



READER'S queries

Your Advocate



This week your advocate is M. Moazzam Husain of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.

**Q:** Few years back I started a small printing business with financial help of my friend. My friend gave the money as loan and I promised him to give back the money within 2 year without any interest. The whole transaction was made verbally. Later, because of loss in business, I did not pay him the money back. Then, he proposed me to take him as a working partner of the business. From then we are running the business on partnership without any formal agreement. Now my friend is asking the money back as he wants to start a new business. It would be really impossible for me to run the business if I pay the money to him. So, I requested some time, but he refused. Some days ago, he sent me a legal notice through a lawyer to pay the money within this December; otherwise he will take legal action against me. I am always willing to give the money back, but I need some time to do so. My question is (1) what would be the consequence if I refuse to pay the money within time, and (2) should I consult a lawyer in this issue? Your opinion will help me to take any decision. Thank you in anticipation.

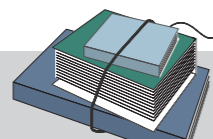
**R Islam,**  
Dhaka.

**Your Advocate:** Relationship between you and your friend looks very rare in the present day context. He is a friend in deed. You too do not lag behind on that scale. You equally feel for him as a friend and sincerely wants to pay back his money. But some business- setbacks have slowed you down in the repayment of the loan. Whole contrast is, you want to pay back the money at your convenience taking some time while your friend wants it back within a deadline fixed by him. Certainly he has strong point in it. Because, he is in need of money at the moment and you have once earlier failed to keep your words in repaying the loan within the time given by you and still giving priority to your own convenience.

Now at the end of the day a legal notice is served upon you at the instance of your friend adding a new dimension to already disturbed relationship. I understand your embarrassment and limitations. The whole thing is going to cost you your otherwise good friendship. It is a critical juncture of your life and the decision that is to be taken is crucial. At this moment there are obviously two options open for you. One is, you can remain silent and wait for an action to be taken by your friend and respond according as the situation demands or you can be good to your friend and make at least a part repayment of the loan and solicit his favour so that you can arrange for further repayment in a reasonable time. A reasonable man is most likely to take the second course for the simple reason that convenience cannot be more valuable than friendship. After all he is your friend and the legal notice is the reflection of a disturbed mind. The ball is in your coat. It is time for you to show gestures of good friendship. Let the situation not go further worse which you too do not inwardly want.

You can take the first option if you so judge for yourself. In that case you can get some time in repaying the loan at the cost of your friend's time, energy and money. Approaching a lawyer will come along. But should you do it as a prudent man and a friend? I hope, not.

LAW lexicon



**Pardon**

A pardon is a government decision to allow a person who has been convicted of a crime, to be free and absolved of that conviction, as if never convicted. It is typically used to remove a criminal record against a good citizen for a small crime that may have been committed during adolescence or young adulthood. Although procedures vary from one state to another, the request for a pardon usually involves a lengthy period of time of impeccable behaviour and a reference check. Generally speaking, the more serious the crime, the longer the time requirement for excellent behaviour. In the USA, the power to pardon for federal offences belongs to the President.

**Parrens patriae**

Latin: A British common law creation whereby the courts have the right to make unfettered decisions concerning people who are not able to take care of themselves. For example, court can make custody decisions regarding a child or an insane person, even without statute law to allow them to do so, based on their residual, common law-based parrens patriae jurisdiction.

**Pari delicto**

Latin for "of equal fault." For example, if two parties complain to a judge of the non-performance of a contract by the other, the judge could refer to provide a remedy to either of them because of "pari delicto": a finding that they were equally at fault in causing the contract's breach.

**Pari passu**

Latin: Equitably and without preference. This term is often used in bankruptcy proceedings where creditors are said to be "pari passu" which means that they are all equal and that distribution of the assets will occur without preference between them.

**Pendente lite**

Latin: during litigation. For example, if the validity of a will is challenged, a court might appoint an administrator pendente lite with limited powers to do such things as may be necessary to preserve the assets of the deceased until a hearing can be convened on the validity of the will. Another example is an injunction pendente lite, to last only during the litigation and, again, designed simply to preserve something until the decisive court order is issued.

**Corresponding Law Desk**

Please send your mails, queries, and opinions to: Law Desk, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email dslawdesk@yahoo.co.uk

Star LAW report

Preliminary inquiry is not mandatory before filing a complaint

High Court Division (Criminal Jurisdiction)  
Before Mr. Justice Gour Gopal Saha and Mr. Justice Sheikh Rezowan Ali  
Criminal Revision No. 1757 of 2001  
The Noagaon Rice Mills Ltd.  
Vs  
Publai Bank Ltd.  
Date of Judgement: November 18, 2002  
Result: Rule discharged

**Background**

Gour Gopal Saha, J: This Rule is directed against the order dated 10.01.2001 passed in Misc. Case No. 1 of 1999 sending a complaint against the petitioner to the Criminal Court concerned.

Short facts relevant for the purpose of the case are that Publai Bank as plaintiff instituted Artha Rin Adalat Suit No. 132 of 1994 before the Artha Rin Adalat, Noagaon for realisation of its outstanding dues from the defaulting loanee, the petitioner. Ultimately, the suit was decreed on contest on 01.12.1998. In the said judgement the learned Artha Rin Adalat found that the present petitioner (who was the defendant in the Artha Rin Adalat suit) committed forgery and used forged documents in the suit. Subsequently the bank filed an application before the Artha Rin Adalat praying for lodging a complaint against the defendant petitioner before the Magistrate concerned for necessary action.

The petitioner before us filed written objection against the aforesaid application of the decree-holder bank for initiating action under sections 195/476 of the Code of Criminal Procedure. The learned Artha Rin Adalat, on hearing the contending parties and on careful perusal of the materials before him, passed the impugned order dated 10.1.2001 lodging a complaint to the Magistrate concerned for proceeding against the defendant petitioner in accordance with law.

Being aggrieved by the aforesaid impugned order dated 10.1.2001, the petitioner moved this Court and obtained the present Rule.

Mr. Md. Khaled Ahmed, the learned Advocate appearing for the petitioner, submits that under section 476 of the Code of Criminal Procedure the learned Magistrate is required to make a preliminary enquiry before lodging any complaint against the delinquent who is alleged to have used a forged document in our relation to a proceeding before the Civil Court. The learned Advocate for the petitioner submits that in the instant case, the Artha Rin Adalat clearly erred in law in passing the impugned order without holding the mandatory preliminary enquiry and the same the occasioned failure of justice and consequently, the impugned order is liable to be set aside in the interest of justice.

The learned Advocate appearing for the petitioner has placed before us the application under section 476 of the Code of Criminal Procedure filed by the bank before the Artha Rin Adalat against the defendant petitioner, the written objection filed by the present petitioner against it as well as the impugned order. It is found that the learned Artha Rin Adalat, on hearing the contending parties at length and on consideration of the materials placed before him, passed the impugned order.

**Deliberation**

Section 476 of the Code of Criminal Procedure provides as follows: When any Civil Revenue of Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in section 195, sub-section (1) clause (b) or clause (c) which appears to have

been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court and shall forward the same to a Magistrate of the First Class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody of such magistrate, and may bind over any person to appear and give evidence before such Magistrate.

Now the only question that call for our consideration is whether a preliminary enquiry before lodging any complaint under section 467 of the Code of Criminal Procedure is mandatory. From a reading of the section itself it appears to us that holding of a preliminary enquiry is not mandatory. The Court may in its discretion hold a preliminary enquiry before lodging any complaint to the Magistrate only when it thinks it necessary but such an enquiry is never obligatory. The Court has enough power to lodge such a complaint without holding any enquiry at all when from the proved facts the Court is prima facie satisfied that an offence has been committed before him in a proceeding or in relation thereto even without hearing the party complained against.

In the present case it is found that sufficient opportunity was given to the defendant petitioner to defend his cause. The written objection filed by the petitioner against the application for taking action under section 476 of the Code of Criminal Procedure was duly considered and the petitioner's engaged Advocate was given a through hearing. In the facts and circumstances of the case, it is thus evident that a preliminary enquiry, which is not at all mandatory, was indeed duly held and only thereafter the learned Artha Rin Adalat resorted to the provision of section 476 of the Code of Criminal Procedure by filing a complaint against the opposite party before the learned Magistrate.

**Decision**

We, therefore, do not find any illegality or legal infirmity in the impugned order occasioning failure of justice so as to justify interference by this Court exercising power under section 115 (1) of the Code of Civil Procedure. We are satisfied that the learned Artha Rin Adalat duly applied his judicial mind into the facts and circumstances and the law bearing on the subject and committed no error of law in taking action against the



petitioner under section 476 of the Code of Criminal Procedure.

The impugned order is found to be perfectly justified and the same is well-reasoned and well-supported by the materials on record. We, therefore, find no merit in the revision case, which fails necessarily.

In the result, the rule is discharged without any order as to cost and the impugned order dated 10-1-2001 passed by the learned Artha Rin Adalat, Noagaon in Misc. Case No 1 of 1999 is affirmed. The order of stay earlier granted by this Court stands vacated.

Mr Md. Khaled Ahmed with Mr. Md. Faruk Hossain, Advocate-for the Petitioner. No one for the opposite party.

LAW letter



New dress-old practice!



Police is the prime agency of the country entrusted with the duty to protect the citizens and maintain law and order. Instead of protecting, some police members are acting like criminals. They arrest innocent people to extort money, torture people in custody to extract confession. Recently they are also mugging people. These are examples of law enforcers assuming the unlikely role of lawbreakers. Is there any other way to describe mugging, killing and other criminal activity by police? Most recently, in Jhenaidha district, one police officer took one accused person to ream in thana custody from jail custody without any order form magistrate. They did it allegedly for realising money form his family. This is unbelievable! The news is another debilitating blow to the standing of law enforcers, already lowered in the public eye, because of assorted culpability committed by police. According to the law, no police officer can keep an arrested person in thana custody for more than 24 hours without permission of a magistrate. A series of incidents have taken place in recent years which cast a shadow on the credibility of the men in charge of ensuring security to citizens. This is a unique one in the list of criminal activity of police. The concerned police official claimed that it was mistake. How is it possible? I hope all the police-turned-criminal will not go unpunished for the greater interest of the police department. There must be a quick turn-around in the situation; for, a vast majority of citizens have lost faith in the integrity and competence of police. If the cops are to restore public confidence in themselves they have to behave like policemen, not criminals.

**Mizanur Rahman,**  
Advocate, Dhaka Judge Court.

Law is not equal for all

I was shocked and astonished by the news published in The Daily Star, "Law makes exceptions for BNP lawmaker". According to the news Nasiruddin Ahmed Pintu, MP of the ruling party, accused in an extortion case, has not been present in the court on 23 consecutive dates and a metropolitan magistrate's court has not issued an arrest warrant against him. The news also revealed that the same magistrate had cancelled the bail of one Farid Ahmed of 53 DIT Extension Road, Naya Paltan at Motijheel in the city, who stands accused in a cheating case, and issued a warrant of arrest against him as well, as he did not turn up on a specific date. We may recall that few days back, Dhaka Metropolitan Sessions Judge Md Matiur Rahman asked the government to seize the power of a metropolitan magistrate for passing unlawful orders in a criminal case. The judge said that Metropolitan Magistrate Shafiq Anwar issued several orders including declaration of an accused as absconder, attachment of his property and ban on his leaving the country though the time fixed for appearance of the accused did not expire.

The above three cases gives us clear idea of how our lower court, specially the magistrate's court works. It is crystal clear that the lower courts are in very much control of the executive. I believe this short of activity will continue unless and until the judiciary is separated.

**Jahangir Alam,**  
Aristopharma, Dhaka.

LAW week



Free legal aid for Bangladeshis

Two non-government organisations of Bangladesh and India have signed a five-year memorandum of understanding (MOU) to provide legal aid for Indian citizens in Bangladesh and Bangladeshi citizens in India free of cost. Under the agreement, the Bangladeshi NGO will provide legal aid for Indian citizens while the Indian organisation will offer the same to Bangladeshi citizens. The MOU was signed by Bangladesh Legal Aid Services Trust (BLAST) and Legal Aid Services in West Bengal (LASWEB) of India. Vice-president of BLAST Justice Naimuddin Ahmed and chairman of LASWEB Justice DK Basu signed the MOU, said a press release. The legal aid will also cover, if needed, cheaper travel expenses to the citizens up to crossing the border, subject to necessary government permission. -Prothom Alo, 4 December.

Bosnian Serb convicted

UN war crimes judges sentenced a former Bosnian Serb army commander to 27 years' imprisonment yesterday for his role in the 1995 Srebrenica massacre of up to 8,000 Muslims -- a stiffer sentence than even prosecutors requested. Momir Nikolic, 48, pleaded guilty in May to one count of crimes against humanity for persecuting non-Serbs in Europe's worst atrocity since World War II. In return for his plea, prosecutors dropped four other charges. Nikolic was an assistant intelligence commander in the Bratunac Brigade that encircled the U.N.-declared "safe area" of Srebrenica in eastern Bosnia.

Under the plea deal, prosecutors agreed to request a 15- to 20-year sentence and the defense said it would recommend 10 years. Judge Liu Daqun said neither term was sufficient. "Neither sentence adequately reflects the totality of the criminal conduct for which Momir Nikolic has been convicted," the judge told the court, saying the Srebrenica massacre was "committed with a level of brutality and depravity not seen previously in the conflict in former Yugoslavia." -Daily Star, 03 December.

Political clashes claim 49 in November

Political violence claimed 49 people, injuring 473 others throughout the country in November. This was revealed by a report prepared by

Killing Case

The government has appointed Advocate Anisul Huq as special Public Prosecutor (PP) to conduct the trial of the Jail Killing Case. The govt. has also appointed three other Special PP for assisting him. They are Advocate Shahara Khatun, Mosharaf Hossain Kjol and Kamrul Islam. Earlier in December last year the government cancelled appointment of the Special PP's after the death of advocate Sirajul Huq, head special PP of the case.

Law Minister Moudud Ahmed told that the government appointed the SPPs on the basis of a request from Deputy Opposition Leader Abdul Hamid. On 3 November, 1975, four national leaders -- Tajuddin Ahmed, Syed Nazrul Islam, M. Kamruzzaman and M. Monsur Ali, all put behind bars by the then Mustaq government -- were killed inside the Dhaka Central Jail by a group of disgruntled army officers. A case was filed with Lalbag Police Station the same day. But no action could have been taken until repeal of the Indemnity Ordinance in 1996 by former Awami League government. The case is now pending with the Dhaka Metropolitan Sessions Judge's. -Prothom Alo, 4 December.

Paparazzi acquitted

Three photographers who took pictures of Princess Diana and Dodi Fayed on the day they died were acquitted on Friday, 28 November of invading their privacy. The three men, whose photographs were confiscated and not published, were among a swarm of photographers who either pursued the car carrying Diana and her boyfriend across Paris on 31 August 1997 or took photos after it crashed into the pillar of a traffic tunnel. Jacques Langevin, with Sygma/Corbis at the time, Christian Martinez of the Angeli agency, and free-lancer Fabrice Chassery had risked a maximum of one year in prison and \$53,000 fines. The prosecutor had asked for suspended prison sentences.

But the Paris court ruled that a crashed vehicle on a public highway is not a private area. The court also said Diana and Dodi Fayed knew they would be photographed when leaving Paris' Ritz Hotel by car. -Daily Star, 30 November.

Special PP appointed for Jail