"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH • dslawdesk@yahoo.co.uk

LAW OPINION

LIABILITY FOR CORPORATE CRIMES

MD. RIZWANUL ISLAM

IN recent years, the liability for crimes committed by companies has been a matter of intense scrutiny in many jurisdictions. However, the matter has relatively rarely been explored in our legal system. *Eusof Babu and Ors* v *State and Others* (LEX/BDAD/0092/2013) is one such rare case. In this case, the fundamental question was whether a prosecution for the dishonour of cheques drawn by companies for the insufficiency of funds in the respective bank accounts against the managing directors, directors, secretary, or other officers of the company could be maintainable even when the companies themselves are not included as accused parties.

The trial court held that such a prosecution is not maintainable because the primary offender, the company, is not prosecuted. The High Court Division (HCD) reversed that decision finding that even in the absence of the company as accused, the prosecution would be maintainable against directors, managers, or other officers who acted on behalf of the company. The Appellate Division (AD) by a 3-1 majority endorsed the HCD's judgement.

According to the majority judgment, under section 138 of the Negotiable Instruments Act, 1881 (NI Act) three categories of persons can be prosecuted for the dishonouring of cheques, namely: (i) the company which has committed the offence, (ii) every person who has been in-charge of the company and responsible for the business of the company at the time of the commission of offence; and (iii) director, manager, secretary or other officer of the company, due to whose connivance or neglect, the company has committed the offence. When the offence is committed by the company, the company alone in exclusion of other two categories of persons can be prosecuted and punished.

However, a prosecution would not fail in the absence of the company as an accused party, if it can be established that though the offence has been committed by the company, these persons have been responsible for the company's affairs or that the offence has been committed with their consent or neglect. The majority judgment found no such explicit bar in the NI Act.

The minority judgment emphasised on the separate entity of companies. The judgment found that the persons related to the company are indicted for the offence of aiding and abetting the company in the commission of an offence, not for doing anything separately on their own. Interestingly, it asked the question that if the company and other persons envisaged in section 138 of the NI Act have been prosecuted together, whether the natural persons working for the company can then be convicted when the company itself was not convicted. It answered in the negative. The minority judgement explains: If for any reason, prosecution against the company founders, it is unthinkable that those others could be convicted, because their cheques had not been bounced they are liable, only because they are "in-charge of and were responsible to the company, for the conduct of the business of the company," at the time the offence was committed. Their indictment and possible conviction is inseparably and indivisibly dependent on these of the company for whose offence they face prosecution as the materialiser of the company's acts. (Para 119).

According to the minority judgement, if sections 138 and 140 of the NI Act are read together, when a cheque issued by a company is dishonoured for the insufficiency of fund, it is the cheque issuing company which is the principal offender as it is such company's cheque that has been dishonoured. Those connected with the company and have acted to help the company to commit the crime, can only be liable for aiding and abetting the company in the commission of the crime. Thus, the minority judgment concluded that the HCD had erred in thinking that the cheques were issued by the directors concerned when at law the fact is that they were issued by the company, which is the owner of those cheques. It is difficult to disagree with the finding of the minority judgement that "[t]he directors only signed the company's cheques and thereby acted as the fuel injectors in the Company's commission of the offence. Section 140 of the Act made them vicariously liable…" (para 157).

Prosecuting the company as well as the top executives and management of the company for crimes committed by the company could have paved the way for ensuring greater liability of the companies.

It has to be said that the majority decision has observed that when a case for the dishonour of a cheque issued in the name of a company is filed against the company alone, excluding the person who was responsible for the affairs of the company, the prosecution would be valid (para 8). Again, in this particular case, the majority decision in its final order also left the option of the respondent to include the company as a party open (para 19) and thus, no practically unjust consequence may have ensued.

However, it would be respectfully submitted here that the majority decision has set a precedent that even when the company is liable for committing corporate crimes, only the directors and other persons in the high in the hierarchy could be prosecuted which in some cases, may create problems. For instance, in some cases, some persons in this category may not have the financial capacity to pay a large amount of fine that may be imposed in a criminal case, which could have been averted if the company, as the principal offender, is included as a necessary party.

In short, insisting on prosecuting the company as well as the top executives and management of the company for crimes committed by the company could have paved the way for ensuring greater liability of the companies.

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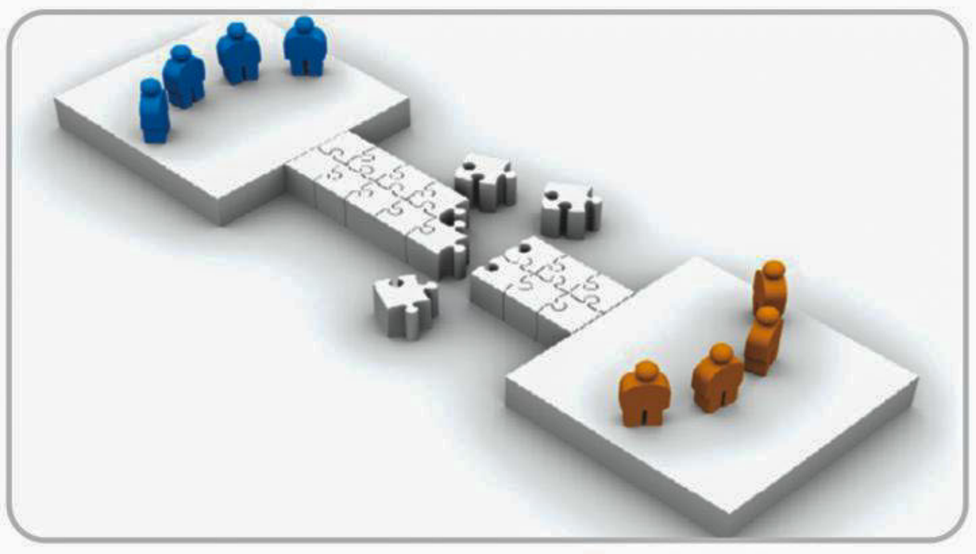
LAW IN-DEPTH

Methods of demerger

SAYED MAHSIB HOSSAIN

DEMERGER is a form of corporate restructuring in which an entity's business operations are divided into one or more components. Where a company/corporate house has a number of different departments, the company chooses to demerge that department which is growing at a remarkable rate and has an abundant potential. In this form of reorganisation, the shareholders or unit holders in the parent company get direct ownership of the demerged entity or the subsidiary entity. Apart from that, where a company elects to demerge, with an aim of corporate restructuring, the undertakings sought to be demerged are transferred from the transferor company to an existing transferee company.

Other common reasons for demerger are: it offers the investors a clear choice between different business types; it allows independent financial strategy; increases the price earning of the companies; it increases the overall market valuation of a company, although a demerger does not increase the value of the assets of the company.



The Company Act 1994 does not explicitly define the term 'demerger'. The concept of demerger may, however, be deduced from different provisions of the said Act, for instance section 228 (6) of the Company Act defines the term 'agreement' as "a reorganisation of share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes or by both those methods and, for the purposes of this section unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors." Further, pursuant to section 107 of the Company Act, the directors of a company or of a subsidiary company of a public company shall not, except with the consent of the company, in general meeting: (a) sell or dispose of the undertaking of the company; and (b) remit any debt due by a director. Finally, according to section 229, where an application is made to the Court under section 228 of the said Act for sanctioning a compromise or arrangement between a company and any such persons mentioned in section 228. The Court may either by the order sanctioning the compromise or arrangement or by any sub-sequent order make provision for such incidental matters as are necessary to secure that the reconstitution or amalgamation is fully and effectively carried out.

A demerger usually attract the other provisions of the 1994 Act envisaging reduction of share capital and as such the company is required to pass a special resolution which is subject to confirmation by the court by making an application under section 60 of the Company Act 1994. Further it is essential that the Articles of Association of the company authorises demerger, division or split of the company in any way.

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LAW WATCH

Discipline of Judges in the grab of the Executive

MD. ABDUR RAHIM

THE independence of the Judiciary is one of the basic structures of our Constitution. The development of democratic and just society is overwhelmingly dependent on an independent and impartial Judiciary. The perception of judicial independence is essentially interlinked with judicial accountability and the former can be enhanced by ensuring proper and balanced utilisation of the latter. Compared to the other two organs of the State, the Judiciary deserves special consideration, specially in the context where political culture is not expectedly firm. Therefore, the judicial accountability is not the same as the accountability of the Executive or the Legislature, or any other public institutions. Former Chief Justice of Bangladesh Mr. Mostafa Kamal rightly asserted in the landmark Masdar Hossain case that 'functionally and structurally judicial service stands on a different level from the civil administrative executive services of the Republic'.

The political culture in Bangladesh is under development and yet to attain maturity. Since our independence, this has been deteriorating day by day creating politically sectoral society. In such a situation, an independent Judiciary is expected to play a crucial role for protecting the victims from the political grudge of the State authority. The judicial independence and accountability in Bangladesh is a much talked issue ranging from apex court to lower tier. Discipline of judges, one of the forms of judicial accountability, is often used as a tool for controlling the Judiciary and the attitudes of the Legislature and the Executive are found to be questionable in this regard.

As the present Chief Justice very often argues, the present format of 'dual rule' by the Executive and the Judiciary causes major hindrance to the proper functioning of the Judiciary. He is in favour of lessening up Executive's interference over the lower Judiciary.

Article 116 of the Constitution authorises the President to have control over the disciplinary matters of the persons employed in the judicial service and magistrates exercising judicial functions. While exercising this power, the President is under a constitutional obligation to consult with the Supreme Court. On behalf of the President, the Law and Justice Division of the Ministry of Law, Justice and Parliamentary Affairs, is the de facto authority to bring disciplinary motions against any judge of the lower courts as per the Government Servants (Discipline and Appeal) Rules 1985. Final decision in this regard is effected by an Order of the President after consultation with the Supreme Court. Hence, in principle and practice the Executive is the primary body to exercise disciplinary jurisdictions over the judges of lower judiciary. The result of which inflicts blow on the idea of separation of powers and judicial independence.

The Executive in Bangladesh always tends to manipulate the Judiciary by keeping it under tight fist. Such an attitude of the Executive became more evident when an unelected authority, i.e. the 2007 Non Party Caretaker Government, had to take initiatives in line with the directions of the Masdar Hossain case to comply with the constitutional mandate of separating Judiciary from the Executive. All happened against strong opposition from the then members of the administration.

Nevertheless, judicial powers in few cases were again vested in the hands of the members of the administration by the subsequent elected political governments. Establishment of the Mobile Courts and Executive Magistrate's Courts are such instances. In the guise of accountability, however, the Executive has unduly been utilising the disciplinary power against the judges keeping them under constant danger of initiation of departmental proceedings. On 26 February 2017, the High Court Division questioned the constitutionality of President's power to control the lower judiciary as it has already been seen that President generally acts on advice from the Prime Minister under article 48 (3) of the Constitution.

The 16th amendment of the Constitution has also inflicted a blow on the independent image of the higher Judiciary by incorporating disciplinary mechanism into the jurisdiction of the Parliament. The High Court Division has already scrapped the 16th amendment declaring it incompatible with the notion of judicial independence. The government has also moved an appeal before the Appellate Division against the decision and we have to now wait to see the future of the higher Judiciary.

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FOR YOUR INFORMATION

Remembering the Rwanda Genocide

INTERNATIONAL DAY OF REFLECTION ON THE GENOCIDE IN RWANDA

RECOGNISING the importance of combating impunity for all violations that constitute the crime of genocide, the United Nations (UN) General Assembly on 23 December 2003 adopted a resolution (A/RES/58/234) designating the 7th of April, the start date of the 1994 genocide in Rwanda, as the International Day of Reflection on the Genocide in Rwanda.

Every year, on or around that date, the UN organises commemorative events at its Headquarters in New York and at UN offices around the world. Since 2005 the Outreach Programme on the Rwanda Genocide and the United Nations has been arranging commemorative activities in more than 20 countries.

The genocide in Rwanda happened 23 years ago in 1994. More than 800,000 men, women and children were systematically murdered across the country – overwhelmingly Tutsi, along with moderate Hutu, Twa and others.

To prosecute the persons responsible for Rwanda Genocide and other serious violations of international humanitarian law committed in the territory of Rwanda, the UN Security Council in 1995 established the International Criminal Tribunal for Rwanda (ICTR). The Tribunal is located in Arusha, Tanzania, and has offices in Kigali, Rwanda. Its Appeals Chamber is located in The Hague, Netherlands.

Since it opened in 1995, the Tribunal has indicted 93 individuals whom it considered responsible for Rwanda Genocide. Those indicted include high-ranking military and government officials, politicians, businessmen, as well as religious, militia, and media leaders.

For the first time in history, the ICTR as an international tribunal recognised rape as a means of perpetrating genocide. Another landmark decision was reached in the Media case, where the ICTR became the first international tribunal to hold members of the media responsible for intentionally broadcasting news and opinions to provoke the public to commit acts of genocide.

The ICTR delivered its last trial judgement on 20 December 2012 in the Ngirabatware case and the ICTR Appeals Chamber delivered its last appeal judgement on 14 December 2015 in the Nyiramasuhuko et al case. With these judicial deliberations, the ICTR ended its 22-year judicial activities to ensure prosecution of the genocide perpetrators.

In his message for the Rwanda Genocide Day, the UN Secretary-General António Guterres said that "Today we remember and honour those who survived in Rwanda Genocide. We recognise their pain and courage, and the struggles they continue to face. The survivors' resilience and their capacity for reconciliation are an inspiration to us all. The only way to truly honour the memory of those who were killed in Rwanda is to ensure that such events never occur again. Preventing genocide and other monstrous crimes is a shared responsibility and a core duty of the United Nations."

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