IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 3285 OF 2009
with
WRIT PETITION NO. 2829 OF 2006

IN THE MATTER OF:

Applications under Article 102 of the Constitution of the People's Republic of Bangladesh

And

IN THE MATTER OF:

Aberchai Mog and others
- Petitioners
-vs-
Joint District Judge, Khagrachari and others.
- Respondents.

And

IN THE MATTER OF:

Chailapru Marma
- Petitioner
-vs-
Land Appeal Board and others.
- Respondents.

And

Mr. Ekramul Islam, Advocate
..... For the Petitioners(in writ petition No.3285 of 2009)

Mr. Sheikh Reajul Hoque, Advocate
..... For the Petitioner(in writ petition No.2829 of 2006)

Mr. Munsurul Haq Chowdhury, Senior Advocate with
Mr. Quamrul Hoque Siddiquee, Advocate with
Mr. S.M. Rezaul Karim, Advocate with
Mr. Md. Abdul Mannan Bhuiyan, Advocate
..... For the Respondent Nos.7 and 9-13.

Mr. Raja Debashish Roy Chowdhury, Advocate with
Ms. Sara Hussain, Advcoate

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মুহাম্মদ আব্দুল ওয়াহাব
সহকারী রেজি: অফিসার
বাংলাদেশ সুপ্রীম কোর্ট
হাইকোর্ট বিভাগ, ঢাকা।

..... For the Respondent No.15(the Intervenor).

Heard On 23.11.2011, 30.01.2012 ,07.05.2012 15.05.2012,21.05.2012,22.05.2012,15.07.2012,31.07.2012 and 01.08.2012

Judgment on 07.10.2012.

Present:

Mrs. Justice Farah Mahbub.
and
Mr. Justice Abdur Rob

Farah Mahbub, J:

Since common question of law and facts are involved in both the Rules Nisi as such, those have been heard together and are being disposed of by this single judgment.

In writ petition No.3285 of 2009 a Rule Nisi has been issued under Article 102 of the Constitution of the Peoples' Republic of Bangladesh, calling upon the respondents concern to show cause as to why the impugned judgment and order dated 22.9.1996 (Annexure-A) passed by the respondent No.2, the Deputy Commissioner, Khagrachari and the ex-officio Civil Judge in connection with Civil Suit No. 20 of 1992 which has been upheld upto the Land Appeal Board, Dhaka directing vide order dated 12.3.2006 to make partition of 24.30 acres of land and opening a separate khatian in Volume 6, page 81 by the respondent No. 5 in

favour of respondent Nos. 9-13 pursuent to Namjari Case No. 165 of 1997 (Annexure-B) should not be declared to have been passed without any lawful authority and are of no legal effect.

In writ petition No. 2829 of 2006 the impugned judgment and order dated 12.3.2001 passed by the Additional Divisional Commissioner, Chittagong Division, Chittagong, respondent No. 4 in Civil Appeal (Khagrachori) Case No. 84 of 1997 (Annexure-C) disallowing the appeal and affirming the judgment and order dated 22.9.1996, passed by the Deputy Commissioner, and ex-officio Civil Judge, Khagrachori, in Civil Suit No. 20 of 1992 allowing the suit for partition, is under challenge.

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মুহাম্মদ আবুল কাশেম
সহকারী রেজিস্ট্রার
বাংলাদেশ সুপ্রীম কোর্ট
হাইকোর্ট বিভাগ

Common facts, in brief, are that late Dogyo Mog (a member of Marma community) was the original owner of the land in question measuring 24.30 acres of land who died in the year 1974 leaving behind two daughters, named Aowa Mogini and Abetu Mogini who had inherited the said property being the successive heirs bearing Dag Nos. 689(full),887(full),1037(part),1038(part), 1040(part), 1041(part),1065(full), 1072(full), 1073(full), 1075(full), 1076(full), 1077(full), 1078(full),1079(part), 1112(part), 1118(part), 1143(full), 1144(full), 1040/1236(part), look to 2676/3361(full), 2675(full), 1242(full), 1180(part),1276(full) appertaining to khatian No. 159

under 262 Golabari Mouza,Police Station –Khagrachari Sadar, District-Khagrachari Hill District(Annexure-B).

It has been stated that Aowa Mogini, one of the daughters of late Dogyo Mog, was insane as well as unmarried; thus, Abetu Mogini, her other sister became the sole successor of the entire property i.e., 24.30 acres of land. However, Abetu Mogini had 3(three) daughters named, Kraynori Mogini, Pusuma Mogini and Aungkra Mogini.

It has also been stated that during the lifetime of Dugyo Mog, Abetu Mogini, one of his daughters, had divided the said property along with possession amongst her 3(three) daughters giving Kraynory Mogini - 8.10 acres(1/3), Pusuma Mogini 10.00 acres, for she was looking after the welfare of Awoa Mogini and gave the rest about 6.20 acres to Aunkra Mogini. It was, however, verbally settled amongst them that after the death of Awoa Mogini, the excess land (about 2.00 acres) would be vested back to Aungkra Mogini from Pusuma Mogini, so that each would get 1/3 share equally (8.30 acres out of 24.30) according to the *"social custom"* of the Marma community.

It has further been stated that Dugyo Mog expired in the year 1974 while he was in the house of Kraynori Mogini, one of his grand daughters who earlier died in 1972 with the aforesaid 8.10 acres of land as inherited from her mother Abetu Mogini. However, Kraynori

Mogini had 3(three) daughters named Krajai Mogini, Aproaprue (Apaprue) Mogini (Writ Petitioner No.8) of writ petition No. 3285 of 2009, Krasong Mogini and one son Chailapru Marma (respondent No.6).

It has also been stated that petitioner No.1 of writ petition No. 3285 of 2009 Abrechai Marma married 2(two) daughters of Kraynori Mogini, firstly he got married to Krajai Mogini and after her death, Krasong Mogini who also died at a later period. Consequent thereto Dugyo Mog while he was alive was the only *de-facto* guardian of all the sons and daughters of Kraynory Mogini including respondent No.6, Chailaprue Marma, for they were minors in the year 1972 to 1974.

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সহকারী রেজিস্ট্রার
বাংলাদেশ সুপ্রীম কোর্ট
হাইকোর্ট বিভাগ, ঢাকা।

However, Aungkra Mogini died leaving behind two sons named, Niyong Choudhury and Sathong Choudhury (respondent Nos. 7 and 8). It has been contended that Pusuma Mogini died in 1982 with 10 acres of land before the death of her insane aunt Aowa Mogini, who died in 1996. As such, question of giving back 2.00 acres of land during her life time to her sister Aunkra Mogini and her successors could not arise.

However, Pusuma Mogini died leaving behind 5(five) sons named Mongsajai Mog, Suijai Mog, Aungpru Mog, Hola Hathoi Mog and Apaise Mog, respondent Nos. 9-13.

In this regard it has been stated that out of 6.00 acres of land, as devolved upon Aungkra Mogini, the respondent government had meanwhile acquired 2 (two) acres of land in connection with the land acquisition case.

It has been contended emphatically that it was known to all that after the expiry of Aowa Mogini 2(two) acres of land, which was earlier given to Pasuma Mogini to look after her aunt Awoa Mogini being insane, would go to the respective successors of Auagkra Mogini named, Niyong Chowdhury and Sathaung Chowdhury, from the respective successors of Pusuma Mogini.

The cause of action arose when in violation of the Marma social custom and with malafide intention not to give back that 2.00 acres of land to the successors of Aungkra Mogini some of the successors of Pusuma Mogini (respondent Nos. 9-13) had managed to procure a succession certificate in the name of Aowa Mogini showing her as one of the successors of late Dugyo Mog.

Under the situation 2(two) sons of Aungkra Mogini named Niyong Chowdhury and Sathaung Chowdhury (respondent Nos. 6 and 7) as plaintiffs instituted Civil Suit No. 20 of 1992 on 09.06.1992, before the Court of Deputy Commissioner and the ex-officio Civil Judge, Khagrachari, respondent No. 2, for separate khatian as per possession and title of the inherited land of late Dogyo Mog impleading the respective successors of late Pusuma Mogini as

defendant Nos. (Ka) 1-7 and also the successors of late Kraynori Mogini as defendant Nos. (Kha) 8-11 (Annexure-C). The defendants, however, duly entered appearance in the said civil suit by filing written statement controverting the statements so made threin (Annexure-C-2).

However, prior to that on 02.06.2002 (Annexure-C-1) the concerned Mouja Headman sent an office letter to the Deputy Commissioner, Chittagong, respondent No. 2 for a detail report regarding the property of late Dogyo Mog. He also made a prayer for staying operation of the Succession Certificate so obtained in connection with Miscellaneous Case Nos. 110, 65, and 98 all of 1990 with a view to settle the issue amicably.

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মুহাম্মদ আবুল খায়ের
সহকারী রেজিস্ট্রার
বাংলাদেশ সুপ্রীম কোর্ট
হাইকোর্ট বিভাগ, ঢাকা।

Conversely, Chailaprue Marma, son of Kraynori Mogini, the defendant No.8 of Civil Suit No. 20 of 1992, as plaintiff instituted another Civil Suit bearing No. 20 of 1990 impleading Abrechai Mog, Apaprue Mogini, (petitioner-8), Krasong Mogini both daughters of Baikyo Mog, and Niyong Choudhury, Sathong Choudhury, both sons of Auagkra Mogini as defendant Nos. 1-6 respectively contending, *inter-alia*, that he was entitled to get entire 1/3 share (8.30 acres of land) of late Kraynory Mogini being her only son, but the defendant No. 1(petitioner No.1 of writ petition No. 3285 of 2009) being the brother-in-law of his two sisters Krajai Mogini and after her death Krasong Mogini was enjoying possession of 4.00 acres of land.

However, the defendants duly submitted written statement denying the assertions so made by the said plaintiff.

Initially, trial of both the suits was held before the Additional Deputy Commissioner, Chittagong on behalf of the Deputy Commissioner, Chittagong who subsequently conducted an inquiry in the presence of the respective contending parties through the Thana Nirbahi Officer, Khagrachori. In the enquiry report he duly opined for division of the property in question in 3(three) parts and to give $\frac{1}{3}$ share to each of the 3(three) daughters of late Dagyo Mog. The said report was duly sent to the Deputy Commissioner, Chittagong for necessary approval on 22.02.1993(Annexure-D).

Ultimately, the Additional Deputy Commissioner (Rev), Khagrachari considering the plaint, written statement, report of the Headman, the inquiry report of the Thana Nirbahi Officer, Khagrachari Sadar and after hearing both the parties recommended, *inter alia*,

"দুগ্য মগের দুই কন্যা আওয়া ও আবেতু মগিনী। আওয়া মগিনী বোবা, কালা, নিঃসন্তান অতিশয় বৃদ্ধা হওয়ার দরুন পিতার সম্পত্তি থেকে বঞ্চিত হইবে। তবে আওয়া মগিনীর বোনের কন্যারা আওয়া মগিনীর লালন পালনের জন্য যে দুই একর সম্পত্তি পুসুমা মগিনীর স্বামী ক্যসাই মগের নিকট থাকিবে। ক্যসাই মগের মৃত্যুর পর আবেতু মগিনীর তিন কন্যার পুত্রদের মধ্যে সমান তিন অংশে ভাগ হইবে। মোট সম্পত্তি ২৮-৩০ একর। ২/০০ একর বাদে অবশিষ্ট ২২.৩০ একর সম্পত্তি সমান তিন অংশে ভাগ হইলে প্রত্যেকের অংশে ৭.৪৩৩৩ অর্থাৎ ৭.৪৩ এক ক্রয়োরী মগিনীর ১(এক) পুত্র চাইলাপ্র মার্মা পাইবে ৭.৪৩ একর এবং অংক্রাই মগিনীর পুত্রদ্বয় পাইবে ৭.৪০৩ একর।

উপরোক্ত হারে বাদীরা ৭.৪৩ এর স্থলে ৮.১০ শতাংশ দখলে থাকাতে .৬৭ শতাংশ জমি বিবাদীদের বরাবরে ছাড়িযা দিবে। এবং চাইলাপ্র মার্মা ৪.০০ একর দখলে আছে আর ৩.৪৩ শতাংশ পাইবে তাহার ভগ্নি পতিদের নিকট থেকে। ভগ্নি পতিদেরকে অবশিষ্ট সম্পত্তি ২ থেকে ৬ নং বিবাদীদের বরাবরে ছড়িয়া দেওয়ার আদেশ হইল।" vide order dated 12.9.1993 (Annexure-D-1) for consideration by the the respondent No. 2. The said respondent having not considered the said recommendation had posted the matter for re-hearing vide order dated 20.10.1993. However, pending hearing of the said suit a "Samajota", an amicable settlement, took place amongst the parties concern in the presence of the respective people of the society concerned contending, *inter alia,*

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"সালিশীতে মৃত দোগ্য মগের প্রকৃত ওয়ারিশ এবং তাহার নামীয় মৌজায় ১০৯ নং খতিয়ানের ২৪.৩০ একর রেকর্ডীয় জমি ভাগ বাটোয়ারা বিষয়ে বিস্তারিতভাবে আলোচনা করা হয়। সালিশীতে মারমা সম্প্রদায়ের ওয়ারিশ বিষয়ে বিভিন্ন প্রশ্ন উঠানো হয়। মারমা বৌদ্ধ ধর্মাবলম্বীদের জন্য আমাদের বাংলাদেশে কোন উত্তরাধিকার প্রবর্তন বা প্রচলন না থাকিলেও ন্যায়ের স্বার্থে ইচ্ছামাফিক উত্তরাধিকার নির্নয় করা সমীচীন বা যুক্তিযুক্ত নহে। গত ২৬.২.৯৫ ইং তারিখের সালিশী বৈঠকে অত্র জেলার মারমা সংসদের ধর্মীয় সভাপতি এবং মারামা সম্প্রদায়ের প্রবীন ব্যক্তি জনাব মথু চৌধুরী জানান যে, তৎকালীন বৃটিশ আমল হইতে অত্র এলাকার মারমা সম্প্রদায়গনের মধ্যে সাধারনত কোন মৃত ব্যক্তি/ব্যক্তিনীর পুত্র-সন্তানগন ওয়ারিশ হিসাবে ত্যাজ্য সম্পত্তির অংশীদার হন। কিন্তু কোন ছেলে সন্তান না থাকিলে মেয়েরা ওয়ারিশ হিসাবে ত্যাজ্য সম্পত্তির অংশীদার হন। কিন্তু কোন ছেলে সন্তান না থাকিলে মেয়েরা ওয়ারিশ হন বটে। গনজ্ঞপাড়ুর রামকমল কাবরী বাবু এবং গনজ্ঞপাড়ার সামাজিক কার্যকরী কমিটির সভাপতি বাবু চাইরেপ্র মারমা একবাক্যে ইহা স্বীকার করেন। তৎকালীন বৃটিশ আমল হইতে অত্র এলাকার বৌদ্ধ মারমা সম্প্রদায় গনের একই নিয়মে আইন আদালতে ওয়ারিশ নির্নয় ক্ষেত্রে বিচার কার্য পরিচালিত হইয়া আসিতেছে। ধর্ম ত্যাগের ধর্ম। তাই, বৌদ্ধ ধর্মমতে ওয়াশি ক্ষেত্রে কোন দিক নির্দেশনা নাই। অত্র এলাকার মং রাজার এক প্রতিবেদন ক্ষেত্রে সালিশীতে পর্যালোচনায় দেখা যায় যে, মারমা সম্প্রদায়ের ওয়ারিশ নির্নয় ক্ষেত্রে জেষ্ঠপুত্র আংশিক বেশী পায়। বাদবাকী সম্পত্তি সব পুত্রগন সমান অংশে ভাগ পায়। স্ত্রী এবং মেয়েরা স্বামী বা পিতার জীবিতাবস্থায় যদি কিছু অংশ সম্পত্তি দিয়া যায় তাহাই পাইবে। অন্যথায় তাইয়েরা সন্তুষ্টচিত্তে যাহাই দেয় তাহাই পাইবে।"(Annexure-E)

It has been alleged however, that the Deputy Commissioner,Khagrachari and the ex- officio Civil Judge without

appreciating the customary rules of inheritance of the Marma community and without inviting any report and opinion from the Headman to that effect passed the impugned judgment and order dated 22.9.1996(Annexure-C) applying *Hindu Dayabhaga Law* relying on the decision of the case of ***Karatala and Bihar Vs. H.R. Chowdhury,*** reported in ***40 DLR(AD) page-137***.

Challenging the said judgment and order dated 22.9.1996 the respondent No. 6- Chailaprue Marma, the petitioner of Writ Petition No. 2829 of 2006 preferred Civil Appeal (Khagrachari) Case No. 84 of 1997 before the Divisional Commissioner, Chittagong Division, Chittagong and the ex-officio Appellate Judge of Chittagong Hill Districts, which was ultimately dismissed vide judgment and order dated 12.03.2001 (Annexure-F).

Being aggrieved said respondent filed Case No. 4-27 of 2001 Appeal (Khagrachari) before the Land Appeal Board, Dhaka which was also dismissed on 12.4.2003(Annexure-F).

Being dissatisfied the said respondent filed Review Petition Case No. 4-56/2003 Review (Khagrachari) before the Land Appeal Board, Dhaka which was also dismissed vide order dated 07.2.2006 (Annexure-F-2).

Challenging the order dated 12.03.2001(Annexure-F) passed by the Divisional Commissioner, Chittagong Division, Chittagong in Civil Appeal (Khagrachari) Case No. 84 of 97 the respondent no. 6,

(defendant No. 8) as petitioner filed Writ Petition No. 2829 of 2006 before this Hon'ble Court wherein a Rule Nisi had been issued; however, vide the ad-interim order dated 24.4.2006 the respective contending parties had been directed to maintain *status-quo* with regard to position and possession of the case property till disposal of the Rule (Annexure-G).

Meanwhile, pursuant to the impugned judgment and order dated 12.9.1996 (Anexure-A) the respondent Nos. 9-13 filed Namjari Case No. 167 of 1997 before the Deputy Commissioner, Khagrachari (respondent No. 2) through the Assistant Commissioner (Land) wherein vide order No. 3 dated 30.7.1997 record of right over 15.18 acres of land out of 24.30 acres of land were directed to be corrected in their names.

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Being aggrieved by and dissatisfied with the petitioners have filed the instant writ petitions and obtained the present Rules Nisi.

Respondent Nos. 9-13 entered appearance by filing affidavit-in-opposition contending, *inter-alia*, that the Marma community of Bangladesh follows Buddhist religion and as Buddhists they are regulated by the *Hindu Dayabhaga Law*. However, according to the *Hindu Dayabhaga Law* of inheritance the sisters are excluded from the property in the presence of their brothers. It has further been stated that in the society of Marma community of Chittagong Hill Tracts the

daughters are always excluded by the sons over the father's and mother's property.

So far the instant case is concerned it has been contended that Pusuma Mogini had 5(five) sons and 2(two) daughters; Krynori Mogini had 1(one) son and 3(three) daughters and Aongkra Mogini had 2(two) sons; as such, according to *Hindu Dayabhaga Law* of inheritance eight(8) sons of three(3) daughters of late Abetu Mogini inherited the case property so left behind by late Dugyo Mog and that the respondent Nos. 9-13 named Mongsajai Mog, Shujai Mog, Hola thoai Mog, Aungprue Mog and Apaise Mog got 3.04 acres of land each according to the said law, which has been mandated as lawful by both the courts below vide the impugned judgment and orders.

Again, it has been contended that the report dated 22.02.1993 as submitted by the Thana Nirbahi Officer, Khagrachari Sadar and the report dated 12.09.93 submitted by the Additional Deputy Commissioner (Rev.) to the respondent No. 2 were not approved by him. Rather, by fixing 20.12.93 he had directed both the contending parties to remain present for hearing of those reports. Ultimately, considering all the documents the respondent No. 2 had disposed of the suits applying the ratio as decided in *40 DLR (AD) 137* vide the impugned judgment and order dated 22.09.1996.

Further, it has been stated that the "Samojota" dated 28.2.95 was not prepared correctly and lawfully before the Court, for all the parties concerned did not agree to the contention so made therein.

Moreover, pursuant to the impugned judgment and order dated 22.09.1996 Mongshajai Mog and 4 others submitted Namajari Case No. 165 of 1997 with a prayer to open separate khatian over 15.18 acres of case land. However, upon due consideration of all the relevant records the respondent No.2 had approved the said case and ordered respondent No. 5 to allow the case over 15.18 acres of land under Khatian No. 159. Ultimately, said mutation case was allowed vide order dated 11.3.2006.

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It has been stated further that the social and cultural dispute of the Marma community can only be resolved exercising administrative power by the Karbari, Headmen, Circle Chief or Divisional Commissioner, Chittagong. However, in the eye of law, inheritance and land dispute may be heard and disposed of by the Civil Judge Court under the existing civil law. As such, the Deputy Commissioner and the ex-officio Civil Judge, the respondent No. 2 had rightly passed the impugned judgment and order dated 22.09.2006 considering the respective rules and regulations under the jurisdiction of the Civil Court.

Mr. Ekramul Islam, the learned Advocate appearing for the petitioners in Writ Petition No. 3285 of 2009 and Mr. Sheikh Reajul Hoque, the learned Advocate appearing for the petitioner in Writ Petition 2829 of 2006 co-jointly submit that since the issue in question involves inheritance of the Marma community thus, it was liable to have decided only according to their *"social custom"* in view of section 66 of the Khagrachari Parbotyo Jela Parishad Ain, 1989 (Act XIX of 1989) and or section 4 of the Chittagong Hill Tracts Regulations (Amendment) Act, 2003 (Act No. XXXVIII of 2003). The respondent No. 2 having decided the matter applying *Hindu Dayabhaga Law* wrongly relying on the decision reported in *40 DLR,(AD)137* hence, the impugned judgment and order dated 22.9.1996 is liable to be declared to have been passed without lawful authority, and is of no legal effect.

In this regard referring to section 66 of the Khagrachari Parbotyo Jela Parishad Ain, 1989 (Act XIX of 1989) he submits that in view of the said provision tribal dispute like the matter in question is required to be decided by the mouza Headman; challenging which may prefer appeal to the Circle Chief, if is aggrieved and then to the Divisional Commissioner, Chittagong Division. The said provision also provides for both the Circle Chief and the Commissioner to consult at least 3(three) experts from the concerned tribe before resolving the dispute, which has not been done in the instant case and

as such, the fundamental right of the petitioners to be treated in accordance with law as guaranteed under Article 31 of the Constitution has been violated.

He further submits that the respondent No. 2 has applied *Hindu Dayabhaga Law* amongst the parties to this case by misconstruing the decision reported in *40 DLR(AD) 137* along with *32 DLR-187* inasmuch as those decisions did not provide that the Buddhists of Marma community are governed by the *Hindu Dayabhaga Law*, for the decision reported in *32 DLR-187* provides that the Buddhists are governed by the principles of justice, equity and good conscience. In this regard he further submits that the Appellate Division was not inclined to review the said view in *40 DLR(AD) 137* since both the parties to that case agreed to apply the principles of *Hindu Dayabhaga Law*.

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হাইকোর্ট বিভাগ, ঢাকা।

He further goes to ague that the Deputy Commissioner and the ex-officio Civil Judge vide the impugned judgment and order has directed a defective partition even in the eye of *Hindu Dayabhaga Law* inasmuch as in this case after the death of Dogyo Mog the entire case property (24.30 acres) devolved upon Abetu Mogini, then to her 3 (three) daughters named Kraynori Mogini and Pusuma Mogini, Aungkra Mogini; admittedly, Kraynori Mogini took 1/3 share (8.10 acres), Pusuma Mogini 10.00 acres and Aungkra Mogini 6.00 acres. However, he submits that the core dispute in question is whether the

excess land (10.00-8.10= 1.90 acres), being enjoyed by the seccessors of Pusuma Mogini (respondent Nos. 9-14), will go to Aungkra Mogini's successors (respondent Nos. 7 and 8). Accordingly, he goes to argue that even if it is accepted for argument's sake that the females are excluded by the males then the whole 1/3 share of Kraynori Mogini (8.10 acres) will go to her only male successor i.e. Chailaprue Mog (respondent No.6); Pusuma Mogini's 1/3 share (8.10 acres) will be divided amongst her 5(five) male successors (respondent Nos. 9-13) each getting 1.60 acres; Aungkra Mogini's s 1/3 share (8.10 acres) will be divided amongst her 2 (two) male successors (respondent Nos. 7 and 8) each getting 4.05 acres (and if the excess 2.00 acres land is not returned from Pusuma Mogini's successors (respondent Nos. 9-13) they will get 2.00 acres each and Aunkra Mogini's successsors (respondent Nos. 7 and 8)will get 3.00 acres each; whereas, in the present case the respondent No. 2 has directed to divide Dogyo Mog's total 24.30 acres of land to his grand daughters' sons giving each 3.04 acres of land, which is misconceived and defective.

He again goes to contend that the respondent No. 2 has erroneously come to a wrong decision that the females of Marma community do not get property in view of *Hindu Dayabhaga Law* without appreciating the fact that the property in question itself came through the maternal line. In this regard he submits that after the death of Dogyo Mog the property went to Abetu Mogini, one of his

daughters and then to her 3(three) daughters named Kraynori Mogini, Pusuma Mogini, Aungkra Mogini and then to their respective successors (the petitioners and the respondent Nos. 6-14) according to their social customary law of inheritance without any discrimination between males and females. Thus, the "Samojota" dated 28.2.1995 (Annexure-E), which provides shares for the females (although proportionately less than the males) dividing Kraynory Mogini's 1/3 share (8.10) amongst her successors (petitioners and respondent No.6) Pusuma Mogini's share (10.00 or 8.10 whatever may be) amongst her successors (respondent Nos.9-14) and Aungkra Mogini's share (6.00 or 8.10 acres) amongst her successors (respondent Nos. 7-8) considering practical condition, and the social and customary demand of the parties, ought to have been considered by the said respondent.

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Mr. Munsurul Haq Chowdhury the learned Senior Advocate appearing with Mr. Quamrul Hoque Siddiquee, the learned Advocate with Mr. S.M. Rezaul Karim, the learned Advocate and Mr. Abdul Mannan Bhuiyan, the learned Advocate on behalf of the respondent Nos. 9-13 of writ petition No. 3285 of 2009 and respondent No. 8 in writ petiton No. 2829 of 2006 submits that the Marma community of Bangladesh being Buddhists are regulated by the *Hindu Dayabhaga Law* as such, the respondent No. 2 while disposing of the issue has rightly applied the principles of the said school referring to the ratio as

decided in *40 DLR(AD) 137*, for the Appellate Division has categorically observed that for the Buddists of Bangladesh *Hindu Dayabhaga Law* of succession is applicable. He further submits that Abrechai Mog was the "ঘর জামাই" of Krynori Mog and as such, he has no *locus standi* to file writ petition No. 3285 of 2009; moreover, Krynori Mog had only 1(one)son named Chaila Prue Mog who inherited the property as left by his mother and that his sisters are excluded by him according to the *Hindu Dayabhaga Law of* inheritance. Moreso, he submits that the Deputy Commissioner and the ex-officio Civil Judge, Khagrachori has also observed, *inter-alia,*

"আব্রেচাই মারমা বিরোধীয় ও জমির কোন অংশ পাইবে না বলিয়া ও সিদ্ধান্ত দেওয়া হইল।"

in Civil Suit No. 20 of 1992. As such, he submits that both the Rules being not maintainable are liable to be discharged.

The Bangladesh Legal Aid and Services Trust(in short, BLAST) has been added as an Intervenor vide order dated 12.06.2011 in order to assist the Court with information and materials regarding the application of law in the Chittagong Hill Tracts and other related facts for effective hearing and disposal of both the Rules.

Mr. Raja Debashish Roy Chowdhury, the learned Advocate, who is also the Chakma Raja and Chief of the Chakma Circle, appearing with Ms. Sara Hussain, the learned Advocate appearing on behalf of the Intervenor submits that the law of succession applicable

to persons of Buddhist affiliation will differ depending upon their ethnicity (whether Bengali or Non Bengali) and if the latter, depending upon the tribe to which they belong and the district (place of residence) where they are located. He further submits that in some cases *Hindu Law* may apply, in others Burmese Buddhist law and in some other cases social customs of the tribe concerned may apply. In this regard he goes to argue that the application of Hindu Law (whether *Dayabhaga* or *Mitakshara* or otherwise) to Buddhists of Bangladesh is limited to the members of Barua community, who are Buddhists by affiliation, who generally regard themselves as ethnically Bangali and are quite distinct from the non-Bangali Buddhists coming from different ethnic groups such as, Chakma, Marma, Tanchangya and Rakhine, who reside in the Chittagong Hill Tracts and in several plains districts of the country. In this regard referring to Article 152 of the Constitution of the People's Republic of Bangladesh, the supreme law of the land, he submits that the Constitution of Bangladesh recognizes *"social custom"* as a source of law. Therefore, he goes to contend that in the matter requiring application of personal laws of the different tribes and other ethnic groups, the application of social customary law is totally consistant with the Constitution, as has also been upheld by the Supreme Court of Bangladesh in several cases.

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He further submits that the Chittagong Hill Tracts Regulations, 1900 (in short, the Regulations)including the Rules so made thereunder, and the respective laws are made to apply to regulate the civil, revenue, land, judicial and other aspects of administration of the region. Like, the District Council Acts for the three(3) hill districts define the powers, functions and responsibilities of the respective Hill District Councils. The Regional Council Act defines the powers, functions and responsibilities of the Chittagong Hill Tracts Regional Council. The Land Commission Act provides for the expeditious resolution of land-related disputes in the Chittagong Hill Tracts (in short, CHT) by a specially constituted Commission. However, all those statutes duly take into cognizance the *"customs"* of the circle/district region and of its tribes. He also goes to argue that the Chittagong Hill Tracts Regulations, 1900, which is one of the major legal instruments for the administration of the hill region, has expressly recognized the prevalence of the customary laws of the Chittagong Hill Tracts. Referring to section 66 of the 3(three) Hill District Councils Acts of 1989 i.e., Act Nos. XIX, XX and XXI of 1989 he submits that vide the said statutes the disputes between the members of the tribes of the concerned district are to be tried and disposed of as per the "প্রচলিত রীতি-নীতি অনুযায়ী" by the local Karbaries, Headmen and Chiefs of the respective mauza and circle concerned, with provision for appeal before the Divisional Commissioner, who is

obliged to consult 3(three) experts from the tribe concerned while hearing appeals. Similarly, section 6(1)(Kha) of the Chittagong Hill Tracts Land Disputes Resolution Commission Act, 2001 provides that the Commission will resolve land related disputes in accordance with the "পার্বত্য চট্টগ্রামের প্রচলিত আইন ও রীতি অনুযায়ী"

However, while defining the jurisdiction of the civil courts in the region, he goes to argue that section 8(4) of the Regulations.1900 has explicitly excluded tribal customary matters of the 3(three) districts from the jurisdiction of the civil courts. Thus, he submits, leaves the administration of the tribal justice including the personal laws of the tribes to the Chiefs and Headmen and excludes it from the jurisdiction of the district civil court.

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So far the question of consultation with the Mauza Headmen is concerned he submits that regulation 39 of the Regulations,1900 also reiterates the consultative prerogatives of the Circle Chiefs, obliging the Deputy Commissioner to consult the Chiefs on important matters affecting the administration of the CHT. However, before the introduction of civil courts in the hill districts in 2008, tribal matters, including inheritance and other customary law matters, were left to be resolved by the Circle Chiefs and Mauza Headmen. In this regard, he goes to argue that prior to issuance of succession certificates, the Deputy Commissioner of each hill district, directly or through the

Upazilla Nirbahi Officers and Assistant Commission (Land) used to consult the concerned Mauza Headmen on the identities of the heirs and successors of any landed estate situated within the district concern, which indicates the prevalence of customary law of different tribes of the CHT recognising the role of the traditional institutions, regarding matters of succession.

He further submits that application of *Hindu Dayabhaga Law* by the respondent No. 2 referring to the ratio as decided in ***Karatala L Bihar*** Vs ***H.R. Chowdhury, 40 DLR (AD) (1988)137***, on the count that the Appellate Division has held that said principles would apply to the Buddhists of Bangladesh, is a misconceived one, for the said case involved a suit for declaration of title and confirmation or alternatively, recovery of possession, and also for a declaration on the illegality of a "Nirupannama", devolving an estate of the Chief Priest of Lakshmi Bihar, who was a member of Barua Buddhist (Bangali) community of Chittagong district and not members of any non-Bengali ethnic groups, including the Marma, Rakhine, Chakma, Tanchangya, etc.; as were the other contenders; however, in the said case the respective contending parties did not contest the application of *Hindu-Dayabhaga Law* to them. As such, he submits that ratio of *40 DLR(AD) 137* cannot be regarded as a yardstick to establish that *Hindu-Dayabhaga Law* would apply to each and every case of inheritance concerning Buddhists of Bangladesh, and certainly not to

Buddhists who are ethnically different from the Buddists (Bengali) Barua community such as, the petitioners Nos. 1-8 and respondent Nos. 9-13 in the present case.

He also submits that in a number of cases the Appellate Division has categorically upheld the application of tribal customary law, rather than Hindu law; like in ***A.S. Prue Chowdhury*** Vs. ***K.S. Prue Chowdhury, 6 BLT (AD)(1998), 109***, the Appellate Division while resolving the issue held that the office of the Bohmong Chief is a customary office and both the government and the Court have to recognize the custom and not to introduce any other criterion or factor which will add to the customary requirements of that office. Also, in ***Rajkumari Unika Devi*** Vs. ***Bangladesh and others, 12 BLT (AD) (2004), 141***, the Appellate Division observed, *inter-alia*, that the appointment was valid, since it followed the "custom, usage and tradition of the Mong Circle."

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In the case of Chakmas and Tripuras too, he goes to argue that it is customary law that applies, and the religious affiliation of the Chakmas or Tripuras is not considered, as supported in *Chakma Byaktigoto O Paribarik Ain pp. 84-85;* and *Tripura Byaktigoto O Paribarik Ain, pp. 67)* . Referring to another publication on *Chakma Inheritance Law by Bankim Krishna Dewan (Chakma Jatiyo Bichar Poddhoti O Chakma Uttoradhikar Protha, Rangamati, 1985)* he goes

to contend that it contains several summaries of case laws from the Courts of the Chakma Chief, the Deputy Commissioner, the Divisional Commissioner, the Board of Appeal and the Provincial Governor, in which customary law, and not any law of religious affiliation, including Hindu Law, were applied.

Accordingly, he submits that the laws and practices prevailing in Bangladesh clearly indicate that inheritance and other personal law matters of the different *ethno-linguistic-cultural* groups that are not ethno-linguistically "Bangali" are governed by the laws of the tribe/people concerned, irrespective of their religious affiliation. In the stated circumstances, he submits that the observations of the Appellate Division in ***Karatala L Bihar*** Vs. ***H.R. Chowdhury, 40 DLR (AD) (1988) 137*** must be confined to the circumstances of the case, involving Bangali Buddhists (Baruas) and involving litigants, whose views on the application of *Hindu-Dayabhaga Law* cannot be imputed to apply to other Buddhists, and definitely not to the non-Bangali Buddhist communities. Consequently, he submits that the respondent No. 2 ought to have referred the matter in dispute to the concerned Circle Chief and/or Mauza Headman, or at least should have consulted them prior to deciding upon the matter.

The cardinal issue which requires determination in the present Rules Nisi is whether dispute over succession within Marma

community, who are ethnically non-Bengali Buddhists, should be resolved in accordance with *Hindu Dayabhaga Law* or with the *"social customs"* of the said community of the Chittagong Hill Tracts(in short, CHT).

The property in question i.e., 24.30 acres of land is situated within Khagrachari Hill District, one of the 3(three) Hill Districts of the Chittagong Hill Tracts. It is, however, the emphatic contention of the Intervenor as well the petitioners of writ petition No.3285 of 2009 that the applicability of law regarding succession differs depending upon the religious affiliation, ethnicity and place of residence. Thus, the law applicable to persons of Buddhist affiliation will go to differ depending upon their ethnicity (whether Bengali or Non-Bengali), and that if the latter, depending upon the tribe to which they belong and the district where they are located.

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It has also been contended that the application of Hindu Law (whether *Dayabhaga or Mitakshara* or otherwise) to Buddhists of Bangladesh is limited to members of the Barua community, who are Buddhists by affiliation, who generally regard themselves as ethnically Bangali and quite distinct from the non-Bangali Buddhists from different ethnic groups such as, the Chakma, Marma, Tanchangya and Rakhine who reside in the Chittagong Hill Tracts and in several plains districts of the country.

Further, it has been contended that *"social custom"* has been recognised by the Constitution of the country having the force of law and that the Regulations, 1900 has duly recognised its applicability in the matters of personal law of the respective tribes of all the 3(three) districts of the Chittagong Hill Tracts where consultation with the local Headmen and Circle Chiefs of the respective Mouza has been made obligatory. In the said backdrop, when both the contending parties of the case pleaded to resolve the dispute applying "প্রচলিত নিয়মে", as such, disposing of the suits by the respondent No. 2 applying *Hindu Dayabhaga Law* on the plea that the Appellate Division in the case reported in *44 DLR(AD) 137* has made the principles of the said school applicable in matters of succession of Buddistis belonging to Marma Community, cannot be tenable in the eye of law.

The word "law" has been defined in our Constitution vide Article 152, which provides as under:

> *"Law" means any Act, ordinance, order, rule regulation, bye-law, notification or other legal instrument, and any custom or usage, having the force of law in Bangladesh;"*

The Chittagong Hill Tracts Regulations, 1900 (in short, the Regulations) recognises *"social customs"* in the area concern along with the authority of the 3(three) traditional Circle Chiefs and about 380 mouza Headmen. In this regard the relevant provisions of law may be looked into-,which are quoted herein below:

" Section 8 *(1)* .....

(2) .....
(3) .....
(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, Khagrachari and Bandarban respectively which shall be triable by the Mauza Headmen and Circle Chiefs.(Emphasis given) "

However, vide regulation 35 of the Regulations, 1900 the districts of Chittagong Hill Tracts comprises the Circles of the three Chiefs, viz the Chakma Chief, the Bohmong Chief and Mong Chief.

In this regard, regulation 38 provides as under:

"38. The Circle-Chiefs shall form an Advisory Council to the Deputy Commissioner, and shall assist him with information and advise on all matters which concerned the administration of their respective circles, and shall exercise their authority as Chiefs in the prompt enforcement in the mauzas of their circles of all orders of the Deputy Commissioner....."

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Regulation 39 enumerates the prerogatives of the Circle Chief to be consulted with on matters affecting the administration of the CHT, which runs as follows:

"39. The Deputy Commissioner shall consult the Chiefs on important matters affecting the administration of the C.H.T. For this purpose a conference shall be held, at least twice a year, under the presidency of the Deputy Commissioner, to which the Chiefs or their representatives shall be invited."

Moreover, section 66 of the "খাগড়াছড়ি পার্বত্য জেলা পরিষদ আইন, 1989 (Act No.XX of 1989)" also provides as under:

"৬৬। (১) খাগড়াছড়ি পার্বত্য জেলার বাসিন্দা এমন উপজাতীয়গনের মধ্যে কোন সামাজিক, সাংস্কৃতিক বা উপজাতীয় বিষয়ে বিরোধ দেখা দিলে বিরোধটি নিষ্পত্তির জন্য স্থানীয় কার্বারী বা হেডম্যানের নিকট উথাপন করিতে হইবে এবং তিনি সংশ্লিষ্ট উপজাতীয়গনের মধ্যে রীতি-নীতি অনুযায়ী বিরোধের নিষ্পত্তি করিবেন। (Emphasis given)

(২) .....

(৩) .....

(৪).....

(৫).....".

From the above quoted provisions of law it is rather evident that considering the role of *"social customs"* being played in all spheres of the respective tribes of the 3(three) districts of CHT the legislature has duly given recognition to it having the force of law.

However, in a number of cases the Appellate Division as well has categorically upheld the applications of triable customary law, as referred and relied upon by the Intervenor.

In ***A.S. Prue Chowdhury*** V ***K.S. Prue Chowdhury, 6 BLT (AD)(1998), 109***, the appellant who was a member of the Marma community of Bandarban hill district had challenged the decision of the Government in appointing and recognizing another member of his family as the Chief of the Bohmong Circle of the CHT (thereby not appointing and recognizing him to the office) on the ground, *inter-alia,* that this appointment was made in violation of the age-old usage, traditions and customs of the Bohmong Chief's family.

The Appellate Division while declaring the appointment of the government of the respondent as Bohmong Chief to be *ultra vires* observed, *inter-alia,* that, *"The court will only inquire whether the selection has been made following the tradition, custom and usage which govern such selection..... Government will also not deny that the susceptibilities of the people should not be ignored."*

In ***Rajkumari Unika Devi Vs Bangladesh and others, 12 BLT (AD) (2004), 141,*** the appellant had challenged the decision of the Government in appointing and recognizing another member of her family as the Chief of the Mong Circle of the CHT (thereby not appointing and recogning her to the office) alleging, *inter-alia,* that this was done in violation of the age-old usage, traditions and customs of the Mong Circle. In the said case the Appellate Division observed, *inter-alia,"*

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"Customs play a predominant part in the matter of succession in the absence of any heir to the late Mong Chief. Customs in this case is the social customs of the Mong Chief, which constitutes a source of law for the Mong Circle in the absence of any law as regards succession. The customs is something that has the effect of local law."

From the above, it is apparent that the statute as well as the *dictum* as settled by the Appellate Division in a number of cases have duly recognised applicability of the *"social customary law"* in the

case of succession together with the cancellation of the Circle Chief for the respective community of the Chittagong Hill Tracts.

As for the instant case, the respondent Nos. 7 and 8, 2(two) sons of Akra Mogini, who was one of the 3(three) daughters of Abetu Mogini, one of the daughters of late Dugya Mog, (the owner of 24.30 acres of land) instituted Civil Suit No.20 of 1992 impleading the respective defendants who were the daughters and sons of Krayari Mogini and Pusuma Mogini, before the Deputy Commissioner, Khagrachari and ex-officio Civil Judge, the respondent No.2 , on 09.06.1991(Annexure-C) contending, *inter alia*,-

> " প্রচলিত বিধির নিয়মে আওয়া মগিনী ওয়ারিশান সনদপত্র মুলে কোন সম্পত্তি অংশীদার বা দাবীদার হিসাবে দোগ্য বা প্রযোজ্য নহে বলিয়া মনে করি। তাই অনিয়মিত ওয়ারিশানের মামলার নথি তলব করিয়া বিজ্ঞ আদালতে পর্যালোচনা ক্রমে প্রচলিত নিয়মে এবং স্হানীয় হেডম্যানের পুনঃতদন্ত প্রতিবেদন তলবে সাক্ষীর শুনানী গ্রহণ পূর্বক অনিয়মিত ইস্যুকৃত একক উত্তরাধিকারী সনদপত্র বাতিল করিয়া অধীনগণের প্রকৃত ওয়ারিশান হিসাবে ইস্যুকৃত উত্তরাধিকারী সনদপত্র বহাল রাখার আকুল আবেদন করিতেছি"। (Emphasis given)

and prayed for –

> "মৃত দোগ্য মগের প্রকৃত ওয়ারিশান সত্বে প্রচলিত নিয়মে বিজ্ঞ আদালত কর্তৃক নির্ধারন করিয়া পূর্বে অনিয়মিত ওয়ারিশান পত্র বাতিল পূর্বক নিম্ন তফসীলভূক্ত জমি ছক মতে ভাগবন্টন করিয়া পৃথক খতিয়ানে এর ডিক্রি প্রদানে মহোদয়ের চির আজ্ঞা হয় " (Emphasis given)

The defendant Nos.1-10 entered appearance by filing written statement on 14.10.1992 contending *inter alia*, that the dispute in question involved the inheritance of Marma community of

Khagrachari Hill District(legally termed as tribal dispute) and thus, made a prayer for:

"অতএব হুজুর আদালত দয়া পরবশ হয়ে সরেজমিনে বিচার বিভাগীয় তদন্ত ক্রমে নালিশী ভূমি ওয়ারিশানের মধ্যে মগ সম্প্রদায়ের ক্ষেত্রে প্রযোজ্য আইন অনুযায়ী ভাগ বন্টনের ডিক্রী দানের বিহিত আজ্ঞা হয়।"

Hence, it is apparent that the pleadings of both the contending parties was to resolve the issue applying "প্রচলিত নিয়মে", social customs, as is applicable for Marma community.

However, after filing of the said suit, pursuant to Memo dated 21.03.1992 issued earlier by the respondent No. 2 the concern Headmen of the respective Mouza had made a request to the said respondent to keep further proceedings suspended for proper inquiry contending, *inter alia*-

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"..... নিম্নস্বাক্ষরকারী এবং উপস্থিত মারমা সম্প্রদায়ী গণ্যমান্য ব্যক্তিবর্গগণ বুঝিতে পারিতেছেন না। কারণ সকলে উপস্থিত সুষ্ঠ তদন্ত করা না হইলে পূর্বের মত ভুল হইয়া বিভিন্ন জটিলতার সৃষ্টি হইবে বা হইতে পারে বিধায় প্রচলিত কাস্টমারী বা সামাজিক বিধি মতে মৃত দ্রুগ্য মগের প্রকৃত ওয়ারিশান পুনঃ তদন্ত মোতাবেক সর্বশেষ সুষ্ঠু তদন্তের সাপেক্ষে মার্মা সম্প্রদায়ী বহু গণ্যমান্য ব্যক্তির উপস্থিতে সমন্বয়ে নির্ধারনের জন্য মহোদয়ের নিকট পুনঃ এক মাসের সময়ের প্রার্থনা করিতেছি। অনুরুপভাবে পূর্বের সকল বিবিধ মামলা মূলে মৃত ব্যক্তির দুগ্য মগের ওয়াশিন হিসাবে ইস্যুকৃত সকল উত্তরাধিকার সনদপত্রের কার্যএক্ম কিংবা সংশ্লিস্ট সম্পত্তি বিষয়ে যে কোন কার্যএক্ম মহোদয়ের পরবর্তী আদেশ না হওয়া স্হগিত রাখার একান্ত আবেদন।"

However, in the inquiry report dated 22.02.1993 the Thana Nirbahi Officer, Khagrachari, Police Station- Khagrachari pursuant to Memo dated 06.12.1992(Annexure-D) stated, *inter alia*-

" মুল মালিক মৃত দগ্য মগের দুই মেয়ের মধ্যে এক মেয়ে আওয়া মগিনী নিঃসন্তান হলেও দুগ্য মগের লালন পালনকারী হিসাবে এবং সর্বোপরী কন্যা হিসাবে

পিতার মোট সম্পত্তির ১/২ অংশ সম্পত্তি তার পাওয়ার কথা। কিন্তু তার কোন সন্তান না থাকায় তার মৃত্যুর পর পরোক্ষভাবে তার অপর বোন আবেন মগিনীর উত্তরাধিকারীরাই তার সম্পত্তির অংশীদারীত্ব লাভ করবে। সেহেতু দুগ্য মগের সমুদয় সম্পত্তির অংশীদার আবেতু মগিনীর উত্তরাধিকারীগন। তবে বর্তমানে আওয়া মগিনীর লালন-পালন কারীরা তার সম্পত্তিক্রমে কিছু সম্পত্তির পেতে।

.....

তার সদয় জ্ঞাতার্থে ও প্রয়োজনীয় ব্যবস্থা গ্রহনার্থে এ তদন্ত প্রতিবেদন তার আগে প্রেরণ করা হলো।"

Subsequently, the Additional Deputy Commissioner(Rev.) Khagrachari passed an order on 11.09.1993 in the form of recommendation for consideration by the respondent No. 2. Ultimately, the Deputy Commissioner and the ex-officio Civil Judge, the respondent No. 2 vide the impugned judgment and order dated 22.09.1996(Annexure-A) has disposed of the suit observing, *inter alia*-

"সম্পত্তি বিতরনের আইন সম্পর্কে ২ পক্ষের ভিন্ন ভিন্ন দাবীঃ বিবাদীপক্ষ দাবী করিয়াছে যে, আমাদের উত্তরাধিকারের কোন লিখিত আইন না থাকায় স্থানীয় প্রথা মতে মৃত দণ্ড মগের সম্পত্তি তাহার ওয়ারিশদের মধ্যে ভাগ করিতে হইবে। বাদী পক্ষ অবশ্য এই দাবী অস্বীকার করিয়া হিন্দু দয়াভাগা আইন অনুসারে সম্পত্তি ভাগের দাবী জানাইয়াছে। সেই বিষয়ে ভিন্ন ভিন্ন লেখকের লেখা হইতে ইহা জানা যায় যে, উত্তরাধিকারের ক্ষেত্রে হিন্দু দয়াভাগা আইন বৌদ্ধ ধর্মাবলম্বীদের ক্ষেত্রে প্রযোজ্য। ৪০ ডিএলআর এ রিপোর্টকৃত অমৃত নন্দ মহাখেরো বনাম হৃদয় রঞ্জন চৌধুরীর মামলার রায় হইতে ও ইহা প্রতীয়মান হয় যে, বাংলাদেশের বৌদ্ধদের উওরাধিকারের ক্ষেত্রে হিন্দু দায়াভাগা আইন প্রযোজ্য। মামলার অবশ্য উভয় পক্ষ উওরাধিকারের ক্ষেত্রে হিন্দু দায়ভাগা আইন প্রযোজ্য কিনা সে বিষয়ের বিস্তারিত আলোচনা করেন নাই। বৌদ্ধ ধর্মাবলম্বীদের ক্ষেত্রে হিন্দু দায়াভাগা আইন প্রযোজ্য বলিয়া উল্লিখিত মামলার উভয়পক্ষ এবং মাননীয় বিচারপতিগন কর্তৃক মানিয়া নেওয়ার ঘটনাও সংশ্লিষ্ট বিষয়ে বিশেষজ্ঞদের লেখা পুস্তকে প্রদত্ত মতামত হইতে ইহা ধরিয়া নেওয়া যায় যে, হিন্দু দায়ভাগা আইনই বৌদ্ধ ধর্মাবলম্বীদের জন্য প্রযোজ্য হইবে। ৩২ ডি এল আর এ রিপোর্টকৃত অজিতা ভিক্ষু বনাম অগ্র বংশ মহাথেরো মামলায় বৌদ্ধ ধর্মাবলম্বদীদের ক্ষেত্রে হিন্দু আইন প্রযোজ্য নয় বলিয়া মাননীয় বিচারপতিগন যে মতামত দিয়াছেন ৪০ ডি এল আর এ রিপোর্টকৃত উল্লিখিত মামলার বিচারকারী মাননীয় বিচারপতিগন উহাকে সুইপিং বলিয়া আখ্যায়িত করার বিষয়টি উপরোক্ত মতামতকে আরও দৃঢ় করিয়াছে। সুতরাং সিদ্ধান্ত নেওয়া যায় যে, মার্মাদের উওরাধিকার নির্নয়ের ক্ষেত্রে হিন্দু দায়াভাগা আইন প্রযোজ্য হইবে।"

Emphasis given

In other words, the Court concern applied the principles of *Hindu Dayabhaga Law* to the Buddhists of the Marma community firstly, on the alleged claim of the plaintiffs, (the respondent Nos.7 and 8) and secondly, applying the ratio of the case reported in *40 DLR(AD)137* and thereby had cancelled the 3(three) Miscellaneous Cases bearing Nos.110, 65 and 98 all of 1990. Vide the said order he further cancelled the claim of the respondent No.6 to get 8.10 acres of land upon dismissing his suit and also observed that his brother in law, Abrechai Marma, who is the petitioner No.1 in writ petition No.3285 of 2009, not being an heir would not get any portion of the property in question and accordingly, had directed the concern Upazilla Nirbahi Officer for recovery of possession from the petitioner No.1 and others who were not the successive heirs, within 60 (sixty) days.

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সহকারী রেজিস্ট্রার অফিসার
বাংলাদেশ সুপ্রীম কোর্ট
হাইকোর্ট বিভাগ, ঢাকা।

The findings of the respondent No. 2 has also been mandated as lawful by the appellate authority in Civil Appeal(Khagrachari) Case No. 84 of 1992, so preferred by the defendant No.8, the petitioner of writ petition No.2829 of 2006, the only son of Crayari Mogini, who also filed separate application claiming to get entire share of his mother in total 8.10 acres and that both the applications of respondent Nos. 6,7 and 8 were disposed of vide the impugned judgment and order passed by the Land Appeal Board (Khagrachari) Case No. 4-27 of 2001 (Appeal), upholding the findings of the respondent No. 2.

As has been observed earlier, the impugned judgment and order dated 22.09.1996 has been passed by the respondent No.2 applying the principles of *Hindu Dayabhaga Law* for succession of Buddhists, (the petitioners and respondent Nos. 9-13) who belong to Marma community relying on the claim of the plaintiffs (the respondent Nos.7 and 8); whereas from the plaint it is rather evident that they had claimed to apply *"social customs"* to resolve the dispute in question. Hence, the said findings of the respondent No.2 have no leg stand , for having been passed beyond the pleadings.

Secondly, the said respondent has applied the rationale of the case reported in ***40 DLR(AD)137*** for application of the principles *Hindu Dayabhaga Law*. It is fact that the Appellate Division in the said case has applied the principles of the said school where the contending parties belonged to the Buddhist(Bengali) Barua community (who are not the members of any non-Bengali ethnic groups including Marma, Takhaine, Chakma, Tanchangya, etc.) over the issue of declaration of title and confirmation, alternatively for recovery of possession; but the fact remains that there the respective parties did not dispute application of *Hindu Dayabhaga Law*; as such, the findings of the Appellant Division should be confined to the facts of the said case and cannot be the *ratio decidendi* in the instant case where both the parties had pleaded to apply *"social customs"*, not *Hindu Dayabhaga Law*. Moreover, in a number of cases the Appellate

Division has duly upheld the application of tribal customary law in the matter of succession of Buddhists by religious affiliation. In addition, the categorical assertion of the petitioners as well as the Invtervenor is that customary law applies in the case of succession of Marma community of CHT, which has not been refuted by the respondents concern in their affidavit in opposition with supporting documents.

Moreover, before passing the impugned judgment and order dated 22.09.1996 by the respondent No.2, from Annexure-C (the prayer of the local Headman to re-inquire) it appears that the opinion was sought for from the concern Headman of the respective Mouza in compliance of the requirement as prescribed under the Regulations, 1900, but while passing the impugned judgment and order by the said respondent it does not reflect that the opinion of the concern Headman was actually considered.

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Lastly, before parting with the judgment it is pertinent to remember one important fact that the property in question has devolved upon the respective contending parties through the maternal line.

In view of the above facts, circumstances, observations and findings we have no manner of doubt to final that disposing of the respective suits by the respondent No. 2 applying *Hindu Dayabhaga Law* in the case of succession of Marma community of the Chittagong Hill Tracts basing on the alleged claim of the respondent Nos. 7 and 8

and the ratio as decided in *44 DLR (AD) 137*, is without any lawful authority having no mandate of law.

In the result, both the Rules in connection with Writ Petition Nos. 3285 of 2009 and 2829 of 2006 are made absolute.

The impugned judgment and order dated 22.9.1996 (Annexure-A) passed by the respondent No. 2, the Deputy Commissioner Khagrachari and the ex-officio Civil Judge in connection with Civil Suit No. 20 of 1992 as well as the judgment and order dated 12.3.2001 passed by the Additional Divisional Commissioner, Chittagong Division, Chittagong, respondent No. 4 in Civil Appeal (Khagrachari) Case No. 84 of 1997 (Annexure-C) , as has been upheld upto the Land Appeal Board, Dhaka directing vide order dated 12.3.2006 to make partion of 24.30 acres of land and opening a separate Khatian in Volume 6, page 81 by the respondent No. 5 in favour of the respondent Nos. 9-13 pursuant to Namjari Case No. 165 of 1997 (Annexure-B) are hereby declared to have been passed without any lawful authority and hence, are of no legal effect.

Since admittedly there is no written law of succession of Marma community hence, the respondent No.2 is hereby directed to resolve the issue in question afresh on the basis of the pleadings of both the contending parties and other relevant documents and in particular upon consultation with the respective Circle Chief and Headman, as has been envisaged in the Chittagong Hill Tracts Regulations, 1900

preferably within a period of 4(four) months from the date of receipt of the copy of this judgment and order.

There will be no order as to costs.

Abdur Rob, J:

I agree.

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Z. kader /B.O.