

LAW OF BANKRUPTCY IN BANGLADESH



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What is Bankruptcy

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.

There are two types of bankruptcy, bankruptcy of individuals and corporate bankruptcy.

In 1997 in Bangladesh the Bankruptcy Act was enacted, which deals with bankruptcy of individuals only

Historical Background

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. 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 bononim /, meaning a 'trustee' or a 'receiver'. The trustee then took control over the business of the debtor and conducted routine works.

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If it was foamed 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.

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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, the debtors were sentenced to jail. As a result, the jails in England were overcrowded, 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.

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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.



Bankruptcy legislation in Indian sub-continent and Bangladesh

In the British-India, there was no comprehensive law on bankruptcy. In 1848 for the first time Indian Insolvency Act was enacted, based on the English bankruptcy laws. The basis of the Indian insolvency law is the Roman principle of 'cessio bonorum [a voluntary surrender of goods by a debtor to his creditors. It did not amount to a discharge of the debt unless the property ceded was sufficient for the purpose, but it secured the debtor from personal arrest.]

► Later, two separate bankruptcy laws were enacted. The Provincial Insolvency Act (1907) was followed by the Presidency-Towns Insolvency Act (1909). The Act of 1907 was replaced by the Provincial Insolvency Act (1920).

► 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. Both the statutes excluded corporations for insolvency proceed in.

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► 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. While, the Provincial Insolvency Act (1920) was renamed as the Insolvency Act (1920) and was made applicable outside the Municipal limits of Dacca.

► In 1997 the Bankruptcy Act“ was enacted by consolidating the earlier two Acts,¹ 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.

Corporate bankruptcy and UN model law

Although this lecture 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.).



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;



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- 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?

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 Commission on International Trade Law (UNCITRAL) adopted the Model Law on Cross-Border Insolvency (1997).

The Preamble 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

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f) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

The Model Law applies in the following cases where:

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.

An Overview of the Bankruptcy Act 1997

▶ The Bankruptcy Act came into force on August 1997. In *Yunus Mia vs. Bangladesh Krishi Bank*, [54 D L R (2002) 123] 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 Aktaruzzamnn vs. Agrani Bank and Others* [57 D L R (2005) 57] ,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.

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.



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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.

Constitution and Powers 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. [Section 4 of the Act of 1997]

It is noted that 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. [Section 5 of the Act of 1997.]

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▶ 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. [Sinna Subba Goundan v Rangai Goundan AIR 1946 Mad 141.]

▶ 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. [Isar Das v Fatima Bibi AIR 1934 Lah 468, (1934) ILR 15Lah 698, 153 IC 993]

▶ However, when a tribunal commits an error of law in deciding an issue raised by it, it acts beyond its jurisdiction and such decision of the Tribunal can be quashed under writ jurisdiction. [Abdur Rashid Chowdhury v Additional District Judge and Others 56 DLR 573]

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.

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.

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Under the Act, an act of bankruptcy is deemed to have been committed **[Section 9 of the Act of 1997.]**

- ▶ 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,
- ▶ or if he transfers property kept in his name, in the name of his wife or children with the intent to defeat his creditors
- ▶ or if he transfers property or mortgages, pledges, hypothecates or creates charge thereon, which would be void as a fraudulent preference,
- ▶ if he was adjudged a bankrupt,

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- ▶ 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,
- ▶ or if his property has been sold in execution of a decree for payment of debt,"
- ▶ or if he files a plaint for being adjudged bankrupt,
- ▶ or if he gives notice to his creditors that he has suspended 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.

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. **[Section 10 of the Act of 1997.]**

The persons subject to bankruptcy proceedings **[Section 11(1) of the Act of 1997]** 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. [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 Cahnn (1879) LR 10 ChD 183]**, married woman etc.]

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On the other hand, the institutions exempted from bankruptcy proceedings 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. [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.]



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- ▶ The creditors are entitled to file a plaint to initiate bankruptcy proceeding, [Section 12(1) of the Act of 1997.]
- ▶ if they can prove firstly, that they are eligible creditor [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.]
- ▶ 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, the debtor is entitled to file a plaint, [Section 13(1) of the Act of 1997]
- ▶ 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

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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, [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 W N 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 M ad 266, (1964) ILR 1 Mad 1012 (1965) 2 C om p LJ 37.]

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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. [Fate chand Tara chand v Parashram Maghan mal AIR 1953 Bom 101.]

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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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.

[Section 33 (I) of the Act of 1997]

The Court may, by order, nullify the transfer of any property of the debtor, within fifteen years immediately preceding 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 preceding 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. [Section 60 of the Act of 1997]

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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. **[Section 61 (1) of the Act of 1997.]**

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Upon the application of the Receiver, the Court shall nullify the transfer, or payment, or obligation, or judicial proceeding [Section 62 of the Act of 1997.] 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 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 .
[Section 94 of the Act of 1997]

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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, [Section 35 (I) of the Act of 1997.]

An order of adjudication does not operate automatically as a protection to the bankrupt. [P M Hamid v Mohrned Sheriff AIR 1935 Rang 415 (1935) ILR 13 Rang 623, 159 IC 936.]

A protection order is a privilege to be granted or withheld, as the court in its discretion, may determine. [Re Gopal Das Aurora AIR 1926 Cal 640, 94 IC 793 (1925) 30 Cal W N 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.]

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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. [Section 32 of the Act of 1997.]

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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.

It is noted that the Bankruptcy Act does not contain any provision relating to Alternative Dispute Resolution.



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, and thereafter the Receiver's fee shall be paid. In the second phase the debts to be paid in priority to other debts.

[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.]

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. [Section 75 of the Act of 1997]

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After disposal of the estate, the Court may make an order of discharge [Section 47 of the Act of 1997.]

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. [Section 51 of the Act of 1997]

Concluding Remarks

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, 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 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.

Questions Session

