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LAW VISION

# STRINGENT RECOVERY SYSTEM

## *The elixir of a better credit management?*

MD. RIZWANUL ISLAM

*Any stance aimed at more stringent legal and administrative measures directed at the recovery of NPLs would likely fail to achieve the desired level of success.*

MEDIA reports sometimes claim that the law for recovery of non-performing loans (NPL) as crafted in the principal law in force in this regard, the Money Loan Court Act, 2003 (MLCA) is too soft towards the borrowers. This write-up would seek to refute this claim and argue that any stance aimed at more stringent legal and administrative measures directed at the recovery of NPLs would likely fail to achieve the desired level of success.

Of course, banks and non-bank financial institutions (NBFIs) have to be vigilant for the recovery of NPLs. As the adage goes, "if few borrowers are not paying back they are in trouble if many borrowers do not repay, the banks are in trouble." And surely when the banks are in trouble, the credit flow decreases, investment plunges, and the whole economy would feel the pinch. However, the over-emphasis on the recovery of NPLs detracts our attention from more pressing issues in the proper management of credit by banks and NBFIs in this country. In the first place, we must not lose sight of the fact that a loan being classified as

NPL, triggering the recourse to legal means for forced recovery, maybe only the symptom of a whole list of problems with the bank and NBFI regime. Not all defaults in the repayment of the loans are wilful and many honest borrowers, for a variety of unforeseen commercial and non-commercial reasons, may fail to repay. Despite this element of chance in the system, a significantly high rate of NPL would normally imply that in some cases, the creditworthiness of the borrowers, the viability of the venture for which the loan has been disbursed (if the loan is a business loan), the adequacy of the security for the loan, etc. have not been properly vetted. This may also mean that more deserving borrowers may have been denied credit.

Contrary to the claim by many, the MLCA already incorporates banks and NFIs friendly provisions which are quite tough towards the borrowers. For instance, in a striking exception to the ordinary course is the civil justice system, a money loan suit would not be dismissed even if the financial institution does not appear on a date fixed for hearing and the judge would have to settle it by examining the documents presented before her/him [Section 19(6) of the MLCA]. There is also a provision that any party (other than a bank or NFI filing the money loan suit) who wants to lodge an appeal or revision against a judgment or decree rendered by the money loan court, will have to make a security deposit for that petition to be admissible before the higher court (Sections 41 and 42 of the MLCA).

Some informed and not-so-informed commentators have sometimes blamed the abuse of legal process, in particular, the tendency of filing writ petitions, by defaulting borrowers as a fundamental factor contributing to the inordinate delay in the recovery of NPLs. Writ petitions or other forms of judicial interventions are, in and of themselves, not the problem. It is only natural that the legal counsels for the defaulters would be engaged in resorting to whatever legal tactic which may suit their clients or at least buy more time for them. However, it is the job of the legal team of the banks and NFIs to defend the case of their clients and the judges to ensure that the mechanism for justice is not abused by frivolous suits. To what extent stringent legal provisions would be able to make a contribution in this regard is very uncertain.

The difference in the rate of NPL in the public and private banks would also imply that in the disbursement of loans, the same degree of professionalism has not been maintained. It is well-known in this country that often many non-career bankers have been offered positions in the board of public banks, not necessarily for their expertise in banking but as a reward for political allegiance. With none or nominal shareholding in the bank on the board of which they serve, there is little incentive for them to be scrupulous in the selection of prospective borrowers. It is possible to fathom that such a disinterested attitude in the performance of the bank may have a negative impact on the lower management of public banks too. If this culture cannot be stamped out, stringent recovery mechanism for the recovery of NPL would have little effect.

Another concern with a tougher regime on the recovery of NPL is the lack of evenhandedness. Indeed, the attitude of regulators has often been lax to the big defaulters. In the not so distant past, a special privilege to big borrowers in the form of restructuring facility of loans of BDT five billion or more was offered. The contribution of big industries to the economy is understandable, but the inequitable nature of the measure was nonetheless unavoidable. It clearly sent a message that the regulators are relaxed towards the recovery of loans from big borrowers which is not conducive for a culture of accountability in the management of credit.

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FOR YOUR INFORMATION

# Set off and carry forward of losses in taxation

ANIKA NAWER SUPA

SET off means adjustment of losses from some heads with income of other head(s) to get the taxable income. The provision of set off is laid in section 37 of Income Tax Ordinance 1984. There are seven heads of income namely salary, interest on securities, house property, agriculture, business and profession, capital gain and miscellaneous. Set off of losses can be done against these sources prescribed in the law.

There is no question of loss in case of income from salary so the provision of set off is not applicable in case of salary as source of income. Loss arising out of the source of income from securities can be set off against any other heads of income. Loss arising out of the source of income from house property also can be set off against any other heads. Loss in case of agriculture can be set off against any other heads except income from capital gain. Loss arising out of business other than speculation business can be set off against any head except income from capital gain and house property. Loss from speculation business can only be set off against any other speculation business. Loss in the source of capital gain can be set off only against other capital gain. Losses in cases of miscellaneous sources of income cannot be set off.

| Sources of Income | Set off of Losses | Carry Forward | Set off of Losses after Carry Forward |
|---|---|---|---|
| *Income from Salary* | Not Applicable | Not Applicable | Not Applicable |
| *Income from Securities* | With Income from any other heads | Not Possible | |
| *Income from House Property* | With Income from any other heads | Not Possible | |
| *Income from Agriculture* | With Income from any other heads except income from capital gain | Possible | Only against income from agriculture |
| *Income from Business and Profession* | With Income from any other heads except income from capital gain and house property | Possible | Only against income from the same business |
| *Income from Capital gain* | Only with income from capital gain | Possible only if the amount exceeds five thousand taka | Only against income from capital gain |

When losses under a head is not possible to set off wholly against same year's income from the head allowed in the Income Tax Ordinance 1984, it is allowed to transfer the unadjusted amount of losses to next year(s) for set off and this means carry forward of losses. Carry forward is not as flexible as set off as it allows to set off after carry forward against the same head only. Sections 38-42 of Income Tax Ordinance explain the process of carry forward.

Income from salary is not subject to carry forward because there is no question of loss in salary. Loss in case of securities cannot be carried forward. Loss in case of income from house property cannot be carried forward as well.

Loss in the source of agricultural income can be carried forward only against income from agriculture and the time limitation is up to 6 year. Loss in the head of business or profession (except speculation business) can be carried forward up to 6 years and can be set off only against income from business or profession. Loss in the source of income from speculation business can be carried forward up to 6 years and set off against only speculation business.

Loss in the head of capital gain can be carried forward if the amount exceeds 5000 taka up to 6 years and set off only against only income from capital gain. Loss in the head of miscellaneous source is not subject to carry forward.

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HUMAN RIGHTS ADVOCACY

# Protecting 'Climate Induced Migrants' of Bangladesh

SAKHAWAT SAJJAT SEJAN

THE annual report 2017 of Internal Displacement Monitoring Center-Bangladesh shows that, Bangladesh is impregnated with 946000 internally displaced people. This number is mounting as 50000 people are becoming homeless due to natural disasters every year. Apart from that, Bangladesh is among the 10 vulnerable nations affected by climate change according to the German Watch Global Climate Index Report. International Panel Climate Change predicts that within 2050 Bangladesh will lose 17.5% of its lands, which includes 30% of food production lands. Whereas according to the International Union for Conservation of Nature (IUCN), the amount of climate-induced displaced persons in Bangladesh may increase up to 15 million by 2050. This is undoubtedly very minatory for the country from the perspective of economy, employment, food, agricultural resources, national harmony and livestock.

However, at present these 1 million citizens of Bangladesh are unprotected from the perspective of government, as there is no recognised term to define those displaced people. As well as no legislation in Bangladesh recognises or safeguards them. Bangladesh is not the sole stakeholder in this hollowness of protection.

International law itself is yet unable to define those people. International Organization for Migration has proposed to fix the term as 'Environmental Refugees', but there are arguments-counterarguments, whether they shall be named climate induced migrants or climate refugees. Refugee as a term requires persecution to be justified according to the definition enshrined in Article 1 of Refugee Convention, 1951. But climate induced migrants don't meet the requirement of being called as 'refugee' as they migrate often within the state without persecution.

It is unjustifiable that in absence of international law's recognition and protection, Bangladesh shall keep these enormous number of people unregulated and unprotected violating 'Right to life' ensured under Article 32 of the Constitution. Also, Disaster Management Act, 2012 could have been the excelsior, but the Act is less concerned about protecting the affected people and more about managing a disaster.

Still a light of hope can be inculcated after scrutinising the efforts of Bangladeshi government. After adopting National Adaptation Programme of Action (NAPA) by United Nations Framework Convention on Climate Change (UNFCC) Bangladesh has comprised them in the domestic policies to regulate the 'Climate Induced Migrants'. Ministry of Environment and Forests has started Bangladesh Climate Change Strategy and Action Plan (BCCSAP) under NAPA with 44 programs on a Short-term and Long-term basis to safeguard 'Climate Induced Migrants'.

Disaster Management Act (DMA), 2012 may be the forerunner to safeguard the climate induced migrants by including the definition, more focusing on migrated people and efficiently adopting 'National Adaptation Programme of Action' in the Act. A council named Climate Migration Council comprising an emergency response cell may be formed under the Act to invigilate the movement and wants of these citizens. Ministry of Disaster Management and Reliefs may initiate policies in cooperation National Disaster Management Committees following section 19 of DMA to equip food, shelter, education, primary health care and hygiene water etc. for the displaced people immediately after displacement. Government may utilise the Employment Generation Programme for the Poorest (EGPP), which focuses on giving short term employment on community sub-projects to enable households to strongly cope with vulnerability to ensure employment for the migrants.

Alongside 'Temporary Protection Directive' may be adopted in Bangladesh Climate Change Strategy and Action Plan (BCCSAP) for immediate protection by Directorates of Disaster Management under section 9 of DMA. Bangladesh government may also replace the people living in disaster-prone areas to better and safer living places prior to any natural disaster. Nonetheless, Bangladesh being one of the most vulnerable countries due to climate change may become vocal in International agencies for protecting 'Climate Induced Migrants' all over the world.

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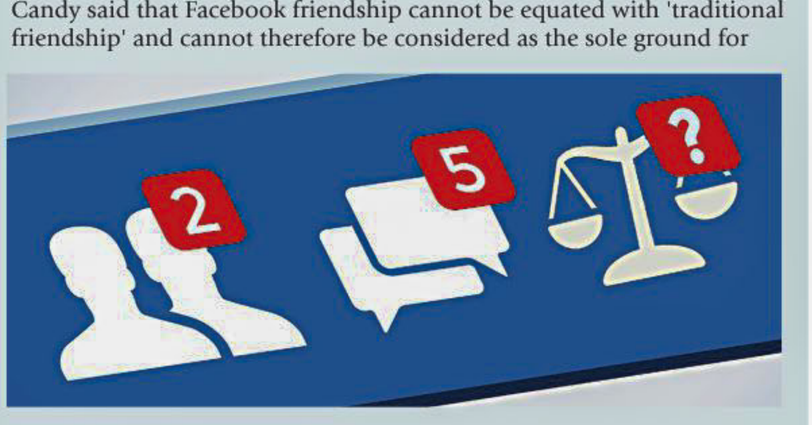
COURT CORRIDOR

# Judges can be friends with lawyers in Facebook

THE Supreme Court (SC) of Florida, USA has ruled by a 4:3 majority that it is okay for judges to be friends in Facebook with the attorneys appearing before them and Facebook friendship as such is not a sufficient ground for disqualifying the judge from considering the matter in question on the ground of likelihood of bias. The judgment delivered on 15 November has philosophical underpinnings on the notion of friendship.

The motion was moved by a law firm Herrsein & Herssein in a trial proceeding. The disqualification of a trial judge was sought on the ground of his being friends with the attorney pleading before him. The motion got initially dismissed and was taken to the SC in appeal.

In the SC, the majority opinion expressed by Chief justice Charles Candy said that Facebook friendship cannot be equated with 'traditional friendship' and cannot therefore be considered as the sole ground for disqualification of the judges.




Justices Ricky Polston, Alan Lawson and Jorge Labarga concurred with the ratio of the majority decision. However, Justice Labarga went on to opine that judges should 'maintain extreme restraint' in using social media so as to give an impression of impartiality. CJ Candy also deliberated on the general legal standard of qualification and said that mere existence of friendship between judges and attorneys cannot legally be adjudged as a ground for disqualifying the judges. He opined that the standard for determining the legal sufficiency in a motion seeking to disqualify a judge is to see whether the alleged facts would put a reasonably prudent person in fear of not receiving a fair as well as an impartial trial.

Justice Barbara Pariente delivered the dissent holding that Facebook friendship is different from traditional friendship and the former enables a person to have a 'peek into another person's inclinations, aptitudes, interests, political opinions etc.' and thereby renders a golden opportunity to a shrewd attorney to manipulate the mindset of the judges that he is dealing with. In the opinion of the dissenting judge, equating friendships from cyberspace with those from real life will be a false equivalency. The bottom line was that because of the indeterminate nature of the relationship and real possibility of impropriety, friendships between judges and lawyers who appear in the judges' courtroom should not be permitted.

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