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Artha Rin Adalat Ain 2003: A Review

Forrukh Rahman*

This article is an endeavor to identify some practical problems prevailing in the Artha Rin Adalat Ain 2003 ("ARAA") and its enforcement. The problems are analysed below:

Two Tier System

It is widely acknowledged that procedural loopholes are partly responsible for the inefficiency of the court system. The Code of Civil Procedure (1908) allows for numerous applications, counter-applications and special leaves by both the plaintiff and the defendant. Evidence must be presented orally, and hearings tend to be long. Judges have wide latitude in determining whether hearings should be adjourned or new claims added to the plaint.

ARAA made an effort to avoid the above problems by introducing its own procedure in some respect and at the same time failed to do so in may respect. Generally, recovery of loan does not demand detailed trial for recovery, as there are relatively few issues are in dispute. Rather execution should be given more importance. At present, under ARAA a separate suit is filed for the execution of the decree obtained. This is not necessary. The Artha Rin Adalat can be made into a quasi-legal tribunal like India by creating a provision for recovery officer in the ARAA for directly executing the decree without the need for filing another suit for it. Further, the main suit can follow a streamlined summary procedure. Evidence can be accepted in writing so that hearings can take shorter amount of time.

Time Killing Mechanism

A recovery proceeding is generally initiated when all out of court effort fails. Although section 21 of ARAA invited settlement conference in the judicial process, in most of the cases, being cases of willful default, the borrowers abuses the system. Killing time is quite often the sole aim of the defendants in a recovery proceeding pending against them. They abuse the system by willfully going though the settlement conference procedure with no intention of settlement. They take advantage of this stage by holding the suit and by taking a transfer of the suit to another Court. As a result, they drag the hearing of the suit.

The banks and financial institutions (FI) do not want to bring a positive result at this level. They rather prefer to obtain a decree to create pressure upon the judgment debtor(s) through execution of proceedings.

It should be left to the discretion of the parties to decide whether they would like to settle the dispute themselves out of court as under section 38 & 45. Section 21 is not likely to serve its purpose.

Taking Possession

Bank/FI faces problems to take possession of the mortgaged land after execution of a particular case. No rule as to taking possession of the land given to the bank/FI through a certificate under section 33(5) and 33(7) when the land concerned could not be sold in auction. This causes problem in the disposal of the land, when the bank can not take possession by themselves. The property does not have much of a market value unless vacant possession is given to lending institutions. There is need to take suitable measures in this regard.

ARAA should be amended for FIs. In case of lease it is the possession of the property, which is most important. FI in particular face the problem of recovery of possession of the asset from the defaulted borrower under a lease agreement where FI is the legal owner of the asset. Sometimes in some unpleasant situations, FI has no other option but to engage private agencies to recover possession of such assets.

The ARAA may help lender to recover the asset by sending police subject the payment of fees to the court. Alternatively a direct provision can be created in ARAA empowering the lender to recover the asset with the help of the police or similar agency.

Judge-Population Ratio

Most civilised countries spend huge amount on the building capacity of the judiciary. As a result of the neglect by the Governments, the judge-population ratio in Bangladesh is one of the lowest in the world. The ratio should be immediately raised to at least 100 judges per million. The reason why we do not have more judges across the board is that the government is simply not willing to provide the finances required. The Court should have not more than 30 cases on board on any given date and there should not be more than 800 cases pending before it at any given point of time.

However, at present, the court has at least a few thousand cases at any given point of time. There is a provision in the ARAA that a loan default case is to be settled within six months, but it is not becoming effective. When there was no such provisions relating to time limits for settlement of loan cases during 1960s, yet the cases were then used to be settled within one to three months. But, now even after having legal provisions, the time limits for settling loan cases are not being maintained.

There should be adequate courtroom facilities. If there are insufficient courtroom facilities for Judges, they can not render full time court work. For efficient and effective functioning of the judiciary, there is a need for proper atmosphere.

Ethics

Sometimes, the legal processes have been observed to be delayed because of lack of Cooperation of bank officials and legal advisers. The parties, which are involved in lawsuits, are plaintiff or complainant, defendant, lawyer and judges. Without having proper ethics, cooperation and sincerity of the involved parties, not only the legal process will be delayed, but also to be obstructed. The problem of loan recovery cannot be addressed only by undertaking legal reforms, at the same time the issues like ethical standard and accountability of the concerned individuals and the overall law and order situation must be improved. Unethical practices of the personnel involved in the process, political lobbying by influential defaulters makes the entire judicial mechanism ineffective.

Creation of Mortgages since 2004 Amendments in Laws

Forrukh Rahman

A mortgage is a transfer of an interest in specific immovable property as security for the repayment of money advanced or to be advanced by way of loan, or an existing or future debt etc. The right created by the transfer is accessory to the right of recovery of debt. The nature of the interest transferred depends on the form of the mortgage. On the other hand, a charge is the creation of a right of payment out of an immovable or movable asset. It is not a transfer of interest.

Until amendment of the Transfer of Property Act 1882 and the Registration Act, 1908 in 2004, "Further Charge" on mortgaged property for enhanced loan used to be created through creating mortgage by deposit of title-deeds with a memorandum under section 59 of the Transfer of Property Act 1882, known as equitable mortgage, coupled with a Deed of Agreement for Further Charge, for the entire loan amount on condition that the registered mortgage already created would not be redeemed prior to the redemption of equitable mortgage.

The amendment made provision for compulsory registration of the memorandum creating equitable mortgage by deposit of title deed. Registration of Memorandum of deposit of title deed involves payment of registration fees on the enhanced amount under new section 78A of Registration Act 1908. Additional stamp duty is also payable on the enhanced amount under Article 40 of the Stamp Act 1899.

Under the present legal framework, the lender has the following option if the loan amount is enhanced on the same security: (a) Registered second mortgage may be created for the amount enhanced only. (b) Equitable mortgage by deposit of title deed with registered Memorandum may be created on the enhanced amount as used to be the practice, however, this will attract same registration fee and stamp duty as legal mortgage. (c) Creation of "Further Charge" only by executing and registering (Under section 17 (1)(b) of the Registration Act 1908) a "Deed of further Charge" under section 100 Transfer of Property Act, 1882. This also involves payment of Stamp duty under Article 32 of the Schedule I of the Stamp Act 1899.

The Redemption of the existing mortgage for the original loan and thereafter creation of fresh mortgage on the whole amount (original loan and also enhanced loan) would be double taxation from the customer's perspective paying for the mortgage on the original loan amount for which he has already paid. This option therefore may not be preferred.

The Sub-Registrars however generally decline to register equitable mortgage, option (b) above, on the plea that since the fees for registration has been reduced significantly, equitable mortgage should not be allowed. They also refuses second mortgage, option (a) above, of the same property for enhanced loan amount only. The same problem occurs when a customer approaches for enhancement of the loan facilities under same sanction letter by providing new collateral.

Under the present legal framework, none of the above denial seems to be tenable and may be challenged under Section 72 of the Registration Act 1908.

This newsletter is an effort to contribute towards the creation, development and maintenance of standard rules & procedure in order to facilitate smooth commercial operation in the country. The views expressed in the articles of this newsletter are of the author's own. Any comment on the articles is welcome. A free copy of the monthly newsletter can be obtained via email. Please contact via rahmansc@gmail.com with email address.

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