LAW OF BANKRUPTCY IN BANGLADESH: A LEGAL EXAMINATION

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Capitalism without bankruptcy is like Christianity without hell.- **Frank Borman**[1]

1.1 Introduction

Bankruptcy is a very old legal concept. In general, bankruptcy or insolvency means inability to meet one's debt or obligation.[2] Bankruptcy is a proceeding by which possession of the property of a debtor is taken for the benefit of his creditors, generally by a Receiver appointed by the Court. Upon realization, subject to certain priorities, the property is distributed rateably among the creditors. A bankruptcy proceeding is a proceeding in personam.[3]

Over the years, with the expansion of trade and commerce, the law of bankruptcy has changed, evolved and developed a lot. Now-a-days, bankruptcy touches not only students of law, legal experts or lawyers, but also economists, bankers, investors, business administrators and many others. There are two types of bankruptcy, bankruptcy of individuals and corporate bankruptcy. This article focuses mainly on bankruptcy of individuals.

In 1997 in Bangladesh the Bankruptcy Act[4] was enacted, which deals with bankruptcy of individuals only. Ten years have already passed. It is high time to examine the effectiveness and shortcomings of this law, based on the available data, analyses, and reported cases. This article is just an exposition on these issues.

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1 U.S. astronaut and business executive, <www.quotationsbook.com/author/866.>

2 Attorney-General of British Columbia v Attorney-General of Canada AIR 1937 PC 95, 168 IC 64 (in a technical sense, it means the condition or standard of inability to meet debts or obligations upon the occurrence of which the statutory law enables the creditor to intervene with the assistance of a Court to stop individual action by the creditors and to secure administration of the debtor's assets in the general interest of the creditors).

3 Pacific International Line (Pvt) Ltd v Vijayalashmi Ammal AIR 1991 NOC 20 (Mad), (1990) 105 Mad LW 175.

4 Act No. X of 1997.

2.1 Historical Background

The Hebrew or Jewish Scriptures provide that in every fifty years on the eve of 'Holy year' or 'Jubilee Year' the Jews were exempted from all sorts of debts and all the debt-slaves were freed. Later this humanitarian provision was founded in the Bible, by which the debtors were exempted after every seven years.[5] In ancient Greece, if someone failed to re-pay his debts, he along with his family, became the subject of 'debt-slavery'. The unfortunate family could not get rid of this slavery until and unless the debt was re-paid by physical labour. In some cities of ancient Greece, the duration of 'debt slavery' was fixed to five years.

The word bankrupt has been derived from two latin words *'bancus'* meaning table and *'ruptus'* meaning broken, denoting 'the wreck or break-up of a trader's business.'[6] In ancient Rome, whenever a businessman fell into financial crisis, his creditors went to the local authority and lodged a complaint on oath. After investigation, the magistrate decided whether it was possible to repay the loan from the business or the property of the debtor. If it was found possible, the magistrate would employ a third party called *'curator bonorum,'*, meaning a 'trustee' or a 'receiver'. The trustee then took control over the business of the debtor and conducted routine works. If it was found impossible to bring back solvency, then the trustee in open market would break the table on which the debtor used to conduct business and would proclaim the financial crisis of the debtor. Thus on the basis of the event of breaking one's business, the concept of *'bancus ruptus'* originated. By closing the business of the debtor and by selling his property in auction, the trustee re-paid the debt. The fate of the poor debtors, who had no property, was even worse. They along with their family were sold as slave. At that time the bankruptcy law was applied only to individuals and businessmen, who were in financial crisis.

In medieval Britain, there was evidence of existence of some forms of bankruptcy process. In 1542, for the first time modern statute on insolvency was enacted in England, to protect the creditors from the fraudulent activities of the debtors. When the claims of the creditors were proved, and the debtors were not in a position to repay the debt,

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5 The Bible, verse 15: 1-2.

6 www.catholicencyclopedia.com.

the debtors were sentenced to jail. As a result, the jails in England were over-crowded, which turned into a national crisis. In 1570, a complete bankruptcy law was enacted during the reign of King Henry VIII. Regulations were made to re-pay the creditors by selling the property of the debtors and various forms of physical punishment, including cutting of ear, were also incorporated. In 1705, by enacting a new law, provisions for capital punishment for fraudulent or non-cooperative debtors were introduced.

In American colonies from the very beginning English Bankruptcy law was applied. The present American bankruptcy law is the result of political impact, as well as, economic consideration. American constitution empowered the Congress with the power to introduce uniform laws on Bankruptcy in nineteenth century.

2.2 Bankruptcy legislation in Indian sub-continent and Bangladesh

In the British-India, there was no comprehensive law on bankruptcy.[7] In 1848 for the first time Indian Insolvency Act was enacted, based on the English bankruptcy laws.[8] The basis of the Indian insolvency law is the Roman principle of 'cessio bonaram'.[9] Later, two separate bankruptcy laws were enacted. The Provincial Insolvency Act (1907) was followed by the Presidency-Towns Insolvency Act (1909).[10] The Act of 1907 was replaced by the Provincial Insolvency Act (1920).[11] The provisions of both the statutes were similar, though the Presidency-Towns Act contained provisions for official assignee, procedure of the court and limitation provisions, in details.[12] Both the

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[7] India being an agriculture based country, there was no necessity for a system of insolvency law and there was also no native law on this topic, *SK Aiyar, Law of Bankruptcy*, 5th edn, 1993, p. 3.

[8] See the Presidency-Towns Insolvency Act 1909: statement of object and reasons.

[9] The term means 'surrender of all his goods by the debtor, for the benefit of his creditors, in return for immunity from process.' For details, see Black's Law Dictionary (1997). See also District Board, Bijnor v Mohammad Abdul Salam AIR 1947 All 383 (1947) All LJ 408, (1947) All WR 318.

[10] Act No. III 1909.

[11] Act no. V of 1920. The necessity of two separate enactments have largely disappeared as trade and commerce are no longer centred in the Presidency-Towns anymore. The Law Commission of India reviewed the law of insolvency and recommended the consolidation of the law into a single comprehensive legislation, which has not been materialized yet. For details, see Law Commission of India, 26th Report.

[12] Report of the Advisory Group on Bankruptcy Laws, India, 2001, p. 11.

statutes excluded corporations for insolvency proceedings.[13] After independence of Bangladesh, the Presidency Towns Insolvency Act (1909) was renamed as the Insolvency (Dacca) Act (1909) and was made applicable within the Municipal limits of Dacca.[14] While, the Provincial Insolvency Act (1920) was renamed as the Insolvency Act (1920) and was made applicable outside the Municipal limits of Dacca.[15]

In 1997 the Bankruptcy Act[16] was enacted by consolidating the earlier two Acts,[17] and under section 119, both the Insolvency (Dacca) Act (1909) and the Insolvency Act (1920) were repealed. Now, we have one bankruptcy law which is applied all over Bangladesh. At the same time Bankruptcy Rules 1997 have been framed. Again, in 1997 two separate Bankruptcy Courts were established in Dhaka and in Chittagong.[18]

2.3 Corporate bankruptcy and UN model law

Although this article mainly focuses on bankruptcy of individuals, it is felt that without making any brief reference to corporate bankruptcy, cross-border bankruptcy and the United Nations model law on cross-border insolvency, this discussion will remain incomplete.

i) Corporate bankruptcy

This refers to the financial crisis of corporate entities, rather than individual businessmen. Corporate restructuring is a genuine treatment of this ailment, which is done either by a compromise / arrangement with the creditors, or under the company law by reduction of share capital or, by winding up (members' voluntary winding up, creditors' voluntary winding up or winding up by the court etc.).

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13 Vide section 107 of Act of 1909 and section 8 of Act of 1920.

14 Preamble to Act of 1909.

15 Preamble to Act of 1920.

16 Act no. X of 1997.

17 This may be considered as a Bangladeshi innovation, something which has been suggested by the Law Commission of India, 26th Report, which to date has not been initiated in India.

18 Ministry of Law, Justice and Parliamentary Affairs, Justice Section 4, Memo No. 785- Justice 4/5-tree -5/97, Dated 31/12/1997.

ii) Cross-border bankruptcy

This concept originated from corporate bankruptcy. Now-a-days, due to the expansion of international trade and commerce throughout the world, the same company operates business in more than one country, either through branches, agencies, franchises, subsidiaries or joint collaborations. One of these branches may fall into financial crisis. Very often situations arise comprising of any or many of the following issues:

a) If a branch of an enterprise located in one country becomes insolvent, should creditors in that country be allowed to initiate insolvency proceedings while the enterprise as a whole is still solvent?
b) If the enterprise as a whole is solvent, should there be separate proceedings in the various countries where its branches are located? ...
c) Alternatively, should there be a single procedure, based in the country where the head office or place of incorporation is situated? ...
d) Should there be a single liquidator or administrator, or one for each country where the enterprise has a place of business or assets?
e) Should the liquidator or administrator appointed in one country be able to recapture assets fraudulently transferred by the debtor to another country?"[19]

The answers to these questions are not uniform as the domestic laws of various countries are not the same. 'This diversity of approach creates considerable uncertainty and undermines the effective application of national insolvency laws in an environment where cross-border activities are becoming a major component of the business of large enterprises.'[20]

(iii) UNCITRAL Model Law on Cross-Border Insolvency

In order to harmonise the laws of corporate bankruptcy of one country with that of the other, the United Nations

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19 Report of the Advisory Group on Bankruptcy Laws, India, 2001, p. 40.

20 Ibid.

Commission on International Trade Law (UNCITRAL) adopted the Model Law on Cross-Border Insolvency (1997). The Preamble[21] provides that 'the purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
b) Greater legal certainty for trade and investment;
c) Fair and efficient administration of cross-border insolvencies that protects the interests;
d) of all creditors and other interested persons, including the debtor;
e) Protection and maximization of the value of the debtor's assets; and
f) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

The Model Law applies in the following cases where:[22]

a) assistance is sought in a state by a foreign court or a foreign representative in connection with a proceeding under the domestic law of a state;
b) assistance is sought in a foreign state in connection with a proceeding under the domestic law of a state;
c) a foreign proceeding and a proceeding under the domestic law of a state in respect of the same debtor are taking place concurrently; or
d) creditors or other interested persons in a foreign state have an interest in requesting the commencement of, or participating in, a proceeding under the domestic law of the state.

Later, in 2004 the Legislative Guide to enactment of UNCITRAL Model Law on Insolvency was adopted.[23]

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21 Preamble of UNCITRAL Model Law of Cross-Border Insolvency (1997).

22 Article 1(1) of UNCITRAL Model Law of Cross-Border Insolvency (1997).

23 Vide resolution 59/40 of the UN General Assembly.

We should note that the Bankruptcy Act 1997 deals with bankruptcy of individuals only. On the other hand, with the expansion of trade and commerce in Bangladesh, corporate bankruptcy has become a regular phenomenon and this matter is dealt with by the company law. Again, in the near past international bankruptcy law has attained a new dimension, with the development of concepts like cross-border insolvency and the formulation of the UNCITRAL Model Law on Cross-Border Insolvency. As an UN member state, Bangladesh has responsibility to implement the model law. So, it is high time for the incorporation of a comprehensive corporate bankruptcy code, which will also include cross-border insolvency. The question is how comprehensive the bankruptcy code should be and whether it should also include individual bankruptcy, so as to make it a complete bankruptcy code. We feel that studies should be carried out to find answer to these questions.

3.1 An Overview of the Bankruptcy Act 1997

The Bankruptcy Act came into force on 1st August 1997.[24] In *Yunus Mia vs. Bangladesh Krishi Bank,*[25] it was held that the Bankruptcy Act, 1997 is a special law and if a man is declared bankrupt virtually he meets social death and therefore the provisions of Bankruptcy Act and rules thereunder must be strictly construed and followed. Again in *KM Aktaruzzaman vs. Agrani Bank and Others,*[26] it was observed by the High Court Division that the Bankruptcy Act 1997 is a special law which has created a special liability and therefore, this special law must be construed very strictly.

3.2 Objects of law of bankruptcy

The Bankruptcy Act has been designed to give relief to a debtor from the pressure of his creditors. The Act protects the debtor from arrest or detention for any debt. The purpose of the law is to ascertain the debts owed by a debtor, take possession of all assets and distribute them amongst all his creditors equitably.[27]

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24 Vide SRO No.162- Ain/97.

25 54 DLR (2002) 123.

26 57 DLR (2005) 57.

27 Mahabir Prasad v Shivanandan Sahay AIR 1934 Pat 514, 152 IC 277, (1934) 15 Pat LT 502. See also Amulya Mohan Bysack v K. Moinuddin AIR 1941 Cal 505, (1941) ILR 1 Cal 318, 196 IC 170.

A detail analysis of the Bankruptcy Act would reveal that the Act has two broad objectives: Firstly, it safeguards, as far as possible, the interests of creditors, by distributing the sale proceeds of the property of the debtor equitably among the creditors. If there were no bankruptcy laws, the debtor might have wasted his properties, or might have preferred one creditor to another. Since the Receiver distributes properties ratably, each creditor is sure of getting at least some thing. Lastly, it also protects the interests of debtors. After completion of distribution of bankrupt's properties, except certain specified debts, all other unpaid debts are cancelled and debtor's disqualifications relating to bankruptcy are removed. On becoming free from past obligations and disqualifications, the debtor gets a fresh start in life. He can engage in trade or service and get on with his life.

3.3 Constitution and power of the Bankruptcy Court

Under the Bankruptcy Act, the District Court acts as the Bankruptcy Court and the District Judge acts as the Bankruptcy Judge to deal with and dispose of the bankruptcy proceedings within the territorial jurisdiction of the Court. The District Judge may authorize any Additional District Judge to deal with and dispose of any bankruptcy proceedings.[28] We mentioned earlier that in 1997 the Government established two Special Bankruptcy Courts in Dhaka and in Chittagong, headed by Additional District Judges.

The Court has full power to decide all questions arising in a bankruptcy proceeding. Every decision given by a court shall be final and binding.[29] It must operate as res judicata as between the debtor's estate on the one hand and all claimants against him and all persons claiming through or under them or any of them, on the other hand.[30] Such court has inherent powers to make necessary orders in order to meet the ends of justice and to prevent abuse of process of court.[31] However, when a tribunal commits an error of law in deciding an

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28 Section 4 of the Act of 1997.

29 Section 5 of the Act of 1997.

30 *Sinna Subba Goundan v Rangai Goundan* AIR 1946 Mad 141, 224 IC 16, (1945) 2 Mad LJ 384. See also *Jakhu Pappamma v Official Receiver*, Guddappah AIR 1943 Mad 230, 207 IC 574, (1942) 2 Mad LJ 778.

31 *Ishar Das v Fatima Bibi* AIR 1934 Lah 468, (1934) ILR 15Lah 698, 153 IC 993.

issue raised by it, it acts beyond its jurisdiction and such decision of the Tribunal can be quashed under writ jurisdiction.[32]

3.4 Act of bankruptcy

An act of bankruptcy is some act of the debtor which shows that he is financially embarrassed. These acts presuppose those acts, which in the public eye, shake the credit of a debtor and are likely to cause a scramble amongst the creditors for the debtor's assets.[33] These acts may be either voluntary or involuntary and may be classified into three kinds, namely those which arise from the debtor's dealing with his property, those which arise due to personal acts or defaults of the debtor, and those which arise from a particular condition of the debtor's affairs showing him to be bankrupt.[34]

Under the Act, an act of bankruptcy is deemed to have been committed,[35] if the debtor transfers property kept in his name, in the name of his wife or children to a third person for the benefit of his creditors generally,[36] or if he transfers property kept in his name, in the name of his wife or children with the intent to defeat his creditors[37] or if he transfers property or mortgages, pledges, hypothecates or creates charge thereon, which would be void as a fraudulent preference,[38] if he was adjudged a bankrupt, or if, with the intent to defeat his creditors, he refrains from communicating with his creditors, or submits fraudulently to an adverse decree, judgement or order,[39] or if his property has been sold in execution of a decree for payment of debt,[40] or if he files a plaint for being adjudged bankrupt,[41] or if he gives notice to his creditors that he has suspended

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32 *Abdur Rashid Chowdhury v Additional District Judge and Others* 56 DLR 573.

33 Charakula Venkatakrishnayya v Talluri Malakondayya AIR 1942 Mad 306, 199 IC 793, (1942) 1 Mad LJ 38.

34 *Yenumula Malludova v Peruri Seetharathnam* AIR 1966 SC 918, [1966] 2 SCR 209.

35 Section 9 of the Act of 1997.

36 The expression 'creditor generally' means all creditors and not a particular class of creditors: *Nazir Mohammad Khan v Murthuza & Sons* (1967) 1Mys LT 196.

37 Re David & Adlard [1914] 2KB 694.

38 *Hiralal v Firm Shriram Surajbhan Glass Bangle Merchants* AIR 1961 MP 15.

39 *Sulaiman Hajee Mohamed Bros v Hajee Ahed Hajee Essak* AIR 1937 Rang 16, 167 IC 96.

40 *Re Gopal Das Aurora* AIR 1926 Cal 640, 94 IC 793 (1925) 30 Cal WN 112.

41 Kanai *Lal Nandy v Tinkari* De AIR 1933 Cal 564, 145 IC 429 (1933) 30 Cal WN 173.

payment of his debt, or if he is imprisoned in execution of the decree for the payment of debt, or if one or more creditors having a valid and matured debt against the debtor for an amount of not less than Tk. 500,000 has / have served on the debtor a formal demand requiring the debtor to pay the debt or to give security for it and within 90 days the debtor failed to comply with the demand.

3.5 Bankruptcy proceedings

Under the Act, if a debtor commits an act of bankruptcy, a plaint may be presented by one or more eligible creditors or by the debtor, and the Court may make an order adjudging the debtor a bankrupt.[42] The persons subject to bankruptcy proceedings[43] are either any person, who is domiciled in Bangladesh, or who generally carries on business in Bangladesh, or who within a year before filing of the plaint, resided in or had a house or place of business in Bangladesh.[44] On the other hand, the institutions exempted from bankruptcy proceedings[45] are either any Government organization, including the Parliament and a judicial body, or any charitable or religious body, or any statutory body, whose principal object is not financial gain, or any autonomous body established by or with the financial assistance of the Government.[46]

The creditors are entitled to file a plaint to initiate bankruptcy proceeding,[47] if they can prove firstly, that they are eligible creditor,[48], secondly, that the aggregate amount of debt amounts to Tk. 500,000, thirdly, that there is a *prima facie* case that an act of bankruptcy has been committed and lastly, that the plaint is filed within one year from the date of commission of act of bankruptcy. On the other hand,

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42 Section 10 of the Act of 1997.

43 Section 11(1) of the Act of 1997.

44 These provisions are wide enough to include a lunatic, if the bankruptcy proceeding is for his own benefit [Re Lee (1883) 23 ChD 216; See also *Ex parte Cahan* (1879) LR 10 ChD 183], married woman etc.

45 Section 11(2) of the Act of 1997.

46 It appears that these institutions are either parts of the Government or they serve the society at large. For the greater interest of the society these exemptions are justified.

47 Section 12(1) of the Act of 1997.

48 According to section 2(39) of the Act, "eligible creditor" means a creditor or creditors who, individually or jointly, raised a claim for a matured debt of at least Tk. 500,000 by sending a formal demand.

the debtor is entitled to file a plaint,[49] if he can prove firstly, that he is unable to pay his debts, lastly, that his debts amounts to Tk. 20,000, or that he is under arrest or imprisonment in execution of a decree for non-payment of debt, or that an order of attachment in execution of a decree has been made against his property at the time of filing of plaint.

We believe that the amount of debt of Tk. 20,000, entitling the debtor to file a plaint to declare him a bankrupt, is too small in today's context. This amount should be increased to at least Tk. 250,000, which is half the amount required for creditors.

When an order of adjudication is made, the bankrupt must assist in the realization of his property and the distribution of the proceeds thereof among the creditors. The property of the bankrupt, except the exempted property, vests in the Receiver, or where no Receiver has been appointed, in the Court,[50] and becomes divisible among the creditors. The property so vested is known as the Estate. No creditor can, during the pendency of the bankruptcy proceedings, have any remedy against the exempted property of the debtor and the Estate or institute any civil suit or any legal proceeding, except with the leave of the Court.[51] The order of adjudication does not affect the right of any secured creditor and is deemed to have taken effect from the date on which the plaint was presented.[52] After making an order of adjudication, the Court appoints a receiver. Appointment of receiver is one big problem is. Since the receiver has to bear the initial costs of proceedings, it is really difficult to get a person, who is interested to work as a receiver. No firm has developed yet which is resourceful and at the same time efficient in property management. We believe that the post of receiver should be made more lucrative in order to get people to act as receiver.

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49 Section 13(1) of the Act of 1997.

50 The operation of this rule is automatic. Thus if a bankrupt has an interest in certain prospects, that interest vest in the Receiver by operation of law: *Hira Lal v Shankar Lal* AIR 1939 Cal 116, 180 IC 683 (1938) 42 Cal WN 695. However, any property acquired by a bankrupt after adjudication does not vest in the Receiver until he takes measures to that effect: *N Mohamed Hussain Sahib v Chartered Bank,* Madras AIR 1965 Mad 266, (1964) ILR 1 Mad 1012 (1965) 2 Comp LJ 37.

51 *Fatechand Tarachand v Parashram Maghanmal AIR* 1953 Bom 101.

52 Section 31 of the Act of 1997.

Any Court, in which a suit or other proceeding in relation to a claim for money or other property is pending against a debtor shall, on proof that an order of adjudication has been made against him, transfer it to the Court which has made the order of adjudication.[53] The Court may, by order, nullify the transfer of any property of the debtor, within fifteen years immediately proceeding the date of the order of adjudication, if the Court is satisfied that the transfer was made to defeat any debt owed by the debtor. The nullification, however, shall not be applicable to a transfer for a proper value consisting of goods, or a transfer of property acquired by way of inheritance or a transfer made, at any time within six years immediately proceeding the date of the order of adjudication, in favour of a person, who proves that at the time of transfer the debtor was able to pay, without the aid of the transferred property, all the claims made in the bankruptcy proceedings. Where an order is made nullifying a transfer, the property shall form part of the Estate.[54] A fraudulent preference is void if it could be proved firstly, that the debtor was unable to pay his debts at the time of transferring any property, or making any payment, or incurring any obligation in relation to any property, or allowing himself to be affected by a judicial proceeding in favour of a creditor, secondly, that the transfer, or payment, or obligation, or the proceeding has the effect of giving any preference to that creditor, or surety, or grantor in relation to the debt due, and lastly, the debtor is adjudged bankrupt on a plaint presented within one year after the date of such transfer, or payment, or obligation, or initiation of proceeding.[55] Upon the application of the Receiver, the Court shall nullify the transfer, or payment, or obligation, or judicial proceeding[56] and thereupon the Receiver shall recover the property transferred or the payment made.

A bankrupt is disqualified for election as a member of Parliament or of a local authority or other statutory body or sitting or voting in the proceedings thereof, for appointment as a Judge, Magistrate, Justice or any other office in the service of the Republic or acting as such, for

53 Section 33(1) of the Act of 1997.

54 Section 60 of the Act of 1997.

55 Section 61(1) of the Act of 1997.

56 Section 62 of the Act of 1997.

appointment as Receiver or acting as such and for obtaining loan from bank or financial institutions. These disqualifications shall cease when the order of adjudication is annulled or the Court makes an order of discharge of the bankrupt.[57] The bankrupt may apply to the Court for protection from arrest or detention for any debt, and the Court may after giving notice and reasonable opportunity of hearing to the creditors, make an order for such protection of the debtor.[58] An order of adjudication does not operate automatically as a protection to the bankrupt.[59] A protection order is a privilege to be granted or withheld, as the court in its discretion, may determine.[60]

The exempted property of a debtor, which cannot to be taken over by the Court, includes tools used by the debtor himself, wearing apparel and household furnishing and other like accessories of himself, spouse and children and debtor's un-mortgaged dwelling place of homestead, the area of which is not exceeding 2500 square feet of land in the urban area, or 5000 square feet of land in the rural area. It should be noted that the total value of tools, wearing apparel and household furnishing etc. shall not exceed Tk. 300,000.[61]

It appears clearly that the provisions relating to exempted properties have been designed to protect the interest of the debtor. When everything is over, the debtor still has something to move on with his life.

We note that the Bankruptcy Act does not contain any provision relating to Alternative Dispute Resolution. It is high time to explore the possibility of including such provisions.

3.6. Disposal of estate and discharge of bankrupt

While disposing of the Estate, in the first phase, the administrative expenses, including the necessary expenses incurred by the Receiver,

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57 Section 94 of the Act of 1997.

58 Section 35(1) of the Act of 1997.

59 *P M Hamid v Mohamed Sheriff* AIR 1935 Rang 415 (1935) ILR 13 Rang 623, 159 IC 936.

60 *Re Gopal Das Aurora* AIR 1926 Cal 640, 94 IC 793 (1925) 30 Cal WN 112: The debtor must apply to the court to grant him privilege of protection against arrest that the court would do only if circumstances of case justify it; a protection order, once granted, cannot be refused or cancelled.

61 Section 32 of the Act of 1997.

and thereafter the Receiver's fee shall be paid. In the second phase the debts to be paid in priority to other debts[62] are all taxes and debts due to the Government, all wages or salaries not exceeding Tk. 2000 due to any clerk, servant or labour, all bank debts, all unsecured claims, and any subordinate claim. In the last phase interest, calculating from the date on which the debtor is adjudged bankrupt, at a rate of not exceeding 6% per annum on all debts included in the schedule are to be paid.[63]

After disposal of the estate, the Court may make an order of discharge[64] and such order shall have the effect of discharging the bankrupt from all claims, debts and liabilities (provable debts). Such order, however, shall not discharge him from any debt due to the Government, or from any debt or liability incurred by means of fraud or fraudulent breach of trust, or from any debt or liability in respect of which he has obtained forbearance by any fraud to which he was a party or from any liability under an order of maintenance given under Section 488 of Code of Criminal Procedure 1898 or the provisions of the Family Courts Ordinance 1985.[65]

3.8 The Bankruptcy Court, Dhaka

We mentioned earlier that two bankruptcy courts have been established in Dhaka and in Chittagong. The following table shows the 10-year performance record of the Bankruptcy Court, Dhaka (1997-2007):[66]

62 Debts paid in priority rank equally between themselves and must be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they must abate in equal proportions between them.

63 Section 75 of the Act of 1997.

64 Section 47 of the Act of 1997.

65 Section 51of the Act of 1997.

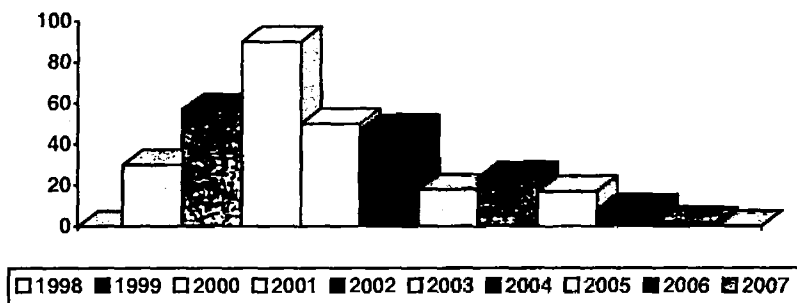
66 These data has been personally collected from the suit register of the Bankruptcy Court, Dhaka.

	Year	Total Filing	Total Disposal	Decree	Dismissed	Dismissed For Default	Withdr awn	Stayed	Pending	Com ment
	1	2	3	4	5	6	7	8	9	10
1.	1998	30	18	07	02	01	007	07	06	
2.	1999	57	47	24	02	00	19	08	04	
3.	2000	90	79	37	18	00	22	11	01	1 Trans fer
4.	2001	50	42	24	15	01	02	06	02	
5.	2002	47	40	30	04	05	01	01	06	
6.	2003	18	14	04	03	04	03	02	02	
7.	2004	24	18	10	05	01	02	00	06	
8.	2005	17	09	03	02	01	01	00	09	1 Trans fer
9.	2006	08	02	00	00	00	001	00	06	1 Trans fer
10.	2007	02	00	00	00	00	00	00	02	
Total	10 Years	343	269	139	51	13	58	35	44	

Note: Column no. 2 contains the aggregate of column no. 4 to 10.

A careful analysis of the table of statistics reveals that in total 343 cases have been lodged, of which 269 cases have been disposed of and 58 cases have been withdrawn. In an average, only 34 cases have been lodged per year. At present 44 cases are under trial and 35 cases are stayed by order of higher court. 7 cases of 1998, 8 cases of 1999 and 11 cases of 2000 are stayed till now. Stay order for an indefinite period works as an impediment to the quick disposal of the cases. It also frustrates the litigants. We feel that provisions should be incorporated in the Bankruptcy Act, so that the bankruptcy proceedings can not be stayed for an indefinite period. There should be a timeframe within which bankruptcy proceedings should be completed.

Chart of number of cases filed from 1998 to 2007



An examination of the above chart reveals that since 2003, filing rate of new cases in the Dhaka Bankruptcy Court has declined gradually. In most of the cases, complainants in the bankruptcy court are either a bank, or a money lending institution. Since the introduction of Artha Rin Adalat Ain 2003[67], where the petitioner has a choice of filing petition either under the Act of 1997 or the Ain of 2003, he is opting for the Ain. The recovery rate of Artha Rin Adalat is also quite satisfactory. It won't be incorrect to say that Artha Rin Adalat is acting as an impediment to realize the full potentials and benefits of the Bankruptcy Court. These two courts are operating parallel to one another. Artha Rin Adalat Ain creates liability on the mortgaged property of the debtor, while the bankruptcy law brings the debtor into a legal compulsion by creating liability on the total property of the debtor. We believe that the Bankruptcy Act 1997 and Artharin Adalat Ain 2003 should be co-ordinated, so that they complement one another. Instead of two laws and two courts, possibility should also be explored for one law and one court, which will serve the objectives of both the Acts of 1997 and 2003.

4.1 Recommendations and Conclusion

Based on the foregoing discussion, the following aspects / issues are proposed to make the Bankruptcy Act 1997 more useful and effective:

- Studies should be carried out to explore the possibility of incorporation of a complete bankruptcy code, which will

[67] Act No. VIII of 2003.

include individual bankruptcy, corporate bankruptcy and UNCITRAL Model Law on Cross-Border Insolvency.

- The amount of debt of Tk. 20,000, entitling the debtor to file a plaint to declare him a bankrupt, is too small in today's context. This amount should be increased to at least Tk. 250,000, which is half the amount required for creditors.
- The post of receiver should be made more attractive by offering attractive remuneration.
- Possibility should be explored for the introduction of provisions relating to Alternative Dispute Resolution in the Bankruptcy Act.
- Provisions should be incorporated in the Bankruptcy Act, so that the bankruptcy proceedings can not be stayed for an indefinite period. There should be a time frame within which bankruptcy proceedings should be completed.
- The Bankruptcy Act 1997 and Artharin Adalat Ain 2003 should be co-ordinated, so that they complement one another. Instead of two laws and two courts, possibility should be explored for one law and one court, which will serve the objectives of both the Acts of 1997 and 2003.

We may conclude that the evolution of bankruptcy law reveals that the law which once was a sword for the creditor has now become an armour for the debtor. This law is now being evaluated from humanitarian and ethical points of view. Bankruptcy law in Bangladesh is still lagging behind the international standard. It is a crying need to update our bankruptcy law to face the challenges of the new millennium.

Number of cases

Careful analysis of the above data for the last ten years shows that altogether 343 cases were filed during this period. On the other hand number of cases filed exceeded 50 three times i.e. in the year 1999, 2000, 2001(58, 90, and 50 respectively). It is noteworthy that the jurisdiction of this court is within the Dhaka city, where most of the Banks and the financial institutions are being working. However we don't have any statistics about the cases filed under the previous act that is "The Insolvency Act, 1920". Therefore it is not possible to have a comparative analysis between the positions under these two Acts.

But from the scarcity of reported cases regarding insolvency act in the Law Journals it is revealed that in the past this act has not been practiced that much. Most provably peoples are not that aware about the provisions of recovery and payment of debt under this act. On average 34 cases were filed each year throughout this period. This number is not sufficient to justify the need for a specified court.

Disposal

Statistics of disposal of cases during this period reveals that among the 343 cases 269 were disposed. Year wise picture is much more important. In the first year that is in 1998, 17 cases were disposed among the 30 cases filed. The statistics of the disposal compare to the cases filed in the years in which number of cases filed were the highest i.e. 1999, 2000, and 2001 is even more fascinating. For example in the 1999, 45 cases were disposed among the 57 cases filed. Similarly in the year 2000, 77 cases among 90 and in the year 2001, 42 cases among 50 were disposed. So from the year wise statistics of disposal we can come to a conclusion that it is possible to resolve the disputes under the "The Insolvency Act" within one year.

Result

Now let's have a look at the results of the cases filed under this law. Statistics of the cases which were disposed after full trail are given in the 4th and 5th columns of the above table. Among the 343 cases the plaintiffs obtained decree in the 139 cases and 51 cases were dismissed. Year wise analysis is interesting enough. In the year 1999, 02 cases were dismissed in contrast to the 24 cases where the plaintiffs obtained decree. In the year 2000, 37 cases were ended with decree and 18 cases were dismissed. Result shows that in this court the success of the plaintiffs are satisfactory.

Withdrawn, Stayed and Pending

During the ten years under consideration altogether 58 cases were withdrawn. In each year at least some cases were withdrawn by the plaintiffs. During the withdrawal plaintiffs used to refer to different procedural mistakes. Responsibility lies on the filing and the conducting lawyers. The main reason behind the withdrawal of 58 cases is lack of efficient lawyers, who failed to deal the Bankruptcy proceedings properly. Besides number of stayed cases are 35. These

cases were stayed mainly during the period from 1998 to 2003. Proceeding of most of the cases were stayed vide the order of the higher court. Being aggrieved by different interim order parties used to seek relief in the higher court. As a result the proceedings of the original case remain stayed. By this process 07 cases filed in the year 1998 have been stayed for last 10 years. If the cases remain stayed for long time parties become frustrated and the objectives of the law failed as well. By limiting the scope of seeking relief in the higher court against the interlocutory order and the provision of stay for an indefinite period we might find out a solution to this problem.

From the statistics we can also see that altogether 44 cases are pending. The duration of the trial of the 06 cases filed in the year 1998 is about 10 years. It is unfortunate that these 06 cases are not disposed within ten years, whereas 17 out of 30 cases were disposed within that year (1998). The reasons behind these long pending cases are- different interlocutory petitions of the parties, time prayer, delay in submitting- all books of accounts, inventories of property, list of creditors and debtors, and statements of due debts in the court and different complexities regarding appointment of receiver. Appointment of receiver is a big problem. Since the receiver has to bear the initial cost it is really difficult to get a person who is interested to work as a receiver. No such firm has developed yet, which is enriched with people, who are efficient in property management. Problem of long delay in the trial of cases may be resolved by reducing the scope of time petition, fixing time in the case of submission of interim issues like accounts of the debtors, appointment of receiver etc.

Since 2003, filing rate of new cases in the bankruptcy courts has declined gradually. In most of the cases, complainants in the bankruptcy court are either a bank, or a money lending institution. Generally it is agreed that due to the introduction of Artha Rin Adalat Ain 2003[68], filing of cases under the Bankruptcy Act 1997 has reduced and the activities of the Bankruptcy Court have become limited. At the same time, the recovery rate of loans through Artha Rin Adalat is quite satisfactory. Artha Rin Adalat is definitely acting as an impediment to realize the full potentials and benefits of the

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68 Act No. VIII of 2003.

Bankruptcy Court. These two courts are operating parallel to one another. Artha Rin Adalat Ain creates liability on the mortgaged property of the debtor, while the bankruptcy law bring the debtor into a legal compulsion by creating liability on the total property of the debtor. There is a tendency on the part of businessmen of our country to take loan from several banks and not to repay them. In this case under the Bankruptcy law, it is possible to settle or recover the loan taken from all the banks. While, under the Artha Rin Adalat Ain different banks are to file different cases in the Artha Rin Adalat to recover their loans, which is time consuming and complicated. So, there are advantages and disadvantages of both the courts.