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The List of "Defaulting Borrowers" and Related Issues

Forrukh Rahman*

Under Section 27 Ka Ka of Bank Company Ain 1991("BCA") a list of defaulting borrowers is prepared by banks and financial institutions ("FIs"), which are distributed by Bangladesh Bank to banks and FIs. Since the inclusion of someone's name in the list has serious consequences e.g. non-availability of further loan etc., it is often challenged in the court by way of writ petition. It is being observed from various judgments that the petitioners were *able to delete their name* from the list by obtaining court orders. It is important to know how a flawless list can be prepared by commercial banks and FIs and distributed by Central Bank after observing due diligence in order to avoid huge number of litigations. In addition to that whether the power vested to the Central Bank under BCA and court's interpretations of related statutes are satisfactory or not, should be discussed.

Who is a "Defaulting Borrower"?

The term "*Defaulting Borrower*" is defined in Section 4 Ga Ga of BCA as any *person* or *institution* from whom or from *whose interested institution* any advance, loan or part of loan or interest on loan is "*overdue*", as defined by Bangladesh Bank, for six months. Provided that a public limited company shall not be taken as *interested institution* unless the *defaulting borrower* is a director or holding more than 25% share in that company. Any other institution shall not be taken as interested institution unless the defaulting borrower is a director or holding more than 20% share in that institution.

The term "*Overdue*" is defined in the Master Circular, BRPD Circular No. 5 dated 05 June 2006, relating it to the nature of the credit facilities granted. The Circular states as follows: "(i) Any Continuous Loan if not repaid/renewed within the fixed expiry date for repayment will be treated as past due/overdue from the following day of the expiry date. (ii) Any Demand Loan if not repaid/rescheduled within the fixed expiry date for repayment will be treated as past due/overdue from the following day of the expiry date. (iii) In case of any installment(s) or part of installment(s) of a Fixed Term Loan (not over five years) is not repaid within the fixed expiry date, the amount of unpaid installment(s) will be treated as past due or overdue from the following day of the expiry date. (iv) In case of any installment(s) or part of installment(s) of a Fixed Term Loan (over five years) is not repaid within the fixed expiry date, the amount of

unpaid installment(s) will be treated as past due/overdue after six months of the expiry date. (v) The Short-term Agricultural and Micro-Credit if not repaid within the fixed expiry date for repayment will be considered past due/overdue after six months of the expiry date.”

Since defaulting borrowers are a special class of borrowers, it is important to see how the term “borrower” is defined. It is not defined in BCA. Rather it is defined in Article 42 (b) of Bangladesh Bank Order 1972 (“BBO”) as “any person to whom any credit limit has been sanctioned by any banking company, whether availed of or not, and includes- (i) in the case of a company or corporation, its subsidiaries; ... (iii) in the case of a firm, any partner thereof or any other firm in which such partner is a partner; and (iv) in the case of an individual, any firm in which such individual is a partner.” It is questionable whether this definition should explain the words “any person” as used in the definition of defaulting borrower. Since no definition is provided in BCA and it also preserves all other statuses unless it contradicts with its provisions, there should not be any problem in using this explanation. It can therefore be submitted that the defaulting borrower shall also include any subsidiary of any company, any partner of any firm etc.

However, the guarantors of loan are not included in the definition of borrowers. The guarantors are simply defined as debtor. Section 5 (Sha) of BCA defines “Debtor” as “a person, company or institution that takes any financial benefit by means of profit and loss sharing basis, purchase, lease or any other means and this includes any guarantor”. This suggests that a guarantor cannot be a defaulting borrower.

For the above definition it reveals that under the present law the name of a Guarantor of a loan cannot be inserted in the defaulting borrowers list although he remain responsible for the loan as a “debtor”. His name may appear in the conventional credit information report with the nature of the guarantee as under Article 42-45 of Bangladesh Bank Order 1972. The same view is also expressed in Mustafa Kamal vs. Bangladesh Bank. 11MLR (HC) 2006.

As stated in the section 27 ka ka of BCA the Directors of a “defaulting borrower” company is also a defaulting borrower. Similarly, a Shareholder of more than 25% of shares of a “defaulting borrower” public limited company (20% in all other cases) is also a “defaulting borrower”. However, Chandpur Jute Suppliers Vs. Subordinate Judge 2 BLC 49 casts some doubt on this simple clarification. The court stated “It is not the intention of aforesaid provision (section 27 ka ka of BCA) to classify a director who was not instrumental in taking the loan and also not responsible for mismanagement of the affairs of the company to classify him as the defaulting borrower”. This interpretation of the Honourable Court seems problematic as it failed to take into account the definition of a “director” given in the Companies Act 1994. Section 2(f) of the Companies Act 1994 states “Director includes any person occupying the position of director by whatever name called”. The definition seems strict granting no exemption to any one. This approach is also desirable and it seems that Parliament did not want to exempt any one for the mismanagement of the company due to his omission or non-involvement.

Defaulting Borrowers’ List vs. Credit Information

The credit information report is prepared under BBO is often confused with the list of defaulting borrower prepared under BCA. Although both reports are submitted to Bangladesh Bank, they are different. Under Article 42 (c) of BBO “Credit Information” is defined as “any information relating to: (i) the amounts and the nature of loans or advances and other credit facilities granted by a banking company to any borrower or class of borrowers; (ii) the nature of security taken from any borrower for credit facilities granted to him; and (iii) the guarantee furnished by a banking company for any of its customers”.

The credit information report helps Central Bank and also various national and international organizations to form monetary and other economic policy. The data is also very useful for banks and FIs for credit approval purpose. The credit information report neither prohibits nor approves any sanction of loan. Further, the credit information report is generally treated as confidential.

On the other hand, banks and FIs are not allowed to sanction new loan to someone whose name is shown in the defaulting borrower’s list.

The list prepared under section 27 Ka Ka of BCA is a separate duty of the banks and also Central Bank under BCA. Further, the list does not give any credit information rather it provides information relating the borrower. There is no obligation on Central Bank to treat the list as confidential.

At present the Credit Information Bureau (CIB) is responsible for the collection and distribution of the both report. It is being observed that the distinction made above between the two reports is not present in practice. For example, the list of defaulting borrowers is taken as confidential whereas no such obligation is imposed by BCA.

Preparation and Distribution of the “Defaulting Borrower’s List”

Since the list of defaulting borrowers is primarily supplied by the commercial banks and FIs to the Central Bank, the commercial banks and FIs should carefully identify the person whose name should appear in the list of defaulting borrower based on the legal analysis as provided above in this article.

Further, special caution should be taken in case of directors and *shareholders* of a defaulting borrower company. Since the Companies Act 1994 made no distinction amongst directors, all directors may be listed as defaulting borrowers, if necessary. The principle of *Chandpur Jute* case may therefore be ignored. If the issue is challenged in the court, sincere effort should be made by the counsel engaged to alter the decision citing the provisions of the Companies Act 1994. Further, validity of the resignation of any director and transfer of shares by any shareholder under section 27 ka of BCA (Duty to obtain NOC from the lender) should be confirmed. If no such NOC is obtained, the name may be inserted in the list since the resignation or transfer is not valid.

In order to be in the safe side, the banks and FIs may insert a term in the sanction letter or the customers account opening form regarding disclosure of information to Bangladesh Bank and by Bangladesh Bank to other banks and FIs under BBO and also under section 27 Ka Ka of BCA etc.

When Bangladesh Bank receives the list from the banks and FIs, it should follow some *routine procedure* before distributing it to banks and FIs in order to avoid litigations. Bangladesh Bank should give a *show cause notice* to the defaulting borrower as to why his name should not be inserted in the “defaulting borrowers” list and also inform him the future steps will be taken against him under section 27 Ka Ka (2) of BCA (i.e. providing the list to other banks and FI) and the consequences which will follow once his name is inserted into the list as stated in Section 27 Ka Ka (3) of BCA (i.e. no further loan) and Article 12 of the Representation of People’s Order 1972 (i.e. disqualified as a candidate in the general election). Issuance of show cause notice is a requirement of natural justice and it applies even though there *may be no positive words* in the statute requiring application of this rule. [*CIT vs. Fazlur Rahman* 16 DLR (SC) 506]. The borrower may be asked to give written reply within seven to fifteen days. If no reply is received the name may be inserted in a final list for the purpose of distributing. Once a reply is received, Bangladesh Bank should look into the validity of the claim and decide accordingly.

As stated above, the question of confidentiality does not apply here. The borrower is not a *third party* to the transaction. Further, such disclosure to the borrower may be stated as justified under the famous *Tourneur case*.

It seems that section 27 Ka Ka (2) of BCA requires Bangladesh Bank to distribute the list of “defaulting borrower” as received from the banks and FIs without any modification. This should not be the case, as being a public body Bangladesh Bank is exposed to writ jurisdiction and is made responsible for any mistakes committed by banks and FIs. The law may be amended so that it allows Bangladesh Bank to carry out obvious correction and desired *modification* based on the reply received from the borrowers.

Conclusion

A number of Writ petitions are pending before High Court involving insertion of someone’s name in the

defaulting borrower's list. The petitioners often challenging the Constitutional validity of Section 27 Ka Ka of BCA or claims that he has not been given an opportunity of being heard or the decision of inserting his name in the list is ultra vires or illegal etc. The High Court already passed a judgment upholding the constitutional validity of the section. The other allegation can only be met if the commercial bank and FIs supply a sound list to the central bank and central bank also carry out such due diligence e.g. issuance of show cause notice to alleged defaulting borrower, carrying out corrections of mistakes in the list etc. Such due diligence should be able to reduce the number of litigations because many borrowers would not feel vulnerable or sense arbitrariness as he was being informed and asked to show cause. Further, since there will be no merit in the petitioner's case, they will automatically be deterred from filing writ petitions. IN addition, Section 27 Ka Ka (2) of BCA may be amended. The new section may state that Bangladesh Bank need to issue show cause notice to each borrowers whose name is supplied by banks and FIs. Based on the reply received from borrower, Bangladesh Bank may be able to carry out necessary correction in the list and shall prepare a final list. Only the final list prepared by Bangladesh Bank should be distributed or published online, in future.

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