

LAW VISION

Covid-19: legal scope of borrowers to claim 'force majeure' in bank loan agreement

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Globally COVID-19 is causing an unprecedented crisis for the investors, borrowers, suppliers, service providers and other business sectors across the world. Consequently, Bangladesh's economy has been severely impacted by this global economic downturn induced by the COVID-19.

Due to sudden turn of events, the borrowers have been facing unprecedented operational disruption, low revenue, raw materials shortage, weak demand for products and services, capital deficiency, poor cash flow and other difficulties. Following these, most of the borrowers are no longer able to repay the availed loan liability being smashed by the impact of COVID-19.

Many countries are giving legal and regulatory protections to their business sectors to overcome the ordeal of these extraordinary times. On February 20, 2020, Indian Ministry of Finance has issued office order to consider this pandemic as 'force majeure'. China issued record number of 'force majeure' certificates worth of billions covering its different business sectors affected by COVID-19. In the U.S.A., regulatory direction has been issued stating that, financial institutions should work constructively with borrowers.

Regrettably, our prevailing banking laws and regulations do not cover pandemic situations like COVID-19. Typically, it is argued that, for invoking 'force majeure' it must be included in loan documentations. Alternatively, borrowers are advised to claim frustration of contract under Section 56 of our Contract Act, 1872. But in case of banking-related

authorities have legal scope.

The modern legal theories empower the courts to construe a contract considering the intention of both parties that may be impliedly agreed upon but not expressed. As per the modern doctrine of 'implied terms', courts can imply terms of 'force majeure' in loan documentations, even though the same was not expressly articulated there. Considering the devastating impact of COVID-19, based on reason and for the sake of doing justice, the courts and the authorities may protect the borrowers from perdition by taking a liberal approach and filling in the gaps of 'force majeure' clause in loan documentations.

The impact of COVID-19 scrutinised with terms and conditions of loan agreements casts no doubt that now the lenders are under implied obligation to be lenient, fair, and reasonable to their

authorities to safeguard the best interests of both lenders and borrowers. Erosion of collateral securities' value and depletion of resources already have multiplied the vulnerabilities of the borrowers. In such crisis, the lenders should not trigger their loan agreements conventionally.

Covid-19 was not within the reasonable control and apprehension of the borrowers. They have suffered badly having no direct or indirect contribution, negligence, willful conduct or default. It has been continuing for an indefinite period of time and still its actual impact is unknown.

However, the Hon'ble Supreme Court of Bangladesh has already shown some positive and optimistic approach addressing the unbearable sufferings of the borrowers and people in general. In the Case of *Md. Fazlul Haque Sarder and others v. Grameen Phone Limited and others*



borrowers-customers.

Another parallel doctrine is 'presumed intent'. Here the contracting parties never foresaw such a situation like COVID-19 would arise. If they had foreseen such situation, they presumably would have agreed upon a fair and reasonable solution. The courts can apply this sound doctrine to construe the loan agreements keeping away the literal and absolute words of loan documentations. In such unanticipated situation, application of 'presumed intent' doctrine will be reasonable, just, and fair for both parties.

The aim, object, and commercial purposes of bank loan agreements are significantly different. The loan agreements have considerable impact on national revenue, employment, export, import and others. For that reason, the lenders and borrowers can't claim it as all over only between them. So, there is ample legal scope for courts and laws to construe the loan documentations in new situation. 'Force majeure' in loan agreements should be construed looking at all prevailing circumstances induced by COVID-19.

The usual pursuits against the enforcement of 'force majeure' in loan agreements are fruitless in modern times. In addition, the devastating and unexpected impact of COVID-19 in business and economy has also rendered this argument obsolete. The present situation requires legitimate and practical considerations of 'force majeure' by the courts and the

(Civil Appeal no. 28 of 2019) the Hon'ble Appellate Division has also acknowledged the pandemic of COVID-19 as 'Act of God' and further illustrated it as an unprecedented, unwanted, and unavoidable circumstance. Hence, the said observation was given in the said case in order to extend the period of limitation under special laws which were itself an extraordinary and pro-people initiative by the Apex Court.

Similar approach is also expected in case of addressing the hardship and sufferings of the borrowers. The Supreme Court of Bangladesh, under the constitutional mandate, is well equipped and empowered to extend its hand and interfere in the loan agreements by implying "force majeure" clause in loan agreements and protect the borrowers for the sake of national economy.

A further pro-people approach covering "force majeure" in loan documentations by the central Bank, the Supreme Court of Bangladesh and others authorities may protect best interests of both lenders and the borrowers. Such protective and facilitative role of the Bangladesh Bank, the Supreme Court of Bangladesh and other authorities based on consumer- focused approach may act as standard contractual reliefs. It will give the stakeholders certainty, clarity and also enable to be prepared for COVID-19-like unprecedented crisis in the future. Let prudence and justice prevail.

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LAW WATCH

The Proliferation of Child Beggars in the Pandemic

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World Vision International, a humanitarian organisation, warns that COVID-19 has forced eight million children into begging and child labour. Amidst the income plummets and job lay-offs of family members, this marginalised population is forced to beg from streets to streets. Various estimates suggest that there are approximately 700,000 beggars in Bangladesh, of which 40,000 reside in the capital city. A survey conducted by Bangladesh Centre for Human Rights and Development (BCHRD) revealed that 16.5% of beggars in Dhaka City are below 12 years of age. A report of World Vision titled "Out of Time: COVID-19 Aftershocks" reports that 34% of families in Bangladesh suffering from significant income loss sent their children to beg on the streets. However, these figures are just the tip of the iceberg. The hardships of child beggars have snowballed in the wake of COVID-19. Streets, footpaths, markets, transportation terminals, crowded parks in cities are usually the locales of child beggars. These children are at a higher peril of contracting the virus for their exposure to crowded areas.

The Constitution of Bangladesh offers an array of judicially enforceable fundamental rights to its citizens including children. Article 28 (4) allows the State to make special provisions in favour of children. Bangladesh has ratified the United Nations Convention on the Rights of the Children (UNCRC) with a pledge to safeguard the rights of the children. Despite repeatedly reiterating its commitment towards the advocacy of child rights, the rights of children begging on the streets are being grossly violated.

The Children Act, 2013 is considered a milestone for the protection of child rights in all spheres of life. Section 71 of the aforesaid Act penalises the employment of a child in begging. Section 85 enumerates institutional care for disadvantaged children. Unfortunately, the Act fails to chalk out a rehabilitation plan distinguishing the children begging in the streets. The Vagrant and Shelterless Person (Rehabilitation) Act, 2011 was passed to rehabilitate people having no fixed abode. However, the Act pays scant attention to child vagrants. It discarded various provisions concerning "child vagrants" from its antecedent Act of 1943. Under Section 10 (3) of the 2011 Act, children of female detained vagrants can stay in the shelter homes till they are seven. Afterward these children will be moved into a children's shelter. Pursuant to Section 18 of the 2011 Act, employment and income-earning source would be created for the detained vagrant person before release.

The Act fails to shed light on ensuring the rehabilitation of vagrant children and ensuring that they do not again end up in the streets. Bangladesh government has been running a programme for rehabilitation and alternative employment of beggars under the Department of Social Services. Though around 2,710 people were rehabilitated in the fiscal year 2017-2018, children often go unnoticed. Children can stay in the shelter homes until their families are traced but no subsequent follow-ups are ensured. Measures are not taken to corroborate their proper care keeping them away from the streets.

The lacunae in the existing laws combined with myopic endeavours have aggravated the barriers for reinstating the children forced into begging by the pandemic. In India, in a public interest litigation filed in Bombay High Court, urgent relief was sought regarding the surge of beggars after the relaxation of lockdown directions. In the light of the pandemic, the petitioner entreated for the rehabilitation of women and children beggars to safeguard them from the virus. In November, the Karnataka State Commission for Protection of Child Rights commenced a child beggary rescue campaign to ensure that no child is forced into beggary and the children already involved are rescued and rehabilitated.

It is high time for Bangladesh to adopt measures before the pandemic lapses more children into begging. An integrated scheme for the identification, rescue, relief, and rehabilitation of child beggars needs to be organised under the National Human Rights Commission. After the rescue, the children need to be placed in a secure and nurturing environment. Adequate relief suitable for the needs of the children needs to be provided. Families of strayed children should be traced and children without families should be taken into shelter homes. Fining or reprimanding the families for employing the children in begging might not be fruitful in the long run. Rather, a holistic approach should be adopted for their rehabilitation. Quality education should be made accessible for these afflicted children and income-generating activities should be conducted with their families. Access to quality education, healthcare coordinated with family reintegration can work as an escape route from begging.

COVID-19 has taken a toll on everyone's life. But no one deserves to wander on the streets, door to door in search of a Samaritan to hand them some alms. Hence, immediate measures need to be taken for curbing the proliferation of child beggars and rehabilitating them.

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loan agreements, doctrine of frustration happens to be legally inapt. This doctrine applies only where performance of contract is impossible, unlawful or could be performed in a significant different way from the contract originally entered into. Likewise, the doctrine of restitution of contract as stipulated in Section 65 and doctrine of contingent contract under Section 32 cannot be applied to bank loan documentations.

Generally, loan agreements disproportionately benefit lenders while all risks are borne by the borrowers. Resultantly, 'force majeure' is not included in the loan documentations. It is argued that 'force majeure' cannot be invoked in the absence of express terms in loan contracts. Nevertheless, the courts and the

LAW NEWS

To prevent air pollution

LAW DESK

On February 4, 2021 the High Court Division of the Supreme Court issued two new directives in response to a writ petition filed by Human Rights and Peace for Bangladesh (HRPB). In the new two directives, the Court ordered the Directorate General of Fire Service and Civil Defence to take required steps to spray the roads with water alongside its regular responsibilities. It also ordered Dhaka North City Corporation and Dhaka South City Corporation to spray the roads as well as the plants on the central reservations and directed Dhaka WASA to supply sufficient water to the city corporations for this purpose.

Pursuant to its responsibilities under Bangladesh Environment Conservation Act 1995, the Department of Environment is entrusted to oversee the air quality. Standards for air quality and pollution have been set out in the Bangladesh Environment Conservation Rules 1997. Other laws are also aimed at preventing air pollution – these include the Bangladesh Environment Conservation Act 1995, the Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013. Some sections of the Road Transport Act 2018 also regulate the emission of harmful gases from motor vehicles. However, air quality of Dhaka city has been

worsening, particularly in light of the reopening of institutions subsequent to the COVID-19 lockdown.

During the hearing of the same petition, the Court previously noted that the air pollution level in Dhaka was very alarming. Right to healthy and sustainable environment has been recognised as a facet of right to life protected under Article 31 of the Constitution in notable Supreme Court cases, the most significant one being *Mohiuddin Farooque v Bangladesh*. The



judiciary has subsequently recognised this right in multiple cases. However, despite notable judicial activism on the matter, matters of environment pollution continue to be a threat to healthy lives of the citizen. It is interesting to note that an appeals court in France recently recognised a sick Bangladeshi individual as an 'environmentally displaced' person noting the level of air pollution in Dhaka.

LAW LETTER

HUMAN TRAFFICKING Intensifying concerns for the society

Human trafficking is increasing in an alarming rate now-a-days in Bangladesh as well as in South Asia. Because of the clandestine nature of trafficking in person and rare prosecutions, crime statistics presents a very low estimate of the incidents of human trafficking. Hence figures that tend to be quoted and cross-quoted in all literature represent undependable data regarding women and children who have been trafficked to other countries from Bangladesh. Surveys regarding the number of women and children being trafficked are not only difficult to collect, but also different sources cite innately different figures. According to a report, 200,000 Bangladeshi women and children are being taken out of the country in last 10 years. At least 20,000 Bangladeshi women and children are trafficked to India and Pakistan and to Middle Eastern states every year. According to another report, 50,000 Bangladeshi girls are trafficked to or via India over the year.

Trafficking in person is now commencing through social media. Traffickers are using social media to convince people and to proliferate their trafficking operations. Traffickers are spreading many rumors and fraudulent advertisements online. With this, most of the countries in the world are being affected by such kind of crimes. Ultimately this situation creates an immense pressure



on the state for protecting its citizens from becoming victims of trafficking.

Human trafficking is a kind of crime that involves several other crimes like smuggling of persons, sexual offences, exploitation of children, among others. While addressing the increased number of human trafficking, the Prevention and Suppression of Human Trafficking Act (PSHT), 2012 has come into effect for restraining and suppressing human trafficking at the earliest possible time and ensuring protection of victims of the offence relating to human trafficking. The Tribunal for the Anti-Human Trafficking Offence has been established with a view

to ensuring speedy trial within 180 days after filing the complaint under section 24 of the PSHT Act, 2012.

Human trafficking is an offence against the humanity and such offences are now under surveillance of many Acts which aim to prevent such offences. In South Asia, rate of offence related to human trafficking is increasing day by day rapidly. States do take steps but in most of the cases, states fail to provide safety to all citizens. It is highly essential to ensure proper implementation of the laws concerning the offences of human trafficking.

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