CONSTITUTIONAL ANALYSIS

Article 147(3) of the Constitution: Issues & interpretation

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IN view of recent debate on article 147(3) of the Bangladesh Constitution, it seems well worth having some academic discussion on the issues relating to its legal meaning and making conjectures about the possible legal consequences for its contravention.

Article 147(3) of the Constitution, save its proviso, reads as follows - No person appointed to or acting in any office to which this article applies shall hold any office, post or position of profit or emolument or take any part whatsoever in the management or conduct of any company, association or body having profit or gain as its object. According to literal construction, this provision in general imposes two prohibitions- (1) any person holding a post mentioned in this provision will not hold any office of profit, and (2) such a person will not take part in the management or conduct of any company, association or body formed for making profit or gain. The aforesaid prohibitions apply to eight different kinds of posts and article 147(3) does not expressly stipulate any consequences in the event of its violation. Since these prohibitions do not apply to all of the targeted posts in similar manner, we shall restrict our discussion to the case of ministers only.

In order to understand the consequence of contravention of prohibition on holding or continuing to hold an office of profit by a minister, one will have to take into consideration two other provisions namely, article 58(1)(b) and 66(2)(f) of the Constitution. Article 58(1)(b) provides that an office of a minister will become vacant if he ceases to be a member of parliament. Article 66(2)(f) provides that a person will be disqualified for being a member of Parliament if he holds any office of profit in the service of the Republic other than an office excepted by the Constitution. Article 58(1)(b) and 66(2)(f) together signify that a minister if holds or continues to hold an office of profit will be disqualified for his membership in parliament and consequently his office of minister will become vacant. Therefore, any contravention of prohibition on holding or continuing to hold office of profit in Article 147(3) constitutes a disqualification for holding the post of a minister.

As for the consequence of contravening the prohibition on taking part by a minister in the management of any company, association or body it may be submitted that the most important expression- 'take any part whatsoever in the management or conduct' - does not carry any special legal implications and therefore, should be interpreted very carefully having regard to the consequences. Company, association and body- although are legal words have not been defined in the Constitution. It may be noticed that the wording of this part of article 147(3) does not envisage taking part in the management of a proprietorship concern.

Hence, one interesting legal issue would be if this parts of article 147(3) covers a partner in profit only who has no voice or functions in the affairs of a partnership? With regard to directorship in a company, an issue could be - can a Director of a borrower company take oath as a minister pending approval for his resignation from the lending Bank? In other words, should a Director of a borrower company, if asked to join the Cabinet, wait for approval for his resignation from the lending Bank? Or a leave of absence will suffice? Presumably, the public policy approach may justify joining Cabinet first because serving public office entails discharge of public duties and in appropriate circumstances the call for joining Cabinet may take priority over resignation from private posts.

It may also be pointed out that the literal meaning of 'take any part' does not mean resignation rather it signifies refraining from taking part in any functions of a company. Interestingly, the Companies Act, 1994 provides that the post of a director will become vacant if he remains absent in three consecutive meetings of the directors or any such meetings in three months without leave. It means if a director of a company who has been sworn in as a minister does not take part in the management of a company without leave, his position as director will fall vacant. If the director takes leave, he might still be regarded as complying with article 147(3) as he would not be taking part in the management of the company. However, such legal position will not be applicable to an entity to whom the Companies Act, 1994 does not apply.

Now, issues concerning judicial remedies for contravention of article 147(3). It may be argued that an application under article 102(2)(b)(ii) of the Constitution (popularly known as writ of quo warranto) would lie in case of contravention of prohibition on holding an office of profit since it constitutes a disqualification for holding an office of minister. In this regard a related issue is - if a writ of quo warranto would also lie for contravention of prohibition on taking part in the management or conduct of a company and so on. As our conjecture goes, one point of view could be that since this part of article 147(3) does not refer to any disqualification, a quo warranto may not lie, however, such functions of a minister as would amount to taking part in the management of a company and such might be declared void and would entail no legal consequence. It seems in an appropriate situation, one could be sued for making good the loss for such void actions or transactions.

Ultimately, determining legal consequences for holding any posts in violation of the prohibitions mentioned in article 147(3) will depend on whether the prohibitions constitute fundamental condition for these posts or not.

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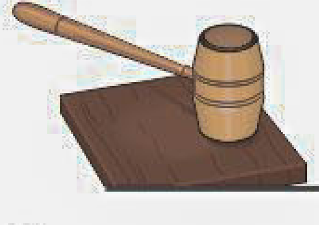
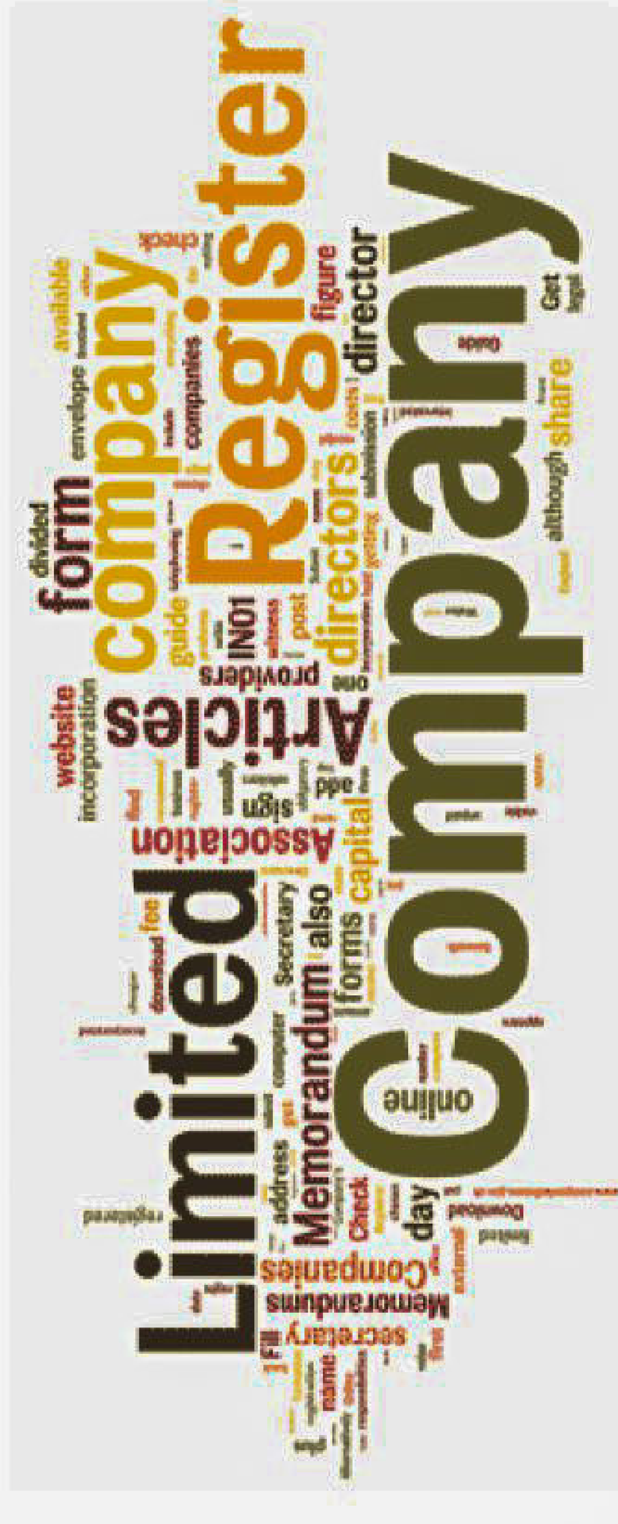


LAW WATCH

Use of similar names by companies



MD. RIZWANUL ISLAM

SECTION 11(1) of the Companies Act, 1994 provides that a company would not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling the name that there is a likelihood of using the name to deceive, unless the company in existence is in the course of being dissolved and signifies its written consent to such use. Section 11(2) provides that if a company, through inadvertence or otherwise, is, without the consent referred to in sub-section (1), registered by a name identical with that by which a company in existence is previously registered, or so nearly resembling the name that there is likelihood of using the name to deceive, the first mentioned company would, on the direction of the Registrar, change its name within a period of one hundred and twenty days.

In *Shafquat Haider & Others* v *Mr. Al-Amin and Another* (1987) 39 DLR (AD) 103, respondent no.1, Mr. Al-Amin, was the chairperson and his mother, Jahanara Begum was a director, collectively holding 50 per cent of total shares of the registered company, Ciproco Computers Ltd. the managing director, Mr. Shafquat Haider, and his wife, Mrs. Haider, another director collectively held the rest of the 50 per cent shares of Ciproco Computers Ltd. This company was registered in June 1985. The main business of this company was to import, sell, and servicing of computers. When based on an application of the respondent no. 1 and his mother claiming a dead-lock, a winding up proceeding was pending; the appellants filed an application seeking an injunction against respondents to restrain them from carrying on a business in the name of Ciproco Computers and entice away the customers of the company.

The respondents contended that Ciproco Computers was in existence well before the Ciproco Computers Ltd's incorporation. The respondent no.1 showed that he had a trade mark registration in 1984 under the Trade Marks Act, 1940. The AD noted that respondent no.1 did not carry on the business of his partnership firm that is Ciproco Computers until the commencement of the winding up proceedings. (para 5) The AD also stressed on the fact that the trade license for the partnership firm, Ciproco Computers was obtained just fifteen days before the filing of the petition for winding up. Thereafter, he started to mislead company's customers to promote his personal business. Interestingly, the High Court Division (HCD) of the Supreme Court (SC) found that "there is a gulf of difference between the name 'Ciproco Computers' and 'Ciproco Computers Ltd.'" (para 1)

Clearly, on the basis of the significant difference between the legal nature of a partnership and a company in our legal regime, the HCD's observation is legally sound. However, if we read Section 11 carefully, we would see that the intention to avoid confusion and deception by the use of identical or confusingly similar name is at its root. In this case, many of the customers who would deal with these two business entities, may not have taken care to note the significant legal difference between the names 'Ciproco Computers' and 'Ciproco Computers Ltd'. That said, clearly in legal terms, the HCD was acting within the letters of the law as Section 11 has not stipulated that an unincorporated business cannot use a name that is identical with or confusingly similar to the name of an existing company.

On appeal, the Appellate Division (AD) not only found a close similarity in names of the two entities but also an endeavour of the respondent no.1 to entice away the customers from the company to the private business. Accordingly, it issued an order for restraining the respondent from using the name 'Ciproco Computers' until the disposal of the winding up petition. Thus, following this decision, it is possible to argue that the statutory bar against using identical or similar names as imposed in Section 11 may not only apply to a company with reference to another company but may also extend to a company with reference to an unincorporated business entity, particularly when there is some sort of deception. The problem with this argument is that it may mean stretching the ratio of this case too far. In the facts of this case, there was solid evidence of deceptive conducts on the part of the respondents and also that they were associated with the appellant company and both of these considerations appear to have influenced the AD's conclusion.

In a future case, where persons connected with an unincorporated entity use names similar to that of a company with which they have no connection, technically there would be no breach of Section 11 of the Companies Act, 1994 and it remains to be seen what approach the court would take in such a case. In such a case, only an action for passing off seems to be a viable option for proceeding against the unincorporated business. However, given that goodwill is a prerequisite for a successful action for passing off, that option would seem to be a much harder route to take.

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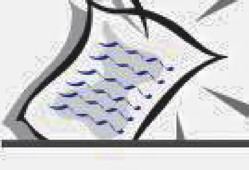

FOR YOUR INFORMATION

LET'S COMPLAIN *to the NHRC*

RAISUL ISLAM SOURAV

ANY person or organisation can bring allegation regarding any violation of human rights to the National Human Rights Commission (NHRC). Hence every human is entitled and have equal access to the NHRC irrespective of his/her race, sex, gender, religion, ethnicity, place of birth, literacy, ability etc. Moreover, NHRC has power to take action *suo motu* against any such violation. It can even take allegation from news of media. However, there is a distinction between crime and human rights violation. All crimes are not human rights violation; a crime would be an infringement of human rights when it happened by state mechanism or when state is being failed to prevent such violation.

Against whom allegation may be brought: Any person or organisation may be liable for violation of human rights and a complainant may bring accusation against one or more to the NHRC. In this regard his/her designation, identity, cast, financial ability will not be barrier to prosecute the violator. Mere involvement with the incident is sufficient to file complaint. Even any Government post holder or any organisation could be responsible for infringement of human rights if s/he abets or provokes to the violence.

Procedure to bring allegation: A complainant can file complaint through application addressing the chairman of the commission on prescribed from (available on www.nhrc.org.bd) or on white paper and can submit through post or personally. Even email (nhrc.bd@gmail.com) is sufficient to file a complaint.

In that case s/he will receive a complain number after sending the complaint and can use that number for further reference. Also the applicant would be able to know about the status of his/her complaint by using that number.

In the application, s/he need to write the name and address of the complainant; name and address of the victim (if the person is different from the complainant); reason to complain/reason to apprehend; nature of violation, gravity of offence; date, time and place of occurrence; present condition of the victim; name and address of the suspects (if identified); description of the violators (if not identified); designation and office of the violator (in case of govt. employee); any action taken by the law enforcement agencies/govt.; proof of allegation (if any) etc.

There is a selection committee in the NHRC to scrutiny the legal aspects of the allegation within 24 hours. If it finds that the allegation is beyond their jurisdiction then they will write the reason and contact with the complainant within three days from the date of receiving the application. In that case they also advice him/her about his/her required steps to get redress. Moreover, they may assist and provide essential legal supports and fess to conduct the case.

Power and function of Commission: The commission has power to summon and interrogate any person, take evidence after oath, inspect any document and can conduct necessary inquiry. Moreover the commission can mediate the matter between the victim and the alleged perpetrators. If the initiative is failed, then it can recommend to the concern authority to lodge a case against the violator. In addition, it can recommend taking such necessary steps to prevent these types of violation and to provide compensation to the victim.

However, NHRC cannot take any matter in their authority in case of a matter pending before a court of law. In addition, it cannot entertain any matter of a public servant which can be tried under the Administrative Tribunals Act, 1980.

One may file the complaint without disclosing his/her identity and in that circumstance the commission will keep the matter confidential. If one feel any risk of security after lodging the complaint s/he can inform it to the commission and commission will order the law enforcers to provide sufficient security.

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LAW NEWS

Education for stable employment

HIGHER education is a prerequisite for millions of youth in the developing world who hope to find a decent, 'non-vulnerable' job; it has been established by a recent United Nations study. The study conducted by the International Labour Organization (ILO) and released on December 16, surveys 28 countries worldwide and demonstrates that having a high level of education "serves as a fairly dependable guarantee" towards securing a formal job.

"The report confirms the role of education in shaping labour market outcomes of young people," Azita Berar Awad, Director of the Employment Policy Department of the ILO, explained in a press release. She also mentioned that, "It also highlights the need for more investments in quality education, from primary through academic levels."

The report notes that, 83 per cent of young people with post-secondary education are in non-vulnerable employment in the 27 low-to-upper middle income countries examined. While the number dropped to 75 per cent among low-income countries.

"Increasing the level of education of the emerging workforce in developing countries will not in itself ensure the absorption of higher skilled workers into non-vulnerable jobs," says Theo Sparreboom, author of the study. "Yet, it is clear that continuing to push forth undereducated, under-skilled youth into the labour market is a no-win situation, both for the young person who remains destined for a 'hand-to-mouth existence' based on vulnerable employment, and for the economy which gains little in terms of boosting its labour productivity potential," he added.

The report also highlights the lingering problem of 'skills mismatch' – or the disparity between the skill-level of those seeking employment and the demands of the jobs available on the market – as a point of concern, particularly as it varies greatly between advanced and low-income economies. In advanced economies, for instance, 'mis-match' often refers to higher skilled young people employed in jobs for which they are overqualified. At the opposite end of the spectrum, mis-matched young workers in low-income economies often suffer from "under-education" and have "no option but to take vulnerable jobs in the informal economy," according to the ILO.

This disparity is largely fuelled by poverty as many youth cannot attend school because they cannot afford the costs or because they need to work to help their families, the UN agency continued.

COMPILED BY LAW DESK (SOURCE: UN.ORG).