Star LAW *analysis*

Amending plaints in Family Courts

ZAHIDUL ISLAM

GENERALLY a court of civil jurisdiction follows the procedure prescribed by the Code of Civil Procedure 1908. But Family Courts are exceptions which, though being courts of civil jurisdiction, do not follow the said procedure. The reason is simple: Family Courts are special courts with specific jurisdiction and purpose, created by a special law, that is, Family Courts Ordinance 1985. This Ordinance not only prescribes a specific procedure to follow but also provides that the provisions of the Code of Civil Procedure, except sections 10 and 11, shall not apply to the proceedings before the Family Courts.

In fact, the Ordinance prescribes almost a complete procedure 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 etc. But this Ordinance does not provide any provision for amendment of plaint as is available in any other civil court that follows the CPC. Lawyers allege that the dearth of provision for necessary amendment of plaint has been creating problems in dealing with the Family Courts. They reason that it is not possible even for good lawyers to prepare a good plaint at a single chance. Moreover, after presentation of the plaint, other logical and legal grounds may arise, necessitating amendment of plaint. Hence, this rigid provision obstructs many good causes.

But what actually is the matter? Is there no scope for amendment of plaint? As to this the lawyers and judges of the Family Courts seem confused -- confused because in the meantime the Supreme Court has given differing opinions.

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 plaint cannot be amended under the Family Courts Ordinance. Though the learned advocate of the case argued that Family Courts Ordinance being silent about amendment of pliant 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 which provides " Save as otherwise expressly provided by this Ordinance the provisions of the CP Code, except sections 10 and 11, shall not apply to the proceedings before the Family Court."

However, after few months later, a High Court Division Bench in Nazrul Islam Majumdar Vs Tahmina Akhtar alias Nahid (47(1995) DLR (HCD) 235; judgment delivered on 23rd January 1994) expressed opposite view, though it could not be learnt whether the HC Bench was aware of the Appellate Division decision in Azad Alam Vs Jainab Khatun and others while expressing the view. The Court held that: 'An amendment of the plaint insofar as it does not change the nature and character of the suit would be allowed always in a suit. ....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. ....and the principle applicable to the amendment of the plaint is also applicable to the amendment of written statement'.

The fact of the above mentioned case was that the amendment was sought for by the wife in her own suit bringing to notice certain facts that accrued or happened after the suit was filed and it was to the effect that she divorced her husband as per provisions of law. The Court expressed that: '... if the wife has legally divorced her husband the prayer made by the wife in her plaint that she would be allowed maintenance would be deleted as her maintenance would not be allowed after she had divorced and if the wife had legally divorced the husband the suit by the husband for restitution of conjugal life may not also be maintainable on that evidence. this, therefore, is a issue vital for both the parties to be decided by the Court on evidence and that being the position for ends of justice this amendment needs to be made and it would be incumbent upon the court to do so'.

The Court also expressed its opinion in the following words: 'In this sort of case the interest of justice needs to be served keeping in mind that the other parties should not be taken by surprise by the amendment of the plaint which would change the nature and character of the suit and if justice demands that the amendment should be done it would be within the discretion of the court to allow such an amendment for ends of justice.

In the case of Satish vs Govt of India AIR 1960 (Cal) 278, the Calcutta High Court reiterated the same principle. It has been again reiterated in the case of Rajeshawar vs Padam AIR 1970 (Raj) 77. And it is the consistent view that court can take into account subsequent view even necessitating amendment by addition of new relief that may be allowed to do complete justice.

It seems quite pertinent to mention a judgment of a Divisional Bench of the High Court in Younus Mia vs Abida Sultana Chhanda 47 (1995) DLR (HCD) 331. In this judgment, section 20 of the Ordinance was interpreted 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 said 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 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 application 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.

In the light of the above mentioned judgment we can come to a decision that as there is no alternative provision for the amendment of plaint in the Family Courts Ordinance, the provisions of the CPC as to the same will apply in the Family Courts. However, the fact is that we cannot reach such a conclusive decision because of the Appellate Division judgment expressing opposite view, and because of the Constitutional directive that the law declared by the Appellate Division shall be binding on the High Court Division and all other subordinate courts.

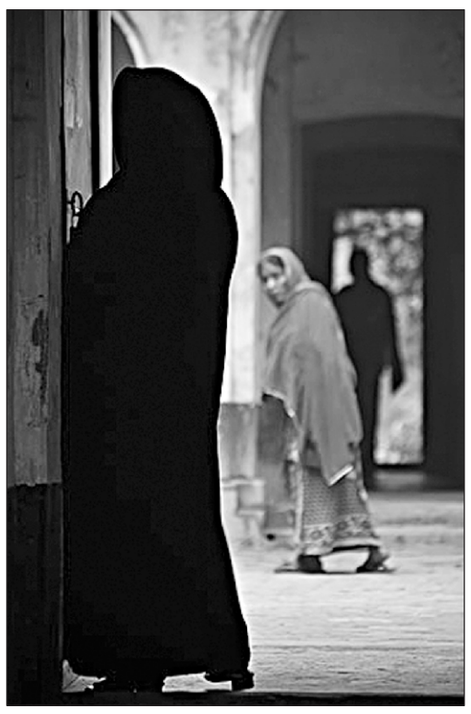
Yes, we cannot bypass the Appellate Division judgment. But at the same time we cannot accept the judgment without thinking its impact on the total justice delivery system. A group of lawyers and judges do strongly support the absence of provision for amendment of plaint by presenting the simple argument that as the Family Courts are specially established for the speedy disposal of family cases, the provision for amendment of plaint would oppose the purpose by destroying the time of a case. They stress on the maxim 'justice delayed, justice denied'. On the contrary, the other group argue that speedy disposal of suit may produce injustice. They stress on the maxim 'justice hurried, justice buried'. It is high time the concerned authority resolved the issue.

The author is a law and governance researcher, currently working for Bangladesh Legal Aid and Services Trust.

HUMAN RIGHTS *advocacy*

Sex workers occupational rights

SHAMIMA PERVIN



THE constitution of Bangladesh guaranteed equality of all citizens before the law, and prohibits discrimination against any citizen based on religion, race, caste, sex, or place of birth life [Article 28(1), 28(2), and 28(3)]. Nevertheless, the sex workers are not only stigmatised and excluded from the mainstream society, they are discriminated against under the law of the land in various ways. They are neither considered as occupational group nor they are in a position to claim fundamental human rights for their daily livelihood. Although, most people have fantasy about the life and livelihood of sex workers, in reality most of them live an inhuman life, which is even difficult to describe.

The term "prostitution" or "prostitute" is deployed as a descriptive term denoting a homogeneous category, usually women and girls and they pose threats to public services like health, education and others, sexual morality, social stability and civic order. The sex workers belong to heterogeneous groups, some of them might be rich, enjoy exclusive living, have connections with high ups of the society; however, majority of these women and girls live under extreme poverty. As one of the young girls of the Madaripur brothel was telling "I feel like dying as after choosing this disgraceful profession I don't get adequate food and cloth". Another girl said" Always I am working, I can't refuse client even while I am eating." In most cases these girls are unable to keep their hard earning; the 'sardarni' they work under, snatch the whole amount of money. Law does not protect them either.

Human rights organisations have dilemma in positioning sex workers' issues as human rights agenda. Even radical women's organisations argue whether sex work is a work. Some groups argue that sex work is just a division of the leisure industry. On the other hand some groups oppose the whole idea of prostitution and consider that sex work simply degrades women and prolongs the concept that women are primarily sex objects. Charity organisations are prone to rescue them and put them in "safe homes" and development organisations are likely to target them as either HIV/AIDS carriers or rehabilitate them through income generation activities.

The kind of oppression that a sex worker goes through can never be perpetrated against a worker of a socially legitimate profession. The justification is given that sex work or sexual service is not a real work or not a service at all but it is seen as derailed or moral degradation of women that is culturally unacceptable, religiously sinful and politically illegal and is not even placed on the table for discussion/debate. In Bangladesh, an adult woman can engage in this profession by making an affidavit with a first Class Magistrate's court or with a Notary Public. However, this affidavit is not a professional licence rather the document only records some information about the woman in sex-trade and it does not entail any regulation, condition or right regarding sex-work.

The constitution and some laws of the land recognise its existence. At the same time they portray the trade as a crime. According to the Suppression of Immoral Traffic Act, 1933, section 4 (1) mentions that using or renting out one's own house for a brothel is a punishable offence. The section 8 of the same law says that any person, 18 or above, will be punished if s/he knowingly depends for his/her livelihood, totally or partially, on the income of a person engaged in prostitution. Chapter 10 of the Code of Criminal Procedure, 1898 defines prostitution as a 'public nuisance'. If all the laws were put into effect no brothel could survive. It is clear that the role of law is dubious in regard to sex trade.

No matter how debatable the issue is, the reality is that women are pushed to be engaged in the sex industry when their basic rights are violated at every level of the society and no alternative choices left except this profession. They are also like other human beings who need food, shelter, education, protection, leisure, dignity at work, love, care and protection from unwanted disease and a violence free life. Most women involved in this work are in a vulnerable position, suffering frequent rape, beatings and robbery at the hands of pimps and clients and harassment including violence from the police. Dubious position of law regarding sex trade has extended their suffering. Hence, will it be injustice to claim their occupational rights?

The author is a national expert, UNDP.

FINANCIAL MARKET *regulation*

Index crash of 1996: A case of regulatory failure

BARRISTER TUREEN AFROZ

BANGLADESH securities market experienced the worst turmoil in 1996. In my previous article published in the DS, I have stated that until mid 1996 Bangladesh securities market failed to attract investors, both local and international. However, between July and mid-November 1996, both Dhaka and Chittagong Stock Exchanges experienced an unprecedented bullish run. During this period, market capitalization went up by 265% and the average daily turnover increased by over 1000%. There were about 192 securities listed with both the stock exchanges at that time. According to the official record, price index at Dhaka Stock Exchange increased by 281% and at Chittagong Stock Exchange increased by 258%. Then the bubble burst: share prices of both the stock exchanges dropped by 25% from their peak in mid-November. It was reported that outside in the 'kerb (informal) market' the prices went down further.

Regulatory response

The regulatory move to control the situation was very slow. The regulatory authority took time to realize the possible impact of index crash on the entire economy. The Bangladesh Securities and Exchange Commission (SEC) declared that the market would be viewed as 'normal' till the index remained above the 1500 points. The government carried on a massive media campaign striking out any possibility of crash and further promised recovery measures only if the index dropped below 1500. The Finance Minister even made public statement to the effect that 'It's not at all a crashing situation. The market has become over heated and now it is stabilizing through correction.'

It was only in late December 1996 that the SEC constituted an Enquiry Committee to investigate into the irregularities of stock market activities during July 1996 to November 1996. In March 1997, the Enquiry Committee prepared a lengthy report identifying a number of companies being in breach of specific provisions of securities market regulation and commented that such companies were guilty of fraudulent acts in relation to securities trading. The Enquiry Committee also identified some of the country's biggest brokers who were apparently involved in market manipulation. Based upon the Enquiry Committee Report, the SEC obtained warrants of arrest against 32 people in 7 brokerage firms and 8 listed companies. The SEC also filed 15 share-scam cases in the High Court Division of the Supreme Court of Bangladesh.

A case of regulatory failure

I argue that the 1996 index crash was caused by the failure of a number of regulatory institutions. However, it is unfortunate that the Enquiry Committee Report failed to address the regulatory aspects in a comprehensive way. The said Report served two purposes: (a) it identified some of the market manipulators involved in many fraudulent activities during the period in question; and (b) it brought into light the irregularities involved in the day-to-day operation of the stock exchanges. The Report, however, completely ignored the role that should have been played by the SEC as a regulatory body to handle the crisis.

Regulatory failure by the stock exchanges

During June-November, 1996 the two stock exchanges were aware of many irregularities and malpractices that took place at the exchanges. However, the exchanges remained indifferent towards regulating (and/or banning) such activities. According to the records, the exchanges, even though were experiencing sharp increase of prices in most of their listed shares, they did not take any action to investigate or control the situation.

Further the trading procedure at both the stock exchanges was susceptible to fraudulent misuse by vested quarter. The Delivery Versus Payment System (DVP) of trading method at the stock exchanges allowed the buyers/seller of the share to settle the transactions directly between them and without involving the stock exchanges. This system was misused by many

brokers/dealers to show artificial trading so that the investors would be induced to buy and demand more shares. Also, the usual practice of T+4 settlement procedure was not followed at the Dhaka Stock Exchange. Forward deals, though forbidden under law, took place in the exchanges at very high prices.

Also, the management system of the Dhaka Stock Exchange was not appropriate; there was no clear demarcation between management and operation and as such, conflict of interest was bound to grow. In addition, such concentration of control in the same group of people actually discouraged to take strict actions against members of the stock exchanges engaged in unethical practices. It was also observed that the stock exchanges did not have internal auditing system for their day-to-day operation.

Regulatory failure by the SEC

It is true that in 1996, securities market of Bangladesh had only a few years of experience in active trading. Therefore, the SEC, as the central regulator of the securities market, should have been more careful in performing its duty as a market watchdog. However, over the period June November 1996 the SEC was rather in conscious disregard of market movements. For example, there emerged an unauthorised and unregulated kerb market right outside the Dhaka Stock Exchange and securities were traded at exceptional high prices in the kerb market affecting the overall price movement. However, the SEC failed to take necessary steps to control such activities and thereby the SEC failed miserably to watch and guard the interest of the market.

The SEC also failed to carry on necessary inspection to monitor the activities of market intermediaries. Irregularities at the stock exchanges or by the brokers/dealers could have been guarded in proper time had the SEC become a bit more vigilant in protecting the interest of the market. Also, the SEC needed to be more alert to the cases of insider trading and market manipulation, which ultimately results in loosing of market confidence.

Finally, it is the duty of the securities market regulators to be alert and prepared for any crash situation. However, in 1996, the regulatory response to merely identify a crash was far behind the time. A more regulatory effort to carry on market surveillance could enable the SEC to make a timely response to the crash.

Further it is essential for regulators to make it apparent to the market that they have a power to control the market, as and when necessary. Enforcement mechanism, exercised by the regulators, encourages the market to move towards proper direction. By adhering to strict enforcement mechanisms against market culprits, the regulators can always discourage such happening in future. However, it is argued that during June-November 1996, the SEC unfortunately failed to enforce securities market regulations against the market malpractices.

It became apparent that from June-November 1996, the stock exchanges were not self-regulating themselves well and market intermediaries were in breach of a number of legal provisions; there was wide range of insider trading taking place to manipulate the market price of the shares. There were even serious allegations regarding the registered chartered accountants certifying false financial statements along with the valuation of assets and property. Many of these activities could amount to fraud and would clearly violate specific provisions of the already existing securities market laws of the country.

However, the SEC, even though entrusted with wide regulatory power, failed to take strict action against such market misbehaviour/malpractices. For example, the SEC failed to prosecute under Order 17 and/or to impose penalty under Order 24 of the Securities and Exchange Ordinance 1969 against 'insider trading' committed by director or sponsor of the issuers. Similarly, the SEC even though observed that during 1996 a number of companies management were making public disclosure of false information, it failed to take any timely action against those companies. Also, the market manipulation activities of the brokers/dealers clearly fell under the fraudulent activities as stated in Ordinance 17 of the Securities and Exchange Ordinance of 1969 and therefore, would attract the penalty provision under Ordinance 24. Nevertheless, the SEC failed to take any reasonable regulatory measure to control such activities.

Conclusion

It is stated that a regulator should be a thoughtful observer to the market and not a reluctant bystander. From the ongoing discussion it is clear that both the SEC and the stock exchanges were inactive to apply any enforcement mechanism against fraudulent activities and malpractices in 1996. It is stated that such failure of the SEC and the stock exchanges to actively enforce their regulatory power has made the market vulnerable to manipulation and finally to crash. Alternatively, it is strongly argued that in 1996 neither the SEC, nor the stock exchanges had the required 'regulatory capacity' to regulate the securities market and as such, the unregulated market had valid reasons to crash.

The author is an Assistant Professor of Law at BRAC University School of Law.