



Star LAW analysis

Bouncing cheque: Let it bounce

KHALED H CHOWDHURY

IN an article published in Law & Our Rights page of the Daily Star last year, the decision of the High Court in *Abdus Salam v Munshi Rashed Kamal*, reported in 54 DLR 234 was discussed. And it was submitted that a wider or more liberal interpretation to Negotiable Instruments Act 1881 (NIA) section 138 ought to have been given looking at the purpose of the law. Subsequently, it has been revealed that the Appellate Division had already upheld (reported at 53 DLR AD 111) another decision of the High Court Division in *Habibur Rahman Howlader v State* where a more liberal interpretation had been advocated.

Section 138 at glance

Section 138 of the Negotiable Instrument Act (NIA) 1881 was amended mainly to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques with adequate safeguards to prevent harassment of honest drawers. However, it is a common saga in our society that cheques get dishonoured for say, insufficiency of funds, or under the drawer's instructions to stop payment, or even that the account has since been closed. Obviously this is a serious matter for the payee and unless it is an honest error on the part of the drawer it often causes severe hardship for the payee. Filing a money suit to obtain payment is an obvious method to make the drawer pay, but this is often futile as civil remedy is not as effective as a criminal sanction. Sections 406/420 of the Penal Code does provide a solution, but it is often difficult to prove the ingredients of the same. Section 138 of the NIA was amended to provide a greater deterrent. Hence, if proper procedure is followed, a defendant upon conviction could face a sentence of imprisonment of upto one year or a fine of upto thrice the amount of the cheque or both. Most importantly, the payee could get the cheque amount from the fine so obtained. The intention of the legislature, therefore is to make it a strict penal law which otherwise was a matter of civil remedy, at the same time keeping the other options open. That a plain reading of the law clearly stipulates that for the offence to bite, the cheque must have been presented to the bank within a period of six months from which it is drawn or within the period of its validity whichever is earlier (s.138(1)(a)). Thereafter, a demand for payment has to be made in writing by the payee within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid (s. 138(1)(b)). Finally, for the cause of action to arise, the drawer of the cheque must have failed to make the payment as called for within 15 days of the receipt of the said notice (s. 138(1)(c)). The case has to be filed in the court of the Chief Metropolitan Magistrate or in a court of First Class Magistrate by a complaint made in writing by the payee or holder in due course within one month of the date upon which such cause of action would arise (s. 141).

S. 138(1)(a) does not impose any restriction whatsoever upon the number of times a cheque can be presented to bank for payment. It is a common practice in the commercial world that the drawer arranges for payment and asks the payee to present the cheque again. It also allows the parties to maintain their commercial relationship. If people were forced to file a complaint after the first bounce leaving no second chance, that would be going against the plain intention of the legislature. The judgement in 54 DLR 234, however, did put such a restriction on the law. According to this judgement, unless legal notice is issued within 15 days of the first time a notice of dishonour is obtained from the Bank (drawee), then remedy under section 138 is gone. If therefore, even by trickery or fraud, the issuer of the cheque manages to see 15 days go by, the innocent payee has no remedy. In the previous article, support in favour of unlimited number of presentation was drawn from a number of decisions of the Indian High Courts, including the decision of the Indian Supreme Court in *Sadanandan Bhadran v Madhavan Sunil Kumar* (1998) 94 Comp. Cas 813 wherein it was held: "... section 138 does not put any embargo upon the

payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transactions, it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after some time, on his own volition or at the request of the drawer, in expectation that it would be encashed.

Needless to say, the primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which, normally is taken out of compulsion and not choice. For the above reasons, it should be held that a cheque could be presented any number of times during the period of its validity.

It may be noted that the judgement in 54 DLR 234 was pronounced on 10th March 2002, but the judgement in *Habibur Rahman Howlader v State* (presided over by Md. Hamidul Haque J. & Md. Mansurul Haque Chowdhury J.) which took a contrary view was delivered on 29th June



2000, i.e. nearly two years earlier. What is interesting to note is that though this earlier High Court judgement had been affirmed by the Appellate Division (reported at 53 DLR AD 111) on 7th November 2000, till the writing of this article, it has not been reported anywhere. Moreover the judgement of the Appellate Division is quite concise and does not go into the detailed facts. This reported short judgement was not even cited in 54 DLR 234, perhaps lawyers for both sides did not find it relevant, though they were appreciated by the learned Judge for their "illuminating and enlightened arguments" (54 DLR 234, at p. 238).

Fact of the Habibur Rahman's case

In *Habibur Rahman Howlader v State*, two cheques, as part of a business venture, one for Tk. 54, 91, 968 was issued by the defendant on 16.3.99, presented to the Bank by the complainant on 18.3.99 and returned by the Bank on 18.4.99 with remark fund insufficient, the same cheque was again presented on 27.5.99 and the same was returned on 7.6.99 with the remark account closed and the other cheque for Tk. 5, 75, 000 was issued on 26.1.99, presented on 01.02.99 and returned by the Bank on 08.03.99 with remarks of fund insufficiency and the same was presented again on 27.5.99, returned on 07.06.99 with remarks account closed. Then on 17.6.99 and 21.6.99 the complainant through his counsel sent two legal notices under s. 138 of Negotiable Instrument Act demanding payment and when the defendant failed to comply, filed complaint on 15.7.99 before the Magistrates' court who took cognizance. Subsequently the defendant got anticipatory bail from the High Court and filed a case under section 561A of the Criminal Procedure Code (Criminal Misc. Case No. 1813/2000). It was alleged that since the demand for payment had not been made within 15 days of the first return of the cheques, the proceedings were liable to be quashed. Rejecting this contention, Md. Mansurul Haque Chowdhury J (as he then was) stated: "It appears from the petition of complaint that both cheques were presented to the Bank within six months from the date of issuance. According to proviso (a) of section 138 of Negotiable Instruments Act a cheque is to be presented to the Bank within a period of six months from the date on which it is drawn or within the period of validity whichever is earlier. There is nothing in the law specifying that a cheque can be presented only once within six months from the date of issuance and 15 days time for serving notice demanding money shall be counted from the date of return on first presentation. We have carefully examined the language of section 138 of the said Act. In our view such a cheque can be presented to the bank more than once but the cheque must be presented to the Bank within six months from the date on which it is drawn or within the period of its validity".

Subsequently the defendant-petitioner lodged a Petition seeking leave to appeal against this judgement before the Appellate Division (Crim. Petition for Leave to Appeal No. 21/2000). Dismissing this appeal, in a short judgement Latifur Rahman CJ held: "It appears that the accused-petitioner issued two cheques and those two cheques were placed for encashment in the bank within 6 months. Once it was returned with the remark that the fund was insufficient and again it was returned with the remark that the account was closed. The complainant served a legal notice within 15 days of the receipt of the information of return of cheques in question and, as such, there was no valid ground for quashing the proceeding..."

Concluding remarks

The judgement accords with the intent of the legislature, which is clearly to deal with the mischief of defrauding people by unscrupulous issuance of cheques. Thus no restrictions should have been imposed into clear wording of NIA by interpretation. Time should be computed from the notice of the last dishonour so long as the cheque is presented during the period of its validity. These decisions undoubtedly have significant impact on everyday commercial life and the correct method should be adopted in the light of the judgement in *Habibur Rahman Howlader v State* by the Magistrates and legal counsels alike. It should also come as a relief for innocent litigants who have been victims of cheque fraud and act as deterrent against those whom the legislature have targeted for proper punishment.

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LAW letter

Draft law is inadequate to protect consumers' rights

In the proposed Consumer Protection Act there is a little guarantee for consumer's right as the president of the district chamber will be the chairman of the arbitration board. Undoubtedly, chairman of the district chamber represents business group who wouldn't be able to do justice towards consumers. Nevertheless it is inauthentic that in the case of the incapability of the president of the district chamber any person nominated by him may sit as the chairman of the arbitration board. It is a vague idea that there are no set criteria for the person who would sit instead of the chamber-president.

Besides, there is no provision for compensation in the draft law for the violation of consumer's rights. Only criminal punishments would be given to the violator, however draft law doesn't articulate under what law the trial will be conducted.

Finally, the draft law has a great deal of limitations. It must be reviewed in order to protect consumers right in a skillful way. Proposed law is to be discussed more widely in public if government is really sincere about consumer's rights.

Ol Md. Abdullah Chowdhury, Field Coordinator

Community Development Library, Mirarmaidan, Sylhet-3100.

LAW amusements

Once, in Dublin, a solicitor came up to a barrister to beg a subscription towards the funeral expenses of a brother solicitor who had died in distressed circumstances. The barrister at once tendered a pound note. "Oh, I only want a shilling from each contributor" said the solicitor. "Take it, my dear fellow," replied the barrister. "And while you're at it, bury twenty of them!"

The local United Way office realised that it had never received a donation from the town's most successful lawyer. A local volunteer calls to solicit his donation, saying "our research shows that even though your annual income is over a million dollars, you do not give one penny to charity! Wouldn't you like to give back to your community through The United Way?" The lawyer thinks for a moment and says: "First, did your research show that my mother is dying after a long, painful illness and has huge medical bills far beyond her ability to pay?"

Embarrassed, the United Way rep mumbles, "Uh, no." "Secondly, that my brother, a disabled veteran, is blind and confined to a wheelchair and is unable to support his wife and six children?" The stricken United Way rep begins to stammer an apology but is cut off. "Thirdly, that my sister's husband died in a dreadful traffic accident", the lawyers voice rising in indignation, "leaving her penniless with a mortgage and three children?"

The humiliated United Way rep, completely beaten, says simply, "I had no idea." The lawyer then says "...and if I don't give any money to THEM, why should I give any to you?"

Corresponding Law Desk

Please send your mails, queries, and opinions to: post - Law Desk, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email dslawdesk@yahoo.co.uk; interactive email lawdesk20@hotmail.com

FOR YOUR information

Consumer protection laws in Bangladesh

LAW DESK

ALTHOUGH there is no comprehensive law in Bangladesh to protect the consumer's rights there are some laws which are operating in different fields. The government is going to promulgate a consumer law soon. A draft of the consumer protection law is prepared by the ministry, which is under consideration of the law ministry. We hereafter summarise the existing laws relating to the protection of consumer's rights.

The Control of Essential Commodities Act, 1956

Objective

The objective of this law, which came into effect on September 19, 1956, is to impose restriction over the essential commodity prices. In order to impose restriction over the essential commodity prices Government possesses the right to produce, distribute, preserve, use and trade, etc. of the essential commodities time to time.

Policy instrument

Policy instrument of the law is introduction of license and permit system, through which Government has been empowered

- To interdict the withdrawal of the sale of the commodities kept for sale and
- direct the hoarder to sell those commodities, in partial or in aggregate, at a determined price, and
- To direct for keeping systematic accounts of the essential commodities and presenting records to the authorised government officials in special cases.

Punishments for violation

- Three years imprisonment, or
- A penalty, or
- Both.

Essential Commodities Price & Bond Ordinance, 1970

Objective

To guarantee the current prices of commodities so that Government possesses the right to determine the prices of essential commodities. Government is empowered with the following right:

- Fixation of maximum price,
- Publication in the government gazettes,
- Estimate cost of commodities imported or produced,
- Estimate related cost of commodities, and
- Consider reasonable profit margin for the producers and

Enforcing the producers

- To mention the price on the commodity,
- To disclose the price list publicly, and
- To issue receipts for the commodities sold.

The Pure Foodstuff Ordinance, 1959

Objective

The objective of this ordinance which came into effect on Oct. 14, 1959 and later amended in 1966 is to check and control adulteration and production, supply and distribution of several foodstuffs including milk and powder milk, flour, edible oils, butter etc.

Restrictions imposed

- Production and sale of adulterated food stuffs, foods harmful to men and animals, brands in labelling and advertisements,
- Sale of flesh of dead animals (banned) and
- The involvement of people suffering from infectious diseases like tuberculosis, leprosy etc. in production and sale of food items.

Policy instruments

Attachments of sanitary inspectors to relevant departments of government to inspect the status of implementation of the law so that

- Any sanitary inspector can collect the samples of any of the listed foodstuffs and send it to the selected testing laboratory for determining the standard of quality, and

- Any citizen can also bring samples of food items to the laboratory of Institute of Public Health and Nutrition to determine the quality of the product.

Punishment

If the sample is found adulterated the local authority enjoys the power to take following actions

- For first time violation of the law punishment ranges up to fine of Tk. one thousand or imprisonment for up to one year or both, and
- For a second time violation the highest length of imprisonment remains the same while the highest limit of fine rises to take four thousand and

Trade Mark Act, 1940

Prior to 1940, there was no statutory law relating to trademarks in the British India, and the law, which was applicable to the subject, was based on common law that was substantially the same as that applied in England before the passing of the first Registration Act in 1875. The Trade Mark Act 1940 (TMA) promulgated in 1940, introduced for the first time for the registration and statutory protection of trademarks in Bangladesh.

Objective

Trade Mark Act, 1940 has following objectives:

- To enable the customers to identify the particular product of their choice out of many, and
- To prevent duplication as well as cheating the consumers.
- Punishments for Violation of the Act:
 - Two years imprisonment, or
 - A penalty, or
 - Both

Breast Milk Substitutes Ordinance, 1984

Objective

This ordinance came into effect on May 24, 1984 with the following objectives.

- To encourage breast feeding, and
- To control marketing of breast milk substitutes through showing or publishing of highly motivating advertisement of breast milk substitutes.

Restrictions imposed

- Prohibition of attractive & lucrative advertisements, and
- Prohibition of promotional activities of companies, i.e. giving free samples, gifts, discounts, sponsorships to health personnel, etc.

Punishments

- Two years imprisonment, or
- A penalty of Tk. a five thousand, or
- Both.

Drug Control Ordinance, 1982

Objective

This ordinance came into effect on June 12, 1982 with the following objective.

- To restrict marketing of unnecessary and harmful drugs, and
- Stricter quality control of medicines, and
- To encourage production of medicines and pharmaceuticals.

Punishments

- Penalty of 1 (one) to 10 (ten) years rigorous imprisonment, or
- Fine up to the amount of Tk. Two hundred thousand only, or
- Both

LAW week



Confirmation of judges in HC urged

Eight eminent lawyers of the country demanded confirmation of service of six additional judges of the High Court earlier recommended by the Chief Justice for confirmation. The lawyers, Dr. Kamal Hossain, Barrister sued Ishaque Ahmed, Barrister Mainul Hossain, Azmalul Hossain QC, Quzi Golam Mahbub, Dr. M. Zahir, Advocate Abdul Malek and advocate Mahmudul Islam, in a joint statement made a strong plea to resolve the present situation through further consultation with the Chief Justice. They said the appointment of judges and the process by which such appointments made are of critical importance in ensuring the independence of judiciary as embodied in the Constitution. They said they have constantly striven to uphold the supremacy of the constitution, independence of the judiciary and the rule of law which makes it imperative to uphold the unity of the Bar and guard against all action taken on the basis of partisan politics. They condemned the introduction of party politics in the matter of appointing judges and law officers and believe that these should be made on the basis of merit after consultation with member of the Bar and Bench. They urged the government to resolve and rectify the present situation through consultation with the Chief Justice. *Law Desk.* (see page 4 for article by eight jurists)

Concerted efforts needed to combat human trafficking

Speakers at a workshop termed human trafficking as a 'social disease' and underscored the need for a concerted efforts of the government, civil society members and NGOs in combating the problem. They said only laws cannot prevent human trafficking, particularly women and children. Rather, a strong commitment on the part of law enforcers as well as building up of awareness should be ensured in this regard. They were speaking at the inaugural session of a three day 'Regional workshop to explore a new paradigm for addressing trafficking in person' organised by Bangladesh Counter Trafficking Thematic Group and the International Organisation for Migration (IOM). Addressing the workshop Women and Children Minister Khurshid Jahan Haque said human trafficking problem that exists throughout South Asia is a part of a complex global phenomenon that cannot be effectively dealt with by any country alone. The Minister deplored that despite wide coverage and many initiatives over the last two decades, human trafficking remained a least explored area with full of inconsistencies, confusion and ambiguities. She mentioned that most of the trafficking concepts are limited in their scope and those fail to apprehend the totality of the problem. UNDP Resident Representative Mr. Jorgen Lissner termed the trafficking in persons as a heinous crime and said this cannot be accepted by the civil society. He also ascribed the problem to lack of awareness and non implementation of the laws, even though there are good laws in this regard. *The Bangladesh Observer, 05 March.*

Bill for energy regulatory body passed

The Jatiya Sangsad passed a bill for setting up of an independent Energy Regulatory Commission for better management of the energy sector. State Minister for Energy and Mineral Resources AKM Mosharraf Hossain tabled the bill styled 'Bangladesh Energy Regulatory Commission Bill, 2003'. Piloting the bill the minister said the commission would be an independent one and will regulate the energy sector. He also said that due to shortage of internal resources, it is essential to attract foreign investment in gas and energy sector. He mentioned that there is a good regional market prospect for gas and power. According to the proposed law the proposed commission would be constituted with a chairman and four members. The President would appoint the chairman on the ministry's suggestion. The commission would issue license to any person for power generation, energy transmission, supply and marketing and energy stocking on certain conditions, according to the proposed law. It would renew, seize and amend any license or impose penalty for violation of terms and conditions of a license. It would fix tariff for gas and energy and introduce codes and standards to ensure quality of energy and gas use. And it would advice the government if needed on gas and energy issue from time to time. *Law Desk.*

UP chairmen, members to be trained

The Ministry of Local Government and Rural Development (LGRD) and Cooperative is organising a series of training programmes for the newly elected Union Parishad chairmen and members. The training is aimed to brief them on how to carry out development agenda involving the grassroots people. About 54 members and chairmen will undergo 037 courses. Training will also be arranged for 4,488 Union Parishad secretaries at Upazila level through 469 orientation courses. UP secretaries who are graduates are eligible for the courses. National Institute of Local Government (NILG), Bangladesh Academy for Rural Development (BARD) and Rural Development Academy (RDA) will conduct the training. The NILG will train the chairmen and members under Dhaka, Barishal and Khulna division, BARD under Chittagong and Sylhet division and RDA under Rajshahi division. With five officials from each upazila, 47 teams will be formed comprising 2345 officials to conduct the training. The trainers themselves will undergo a special training. The NILG, BARD and RDA will also provide training to the officials. Besides, various international voluntary organisations and NGOs, who have been providing training to the elected grassroots representatives, have shown interest to assist the training programs. *The Daily Star, 06 March.*

Monitoring cell proves effective

The creation of a monitoring cell has helped speedy disposal of 14 sensational cases in less than one year. The cases include nine murder and four rape cases. The cell created by the Home Ministry has listed 172 sensational cases. Ninety of them are now under trial. Besides, 54 more cases are being investigated. Of them, charge sheets have been submitted in 28 cases while progress in 15 cases is remarkable. The BNP led coalition government formed the 11 member high-powered monitoring cell headed by State Minister for Home Mr. Lutfulzaman Babar. Some of 14 cases, which have already been disposed of, are: the Rubel murder, Shihab murder, Indian citizen Zibran Tayebi murder in Chittagong, gang rape of Rekha in Natore, Sini suicide case, Trisha murder at Gaibandha, Mahima rape and suicide in Rajshahi, Shipu murder in Dhaka, Bappi murder in Dhaka and Principal Gopal Krishna Muhuri murder in Chittagong. Similar monitoring cell have also been formed in all district headquarters to identify sensational cases. These cells has scrutinised 434 cases. Officials of the Monitoring Cell said, witnesses are turning up after formation of the cell. A police officer has been assigned to each court to pursue a case until its completion. Steps have also been taken so that an accused cannot avoid appearance before the court on lame excuses. *The Daily Star, 08 March.*

Banking laws amended

The Jatiya Sangsad passed three bills including one proposing formation of a Monetary and Fiscal Policies Coordination Council to lessen governments control on the Bangladesh Bank. The two other bills aim at further strengthening the role of Bangladesh Bank and brining about necessary reforms in the banking sector. The bills are Bangladesh Bank (Amendment) Bill 2003, The Bangladesh Bank (Nationalisation) (Amendment) Bill 2003 and The Bank Company (Amendment) Bill 2003. A statement on the objectives of the Bangladesh Bank (Amendment) Bill 2003 says it provides for autonomy to the Bangladesh Bank to take decision as per need. The bill provides for establishing a Monetary and Fiscal Policies Coordination Council so that the governments macroeconomic framework is reflected in the central bank's policy. The proposed council to be headed by the finance minister, will comprise six members and coordinate fiscal, monetary and exchange-rate policies. The Commerce Minister, Governor of Bangladesh Bank, Secretary of Finance Division, Secretary of Internal Resource Division and Member (Programming) of the Planning Commission will be its other members. In the bill, the central bank governor has been made accountable to the parliamentary standing committee on finance, empowering the JS body to gather information on bank loans and to impose restriction in case of appointment of the governor, deputy governor and directors of the bank. The Bangladesh Bank (Nationalisation) (Amendment) Bill 2003 enhances the supervisory power of Bangladesh Bank on nationalised commercial bank. The Bank Company (Amendment) Bill 2003 seeks to strengthen activities in the banking sector and enhance the supervisory authority of Bangladesh Bank over nationalised banks. It also proposes raising the paid up capital of commercial banks from Tk. 20 crore to Tk. 100 crore. *The Daily Star, 10 March.*