Secondly, whether the Land Appeal Board has power to decide a review petition filed against an order of the Commissioner arising out of a matter under Regulation of 1900 and finally whether, the views taken in Bikram Kishore Chakma V. Member, Land Appeal Board, 6 BLC 436 that the Regulation of 1900 has no manner of application after the passing of the Constitution and that the provisions of Land Appeal Board Ain, 1989 will be applicable to the Chittagong Hill Tracts (CHT).

To resolve the points in controversy, it is relevant at this juncture to consider short facts, which are as under:

Wagachara Tea Estate is located in mouzas Chatamaram and Wagachara under Rangamati Hill district. One Jagat Chandra Mohajan was the owner of the land of the said tea estate, who was succeeded by his three sons Ruhuni Ranjan Das, Mohini Ranjan Das and Nalini Ranjan Das. Ultimately twelve descendents of Jagat Chandra became the owners, who executed a power of attorney on January 5, 1978, in favour of Alhaj Moulana Nurul Huda Quaderi, the Managing Director of the appellant company. The said owners thereupon entered into an agreement on September 19, 1981 with Alhaj Moulana Nurul Huda Quaderi for sale of the land including the tea estate. As per customs, the owners applied to the Deputy Commissioner, Chittagong for clearance certificate for sale. In due course the Deputy Commissioner accorded permission on January 18, 1982. Except Shibu Prosad, other eleven owners executed a sale deed in favour of Alhaj Moulana Nurul Huda Quaderi. Pursuant thereto the Wagachara

Tea Estate Limited instituted Civil Suit No.12 of 1984 before the Deputy Commissioner, Chittagong Hill Tracts under section 7 of the Regulation of 1900 for specific performance of contract. The suit was dismissed by the judgment and order dated February 4, 1992. An appeal was preferred to the Divisional Commissioner from the said judgment which was also dismissed. Thereafter, the company took a revision petition under section 5 of the Land Appeal Board Ain before the Land Appeal Board. The revision petition was also dismissed by order dated January 8, 1994. Thereafter, the appellant company filed a review petition and the Land Appeal Board allowed the review petition by order dated December 26, 1995 and directed Shibu Prosad to execute a sale deed in respect of his share of land. Shibu Prosad thereupon preferred another review petition before the Land Appeal Board against the earlier order of review. Subsequently, Shibu Prosad executed a sale deed on January 1, 1994, with the prior permission of the Deputy Commissioner in favour of writ petitioners who are the respondent Nos.1-4. The writ

petitioners claimed that the order dated December 26, 1995 of the said Board has been passed without lawful authority.

Learned counsel appearing for the appellant has raised a pertinent question as to the enforceability of Chittagong Hill Tracts Regulation, 1900 under the changed circumstances and submits that the High Court Division has erred in law in holding the view that the Land Appeal Board has no jurisdiction to hear revision or review petition in respect of matters arising out of judgments passed by the Deputy Commissioner and Divisional Commissioner in a civil suit. Learned counsel for the appellant has referred two cases, Bikram Kishore Chakma V. Members Land Appeal Board, 6 BLC 436 and Bangladesh Forest Industries Development Corporation V. Shekih Abdul Jabbar, 53 DLR 488 in support of his contention.

In Bikram Kishore Chakma, the latter challenged an order of the Member, Land Appeal Board by which order, the Board set aside an order of the Divisional Commissioner, Chittagong. The dispute was relating to refusal of

settlement of a plot of land by the then Sub-Divisional Officer, Rangamati. The writ petitioner challenged the said order of refusal to the Deputy Commissioner, Rangamati, who however, granted settlement of the said plot jointly in favour of the writ petitioner and writ respondent No.3 in equal shares. Against the said order, a revision petition was filed before the Divisional Commissioner by the writ respondent No.3, who by order dated December 23, 1990 rejected the revision petition. Against the said order the writ respondent No.3 preferred an appeal before the Land Appeal Board. The Member Land Appeal Board allowed the appeal and set aside the order of the Deputy Commissioner granting settlement of the plot jointly. The writ petitioner then challenged the said order by a review petition before the Land Appeal Board. The review petition was also rejected. Under such circumstances, the High Court Division held as under:

> "Chittagong Hill Tracts was such territory which constituted East Pakistan immediately before proclamation of independence and, as

such, it is a part of the Republic of Bangladesh like any other territory of the country. The Constitution nowhere refers to Chittagong Hill Tracts as a special territory and, in fact, there is no mention of Chittagong Hill Tracts by name. It is a territory like any other territory of Bangladesh. That being the constitutional position of the territory comprising Chittagong Hill Tracts it cannot be excluded from application of any law passed by the Parliament. The existence of Chittagong Hill Tracts Regulation, 1900 is like any other law of the country and subject to the law passed by the Parliament. We have seen that section 3 of the land Appeal Board Act, 1989 (Act 24 of 1989) provides that the provisions of the Act and the rules made thereunder will prevail over any existing law. Therefore in case of any conflict between said Act and the provision of Chittagong Hill Tracts Regulation, 1900, the Act being a

latter law will prevail over the provision of the Chittagong Hill Tracts Regulation. It may be mentioned that the Constitution of Bangladesh is of unitary type providing no special status to any particular territory including Chittagong Hill Tracts. Therefore, the law which is made applicable to the Republic must be made applicable to the Chittagong Hill Tracts also. In the present case there is nothing in Act 24 of 1989 and the rules thereunder that the law and the rules will not be applicable to Chiggagong Hill Tracts and that being the case the Act 24 of 1989 and the rules framed thereunder will be applicable to Chittagong Hill Tracts notwithstanding the provision in the Chittagong Hill Tracts Regulation that no notification will be made by the Government in the official Gazette to declare any enactment after commencement of Part III of the Government of India Act, 1935. After emergence of

> Bangladesh and the passing of the Constitution this provision of the Chittagong Hill Tracts Regulation has no manner of application. In that view of the matter we do not find anything to accept the contention of the learned Advocate for the petitioner that the respondent No.1 Member, Land Appeal Board has no jurisdiction to hear the appeal against or reverse the judgment and order passed by the Commissioner, Chittagong Division, in respect of settlement of khas land in the Chittagong Hill Tracts. We therefore have no reason to declare that the respondent No.1 acted without jurisdiction in passing the judgment and order by Annexure I and J."

The High Court Division was of the view that the Land Appeal Board Ain, 1989 being the latest law on the subject, the same would prevail over the provisions of the Chittagong Hill Tracts Regulation. It has been observed that in the absence of any provision in our Constitution providing special status of the CHT, the Ain of XXIV of

1989 and the Rules framed thereunder will prevail and be applicable to CHT. As regards the applicability of Ain of XXIV of 1989, in CHT, I will express my opinion later on, but the High Court Division has committed a fundamental error in holding the view that the Regulation of 1900 has no force of law. It fails to consider that this Regulation has not been repealed as yet and that the parties to the litigation have also surrendered to the jurisdiction of the Deputy Commissioner and the Commissioner admitted the enforceability of Regulation of 1900. The opinion expressed in that case is devoid of substance.

In the latter case, Abdul Jabbar was appointed as supervisor in the timber extraction project, Kaptai on master roll basis. He was dismissed from the service for defalcation of money. He then filed a suit challenging the legality of his removal before the Deputy Commissioner, Rangamati under Regulation of 1900. The suit was dismissed by the Deputy Commissioner and on an appeal, the Divisional Commissioner remanded the matter to the Deputy Commissioner. This order was challenged before the High

Court Division by filing a revision petition under section 115 of the Code of the Civil Procedure. The High Court Division held that the suit was filed under the Regulation of 1900 and therefore, the High Court Division had no power to sit on revision under section 115 of the Code of Civil Procedure against the said order and that the remedy, if there be any, against the said order was by way of judicial review under Article 102 of the Constitution. I fail to understand why the learned counsel has referred this case, which in fact helps the case of the respondents.

There is no doubt that the Regulation of 1900 is a special law that applied to several parts of former British India Empire including Burma now Myanmar where indigenous peoples were inhabited. This piece of legislation was promulgated in accordance with the laws, customs and systems prevailing to the people of indigenous peoples of Chittagong Hill Districts. It not only retains the special legal and administrative status of the three districts, but also safeguards a wide body of customary

laws on land, forest and other natural resources of the indigenous people residing in those districts. It has 20 sections, Chapter II of the Regulation contains under the heading 'Laws': Chittagong Hill Tracts: how to be administered. Section 3 provides that subject to the provisions of the Regulation, the administration of CHT shall be carried on in accordance with the Rules for the time being in force framed in exercise of powers under section 18. Section 18 says, the government may make Rules for carrying into effect the objects and purposes of the Regulation. The objects are provided in sub-section (2) as under:

> "(a) to provide for the administration of civil justice in the Chittagong Hill tracts;
>
> (b) to prohibit, restrict or regulate the appearance of legal practitioners in cases arising in the said tracts;
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> (c) to provide for the registration of documents in the said tracts;

(d) to regulate or restrict the transfer of land in the said tracts;

(dd) to provide for the control of money lenders and the regulation and control of money-lending in the said tracts;

(e) to provide for the sub-division of the said tracts into circles, (and those circles) into mauzas;

(f) to provide for the collection of the rent and the administration for the revenue generally in the said circles, and mauzas through the Chiefs and Headmen;

(g) to define the powers and jurisdiction of the Chiefs, and Headmen, and regulate the exercise by them of such powers and jurisdiction;

(h) to regulate the appointment and dismissal of Headmen;

(i) to provide for the remuneration of Chiefs, Headmen and Village Officers generally by

the assignment of lands for the purpose or otherwise as may be thought desirable;

(j) to prohibit, restrict or regulate the migration of cultivating *raiyats* from one circle to another;

(k) to regulate the requisition by government of land required for public purposes;

(kk) to provide for compulsory vaccination in the said tracts;

l) to provide for the levy of taxes in the said tracts;

(ll) to provide for the registration of the persons who are habitual consumers of opium in the said tracts; and

(m) to regulate the procedure to be observed by officers acting under this Regulation or the Rules for the time being in force thereunder.

Section 19 says, except as provided in the Regulation or in any other enactment for the time being in force, a decision passed, act done or order made under the

Regulation or the Rules framed thereunder, shall not be called in question in any Civil or Criminal Court. The Deputy Commissioner has been given the jurisdiction before the amendment in 2003, in respect of civil, revenue and all other matters under section 7 of the Regulation. In the Rules framed by Gazette notification dated May, 1900, no legal practitioners are permitted to appear in any matter except with prior permission of the Commissioner in sessions cases. In appeals and revision cases before the Commissioner, where the subject matter of such cases is of Tk.2000/- or over a lawyer may appear with the consent of the Commissioner. In all cases where the Chiefs are personally concerned, they are as far as possible to be personally dealt with. Agents are only to be allowed when the personal presence of the Chief is inconvenient or impracticable. The procedure for dealing with civil suits is upon the viva voce examination of the parties. Witness examination is discarded except in cases where the Officer is unable to come to a decision on the facts of the case without them. There is one provision for appeal to the

Commissioner from all orders of the Deputy Commissioner in Civil suits. However, in criminal matters, it has been provided in Section 9 that the High Court Division shall exercise the powers of the Code of Criminal Procedure for all purposes. This provision enjoins a convicted person to prefer an appeal against the judgment in case of conviction in the High Court Division.

Thus it is apparent that the Regulation of 1900 not only retains the special legal and administrative status of the CHT but also implicitly recognizes a wide body of customary laws on land, forests and other natural resources that are crucial safeguards for the indigenous people and other residents of the area. The administration of the districts includes, in addition to the special local government system, the traditional self-government institutions such as, Rajas or Circle Chiefs, Headmen and Kaarbaries (Village Chiefs). The system of administration of justice in those districts is different from other parts of the country with regard to disputes between indigenous people, except for civil litigation involving

commercial suits and criminal offences of a serious nature, the normal courts of the country are barred from adjudicating them and they are being adjudicated by Circle Chiefs, Mouja Headmen[1]. Secondly, with regard to civil litigation, the complex procedures provided in the Code of Civil Procedure and the Civil Rules and Orders governing the process of summons, discovery, pleadings, relief, execution do not apply. Finally, even after the amendment of the Regulation, as will be discussed later on, the Judges are required to try the cases in accordance with the laws, customs and practices, that is to say, in accordance with customary law. Now question is what is customary law? When is it law; for whom it is law?

Customary laws comprises "customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws".[2] Customary laws are also defined as consisting of "established patterns of behaviour that can

[1] Sections 8(3) and 8(4) of the Regulations, 1900.
[2] Black's Law Dictionary, 8th edition, 2004.

be objectively verified within a particular social setting. The modern codification of civil law developed out of the customs, or *coutumes* of the middle ages, expressions of law that developed in particular communities and slowly collected and written down by local jurists. Such customs acquired the force of law when they became the undisputed rule by which certain entitlements (rights) or obligations were regulated between members of a community"[3].

The idea of "customary law" that is under consideration concerns the laws, practices and customs of indigenous people and local communities. It is not, for instance, the same idea as "customary law" in the international context. "Customary international law" has a more precise and technical meaning in the realm of rules governing relations between distinct States. Customary law is, by definition, intrinsic to the life and custom of indigenous peoples and local communities. What has the status of "custom" and what amounts to "customary law" as such well depend very much on how indigenous peoples and

[3] http.//en.wikipedia.org/wiki/customary_law

local communities themselves perceive these questions, and on how they function as indigenous peoples and local communities. According to one definition, "custom" is a "rule of conduct, obligatory on those within its scope, established by long usage. Valid customs must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to Statute Law, though it may derogate from the common law. General customs are those of the whole country, e.g. the general custom of merchants. Particular customs are the usage of particular traits. Local customs are customs of certain parts of the country."[4] For instance, customary laws are defined by some authorities as "Customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic and part of a social and economic system that they are treated as if they were laws[5], and established patterns of behaviour that can be objectively verified within a particular social setting. The modern codification of civil law developed out of the

[4] Osborne's Concise Law Dictionary. Ninth Edition (Sweet and Maxwell, 2001.
[5] Black's Law Dictionary, 8th edition, 2004.

customs, or *courtumes* of the middle ages, expressions of law that developed in particular communities and slowly collected and written down by local jurists. Such customs acquired the force of law when they became the undisputed rule by which certain entitlements (rights) or obligations were regulated between members of a community.

Customary laws and protocols are central to the very identity of many indigenous peoples and local communities. These laws and protocols concern many aspects of their life. They can define rights and responsibilities of members of indigenous peoples and local communities on important aspects of their life, culture and world view; customary law can relate to use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage and knowledge systems, and many other matters. Customary law can help to define or characterize the very identity of the community itself. Further, for many indigenous people and local communities, it may be meaningless or inappropriate to differentiate

their laws as "customary", suggesting it has some lesser status than other law – it simply constitutes their law as such.[6]

Maintaining customary laws and protocols can therefore be crucial for the continuing vitality of the intellectual, cultural and spiritual life and heritage of indigenous peoples and local communities. Customary laws and protocols can define how traditional cultural heritage is shared and developed, and how traditional knowledge systems are appropriately sustained and managed by indigenous peoples and local communities. So maintaining customary laws and protocols even within the original community is an important concern; it is often a key aspect of preserving the cultural and legal identity of indigenous peoples and local communities. But indigenous peoples and local communities have also called for various forms of respect and recognition of their customary laws and protocols – beyond the scope of indigenous peoples and local communities themselves. This can be a complex issue

[6] World Intellectual Property Organization (WIPO).

in national constitutional law, and may arise, for example, in claims over land and natural resources.[7]

A sacred site that is of importance to indigenous peoples and local communities cannot be violated by a third party; but a sacred symbol, or sacred knowledge, can be appropriated and used in a remote location, far from indigenous peoples and local communities; a sacred cultural expression can be replicated in large quantities for commercial purposes. The customary context may indeed help clarify or define what these terms actually mean; what makes cultural expressions and knowledge "traditional" may be the very fact that they are developed, maintained and disseminated in a customary and intergenerational context; and often that context will be defined and shaped by customary law, protocols and practices.[8]

As noted, customary laws and protocols are an intrinsic part of the life, values, world view and the very identity of many indigenous peoples and local

[7] Ibid.
[8] Ibid.

communities. A major debate arises over as to what makes a customary practice a “law” and gives it binding effect, and when is it “just” practice? And if it is obligatory, who is bound by it, within and beyond the relevant indigenous peoples and local communities? A customary practice may effectively govern or guide many aspects of indigenous peoples and local communities life, but it may be so engrained within indigenous peoples and local communities and embedded in the way it lives and works, that it may not be perceived as stand alone, codified “laws” as such. The binding effect of a customary practice may only be fully perceived when the practice is contravened. This could occur, for example, when think tank is used by third parties in a way that conflicts with the customary laws that determine how it is used and transmitted by indigenous peoples and local communities; this can lead to calls for the customary laws to be respected by such third parties, as either a legal or an ethical obligation[9].

[9] WIPO

A decisive factor in determining whether certain customs have status as laws is whether they have been viewed by indigenous peoples and local communities as having binding effect, or whether they simply describe actual practices. A similar concept applies at the level of international law, where customary law that binds states develops from the consistent practice of states who both follow a customary pattern but in doing so also accept that it has a binding quality. Thus the World Court is required to apply (among other things) international custom, as evidence of a general practice accepted as law.[10]

The normative force of customary law may be felt within a community in particular, but may also create a legal or moral expectation that it will be recognized beyond the original community. The full effect of customary law may only be understood with reference to the social and community context; as one commentator observes, "to understand why customary law rights such as those in folklore are binding, it is necessary to examine more

[10] Statute of the International Court of Justice, Art. 38.

closely the nature and significance of the social and political structure in tribal societies.[11]

Customary laws may also be linked to the specific social structures that apply and transmit law between successive generations. They may also have links to the traditional land and environment associated with indigenous and local communities. By the same token, customary laws and practices may be a factor in establishing tenure over traditional lands, or other rights relating to land and resources. The "local" character of customary law also highlights its potential role in relation to the conservation, sustainable use and equitable benefit sharing relating to *in situ* genetic resources[12]. The recognition of community rights forms one of the pillars of the African Model Law, which is expected to influence the direction or form the basis of legislation in many countries when they finally get around

[11] Kuruk P. African Customary Law and the Protection of Folklore, Copyright Bulletin, XXXVI, No.2, 2002.
[12] Article 2 of the convention on Biological Diversity (1992) defines 'genetic resources' as genetic material of actual or potential value.

to instituting or finalizing the necessary regulatory regimes on access and benefit-sharing.[13]

The options could be considered at several levels:

(a) the traditional or indigenous legal system itself, including any customary laws and practices that govern the creation, holding, use and transmission of cultural expressions or knowledge: for the communities concerned, at least, these may be considered as directly binding law;

(b) recognition of pre-existing customary law as defining continuing rights within a broader legal context.[14]

(c) a separate legal system could recognize and externally apply rights and obligations that already exist within on the customary think tank system, but recognizing them directly as having legal effect

[13] Kent Nnadozie, Integrating African Perspectives and Priorities into Genetic Resource Regulations: A Resource Guide for Policymakers.
[14] Mitchell V. M.N.R. (Supreme Court of Canada), per Mcl achlin C.J.; "English law, accepted that the Aboriginal peoples possessed pre-existing laws and interests, and recognized their continuation... aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights."

(i.e. extending the legal effect of existing customary law beyond its traditional circle),[15]

(d) distinctly recognized legal rights and obligations that correspond to rights and obligations under customary law context, but which have a separate legal basis; by this approach, the prior existence of customary law right or obligation is established as a matter of fact, and helps to determine rights and obligations within a separate legal system; the customary law is not a true source of law in itself,[16]

(e) separate rights and obligations may be recognized and granted according to distinct, objective criteria, these would have no direct legal relationship to the customary law context, but would be consistent in practical with the policy goals of recognizing and respecting customary laws and

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[15] African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources provides that "the State recognizes and protects community rights.....as they are enshrined and protected under the norms, practice and customary law found in, and organized by the concerned local and indigenous communities, whether such law is written or not"

[16] Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty...."Mabo and Others V. Queensland (No.2) (1992) 176 CLR 1 F.C. 92/014, per Brennan J. at p. 64.

practices (for example, a number of *sui generis* law for protection of think tank have exceptions to permit customary practices to continue notwithstanding the distinctly think tank right);

(f) the substantive norms and principles of customary law could be documented and codified to provide the basis of newly negotiated or legislated legal mechanisms;

(g) the procedures established under customary law and protocols could be applied in broader contexts, such as consultations on prior informed consent and benefit-sharing, and dispute settlement.

Customary laws can govern many aspects of community life – dispute settlement, land tenure and other rights, inheritance, family law, and political and social relations generally. Customary law is often described as forming part of a holistic world view of indigenous communities, suggesting that it can only be fully understood and comprehensively applied within the community itself. It is challenging to consider how the

full body of a community's customary law and practices could be made to apply integrally to third parties beyond that community and the traditional reach of its customary jurisdiction. This may concern constitutional questions or, for those in foreign countries, the field of private international law. In addition, there may be limits to how those outside the community can fully respect and respond to the complex social, political, cultural and spiritual context that shapes and defines customary laws and practices.[17]

Some of these areas of law may be relevant to third parties living and working beyond the community, but much of it may not; for instance, those involving family relations or governing use of ancestral lands. But within the broader sweep of customary law, there may also be very specific, clearly identified obligations relating to how a community's knowledge or cultural expressions must be handled. It can be possible to recognize these as specific obligations on third parties. One straightforward example is secret sacred material; while such material has much

[17] WIPO

richer significance for an indigenous community, in ways that an outsider, it is fully possible to be placed under a strict obligation of confidentially, enforceable under external laws that in some way 'take account' of the customary law obligation not to disclose this material.[18] Another example is the recognition of the traditional custodial rights and obligations of an indigenous community within national copyright law.

For the protection and preservation of the indigenous peoples, United Nations General Assembly adopted Resolution No.61/295 on September 13, 2007 on 'United Nations Declaration on the Rights of Indigenous Peoples' as under:

'Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

[18] Foster V. Mouniford and Rigby (1976) 29 FLR 233.

‘Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

‘Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

‘Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

‘Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

‘Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

‘Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

‘Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

‘Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

‘Encouraging States to comply with and effectively implement all their obligations as they apply to

indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

‘Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

‘Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

‘Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

‘Recognizing also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional

particularities and various historical and cultural backgrounds should be taken into consideration .....’

This Declaration is self explanatory. It has recommended to promote the inherent rights of indigenous peoples from their political, economic and social structures and from their culture, spiritual tradition, history and philosophy, specially their rights to their lands, territories and resources. It has emphasized the contribution of the demilitarization of the lands and territories of the indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world. It has recognized the indigenous peoples right to maintain and strengthen their distinct political, legal, economic, social and cultural institution, while retaining their right to participate fully, if they choose, in the political, economic, social and cultural life of the Estate.

Under the Government of India Act, 1919 the CHT was included within the category of areas called "backward tracts", a classification resulting from the Montague-Chelmsford Reforms[19]. Section 92 of the Act provided "no Act of Federal Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area, unless the Governor by Public notification so directs and the Governor in giving such a direction may specify that the Act in its application to the area shall be subject to such exceptions or modifications as he thinks fit'. The Government of India Act, 1935 was supplemented with the Government of India (Excluded Area) Order, 1936, which identified the different areas under this category including the CHT.

In the Provincial Constitution of Pakistan until 1956, the aforesaid status was recognized and the CHT was retained as an 'excluded area'. In the 1962 Constitution of Pakistan the CHT was retained as a 'tribal area', that is to say, the area was re-designated as tribal area from 'excluded area'. However, in the Constitution (First

[19] . Z.A. Ahmed, "Excluded Areas under the New Constitution" Congress Political and Economic Studies No.4, 1937.

Amendment) Act, 1963, the CHT ceased to be a tribal area with effect from January 10, 1964. The similar position continued in the 1972 Constitution. Even then the then government of Pakistan and the government of Bangladesh ever questioned the special status of CHT and those regions are being regulated under the Regulation of 1900 and the Rules framed thereunder.

In Armendra Pratap Singh V. Tej Bahadur Prajapati,[20] it was observed:

> "Tribal areas have their own problems. Tribals are historically weaker sections of the society. They need the protection of the laws as they are gullible and fall prey to the tactics of unscrupulous people, and are susceptible to exploitation on account of their innocence, poverty and backwardness extending over centuries. The Constitution of India and the laws made thereunder treat tribals and tribal areas separately wherever needed. The tribals need to be settled, need to be taken care of by

[20] AIR 2004 SC 3782

the protective arm of the law, and he saved from falling prey to unscrupulous device so that they may prosper and by an evolutionary process join the mainstream of the society. The process would be slow, yet it has to be initiated and kept moving. The object sought to be achieved by the 1950 Act and the 1956 Regulations is to see that a member of the aboriginal tribe indefeasibly continues to own the property which he acquires and every" process known to law by which title in immovable property is extinguished in one person to vest in another person, should remain so confined in its operation in relation to tribals that the immovable property of one tribal may come to vest in another tribal but the title in immovable property vesting in any tribal must not come to vest, in a non-tribal. This is to see and ensure that non-tribals do not succeed in making in-roads amongst the

> tribals by acquiring property and developing roots in the habitat of tribals."

Our judiciary always play a pivotal role to strengthen and promote social justice, and the protection of indigenous people is one of the basic principle for promoting social justice. To that end in view, it is the duty of this Court to see that the indigenous people enjoy the rights and protections guaranteed to them under the Constitution and the laws. These people are mainly dependent on agriculture because of the location where they usually reside. In this connection the Supreme Court of India observed:

> 'Agriculture is that only source of livelihood or scheduled tribes, apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribals deribe their sustenance social status, economic and social equality and permanent place of abode

> and work and living. It is a security and source of economic empowerment. Therefore, the tribes too have great emotional attachment of their lands. The land, on which they live and till, assures them equality of status and dignity of person and means to economic and social justice and is a potent weapon of economic empowerment in a social democracy[21]."

We find from the above observations, the Supreme Court opened another vista for judicial intervention, and ensured that even the tribal communities living in forest enjoy the rights and protections guaranteed to them under the Indian Constitution. It is not only India which have preserved and protected the rights of these people in its constitution and also by enacting laws, all countries around the globe where the indigenous people live, with view to preserve and protect these people enacted laws. In Victoria the Human Rights and Responsibilities of the aboriginals are protected by law. In its Charter, the rights protected include: recognition and equality before

[21]. Samantha V. State of A.P. (1997) 8 SCC 191.

the law; right to life; protection from torture and cruel, inhuman or degrading treatment or punishment; privacy and protection of reputation; freedom of thought, conscience, religion and belief, protection of families and children; cultural rights; property rights; right to liberty and security of person etc. In the United States of America it was stated 'Although the Federal Government has enormous power over Native American tribes this is tempted by specific obligations toward Indians. The Federal Government's relationship is classified as a trusteeship or guardianship and it is supposed to act according to the highest fiduciary standards. State Governments do not have jurisdiction within the boundaries of reservations and most state laws do not apply to Native Americans on reservations.' In Canada 'Self Governments agreements allow for Aboriginal law making authority (whether negotiated within a comprehensive claims or specific claims process or as separate agreements) in relation to matters that are internal to their communities; integral to their unique cultures, identities, traditions,

languages and institutions; and with respect to their special relationship to their land and their resources.'[22]

Section 4 of CHT 1900 provides that the enactments specified in the schedule to the extent and with the modifications therein set forth and so far as they are not inconsistent with the Regulation or the Rules for the time being in force, are declared to be in force in the CHT. In the schedule some Acts, amongst others, the Police Act, 1869, the Court Fees Act, 1870, the Cattle Trespass Act, 1871, the Evidence Act, 1872, The Christen Marriage Act, 1872, the Mohamadan Marriages and Divorce Registration Act, 1876, the Limitation Act, 1877, the Forest Act, 1878, the Chittagong Hill Tracts Frontier Police Regulation 1881; the Explosives Act, 1884; the General Clauses Act, 1897; the Code of Criminal Procedure, 1898; the Post Office Act, 1898; the Prisoners Act, 1900; the Limitation Act, 1908; the Explosive Substances Act, 1908; the Penal Code, 1860; the Public Demands Recovery Act, 1919; the

[22] Victorian Equal Opportunity and Human Rights Commission, Occasional paper prepared by Professor Larissa Behrendt and Alison Vivian Jumbunna Indigenous House of Learning, University of Technology, Sydney.

Income Tax Act, 1922; the Forest Act, 1927; the Trade Mark Act, 1940 etc. were included. In column four of the schedule, it was mentioned against some of those Acts "so much as may from time to time, be in force in the district of Chittagong". In respect of Court Fees Act, it was mentioned "as modified in the application to Bengal and in so far as it is inconsistent with the Chittagong Hill Tracts Regulation 1 of 1900'.

So all prevailing laws in the country are not applicable to these hill districts and only those provisions which are not inconsistent with the Regulation and the Rules for the time being in force are applicable. Though our Constitution does not provide any provision of special status for the indigenous peoples residing in CHT, Clause (2) of Article 19 even been placed in the chapter of the directive principles of the state policy, it is noteworthy that the State has power to adopt effective measures to remove social and economic inequality between man and man and ensured equitable distribution of wealth among citizens and opportunities in order to attain a

uniform level of economic development throughout the country. Article 23 however, states that the State shall adopt measures to conserve the 'cultural tradition and heritage of the people, and so to foster and improve the national language, literature and the arts that all sections of the people are afforded the opportunity to contribute towards and to participate in the enrichment of national culture'. Under this provision the culture, heritage and tradition of the indigenous peoples have been recognized. Article 42 states that "subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalised or requisitioned save by authority of law'. Coupled with this provision, clause (4) of Article 28 enjoins the State from making special provision in favour of women and children or for the advancement of any backward section of the citizens.

Though Article 29 (1) provides equality of opportunity in public employment, clause (3) (a) of

Article 29 is not in the nature of an exception to clauses (1) and (2), but an instance of classification permitted by clause (1). If provides, nothing in Article 29 shall prevent the state from–

> (a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic’.

The object of this clause is to bring in line with Articles 19(2), 23 and 28(4) and to make it constitutional for the State to reserve seats for making special provision for backward class of citizens. More so, these provisions assure a concession in favour of backward section which has to be reconciled in such a manner that it does not unreasonably encroach upon the field of equality. It is exhaustive of the concept of reservation in favour of backward classes. It enjoins the State to take positive step to alleviate inequality in economic, social, political and other segment of the State. It is, therefore, not sound argument that under the scheme of the

Constitution there is no scope to provide special status to any particular territory. It is also not correct view that all laws which are applicable to the country to be applicable to the three hill districts. Clause (a) of Article 29 authorises the State from making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of Republic.

There is no doubt that the citizens of three hill districts are backward people. These provisions embody the concept of making special provisions for the weaker backward section of the citizens by taking such measures as are necessary for removal of economic inequalities and rectifying discriminations resulting from State actions between unequal in society. This may be achieved by special laws or by direct regulation of transactions by forbidding certain transactions. It also means that those who have been deprived to their property by unconstitutional actions should be restored to their property. The State is under obligation to provide the

facilities and opportunities for their economic empowerment as it is their fundamental right.

The restrictions mentioned in Article 42 will be available in section 97 of the State Acquisition of Tenancy Act, 1950, Rule 34 of the Rules for the administration of the Chittgaong Hill Tracts and section 64 of the Rangamati, Bandarban, Khagrachori Zilla Parishad Ains, 1989. Section 97 of the Act of 1950 provides 'Restriction of alienation of land by aboriginals'. Under this provision if an aboriginal raiyat desires to transfer holding or any portion thereof by private sale, gift or will to any person who is not such as aboriginal, he may apply to the Revenue Officer for permission in that behalf and the Revenue Officer may pass such order on the application as he thinks fit. There are also restrictions for mortgage of land of aboriginals. Rule 34 of the Rules promulgated in exercise of powers under Chittgaong Hill Tracts Regulation, 1900 which restricts "Settlement and Government khas land, Transfer, Partition and Subletting". It is provided that no 'settlement of Government Khas Land

shall be made in the district of Chittagong Hill Tracts except in the manner specified in clauses (a), (b), (c), (d), (e), (f) and (g). Section 64 of the Ains of 1989 prohibits sale, lease, settlement or otherwise transfer of lands of three hill districts without prior permission of the Hill District Parishads.

Now the question is, in the absence of any constitutional safeguards, whether the Regulation of 1900 is still in force or not. If we look at various laws promulgated from time to time, it is difficult to accede to the argument that this Regulation has no force of law. Besides this Regulation, it is pertinent to note that the Bazar fund Manual, 1937, the Chittagong Hill Tracts Land Acquisition Regulation, 1958, the Chittagong Land Khatian Ordinance, 1984 are still hold the field to regulate the political and administration of the people of the Chittgaong Hill districts. There is another Regulation apart from the Regulation of 1900, which was in operation in these three districts. The Chittagong Frontier Police Regulation, 1881 is one of Regulation but this Regulation

is now no longer a valid law. This Regulation provided the manner of discipline of the special Chittgaong Hill Tracts police force, which was promulgated in accordance with the Police Act, 1861. Similar provision has been provided in the three Zilla Parishad Ains, 1989. By the Amending Act, 1903 (Act 1 of 1903) which repealed Act XXII of 1860 (an Act to remove certain tracts on the eastern border of the Chittagong District from the jurisdiction of the tribunal established under General Regulation and Acts), Bangal Act IV of 1863 (an Act to amend Act XXII of 1860) and so much of the second schedule to the Scheduled Districts Act, 1874 (Act XIV of 1874), and of the Repealing and Amending Act, 1891 (Act XII of 1891), as relates to either of the enactments aforesaid.

The Manual of 1937 was promulgated providing for the administration of the Bazars in the Chittagong Hill districts. The Chittagong Hill Tracts (Land Acquisition) Regulation, 1958 was promulgated just prior to the commissioning of Kaptai Multipurpose Hydro Electric Dam, (1960) enabling the government to acquire privately owned

land on payment of compensation. The Land Khatian (Chittgaong Hill Tracts) Ordinance, 1984 was passed with the aim of resettling landless Bangalee migrants from the plain districts. The object of the Ordinance was to provide for the publication of maps and land records taking in mind that no survey was ever conducted in those areas. The **পার্বত্য জেলা পরিষদ আইন, ১৯৮৯, খাগড়াছড়ি জেলা পরিষদ আইন, ১৯৮৯ এবং বান্দরবন জেলা পরিষদ আইন, ১৯৮৯** which were promulgated by providing more autonomy and authority to the Hill District Parishads with the aim of expeditious, cost free justice, accounting for customary law, to deal with instances of land grabbing, land alienation and so forth. Initially the Hill District Council was known as "Local Government Council" and in its place, the Bandarban Parbatya Zilla Parishad, Khagrachori Parbatya Zilla Parishad and the Rangamati Parbatya Zilla Parishad have been substituted.

Under the scheme of the Rangamati Hill District Parishad Ain, one chairman and thirty members with the ethnic composition, such as, ten from the Chakma tribe, ten from non-tribals and the remaining ten from one

Khyang, one Lushai, four Marma, one Pangkhua and two Tanchangya and one Tripura. This was the first composition of the Parishad. In future elections, provisions were made for induction of three women members, two from hill persons and one non-hill person. The chairperson must be a tribal. In respect of Khagrachori and Bandarban districts, there is some slight variation as regards composition of the Parishads. Khagrachori will have nine non-tribals and Bandarban ten non-tribals to be eligible for the election. Both tribal and non-tribal candidates must obtain a certificate from the concerned Circle Chief or Raja. The voters are restricted to the category of tribals and non-tribal residents[23].

The functions of the Parbatya Zilla Parishads have been provided in section 22, which provide that the said Parishads shall act on 33 different subjects such as, Law and Order, co-ordination of development activities of local authorities, education, health, agriculture and forests, animal husbandry, trade and commerce, social

[23] In order to qualify a non-tribal resident a non-tribal person must have a permanent and specific place of residence within the district along legal land title. (Ss. 2 and 6 of Act 1989).

welfare, culture, local police, tribal custom, land management, environment and ecology, local tourism and swidden (jum) cultivation, etc. etc. Administrative authority over some district level fields i.e., health, agriculture extension and primary education have been given to the Parishads. Law and order, local police, secondary education and land administration have not been transferred to the Parishads. Under section 64 of the Ains, the alienation of any property whether by way of lease, acquisition or sale have been totally restricted, which can only be done with the prior approval of the Parishads. The Parishads are authorized to collect local rates, tolls and fees on certain matters including on land, transport, cattle, entertainment etc[24]. Any act or omission in violation of the Parishads' functions is criminal offence. The Parishads are statutory bodies having perpetual succession and common seals.

Under the scheme of our Constitution, the composition of the 'Local Government' has been provided in Chapter III, which contains Articles 59 and 60. Article 59(1) says

[24] Section 44 of the Rangamati Parbatya Zila Parishad Ain, 2009.

the local government in every administrative unit of the Republic shall be entrusted to bodies, composed of persons elected in accordance with law. Clause (2) of Article 59 is relevant for our consideration which provides "Everybody such as is referred to in clause (1) shall, subject to this Constitution and any other law, (emphasis supplied) perform within the appropriate administrative unit such functions as shall be prescribed by Act of Parliament, which may include functions relating to –

(a) administration and the work of public officers;

(b) the maintenance of public order;

(c) the preparation and implementation of plans relating to public services and economic development.'

Article 60 empowers the government to promulgate law for the purpose of giving effect to the local government by conferring powers including power to impose taxes for local purposes, to prepare their budgets and to maintain funds. In exercise of that power, the Zilla Parishad Ain,

2000 was promulgated. In sub-section (2) of section 3 of the said Ain it was specifically provided that this Ain will not be applicable to Bandarban Parbatya Zilla, Khagrachri Parbatya Zilla and Rangamati Parbatya Zilla. Though Articles 59 and 60 provide for composition of local government in every administrative unit of the government in accordance with law, but the laws promulgated for three hill districts are completely different from the other districts of the country. This has been done in accordance with clause (2) of Article 59 which enjoins the government to constitute an administrative unit for a local government by promulgation of law. This distinction is significant. Even in the absence of a provision recognizing the special status of the hill districts by our Constitution as was recognised by the Constitution of the British India and the Provincial Constitution of Pakistan, there is implied recognition of special status of CHT which is completely distinct from those located in other parts of the Republic.

If we read the scheme of the Regulation of 1900, the three Hill Zilla Parishad Ains and the Chittagong Hill

Tracts Regional Council Ain, 1989, we notice that though Bangladesh is a unitary form of Government, a major form of legal pluralism is being practised in the three hill districts. It cannot be said that this is not permissible under the scheme of our Constitution. It is because of Articles 19(2), 23, 28(4), 29(3), 42, 59(2) and the definition of 'law' which includes rule, regulation, any custom or usage[25]. Even in respect of local securities, there is provision for raising local police force. Initially the provision for local security by raising local police was not provided in the Ain, but by way of amendment in 1989 in the Ains of IX, X, XI, the words **'সংরক্ষিত বা'** were added in the first schedule. However, this power has not been transferred to the Parishads as yet.

Apart from the above three Ains, there is another provision **'পার্বত্য চট্টগ্রাম আঞ্চলিক পরিষদ আইন, ১৯৯৮'** (Ain XII of 1998). The functions of the Regional Parishad are; (a) Overall supervision and co-ordination of all development activities under the Hill Zilla Parishads, (b) Supervision and co-ordination of local Parishads including Municipalities, (c) Overall supervision and co-ordination of Chittagong Hill Tracts Development Board set up under the Chittagong Hill Tracts Development Board Ordinance, 1976 (d) Supervision and co-ordination of the general

[25] Article 152 of the Constitution.

administration of the hill districts, law and order and development, (e) Supervision and co-ordination of tribal traditions, practices etc. and social justice; (f) Issuing licences for setting up heavy industries in hill districts in keeping with the national Industrial Policy; (g) To conduct disaster management and relief work and coordinating NGO activities. This Regional Parishad comprises with one chairperson- who must be a 'tribal' and twenty-one members, of them, fourteen are 'tribal' including two women and 7 are 'non-tribal' including one women. The chairperson of the three Zilla Parishads are ex-officio members of the Parishads. The chairperson and the other members of the Council are to be elected indirectly by the chairpersons and members of the three Zilla Parishads. A provision for Chief Executive Officer is provided, who shall be appointed by the government from among the Join Secretary level officers of the government with preference to an officer from tribal community. Under our local government scheme no such Parishad has been constituted other than the three hill districts.

It is important to note here that this Regional Parishad has been given legislative power as well in relation to the Chittagong Hill Tracts, to advise and recommend the government to remove inconsistency between

the Regulation of 1900 and the Hill District Parishad Ains of 1989 or other laws and to apply to the government to amend any law if it adversely affect the development of the region and to frame Regulation in accordance with the Ains and the Rules.

Besides, there is another provision, the **পার্বত্য চট্টগ্রাম ভূমি-বিরোধ নিষ্পত্তি কমিশন আইন, ২০০১.** (Ain LIII of 2001). The composition of the Commission is, a retired Judge of the Supreme Court of Bangladesh to be appointed as Chairman of the Commission with the chairpersons of the Chittagong Hill Tracts Regional Parishads and other bodies. The Commission is to provide decision on land related disputes brought before it in accordance with laws, customs and systems prevailing in the Chittagong Hill Tracts[26]. It has been given power to declare land grants illegal and to restore possession[27]. The Commission is not bound by the rules of procedure but its decision will have force of a court of civil nature and there is no provision for appeal from the decision of the Commission[28]. This Commission was

[26] Section 6 of the Ain.
[27] Section 6(1) ibid.
[28] Section 16 Ibid.

set up following the letter and spirit of the Accord of 1997 for providing expeditious, cost free justice and other allied matters. The Regulation of 1900 was also amended[29]. By this amendment Rangamati, Khagrachory and Bandarban districts of the CHT shall constitute three separate Sessions Divisions, and the concerned District Judge shall be the Sessions Judge of the respective Sessions Division and the Joint District Judge shall be the Assistant Sessions Judge. These three districts shall also constitute three separate civil jurisdictions with three District Judges. The Joint District Judge shall act as a court of original jurisdiction and shall try all civil cases in accordance with the existing laws, customs and usages of the district concerned except the cases arising out of the family laws and other customary laws of the tribles which shall be tried by the Mauza Headmen and Circle Chiefs.

By this amendment the indigenous peoples trait, their customs and traditions have not been at all been impeded, rather they are safeguarded. The change that has been made

[29] The Chittagong Hill-Tracts Regulation (Amendment Act), 2003.

is that the Deputy Commissioner shall act as District Magistrate and the administration of justice has been given upon the judicial officers in place of executive officers. The Sessions Judge has been given the power to take cognizance of any offence as a court of original jurisdiction without the accused being sent to him by a Magistrate for trial. While taking cognizance of the offence, he shall follow the provisions of the Code of Criminal Procedure.

Despite introduction of administration of justice by the Sessions Judges, District Judges and the Joint District Judges, Assistant Sessions Judges, the respective system of administration of customary law and other local laws and practices by the Headmen and Circle Chiefs, who can try minor criminal offences, remain unaffected by this amendment. This amendment introduces the dispensation of justice in respect of civil matters in accordance with the existing laws, customs and usages of the District concerned[30]. The jurisdiction of the civil courts, however, excludes the cases arising out of family laws and other customary laws of the types of the districts Rangamati, Bandarban and Khagrachori respectively which

[30] . Section 4c(4) of the Act

shall be triable by the Mouza and Circle Chiefs[31]. In case of criminal matters, the provision of the Code of Criminal Procedure, 1898 shall apply in so far as it is not inconsistent with Regulation of 1900 and the Rules framed thereunder. Therefore, there is no gainsaying that despite setting up of civil courts and criminal courts with the judicial officers, the courts will be guided by the Regulation of 1900 subject to certain variations. Therefore, the government recognizes the Regulation of 1900 by promulgating three Zilla Parishad Ains, one Regional Parishad Ain and by amending the Regulation of 1900. How then can it be accepted the contention that this Regulation of 1900 has no force of law?

Banion on Statutory Interpretation, Fifth Edn. at page 1033 stated that unless the contrary intention appears, an enactment by implication imports any principle or rule of law whether statutory or non-statutory which prevails in the territory to which the enactment extends and is relevant to its operation in that territory. This view was followed by Lord Browne-Wilkinson and Lord Steyn[32]. It is generally accepted principle that an Act of Parliament is not a statement in a vacuum. Parliament intends its Act to be read and applied within the context of the existing *corpus juris* or body of law. As long as a

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[31] . Regulation 894 of Regulation 1900.
[32] Rv Secretary of State for the Home Department (1997)3 All E R 577 (591).

statute appears on its face to be valid, it must be taken to be so. The requisite formula is that it was passed by the Parliament. Lord Reid in this connection observed:

> "The function of the court is to construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its standing orders perform those functions. Any attempt to prove that they were misled by fraud or otherwise would necessarily involve an inquiry into the manner in which they had performed their functions in dealing with the Bill which became the British Railways Act, 1968[33].

The presumption is always in favour of the constitutionality of an enactment. The reason is obvious. It is assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds. Every statute is to be so interpreted and applied as not to be inconsistent with other laws and there is presumption that the legislature does not intend what is

[33] . Pickin V. British Railways Board, (1974) All ER 609 (618).

inconvenient and unreasonable. Finally, it is presumed that the legislature does not make mistakes or omissions.

Now turning to the powers of the Land Appeal Board, as observed above, the Regulation of 1900 being a special law and the same is still in force, it will prevail over any other laws in force. In this connection Maxwell in Interpretation of Statutes has put the matter thus:

> Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special Act and that the general one was intended to embrace the special cases provided for by the previous one, or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute is read as silently excluding from its operation

the cases which have been provided for by the special one[34].

Section 17 of the Regulation provides:

"17. (1) All officers in the Chittagong Hill Tracts shall be subordinate to the Deputy Commissioner, who may revise any order made by any such officer, including a Deputy Magistrate and Deputy Collector or a sub-Deputy Magistrate and Sub-Deputy Collector invested with any of the powers of the Deputy Commissioner under section 6.

(2) The Commissioner may revise any order made under this Regulation by the Deputy Commissioner or by any other officer in the Chittagong Hill Tracts.

(3) The Government may revise any order under this Regulation." (emphasis supplied)

This provision provides that the Deputy Commissioner of the district has been given power to revise any order passed by a Deputy Magistrate or Deputy Collector or a

[34] . Maxwell, Ninth Edn. P.14.

Sub-Deputy Magistrate or Sub-Deputy Collector and a Divisional Commissioner may revise any order made under the Regulation by the Deputy Commissioner and the Government may revise any order made by the Commissioner. Under this provision, no power has been given upon the Land Appeal Board to revise any order passed by the Divisional Commissioner. The Land Appeal Board Ain, 1989 has been empowered to exercise such powers as may be given by the government or by any other law. There is a provision for appeal to the government from the decision of the Board and the said decision of the appellate authority shall be final. Subsequently, by circular under memo dated May 23, 1989, the following powers of the Board has been given from the decision of the Deputy Commissioner, Additional Deputy Commissioner (Revenue) and the Divisional Commissioner for its disposal: **(ক) ভূমি সংক্রান্ত মামলা, (খ) নামজারী ও খরিজ মামলা, (গ) পরিত্যক্ত, অর্পিত ও বিনিময় সম্পত্তি বিষয়ক মামলা, (ঘ) সায়রাত ও জলমহল সংক্রান্ত মামলা, (ঙ) ভূমি রেকর্ড সম্পর্কিত মামলা, (চ) ভূমি উন্নয়ন কর, সার্টিফিকেট মামলা, (ছ) ওয়াকফ/দেবোত্তর সম্পত্তি সংক্রান্ত মামলা, (জ) খাসজমি বন্দোবস্ত সংক্রান্ত মামলা ।**

The expression 'land related dispute' as mentioned in clause **(ক)** does not mean that the Board has power to resolve disputes of land arising out of a civil suit or that it has power to decide the right, title, interest of parties relating to immovable property. It relates to disputes arising out of settlement of khas land or other related matter, which do not cover clauses (M) to (N) above. The Board has not been given any power to adjudicate in respect of a revision, review or appeal from the judgment of the Deputy Commissioner or the Commissioner in a civil suit involving the rights of the land of CHT. The Land Appeal Board has framed Rules in exercise of powers under section 7 of Ain XXIV of 1989. We need not discuss in detail about the Rules since the parent law has not given any power upon the Board to decide any dispute against a decision passed by the Commissioner in a civil suit disposed of under Regulation of 1900.

In Bikram Kishore Chakma, the High Court Division has stressed upon section 3 of Ain XXIV of 1989, which

provides that the said Ain and the Rules framed thereunder shall have precedence over any other law and therefore, the said Ain shall prevail over Regulation of 1900. A general law prima facie is that which applies to the whole community. In the general meaning of the term means an Act of Parliament which is unlimited both in its area and as regards the individual in its effects, and is opposed to local or special law. A 'special law' is a law applicable to a particular subject. According to Craies on Statute Law, Seventh Edn, the court would treat 'special statute', like local customs, as exceptions on the general law requiring special proof. Where there is a special law dealing with a special subject, resort should be had to that law instead of to a general provision which is exercisable or which is available under extraordinary circumstances only. Where a general intention is expressed in a statute, and also a particular intention which in incompatible with the general one, the particular intention is considered an exception to the general one. Even when the later part of the enactment is in negative,

it is sometimes reconcilable with the earlier one by so treating it. Where special provision is made in a special statute that special provision excludes the operation of general provision in the general law.

The Land Administration Board shall act such powers as may be conferred by the government or by any other law. Since Board has not been given any specific power under the said Ain or the Regulation of 1900, it cannot exercise powers in respect of a dispute arising out of Regulation of 1900. Its power has been given by a circular under memo dated 23rd May, 1989. Those powers are for mutation, Vested and Non-vested Properties, Fisheries, Land Development Tax and Settlement of Khas Land related cases. It has not been given any power to decide any substantive matter of right or liabilities arising out of civil suit which determines the right, title and interest of any party. Under section 17 of the Regulation of 1900, the revisional power from the decision of the Deputy Commissioner or Commissioner has been given upon the Government and not upon the Land Appeal Board. Therefore,

the views taken by the High Court Division in Bikram Kishore Chakma is based on not conformity with law and thus, the same has no sanction of law.

In the present case, the High Court Division rightly held that the language of the circular under memo dated 23rd May, 1989, does not show that the Land Appeal Board has been given power to hear appeal or revision in respect of matters arising out of civil suits disposed of by the Deputy Commissioner of CHT; that the Land Appeal Board Rules do not show that it has jurisdiction to hear appeal or revision in matters arising out of civil suit disposed of by the Deputy Commissioner of the Hill Districts and that section 17(3) of the Regulation of 1900 has not delegated the powers of the government to the Land Appeal Board. However, the observations that in Bikram Kishore Chakma (6 BLC 436), it was out of a dispute over "settlement of government khas land within Chittagong Hill District" meaning thereby that in case of disputes over settlement of land of the three hill districts, the Board has power to revise any decision given by the Commissioner

is not a sound view in view of sub-section (3) of section 17 which clearly provides that the government may 'revise any order made under this Regulation'. It is only the government which can revise any decision of the Commissioner made in exercise of powers under Regulation of 1900. The Board has no power to decide any dispute from the decision of the Commissioner over the settlement of government khas land or any other matters relating to Vested and Non-resident Property, Abandoned Property, Land Survey Record, Land Development Tax, Certificate Case, Waqf or Debuttor property or any other related matters which cover Regulation of 1900.

What's more, the appellant has surrendered to the jurisdiction of the Deputy Commissioner and the Commissioner under the provisions of the Regulation of 1900. It cannot now say that this provision is not applicable. On the doctrine of approbation and reprobation, persons to the litigation cannot be permitted to take up inconsistent position. This principle has been argued by the Judicial Committee. A litigant who has all

along maintained a position in support of one branch of his litigation cannot be permitted, when he fails upon this branch, to withdraw from the position and assert the contrary, more especially when he thereby places his opponent at a great disadvantage.[35] To make the point more clear, a person or litigant cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn round and say it is void for the purpose of securing some other advantage. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it; one cannot play fast and loose. It is well settled that party to the litigation cannot be permitted to assume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of the opponent; and that this wholesome doctrine applies not only to the successive stages of the same litigation, but

[35] Gajapathiraj V. Secretary of state, AIR 1926 P.C. 18.

also to another litigation other than the one in which the position was taken up, provided the second litigation grows out of the judgment in the first. Where a party invites the court to follow a procedure which is not contemplated by a particular law, say Code of Civil Procedure and is in fact a procedure extra *cursum curie*, he cannot turn round and say that the court is to blame for adopting the very same procedure which he invited the court to follow. The doctrine of estoppel would apply to a party who attempts to blow hot and cold.

Learned counsel for the appellant also finds it difficult to support the decision of the Land Appeal Board in view of section 17(3) of Regulation. On a plain reading of the Regulation of 1900, one may arrive at the conclusion that this Regulation was promulgated with the object of giving a special privilege to the indigenous people of the three hill districts to protect and safeguard their culture, traditional practices and customs, and they should not fall prey to the tactics of unscrupulous people. A privilege is a special right

reserved to an individual person or a limited class of persons, bodies or institutions. Its grant is generally attended by some degree of formality in the form of letters patent or some other document. Privileges would occupy a small circle within a much larger circle of rights. Every privilege is a right but not every right is a privilege. So infringement or removal of a privilege would be just as actionable as infringement of a right which was not a privilege. A custom has the force of law. Custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility. The fact that any rule has already the sanction of custom, raises a presumption that it deserves to obtain sanction of law also. Speaking generally, it is well that courts of justice, in seeking for those rules of right which it is their duty to administer, should be content to accept those which have already in their favour the prestige and authority of long acceptance, rather than attempt the more

dangerous task of fashioning a set of rules for themselves by the light of nature.

The appeal, is therefore, dismissed with costs.

J.

J.

J.

J.

The 2nd December, 2014
Mohammad Sajjad Khan

APPROVED FOR REPORTING