Star LAW *analysis*

Applying CPC in Family Courts

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TWO decades have already passed since the establishment of Family Courts in the country, but the courts are still entangled with some confusions of law. One of such confusions is as to whether or how much of the Code of Civil Procedure (CPC) will apply to the proceedings before the Family Courts. While on the one hand, Section 20 (1) of the Family Courts Ordinance 1985 has clearly expressed that the provisions the Code except sections 10 and 11 shall not apply to the proceedings before the Family Courts; on the other hand the Supreme Court in different suits at different times has rendered differing opinions over the issue. The reason behind the confusion is, therefore, obvious.

Not surprisingly, the issue of non-applicability of CPC emerged as a great problem in the very first suit of the Family Court of Ramgonj of Lakshmipur in 1985, the very year of the commencement of the Family Courts Ordinance. The fact of the suit was that the plaintiff, the husband, filed the suit against the defendants, his wife and others, for restitution of his conjugal life. In the said suit the plaintiff also filed an application for temporary injunction restraining the marriage of her wife, who claimed that she had divorced her husband, elsewhere till the disposal of the suit. The prayer for injunction was rejected; then the plaintiff moved the learned district judge and preferred appeal, wherein also the prayer was rejected on the ground that the provisions of Code of Civil Procedure granting injunction is not applicable in the proceedings under Family Courts Ordinance. Consequently the plaintiff moved the High Court Division which also confirmed the decision of the lower courts holding that Family Courts Ordinance 1985 is a self contained Ordinance providing the mode and method of trial and disposal of suits, and as section 20 thereof makes all the provisions, except sections 10 and 11, of the Code inapplicable, no other provisions of CPC will be applicable in the proceedings of Family Courts.

In the said case [Moqbul Ahmed vs Sufia Khatun and others, 40 (1988) DLR (HCD) 305, Judgment delivered in 1988], the learned Advocates for the plaintiff-petitioner submitted, among others, that though in specific terms the provisions of Order 39, Rule 1 of the Code has not been made applicable in a proceeding under Family Courts Ordinance, to serve the purpose of the legislation the Court may apply Order 39, Rule 1 of the Code of Civil Procedure. Section 141 of the Code provided that the procedure provided in the Code of Civil Procedure in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction. The proceeding before the Family Courts is a civil proceedings and as such section 141 of the CPC may come into play.

After placing some leading decisions from Indian and Bangladeshi jurisdiction, some other arguments were also submitted, the essence of those submissions were that the strict application of sections of the Ordinance may sometimes frustrate the true intention of the law-makers. In fact, as it was submitted, it is a sound rule of interpretation that a statue should be so construed as to prevent the mischief and to advance the remedy according to the true intention of the makers of the statute. But none of the arguments was accepted by the learned judge of the High Court Division.

Similarly in 1993 in Azad Alam vs Jainab Khatun and others [1(1996) BLC (AD) 24; judgment delivered on 23rd October 1993] the full Bench of Appellate Division of the Supreme Court upheld the view that nothing of the CPC, except otherwise expressly provided by the Ordinance, will apply in the Family Courts. Though it was argued that the Court got power under section 6 of the General Clauses Act to pass any order necessary to give relief, the Court rejected the same in view of the provision under section 20 of the Family Courts Ordinance.

Interestingly, in 1994 just after three months later from the above mentioned Appellate Division decision, a differing opinion came from a Divisional Bench of the High Court in Nazrul Islam Majumdar vs Tahmina Akhter alias Nahid and another [47(1995) DLR (HCD) 235; judgment delivered on 23rd January 1994]. The case was about amendment of plaint about which there is no provisions in the Family Courts Ordinance. The High Court Division in the judgment did not precisely mention whether whole or how much of the Code of Civil Procedure will apply, but clearly expressed that it is discretion of the Court to allow an amendment for ends of justice. And the guiding principle for amendment of plaint is that it ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings.

Here are the points 'ends of justice' and 'the purpose of determining the real question in controversy' which were absolutely ignored in earlier two decisions.

It was the same year 1994 when another Divisional Bench of the High Court in Younus Mia vs Abida Sultana Chhanda [47 (1995) DLR (HCD) 331; judgment delivered on 23 February 1994] flashed light on the issue from a broader outlook. The case was against an order of a Family Court allowing the defendant, a purdanishin Muslim lady, to examine herself on commission as per provision of Order 26 of the CPC, which on appeal was also affirmed by the learned district Judge.

In this judgment, the learned High Court Division interpreted the section 20 of the Ordinance as follows:

Upon reading this section it appears to us that the meaning of the expression 'proceedings before the Family Courts' as understood by the Ordinance itself is the key to the solution. The word 'proceeding' in a general sense means 'the form and manner of concluding judicial business before a Court of Judicial Officer' (Black's Law Dictionary. p.1368).

Keeping this meaning of that term 'proceeding' in mind, we now look into the scheme of the Ordinance so far it is relevant for our purpose by section 4 and 5, after respectively providing for the establishment of Family Courts and the jurisdiction thereof, The Ordinance prescribes procedures applicable to the proceedings before the Family Courts regarding (i) institution of suits and plaints, (ii) issuance of summons and Notice, (iii) written statement, (iv) consequence of non appearance of parties, (v) recording evidence, (vi) writing the judgment and (vii) summoning witnesses respectively in Sections 6, 7, 8, 9, 12, 15 and 18, that is, by these sections the Ordinance substitutes for itself the provisions of Orders 4, 7, 5, 8, 18, 20 and 16 of the Code of Civil Procedure respectively. Therefore, when section 20 of the Ordinance says that the provisions of the Code 'shall not apply to proceedings before the Family Courts' it means that provisions of the Code shall not apply which are in the Ordinance as prescribed modes for conducting Judicial business by the Family Courts.

The Court mentioned that it is a canon of interpretation that an attempt should be made to discover the true legislative intent by considering the relevant provision in the context of the whole statute, and subsequently observed that Code of Civil Procedure itself does not create any Court nor does define the word 'Court'. Its preamble says that it is the intended to regulate the procedure of the Courts of Civil Judicature. Basically, the Code of Civil Procedure is a procedural law and, therefore, there is no difficulty in its applications to proceedings of a civil nature suit pending before the courts of any kind. Therefore, the bar in applying the Code to the proceedings before the Family Courts imposed by section 20 of the Ordinance is not and cannot be an absolute bar, but it must be a qualified and limited bar. Enactment of section 20 was thus only necessary due to certain procedures prescribed in the Ordinance.

The learned Court finally held that only those provisions of the Code shall not apply to the Family Courts where alternative provisions have been prescribed for the Family Courts in the Ordinance.

It is quite pertinent to mention that this Court not only pronounced its own judgment but also expressed its findings that the decision of the learned Single Judge in Moqbul Ahmed vs Sufia Khatun and others (mentioned above) that section 20 "has not provided that other provisions of the Code will also be applicable in a suit filed under the Family Courts Ordinance" is not a correct decisions.

It could not be learnt whether the High Court Division's benches while giving decisions in the above two cases were informed about the Appellate Division decision in the Azad Alam Vs Jainab Khatun and others [1(1996) BLC (AD) 24]. Because we see, the High Court Division in 2000 in Saleha Begum vs Dilruba Begum [53(2001) DLR (HCD) 346] reverted to the early position by holding that section 20 of the Family Courts Ordinance is a bar to the application of the Civil Procedure Code in Family Court proceedings; and Family Courts Ordinance being a special law must be applied strictly.

Not surprisingly, the judge in the abovementioned case has bypassed the High Court Division decision in Younus Mia vs Abida Sultana Chhanda and relied on the Appellate Division decision in Azad Alam vs Jainab Khatun and others as per the Constitutional directive that the law declared by the Appellate Division shall be binding on the High Court Division.

In the concluding remarks I want to say that even after the Appellate Division judgment on the issue, the problem is not solved. For the successful completion of family courts' suits, the necessity of applying CPC will come time and again. As a matter of fact, we cannot in any way neglect the High Court Division decision in Younus Mia vs Abida Sultana Chhanda that was founded upon apparently some very cogent and convincing grounds. In fact, we must think the issue again and decide whether the procedural bar to the provisions of the Code of Civil Procedure as contemplated in the section 20 of the Family Courts Ordinance is absolute or a qualified one? Is a Family Court devoid of powers under section 151, which gives the Civil Courts the inherent powers, section 141 and all such essential power as are available to other Civil Courts? We must think whether a civil court, and not a tribunal, can be conceived of without its inherent and ancillary powers.

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FINANCIAL MARKET *regulation*

SECURITIES MARKETS IN BANGLADESH

Regulatory development after 1971

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AFTER the independence, Bangladesh adopted most of the laws, which were in operation in the region before the independence. In the securities market, the government adopted Securities Act 1920, Capital Issues (Continuance of Control) Act 1947 and the Securities and Exchange Ordinance 1969. I have already discussed these laws in earlier articles published in the DS. This article therefore explores the regulatory development in the post-independence securities market of Bangladesh.

History accords that transactions in the Dhaka Stock Exchange and thus, in the overall securities market in Bangladesh were closed during the 1971 liberation war. Dhaka Stock Exchange was reopened in 1976. There were only 9 companies listed in Dhaka Stock Exchange in 1976. The Investment Corporation of Bangladesh, which remained the single-most institutional investor in Bangladesh for long, was established in 1976 to broaden the investment base and to develop the capital market in the emerging Bangladesh. After independence, the Bangladesh securities market came to be regulated jointly by the Controller of Capital Issues, the Registrar of Joint Stock Companies, the Bangladesh Bank and the Chief Controller of Insurance.

It is interesting to note that Bangladesh formulated its own Securities and Exchange Rules 1987 almost after 16 years of independence. These rules essentially deals with qualification of becoming and remaining as a member of a stock exchange (Rule 3), the manner of transaction of such member's business (Rule 4), the requirement of maintaining books of audited account and other documents by both the stock exchange and the members (Rules 5, 7 and 8); requirement of submission of annual and half-yearly report by the issuers (Rules 12 and 13) etc.

According to the Securities and Exchange Rules 1987 the annual report to be submitted by the issuer should include 'financial statements' consisting of (i) an audited balance sheet; (ii) an audited profit and loss account; (iii) an audited cash flow statement; and (iv) notes to the accounts (Rule 12(1)(1)). Moreover, the financial statements of the issuer must be in conformity with the International Accounting Standards and the International Standards of Auditing as issued by the International Accounting Standards Committee and the International Auditing Practices Committee of the International Federation of Accountants respectively and as the same adopted by the Institute of Chartered Accountants of Bangladesh (Rules 12(1)(2) and 12(1)(3)).

In 1993, the Government of Bangladesh enacted the Securities and Exchange Commission Act 1993. With a view to efficiently regulating the securities market of Bangladesh, on 8 June 1993, this Act established a statutory organization known as the Securities and Exchange Commission (henceforth, SEC) and entrusted it with a number of regulatory powers, including market surveillance, monitoring and adjudicatory powers.

SEC is a body corporate, having perpetual succession and a common seal with power to acquire, hold and dispose of properties, both movable and immovable, and by the said name can sue and be sued (Section 3 of the SEC Act). SEC is consists of (a) the Chairman (appointed by the government); (b) four full time members (all appointed by the government); (c) a government nominated representative from the Ministry of Finance; and (d) a Deputy Governor of the Bangladesh Bank.

SEC is expected to perform all such functions and duties as may be prescribed for fulfilling the objectives of the Securities and Exchange Commission Act 1993. These include: regulating the business of the stock exchanges or any other securities market, registering and regulating the working of market intermediaries, registering, regulating and monitoring the working of collective investment schemes, promoting, monitoring and regulating authorized self-regulatory organizations, prohibiting fraudulent and unfair trade practices, promoting investors education and training of all market intermediaries, prohibiting insider trading, regulating substantial acquisition of share or stock and take-over of companies, investigating and doing inspection, monitoring financial performance of issuers, levying fees or other charges, and conducting research and publications. The SEC is also to hold meetings, furnish annual budget statement to the Government; maintain audited accounts and furnish reports to the Government, as and when required. The SEC can act as a civil court, impose penalty, hear appeal, prosecute offences, exempt the compliance requirements of securities regulation and can delegate power.

In 1994, to regulate the working of stock-dealers, stock-brokers and the authorized representatives, the SEC made the Securities and Exchange Commission (Stock-Dealer, Stock-Broker & Authorised Representative) Regulations 1994. Similarly, in 1995, to regulate the working of the merchant bankers and the portfolio managers, the SEC made Securities and Exchange Commission (Merchant Banker & Portfolio Manager) Regulations 1996. The said regulations prohibited the concerned category of people to carry on their respective activities in Bangladesh without duly registered with or holding the prescribed certificate from the SEC. Also, in 1995, the SEC made Securities and Exchange Commission (Prohibition of Insider Trading) Regulations 1995.

Bangladesh securities market was opened to the non-resident/foreign investors during 1991-1992. According to Bangladesh Bank sources, flow of capital into the stock markets by non-residents shot up to a record of Tk. 3101.80 million by the end of 1994 which stood only at Tk. 50.80 million in June 1992. Also, during 1993 1994, significant steps were taken to ease the process of repatriation of capital gains and dividends by foreigners.

However, on 11 February 1995, the government of Bangladesh introduced a restriction, which was known as 'lock-in'. Such lock-in provisions required foreign investors to hold stocks purchased in new public offerings for a minimum of one year. In other words, the foreign investors would not be permitted to transfer such shares and repatriate the sale proceeds within one year of purchase in initial public offerings. It may be mentioned that after imposition of lock-in provisions, foreign investment in Bangladesh stocks dropped significantly.

It is argued that by mid 1990s Bangladesh securities market had adopted all necessary regulatory techniques of the developed markets. The 1969 Ordinance and the establishment of the SEC, both followed the regulatory models of the developed Anglo-American jurisdiction. Very particularly, the Bangladesh SEC was set up after the institutional framework of the US Securities and Exchange Commission. It is well known that the US SEC played a dominant role in the development of the US securities market and the overall growth of the US economy. On the contrary, Bangladesh securities market experienced its worst turmoil in 1996 even after having necessary regulatory provisions and institutions. The index crash of 1996 also casts doubt on the efficiency of the SEC as a regulatory body. In the next article therefore I will discuss in detail the 1996 securities market crash and some relevant regulatory issues that it gives rise to.

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