IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, *Chief Justice*
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Jahangir Hossain

CIVIL APPEAL NOS. 10-12 OF 2022

(Arising out of C.P Nos. 1903 of 2020, 2149 of 2020 and 2024 of 2020 respectively)

Bangladesh Bank, represented by its Governor, Bangladesh Bank Bhaban, Motijheel Commercial Area, Dhaka and another .... Appellants (In C.A. No.10 of 2022)

Managing Director, United Finance Company Limited, Camellia House, 22, Kazi Nazrul Islam Avenue, Dhaka-1000 ... Appellant (In C.A. No.11 of 2022)

Managing Director, Social Islami Bank Limited, City Centre (19th Floor), 90/1, Motijheel C/A, Dhaka-1000 ... Appellant (In C.A. No.12 of 2022

-Versus-

Homeland Footwear Limited, represented by its Managing Director, Mr. Amir Hossain and others ....Respondents (In all the appeals)

For the Appellants (In C.A. No.10 of 2022)	:	Mr. Shamim Khaled Ahmed, Senior Advocate instructed by Mr. Md. Abdul Hye Bhuiyan, Advocate-on-Record
For the Appellant (In C.A. No.11 of 2022)	:	Mr. Khan Mohammad Shamim Aziz, Advocate instructed by Mr. Mohammad Ali Azam, Advocate-on-Record.
For the Appellant (In C.A. No.12 of 2022)		Mr. Khan Mohammad Shamim Aziz, Advocate instructed by Mr. Mohammad Ali Azam, Advocate-on-Record.
For Respondent Nos.1-2 (In all the cases)		Mr. Amir Hossain (In person)
For Respondent Nos.3-4 (In C.A. No.11 of 2022)		Mr. Md. Abdul Hye Bhuiyan, Advocate-on- Record
Respondent Nos.3-5 (In C.A. No.10 of 2022)		Not represented
Respondent Nos.5-6		Not represented

(In C.A. No.11 of 2022)
Respondent Nos.3-6 Not represented.
(In C.A. No.12 of 2022)
Date of Hearing : 25.07.2023, 26.07.2023 and 02.08.2023.
Date of Judgment 08.08.2023

J U D G M E N T

Md. Ashfaqul Islam, J: All these civil appeals by leave are directed against the judgment and order dated 13.09.2020 passed by the High Court Division in Writ Petition No. 52 of 2020 making the Rules absolute with a direction upon the writ respondent Nos. 1 and 2 to remove the names of the writ petitioners from the Credit Information Bureau (in short, CIB) report immediately.

These 3 (three) civil appeals are heard together and disposed of by this single judgment.

Short facts are that, the present respondent Nos.1 and 2 herein as petitioners filed the aforesaid Writ Petition being No.52 of 2020 before the High Court Division challenging the publication of their names in the CIB Report of Bangladesh Bank seeking direction upon the writ respondent Nos.1 and 2, (appellants herein) to remove their names from the CIB report of Bangladesh Bank stating, inter alia, that the writ petitioner No.1 is a

private limited company engaged in Manufacturing Footwear Products as well as to export the domestic consumption as same. The writ petitioner No.2 was the Managing Director (shortly MD of the writ petitioner No.1's Company). Apart from that, the writ petitioner No.2 is also the proprietor of "M/S Homeland Plastic Industries" and "M/S Amir Trading". During the course of business by the writ petitioner No.1, the writ petitioner No.2 invested an amount of Tk. 45,07,386.00/- in writ petitioner No.1's company in the year 1999. However, the writ petitioner No.1 failed to pay-off the said investment within the stipulated time. In such a situation, the writ petitioner No.2 filed an application under section 241(v) of the Companies Act, 1994 for winding up of the writ petitioner No.1's company for the failure to pay its debt to the creditors before the High Court Division which gave rise to Company Matter No.59 of 2001. After serving due notice upon the writ respondents of the winding up proceedings, the High Court Division ultimately, vide judgment and order dated 21.07.2002, allowed the application and wound up the writ petitioner No.1's company. Against the above judgment and order dated 21.07.2002 passed by the High

Court Division, the writ petitioner No.1 filed Civil Petition for Leave to Appeal No. 1552 of 2002 before this Division. This Division eventually vide judgment and order dated 14.07.2003 dismissed the said Civil Petition for Leave to Appeal and affirmed the judgment and order passed in Company Matter No.59 of 2001.

Subsequently, the writ petitioner No.2 entered into an agreement with the earlier management of writ petitioner No.1's company on 17.07.2004 and in view of the said agreement, the writ petitioner No.2 filed an application before the High Court Division under section 253 of the Companies Act, 1994 for staying the winding up proceedings and the High Court Division by its order dated 18.07.2004 allowed the said application and stayed the proceedings of winding up of the writ petitioner No.1 for a period of 6 (six) months resulting in maximum shares of the previous Directors and Shareholders of the writ Petitioner No.1 being transferred to the writ petitioner No.2 and thereby the writ petitioner No.2 acquired more than 51% of the total shares holding the writ petitioner No.1’s company.

Subsequently, on 21.10.2017, the said order of stay was extended perpetually and the writ petitioner No.2 was allowed to carry on the business of the writ petitioner No.1 and the company started running under the stewardship of the writ petitioner No.2 as per the scheme allowed by the High Court Division.

It has been further stated that, the writ petitioners did not avail any credit facilities from any financial institution after writ petitioner No.1's company is wound up. On 28.07.2019, the writ petitioner No.2 applied for availing credit facilities from National Credit and Commerce (shortly NCC) Bank Ltd. for opening a Letter of Credit (shortly LC) valuing USD 29,400.00 for his proprietorship concern "M/s Homeland Plastic Industries". But the NCC bank vide its letter dated 05.08.2019, apprised the writ petitioner No.2 that, since his name has been enlisted in the CIB, it was unable to make any accommodation extending credit facilities. Having learned, the writ petitioner No.2 made several representations to Bangladesh Bank to let him know at whose instance the writ petitioner's name has been reported in the CIB, but the writ respondent No.2,

Bangladesh Bank replied that it was not bound to disclose the name of the creditor. Under the aforesaid facts and circumstances, finding no other alternative efficacious remedy, the writ petitioners filed the aforesaid writ petition before the High Court Division and obtained Rule.

The writ respondent Nos. 4 and 5 contested the Rule by filing affidavit-in-opposition.

In due course, after hearing both the parties a Division Bench of the High Court Division made the Rule absolute by the impugned judgment and order dated 13.09.2020.

Feeling aggrieved, by the judgment and order dated 13.09.2020 passed by the High Court Division, the present appellants filed three separate Civil Petitions for leave to appeal and obtained leave giving rise to these appeals.

Mr. Shamim Khaled Ahmed, the learned Senior Advocate appearing on behalf of the appellant in Civil Appeal No. 10 of 2022 and Mr. Khan Mohammad Shamim Aziz, the learned Advocate appearing on behalf of the appellants in Civil Appeal Nos. 11 and 12 of 2022 submits that the High Court

Division erroneously failed to consider that writ respondent No.2 having come to know from a letter dated 13.01.2020 issued by the writ respondent No.4, Social Islami Bank Limited detailing latest composition of the writ petitioner No.1's company showing that the name of the writ petitioner No.2 appeared in Form XII as holding the position of Managing Director of the company as on 06.12.2015 and from the plaint of Artha Rin Suit No.22 of 2019 instituted by writ respondent No.5, United Finance Limited it was presumed that the writ petitioner No.1's company was a defaulting borrower, and under the provision of section 5 (Ga Ga) of the Bank Companies Act, 1991 as amended turned the writ petitioner No.2 also defaulting borrower and, therefore, that there was no illegality in reporting by the bank concerned the names of the petitioners in the report of CIB of Bangladesh Bank, as per section 27 (ka ka) (1) of Bank Companies Act, 1991 as amended.

He further submits that the High Court Division failed to consider that writ petitioner No.2 himself admitted liability of the loan and failed to pay the outstanding amount, as such the writ respondent No.2 has

no option but to send to requiring bank or financial institution the name of the defaulting borrower from bank and financial institution in the database of the CIB of Bangladesh Bank after receiving the name of the creditor banks.

He next submits that the High Court Division misconceived that by the agreement dated 17.07.2004 all the liabilities of the writ petitioner No.1's company were taken over by the earlier management. However, the High Court Division failed to take note of the pivotal fact that the liabilities of the writ petitioner No.1, company to the writ petitioner No. 2 were not covered by the said agreement at all and eventually continue to attach with the writ petitioner No.1, company. Thus, sending the name of the writ petitioner No.1, company to CIB by the appellants is well founded under the prevailing laws and rules. The name of the writ petitioner No.2, however, appears in the CIB as the respondent No.1 being his "স্বার্থ সংশ্লিষ্ট".

He also submits that the High Court Division erred in law by holding that since under section 5 (Ga Ga) of the Bank Companies Act, 1991 defaulting borrower means debtor

person or institution which the writ petitioner No.1 was not defaulter because the High Court Division having earlier purported to have found that the writ petitioner No.2 took over the management of writ petitioner No.1, company unencumbered on 22.07.2004 on the ground that the High Court Division was totally misconceived by holding previous liability of the writ petitioner No. 1, Company were to be borne by its earlier management. It was clearly settled principle of company law that liability as well as asset of a company being a juristic person belongs to the company as laid down by House of Lords in Solomon versus Solomon [1897] AC 22 and followed in Punjab Ali Pramanik's case reported in 29 DLR AD 185.

Mr. Amir Hossain (in person) appearing on behalf of the respondent Nos. 1-2 in all the cases and Mr. Md. Abdul Hye Bhuiyan, the learned Advocate-on-Record appearing on behalf of the respondent Nos. 3 and 4 in Civil Appeal No. 11 of 2022 made submissions in support of the impugned judgment and order of the High Court Division.

We have heard the learned Advocates for the appellants and Mr. Amir Hossain (in person) appearing on

behalf of the respondent Nos. 1-2. We have also perused the impugned Judgment and order of the High Court Division and other materials on record carefully.

At the very outset we felt it proper to address first on the question of maintainability in filing the aforesaid writ petition as raised by the learned Advocates for the appellants.

It's true that under section 27ka of the Act of 1991 no resignation of a director of a defaulting company can be effected or he/she can transfer or sell out share without the approval of its creditor or financial institutions. Record shows, none of the writ respondent nos. 4 and 5 raised any claim of having liabilities towards the writ petitioner no. 1 during the entire winding-up proceedings initiated vides Company Matter No. 59 of 2001 and subsequent proceeding of its stay.

Further, from the order dated 18.07.2004 and 29.10.2017 passed by the High Court Division it further appears that, while staying the winding up perpetually, the scheme for taking over the management of writ petitioner no. 1, company transferring share by the previous directors of writ petitioner no. 1 to writ

petitioner no. 2 was approved on the basis of the agreement dated 17.07.2004 and writ petitioner no. 2 became its Managing Director on 22.07.2004. To date, (for the last 16 years) the said order staying winding-up of the writ petitioner no. 1 remained unchallenged by any of the creditors who now raised the issue characterizing the writ petitioners as defaulting-borrowers. Conversely, within the very knowledge of writ respondent nos. 4-5, name of the writ petitioner no. 2 was entered into the register of joint stock company and firm confirming him as the Managing Director of writ petitioner no. 1, company and basing on that very point, the learned counsel for present appellant (writ respondent no. 4) has very robustly asserted that, the name of the writ petitioner no. 2 has rightly been referred for reporting in the CIB since he is the Managing Director of writ petitioner no. 1, company.

Now let us examine the very vital point-in-issue in the instant case as to whether both the writ petitioners (respondent No. 1 and 2 herein) can be termed as defaulting-borrowers under the purview of section 5(ga ga) of the Act of 1991. In this regard, all the

appellants in a chorus asserted that, since the writ petitioner no. 2 is holding 51% shares in writ petitioner no. 1, company and writ petitioner no. 1 became the defaulting-borrower and the same is the "স্বার্থ সংশ্লিষ্ট প্রতিষ্ঠান" of writ petitioner no. 2, so both are defaulting-borrowers and their names have rightly been referred under section 27(ka ka) of the Act of 1991 by the writ respondent nos. 4-5 to writ respondent no. 2, Bangladesh Bank for reporting it in the CIB. Whereas, Mr. Amir Hossain's (in person) contention is that, the credit facilities if taken, it was availed by the earlier management of writ petitioner no. 1, company and the said liabilities will never be vested upon writ petitioner no. 2 and in the same vein, writ petitioner no. 1 cannot be termed as any defaulting-borrower as well. He further avers that, since no such creditors raised their liabilities against the writ petitioner no. 1, company during the entire winding up proceedings in spite of serving statutory notice of the said winding up proceedings upon all the creditors so at this stage (after long 18 years), they (writ respondent nos. 4-5) are totally precluded from levelling this writ petitioner no. 1 as defaulting-borrower.

In this regard from the agreement dated 17.07.2004 and that of the order passed on 18.07.2004 staying the winding-up proceedings made under Section 253 of the Companies Act we find that in clause nos. 3, 4 and 7 of the said agreement, it has clearly been set-out how the management and share of the previous shareholders/directors would be transferred to the writ petitioner no. 2 and how the liability of writ petitioner no. 1, company be resolved by earlier management. In the agreement in particular, in clause no. 4 thereof, it has clearly been outlined that, "তবে তিনি (writ petitioner no. 2) কোম্পানীর বিদ্যমান দেনার জন্য ব্যাংকের নিকট ব্যক্তিগত গ্যারান্টি প্রদান করিবেন না". And then in clause no. 7, it has also been agreed by the party nos. 1 and 2 of the 2nd party to the said agreement to the effect that: " ১ এবং ২ নং দ্বিতীয় পক্ষগন আগামী তিন মাসের মধ্যে পুনর্গঠিত কোম্পানীর পাওনাদার ব্যাংক রুপালী ব্যাংক লিঃ, সোস্যাল ইনভেস্টমেন্ট ব্যাংক লিঃ এবং আল-আরাফাহ ইসলামী ব্যাংক লিঃ এর সহিত সমঝোতা করিয়া উক্ত ব্যাংক সমূহ কর্তৃক দাখিলকৃত যথাক্রমে দেঃ মোঃ নং- ৩৯/২০০২, মানী মোঃ নং- ৫৩/৯৮ এবং মানী মোঃ নং- ৫৮/২০০২ উত্তোলন করানোর ব্যবস্থা গ্রহণ করিবেন".

Now question may crop up, whether as per section 5(Ga Ga) of the Act of 1991, this writ petitioner no. 1, company is any "স্বার্থ সংশ্লিষ্ট প্রতিষ্ঠান" of writ petitioner no. 2 and as per explanation thereof (in section 5gaga) writ

petitioner no. 2 will be regarded as defaulting-borrower for owning 20% above shares in writ petitioner no.1, company. In the first place, what we view that, as per section 5gaga of the Act of 1991 defaulting-borrower means, debtor person or Institution (খেলাপী ঋণ গ্রহিতা অর্থ- কোন দেনাদার ব্যক্তি বা প্রতিষ্ঠান) and in the above discussion, we find that writ petitioner no. 2 took over the management of writ petitioner no. 1, company totally unencumbered on 22.07.2004 when previous liability of the writ petitioner no. 1, company will be borne by earlier management.

Further, it is admitted position that the writ petitioner No. 2 since his stepping into the management of writ petitioner no. 1, company has not availed any loan from any creditors let alone writ respondent nos. 4-5 and the High Court Division allowed the said arrangement by staying the winding up proceedings. So under no circumstances, can the writ petitioner No. 1 be termed as defaulting-borrower so does the writ petitioner no. 2 for being "স্বার্থ সংশ্লিষ্ট প্রতিষ্ঠান" of him for mere having 51% shares holding in writ petitioner no. 1, company.

Invariably, it is not the true import of section 5gaga or 27(kaka) to put a company sick for time

immemorial on the plea of defaulting-borrower when its earlier liability is being effectively dealt with in the court of law having sufficient security. Further, the main objective of staying the winding up proceeding was to rescue the company from the debt burden and to rebound the company. But the action taken by the creditors has totally jeopardized all its honest effort. If such a hostile attitude continues by the creditor bank towards the promising industries very industrialization in our country would become a far cry.

More so, as has been stated earlier, the previous management of the writ petitioner no. 1, company had taken over the responsibility of squaring up all the liability and that very commitment clearly embodied in the conditions of the agreement which became the part of the order of this court while staying the winding-up proceeding. In such a situation, the writ respondent Nos. 4-5 and that of Bangladesh Bank rather should have played a decisive role as of savior of writ petitioner No. 1, company for the rapid economic growth of this country when both writ respondent Nos. 4-5 have been pursuing their claims in the court of law against their secured

loan. But from the manner the writ respondent No. 2 asked for furnishing information about writ petitioner No. 2 from writ respondent No. 4 clearly put its regulatory authority in the wane.

By all accounts, neither the writ petitioner No. 1 nor the writ petitioner No. 2 be termed as defaulting-borrower within the meaning of sections 5gaga and 27kaka of the Bank Companies, Act, 1991.

Now let us explore their involvement in providing credit facilities to the writ petitioners and whether at their instance the writ petitioners can be regarded as defaulting-borrowers.

We find that, a money suit being Money Suit No. 53 of 1998 and upon a decree, it was initiated Money Decree Case No. 12 of 2000 which then re-numbered as Artha Execution Case No. 601 of 2003 which is now pending. By a letter dated 04.12.2016 issued by writ petitioner no. 2, it asserted that, the writ petitioner no. 2 admitted the claim of writ respondent no. 4 of the loan of 31,00,000/- and prayed for providing writ petitioner No. 1 installment to pay it off and even the writ petitioner

no. 2 gave a cheque amounting to taka 1,00,000/- to respondent no. 4 (though it is dated 04.06.2017).

It is admitted position, writ respondent No. 4 did not turn up to claim such liability in the winding up proceedings. Then in the agreement dated 17.07.2004 annexed with the application for stay of the winding up proceeding, it was agreed by the earlier management that the liability of the writ respondent No. 4 would be paid off by them. Most importantly, the writ petitioner no. 2 was not any party to the suit or execution case. Also, it appears that, earlier management to writ petitioner no. 1, company failed to live-up their commitment. Had it been the case, then consequence will follow the creditor would realize the default amount though filing case and then through execution case which it has done and the said loan is secured one from where one Rupali Bank liquidated their claim by selling 'kha' scheduled property out of three schedules appended in the schedule of the execution case filed by the writ respondent no. 4.

Also, mere praying for waiver of loan taken by earlier management per se does not make one defaulting-borrower when record shows, writ petitioner no. 2 has got

no loan liability with writ respondent no. 4 and only for that neither the writ petitioner no. 1 nor the writ petitioner no. 2 can be termed as defaulting-borrowers.

Last but essentially not the least, from the Affidavit-in-Opposition filed by writ respondent no. 2, it manifests that, till 22.12.2019, the name of the writ petitioner no. 2 had not been referred by writ respondent no. 4 to report in the CIB. So, it is palpably clear that, until 05.08.2019- that is, the date of refusal by the NCC bank to accommodate credit facilities to the writ petitioners, the name of the writ petitioner no. 2 was not in the CIB list. So all the above material proposition lead us to conclude that, the name of the writ petitioners has been sent to the writ respondent no. 2 for enlisting in the CIB database for an ulterior motive to deprive them to avail any credit facilities and to run their business smoothly.

We find that for a loan amounting to taka 35,80,378.00/- availed by writ petitioner no. 1 and its previous management, it filed Artha Rin Suit No. 22 of 2019 only on 10.01.2019 claiming taka 34,72,994.00/- as on 27.12.2018. Despite the fact that, the loan was

availed on 12.05.1999 and winding up proceeding of the writ petitioner no. 1, company had been continuing in the year 2001 but it did not raise any claim during that period. Moreover, it shows from the plaint of the suit that, former Managing Director of writ petitioner no. 1, company has been impleaded as defendant no. 2 in the said suit, despite the facts that, at the time of filing of the suit he was no more in the company as the writ petitioners and writ respondent no. 4 supplied the current composition of the Board of Directors in the company in their respective Supplementary-Affidavits which conversely proves that, the writ petitioner no. 2 had no loan liability towards writ petitioner no. 1, company.

The learned counsel for the appellants gave much emphasis on the application of section 27kaka(4) of the Bank Companies Act, 1991 that asks the creditor to file suit against its defaulting-borrower for which it has compelled to file that suit. Since in the agreement dated 17.07.2004, the name of the writ respondent No. 5 is absent showing it as any creditor nor it filed the suit against the writ petitioner no. 2 and lastly, since in

the said agreement the writ petitioner no. 2 had been exonerated of any liability of writ petitioner no. 1, company so under no circumstances, can these writ petitioners be termed as defaulting-borrowers at its instance. Obviously, the writ respondent No. 5 could realize its outstanding dues if any, from the earlier management of the writ petitioner no. 1, company which it is still pursuing.

Though, Bangladesh Bank, writ respondent no. 2 claimed to have played its role in reporting the name of the writ petitioner in the CIB database in compliance with the provision of Chapter IV of Bangladesh Bank Order, 1972 as well as section 27kaka (2) of the Act of 1991 but in fact, Bangladesh Bank has no role to play apart from sending the name of the defaulting-borrowers to all the banking company and financial institutions in the country under the said provisions of law.

Since the writ petitioner no. 2 after taking the responsibility of the writ petitioner no. 1, company on 22.07.2004 has not availed any credit facilities for writ petitioner no. 1, company and since in the agreement executed by the writ petitioner no. 2 with its earlier

management of writ petitioner no. 1, the writ petitioner no. 2 had not taken any liabilities of its creditor and there has been clear stipulation in the said agreement that, the previous management will bear all the liabilities of the creditor where in the name of the creditors has also been mentioned so the name of the writ petitioners can never be shown in the CIB. Furthermore, since the very agreement that has been annexed to the application for stay of the winding up proceeding became part of the order of the High Court Division, so under no circumstances, the writ petitioners can be termed as any defaulting-borrower. If there had no such stipulation in the agreement retaining the liabilities of earlier management towards their creditor in that event, the facts would have been otherwise. Also, since the order dated 18.07.2004 passed by the High Court Division is still in force so under no circumstances, the writ petitioner no. 1 and the writ petitioner no. 2 can be termed as any defaulting-borrower within the meaning of section 5gaga of the Act of 1991.

As it has been observed in the foregoing paragraphs that, though the loan of the writ respondent nos. 4 and 5

towards the writ petitioner no. 1 has surfaced soon after issuance of the rule when Bangladesh Bank filed Affidavit-in-Opposition and till then those two respondents kept silent for last 18 years but since they have already taken proper steps in realizing the dues from the writ petitioner no. 1, company and its earlier management so there has been no scope to hold the writ petitioners for the liability of such loan and in the same vein these petitioners cannot be regarded as any defaulting-borrower.

The borrower who takes over the management unencumbered can in no way be responsible of the previous liabilities which must be vested upon the previous management. In the instant case, the respondent no. 1, company did not avail any loan after the new management took over the charge of it so, as per the agreement and that of the order of the High Court Division staying the winding-up proceeding, they cannot be treated as defaulting-borrowers.

We, therefore, hold that in no way the respondent Nos. 1 and 2 can be treated as defaulting-borrower and the High Court Division has rightly declared their

enlistment in the CIB report illegal directing to remove their names from the CIB report. The judgment and order passed by the High Court Division is elaborate, speaking and well composed. We are not inclined to interfere with the same.

Accordingly, all these appeals are dismissed, however, without any order as to costs.

CJ.

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The 08th August, 2023
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