



LAWSCAPE

Banks and litigation: Problems and remedies

MUSTAFIZUR RAHMAN KHAN

THE Artha Rin Adalat (Money Loan Court) Act was enacted in 1990 to expedite loan recovery by 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.

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.

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.

Sometimes, the damage is done inadvertently. The number of banks and their branches are spreading like some endemic disease.

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 "gung-ho" 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.

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.

This article has been prompted by certain aspersions that the Finance Minister had recently cast on the integrity of the members of the legal profession while expressing his frustration at the slow pace of recovery of loans in the Artha Rin Adalat.

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.

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.

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.

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. Shafiqul 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.

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.

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, 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.

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, lead 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.

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.

This article has been prompted by certain aspersions that the Finance Minister had recently cast on the integrity of the members of the legal profession while expressing his frustration at the slow pace of recovery of loans in the Artha Rin Adalat. The leadership of our Bar, who are otherwise so vociferous about issues that concern the public interest and the administration of justice, did not find it necessary to raise a note of defence or protest against the remarks of the Minister. One fears that such silence could have only been construed by the general public as a tacit admission that the Minister's comments were well founded, which is a pity, since the majority of the members of the legal profession are conscientious and aware of their role as officers of the court. It is hoped that this article would provoke thought and debate in this area, which may improve the situation and restore some measure of public confidence in our legal profession.

Mustafizur Rahman Khan, an advocate of the Supreme Court of Bangladesh, is a partner of Mahmood Jabbar Khan, a city law firm.

RIGHTS corner

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

HUMAN RIGHTS FEATURES

THE 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."

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 powers."

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.



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