

Report on a reference by the Government on a proposed Act named "Secured Transactions Act, 200-----".

This is a reference under 6 (Ena) of the Law Commission Act, 1996 to examine and recommend whether a law could be enacted titled "Secured Transactions Act" on the line of the draft bill prepared by JOBS.

In the reference sent to the Commission under memo no. 710-Ain, dated 17/10/2002 of the Ministry of Law, Justice and Parliamentary Affairs, Legislative Drafting Wing, it has been stated that in our country movable property is not considered as source of loan in trade and commerce. Apart from mortgage the other movable property based capital generation sources, such as, loan on equipment, loan on stock in trade, loan on expected income, etc. have got no special utilisation at all. As a result, in our country wider scope of getting loan in trade and commerce is very limited.

It has been further stated that any scope for generation of fund with the moveable property will mobilize greater capital in trade and commerce which in turn will help to expand the trade and commerce.

In the said reference it has been also stated that in the absence of a law regulating movable property based loan, asset and liability of the borrower and securing interest of the borrower financial institutions of home and abroad are not coming forward to give loan to the small and medium entrepreneurs.

JOBS an USAID affiliated organization, considering importance of the matter prepared a draft bill and sent the same to the Government expecting its positive response regarding the issue.

In the aforesaid backdrop the reference sent to the Commission includes two points:

- (a) whether a law could be enacted incorporating the provisions proposed by the JOBS in the draft bill;

- (b) if the proposition in point (a) is found in the affirmative the recommendation of the Commission regarding the law to be enacted and also a Bengali translation of the bill therefor, have been solicited.

A plain look into the draft bill shows that it has been designed to secure debt with moveable property including pledge, hypothecation, hire-purchase, lease as security, assignment and lease for a period exceeding six months.

Under the existing laws Banking Companies sanction loan against lien, pledge, mortgage and hypothecation. Apart from that Banking Companies under consumers credit scheme finance hire-purchase. Banking companies also allow assignment of accounts when borrower as against work-order undertakes that the bill will be paid to the Bank.

At present when Banking Companies sanction any loan in favour of any public or private limited company or firm registered with Registrar of Joint Stock Companies and Firms of Bangladesh (RJSC) then for securing the loan apart from mortgaging the property by way of registration with the office of Sub-Registrar the limited companies or registered firms are required to execute charge documents with the office of the Registrar of Joint Stock Companies and Firms of Bangladesh and when the same company or registered firm wants to take any further loan from any other Banking Company then subject to valuation of mortgaged property in the context of total amount of loan a second charge may be created. In this way 3rd or 4th charge and so on subject to securing capacity of mortgaged property may be created. However, for creation of any 2nd charge by the 2nd Banking Company or Financial Institution no objection certificate from 1st charge holder Banking Company or Financial Institution is required. In the normal course registration of the mortgage or charge with the office of the Registrar of the Joint Stock Companies and Firms of Bangladesh is necessary in order to secure the charge or mortgage.

The information forming basis of this report about procedures followed by the Banking Companies, Financial Institutions and Marketing Companies while sanctioning loan securing both moveable and immoveable properties has been

gathered from discussion at the time of deliberations made with the officials of the aforesaid institutions on different banking laws.

The Banking Companies while financing any hire-purchase, in most of the cases it is financed for purchasing movable property and in such financing the Banking Companies sanction loan without any collateral. However, a guarantor holding any class-I job in any governmental organisation is required although there is flexibility in the same by some Banking Companies. But it has been gathered that the Banking Companies secure the loan of hire-purchase by obtaining post-dated cheques from the borrowers and in case the borrower fails to pay any installment the Banking Companies file case against him under the Negotiable Instruments Act, 1881 and since in that Act in case of bouncing of cheques there is provision for awarding sentence of punishment and fine to the amount involving the cheque the borrower usually does not default. It has been also gathered that in the consumer credit scheme the recovery rate of the Banking Companies is about 98.5%.

There are now considerable number of Leasing Companies in Bangladesh which are involved in lease financing and hire-purchase. In lease financing the Leasing Company pays for the equipments leased to the borrower and till payment of the entire claim of the Leasing Company it has the charge against the equipments.

At present there is no specific law for Leasing Companies for operation of their business and in absence of such law the Leasing Companies are now operating their business under the coverage of the Financial Institutions Act, 1993.

In the case of hire-purchase the procedures followed by the Banking Companies and the Leasing Companies are the same.

From the above discussion it is evident that under the existing laws both Banking Companies and Leasing Companies are authorised to sanction loan by securing both movable and immovable properties.

At present many Banking Companies are in a very bad financial position because of increase of the classified loans. The same is the case also in respect of some Leasing Companies.

For early recovery of the classified loans the Money Loan Court Act, 1990 (অর্থ ঋণ আদালত আইন, ১৯৯০) was enacted but during its journey of thirteen years it could achieve little towards recovery of classified loans. That necessitated enactment of a new Money Loan Court Act in 2003 and it came into effect on 1st May 2003 although 2 sections of this Act namely sections 46 and 47 concerning special provision and time limit in respect of institution of suits and restriction in respect of imposition of claim shall come into force from 1st May, 2004. The new Act provides for alternative dispute resolution by way of settlement conference, mediation which are new and said to be epoch-making.

After enactment of Money Loan Court Act, 2003 for developing awareness amongst bankers, judges, lawyers, borrowers and different stakeholders as regards alternative dispute resolution different seminars and workshops were organised and are being organised both by the Banking Companies and Leasing Companies. The Banking Companies are of the view that the newly enacted Act is complete in itself and will greatly help the Banking Companies to realize their outstanding dues.

On the other hand the Leasing Companies say that the Act will better serve the purposes of the Leasing Companies if by bringing about amendments in sections 2 & 12 of the Money Loan Court Act, 2003 the definition of "lease" and act of "right to repossess" are inserted in those two sections.

In the proposed bill there has been recommendation for establishment of the enlistment office whose job will be to register each individual case of loan with moveable property and here also provisions of first charge, second charge as well as obtaining no objection certificate have been kept.

It appears that in section 7 of the proposed Act it has been stated that a charge agreement may be executed anywhere without notarial approval or authentication by any person or authority and shall not be subject to stamp duty or any other tax.

This will occasion deprivation of revenue earning of the government which is unreasonable and it will also be conflicting with the Stamp Act, 1899 and the Transfer of Property Act, 1882.

Experience shows that more counters you open, more the chance of corruption and red-tape. Instead of helping the transactions, they are likely to create more difficulty given the nature of our people.

Section 54 of the Transfer of Property Act, 1882 requires that sale of any immovable property of the value of 100 taka and upwards or in the case of a reversion or other intangible thing can be made only by a registered instrument.

Section 30 of the Stamp Act, 1899 requires that any person receiving any money exceeding 20 taka in amount, or any bill of exchange, cheque or promissory note for an amount exceeding 20 taka, or receiving in satisfaction or part satisfaction of a debt any moveable property exceeding 20 taka in value, shall, on demand by the person or delivering such money, bill, cheque note or property, give a duly stamped receipt for the same.

Schedule 1 of the Stamp Act, 1899 requires that for executing any deed of loan stamp duty shall have to be paid at the rate fixed by the government from time to time.

It appears that save and except establishment of an enlistment office for maintaining records of loan of moveable property the other aspects which have been proposed in the bill have already been incorporated in the existing laws of the land, that is, the Transfer of Property Act, 1882, the Money Loan Court Act, 2003, Banking Companies Act, 1991 and the Financial Institutions Act, 1993, the Contract Act, 1882, the Sale of Goods Act, 1930 and Negotiable Instrument Act, 1881.

We have earlier discussed that if definition of 'lease' and the act of 'right to re-possess' are included in sections 2 and 12 of the Money Loan Court Act, 2003 that would to a great extent secure the position of the Leasing Companies in realizing their advances.

The proposed Act is totally silent as to what mechanism the Banking Companies, Financial Institutions or Leasing Companies would apply for realization of the money advanced for securing debt with moveable property. It is palpable that in the absence of any legal forum for such realization the amount of classified loan would further increase resulting in a negative impact on the economy of the country.

When our experience shows that sanctioning loans against moveable property with a guarantor and also by obtaining post-dated cheques is fully securing the position of the Financial Institutions, Banking Companies and Leasing Companies then it is advisable to secure the loan against moveable property by obtaining post-dated cheques and in this respect necessary amendment may be brought about in Banking Companies Act, 1991 and Financial Institutions Act, 1993 if the existing mechanism is found to be insufficient.

As the Money Loan Court Act, 2003 is complete in itself in realizing money advanced by way of lien, pledge, mortgage and hypothecation so it is felt that if amendments of the nature as mentioned earlier are brought about in the said Act that would well serve the purpose for which the Act has been proposed to be enacted.

For achieving the objectives discussed earlier some amendments are required to be brought about in the Money Loan Court Act, 2003 in the following manner:

1) After section 2 (gha)(4) a new serial no. 5 shall be inserted which shall run as follows:

"(5) lease by which any Banking Company, Financial Institution or Leasing Company as being owner of any moveable or immoveable property allows another person to use it for specified time in return for rent."

2) After section 12(3) a serial no. being (ka) shall be inserted as follows:

"if any Banking Company or Financial Institution sanctions loan by way of lease and hire-purchase of any moveable or immoveable property then any of the institutions stated above in case of default

by the lessee or hire-purchaser to pay any instalment shall enable them to re-possess the moveable or immoveable property leased by them earlier."

There are now many marketing companies in Bangladesh of which mention may be made of three namely, Singer Bangladesh Ltd., Butterfly Marketing Ltd. and Rangs Ltd. which are involved in hire-purchase business (loans against moveable property) without obtaining any security from the borrower. The requirements of these companies are that as security of loan given in the name of hire-purchase there should be two guarantors holding class-1 government job and in addition to that an agreement to be signed by which a charge to be created authorising the marketing company to re-posses the movable property in case the borrower fails to pay the instalment. On being asked the marketing companies reveal that their monitoring and supervision are so effective and strong which ensured recovery @99.50%. The examples of the Marketing Companies are good instances before us that with effective management and supervision with having responsible guarantors the recovery could be ensured to the optimum level. These instances are lessons to learn that without establishing any enlistment office the recovery of debts could be ensured with the sincerity and honesty of the persons handling the affairs of hire-purchase.

At present immediately after advancing loan against immoveable property to any public or private limited company or registered firm a charge is created by the office of the Registrar of Joint Stock Companies and Firms of Bangladesh with the registration of the document. This registration serves as a record and in that consideration any loan sanctioned in favour of any public or private limited company or registered firm is double secured. Firstly, it is secured as the mortgaged property is registered with the office of the sub-Registrar and secondly, it is secured as it is registered with the Registrar of the Joint Stock Companies and Firms of Bangladesh.

The registration with the office of the Registrar of Joint Stock Companies and Firms of Bangladesh is not necessary when loan is sanctioned in favour of a private individual against his moveable or immoveable property. If system of such registration could be developed that would secure the loan in a better way and stop the scope of getting second loan from any other Banking Company or Financial Institution by mortgaging the selfsame moveable or immoveable property. If with a view to safeguard the interest of the Banking Companies and Financial Institutions the government decides to develop a system of registration of the deed of loan for the purpose of creation of charge in respect of any moveable or immoveable property of private individual then a decision shall have to be taken who will carry out such job. It is advisable to give such job to the office of the Registrar of Joint Stock Companies and Firms of Bangladesh as already this office is doing alike job. However, since it would be a huge job it would require recruitment of additional manpower in the said office for which the government may have to incur substantial amount of expenditure.

Considering this reality if provision is made requiring any borrower obtaining loan securing moveable or immoveable property shall have to furnish an affidavit affirming that the property against which charge will be created by the Banking Company or Financial Institution is not mortgaged or hypothecated to any other Banking Company or Financial Institution. The Banking Company or Financial Institution also shall not sanction any loan of any moveable or immoveable property against which charge has been created unless no objection certificate is issued by the 1st charge holder Banking Company or Financial Institution. This provision will be effective and shall also act as safeguard against registration if penal provision is incorporated for contravention either by borrower or by any officer of Banking Company or Financial Institution.

For achieving this an amendment by way of insertion is required to be brought about in the Money Loan Court Act, 2003 in the following manner:

(1) After section 12(3)(ka) a serial no. being (kha) and (ga) shall be inserted as follows:-

"every borrower at the time of applying for loan shall furnish with his application an affidavit affirming that the moveable and immoveable property against which charge will be created for sanctioning of loan is not mortgaged or hypothecated to any other Banking Company or Financial Institution."

"if any borrower applies for or obtains any loan securing moveable or immoveable property suppressing the fact of charge against the said moveable or immoveable property by any Banking Company or Financial Institution and if any officer of the Banking Company or Financial Institution knowing the fact of 1st charge by it issues a no objection certificate shall be liable to suffer imprisonment which may extend upto 7 years and shall also be liable to pay fine upto Tk. 1,00,000/-".

Recommendations

- 1) We, accordingly, recommend that an enactment in accordance with the proposed bill may not be necessary.
- 2) The Government may, however, consider this report and bring about amendments in the existing Money Loan Court Act, 2003 in the manner suggested provided the reasons given are found to be acceptable for not enacting a law as proposed.

Justice A.K.M. Sadeque
Member

Justice A.T.M. Afzal
Chairman