



Managing conflict of interest



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CONFLICT of interest between shareholders, sometimes inbuilt in the affairs of a company, is a common phenomenon around the world. In order to ensure good corporate governance and balance competing interests between shareholders, different rules and regulations have been formulated through statutes and case laws. In Bangladesh, the laws relating to company affairs are governed by, inter alia, the Companies Act 1994 ("CA 1994").

Section 233 of the CA 1994 protects the interest of minority shareholders in Bangladesh. In simple terms, this provision states that any shareholder of a company, who holds one-tenth of the issued share capital (in case the company has a share capital) and not less than one-fifth of the number of persons registered as shareholders (in case the company does not have a share capital), can bring a legal action if: (a) the affairs of the company are being conducted in a manner prejudicial to one or more of its shareholders' interest, (b) the company is acting or is likely to act in a manner which discriminates or is likely to discriminate the interest of any shareholder, or (c) any resolution has been passed or is likely to be passed which discriminates or is likely to discriminate against the interest of one or more of the shareholders.

In order to bring any claim under Section 233 of the CA 1994, the minority shareholder must prove that the affairs of the company are or were being run in a prejudicial manner by the majority shareholders. Section 233 of the CA 1994 does not itself define the term 'prejudicial'. It is a broad concept developed through case laws incorporating different actions and omission which are likely to affect the interest of the minority shareholders. The concept of prejudice is flexible which enables the Companies Court to mould this concept according to the circumstances of the case.

There are many examples which may form the subject matter of a Section 233 case. However, the most common is when majority shareholders act in a way which deprives the minority shareholder of its share in the profits of the company. This may be done by the majority shareholders by keeping the minority shareholder in dark about the affairs of the

company. This may also take place when the majority shareholders take a decision to divert funds from the company for their own benefit or use as opposed to returning the money in the form of dividend to the minority shareholders. Other such cases of prejudice may include profit reallocation, asset misuse, transfer pricing, selling services or a part of the company to other firms where the majority shareholders are the actual or beneficial owners. Although many cases related to Section 233 revolve around the fact that the minority shareholders have not received any dividend from the company, non-declaration of dividends, on its own, does not constitute prejudice unless it is proved that the minority shareholder has been deliberately discriminated. In a Bangladeshi case, the Companies Court held that Section 233 of the CA 1994 enables a shareholder to obtain a remedy where a company with sufficient profit persistently refuses to pay dividends to the minority shareholder.

The next issue which is found in the majority of Section 233 cases is the issue of legitimate expectation. Whenever a person becomes a shareholder in a company, he/she will legitimately expect that he/she will participate in the management and affairs of the company and enjoy the proportionate share of the benefits accruing from the company. This legitimate expectation is protected by the laws of Bangladesh. So, any action by the shareholders in control, which results in a substantial deviation from this expectation may give rise to a Section 233 case. In a famous English case, it was held that if management participation was a legitimate expectation then its demise could rightly find a claim for unfair prejudice.

Misappropriation is a very common allegation in Bangladesh generally made against the majority shareholders. If the minority shareholders have been a victim of misappropriation, then it can rightly seek the protection of the Companies Court in order to protect their interests. Minority shareholder can successfully seek the protection of law if the majority shareholders have been endeavoring, whether directly or indirectly, to appropriate to themselves money, property or advantages which belongs to the company.

In order to successfully establish a Section 233 case, a minority shareholder must prove

that the value of his shareholding in the company has been seriously diminished or jeopardised due to the actions of those persons who are in de facto control of the company. The conduct complained of should be burdensome, harsh and wrongful. A lack of probity and fair dealing in the affairs of a company to the prejudice of the minority shareholder may also constitute oppression and is likely to be the subject matter of a Section 233 case. Whatever the complaint by the minority shareholder, he/she has to prove a credible case before the Companies Court with substantial evidence. An unfounded allegation as to oppression and prejudice is liable to be rejected by the Companies Court. The test of prejudice is generally objective –there is no need to show any conscience knowledge on the part of the controlling shareholder that the conduct was unfair, or any other evidence of bad faith. It would be a question of whether a reasonable bystander would regard it as unfairly prejudicial.

Once proved, the minority shareholders may seek for a range of orders from the Companies Court. The Companies Court has ample discretion to decide the case and grant any remedy as it deems fit based on the particular situation. In some cases, the Court can make any just order (even beyond the relief sought for) in order to bring the affairs of the company to its right track and safeguard the interest of the minority shareholders. This power may include, inter alia, appointing a receiver to manage the company's affairs temporarily. However, generally, the remedy sought by the minority shareholders is a buy-out of their shares by the majority shareholders at a fair market value to be determined by independent auditors.

Many shareholders are generally not aware of their legal rights and duties. In fact, there is very little awareness about shareholders' rights and responsibilities. It is a common fact that upholding shareholder democracy is one of the fundamental aims of corporate governance. However, law is not enough to shield the interests of minority shareholders unless they themselves are pro-active and aware of their rights and responsibilities.



Protecting consumer rights

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CONSUMER protection is a vital, but often ignored, issue in developing countries, and Bangladesh is no exception. However, in a country like Bangladesh, with a rapidly growing consumer-base, protection measures for consumers are of paramount importance. This has now necessitated giving high priority for the protection of the consumers and promotion of a responsible consumer movement in Bangladesh.

Consumer protection, in the broader sense, refers to the laws and regulations that ensure fair interaction between service providers and consumers. A consumer protection framework generally includes the introduction of greater transparency and awareness about the goods and services, promotion of competition in the marketplace, prevention of fraud, education of customers, and elimination of unfair practices.

Current legal regime:

Consumers in Bangladesh very often have to suffer from unsafe poor-quality products which break down just after purchase and are sometimes life-threatening. A number of cases have recently come to light in which consumers have bought fake, poor quality and/or goods ranging from vegetables sprayed with pesticides, cosmetics containing toxic chemicals and fake medicines. The problem of formalin, a toxic disinfectant and preservative, in fruits and vegetables has been an endemic problem of recent years, especially in the cities.

Even though until 2009, a unified consumer Act did not exist, about 40 different pieces of legislation could be attributed as forming the legal regime in the field of consumer protection regulating different goods and services in Bangladesh. Some notable laws include the Bangladesh Standard Testing Institute (BSTI) Ordinance, 1985, the Control of Essential Commodities Act, 1956, the Pure Foods Ordinance, 1959, the Sale of Goods Act, 1930, the Standards of Weights and Measures Ordinance, 1982 and the Accreditation Board Act, 2006. However, there was no unified and effective machinery for the enforcement of these legislative measures until 2009 and thus the consumers did not enjoy statutory rights to seek redress of their grievances arising out of the violation of the provisions of these laws.

Though the Consumer Rights Protection Act, 2009 ("CRPA, 2009") has been enacted but it has got little sign of enforcement till date. Rules for the operation of the Act have only been made last year. However, significantly,



Bangladesh's first Competition Act has been enacted in 2012, which has made way for a Competition Commission which is yet to be formed.

The CRPA, 2009 provides protection of consumer rights and also to prevent any acts against consumer right and interest and other relevant issues. The Act mainly deals with the obligations of "economic operators" and products safety. It enjoins state organs to punish the offenses of economic operators who violate consumer rights and interests. It provides for various actions to be taken by the respective ministries against the production of products or services that are likely to induce grave or imminent dangers. The CRPA, 2009 also sets out comprehensive procedures to be followed by inspection agents to ensure the quality and safety of products (goods and services). It also allows for the establishment of a specialised institution to be in charge of fraud repression and inspections of imported and exported goods.

However, a significant drawback of the Act is that it is mostly an administrative one and does not have a rights-based, bottom-up approach like other new consumer protection legislation around the world. To start with, despite the name of the act, "consumer rights" are not defined or listed, although a list of practices are termed as

liability and to prevent liability shifting through contractual means to protect the rights of the consumers. There is no provision in the CPRA, 2009 on unfair conduct or unfair contract terms to better ensure the safety of Bangladesh consumers in relation to services liability.

We can argue that the Act should be rights based defining the rights of the consumer, rather than making another bureaucratic mechanism which can promote corruption and be largely ineffective.

Redress mechanisms and institutional capacity

Redress is one of the very important rights which include the right to receive compensation for misrepresentation of shoddy goods or unsatisfactory services and the availability of acceptable forms of legal aid or redress for small claims wherever necessary.

In India, the Consumer Protection Act, 1996 with the specific purpose of protecting consumers' rights and providing a simple quasi-judicial dispute resolution system for resolution of consumers complaints. Under COPRA, three-tier quasi-judicial machinery at the National, State and District levels has been established.

However, in Bangladesh CRPA does not allow either the Council or the Directorate created under the law to receive

"anti-consumer rights practices". The Act mostly concerns itself with the composition of the National Consumer Rights Protection Council and the National Consumer Rights Protection Directorate. Although it fulfils one function of a consumer law, which is to establish an institution tasked with consumer protection, it can barely be called a "citizen's guide" as it does not define their rights as consumers and does not empower them to participate in the enforcement of those rights.

Another important criticism forwarded is that the CPRA, 2009 does not provide standard international precepts of strict

complaints from consumers. This is an uncommon feature for a consumer protection law. Most consumer laws allow receipt of complaints directly from the consumers under some institutional mechanism or the other. The Bangladeshi Act provides only for redress in the usual criminal and civil courts. As per the CPRA 2009, no complaint can be entertained by the Court without endorsement of the Director General of the Consumer Rights Protection Department. Therefore, only competent government officers are entitled to institute a case against any violation of such laws.

The Indian Act gives a redress mechanism which avoids the traditional legal system which consumers can use. The inherent problems with using the existing legal system include lengthy trials, difficulty of access without lawyers, high costs and enormous backlogs already existing. Most importantly, the traditional courts are not trained or aware of consumer rights and their applications. They are not a specialised centre of dispute resolution of this special kind.

The CRPA bestows a rather confusing "supervisory" role upon the Directorate. It mentions that the Directorate will "supervise" the list of anti-consumer rights practices but does not essentially spell out how. There is no power given to the Directorate to direct specific agencies of the state to carry out activities as necessary nor is it given sufficient institutional capacity to build a force for supervising the markets. How the institution will act with these constraints is yet to be seen.

The way forward

Although the CRPA, 2009 is a bold recognition of the existing consumer rights issues in Bangladesh, it has failed so far in having any impact on the alleviation of rampant violation of those rights. The inherent drawbacks of the legislation as stated above have the potential to hold back any benefit that the Bangladeshi consumer could have reaped from it. Furthermore, the Government's slowness in establishing an authority under the Act also shows a lack of interest in the state machinery to give the legislation the desired effect.

In this situation, in order to make the legislation a meaningful one, it must be amended with clear statement of the consumer's rights, easy and cheap redress procedures and increased power of the Council and the Directorate to make use of state machinery in order to enforce orders, directives and judgments against violations of consumer rights.



Lawyering for right to food

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RIGHT to food is one of the fundamental human rights which is not only enshrined in the national constitution but also recognised in the international instruments dealing with human rights. Right to food has been asserted in the constitution of the people's republic of Bangladesh under the head of fundamental principles of state policy which is not judicially enforceable. The absence of progressive realisation of the right to food not only curtails our basic necessities but also shows utmost indifference to fulfill constitutional commitment.

Though state is under an obligation to secure an enabling environment for the realisation of right to food, it still remains a far cry in case of Bangladesh. Right to food is also closely interlinked with the fundamental right to freedom from hunger and malnutrition which also remains unrealised. It is evident that without realising right to food, it is not possible to enjoy other rights in fuller sense. Further, the non-realisation of right to food hampers the poverty reduction process which is indispensable for the growth of human rights culture in Bangladesh.

In this backdrop, National Human Rights Commission Bangladesh and Oxfam organised a Lawyers' Training on Right to Food which was held at NGO Forum for Public Health from 23-25 March 2014. This training aimed to create awareness and sensitisation on the need for judicial safeguards of right to food, and on the need for legal recognition of right to food and at the same time to strengthen the capacity of the legal professionals to facilitate legal actions to advance the right to food. The participants of the programme were mostly legal professionals including advocates and human rights activists. Prof. Dr. Mizanur Rahman, NHRC, Chairman, Sara Hossain, Advocate, Supreme Court of Bangladesh, Dr. Zakir Hossain, Ex-Dean, Faculty of

Law, Chittagong University and Dr. Abdullah Al Faruque, Dean, Faculty of Law, Chittagong University among others took sessions on various aspects of right to food.

Adulteration of food is a major threat to quality aspect of food security which needs to be addressed by strengthening Regulatory framework, said Dr. Abdullah Al Faruque. Although rice productions are largely sufficient in Bangladesh, self-sufficiency in other food items is still to be achieved and accordingly about half of the populations of Bangladesh still live below the food-based poverty, he informed.

Sara Hossain emphasised on the development of contents of policies and the monitoring of policy implementation to ensure protection of right to food, while discussing on Legal and Institutional Framework on Right to Food in Bangladesh. She stressed to maintain consistency between policy goals and targets relating to right to food and state's duties to enforce right to food.

To ensure right to food through legal mechanism it is necessary to make people as right holder by making them aware of their rights so that they can hold the state accountable, said Advocate Sultana Kamal, Executive Director of Ain o Shalish Kendro at the closing ceremony of the training programme.

Professor Dr. Mizanur Rahman emphasised on the empowerment of peasants and farmers to secure right to food who are contributing greatly for availability of various food products. In the presence of poverty people cannot be empowered and at the same time human rights cannot be ensured, he added.

More attention must be given on the realisation of economic, social and cultural rights, otherwise civil and political rights enshrined in our constitution would not flourish, Dr. Rahman urged.

