LAW REVIEW

Mediation at the instance of the court

In the social context of Bangladesh, it turns to be more serious when a party drags his opponent to the premises of courts. In most cases, the mindset of the parties becomes so confrontational that they prefer to continue with legal battle in courts to secure win at any cost. Therefore, mediation hardly works as it is not a mandatory first step before litigation.

KAMAL HOSSAIN MEAHZI

Dispute resolution through Alternative Dispute Resolution (ADR) methods received massive legislative support and recognition in Bangladesh in the last two decades. The amendments made in 2003 to the Code of Civil Procedure 1908 created scope for dispute resolution through the process of mediation and arbitration in sections 89A- 89E.

In the similar vein, the legislature has introduced amendments to the Money Loan Court Act 2003. By an amendment in 2010, sections 22-23 were inserted providing scope for mediation in money-loan cases at two stages. First, after filing a case and upon submission of written statements by the defendant(s), it is incumbent upon the court to refer the case to mediation. If mediation is unsuccessful at the pre-trial stage, the chance for mediation is also available after conclusion of the trial and before delivery of the judgment. It takes place before pronouncement of the judgment and upon joint prayers by the disputing parties.

The main feature of the amended law is that the mediation takes place during proceedings in court mandatorily. However, it is not made as a mandatory first step prior to the initiation of proceedings. After the commencement of litigation, the parties take an adversarial position which minimises the chance of dispute resolution through consensual means. In the social context of Bangladesh, it turns to be more serious when a party drags his opponent to the premises of courts. In most cases, the mindset of the parties becomes so confrontational that they prefer to continue with legal battle in courts to secure win at any cost. Therefore, mediation hardly works as it is not a mandatory first step before litigation. Secondly, the amended law has left no option for the court to apply its discretion to decide whether the dispute can be resolved through alternative means to begin with.

In some instances, dispute cannot be resolved through alternative means, for example, when a party alleges fraud against the other or when there exists high level of animosity between the parties or when a

case is so complex that it requires judicial decision. Thirdly, pursuant to a court order, mediation does not take place under any accredited institution dedicated to providing for mediation service.

Finally, the relevant legislations do not contain any provision providing for a limit as to the fees of a mediator. There is no standard guideline or rules fixing the mediator fees based on the complexity of the subject matter or valuation of a case. The absence of such rules burdens the parties with additional expenses. The situation becomes more complicated when both parties are not equal. The power imbalance between the parties results in a failed mediation.

In light of the discussions above, it can be said that the infrastructure for mediation, at the direction of the court under the amended laws, is not encouraging for ADR users. In a legal proceeding prior to its trial, the disputing parties often view this compulsory mediation as an additional hurdle, an added investment of time and costs with no security of a return. As a result, after the lapse of the statutory period for mediation, the majority of cases return to the normal court system. In the process, it causes further delay in the disposal of cases. And it benefits a party who takes undue advantage of the delay.

In the UK, the Civil Procedure Rules provide support for the use of ADR through case management and sanctions. The court can penalise a party in costs if it unreasonably refuses to attempt ADR, particularly if it is ordered by the court to do so. To support the use of ADR, the Civil Mediation Council has been set up in 2003, which sets standards for training, practice, and also there exists a standard guideline for fees that may be charged for mediation services.

Bangladesh should introduce necessary amendments to the Code of Civil Procedure 1908 and the Money Loan Court Act 2003 to make ADR, in particular mediation, a meaningful practice for dispute resolution.

The Writer is an Advocate, Supreme Court of Bangladesh.

RIGHTS WATCH

Restrictions on strike in essential service sectors

MONSUR ABDULLAH

Strikes are common forms of protest performed by employees in various professions, especially workers, to address grievances and demand fair treatment. However, it is important to note that the government of Bangladesh has the authority to impose restrictions on strikes. Two legislations, namely the Essential Services (Maintenance) Act 1952 and the Essential Services (Second) Ordinance 1958, outline the government's power to prohibit strikes.

These legislations provide the government a wide scope of application. However, certain conditions must be met for private employment. The government can declare private employment subject to these legislations if it deems it essential for defence, security, public order, or the maintenance of crucial supplies or services for the people of Bangladesh. Any such declaration is valid for a maximum of six months, unless extended by an order. Under the Essential Services (Maintenance) Act 1952, the government can also restrict employees engaged in such employment from leaving their workplace or specified locations mentioned in the order.

Singly or collectively disobeying any orders at the workplace or inciting others to do so, refusing or neglecting duties, leaving or staying absent from the workplace without reasonable cause, or disobeying prohibitions on leaving a place without authority permission are considered offences under these legislations. Besides, the Act of 1952 also holds employers accountable. If an employer dismisses an employee without reasonable cause or shuts down the establishment preventing work, this is to be deemed

a breach of law. Furthermore, aiding or encouraging the commission of an offence under this Act is also considered to be a contravention of law.

Offenders proven guilty under this Act may face imprisonment for up to one year and fines of any amount. If the accused is a director, manager, secretary, or officer of a company or corporate body, he/she can be held equally liable unless he/she can prove their lack of knowledge or demonstrate due diligence in preventing the offence.

Ongoing strike means that employees collectively refrain from working regardless of the orders of the employer or superior officer in protest of any injustice or inconsistency in the workplace or to establish a fair right. But such activities are treated as punishable offences for some class of employees in the above legislations, which actually restrict their right to strike.

Although the Constitution of Bangladesh prohibits forced labour (art 34), it allows exceptions for laws imposed to pursuit public purposes. Similarly, while art 36 guarantees freedom of movement for the citizens of Bangladesh, reasonable restrictions imposed by law in the public interest are permissible. Therefore, the Essential Services (Maintenance) Act 1952 and the Essential Services (Second) Ordinance 1958 can only be applied in the interest of achieving public objectives. If these legislations are used against public interest, they would violate the constitution.

The government is currently planning to replace these two legislations with a new law. The proposed bill provides a comprehensive list of services classified as essential. It empowers the government to prohibit owners from suspending work due to reasons like raw material shortage or stockpiling of goods or equipment failure, which may lead to layoff. Violating the restrictions outlined in the bill can result in a maximum of six months imprisonment, a fine of Tk 50,000, or both.

The Essential Services Bill 2023 has been sent to the Ministry of Labour and Employment-related Parliamentary Committee for approval. It is hoped that the new law will not undermine the civil, political, and constitutional rights of the citizens.

The Writer is a Student of Law, Bangladesh University of Professionals.

LAW EVENT

CSGJ monthly lecture on the legal implications for Bangladesh hosting the refugees

On May 27, 2023, Center for the Study of Genocide and Justice (CSGJ) at the Liberation War Museum organised the ninth lecture of its monthly lecture series where Naureen Rahim, a PhD Research Fellow at the Faculty of Law, University of Oslo, gave an extensive talk on the topic 'Bangladesh as Refugee Hosting State: Legal Implications in Dealing with the Rohingyas'.

Before delving into the issue of the present Rohingya refugee crisis persisting in Bangladesh, Ms. Rahim first discussed about the historical narrative of refugees in Bangladesh. She briefly spoke about the plight of the Bengali refugees who fled to India during the 1971 Liberation War and the post-war government's dilemma regarding the Urdu speaking minorities in Bangladesh. According to her, although the Urdu speaking minorities have gradually been granted electoral right and now being treated as citizens, they still face social discrimination.

Sharing the research findings from her ongoing PhD fieldwork, Ms. Rahim opined – with reference to the UNHCR – that aside from the Rohingyas, Bangladesh is also a host to refugees from other nationalities such as Iran, Iraq and Afghanistan.

Regarding Bangladesh's decision not to ratify the 1951 Refugee Convention and its 1967 Protocol, she stated that no official document contains any justification on the non-ratification. Ms. Rahim highlighted how the limited involvement of South Asian States during the drafting of the 1951 Refugee Convention has led them to reject this Eurocentric refugee recognition practices which was drafted after the second world war to meet the European refugee crisis. However, it remains unclear whether Bangladesh's decision not to ratify the Convention and its Protocol is influenced by this historic narrative or not.

On the contrary, Ms. Rahim is of the opinion that despite not being a party to the 1951 Refugee Convention, Bangladesh is

hosting the Rohingya Refugees with full respect to the international protection regime. She reflected in one judgement of the Supreme Court of Bangladesh (*RMMRU v Government of Bangladesh*, 2017) where the Court observed that although Bangladesh has not ratified the 1951 Convention, this Convention has by now become customary international law through state practice making it binding upon all countries of the world irrespective of whether a country has signed, acceded or ratified it.

Despite being a non-signatory state to the Refugee Convention, Bangladesh has been in association with the UNHCR's Executive Committee (ExCom) since 1995 and also with the Global Compact on Refugees (GCR) since 2018.

Ms. Rahim also talked about the lack of national law dealing with refugee crisis in Bangladesh. This gives rise to issues regarding how civil and criminal disputes are being resolved within and outside the camp areas. At present, the Constitution of Bangladesh and the Foreigners Act 1946 are the major laws that are being used for dealing with such issues whereas if the dispute concerns eruption of violence within the camp, the authorities apply the Penal Code 1860.

Lastly, Ms. Rahim discussed about the longstanding repatriation problem of the Rohingya refugees drawing upon the recent negotiation between all the concerned parties. Finally, the lecture was concluded with an active Q/A session.

–From CSGJ, Liberation War Museum.

YOUR ADVOCATE

Rights of the minority shareholders

This week Your Advocate is **Barrister Omar Khan Joy**, *Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, family law, labour law, land law, constitutional law, criminal law, and IPR.*

Query:

I have recently bought some shares at a company. However, my opinions are not being considered as I am only a minority shareholder. Are there any rights for minority shareholders according to relevant laws?

Jahid (Anonymous)

Response:

Thank you for your query. For your information, company matters in Bangladesh are primarily governed by the Companies Act 1994. The rights of the shareholders in a company are according to the number/percentage of shares they possess. Thereby, a shareholder with fewer shares would have lower degree of control and authority over the affairs of the company in contract with shareholders holding larger amount of shares. In simpler words, majority shareholders naturally have more rights to make decisions for and manage the company than minority shareholders as reflected in both the forums of Board of Directors and general meetings of the shareholders. Thus, the decisions taken by the majority can be contrary to the view of the minority shareholder(s). While the majority have more rights and control over the management of the company, the entitlement as a result of their investments comes with higher risks as well.

Section 233 of the Act protects the minority shareholders from actions of the majority that may be 'prejudicial' to one or more shareholders of the company, or, which may discriminate against the interest of any shareholder. However, the protection under section 233 of the Act is conditional. As per section 195 of the Act, the protection under section 233 is subject to the minority shareholder/s holding a minimum of 10% of shares in the company if the company has share capital, and in case the company has no share capital, the minority shareholders having not less than one-fifth the number of a person on the company register of members. Therefore, under the first condition, if a minority shareholder holds, for example, 7% shares, s/he will not be eligible for protection under section 233.

In your case, the first question that arises is whether you were aware of the fact that you would have fewer rights if you become the company's minority shareholder. Companies usually do not vest such decision-making powers to their minority shareholders. It should be articulated in the Articles of Association of the company that you are the shareholder. If there are no decision-making rights, you can bring no claim against the majority for disregarding your opinion in the decision-making process/voting. Your right to file a complaint to the court under section 233 only arises if the majority acts in any manner that is prejudicial (harmful) or discriminatory to you, subject to the conditions in section 195 of the Act. If the majority acts in a prejudicial and/or discriminatory manner and one of the section 195 conditions is met, you can make an application under section 233 to the High Court Division of the Supreme Court of Bangladesh.

However, with the increase in the number of minority shareholders in companies these days, it is best to take preventative measures to protect your rights, such as having a shareholder's agreement or stipulation of further conditions in the Articles of Association prior to subscribing the shares.

I hope my answer will help you find a solution to the issue.

Send us your law related queries to dslawdesk@yahoo.co.uk