

CHAPTER V

PERSONAL LAWS

1. SOURCES AND SCHOOLS

Among the people of Bangladesh two major systems of personal law prevail: Muslim law among the Muslims and Hindu law among the Hindus.¹ Both of these personal laws are based on religious beliefs but they are fundamentally different in major aspects. They are not codified but some changes have been made by legislative enactments with a view to coping with the changing circumstances of the prevailing society.

To begin with Muslim law which has four main sources: the *Koran*, *Sunnah* (practice of prophet Muhammad Sm.), *Ijma* (consensus opinion) and *Qiyas* (analogical deduction). There are main two schools of thought under Muslim law: the *Sunni* school and the *Shia* school. The *Sunni* school is sub-divided into four schools: the *Hanafi* school, the *Maliki* school, the *Shafei* school and the *Hanbali* school. In Bangladesh the *Sunni* school predominates.

The Hindu law is the ancient law of Bangladesh. The sources of classical Hindu law are three in number: the *Shruti* (what is heard), the *Smriti* (what is remembered) and custom. When there is a conflict between a custom and a text of the *Smritis* the custom override the text.² There are two main schools of Hindu law: the *Mitakshara* and the *Dayabhaga*. The *Mitakshara* is of superior authority throughout India except West Bengal. The *Dayabhaga* is of superior authority in West Bengal and Bangladesh.

2. MARRIAGE

Muslim Law: under Muslim law marriage (*nikah*) is defined as a contract for the legalization of intercourse and the procreation of children. "It implies a particular contract used for the purpose if [sic.] legalizing generation."³ "Marriage among the Muhammadans is not a sacrament, but purely a civil contract."⁴

For the validity of a marriage the following conditions must be fulfilled: there should be a proposal made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other; the proposal and acceptance must be expressed at one meeting; the proposal and acceptance must be made in the presence and hearing of two male or one male and two female witnesses who must be sane and adult Muhammadans.⁵ The bride's dower should be fixed at the wedding and is usually divided into two parts: prompt and deferred, the former being payable forthwith and the latter on the dissolution of the marriage by the death of the husband or wife. The Muslim Family Laws Ordinance, 1961 (Ordinance VIII of 1961), requires a Muslim marriage to be registered by *nikah* registrar.⁶

Effects of a valid marriage are as follows: sexual intercourse become lawful and children born of the union are legitimate; the wife is entitled to dower; the wife is entitled to maintenance; the husband is entitled to exercise marital authority; mutual rights of inheritance are established; prohibitions regarding marriage comes into operation; and the wife does not change her status on marriage.⁷

Hindu law: Marriage under Hindu law is a holy union for the performance of religious duties. it is regarded not only as "a civil contract, but also as a sacrament".⁸ It is more religious than

secular in character. The union is indissoluble, for it is a union of flesh with flesh, and bone with bone.⁹

The following are the essentials of a valid marriage: the bridegroom must have capacity to marry; the parties to a marriage belong to the same caste; the girl must be given in marriage by the guardian; parties should not be within the prohibited degrees; and marriage ceremonies, i.e. invocation before the sacred fire and *saptapadi* (taking of seven steps by the bridegroom and the bride jointly before the sacred fire), must be performed. The marriage becomes completed when the seven step is taken; till then it is imperfect and revocable.¹⁰

The following are the legal effects of a marriage: the wife is bound to live with her husband, and to submit herself to his authority; the husband is bound to live with his wife and to maintain her; either party to a marriage is entitled to sue the other for the restitution of conjugal rights; children born of the husband and wife are legitimate; and after the death of the husband the widow, subject to exception, is bound to reside with her husband's family.

3. DIVORCE

Muslim Law: A Muslim marriage may be dissolved in any of the following ways: by the death of the spouse; by the husband at his will without the intervention of a court; by mutual consent of the husband and wife, without the intervention of a court; and by judicial process.

When the dissolution or divorce is effected by the husband at his will without the intervention of a court it is called *talak* (repudiation). Any Muslim of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause.¹¹

The wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after the marriage. but under the Dissolution of Muslim Marriage Act, 1939 (Act VIII of 1939), a married woman may seek dissolution before a court on any of the following grounds: whereabouts of the husband are unknown for a period of four years; failure of the husband to provide for the maintenance of the wife for a period of two years; sentence of imprisonment on the husband for a period of seven years; without reasonable cause to perform marital obligations; impotence of the husband; insanity of the husband; repudiation of marriage by wife on attaining majority; cruelty of the husband; and any other grounds recognised by the Muslim law.¹² The Muslim Family Laws Ordinance, 1961, has provided another ground of dissolution that if the husband has taken an additional wife in contravention of the provisions of the said Ordinance the wife may seek dissolution of the marriage.¹³

Hindu Law: Divorce is not known to the general Hindu law.¹⁴ Change of religion or excommunication from the caste does not effect a divorce¹⁵. The adultery of either party or the fact that the wife has deserted her husband and become a prostitute does not operate as a dissolution of marriage.¹⁶

Though the classical Hindu law does not permit dissolution of marriage, but there are some statutes under which dissolution of marriage may be sought. Thus, the Native Converts' Marriage Dissolution Act, 1866 (Act XXXI of 1866), provides that where a Hindu becomes a convert to Christianity, and in consequence of such conversion the husband or wife of the convert deserts or repudiates the convert, the court may on a petition presented by the convert, pass a decree dissolving the marriage, and the parties may then marry again as if the prior

marriage has been dissolved by death. Conversion does not operate *per se* as a dissolution of marriage.¹⁷

As a Hindu in Bangladesh can marry under the provisions of the Special marriage Act, 1872 (Act III of 1872), a divorce can be had in accordance with the provisions contained therein, if the marriage took place under that Act.

The Hindu widows Remarriage Act, 1856 (Act XI of 1856), has legalised the remarriage of a Hindu widow. The Act provides that the parties to such a marriage must observe the formalities and ceremonies for a valid marriage under the general law or usage governing the marriage.

Though remarriage of Hindu widow is permitted under the statute, but only in few cases remarriage takes place among the Hindus in Bangladesh.

4. GUARDIANSHIP

Muslim Law: guardianship under Muslim law may be of the person, or property and in marriage. In the first instance there is guardianship of the person. Under *Hanafi* school the mother is entitled to the custody (*hizanat*) of her male child until she has completed the age of seven years or of her female child until she has attained puberty. But the mother is not "the natural guardian; the father alone, or, he be dead, his executor (under the *sunni* law) is the legal guardian."¹⁸

Failing the mother the following female relations are entitled to custody in order of priority: mother's mother how high soever; full sister; uterine sister; consanguine sister; full sister's daughter; uterine sister's daughter; consanguine sister's daughter; maternal aunt, in like order as sisters; and paternal aunt

in like order as sisters. In default of the mother and the female relations the custody belongs to the following persons in order given below: the father; nearest paternal grandfather; full brother; consanguine brother; full brother's son; consanguine brother's son; full brother of the father; consanguine brother of the father; son of father's full brother; and son of father's consanguine brother.

As regards guardianship of property, father is the legal guardian of the minor's property. Failing him, in order of priority, the following are entitled: father's executor; father's father; and father's father's executor. In default of the legal guardian the duty of appointing a guardian for the protection and preservation of the minor's property falls on the judge as representing the State.¹⁹

A person may neither be a legal guardian nor a guardian appointed by the court, but may have voluntarily placed himself in charge of the person and property of a minor. Such a person is called *de facto* guardian. A *de facto* guardian is merely a custodian of the person and property of the minor.²⁰

As regards guardianship, a minor can only be given in marriage by a marriage guardian (*wali*). A guardian must "be major, sane and free"²¹ Muslim. The following persons are entitled, in order of priority, to act as guardian in marriage: the father; the father's father how highsoever; the brother and other collaterals according to the priorities in the law of inheritance; the mother and maternal relations; and finally the ruling authority, that is, the *Qazi* or the court.²² A person, if married during minority, has on attaining majority, the right to terminate the marriage by exercising the option of puberty (*khyar-ul-bulugh*). If he is still unmarried, guardianship terminates, and such person has the absolute right to contract a lawful marriage. The rule

applies both to men and women, but there is a difference of opinions as regards women.²³

Hindu Law: Guardianship under Hindu law may be divided into four classes: (A) natural guardians; (b) testamentary guardians (c) guardians appointed by the court; and (d) *de facto* guardians. (a) **Natural guardians:** the father is the natural guardian of the person and property of his minor children, and next to him the mother, unless the father has by his will appointed another person as the guardian of the person of his children. (b) **Testamentary guardians:** Hindu father may by his will nominate a guardian for his children so as to exclude even the mother from the guardianship. (c) **Guardians appointed by the court:** where the court is satisfied that it is the welfare of a minor an order should be made appointing a guardian of his person or property, or both. the court may make an order under the Guardians and Wards Act. 1890 (Act VIII of 1990), appointing a guardian.²⁴ (d) **De facto guardians:** a person who manages the affairs of the infant in the same way as *de jure* guardian does should be described as a *de facto* guardian although is not a natural guardian or a guardian appointed by the court.²⁵

As regards guardianship in marriage it can be noted that the following persons are qualified, in order of priority, to be guardians of the girl in marriage: father; paternal grandfather; brother; other paternal relations of the girl in order of propinquity; maternal grandfather; maternal uncle; and mother.²⁶ The following persons, in order of priority, are guardians in remarriage of a widow: the father; full paternal grandfather; mother; elder brother; other brothers; and next male relatives. In the case of a widow who is of full age, or whose marriage has been consummated, her own consent is sufficient to constitute her remarriage lawful and valid.²⁷

5. PATERNITY

Muslim Law: Paternity of a child can be established by the valid or irregular marriage between the parents of the child. Marriage may be established by direct proof. If there be no direct proof, it may be established by indirect proof, that is, by presumption of legitimacy drawn from certain facts.

The rules as regards presumption of legitimacy under Hanafi law may be stated as follows: (a) a child born within less than 6 months after marriage is illegitimate; (b) a child born after 6 months from the date of marriage is presumed to be legitimate, unless putative father disclaims the child by *lian*; (c) a child born within 2 years after the termination of the marriage is presumed to be legitimate, unless disclaimed by *lian*.²⁸

The present rule on the subject is to be found in the conclusive presumption raised in section 112 of the Evidence Act, 1872 (Act I of 1872). The rule may be shortly stated as follows: a child born during the continuance of a valid marriage, or within 280 days after its dissolution, the mother remaining unmarried is conclusively presumed to be legitimate, unless there was no access when he could have been begotten. This rule, it was held, superseded Muslim law and it applied to Muslims.²⁹

The rule as regards acknowledgement of legitimacy may be stated as follows: where the paternity of a child cannot be proved by establishing a marriage between his parents at the time of his conception or birth, Muslim law recognises acknowledgement as a method whereby such marriage and legitimate descent can be established as a matter of substantive law for the purposes of inheritance. In order to render the acknowledgement valid and effectual the following conditions must be fulfilled: (a) the

paternity of the child is not established in any one else;³⁰ (b) the age of the parties are such that they may be father and child;³¹ (c) the acknowledgement must not have been repudiated by the person acknowledged;³² (d) the person acknowledged must not be the offspring of *zina*;³³ and (e) the acknowledgement is not merely of sonship but of legitimate sonship.³⁴

The following are the effects of a valid acknowledgement: the acknowledgement of the children has the legal effect of the acknowledgement of the wife as well; the acknowledgement of a man is valid with regard to five persons -- his father, mother, child, wife and freed slave (*mawla*). A valid acknowledgement gives rights of inheritance to the children, the parents and the wife. Acknowledgement once made is not revocable.³⁵

Hindu Law: As a general rule paternity of a child can be established by the marriage between the parents of the child. The marriage between the parents like Muslim may be established by direct proof, or indirect proof, that is, by presumption of legitimacy as provided in section 112 of the Evidence Act, 1872.

Besides this natural child, Hindu law in Bangladesh recognises another kind of son, adopted (*dattaka*) son. The objects of adoption are twofolds: the first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water to the manes of the adopter and his ancestors; the second is secular, to secure an heir and to perpetuate the adopter's name.³⁶

For the validity of an adoption the following requirements must be fulfilled: (a) the person adopting is lawfully capable of taking in adoption; (b) the person giving in adoption is lawfully capable of giving in adoption; (c) the person adopted is lawfully capable of being taken in adoption; (d) the adoption is completed by an actual giving and taking; and (e) the ceremony called *datta*

homam (oblation to fire) has been performed.³⁷

The effects of a valid adoption are as follows: (a) an adoption operates as "birth of the boy in the family of adoption, and as civil death in the family of birth, having regard to the legal consequences that are incidents of such adoption."³⁸ (b) Adoption does not sever the tie of blood between the adopted son and the members of natural family. (c) Subject to exceptions, an adopted son is entitled to inherit in the adoptive family as if he were a natural born son, both in the paternal and maternal lines. (d) The wife of the adopted person, but not his son born prior to the date of adoption, passes with her husband into the adoptive family because according to *shastra* husband and wife form one body.³⁹

Thus, the Hindu law provides a peculiar system of paternity and sonship which is totally prohibited in Muslim law.

NOTES AND REFERENCES

1. Besides the Muslims and Hindus some Buddhists and Christians live in Bangladesh. They follow their own personal laws.
2. In the case of *Collector of Modura v. Mootoo Rama Linga* it has been held: "under the Hindu system of law, clear proof of usage will outweigh the written text of the law." (1868)12 M.L.A. 397 at.p. 436.
3. Charles Hamilton, *the Hedaya* (Lahore: premier Book House, 1963) p. 25.
4. *Abdul Kadir v. Salima*, (1886)8 All. 149, per Mahmood J. at p. 154.
5. See Nail B.E. Baillie, *A Digest of Moohummudan Law* (Lahore: Premier Book House, 1963) pp. 1-2.

6. Section 5 of the Muslim Family Laws Ordinance, 1961.
7. Faiz Badaruddin Tyabji, *Muslim Law* (Bombay: N.M. Tripathi Private Limited, 1968) pp. 55-57.
8. Gooroodass Banerjee, *the Hindu Law of Marriage and Stridhan* (Calcutta: S.K. Lahiri and Co., 1923) p. 37.
9. *Tikait Monmohini v. Basant Kumar*, 28 Cal. 751, at p. 758.
10. *Chunilal v. Surajram*, (1909) 33 Bom. 433.
11. *Ahmad Kasim v. Khatun Bibi*, (1932) 59 Cal. 833.
12. Section 2 of the Dissolution of Muslim Marriage Act, 1939.
13. Section 13(a) of the Muslim Family Laws Ordinance, 1961.
14. Ernest John Trevelyan, *Hindu Law as Administered in British India* (Calcutta: Thacker Spink & Co., 1917) p. 63.
15. *Ibid.*, at p. 64; Golap Chandra Sastri Sarkar, *the Hindu Law* (Calcutta: S.C. Sarkar, 1940) p. 143; Hari Singh Gour, *the Hind Code* (Nagpur: the Central Book Depot, 1938) p. 143.
Cf. *Ayesha Bibi v. Subodh Ch. Chakaravarty*, A.I.R. 1949 Cal.436.
16. *Government of Bombay v. Ganga*, (1880) 4 Bombay 330.
17. *Gobardhan v. Jasadamoni*, (1891) 18 Cal. 252.
18. *Imambandi v. Mutsaddi*, (1918) 45 I.A. 73 at p. 83.
19. *Ibid.*, pp. 83-84.
20. *Ibid.*, *Mohammad Ezazz v. Mohammad Iftikhar*, (1932) 59 I.A. 92, at p. 101.
21. Syed Ameer Ali, *Mohammedan Law* (Lahore: All Pakistan Legal Decisions, 1965) p. 264.

22. *Ibid.*, at pp. 265-266.
23. Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (Delhi: Oxford University Press, 1977) p. 210.
24. Sections 4,5 and 7 of the Guardians and Wards Act, 1890.
25. *Hunooman Persaud v. Mussumat Babooee*, (1856) 6 M.I.A. 393, at p. 412.
26. D.F. Mulla, *Principles of Hindu Law* (Bombay: N.M. Tripathi Private Limited, 1982) p. 555.
27. Ernest John Trevelyan, *op. cit.*, at p. 51.
28. D.F. Mulla, *Principles of Mahomedan Law* (Bombay: N.M. Tripathi Private Limited, 1977) pp. 351-354.
29. *Muhammad Allahadad v. Muhammad Ismail*. (1880) 10 All. 289; *Sibt Muhamnad v. Muhammad*. (1926) 48 All. 625; *Mt. Rahim Bibi v. Chiragh Din*, A.I.R. 1930 Lahore 97. See also Faiz Badaruddin Tyabji, *op. cit.*, at p. 204.
30. Charles Hamilton, *op. cit.*, at p. 439.
31. Syed Ammer Ali, *op. cit.*, at p. 196.
32. *Habibur Rahman v. Altaf Ali Chowdhury*, (1921) 48 I.A. 114.
33. *Ibid.*
34. *Ibid.*
35. *Ashrufood Dowlah v. Hyder Hossein*, (1866) 11 M.I.A. 94.
36. *Bal Gangadhar Tilak v. Shrinivas*, (1915) 42 I.A. 135.
37. For details see D.F. Mulla, *Principles of Hindu Law*, at pp. 269-604.
38. Golap Chandra Sastri Sarkar, *op. cit.*, at p. 196.
39. *Kalgavda v. Somappa*, (1909) 33 Bom. 669.

CHAPTER VI

AGRARIAN AND NON-AGRARIAN LAWS

1. AGRARIAN LAW

The East India Company acquired the *Diwani* of Bengal, Bihar and Orissa in 1765 A.D. and introduced Permanent Settlement into the land system in 1793. Permanent Settlement continued upto the 13th April, 1956. On the 16th March, 1951, a new legislation entitled State Acquisition and Tenancy Act, 1950 (Act XXVIII of 1951), was passed for "the acquisition by the State of interests of rent-receivers and certain other interests in land in Bangladesh..."¹ The Act came into effect on the 14th April, 1956.

The Act enables the then Provincial Government to acquire by notification in the Official Gazette all interests of the rent-receivers as might be specified in the notification in their respective estates, taluks, tenures, holdings or tanancies in any district, part of a district or local areas.² The Act also empowered the Government to acquire in a similar manner all or any of the lands in the *khas* possession of such rent-receivers of which they were not entitled to retain possession under section 10 of the said Act.³ According to section 20 a rent-receiver was entitled to retain under the Government 375 standard *bighas* or an area determined by calculating at the rate of 10 standard *bighas* for each member of his family whichever was greater. A

rent-receiver, however, might be allowed to retain land in excess of the prescribed limit on the basis of a certificate granted by the Revenue Authority in the following cases: (a) when he has undertaken large scale farming on a co-operative basis or otherwise by the use of power-driven mechanical appliances⁴ or (b) when he has undertaken large scale dairy farming;⁵ or (c) when a person holds land for the purpose of cultivation and manufactures of tea, coffee or rubber;⁶ (d) when a company holds land for cultivation of sugarcane for manufacturing sugar;⁷ or (e) when raw materials are grown by large scale industry.⁸ He cannot retain the following classes of lands: (a) any land or building in a *hat* or *bazar*;⁹ (b) any fishery other than tank constructed solely by process of excavation; (c) any land consisting of forest; (e) any land actually in use for a ferry; (f) office or *cutchery* for the collection of rent; and (g) derelict tea garden.^{9A}

The consequences of acquisition of the interests of a rent-receiver may be summarised as follows: (a) all interests of the rent receivers as specified in the notification shall vest absolutely in the Government free from all encumbrances.¹⁰ From the date of acquisition of the interests of rent-receivers, all tenants holding lands under the rent-receivers will be tenants directly under the Government.¹¹ Similar is the case of persons who were holding over as tenants after the expiry of the lease.¹² After the acquisition of the interests of the rent-receivers there will be only one class of tenants, namely a *raiyyat* under the Government. That being so under-*raiyyats* are up-graded as *raiyyats*.¹³ They will be regarded as *maliks* (proprietors) of the land.¹⁴ When the tenants have come directly under the Government they are to pay rent of their holdings to the Government and not to any body else.¹⁵ On the acquisition of their interests the rent-receivers are entitled to compensation.¹⁶

The Act also provides an alternative mode of acquisition in Chapter V of the Act. Under section 17 of the Act the Government may make an order directing that a record of rights be prepared in respect of districts, part of a district, or local area, or that the record of rights last prepared in respect of such district, part of a district, or local area be revised. When such record of rights is published, the revenue-officer is required by section 33 to prepare in the prescribed form and in the prescribed manner a compensation assessment - roll in which the gross assets and the net income of all rent-receivers within such district, part of a district, or local area and the compensation to be paid to all persons whose interests are acquired, shall be specified. On the final publication of such assessment-roll, subject to certain exceptions, the interests of all the rent-receivers within the area to which such roll relates, including their interests in the lands in their *khas* possession, vest absolutely in the Government.¹⁷

It should be noted in this connection that the Government on the 2nd April, 1956, issued notifications districtwise purporting to acquire the interests of the rent-receivers under section 3(1) and lands in their *Khas* possession under section 3(2), with effect from the 14th April, 1956. The notifications of the 2nd April, 1956, were challenged in the case of *Jibendra Kishore Acharjya v. Province of East Pakistan*¹⁸ wherein the High Court of East Pakistan delivered the judgment unanimously repelling all constitutional objections to the notifications. The Supreme Court of Pakistan upheld the judgment of the High Court of East Pakistan¹⁹ and since then no question as regards the acquisition of interest of the rent-receivers was raised and the Government was, in pursuance of section 3 of the State

Acquisition and Tenancy Act, 1950, able to acquire all those interests of the rent-receivers which they could not retain in their *khas* possession under the provisions of the said Act.

The State Acquisition and Tenancy Act, 1950, may be regarded as "the most important agrarian legislation"²⁰ of Bangladesh because by that Act the *zamindari* system was abolished and the *rai-yats* regained their ancient rights to hold land directly under the Government as they were under the Hindu and Muslim governments. They became the *Maliks* or proprietors of the holdings which are now heritable and transferable. Thus, the interests of the intermediate class in lands had been abolished and the ancient rights of the *rai-yats* in lands have been re-established. However, after the emergence of Bangladesh in 1971, either some basic amendments have been made to the State Acquisition and Tenancy Act, 1950, or some new laws relating to land have been promulgated. In order to remove the hardship of the small farmers the State Acquisition and Tenancy (Third Amendment) Order, 1972 (P.O. 96 of 1972), was passed. According to the provisions of this Order where the total area of agricultural land held in Bangladesh by a family does not exceed twenty-five standard *bighas*, such family shall be exempted from payment of land revenue in respect of such lands with effect from the first *Baisakh* of 1379 B.S. (First day of Bengali year) or from such date as it may be entitled to such exemption under section 151-I, as the case may be.²¹ Under the Bangladesh Land Holding (Limitation) Order, 1972 (P.O. 98 of 1972), the total quantity of land which may be held by a family in Bangladesh has been reduced to 100 standard *bighas*.²² Recently the quantity of the land has been reduced to 60 standard *bighas*.²³

2. LAW RELATING TO RECOVERY OF LAND REVENUE

The provisions for the recovery of public demands have been contained in the Public Demands Recovery Act, 1913 (Act III of 1913). The procedure for recovery of public demands may be summarised as follows: when a certificate - officer is satisfied that any public demand payable to the Collector is due, he may sign a certificate stating that the demand is due, and shall cause the certificate to be filed in his office.²⁴ Filing of certificate can be made on requisition.²⁵ When a certificate has been filed, the certificate - officer shall cause to be served upon the certificate-debtor a notice and a copy of the certificate.²⁶ From and after the service of notice of any certificate upon the certificate-debtor—(a) any private transfer or delivery of any of his immovable property situated in the district in which the certificate is filed, or of any interest in any such property, shall be void against any claim enforceable in execution of the certificate; and (b) the amount due from time to time in respect of the certificate shall be a charge upon the immovable property of the certificate-debtor, wherever situated, to which every other charge created subsequently to the service of the said notice shall be postponed.²⁷ The certificate-debtor may file petition denying liability.²⁸

A certificate may be executed by the certificate-officer in whose office the original certificate is filed or by the certificate-officer to whom a copy of the certificate is sent for execution.²⁹ A certificate-officer may order execution of a certificate by sale of any property or by attachment of any decree; or by arresting the certificate-debtor and detaining him in the civil prison.³⁰ There is procedure for setting aside sale.³¹ The certificate-debtor

may bring a suit in the civil court to have the certificate cancelled or modified on some specified grounds.³²

The Public Demands Recovery Act, 1913, contains provisions for appeal, revision and review³³ to give relief to the aggrieved party.

3. NON-AGRARIAN LAW

The incidents of tenancies of non-agrarian land are governed by the Non-Agricultural Tenancy Act, 1949 (Act XXIII of 1949). The Act was brought into existence with the object of conferring a wide range of rights on non-agricultural tenants whom it intended to protect by raising a barrage of massive statutory rights.³⁴

A non-agricultural tenant may hold non-agricultural land for homestead or residential purposes; manufacturing or business purposes; or religious or other purposes.³⁵ The incidents of tenancies held for not less than twelve years, including renewals and transfers thereof and succession thereto, are provided in sections 7 and 8. Incidents of tenancies held for more than a year but less than twelve years are provided in section 9. Under these three sections the ejection of a tenant is not an easy affair as it was before.³⁶ Section 20 of the Act declares the grounds on which the under-tenant makes himself liable to be ejected; and section 21 provides the incidents of his tenancy, such as heritability, transferability and the section 22 confers certain privileges of tenants on a class of under-tenants of not less than 12 years standing or having other attributes.³⁷

The transfer of non-agricultural land is compulsorily registerable irrespective of the value of such land.³⁸ A bequest

or a sale in execution of decree or a of certificate signed under the Public Demands Recovery Act, 1913, are the exceptions to this rule. Section 24 of the Act confers the right of pre-emption upon a co-sharer tenant when a portion or share of the non-agricultural land is transferred. The object of section 24 of the Act is to prevent non-agricultural land from being possessed by stranger purchasers if the other co-sharer tenants desire to have the same themselves.³⁹

Under the Act, both the tenant and landlord have the rights to make improvement, but when both the tenant and the landlord wish to make the same improvements, the tenant will get the priority.⁴⁰ The Act declares that no non-agricultural tenant shall be ejected from the tenancy or from any non-agricultural land which he holds except in execution of a decree of a competent civil court.⁴¹ Where a non-agricultural tenant has erected any structure on any non-agricultural land held by him and such land is sold in execution of a certificate for arrears of rent due in respect of such land, the purchaser shall be entitled to obtain delivery of possession of the land sold by the removal of such structure.⁴²

The Non-Agricultural Tenancy Act, 1949, is not a complete code. Sections 2 (8) and 71 of the Act establishes the connection of the Act with the Transfer of Property Act, 1882, and the State Acquisition and Tenancy Act, 1950. Many provisions of the Transfer of Property Act, 1882, and the State Acquisition and Tenancy Act, 1950, are applicable in the case of non-agricultural tenancies. So, the statement made in the Preamble to the Act is justified when it speaks that the Act intends to "make better provision relating to the law of landlord and tenant in respect of certain non-agricultural tenancies in Bangladesh."

Notes and References

1. See Preamble to the State Acquisition and Tenancy Act, 1950.
2. Section 3 (1) of State Acquisition and Tenancy Act, 1950.
3. Section 3 (2), *ibid.*
4. Section 20 (4), *ibid.*
5. *Ibid.*
6. Section 20 (4A), *ibid.*
7. *Ibid.*
8. Section 20 (5) (i) (b), *ibid.*
9. See Section 3(4), 20(2)(b) and 20(2a), *ibid.*
10. Section 3(4)(a), *ibid.*
11. Section 3(4)(e), *ibid.*
12. *Lalita v. Rafique*, 17 D.L.R. (1965) 107.
13. *Rafiqul Islam v. Kazi Taibur Rahman*, 18 D.L.R. (1966) 375.
14. Section 82(8) of the State Acquisition and Tenancy Act, 1950.
15. Section 3(4) (e), *ibid.*
16. Section 3(5), *ibid.*
17. Section 44, *ibid.*
18. 9 D.L.R. (1957) 457.
19. See *Jibendra Kishore Acharjya - v. Province of East Pakistan*, 9 D.L.R. (S.C.) (1957) 21.
20. Kabir, *Land Laws in East Pakistan* Vol. III (Dhaka: Law House, 1969) p.6.

21. New section 191C of the State Acquisition and Tenancy Act, 1950.
22. Section 3(a) of the Bangladesh Land Holding (Limitation) Order, 1972.
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CHAPTER VII

COMMERCIAL LAWS

1. LAW OF CONTRACT

The Contract Act, 1872 (Act IX of 1872), possesses the combined effect of common law and equity doctrine much simplified and altered in some particulars so as to accommodate it to the circumstances of Indian Sub-continent. Frederick Pollock went to the extent of saying: "the Indian Contract is in effect... a code of English Law."¹

Section 2(h) of the Contract Act, 1872, defines a contract as "an agreement enforceable by law." In order to be enforceable the agreement must create an obligation on both the parties to the contract which law may justly step in to enforce whenever there is any default on the part of either. A contract is made by proposal and acceptance if the latter unconditionally corresponds with the former.

A contract is voidable at the option of a person whose consent has been secured by coercion, fraud, undue influence or misrepresentation.² An agreement by a person of unsound mind due to drunkenness is voidable.³ Certain contracts by minors are voidable either during minority or within a reasonable time after the settlement of majority.⁴

A contract is void if its object or consideration is unlawful, fraudulent, immoral or opposed to public policy or if it was entered into under a mutual mistake of fact essential to the

agreement.⁵ Every agreement in restraint of the marriage of any person, other than the minor, is void.⁶ Every agreement in restraint of a lawful profession, trade or business of any kind is void.⁷ Agreements in restraint of judicial proceedings are void except those that provide for reference of disputes to application.⁸ Uncertain contracts are void.⁹ Agreement by way of wager is void.¹⁰

A contract is dissolved—by performing respective shares of the promises; or by fresh agreement between the same parties to the contract; or by supervening impossibility; or by operation of law.¹¹ When a contract is dissolved the party affected by it has the following remedies: damages, specific performance, *quantum meruit*, or injunction.¹²

The contract Act, 1872, deals with the law of agency. An agent who is authorised to do a particular act has authority to do every lawful thing which is necessary in order to do such an act.¹³ When an emergency arises an agent has authority to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case under similar circumstances.¹⁴ An agent cannot appoint a sub-agent. But he can appoint a sub-agent where it is the usual custom of the trade in question or where without such a sub-agent the assignment cannot be properly executed or where the principal has authorised the appointment of a sub-agent.¹⁵

The Contract Act, 1872, also deals with bailment. Bailment is the delivery of goods to the bailee to be returned to the bailor or disposed of in accordance with his directions when the purpose of bailment is accomplished.¹⁶ The bailor is bound to disclose to the bailee faults in the goods bailed of which he is aware and which materially interfere with the use of them or expose the bailee to extraordinary risks.¹⁷ If the bailee makes any

unauthorised use of the goods bailed, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.¹⁸ The bailee is bound to return, deliver or tender the goods bailed at the proper time; if he fails, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.¹⁹

A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person is called a contract of indemnity.²⁰ A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in the case of his default.²¹

There are the laws with which the Contract Act, 1872, deals. The laws of contract are mainly part of civil law and are used for commercial and business purposes. hence, it comes under the purview of the commercial law.

2. LAW OF PARTNERSHIP

The Partnership Act, 1932(Act IX of 1932), is based on the English Partnership Act, 1890 (53 & 54, Vic. C. 39). Prior to 1932 the law relating to partnership was contained in Chapter XI of the Contract Act, 1872, which was "based on the rules included in the Report of the Indian Law Commission presided over by Lord Romilly in 1886"²² and which was held to be not exhaustive by the Privy Council as well as the High Court of Madras.²³ In order to remove the shortcomings Chapter XI of the Contract Act was repealed and the Partnership Act, 1932, was passed.

Section 4 of the Partnership Act, 1932, defines partnership as "the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all." Since the relation of partnership is created by contract the mutual rights and liabilities of the partners may be wholly governed by the terms of the agreement of partnership.

Under section 12 of the Act; subject to the contract, every partner has the right to take part in the conduct of the business of the firm; to inspect the books of the firm; and to express an opinion on any matter connected with the business though the decision must be that of the majority.²⁴ Subject to the contract, a partner is entitled to an equal share in the profits earned and interest on the capital subscribed by him; but not other remuneration.²⁵ Every partner has to indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.²⁶ On the contrary, the firm is liable for the wrongful act or omission of a partner acting in the ordinary course of business of the firm. But without the express authority the partner cannot—submit a dispute relating to the business of the firm to arbitration; open a banking account on behalf of the firm in his own name; withdraw a suit or proceeding filed on behalf of the firm; deal with immovable property of the firm.²⁷

A minor cannot be a partner in a firm because he has no contractual capacity—but he may be admitted to the benefit of partnership.²⁸ Such a minor is not personally liable for the acts of the firm but his share is liable for such acts.²⁹ Within six months of attaining majority or of knowledge of his relation with the firm, whichever is later, he may give notice of his election to become a partner; if he fails to do so, he becomes partner automatically.³⁰

The partnership Act, 1932, provides that person shall not be introduced as a partner into a firm without the consent of all the existing partners.³¹ A partner may retire—with the consent of all other partners in accordance with an express agreement by the partners; by giving notice in writing to all partners of his intention to retire if the partnership is at will.³² No majority of partners can expel a partner unless such power is conferred by contract between the partners, and the power is exercised in good faith.³³ A partner ceases to be a partner as soon as he is adjudged as insolvent.³⁴ Unless otherwise provided by the contract of partnership, the death of a partner has the effect of dissolving the partnership.³⁵

A firm is dissolved—as a result of any agreement between all the partners³⁶ by the happening of any event which makes the business of the firm unlawful,³⁷ on the happening of certain contingencies such as efflux of time, death of a partner, insolvency of a partner,³⁸ and by the intervention of the court.³⁹ On the dissolution of a firm every partner or his representative is entitled to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights.⁴⁰

In this way the Partnership Act, 1932, "makes considerable changes in definition and arrangement" and "gives effect... to the mercantile view of a firm's continuity."⁴¹

3. LAW OF SALE OF GOODS

The Sale of Goods Act, 1930(Act III 1930), is based on the English Sale of Goods Act, 1893 (56 and 57 Vict. C. 71), which is characterised as "a very successful and correct

codification of this branch of the mercantile law."⁴² Though Sale of Goods Act, 1930, is said to "restate minutely and full what had been enacted by the English Sale of Goods Act of 1893",⁴³ but there are some provisions which are different in some respects from those in force in England. The Sale of Goods Act repealed chapter VII of the Contract Act, 1872, which were adequate for their time, but needed amendment as a result of the development of modern commerce."⁴⁴

Section 4(1) of the Sale of Goods Act, 1930, defines a contract of sale of goods as "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price." In this context the view of Lord Alfred Denning M.R. may be mentioned. His lordship held: "the word 'sale' property connotes the transfer of the absolute or general property in a thing for a price in money."⁴⁵

A contract of sale may contain condition or warranty. A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to repudiate the contract.⁴⁶ A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not a right to reject the goods or to repudiate the contract.⁴⁷

There is a general proposition that no one can give that he has not got (*nemo dat quod non habet*) which has been provided in section 27 of the Sale of Goods Act, 1930. Under this section where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. There are certain exceptions to this rule: (1) *estoppel* :- Where the owner of the goods is by his conduct precluded from denying the seller's authority to sell:⁴⁸

(2) *sale by mercantile agent*—where he sells under the authority or with the consent of the owner;⁴⁹ (3) *sale by one of joint owners*—where a person buys in good faith goods from one of the several joint owners who has the sole possession of them and the buyer has not at the time of the contract of sale notice that the seller has no authority to sell;⁵⁰ (4) *sale by person in possession under voidable contract*—where a person buys goods in good faith and without notice of the seller's defect of titles from a person who has obtained possession thereof under a voidable contract but the contract has not yet been rescinded.⁵¹

In accordance with the terms of the contract of sale it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them.⁵² Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if he accepts the goods so delivered he has to pay for them at the contract rate.⁵³ In the case of excess delivery, the buyer may reject the whole or the excess, but if he accepts the whole he must pay at the contract rate.⁵⁴

Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract and the seller is bound to afford to the buyer a reasonable opportunity of examining the goods.⁵⁵ If the buyer does not examine the goods in spite of reasonable opportunity being given by the seller, the buyer is deemed to have accepted the goods.

An unpaid seller may retain the goods in his possession until he is paid.⁵⁶ He has the right of stopping the goods in transit after he has parted with the possession of the goods.⁵⁷ He has the right to re-sell the goods in some specific cases.⁵⁸

where the property has passed to the buyer and the buyer wrongfully neglects or refuses to pay, he may be sued.⁵⁹ Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.⁶⁰ Where there is a breach of warranty by the seller, the buyer may—set up against the seller the breach of warranty in diminution or extinction of the price, or sue the seller for damages for breach of warranty.⁶¹

4. LAW OF NEGOTIABLE INSTRUMENT

In Indian Sub-continent the Negotiable Instruments Act, 1881 (Act XXVI of 1881), was the first enactment to define clearly the rules relating to bills of exchange, promisory notes and cheques. The Act is mere "the codification of the English law with minor changes."⁶² Section 13 of the Act describes that "a negotiable instrument means a promisory note, bill of exchange or cheque payable either to order or to bear". The Act does not defines negotiable instruments but only describes as to what the term includes.

A promisory note is defined as an instrument not being a bank note or currency note, containing an unconditional undertaking signed by the maker, to pay on demand or at a fixed or determinable future date a certain sum of money to or to the order of a certain person or to the bearer of the instrument.⁶³ A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.⁶⁴ A cheque is

a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.⁶⁵

When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.⁶⁶ If an instrument is payable to bearer, it can be negotiated by mere delivery.⁶⁷ When the maker or holder of a negotiable instrument signs the same, otherwise than as such maker, for the purpose of negotiation, on the back or face thereof or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the indorser.⁶⁸

The holder of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.⁶⁹ Where the promissory note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.⁷⁰ Any person who, for consideration, becomes possessor of a negotiable instrument payable to bearer is known as a holder in due course of such instrument provided he comes into possession before the amount payable is due and he has no notice of any defect in the title of the person from whom he derives his title.⁷¹

Section 26 of the Negotiable Instruments Act, 1881, lays down that every person capable of contracting according to the law to which he is subject may be a party to a negotiable instrument. Under this section read with section 11 of the Contract Act, 1872, the following persons are disqualified to be parties to a negotiable instrument: (a) minors; (b) persons of unsound mind by reason of lunacy, idiocy, intoxication; (c) alien enemies; and (d) persons declared disqualified by any other law.

If minor draws or negotiates an instrument the transferee can enforce it against any party other than the minor. A partner, if acts in the name of the firm, binds the firm by making or dealing with an instrument to the extent authorised by the Partnership Act, 1932.

A negotiable instrument is said to be dishonoured when the drawee either refuses to accept it or to make payment upon it. Dishonour, gives rise to cause of action for suit against the drawer or previous holders. If an instrument has been lost or obtained by means of an offence or fraud or unlawful consideration, the person who finds it, or so obtains it and any person claiming under him cannot claim payment, unless he is a holder in due course.⁷²

5. COMPANY LAW

The Companies Act, 1913 (Act VII of 1913), is almost *verbatim* reproduction of the English Companies (Consolidation) Act, 1908.⁷³ A company formed or registered under this Act is a distinct legal entity.⁷⁴ It can own and deal with property, sue and be sued in its own name, contract on its own behalf and the members are not personally entitled to the benefits or liable for the burdens arising therefrom. Once the company is incorporated, it must be treated like any other independent person, and the motives of those who promoted it are irrelevant.⁷⁵

Two persons may form a private company but number of members will not exceed fifty.⁷⁶ There is no limitation as to the membership of a public company, minimum number being seven. The first stage of formation of a company is that a few

people known as promoters get together to bring it into existence for the purpose of carrying on a lawful joint-stock business.

The next stage, the promoters, having decided to form a company, must fix up five things: (a) the objects of the company; (b) the name of the company; (c) the place where the business of the company is to be carried on; (d) liability of the members; and (e) the amount of capital necessary for the business to be carried on successfully. The decisions of the promoters on these five points are recorded in a document called the *memorandum* of association.⁷⁷

In the third stage, the promoters have to decide upon the manner of carrying on the business of the company. This calls for the appointment of directors of the company, the division and allotment of shares, meetings of shareholders and such other things as are necessary for the internal administration of the company. This arrangement are expressed in a document called the articles of association.⁷⁸ The articles of association are subordinate to the *memorandum* of association. Any clause in the former at variance with the latter is to that extent inoperative.⁷⁹

In the fourth stage, the promoters have to submit to the Registrar of Joint-Stock Companies information regarding the *memorandum*, the articles, the names with address of the directors and so on for the purpose of the company's incorporation and thus get it registered.⁸⁰

In the fifth stage, after the company has been incorporated by registration it becomes a legal person distinct from its members. A private company can commence business as soon as it is registered. But a public company has to pass through certain preliminary formalities before its business can be commenced.⁸¹

For the purpose of managing the business of the company directors are elected by the shareholders from among themselves. The Companies Act, 1913, requires that every public company shall have at least three directors.⁸² This rule does not apply to private company except where a private company is a subsidiary company of a public company.⁸³ "The true position of directors seems to be that of agents for the company with powers and duties of carrying on the whole of its business subject to the restrictions imposed by the articles and the statutory provision."⁸⁴

One of the peculiar feature of the Companies Act, 1913, was the introduction of managing agent in the management of the company. Managing agent means a person, firm or company entitled to the management with the company and under such control and direction of the directors as may be provided for the agreement. Thus, if the agreement so provides, a managing agent may be almost free from the control and direction of the directors.⁸⁵

The Companies Act, 1913, has laid down three modes of winding up of a company : (a) winding up by the court; (b) voluntary winding up; and (c) winding up subject to the supervision of the court.⁸⁶ In the case of winding up of a company the court has a great role to play. It should be noted in this connection that the court herein means the High Court Division of the Supreme Court of Bangladesh because under section 3 of the Companies Act only this said Division has jurisdiction over company matters.

6. LABOUR LAWS

In Bangladesh there are many laws relating to to the labours. Among them some important laws such as the Workmen's Compensation Act, 1923 (Act VIII of 1923), the Factories Act,

1965 (Act XII of 1965), and the Industrial Relations Ordinance, 1969 (Ordinance XXIII of 1969), have been discussed as follow:

Under the provision of section 3(1) of the Workmen's Compensation Act, 1923(Act VIII of 1923), the employer is liable to pay compensation for injury caused to a workman by accident arising out of or in the course of his employment. The contracting of some occupational diseases peculiar to the nature of the work done is also considered an injury by accident arising out of or in the course of employment.⁸⁷ The employer is not liable to pay compensation in respect of any injury which does not cause total or partial disablement of the workman for more than four days. He is also not liable in respect of any injury, not resulting in death, caused by an accident which is directly attributable to the workman being under the influence of drink or to the wilful disobedience of the workman to any order expressly given for the purpose of securing safety or the wilful removal or disregard by the workman of a safety device.⁸⁸

The Factories Act, 1965, applies to the factories employing ten or more workers for the purpose of carrying on manufacturing process with or without the aid of power, but does not include a mine subject to the operation of the Mines Act, 1923(Act IV of 1923).⁸⁹ The Act provides that no adult worker should work in a factory for more than 48 hours in a week.⁹⁰ The working hours of the adult workers should not exceed nine per day in a factory.⁹¹ A male adult worker in a seasonal factory may work for ten hours in any day.⁹² A woman worker shall not be allowed to work in a factory except between 7 a.m. and 8 p.m.⁹³

Children under the age of 14 years are not allowed to work in a factory.⁹⁴ A child between the age of 14 and 18 years shall work in a factory if certified by Certifying Surgeons as

physically fit.⁹⁵ The working hours of children are limited to -- five hours per day,⁹⁶ and two shifts which shall not overlap or spread over more than seven and a half hours.⁹⁷ Beside these, the Factory Act, 1965, has made ample provisions for health and hygiene, safety and welfare of the workers.⁹⁸

The Industrial Relations Ordinance, 1969, consolidates the formation of trade unions and settlement of disputes between employers and workmen. The Act provides that the workers shall have the right to establish and to join associations of their own choosing without previous authorisation.⁹⁹ The employers shall have the right to establish and to join associations of their own choosing without previous authorisation.¹ The Trade union and the employers' association shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.² The trade union must be registered.³ Where there is only one registered trade union in an establishment or a group of establishments, that trade union shall be deemed to be collective bargaining agent for such establishment or group.⁴

If any industrial dispute is likely to arise between the employer and any of the workmen, the parties to the dispute tries to reach a settlement by negotiation; if the negotiation fails the conciliator will be requested in writing to conciliate in the dispute. If the conciliator fails to settle the dispute within ten days, the collective bargaining agent or the employer serves on the other party to the dispute twenty-one days' notice of strike or lock-out, as the case may be.⁵ If the conciliation fails, the conciliator shall try to persuade the parties to agree to refer the dispute to an arbitrator⁶ whose award shall be final and no appeal shall lie against it.⁷ If no settlement is arrived at during the course of conciliation proceedings and the parties to the

dispute do not agree to refer it to an arbitrator, the workmen may go on strike or, as the case may be, the employer may declare a lock-out.⁸

The parties to the dispute may, at any time, make a joint application for adjudication of the dispute to the Labour Court which consists of a Chairman appointed by the Government and two members, one to represent the employers and the other to represent the workmen.⁹ The Labour Court shall make such award as it deems fit as expeditiously as possible.¹⁰ Any collective bargaining agent or any employer or workman may apply to the Labour Court for the enforcement of any right guaranteed to it or him by or under any law or award or settlement.¹¹ Any decision of the Labour Court shall be final and shall not be called in question by any court or authority.¹² But against the award of the Labour Court appeal shall lie to the Labour Appellate Tribunal consisting of one member who is or has been a Judge or an Additional Judge of the High Court Division of the Supreme Court.¹³

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