

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mr. Justice Syed Mahmud Hossain

Mr. Justice Hasan Foez Siddique

CIVIL APPEAL NO.08 OF 2008.

(From the judgment and order dated 13.05.2003 passed by the High Court Division in Writ Petition No.1774 of 2001.)

Government of Bangladesh represented by Secretary, Ministry of Finance, Bangladesh Secretariat, Ramna, Dhaka: Appellant.

=Versus=

Rangamati Food Products Ltd. and others: Respondents.

For the Appellant: Mr. Murad Reza, Additional Attorney General, (with Mr. Protikur Chakma, A.A.G, Sk. Saifuzzaman, A.A.G & A.B.A. Mahbub, A.A.G), instructed by Mr.Zainul Abedin, Advocate-on-Record.

For the Respondents: Exparte

Date of hearing: 22nd November, 2016.

Date of Judgment: 22nd November, 2016.

J U D G M E N T

Surendra Kumar Sinha, CJ: Two vital law points of public interest are involved in this appeal. Whether the Chittagong Hill Tracts Regulation 1900 (Regulation 1 of 1900) is a dead law or still in force in Chittagong Hill Districts and secondly, whether all laws which are in force in Bangladesh are equally applicable to Chittagong Hill Districts

in the similar manner as are applicable in other parts of the country.

To resolve the said points short facts are required to be considered. Respondent No.1, a public limited company and manufacturer of canned jam, jelly, squash and fruit juices by using the locally produced fruits, filed a writ petition challenging the order dated 12.10.2000 of the Commissioner of Customs seeking a direction upon the writ respondents to refund Tk.1,77,296.26 paid as advance as income tax and VAT on the averments that the Director (Administration), the Ministry of Social Welfare (Special Cell) vide its letter dated 29.10.90 written to the Chairman, Local Government Parishad, Rangamati; Divisional Commissioner, Chittagong Division and Deputy Commissioner, Rangamati that the provisions of the Chittagong Hill Tracts Regulation 1900 are still in force and that it got tax holiday for 9 years with effect from 1st August, 1983 under the Income Tax Ordinance, 1983

and in the year 1985, the President declared Chittagong Hill Tracts as "Special Economic Zone"; that Bangladesh Bank by Circular No.12 dated 18.04.1984 and the Directorate of Industries, Chittagong issued memo dated 13.08.1985 stating that industries situated at Chittagong Hill Tracts (CHT) including cinema halls were exempted from customs and excise duties, income tax, VAT in pursuance of SRO No.138 Law/93/73 VAT dated 12.7.1983. In spite of that the Commissioner of Taxes collected advance income tax and the Commissioner of Customs and Excise, also collected VAT. The company filed Civil Suit No.39 of 1997 before the Deputy Commissioner, Rangamati for declaration that imposition of income tax and VAT, is illegal and not binding upon it. The Ministry of Finance, by memo dated 6.12.98 addressed the Prime Minister, expressing that the provisions of Regulation 1 of 1900 are still in force in CHT. On 16.11.98 the company opened letter of credit for importing merchandise and on 11.2.99, submitted Bill

of Entry No.C-17966 dated 14.2.99 for release of those goods but the customs authority, refused to accept the applicability of Regulation 1900.

Respondent No.2 opposed the rule stating inter alia that though Regulation 1900 is still in force, and applicable to CJT, the same being not a special law, does not enjoy any special status over any other law and is subject to the Finance Act. VAT Act being a special law will prevail over Regulation 1 of 1900. After coming into force of Regulation 1 of 1900, the expressions "excluded area" and "partially excluded area" were introduced for the first time by the Government of India Act, 1935 and those expressions were retained in the constitutions of Pakistan in 1956 and 1962, but thereafter in 1964, by the Constitution (First Amendment) Act, 1964, the definition of "Tribal Area" was omitted on and from 10.1.1964. In the constitution of Bangladesh the term "Tribal Area" has not been retained. The benefit of special status was given to the tribal

people and therefore, all the districts of CHT are part of Bangladesh like any other territory of this country and in terms of the Finance Act, the company is liable to pay VAT and advance income tax.

The High Court Division discharged the rule holding that Regulation 1 of 1900 is a dead law and that all laws applicable to Bangladesh are also equally applicable to the Hill Districts.

Learned Additional Attorney General argues that the High Court Division fell in an error in holding that Regulation 1 of 1900 is a dead law since 10th January, 1964. He submits that this regulation has not been repealed by the government and thus it has still force of law and is applicable to CHT, inasmuch as, all laws existed on 26.03.1971 on any part of the territory now comprised Bangladesh are applicable by P.O.48 of 1972. Finally it is submitted that in recognition of the Regulation 1900 the government has issued series of notifications and circulars reiterating that it has force of law -

the High Court Division erred in law in ignoring them. In support of his contention he has submitted a written argument.

Though the High Court Division observed that since 10th January, 1964, Regulation 1 of 1900 is not applicable in CHT, neither provincial government nor the central government repealed it declaring that it had no force of law. The basis for coming to such conclusion is the Constitution (First Amendment) Act, 1964, by which, the words "Tribal Area" were deleted on and from 10th January, 1964 and that in our constitution the expression "Tribal Area" has not been recognized and/or restored. It has also relied upon the case of Collector V. Azizuddin, 23 DLR (SC) 73.

It is not disputed fact that even after the amendments of the constitution of Pakistan the special status given to the tribal people of the hill district was prevailing and the administration of the district was regulated under the Regulation

1900. The Bangladesh (Adaptation of Existing Laws) Order, 1972 (President's Order No.48 of 1972) came into effect on 26th March, 1971 and in article 2, it said 'Existing Laws' means any Act, Ordinance, Regulation, Rule, Order or bye-law which immediately before 26th March, 1971 had the force of law in whole or any part of the territories of the Peoples Republic of Bangladesh. Article 3 said that from 26th March, 1971 all 'existing laws' shall, until repealed or altered or amended by competent legislature or other competent authority, in their application to Bangladesh, be subject to the adaptation directed by the Order. There is nothing in this Order or any other law that can be inferred that Regulation 1 of 1900 has been kept out side the 'existing law'. By reason of article 2 of P.O.48 of 1972, Regulation 1 of 1900 be taken as 'existing law' if it existed on 26^h March, 1971. Therefore, it is to be looked at whether on 26th March, 1971, this Regulation 1 of 1900 was in force or not.

Regulation 1 of 1900 was promulgated for the administration of CHT which received assent of the Governor General on 6th January, 1900 and it was published in the gazette. Before promulgation of Regulation 1900, the Penal Code, 1860; the Police Act, 1861; the CHT Frontier Police Regulation, 1881 were in force partially. The latter law was a bit different in its applicability other than the earlier two Acts, inasmuch as, the latter law was enacted under the Government of India Act, 1870 and under this special law, for the first time the force had performed in the capacity of quasi-military character and a large number of local hill men of CHT were recruited with the prime object to preventing raids marauders from nearly mountainous areas. So far the above Acts, and other laws in general application are applied to CHT to the extent and with modifications set forth in fourth column of the schedule and so far as they are not inconsistent with the Regulation 1900. So Regulation 1 of 1900

supplemented the application of general statutes applicable to Bengal.

This Regulation lays down a detailed policy for the general, judicial, land and revenue administration of the region and defines the powers, functions and responsibilities of various officials and institutions. It also stipulates the manner and extent of the application of other laws to the region. It lays down on such matters to be exercised by government officials, traditional chiefs and headmen in respect of the subjects. It retains the special legal and administrative status of CHT and also recognizes a wide body of customary laws on land, forest and other natural resources that are crucial safeguards for the tribal people of the said region. Elaborate Rules have been framed by the government in exercise of powers under section 18 for the administration of CHT delineating (a) administration of civil justice (b) legal practitioners and agents; (c) registration of deeds;

(d) settlement of government land; (e) Circle Division; (f) Taluk Division; (g) Mouza; (h) administration of the circle and mauzas (i) Maini Valley; (j) Police Administration; (k) administrative powers of the Chiefs and Headmen; (l) control and regulation of jhuming; (m) Jhum tax; (n) compulsory labour; (o) collection of rent; (p) non-agricultural rents; (q) Grass and Garjan Khola Rents; (r) levy of grazing tax; (s) remuneration; (t) Khas Mauzas of Chiefs; (u) migration and migrating defaulters and absconders; (v) occupation of non-urban Land for homestead and resumption of land for public purpose; (w) expulsion of undesirables; (x) immigration into the Hill Tracts; (y) protection against small-pox and (z) registration of opium consumers etc.

As per Rules CHT comprises under three Chiefs namely, the Chakma Chief, the Bohmong Chief and Mong Chief divided into 33 blocks (Taluk Division) and under Chakma Chief 9 blocks, Bohmong

Chief 18 blocks and Mong Chief 6 blocks. The whole area outside the forest reserves is divided into mouzas. The circle chiefs shall form an advisory council to the Deputy Commissioner. The mauza headmen have been given the power to adjudicate on all disputes which will be brought to them by residents of the mauzas and the Chiefs will adjudicate all disputes in their khas mauzas as headmen.

For the maintenance of discipline, a separate force was created by the Chittagong Frontier Police Regulation, 1881. This police force was totally different from the police force exercising powers in the rest of the country on consideration of the unique socio-economic and cultural traditions of the region, among others, set it apart from the rest of the country. In early years of British rule, the superintendent, and later on, the Deputy Commissioner, exercised the powers as ex-officio superintendent of police while the Commissioner

exercised the powers of Inspector General of Police (Compendium on National and International Laws and tribal peoples in Bangladesh, compiled by Raja Devasish Roy, Pratikar Chakma, Shirin Lira).

In the Government of India Act, 1909, CHT Regulation was termed as 'backward tracts' and in the Government of India Act, 1935, it was termed as 'excluded area'. Even in the Pakistan's constitution 1956, the said region was recognized as excluded area. In the constitution of 1962, this region was named as 'tribal area' and the expression 'tribal area' was removed by the Constitution (First Amendment) Act, 1963, which came into effect on 10th January, 1964. Though the expression 'tribal area' was deleted by amendment, the CHT was regulated and administered in accordance with Regulation 1 of 1900 and it continued till 26th March, 1971. There was nothing on record to infer that even after deletion of the word 'tribal area' by amendment, the civil laws which were applicable to the rest of East

Pakistan were applicable to the said region to the same extent inconsistent with the Regulation. No civil court constituted under the Civil Courts Act, 1887 or the Criminal Courts in accordance with Code of Criminal Procedure 1898 or that the general courts were working in accordance with them. The Deputy Commissioner performed the functions of a District Judge dealing with civil matters and the Divisional Commissioner performed as Session Judge. These are the admitted position prevailing in the region till 26th March, 1971.

More so, after the independence, besides P.O.48 of 1972, the Bangladesh Laws (Revision and Declaration) Act, 1973 was promulgated for adapting, modifying, amending laws in force 'in territories now in Bangladesh'. The Regulation 1900 has not been deleted as not existing law. It is provided in section 2 that the Acts specified in the First Schedule were repealed and in section 3 it is provided that the laws specified in the Second

schedule were amended to the extent mentioned in the Fourth Column. This Regulation 1 of 1900 was kept intact without modification.

Article 149 of the constitution provides that "subject to the provisions of this constitution, all existing laws shall continue to have effect but may be amended or repealed by law made under this constitution". So, besides P.O.48 of 1972, our constitution recognizes continuation of the laws in force on 26th March, 1971 to be continued to have effect until such laws are amended or repealed. It is contended on behalf of the appellants that the government by notification No.415-SEC(1) dated 21st May, 1974, recognised the Circle Chiefs, and thereafter by notification dated 4th December, 2008 the Mong Chief was appointed following rule 48 of Rules framed for the administration of the CHT. These Rules have been framed in exercise of powers under section 18 of the Regulation of 1900 by the Government of Bengal. Rule 48 provides as under:

"The investiture of the Chief is regulated by the Bengal Government. The headmen will be appointed by the Deputy Commissioner in consultation with the Chief and they may be dismissed by the Deputy Commissioner for incompetence or misconduct after a reference to the Chief concerned. The Deputy Commissioner will not be bound, in either case by the wishes of the Chief, but full consideration should be given to them. This appointment is not hereditary, but a son, when competent, may be appointed to succeed his father".

So, till 4th December, 2008, the government recognized the Rules framed in exercise of powers under Regulation 1 of 1900. The High Court Division though noticed the amendment of the Pakistan's Constitution in 1964, it did not say anything that after this amendment, which laws were prevailing in the region and the mode of administration of the

region. It only noticed the case of Collector V. Azizuddin, 23 DLR(SC)73.

The question involved in Azizuddin was whether the exemption from the payment of excise duty for four years by the Central Board of Revenue by notification dated 30th June, 1961 was curtailed by the amendment to the constitution in 1964 by which the CHT was removed from the category of 'tribal area.' Respondent prayed for shifting the site of his cigarette factory with a view to availing of the opportunity of exemption. After the amendment of the constitution, the Central Board of Revenue published another letter to the Inspector of Central Excise on 28th February, 1964 intimating that in view of the amendment all exercisable goods produced in CHT are subject to excise duty. The Central Government issued another notification on 28th February, 1964 providing that the exemption granted would not apply to any excisable goods manufactured in the 'tribal areas' which would bear brand or trade names or

trade marks under which similar goods manufactured in any area of Pakistan other than the said tribal areas are also marketed. Respondent had another cigarette factory at Bogra and he had been manufacturing similar brand of cigarettes in that factory as well. The Supreme Court held that the 'respondent had acquired a vested right of exemption from the levy of excise duty on all goods produced or manufactured by it for a period of four years under the Notifications of the Central Government referred to above. That vested right could not, therefore be taken away by an executive action. The Notification dated the 28th February, 1964, being completely destructive of the right vested in the respondent-company was in this view without lawful authority.....' The Supreme Court, however, allowed the appeal on the reasonings that 'the High Court was not right in ordering the refund of the duty recovered from the respondent by the government without taking an account as to how much amount had

been realised as excise duty up to 30th June, 1965.'

I fail to understand why the High Court Division has relied upon this case and without considering the ratio of the case, it has observed that the Regulation 1900 was kept not in force on misconception of law.

The High Court Division also noticed the case of Bikram Kishore Chakma V. Land Appeal Board, 6 BLC 436 and Bangladesh Forest Industries Development Corporation V. Sheikh Abdul Jabbar, 53 DLR(2001)488. This Court overruled Bikram Kishore in C.A.No.147 of 2004. The case of Sk. Abdul Jabber has no relevance in this case. There is no dispute in the observation of the High Court Division that 'the hill districts of the Chittgong Hill Tracts do form part of Bangladesh like any other territory of our country' but the observation that 'It does not enjoy any extra-constitutional privilege under the present constitution' is devoid of substance. Till today the CHT has been treated and identified as an area

inhabited predominantly by tribal people under the Scheme of the constitution and the constitution does not debar to identify as such. There is provision in clause (4) of article 28 that the state can promulgate special provision for the advancement of any backward section of citizens. Mere changing of the nomenclature does not ipso facto change the laws, customs and privileges which are being enjoyed by a section of a people of the country.

By gazette notification dated 17th January, 1974, the government promulgated Chittagong Hill Tracts Forest Transit Rules 1973. The very nomenclature of the Rules is self explanatory. The government made separate Rules for the purpose of felling trees and removal of trees from the CHT. Again in 1976, the government has promulgated the Chittagong Hill Tracts Development Board Ordinance, 1976. This Ordinance is altogether different from the Local Government laws applicable to the country. It was promulgated for the development of Hill

Districts and in it, there is provision for consultative committee consisting of the three Rajas or their nominees; one representative of the headmen from each sub-division in the districts of CHT. The government has also promulgated the Districts (Extension of Chittagong Hill Tracts) Ordinance, 1984 and by this Ordinance the District Act, 1836 was made applicable to CHT and by this Ordinance the districts of Bandarban and Khagrachri have been created in CHT and those districts are constituted as districts under the provisions of the Code of Criminal Procedure.

Another legislation is ভূমি খতিয়ান (পার্বত্য চট্টগ্রাম আঞ্চলিক পরিষদ আইন, ১৯৮৪) In the definition clause, the expression ‘পার্বত্য চট্টগ্রাম’ means the areas fall under Bandarban and Khagrachari Districts. Section 7 provides for objection and dismissal of appeal. In sub-section (1) it provides that the authority who hears any objection or appeal can exercise those powers authorised by an officer empowered to

adjudicate civil suits in Hill Districts. Thereafter, the government has promulgated 'বান্দরবন পার্বত্য জেলা পরিষদ আইন, ১৯৮৯; খাগড়াছড়ি পার্বত্য জেলা আইন, ১৯৮৯ এবং রাঙ্গামাটি পার্বত্য জেলা পরিষদ আইন, ১৯৮৯' Under these Ains, the government virtually recognized the Regulation 1 of 1900 and gave a special privilege to these three Hill Districts in respective fields. This local government bodies are working which are totally distinct from those working in other parts of the country. It is contended that these three independent local bodies have been created in recognition of the signing of the Chittagong Hill Tracts Accord in 1997. There is merit in the submission.

On perusal of these provisions, it is apparent that the scheme of the Zilla Parishads is totally different from other Parishads working in the country. Besides those three Ains, the government has also promulgated 'পার্বত্য চট্টগ্রাম আঞ্চলিক পরিষদ আইন, ১৯৯৮। The functions of the Regional Parisad 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 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 and

(g) To conduct disaster management and relief work and coordinating NGO activities."

The government has also promulgated 'পার্বত্য চট্টগ্রাম ভূমি বিরোধ নিষ্পত্তি কমিশন আইন, ২০০১। In the preamble of the Ain there is reference about execution of Accord on 2nd December, 1997. It is stated 'যেহেতু উক্ত চুক্তি বাস্তবায়নের অংশ হিসেবে পার্বত্য চট্টগ্রামের জায়গা-জমি সংক্রান্ত কতিপয় বিরোধের দ্রুত নিষ্পত্তির জন্য একটি কমিশন গঠন ও আনুষঙ্গিক বিষয়ে বিধান করা সমিচীন প্রয়োজন হইবে।' The object of the Ain has been clearly disclosed in the preamble that this Ain has been enacted for the purpose of resolving some disputes relating to Hill Districts. The composition of the Commission is as under:

"(a) A retired Judge of the Supreme Court of Bangladesh, Chairman,

(b) Chairpersons of the Chittagong Hill Districts Regional Parishads and other bodies."

This Commission is empowered to give decision on land related disputes brought before it in accordance with the laws, customs and systems prevailing in CHT. It has power to declare land grants illegal and to restore possession. It is evident from the preamble of the Ain that it has been constituted following the spirit of the Accord 1997 and by this Ain, the government has recognized Regulation 1 of 1900 as an enforceable law in CHT and the powers and authority of Circle Chiefs as per customs of the tribal people have been recognized. The Circle Chiefs have been included as members. On consideration of this provision, this court held in Civil Appeal No.147 of 2004 that "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?"

These provisions clearly suggest no inference other than that the Regulation 1 of 1900 has force of law and subsisting. In Civil Appeal No.147 of 2004, this court concluded its opinion observing that the object of promulgating the Regulation was for the purpose of giving special privilege to the tribal people of the three hill districts and to protect and preserve their culture, traditional practices, customs etc. A custom which is followed in a particular region and recognized by the government has a force of law (article 152 of the constitution).

By amendment of section 7 of the Regulation by the Chittagong Hill Tracts (Amendment) Act, 2003 for the words 'a district' the words 'three districts' have been substituted, the words 'and civil' and

'civil' have been deleted. Section 8 (1) has been substituted as under:

"(1) The Rangamati, Khagrachory and Bandarban districts of the Chittagong Hill Tracts shall constitute three separate sessions divisions and the concerned District Judge shall be the Sessions Judge of the respective sessions divisions and the Joint District Judge shall be the Assistant Sessions Judge."

and in sub-section (2) the word 'As' has been substituted for the word 'The' and in the sixth line the word 'warrant' has been deleted. Thereafter sub-sections (3) (4) and (5) have been in the following manner:

"(3) The Rangamati, Khagrachory and Bandarban districts of the Chittagong Hill Tracts shall constitute three separate civil jurisdictions under three District Judges.

(4) The Joint District Judge as a court of original jurisdiction, shall try all civil cases in accordance with the existing laws, customs and usages of the districts concerned, except the cases arising out of the family laws and other customary laws of the tribes of the districts of Rangamati, Khagrachory and Bandarban respectively which shall be triable by the Mauza Headmen and Circle Chiefs.

(5) An appeal against the order, judgment and decree of the Joint District Judge shall lie to the District Judge."

In Section 8 of the Regulation, sub-sections (1) and (2) have been substituted as under:

"(1) The Rangamati, Khagrachory and Bandarban districts of the Chittagong Hill Tracts shall constitute three separate sessions divisions and the concerned

District Judge shall be the Sessions Judge of the respective sessions divisions and the Joint District Judge shall be the Assistant Sessions Judge.

(2) The Sessions Judge may take cognizance of any offence as a court of original jurisdiction, without the accused being committed to him by a Magistrate for trial, and when so taking cognizance, shall follow the procedure prescribed by the Code of Criminal procedure, 1898 (Act V of 1898), for the trial of cases by Magistrates."

By this amendment, the Session Judge has been given the power to take cognizance of any offence as a court of original jurisdiction. This power has been given to a Magistrate in respect of other Session Divisions of the country. The three districts have been constituted three separate civil jurisdictions under three Districts Judges and

a Joint District Judge has been given power to exercise a court of original jurisdiction under section 8(4). While exercising such power he shall follow the existing laws, customs and usages of the districts concerned, except the cases arising out of Family Laws and other customary laws of the tribes of the districts of Rangamati, Khagrachori and Bandarban respectively, which shall be triable by the Mauza headmen and Circle Chiefs. Against an order, judgment or decree passed by the Joint District, the District Judge have been given the appellate power.

The High Court Division has been given all appellate powers under the Code of Criminal Procedure under section 9, but in respect of civil disputes no such power has been given upon the High Court Division. These provisions are sufficient to come to the conclusion that the government still recognize the customs and usages of the tribal

people of the region while adjudicating civil disputes.

The High Court Division has totally ignored these aspects of the matter. The appeal is therefore, allowed. The judgment of the High Court Division is set aside, so far as it relates to the observation that Regulation 1 of 1900 is a dead law.

C.J.

J.

J.

The 22nd November, 2016

Md. Mahub Hossain

APPROVED FOR REPORTING