Banks and litigation: Problems and remedies

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HE Artha Rin Adalat (Money Loan Court) Act was enacted in 1990 to expedite loan recovery by our banks and financial institutions. Yet, more than a decade later, the culture of default that the Act was meant to combat continues to afflict our economy. According to a report published in the Daily Star on 19 May 2002, the total amount of defaulting loans of Nationalised Commercial Banks (NCBs) alone stood at Tk. 2,400 crores by December, 2001, which constituted 34% of their total loan portfolio. Therefore, it is high time to review the effectiveness of the Act. In this article, the author, who has some practical experience of working in this general area, seeks to identify a few of the reasons why loan recovery through legal action continues to be a frustrating process for our banks and financial institutions.

(In)security of the Bank

The problem actually starts much before the Act comes into play. It begins when the bank sanctions a loan to a borrower. The terms of the sanction includes the execution of various securities by the borrower and the guarantor, e.g. charges and mortgages, in favour of the bank. As a pre-condition to disbursal of the loan, the bank requires such security documentation to be completed to the satisfaction of a lawyer, usually one who is included in a pre-approved panel of the bank. The lawyer's job at this stage is three-fold. Firstly, the lawyer sees whether the mortgagor has the legal right, title and interest in the property proposed to be mortgaged, which involve the examination of title deeds and other documents pertaining to the property, and addresses a legal opinion to the bank. Secondly, the lawyer ascertains whether the executors of third party securities, particularly corporate guarantors, do indeed have requisite legal capacity to execute such securities Finally, the lawyer drafts the required security documents where necessary though in this respect, many charge documents are actually executed in standard format stationery printed by the bank. If the necessary legal work at this stage is not accomplished scrupulously, then the securities held by the bank may not actually be perfect. This may then return to haunt the bank if the borrower defaults and the bank seeks to enforce these securities.

Banks pay legal fees as per schedules that are pre-approved by their boards. Lawyers have to accept these schedules as a pre-condition to their being empanelled with the banks. Some of the fees paid are, guite frankly laughable (e.g. Tk. 250/- to Tk. 750/- in case of an NCB for a legal opinion on documents pertaining to property proposed to be mortgaged to secure a loan of, say, Tk. 50 lacs). Also, with respect to some banks, there are allegations that at the time of disbursing the fees, the concerned bank officer demands a "share". Therefore, good lawyers do not always feel encouraged to work for banks (however, it must be said that some banks have had the good sense to have separate, more realistic, fee schedules for some selected lawyers with proven records of competence, though even these lawyers are not necessarily instructed regularly). As a result, some of the lawyers who do end up working for banks are not always very competent or very honest (though again, the generality of this statement must be emphasised as there are a good number of very competent, honest and hardworking lawyers representing banks, even at pitiable fees). Also, poor fees may cause a lawyer, who is otherwise sincere, to prioritise his work in a manner so that the banks get relatively less attention and focus.

Dishonest lawyers are particularly dangerous. One hears of allegations where lawyers entrusted with the task of vetting property documents and preparing security documentation contact the borrowers concerned and extract payments to "lubricate" the process, even if the property documents are actually imperfect. Besides compromising the security position of the bank, this is completely contrary to lawyers' professional ethics, as it represents a conflict of interests. In some cases, this is done with the eager participation of bank officers, who get "a cut" of the proceeds. The adverse effect of such misdeeds is not felt until the time arrives, usually 7 or 8 years later, when the borrower defaults and the bank takes legal action, only to find the enforceability of the securities impaired. The unholy nexus between the unscrupulous lawyer acting on behalf of the bank and the defaulter can also rear its ugly head at the time of litigation.

Sometimes, the damage is done inadvertently. The number of banks and their branches are spreading like some endemic disease. Competition has become the order of the day and only the fittest can expect to survive. Accordingly, the performances of individual bank officers are measured by

the volume of business they generate in the form of total loans disbursed. So, there are inevitably cases where a lawyer, pressured to satisfy a "gungho" bank officer and perhaps eager to nab or keep a bank as a client, does his work shoddily for the sake of having it expedited, with neither the bank officer nor the lawyer fully appreciating the ultimate extent of the damage potentially caused to the bank.

Litigation

Once a bank decides to commence legal action for recovery of loan, the provisions of the Artha Rin Adalat Act, 1990 comes into play. The Act establishes special courts (Artha Rin Adalats) that exclusively try suits regarding recovery of loans extended by banks and financial institutions. These Artha Rin Adalats function like any other ordinary civil court applying the provisions of the Code of Civil Procedure, 1908 save to the extent modified by the provisions of the Act. These modifications are designed to expedite litigation. Specifically, Section 5(5ka) of the Act of the provides that a suit in the Artha Rin Adalat cannot be adjourned for more than three times and that the suit has to be decided within 6 months of the suit being filed. The purpose of this provision was to prevent the defendant from delaying the suit by seeking successive adjournments. Section 5Ka of the Act allows the plaintiff bank to have, upon an application to the Artha Rin Adalat, notices of the suit to be published in daily newspapers, which can be adduced later to resolve ques-

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tions as to whether or not notices were served on the defendants. This provision was intended to prevent defendants from delaying the suit by avoiding summonses. Section 6(1) of the Act provides that save for the provisions of Section 7 of the Act, no question can be raised before any court or authority regarding the proceedings, orders, judgements and decrees of an Artha Rin Adalat. Section 7(1) of the Act provides that any person aggrieved by the judgement or decree of the court can appeal to the High Court Division within 30 days and that no appeal can be filed against an interlocutory order of an Artha Rin Adalat. Section 7(2) further provides that where a defendant seeks to prefer an appeal against a decree of the Artha Rin Adalat, he has to deposit at least half the decretal amount in the Artha Rin Adalat where the suit was tried. Section 6(2) requires the defendant to make a similar deposit if he seeks to set aside an ex parte decree (i.e. a decree passed in his absence).

The above provisions were supposed, in theory at least, to expedite the recovery of loans through litigation. In practice, however, this has not been achieved to the extent desired. Among the reasons responsible for this situation, a few are discussed.

The Artha Rin Adalats are not following the provisions of Section 5(5ka) of the Act strictly. While the courts are generally strict in terms of not granting

adjournments at the instance of the defendants, they are still finding it difficult to maintain the six-month time limit within which they are supposed to dispose of cases. Also, there are allegations that there are certain unscrupulous lawyers representing banks who, in exchange of small pay-offs, do not oppose adjournment applications moved by defendants. When the lawyer for the plaintiff bank does not oppose an application for adjournment filed by a defendant, the court has practically no option but to allow the adjournment. In other cases, the meagre amount of the fees causes lawyers to arrange their court schedule in a manner so that client banks get less priority, and make them inclined to seek adjournments so that they can attend to cases where they get higher fees. Alternatively, they may depute a novice junior to attend the court, which may ultimately prejudice banks' interests.

The Artha Rin Adalat Act bars appeals against interlocutory orders of the Artha Rin Adalat. Also, following the judgements of the Appellate Division of the Supreme Court of Bangladesh in Sultana Jute Mills Ltd. Vs. Agrani Bank 46 DLR (AD) (1994) 174 and Islami Bank Bangladesh Ltd. Vs. Al-Haj Md. Shafiuddin Howlader 20 BLD (AD) (2000) 162, it is settled that civil revisions under Section 115 of the Code of Civil Procedure cannot be filed against interlocutory orders of the Artha Rin Adalat. However, writ petitions to the High Court Division under Article 102 of the Constitution will always lie against interlocutory orders in appropriate cases. Therefore, it is open for the defendant to raise various procedural issues through interlocutory applications and, if the order of the Artha Rin Adalat is unfavourable, challenge its legality in a writ petition and have the proceedings of the case stayed pending the disposal of the writ petition. This can be used as a device of delaying proceedings.

The jurisdiction of the High Court Division under Article 102 is constitutionally conferred and cannot be curtailed or abridged by ordinary legislation: *Jamil Huq Vs. Bangladesh* 34 DLR (AD) 125, and hence there cannot be any question of the Artha Rin Adalat Act being amended to exclude the right of defendants to file writ petitions. Rather, in order to tackle the use of the writ jurisdiction of the High Court Division as a vehicle of delaying Artha Rin Adalat proceedings, lawyers acting on behalf of banks would do well to look more closely at the grounds that are commonly taken in writ petitions that impugn orders of the Artha Rin Adalat as well as the interlocutory applications that precede such orders, so that these grounds can be pre-empted while framing suits.

In many instances, defective pleadings filed on behalf of the plaintiff banks open up the opportunity for the defendants to raise procedural objections that ultimately frustrate disposal of the suits. For example, Section 5(1) of the Artha Rin Adalat Act provides that the jurisdiction of the Artha Rin Adalat is to try suits that are concerned with the realisation of loans as defined in Act. Suits of any other nature cannot be tried in the Artha Rin Adalat. Therefore, the Artha Rin Adalat does not have jurisdiction to entertain a suit where the plaintiff pleads fraud on the part of the defendants Harunar Rashid Vs. Subordinate Judge, (Artha Rin Adalat) Bogra 50 DLR (1998) 170, or where the plaintiff alleges that the defendant misappropriated the money: Agrani Bank Vs. A. F. M. Emamul Huq 50 DLR (1998) 173. Yet, it is sometimes seen that plaints filed in the Artha Rin Adalat contain averments alleging that the defendants had committed fraud or that the plaintiff bank had sustained damages, allowing the defendants to legitimately raise objections, through interlocutory applications as well as during the hearing of the suits, with regard to jurisdiction or the paucity of particulars

Therefore, lawyers acting on behalf of banks must stick to the basic principles of pleadings and aver only material facts in plaints, which for any Artha Rin Adalat case should not be much more than the fact that a loan was sanctioned and disbursed under certain terms and conditions, the fact that it was secured by certain securities and the fact that it was not repaid. Undue prolixity of pleadings by the plaintiff is not only unnecessary but is potentially self-defeating in that it can be taken advantage of by the defendant by raising various objections through interlocutory applications, such as those that relate to jurisdiction or by, say, demanding further and better particulars of irrelevant or vague allegations, with an ultimate view to frustrate proceedings.

In this regard, it must be said that not all of the interlocutory applications filed by defendants in Artha Rin Adalats are frivolous. Some raise genuine issues. However, perhaps in appreciation of the policy considerations that underpin the Artha Rin Adalat Act, the courts are, at the first instance, inclined to dismiss such applications. But the net effect of such dismissal

orders, in some cases, is actually to open an opportunity for the defendant to file a writ petition challenging the order and stay the proceedings pending disposal of the writ petition. Rather, if the courts in the first instance are inclined to treat such application on merits, rather than upon a construal that the defendant is merely intending to delay the suit, then though some cases would be frustrated initially, one feels that in the long run it would prompt greater professionalism on the part of lawyers acting on behalf of banks.

One has also seen banks become unstuck in litigation through poor documentation, poorly kept (or filed) records and failure to adhere to the provisions of the law of evidence, particularly the Bankers' Book Evidence Act, 1891. For example, a particularly bad banking practice is the obtaining of signatures of borrowers and guarantors on standard format charge documents that are left blank, i.e. without the relevant dates and figures being filled in. Later on, at the time of filing the suit, these documents are sometimes filed with improper dates and figures being filled in or, amazingly, without the blanks being filled in at all, which can, for instance, let a guarantor off the hook.

What can be done

Firstly, banks must review and revise their fee schedules to ensure that good lawyers feel encouraged to work for banks on a priority basis. There have been suggestions that lawyers may be encouraged if they are given contingency fees, i.e. a proportion of the decretal amount, upon the successful outcome of cases. If the author's understanding is correct, the Canons of Professional Conduct as framed by the Bangladesh Bar Council do not actually allow lawyers in Bangladesh to work on a contingency fee basis. Perhaps the Council can review its rules to make an exception for lawyers working for banks.

Secondly, unscrupulous lawyers must be identified and dealt with sternly by the Bar Council. Banks must also investigate and take action against their officers who are involved in corruption.

Thirdly, certain amendments can be made to the Artha Rin Adalat Act. The author would suggest that instead of having the time limit for disposal of the suit set at 6 months, which is unrealistic, the legislature considers amending the Act so that time limits are set on filing various interlocutory applications. For example, the law may provide that if an application raising an issue as to jurisdiction, maintainability or joinder of parties is filed beyond a certain period after summons is served, the court shall, instead of disposing the application, frame the issue as one for determination during the hearing of the main suit. This would cut short the time spent on interlocutory matters.

Fourthly, banking practice, law and litigation hardly features in our law syllabuses. Lawyers garner education after they enter the profession in a piece-meal fashion through experience, sometimes at the expense of clients. Our universities should consider introducing, as an option at least, the law and practice of banking as a separate paper, which would build upon the students' understanding of the law of contract, company law, commercial law and property law. In the short term, the Bar Council may also consider introducing intensive courses in banking practice, law and litigation, which, if necessary, would be sponsored by banks.

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RIGHTS corner

Optional Protocol to CAT: India can't see the consensus

HUMAN RIGHTS FEATURES

HE world will mark the International Day in Support of Victims of Torture on 26 June. A day on which, as UN Secretary General Kofi Annan put it, "we pay our respects to those who have endured the unimaginable." An occasion "for the world to speak up against the unspeakable."

Not in this part of the world. For the majority of Indians and their democratically-elected government, it will be just another day. Victims of torture, meanwhile, are probably not aware that such a day exists. Torture in India is unmentionable because it may "affect the morale" of the perpetrators, and in the event that it is used, it is of course only in the interests of 'national security'

The blinkers were firmly in place during the 58th annual session of the United Nations Commission on Human Rights (CHR) of which India is a member in Geneva in March-April this year. The Indian delegation first registered its opposition to the consideration of an important adjunct to the Convention Against Torture (CAT). And when the document fought its way through a highly charged, potentially damaging process and came up for a vote, the delegation primly sat on the fence.

The draft Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (hereafter Optional Protocol) aims to create a global system of inspection of places of detention as a way of preventing torture and ill-treatment. A Sub-Committee of the Committee Against Torture, composed of 10 independent and impartial members working in their individual capacity, will be empowered to carry out missions to any State that ratifies the Optional Protocol. On the basis of its visits, the Sub-Committee will write a confidential report for the State Party, including practical recommendations. It will initiate a dialogue with the State Party on measures to improve the conditions of persons in custody with the aim of preventing torture.

The second important element of the Protocol is the requirement to put in place national preventive mechanisms. Article 3 of the Protocol requires ratifying States to "set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment."

House of Lords judgement on Northern Ireland Human Rights Commission

Amnesty International, British Irish Rights Watch and the Committee on the Administration of Justice (CAJ) today welcomed the ruling by the House of Lords that the Northern Ireland Human Rights Commission (NIHRC) can intervene in cases before the courts in Northern Ireland by submitting advice on human rights issues.

The three human rights non-governmental organizations (NGOs) had successfully applied to intervene before the House of Lords to challenge rulings by a lower court stating that the NIHRC was not empowered to intervene in cases in Northern Ireland. The legal submission by the three organizations pointed to international standards and practice which supported the right of all national human rights institutions to intervene before domestic courts in order to promote the implementation of human rights law and standards in domestic courts.

Welcoming the judgment, a spokesperson for the three NGOs said: "This is an important advance in terms of protecting rights in Northern Ireland but this addresses only one of our concerns about the NIHRC's

The government needs to respond positively to the Commission's request for improvements in its funding and powers, particularly in relation to its investigative powers, in order to comply with the relevant international standards.

Source: Law Watch, A Centre for Studies on Human Rights Law

The emphasis of the Optional Protocol is on prevention. International standards prohibiting torture and ill-treatment are already in place; the Optional Protocol aims to implement these standards more effectively.

The Draft Protocol to the Convention against Torture was presented to the Commission after 10 years of discussion in a working group set up for the purpose. At the 58th CHR, the Costa Rica-sponsored resolution on the Draft Optional Protocol went through a no-action motion demanded by Cuba. The no-action motion is used to effectively prevent discussion of the draft in question. India voted in favour of the no-action motion on the resolution, which means it favoured putting the issue aside. The motion was eventually rejected. This led to the resolution being voted on, during which India abstained.

The debate on the no-action was on expected lines, with the self-styled Like Minded Group of countries (LMG), including India, throwing their weight behind Cuba, and the Western group opposing the motion. Those in favour of no-action argued that there was no consensus on the issue, and for that reason it should be deferred. The Protocol, India added, would be "impaired" by the manner in which it was proposed to be adopted i.e. a vote and the Indian delegation would therefore support the motion of no-action. The motion was nevertheless defeated with 28 votes against, 21 in favour, and four States abstaining, which finally led to the debate on the Costa Rican draft.

States opposed to this draft the substantive text that emerged from the

working group discussions reiterated that consensus had evaded the working group and suggested that the document be sent back to the working group for further discussion until consensus was achieved. Consensus, the Indian delegation added, was "of paramount importance", and more time should therefore be allowed for an agreement to emerge.

Sponsors of the resolution, notably Costa Rica and its supporters, reminded the Commission that the issue had been under consideration for 10 long years. In all likelihood, and as the sponsors evidently feared, the text would have been watered down further had it been sent back to the working group. Responding to the opposing countries' arguments, Costa Rica emphasised that the Protocol was optional. States were not obliged to sign it. They should therefore not prevent the Protocol from coming into effect. Finally, dismissing the need-for-consensus argument, the Mexican delegation pointed out that the Universal Declaration of Human Rights "would never have been adopted" if States had waited for a consensus. The UDHR, one of the most fundamental international human rights instruments, had to go through a vote before it was adopted.

The Costa Rica-sponsored resolution was eventually adopted with 29 States in favour, 10 against, and 14, including India, abstaining.

India's stand was unnecessary, inappropriate and unjustified. In supporting the no-action motion and later abstaining on the vote on the resolution, the Indian delegation acted against the consensus in the Indian Parliament as well as in the superior courts on the need to end impunity on torture in India.

Article 21 of the Constitution of India provides that "[n]o person shall be deprived of his life and liberty except according to procedure established by law". The right to life in Article 21 of the Constitution of India does not mean mere survival or existence. It encompasses the right to live with dignity. Torture is inflicted with the aim of degrading a person and involves the violation of dignity. It therefore falls within the ambit of Article 21.

Further safeguards are provided under other articles of the Constitution. Under Article 20(3), no person accused of any offence can be compelled to be a witness against himself. Article 22 (1) and (2) provide that a person who is arrested must be informed as soon as may be of the grounds of his arrest. The person also has the right to consult a lawyer of his choice. An arrested person must be produced before the nearest magistrate within 24 hours of his arrest.

The Code of Criminal Procedure (CrPC) also requires the production of accused before court within 24 hours. Section 54 of the CrPC gives the arrestee the right to be medically examined. No statement of a witness recorded by a police officer, according to Section 162 of the CrPC, can be used for any purpose other than contradicting such a statement. Thus admission of guilt before a police officer is not admissible in a court of law. Section 164 of the CrPC requires that the magistrate must ensure that a confession by the accused is voluntary. Sections 330 and 331 of the Indian Penal Code (IPC) make it a penal offence to cause hurt to a person in order to extract a confession.

A victim of torture by the police is entitled to move the Supreme Court of India under Article 32 of the Constitution or the concerned High Court under Article 226. The Supreme Court and different High Courts have entertained various writ petitions alleging police torture of prisoners. According to the Supreme Court, any form of torture or cruel, inhuman or degrading treatment fall within the ambit of Article 21 of the Constitution whether be it during interrogation, investigation or otherwise. A person does not shed his fundamental right to life when he is arrested. Article 21 cannot be denied to

arrested persons or prisoners in custody (D K Basu v State of West Bengal).

The Indian delegation's actions are also incompatible with India's obligations under international law. Article 5 of the Universal Declaration of Human Rights (UDHR) declares that "[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment." Article 10 (a) of the International Covenant on Civil and Political Rights (ICCPR) further declares that "[a]II persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

India is signatory to the Convention Against Torture (CAT), and while it is

yet to ratify the instrument, the signature implies an intention to eventually incorporate the provisions of the Convention into domestic law. The Convention specifically prohibits the use of torture, obliging every State Party to "take effective legal, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

Furthermore, since India is not party to CAT, it had no legitimate right to obstruct the adoption of the Draft Optional Protocol which, if adopted by ECOSOC, would only be open for signing by States that are party to the Convention.

India also did not actively participate in the working group on the Draft Optional Protocol. However, observers at the Commission reported that one week before the Costa Rican text was to come up before the Commission, the Indian delegation suggested to the Asian group that a proposal be made to extend the Working Group's mandate to provide for further negotiations. No time limit for the extension was suggested.

The Indian Permanent Mission in Geneva must be taken to task for going against the established domestic consensus and India's international obligations in this regard.

As a further step in the acknowledgement of the right to be protected from torture, India must ratify the Convention Against Torture at its earliest. The implicit prohibition of torture is already found in the Indian Constitution and in case law, as described above. In its 1998-99 annual report, the National Human Rights Commission expressed regret that the formalities for ratification were still not complete. It urged the "earliest ratification" of the Convention and "the fulfillment of the promise made at the time of signature, namely that India would 'uphold the greatest values of Indian civilization and our policy to work with other members of the international community to promote and protect human rights."

Meanwhile, reports continue to be received of the widespread use of torture, despite the existing legal safeguards. This makes an even stronger case for the establishment of domestic and international preventive mechanisms, which the Optional Protocol aims to achieve.

The refusal to formally outlaw the use of torture and other inhuman or degrading practices is incompatible with India's cultural and democratic traditions. And yet, India is in the league of such worthies as Syria, Angola, North Korea, Malaysia and Pakistan, which have yet to ratify the Convention Against Torture. India has also consistently refused to extend an invitation to the United Nations Special Rapporteur on Torture who is mandated to investigate complaints of torture and ill-treatment.

This lack of transparency belies India's claims to democracy and the primacy of the rule of law. International instruments and monitoring mechanisms are in India's interests and are the hallmark of a mature democracy that believes in universal values. But the lack of a coherent policy in New Delhi on human rights issues allows unenlightened officials and diplomats at international forums to function according to their own whims and often take regressive steps on key issues.

In the above case, the delegation adopted a stance that contradicts the progressive approach of the judicial and quasi-judicial bodies in India. A rap on the relevant knuckles is clearly in order.

Human Rights Features is the voice of the Asia-Pacific Human Rights Network. It is a joint initiative of SAHRDC and HRDC based in Delhi India

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Introducing new sections

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