PUNJAB JUDICIAL ACADEMY

HANDBOOK ON
BANKING LAWS
IN PAKISTAN

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EXECUTIVE SUMMARY

This handbook consists of five chapters examining the governing laws in Pakistan at present, the historical development of banking laws and their codification in the Financial Institutes (Recovery of Finances) Ordinance, 2001 which encapsulates the development of banking practices in Pakistan. The different chapters examine why banks exist, how they function, how two parallel systems of conventional and Islamic banking are co-existing in Pakistan and how they are managed, their legal, organizational, and governance structures. Particular emphasis is placed on the evolution of both conventional and Islamic banks within the wider financial system, and how the disputes that arise between these financial institutions and others are dealt with by the judiciary.

It is noted that the scale, scope, and complexity of banking business have increased as banks have diversified across product and geographic lines. This has led to changes in the techniques used by banks to manage liquidity, credit, and other risks. New complex organizational structures have emerged, including large international financial conglomerates that pose new challenges for regulation and supervision. With these new trends and practices, the need for a separate court system and their commitment to the efficiently resolve the currently staggering banking cases.

Chapter one of this handbook is an introduction to the banking laws in Pakistan, how they have developed and are codified. This handbook aims to shed light on the legal and regulatory framework presently in force to govern the banking sector. Chapter two examines the different conventional banking practices and their regulation. The advancement in technology and the international conventional adherences required to attain economic sustainability. Chapter three discusses Islamic banking, the different modes of Islamic banking and how they are regulated in Pakistan.

Chapter four analyses the development and implementation of the Financial Institution (Recovery of Finance) Ordinance, 2001. The requirements that the ordinance prescribes for filing and the institution of a suit in a banking court, the limitations it prescribes and the remedies it provides to the customer and the financial institutions.

Chapter five of this handbook is to equip the reader with the landmark banking cases which have aided in shaping the judicial landscape for financial institutes and the customers alike. For this purpose, a detailed overview is given in chapter five, explaining how banking cases are addressed by the banking courts, the issues brought before, what the judiciary has been looking at considering precedents in the past and the resolution. The compilations of case law given, provides an overview of the banking laws and their interpretation and enforcement in Pakistan. Through the development of a separate court system, much of Pakistan's banking has been streamlined into a separate system and is dealt with accordingly.

Chapter-1

INTRODUCTION OF BANKING LAWS IN PAKISTAN

The banking sector of Pakistan has gone through three phases of development which are pre-nationalization, nationalization and post nationalization. In the pre-nationalization phase, Australian Bank Ltd. and Habib Bank Ltd. were the only two banks after the partition of Pakistan and India on August 14, 1947. For both the newly established countries, the Reserve Bank of India was performing the functions of a Central Bank. A need was felt to establish the banking sector of Pakistan because the Reserve Bank of India was not performing its functions fairly for the Pakistani banking industry.Pakistan's government founded the State Bank of Pakistan in 1948 and subsequently the National Bank of Pakistan in 1949. The Government then launched the State Bank of Pakistan act in 1956 and introduced Banking Companies Ordinance in 1962 for the development of the banking sector in Pakistan. The second phase began in 1974. The government decided to nationalize the banking sector by merging all the banks and established five banks. The last phase which is titled post nationalization began in 1990 when the government of Pakistan privatized the banks and denationalized two financial institutions by making amendments in National Act of 1974. The government made relaxation in the policy of opening up of private banks which encouraged the private sector to grow.[1]

Pakistan's Banking industry encompasses nationalized commercial banks, private banks, public sector banks, foreign banks, Islamic banks, specialized banks and microfinance banks. There are some companies in Pakistan which are working as banks so the financial sector can develop along with economic growth. In 1993, 33 commercial banks were functioning out of which 19 were foreign and 14 were local banks. By the end of 2001, the number of commercial banks increased to 43, out of which 19 were foreign banks and 24 were local banks . In 2010, the number of bank branches reached 9,348 which comprised of 25 domestic private banks, five public commercial banks, four specialized banks and six foreign banks. At present, the State Bank of Pakistan is regulating 46 banks which comprise of 39 local banks and seven foreign banks. The local banks comprise of four specialized banks, five public sector banks, five Islamic banks, eight microfinance banks and 17 private banks.

[1] https://www.iosrjournals.org/iosr-jef/papers/vol1-issue5/F0154650.pdf

1.1 GOVERNING LAWS IN PAKISTAN

Pakistan's Banking Laws have developed over time to incorporate the needs of changing times and the growth in the financial sector. Before the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as "**the Financial Institutions Ordinance, 2001**"), the banking sector was being regulated by the State Bank policies and the Banking Companies Ordinance, 1962. After its Promulgation, in 2001, a separate set of courts has been set up to hear and dispose of relevant cases pertaining to the banking in Pakistan.

- Financial Institutions (Recovery of Finances) Ordinance, 2001;
- Bankers Book of Evidence Act, 1891;
- State Bank of Pakistan Prudential Regulations;
- The Contract Act, 1872;
- The Constitution of the Islamic Republic of Pakistan, 1973.

1.2 POWERS AND JURISDICTION OF BANKING COURTS

Banking courts in Pakistan have been established under Section 5 of the Financial Institutions Ordinance, 2001. The banking courts therefore have the same powers as that of a civil court.

The sole objective of this Ordinance is to provide a speedy summary procedure for the recovery of loans, advances, credits and finances extended by the financial institutions operating in Pakistan to their borrowers and customers. Under summary procedure the defendant cannot appear and defend the suit as a matter of right but only after he has obtained leave to defend on showing that there is a triable cause.

Before the introduction of this Ordinance banking courts were operating under the **Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997** (hereinafter referred to as the **"BCA, 1997"**). This law provided for a single forum for banks as well as customers, who were required to go before the ordinary courts which were creating multifarious proceedings. BCA, 1997 also provided a remedy to customers to approach the same court which can be approached by a bank prior to it. Hence BCA, 1997 repealed two laws for the purpose of recovery of bank loans and other allied disputes namely, Banking Companies (Recovery of Loans) Ordinance, 1979 and the Banking Tribunal Ordinance, 1984.

Under Section 7 of the Financial Institutions Ordinance, 2001, Banking Courts would have all the powers vested in a Civil Court under the Code of Civil Procedure, 1908 (hereinafter referred to as the "**CPC 1908**") and at the same time also has all the powers of a

criminal court which a sessions court possesses under the Criminal Procedure Code, 1898. Some of the inherent powers of the Banking Courts include power to recall, examine execution proceedings, powers in auction procedure, the power to grant adjournment, interim relief, and extra territorial injunction. A banking court has power to summon witnesses for further cross examination, jurisdiction to determine fraud and misrepresentation and it also has powers to punish anyone who commits contempt of court or any other offence under the provisions of the law.

Section 9 of the Financial Institutions Ordinance, 2001 specifies the procedure of the banking courts. Where a customer or a financial institution commits a default in fulfilment of any obligation with regard to any finance, the financial institution or as the case maybe, the customer, may institute a suit in the banking court by presenting a plaint.

The plaint shall be supported by a statement of account which in the case of a financial institution shall be duly certified under the Bankers Book Evidence Act 1898 and all other relevant documents relating to grant of finance. Without a valid statement of account a suit of financial institution is liable to be dismissed. Legal presumption of correctness and truth lies with the statement of account however it can be questioned and challenged by the defendant with regards to its correctness and admissibility. The plaint must contain certain particulars which include the amount of finance availed, the amount paid back, the outstanding amount etc.

After examining the correctness of the suit the court shall send notice\summons to the defendant who by virtue of Section 10 of the Financial Institutions Ordinance, 2001, has thirty days to file a petition of leave to appear and defend the suit. In default of doing so, the allegations of fact in the plaint shall be deemed to be admitted and the suit shall be decreed summarily. According to Section 10, application for leave to defend shall state the amount of finance availed by the defendant, the amount paid by the defendant, dates of payment, the total amount which in the view of the defendant is outstanding and the amount if any, which the defendant disputes as payable.

1.3 TYPES OF BANKING IN PAKISTAN

The following are the two prominent types of banking in Pakistan:

a) CONVENTIONAL BANKING

Commercial banks provide basic banking services and products to the general public, both individual consumers and small to mid-sized businesses. These services include checking and savings accounts, loans, basic investment services such as customer deposits, as well as other services such as safe deposit box.

Banks also earn money from interest they earn by lending out money to other clients. The funds they lend comes from customer deposits. However, the interest paid by the bank on the money they borrow is less than the rate charged on the money they lend.

While commercial banks have traditionally provided services to individuals and businesses, investment banking offers banking services to large companies and institutional investors. They act as financial intermediaries, providing their clients with underwriting services, mergers and acquisitions (M&A) strategies, corporate reorganization services, and other types of brokerage services for institutional and high-net-worth individuals (HNWIs).

While commercial banking clients include individual consumers and small businesses, investment banking clients include governments, hedge funds, other financial institutions, pension funds, and large companies.

b) ISLAMIC BANKING

Islamic banking outlines the concept of banking in consonance with the ethics and value system of Islam and is governed by the principles laid down by the Islamic Shariah. In addition to the conventional good governance and risk management rules, interest free banking is a restricted concept denoting a number of banking instruments or operations, which avoid interest. Islamic banking, the more widespread term is anticipated not only to avoid interest-based transactions, prohibited in the Islamic Shariah, but also to steer clear of unethical practices and participate actively in achieving the goals and objectives of an Islamic economy.

Different types of Islamic banking practices are described in Chapter 3.

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Chapter-2

CONVENTIONAL BANKING

2.1 HISTORY OF CONVENTIONAL BANKING

Banks play a critical role in every economy. They operate the payments system and are the major source of credit for large swathes of the economy, and (usually) act as a safe haven for depositor's funds. The banking system aids in allocating resources from those in surplus (depositors) to those in deficit (borrowers) by transforming relatively small liquid deposits into larger illiquid loans. This intermediation process helps match deposit and loan supply and provides liquidity to an economy. If intermediation is undertaken in an efficient manner, then deposit and credit demands can be met at low cost, benefiting the parties concerned as well as the economy overall. In addition to these on-balance sheet activities, banking organizations have long engaged in traditional off-balance sheet operations, providing loan commitments, letters of credit, and other guarantees that help counterparties plan for future investments, and in some cases gain access to alternative sources of external finance. They also provide an expansive range of various derivative contracts that allow counterparties to hedge their market risks.

In recent years, this simple conceptualization of banking business has radically changed. The largest banks in many countries have transformed themselves, typically via merger and acquisition into multiproduct financial service conglomerates with offerings including: retail banking, asset management, brokerage, insurance, investment banking, and wealth management. These major developments on services have also been matched by the emergence of a diverse array of new funding sources. Driven by securitization, particularly of residential mortgages, banks have become less constrained by their deposit bases for lending. On-balance sheet assets have increasingly been bundled and sold into the market to release capital to finance expansion. Off-balance sheet assets (such as Structured Investment Vehicles (SIVs), SIV-lites, and conduits) have been created to enable banks to collateralize assets funded by the issue of short-term lease, not only generating trading profits, but also enabling them to raise resources to finance growing funding gaps. Small and medium-sized institutions have also actively participated in diversifying their product and funding features.

2.2. MODERN BANKING

Phenomenal growth in structured credit products has been a major recent feature of modern banking business apart from that technology has been another important element in transforming the banking industry. Banks are major users of I.T and other financial

technologies. Technological advances have revolutionized both back-office processing and analysis of financial data, as well as front-office delivery systems. Evidence suggests that the former has led to significant improvements in bank costs and lending capacity whereas the latter has improved the quality and variety of banking services available to customers. Possibly the most substantial impact of technology on the banking system has been on the payments system, where electronic payments technologies and funds transfers have replaced paper-based payments (cash and checks) and paper recordkeeping. The reduction in costs from such changes has been significant.

2.3. REGULATION

In addition to the generally favorable economic climate, banking business has been transformed by deregulation that removed barriers to competition in traditional and new (non-banking) product areas as well as geographically. Inextricably linked to the deregulation trend have been the moves toward the harmonizing of regulations—across countries and different financial service sectors.

In general, there has been a strong policy move to create more uniform regulatory structures so that no jurisdiction or sector of the financial services industry has an unfair competitive advantage. Other noteworthy initiatives include the OECD's anti-money-laundering/anti-terrorist financing initiatives under the aegis of the Financial Action Task Force.

With the growing innovative practices in the banking sector, the courts and the judiciary have to keep abreast with these growing finance and leasing activities, the prevalent market practices and the relevant laws which aid in resolution.

2.4. CORPORATE BANKING

Corporate banking is a subset of business banking that involves a range of banking services that are offered only to corporate entities. The services include but are not limited to the provision of credit, cash management facilities and others. Some of the available modes of financing are discussed below.

a) LETTER OF CREDIT

A letter of credit also known as a credit letter, is a letter from a bank or a financial institute guaranteeing that a buyer's payment to a seller will be received on time and for the correct amount. In the event that the buyer is unable to make a payment on the purchase, the bank will be required to cover the full or remaining amount of the purchase. Letters of credit are often used within the international trade industry. Due to the nature of international dealings, including factors such as distance, differing laws in various countries

and not having any background information on the parties, the use of letters of credit has become a very important aspect of international trade. Banks usually charge a fee for issuing a letter of credit. It is a negotiable instrument and has various types.

The following table encapsulates different types of letters of credit:

LETTER OF CREDIT TYPES	
COMMERCIAL LC	A standard LC, also called as documentary credit
EXPORT /IMPORT LC	LC depending on who uses it. If used by exporter, he will name it to be exporter L/c and vice-versa.
TRANSFERABLE LC	As the name says, it is transferrable to the next supplier in chain & that allows the beneficiary to provide its own documents. The beneficiary is only an intermediary for actual supplier
UN-TRANSFERABLE LC	The beneficiary is the recipient & cannot further use LC to pay anyone. In short, he is not allowed to transfer it to third parties
REVOCABLE LC	Can be altered at any time by the issuing bank/ buyer without informing the seller. Not used frequently, no shield to seller.
IRREVOCABLE LC	Without consent of seller, no alterations can be made by anyone.
STANDBY LC	It ensures the payment to seller if anything wrong happens
CONFIRMED LC	When the advising bank also guarantees the payment to the beneficiary, it is called Confirmed LC
UNCONFIRMED LC	This is assured only by issuing bank & not in need of second bank
REVOLVING LC	These can be used be used for many payments instead of issuing for each of them
BACK TO BACK LC	Two LCs are issued- one by the bank of buyer to the intermediary & second by the bank of an intermediary to the seller.
RED CLAUSE LC	Partial payment before the goods are shipped like an advance against a written confirmation from the seller & the receipt
GREEN CLAUSE LC	Same like Red Clause LC, but the only difference is proof of warehousing is also given to the seller.

[2]

The bank may even consider taking a security to minimize any potential loss. They carry a risk for the issuing bank in case the bank makes a payment under the letter of credit

[2] https://efinancemanagement.com/sources-of-finance/letter-of-credit

and the client defaults. Therefore, before issuing a letter of credit, the bank assesses the client's financial position to determine whether the client's creditworthiness merits the risk taken by the bank on the client's ability to pay. The bank may even consider taking a security to minimize any potential loss.

LONG TERM FINANCING

Long-term finance can be defined as any financial instrument with maturity exceeding one year by way of issuing equity shares, by the form of debt financing, by long term loans, leases or bonds and other public or private equity instruments. It is done for usually big projects financing and expansion of company and such long-term financing is generally of high amount. The fundamental principle of long-term finances is to finance the strategic capital projects of the company or to expand the business operations of the company. These funds are normally used for investing in projects that are going to generate synergies for the company in the future years. Long term financing can be done under conventional banking methods as well as Islamic banking. The above stated categories which then have further sub-categories discussed below in detail:

EQUITY CAPITAL

This represents the interest-free perpetual capital of the company raised by public or private routes. The company may raise funds through the market via public offerings or opt for private investors who shall take a substantial stake in the company. However, in equity financing, there is a dilution in the ownership and the controlling stake rest with the largest equity holder.

PREFERENCE CAPITAL

Preference Capital is that portion of capital which is raised through the issue of the preference shares. There is no legal obligation on the firm to pay a dividend to the preference shareholders and this kind of capital is considered as a component of net worth and hence, the credit worth of the company increases. This is the hybrid form of financing that has certain characteristics of equity and certain attributes of debentures.

DEBENTURES

Debentures are defined as a loan taken from the public by issuing debenture certificates under the common seal of the company. Debentures can be placed through public or private placement. If a company wants to raise money from the general public, it takes the public offering route where all the public subscribing to it gets allotted certificates and are creditors of the company. If a company wants to raise money privately, it may

approach the major debt investors in the market and borrow from them at higher Interest Rates.

TERM LOANS

A term loan provides borrowers with a lump sum of cash upfront in exchange for specific borrowing terms. Term loans are normally meant for established small businesses with sound financial statements. In exchange for a specified amount of cash, the borrower agrees to a certain repayment schedule with a fixed or floating interest rate. They are given generally by banks or financial institutions for more than one year against strong collaterals provided by the company in the form of land, buildings, machinery and other fixed assets.

RETAINED EARNINGS

Retained earnings are the profits that are kept aside by the company over a period of time to meet the future capital needs of the company. These are the free reserves of a company and do not form a cost or interest repayment burden.

Conventional banking has evolved over the years. Banks offer trade finance related operations under the concept of services, guarantee and lending.

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Chapter-3

ISLAMIC BANKING IN PAKISTAN

3.1. HISTORY OF ISLAMIC BANKING

The first Constitution of the Islamic Republic of Pakistan in 1956 shed light on the state's responsibility to eliminate riba, which was also known as interest on loans. The recommendation to overhaul the banking system was given by the council on Islamic Ideology in 1969 and then again in 1971. Steps for Islamization of banking and financial system of Pakistan were started in 1977-78. Later in July 1979, General Zia declared that the affairs of the National Investment Trust, the House Building Finance Corporation, and the Investment Corporation of Pakistan were to be run on an interest-free basis through the adoption of profit-loss sharing.

Pakistan was among the three countries in the world that had been trying to implement interest free banking at a comprehensive/national level. But as it was a mammoth task, the switchover plan was implemented in phases. The Islamization measures included the elimination of interest from the operations of specialized financial institutions including HBFC, ICP and NIT in July 1979 and that of the commercial banks during January 1981 to June 1985.

The legal framework of Pakistan's financial and corporate system was amended on June 26, 1980 to permit issuance of a new interest-free instrument of corporate financing named Participation Term Certificate (PTC). An Ordinance was promulgated to allow the establishment of Mudaraba companies and floatation of Mudaraba certificates for raising risk-based capital. Amendments were also made in the Banking Companies Ordinance, 1962 (The BCO, 1962) and related laws to include provision of bank finance through PLS, mark-up in prices, leasing and hire purchase.

Separate Interest-free counters started operating in all the nationalized commercial banks, and one foreign bank (Bank of Oman) on January 1, 1981 to mobilize deposits on profit and loss sharing basis. Regarding investment of these funds, bankers were instructed to provide financial accommodation for Government commodity operations on the basis of sale on deferred payment with a mark-up on purchase price. Export bills were to be accommodated on exchange rate differential basis. In March, 1981 financing of import and inland bills and that of the then Rice Export Corporation of Pakistan, Cotton Export Corporation and the Trading Corporation of Pakistan were shifted to mark-up basis.

Simultaneously, necessary amendments were made in the related laws permitting the State Bank to provide finance against Participation Term Certificates and also extend advances against promissory notes supported by PTCs and Mudaraba Certificates. From July 1, 1982 banks were allowed to provide finance for meeting the working capital needs of trade and industry on a selective basis under the technique of Musharaka.

As from April 1, 1985 all finances to all entities including individuals began to be made in one of the specified interest-free modes. From July 1, 1985, all commercial banking in Pak Rupees was made interest-free. From that date, no bank in Pakistan was allowed to accept any interest-bearing deposits and all existing deposits in a bank were treated to be on the basis of profit and loss sharing. Deposits in current accounts continued to be accepted but no interest or share in profit or loss was allowed to these accounts. However, foreign currency deposits in Pakistan and on-lending of foreign loans continued as before. The State Bank of Pakistan had specified 12 modes of non-interest financing classified in three broad categories. However, in any particular case, the mode of financing to be adopted was left to the mutual option of the banks and their clients.

The procedure adopted by banks in Pakistan since July 1 1985, based largely on 'mark-up' technique with or without 'buy-back arrangement', was, however, declared un-Islamic by the Federal Shariat Court (FSC) in November 1991. However, appeals were made in the Shariat Appellate Bench (SAB) of the Supreme Court of Pakistan. The SAB delivered its judgment on December 23, 1999 rejecting the appeals and directing those laws involving interest would cease to have effect finally by June 30, 2001. In the judgment, the Court concluded that the present financial system had to be subjected to radical changes to bring it into conformity with the Shariah. It also directed the Government to set up, within specified time frame, a Commission for Transformation of the financial system and two Task Forces to plan and implement the process of the transformation.

The Commission for Transformation of Financial System (CTFS) was constituted in January 2000 in the State Bank of Pakistan under the Chairmanship of Mr. I.A. Hanfi, a former Governor State Bank of Pakistan. A Task Force was set up in the Ministry of Finance to suggest the ways to eliminate interest from Government financial transactions. Another Task Force was set up in the Ministry of Law to suggest amendments in legal framework to implement the Court's Judgment. The CTFS constituted a Committee for Development of Financial Instruments and Standardized Documents in the State Bank to prepare model agreements and financial instruments for new system.

The CTFS in its Report identified a number of prior actions, which were needed to be taken to prepare the ground for transformation of the financial system. It also identified

major Shariah compliant modes of financing, their essentials, draft seminal law captioned 'Islamization of Financial Transactions Ordinance, 2001', model agreements for major modes of financing, and guidelines for conversion of products and services of banks and financial institutions. The Commission also dealt with major products of banks and financial institutions, both for assets and liabilities side, like letters of credit or guarantee, bills of exchange, term finance certificates (TFCs), State Bank's Refinance Schemes, Credit Cards, Interbank transactions, underwriting, foreign currency forward cover and various kinds of bank accounts. The Commission observed that all deposits, except current accounts, would be accepted on Mudaraba principle. Current accounts would not carry any return and the banks would be at liberty to levy service charge as fee for their handling. The Commission also approved the concept of Daily Product and Weightage System for distribution of profit among various kinds of liabilities/deposits. The Report also contained recommendation for forestalling willful default and safeguarding interest of the banks, depositors and the clients.

According to the Commission, prior/preparatory works for introduction of Shariah compliant financial system briefly included creating legal infrastructure conducive for working of Islamic financial system, launching a massive education and training program for bankers and their clients and an effective campaign through media for the general public to create awareness about the Islamic financial system.

It was decided in September 2001 that the shift to interest free economy would be made in a gradual and phased manner and without causing any disruptions. Accordingly, the State Bank issued detailed criteria in December 2001 for establishment of full-fledged Islamic commercial banks in the private sector. Al Meezan Investment Bank received the first Islamic commercial banking license from SBP in January 2002 and the Meezan Bank Limited (MBL) commenced full-fledged commercial banking operation from March 20, 2002. Further, all formalities relating to the acquisition of Societe Generale, Pakistan by the MBL were completed, and by June, 2002 it had a network of 5 branches all over the country, three in Karachi, one in Islamabad and one in Lahore.

The Government as also the State Bank are mainly concerned with stability and efficiency of the banking system and safeguarding the interests, particularly, of small depositors. With this concern in mind, it has been decided to operate Islamic banking side by side with traditional banking. The approach is to institute best practice legal, regulatory and accounting frameworks to support Islamic banks and investors alike. The year 2002-2003 witnessed strengthening measures taken in the areas of banking, non-bank financial companies and the capital markets.

3.2 DIFFERENT MODES OF ISLAMIC BANKING AND FINANCES

The major modes of Islamic banking being practiced in Pakistan are listed below:

a) MURABAHA

The term Murabaha is defined as the sale on mutually agreed profit. Technically, it is a contract of sale in which the seller declares his cost and profit. Islamic banks have adopted this as a mode of financing. As a financing technique, it involves a request by the client to the bank to purchase certain goods for him. The bank does that for a definite profit over the cost, which is stipulated in advance.

b) IJARAH

Ijarah is a contract of a known and proposed usufruct against a specified and lawful return or consideration for the service or return for the benefit proposed to be taken, or for the effort or work proposed to be expended. In other words, Ijarah or leasing is the transfer of usufruct for a consideration which is rent in case of hiring of assets or things and wage in case of hiring of persons.

c) IJARAH-WAL-IQTINA

A contract under which an Islamic bank provides equipment, building or other assets to the client against an agreed rental amount along with a unilateral undertaking by the bank or the client that at the end of the lease period, the ownership in the asset would be transferred to the lessee. The undertaking or the promise does not become an integral part of the lease contract. The rentals as well as the purchase price are fixed in such a manner that the bank manages to attain the principal amount along with profit over the period of lease.

d) MUSAWAMAH

The concept of musawamah deals with the sale of a commodity where the price of the same is bargained between the buyer and the seller. This is done without any reference to the price paid or cost incurred by the latter.

The theory is different from Murabaha financing in terms of pricing. Unlike Murabaha, the seller in musawamah is not obliged to reveal his cost. Both the parties negotiate the price. All other conditions relevant to Murabaha are valid for Musawamah as well. Musawamah can be used where the seller is not in a position to ascertain precisely the costs of commodities that he is offering to sell.

e) ISTISNA'A

It is a contractual agreement for manufacturing goods and commodities, allowing cash payment in advance and future delivery or a future payment and future delivery.

Istisna'a can be used as a mode of financing for the manufacturing or construction of houses, manufacturing plants, building of bridges, roads and highways and various other large-scale projects.

f) BAI MUAJJAL

Bai muajjal constitutes credit sale. It is a contract in which the bank earns a profit margin on his purchase price and allows the buyer to pay the price of the commodity at a future date in a lump sum or in installments. It has to expressly mention the cost of the commodity and the margin of profit is mutually agreed. The price fixed for the commodity in such a transaction can be the same as the spot price or higher or lower than the spot price.

g) MUDARABAH

A form of partnership where one party provides the funds while the other provides expertise and management. The latter is referred to as the Mudarib. Any profits accrued are shared between the two parties on a pre-agreed basis, while loss is borne only by the provider of the capital.

h) MUSHARAKAH

Musharakah symbolizes a relationship established under a contract by the mutual consent of the parties for sharing of profits and losses in a joint business setup. It is an agreement under which the Islamic bank provides funds, which are mixed with the funds of the business enterprise and others. All providers of capital are entitled to participate in the management, but not necessarily required to do so. The profit is distributed among the partners in pre-agreed ratios, while the loss is borne by each partner strictly in proportion to respective capital contributions.

i) BAI SALAM

Salam means a contract under which advance payment is made for goods to be delivered in the future. The seller undertakes to supply some specific goods to the buyer at a future date in exchange of an advance payment which is fully paid at the time of the contract. It is necessary that the quality of the commodity being purchased is specified leaving no room for ambiguity in case of a dispute. The main objects of this kind of sale are that the goods in question cannot be gold, silver or currencies. Barring this, Salam covers almost everything, which is capable of being definitely described as to quantity, quality and workmanship.

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Chapter 4

FINANCIAL INSTITUTIONS (RECOVERY OF FINANCES) ORDINANCE, 2001

4.1 ESTABLISHMENT

A Banking Court is defined as one established by the Federal Government under the Financial Institutions Ordinance, 2001, for cases in which the claim does not exceed a hundred million rupees, or for trying criminal offences under the Ordinance, or as the High Court for cases in which the claim exceeds the limit of one hundred million. The Federal Government is empowered to establish as many Banking Courts in a district as it deems necessary. It shall appoint a judge for each court and, whenever there is more than one court in any district, it shall specify the territorial limitations of their respective jurisdictions. A banking court judge must currently be, have been or qualified to be a District Judge.

The Financial Institutions Ordinance, 2001 states that '*...**no Court other than a Banking Court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Banking Court extends under this Ordinance'.***

This provision has been interpreted by the Supreme Court of Pakistan as conferring exclusive jurisdiction to Banking Courts over all disputes in relation to any financial facilities availed by the customers (as defined under the Financial Institutions Ordinance, 2001) from any financial institution, to the exclusion of banking offences courts, criminal courts and the Federal Investigation Agency.

This decision of the apex court has brought an end to a previous common practice where the Banks used to lodge First Information Reports ('FIR') against their defaulted customers upon the dishonouring of post-dated cheques deposited by the customers at the time of availing loans. This created great pressure on the customer in case of defaults as they were likely to face criminal proceedings under sec. 489-F of the Code of Criminal Procedure along with civil recovery proceedings under the Financial Institutions Ordinance, 2001.

4.2 FILING A SUIT

The Financial Institutions Ordinance, 2001 requires that the plaint should be accompanied by a statement duly certified under the Banker's Book Evidence Act, 1981. It is further required that copies of all other documents relating to grant of the financial facilities should also be filed. In other words, the suit should be supported fully by a statement of account and all supportive documents.

It is also required under the Financial Institutions Ordinance, 2001 that the following particulars should be specifically stated in the plaint:[3]

a) The amount of finance availed by the customer from the financial institution.

b) The amount paid by the customer to the financial institution and the dates of payment; and

c) The amount of finance and other documents relating to finance payable by the customer to the financial institution up to the date of the suit.

In order to constitute a duly certified copy regarding entries in the books of a Banker, the Statement of Account must bear a Certificate stating that 'it is true copy of such entry and such entry is contained in one of the ordinary books of the bank. It was made in the usual and ordinary course of business. Such book is still in the custody of the bank' and in addition to that it must be dated and subscribed by the principal accountant or manager of the bank along with their names and designations. In a recent judgment the court has held that computer generated statements do not require any signature or certification.[4]

4.3 LIMITATION

Ordinarily a suit of recovery has to be filed in the Banking Court within three years of default of the customer. However, the Lahore High Court has declared that if the recovery suit is sought against mortgaged properties then the limitation for filing is twelve years from the date of default.[5]

In the case **Tariq Shahbaz Chaudhry v. Bank of Punjab** (2004 CLD 207), the Lahore High Court, Lahore, has clarified the operation of time limitation, in case of a suit filed against a guarantor. The appellant in the case claimed that limitation against a guarantor expires with the expiry of limitation period against the customer. However, the court clarified that the limitation against the guarantors who had furnished their personal guarantees to the financial institution when the customer availed any finances, would run from the date of calling of the guarantees, and not automatically on the customer's default.

Under the Financial Institutions Ordinance, 2001, a different procedure has been introduced contrary to the procedure required before, where the defendant was entitled to defend suits and produce evidence in their defence, while the financial institution was bound to produce evidence in support of its claim. Now however, a customer has to file an application for leave to defend (also called Petition for Leave to Appear, abbreviated as

[3] S. 9(3) of FIO 2001

[4] 2017 CLD 552.

[5] Id. s. 132 as interpreted by the Lahore High Court in Silk Bank Limited v Al-Khan Constructions Company (PVT) 2017 CLD 496.

'PLA') to obtain leave of the Court first to defend the suit. A PLA shall contain a summary of the substantial questions of law as well as fact in respect of which, in the opinion of the defendant, evidence needs to be recorded.[6] A PLA has to be moved in the Court within 30 days from the date of service of a notice regarding the suit having been filed[7]. Thereafter a notice is served either through officials of the Court, or registered post, or courier service, or publication in the press.

The Lahore High Court in the case **Abdul Sattar v. The Bank of Punjab** (2017 CLD 1247) has confirmed that, according to the clear wording of the Financial Institutions Ordinance, 2001, the service notice is to be considered as validly served if any one of these above mentioned ways is used and that, in case of multiple attempts, the time of 30 days for filing PLA starts from the date of first valid service.

4.4 CONDITIONS FOR FILING

Section 9(3) of the Financial Institutions Ordinance, 2001 imposes a condition on the financial institution to give details of finances according to the records it maintains, along with the records itself, in its plaint. A similar provision, Section 10(4), imposes the burden on the customers to give details of their finances and clearly mention them in their petition for leave to appeal ("**PLA**").

The following information is required to be furnished in a tabular form in the customer's PLA:

- he amount of finance availed by the customer from the financial institution, the amounts paid by the customer to the financial institution and the dates of payments;
- The amount of finance and other amounts relating to the finance payable by the customer to the financial institution up to the date of institution of the suit; and
- The amount, if any, which the customer disputes as payable to the financial institution and facts in support thereof.

Failure to submit the requisite information or giving any materially incorrect information will result in loss of the right to defend the suit, and in a penalty of not less than five per cent of the amount of the claim, unless the defendant can prove the mistake was made in good faith.

[6] S. 10(3) of FIO 2001

[7] S. 10(2) of FIO 2001

4.5 PROCEDURE BEFORE THE BANKING COURT

Once a customer has filed a PLA in the Court, the Plaintiff financial institution is given the opportunity to rebut the assertions made in it through filing a replication before the court. The Plaintiff may file any additional documents with the replication after filing the plaint, subsequently leave can be granted to the defendants.

Unless, the additional documents are nothing but clarifying the existing assertions made in the plaint, in which case leave will be granted on the merit of the customer's assertions.

If the customer has failed to file PLA in the court or if the court is not satisfied with the grounds taken in the PLA, a decree would follow by the court, unless the court, in its own discretion, requires further materials from the financial institution in support of its claim or in the interest of the prevalent government policies.

In case leave to defend is granted to the customer, the court also has the power to pass an interim decree to the extent that the court might be of the view that the claim was, prima facie, established. This decree can be amended or modified until a final decree is passed by the court in the matter.

Once a decree has been passed by the court, the same may be executed through the process of the Court or by the financial institution itself without intervention of the court. In case of private execution, accounts have to be filed in the court. The courts can grant leave to the defendants either unconditionally or they may also attach some conditions on the defendant for granting leave to him.

4.6 REMEDIES FOR FINANCIAL INSTITUTIONS BEFORE THE COURT'S DECREE

When a suit is for recovery of an amount for which security had been provided, or if it is regarding any claim based on a finance lease, the Court, to prevent the relevant property being used in a manner that might prejudice the security or the property of the financial institution, may issue and order to:

a) restrain the customer and any other concerned person from transferring, alienating, parting with possession or otherwise encumbering, charging, disposing of or dealing with the property in any manner:

- Attach such property;
- Transfer possession of such property to the financial institution; or
- Appoint one or more Receivers of such property on such terms and conditions as it may deem fit.

The above-mentioned order may also be passed regarding property that might be held in the name of some other person but belongs to the customer.

In cases where a customer has obtained property through a finance lease or has entered into an agreement with the financial institution authorizing it to take possession of the property without filing a suit, the financial institution may, at its discretion:

- Directly recover the same if the property is movable; or
- File a suit and the Banking Court may pass an order at any time, either authorizing the financial institution to recover the property directly or with the assistance of the Court.

4.7 ENFORCEMENT OF JUDGMENTS / DECREES

a) SALE OF SECURED ASSETS

The assets secured by way of mortgage, pledge and hypothecation can be put up for public auction through intervention of the banking court. Under Section 15 of the Financial Institutions Ordinance, 2001 certain powers have been given to financial institutions to sell out the mortgaged properties privately without intervention of the court after duly serving notices to the defaulted customer.

The said provision of the Financial Institutions Ordinance, 2001 was declared ultra vires by the Honourable Supreme Court of Pakistan through its Judgment in National Bank of Pakistan vs. SAF Textile Mills Ltd etc. as the Court held that in banking debt recovery cases, a bank is also a party to that particular case and therefore determination of outstanding liabilities towards the customer by the bank itself cannot be considered as fair. The principle of ***nemo iudex in causa sua*** (no-one should be a judge of his own cause) was seen as being infringed by section 15 of the Financial Institutions Ordinance, 2001, and this constituted a breach of the right to a fair trial protected by Article 10A of the Constitution of Pakistan. Moreover, as discussed above, the provision was declared to be unconstitutional on two more grounds, namely; being in violation of the constitutional prohibition of exploitation and the protection of property rights.

The Recovery Amendment Act, hence modified section 15 and granted additional powers to the Federal Government to enact rules in the matter. Pursuant to that, the Federal Government has recently framed rules, the Recovery Rules, which provide a complete mechanism to deal with the determination of outstanding liabilities of defaulted customers through an independent chartered accountant. The independent assessor's expenses shall

initially be borne by the financial institution but will be later adjusted from the outstanding liabilities of the customer, after impartial determination by the same.

b) ATTACHMENT OF PERSONAL ASSETS

Enforcement of judgments for satisfaction of outstanding decretal amounts can be done against judgment-debtors, which might include the principal borrower and the guarantors. In case of default, guarantors are equally liable for the default committed by the customer and they cannot ask the Bank to avail all remedies against the customer/principal borrower. However, personal assets of mortgagors who had secured debts of third parties by way of mortgage only and had not furnished any personal guarantee cannot be attached for satisfaction of the decrees. On the other hand, if a borrower dies, his or her property can be attached and legal heirs would be bound by that attachment.

c) ARREST OF JUDGEMENT DEBTORS

If the assets of the judgment debtors are not traceable by the decree holders, the only remedy available to them is to seek the arrest and detention of the judgment-debtors by filing an application before the banking court.

4.8 APPEAL: REMEDIES AGAINST THE DECREE PASSED BY A BANKING COURT

Either party aggrieved with the final order of the banking court can file an appeal within 30 days. After a final order/judgment is passed by the banking court, appeal lies before a Division Bench of the concerned High Court, and in case the appeal is admitted, it shall be decided within 90 days from the date of admission[8].

However, the appellant, like in other appellant systems cannot raise any new grounds in the appeal which he failed to take up earlier.

Once an appeal is allowed by the High Court it, the High Court can exercise the following powers:

- Remand the case to the banking court – for further deliverance on facts
- Hear the parties and decide on the merits of the case
- Uphold the Banking court's decision in the case and dismiss the appeal.

In case the Court of Appeal grants a stay against execution of the decree when an appeal is filed against a decree, the customer would be required to deposit in cash the amount of the decree or if the court so allows, to furnish security for satisfaction of the

[8] Sec. 22 subsection (4) of the Financial Institutions (Recovery of finances) ordinance 2001

decree. However, any order of stay of execution, cannot be granted for a period longer than six months and automatically lapses on expiry of such period.

For ex-parte judgment against the defendants, they or a third party may apply before the Banking court for setting aside the decree within 21 days of the decree or, if the summons was not duly served, from the moment they acquire knowledge of the decree.

The Financial Institutions Ordinance, 2001 also puts a limitation period of 90 days within which the appeal has to be decided by the High Court, once it is allowed on merits (Sec. 22, sub section (4)).

Some significant case law in recent years is being reproduced below, which gives an overview of the issues that have been raised in appeal before the High Court and the Honorable High Court's decision's reflecting the jurisprudence developed in the area accordingly.

4.9 APPEALS UNDER SECTION 22 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001:

Appeals in high courts are often accepted and remanded on the basis of common errors in judgments by the banking courts. For ease of reference, some of the most common reasons for appeal have been listed below:

a) Application for leave to defend, if filed, must be heard and decided before the court proceeds further with the suit. It is also pertinent that the contentions raised in the application for leave to defend are carefully examined and weighed in. A decree cannot be passed without first deciding on the application to leave to defend. Reliance is placed upon 2020 CLD 1379; 2019 CLD 1254; 2019 CLD 113; 2019 CLD 181; 2019 CLD 713; 2013 CLD 583; 2017 CLD 521; 2016 CLD 1821; 2016 CLD 609; 2002 CLD 1279; 2002 CLD 1707; 2003 CLD 245; 2003 CLD 284; 2004 CLD 1366;

b) Even in the absence of a petition for leave to appear, the banking court is bound to examine the record before passing the decree. Once a petition for leave to appear was filed, its grounds could not be ignored and the court must consider those grounds, even in the absence of the defendants. Reliance is placed upon 2017 CLD 1650; 2002 CLD 1279; 2003 CLD 1567;

c) Electronic and computer-generated financial statements are admissible in the court of law as valid evidence under Electronic Transactions Ordinance 2002. Reliance is placed upon 2018 CLD 1476;

d) All amounts must be recalculated in accordance with law, incorporate "agreed loss value" where need be and it is only after providing both parties an opportunity to be heard, that the banking court should make a well-reasoned order. Reliance is placed upon 2021 CLD 692; 2020 CLD 1356; 2020 CLD 740;

e) The Banking Courts must not set aside or hinder or vitiate any auction proceedings if there are not any objections filed by either side. Reliance is placed upon 2019 CLD 696; 2019 CLD 733;

f) The Banking Courts must not proceed with any suit ex-parte without ensuring proper and effective service upon the defendant. Effective service is through personal service by the bailiff, registered post/courier service or by way of passing on the given address. Reliance is placed upon 2021 CLD 553; 2002 CLD 1259; 2002 CLD 1697; 2003 CLD 254;

g) If the claim of the defendant in the application to leave to defend is different from the grounds taken by him against the suit, then the principle of Resjudicata (Section 11 of the CPC) does not apply. Reliance is placed upon 2019 CLD 546;

h) Delay in filing of proceedings could not be condoned lightly unless there was shown sufficient reason in causing delay. When and if the delay is duly explained by the defaulting party, it was his right to have hearing on merits. Opposite party was entitled to a right accrued by such lapses and negligence did not constitute sufficient cause to condone the delay. Reliance is placed upon 2017 CLD 521;

i) The banking court must provide "sufficient reasons" for passing an order in regard to payment of a decretal amount in installment. Requirement of "sufficient reason" is embodied under Order XX, Rule 11 of the Civil Procedure Code, 1908. Reliance is placed on 2015 CLD 1167; 2017 CLD 757; 2002 CLD 739; 2002 CLD 867; 2004 CLD 1215; 2004 CLD 832; 2004 CLD 1157;

j) The banking court cannot charge additional amount on grounds of delay, by the virtue of the State Bank of Pakistan BCD Circular Nos.13 of 1984 dated June 20, 1984 and BCD Circular No.32 of 1984 dated November 26, 1984, which states that all Financial Institutions in Pakistan are prohibited from charging any additional sum on account of delay caused by the customer in re-payment of its obligation created under an agreement based on mark-up and such obligation under a mark-up based agreement, once fixed could not be enhanced. Reliance placed upon 2015 CLD 1439; 2002 CLD 1267;

k) The Banking Court while passing impugned must take into account the rate of cost of funds as determined by the State Bank of Pakistan and parameters set out in S.3 of

the Financial Institutions (Recovery of Finances) Ordinance, 2001. Reliance is placed upon 2015 CLD 1089;

l) Banking Courts cannot grant an appeal for banks charging markup beyond the expiry date of a facility; where the documents and rate of markup were disputed. Documents are disputed where in the statement of accounts, most of the entries and particulars of transactions are not given. Reliance placed upon 2014 CLD 153;

m) The Financial Institutions Ordinance, 2001 is a special law and the Limitation Act 1908 is a general law, thus Section 5 of the Limitation Act 1908 is not applicable in filing of appeal under Section 22 of Financial Institutions Ordinance, 2001. Reliance is placed upon on 2017 CLD 267;

n) The Banking Court should exclude the time spent in obtaining the copies from the parties, when calculating the period of limitation. Reliance is placed upon 2014 CLD 1020;

o) Banking Court could determine the date of default for the cost of funds under S. 47, C.P.C., only if no date was defined in the decree. However, if such date is defined under the decree, the court is bound to follow it. Reliance is placed upon 2013 CLD 1661;

p) Under the provisions of Section 171 of the Contract Act 1872, a Banker, amongst others named therein, in absence of a contract to the contrary had a right to retain as security for a general balance of account goods bailed to him. Reliance is placed upon 2016 CLD 2306;

q) Mere reference of documents exhibited would not amount to minutely examining the case by the Banking Court. Instead, every bit of evidence should be discussed and judgment should be based on the basis of evidence. The court cannot miss any piece of evidence that has been submitted to the Court. Reliance is placed on 2013 CLD 2230; 2002 CLD 1245; 2002 CLD 1730; 2004 CLD 810; 2004 CLD 1356; 2005 CLD 875;

r) The Banking Courts can only set aside or vitiate the auction proceedings by fulfilling the requirements encapsulated under section 15(4) Financial Institutions Ordinance, 2001. These include a press publication of the venue of the auction in at least two daily newspapers and a proper service of notice to the parties 15 days prior to the publication of proclamation of sale under Order XXI, Rule 66 of the Civil Procedure Code, 1908. Furthermore, the Bank is required to submit accounts of auction to the Banking Court within thirty days with approval and the Bank is not to sell the suit property for anything less than the reserve price and lastly, the Bank is required to

inform the Banking Court or local authorities while handing over possession of suit property to auction purchaser, without preparing its inventory. The Bank is also required to place on record list of bidders that participated in the auction and other proceedings conducted at the spot. Reliance placed upon 2017 CLD 833; 2013 CLD 546; 2016 CLC 204; 2013 CLD 1992; 2003 CLD 1318;

s) The Banking Court must not proceed with any suit without applying its "judicious mind", while erring the law i.e., Article 25 of The Constitution of 1973 (persons equally placed must be treated alike). Reliance placed upon 2012 CLD 1582; 2004 CLD 1157;

t) Banking court may not impose penalty upon the bank, without any explanation and without issuing any show-cause notice; it was the primary responsibility of the Banking Court to pass the order keeping in view the principles of natural justice i.e., without fulfilling prerequisites of an arrest under S.22 of Peoples' Finance Corporation Act, 1972. Reliance placed upon 2009 CLD 1493;

u) No warrants of arrest could be issued by the banking court default without first seeking the sale of the property for the satisfaction of decree and fulfilling the condition laid down in Precision Engineering Ltd. and others v. The Grays Leasing Ltd. PLD 2000 Lah. 290. Reliance placed upon 2011 CLD 316;

v) Banking courts, while granting leave to appeal to the debtors, must consider the question of limitation as a substantial question of fact and law. In regard to this consideration of limitation, as per the provision of S.24 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, the suit can be instituted even after the expiry of limitation, when a sufficient cause is proved. Additionally, as per the provisions of O.VII, R6, C.P.C. The ground of exemption of limitation had to be also mentioned. Reliance placed upon 2009 CLD 1656; 2003 CLD 751;

w) Banking courts must not order ex parte proceedings in slipshod manner and that too against a dead person. It is the bounden duty of the learned Banking Court to take care of the mandatory provisions of Order XXII, C.P.C. Reliance is placed upon 2008 CLD 858;

x) The persons who were not covered under the definition of customer provided under section 2 of the Financial Institutions Ordinance, 2001, could not be made party to the suit. Reliance is placed on 2002 CLD 1462; 2003 CLD 722;

y) Banking courts cannot approach a matter in a manner as if only a formality is being completed. This is not the spirit of the law. Reliance is placed on 2003 CLD 1751; 2004 CLD 464; 2002 CLD 667;

Chapter – 5

CASE LAW UNDER FINANCIAL INSTITUTES (RECOVERY OF FINANCES) ORDINANCE, 2001

Historically the judiciary has always played a very prominent and significant role in interpreting the law. The superior courts and the banking courts of Pakistan have actively worked to eliminate errors, procedural inaccuracies and other oversights within the banking and finance sector. Below are some crucial judgments that have aided in the interpretation, application and development of Financial Institutions Ordinance, 2001:

5.1. SECTION 2(a) OF FINANCIAL INSTITUTIONS ORDINANCE, 2001

Definitions. - In this Ordinance, unless there is anything repugnant in the subject or context

a) "financial institution" means and includes:

(i) any company whether incorporated within or outside Pakistan which transacts the business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a government savings bank, but excludes the State Bank of Pakistan;

(ii) a modaraba or modaraba management company, leasing company, investment bank, venture capital company, financing company, unit trust or mutual fund of any kind and credit or investment institution, corporation or company; and

(iii) any company authorised by law to carry on any similar business, as the Federal Government may by notification in the official Gazette, specify;

CASE LAW UNDER SECTION 2(a) OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

1. **ASIM RIAZ QURESHI vs BANK AL-FALAH LTD;**
   2017 CLD 538 [Lahore];
   Before Shahid Karim and Jawad Hassan, JJ

"Para 11…The said Offer Letter clearly depicts that the Appellant has availed the Facility of Finance from the Respondent Bank and it cannot be imagined that it was a mutual agreement for the purchase of the Plot by both the parties.

Para 13… In light of the above principle, the matter is within the ambit of section 65 of the Contract Act and the Appellant doesn't have any grounds to argue this at length.

Para 14… Moreover, under sections 2-d and 2-e of the Financial Institutions Ordinance, 2001, the Appellant is bound to return the amount obtained through finance and the Respondent Bank has rightly filed the suit for recovery on default of repayment of Finance under section 9 of the 2001 Ordinance. Sections 2-d and 2-e of the Financial Institutions Ordinance, 2001 is reproduced for ready reference which reads as follows:

(d) ---finance includes---

i. an accommodation or facility provided on the basis of participation in profit and loss; mark-up or mark-down in price, hire-purchase, equity support, lease, rent-sharing, licensing charge or fee of any kind, purchase and sale of any property including commodities, patents, designs, trademarks and copy-rights, bills of exchange, promissory notes or other instruments with or without buy-back arrangement by a seller, participation term certificate, musharika, morabaha, musswama, istisnah or modaraba certificate, term finance certificate;

ii. facility of credit or charge cards;

iii. facility of guarantees, indemnities, letters of credit or any other financial engagement which a financial institution may give issue or undertake on behalf of a customer, with a corresponding obligation by the customer to the financial institution;

iv. a loan, advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a financial institution to a customer;

v. a benami loan or facility that is, a loan or facility the real beneficiary or recipient whereof is a person other than the person in whose name the loan or facility is advanced or granted;

vi. any amount .due from a customer to a financial institution under a decree passed by a civil court or an award given by an arbitrator; any amount due from a customer to a financial institution which is the subject matter of any pending suit, appeal or revision before any court; any other facility availed by a customer from a financial institution.

(e) ---obligation includes ---

i. any agreement for the repayment or extension of time in repayment of a finance or for its restructuring or renewal or for payment or extension of time in payment of any other amounts relating to a finance or liquidated damages; and

ii. any and all representations, warranties and covenants made by or on behalf of the customer to a financial institution at any stage, including representations, warranties and covenants with regard to the ownership, mortgage, pledge, hypothecation or assignment of, or other charge on assets or properties or repayment of a finance or payment of any other amount relating to a finance or performance of an undertaking or fulfillment of a promise; and

iii. all duties imposed on the customer under this Ordinance; and"

Para 15... It is clear that the Appellant has obtained the finance for the Bank as stated above after first filing an application and then offer letter. This was neither the partnership nor the agreement to purchase with the Bank, hence, Bank is not liable for the mistake or the fraud on the plot, hence, section 20 of the Contract Act, 1872 is not attracted in this case. The Appellant in order to get rid of its obligations to repay the finance, is bringing this meritless arguments."

2. **HABIB BANK LTD., DEIRA BRANCH, DEIRA DUBAI UAE- vs W.R.S.M. TRADING COMPANY, L.L.C. and 4 Others;**
2015 CLD 1644 [Lahore];
Before Amin-ud-Din Khan and M. Sohail Iqbal Bhatti, JJ

"Para 12… The most relevant is the definition of "Financial Institution", which is provided under the definitions mentioned in section 2 of Financial Institutions (Recovery of Finances) Ordinance, 2001, which is reproduced as under:-

"Financial Institution" means and includes---(i) any company whether incorporated within or outside Pakistan which transacts the business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a government savings bank, but excludes the State Bank of Pakistan;

(ii) A modaraba or modaraba management company, leasing company, investment bank, venture capital company, financing company, unit trust or mutual fund of any kind and credit or investment institution, corporation or company; and

(iii) any company authorized by law to carry on any similar business, as the Federal Government may by notification in the official Gazette, specify."

We have thoroughly gone through this definition, under section 9 of Financial Institutions Ordinance, 2001 before a Banking Court the Financial Institution or a customer can file a suit and none else. In this case when it has been claimed that plaintiff-appellant is a financial institution, the plaintiff to prove that it is "financial institution" under the definition

clause of section 2 of the Financial Institutions Ordinance, 2001. As we have noted supra we have carefully and thoroughly read the definition of "financial institution", what we have been able to gather from the definition of "financial institution" is that a company may be incorporated within or outside Pakistan and transacts a business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan, means that transaction must have taken place in Pakistan. It is not necessary that the branch of that company may be situated within Pakistan or outside Pakistan but for falling within the definition of "Financial Institution" the transaction must be within Pakistan. When any branch of company situated within Pakistan or outside Pakistan does not transact a business within Pakistan for that transaction that institution cannot be said to be a "financial institution". When for the purposes of that transaction the company is not a financial institution, therefore, in case of default by the other side the company cannot file a suit under section 9 of the Financial Institutions Ordinance,, 2001 in Pakistan. '

Para 13... In the light of what has been discussed above, we are clear in our mind that for the transaction in question or for filing of suit in Pakistan under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, 'the appellant bank is not a financial institution under section 2(a) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, therefore, the order of return of plaint passed by the learned Banking Court has no exception. Resultantly, R.F.A. No. 362 of 2003 is allowed, judgment and decree impugned therein are set aside and plaint is returned. R.F.A. No.395 of 2005 as well as R.F.A. No. 395 of 2004 and F.A.O. No. 254 of 2008 are not maintainable, same stand dismissed."

3. **SHAMIL BANK OF BAHRAIN E.C vs Mian AYAZ ANWAR and 6 others**;
   2015 CLD 893 [Lahore];
   Before Amin-ud-Din Khan and M. Sohail Iqbal Bhatti, JJ

"Para 8… In the above noting of statutory provisions and after its perusal it is clear that a "foreign banking company" which is not registered with the State Bank of Pakistan, cannot do the banking business in Pakistan and therefore cannot file a suit under section 9 of Financial Institutions Ordinance, 2001 and is not a "Financial Institution" in the light of said provision of law. We get further support from the perusal of section 3 of the Financial Institutions Ordinance, 2001 because a State Bank certifies cost of funds of the banking companies which are registered with the State Bank of Pakistan and those cost of funds are to be awarded in a decree passed by the Banking Court and the word "shall" indicates that without awarding cost of funds no decree can be passed. Furthermore, thorough reading of the definition of "Financial Institution" given in section 2(a)(i) of the Financial Institutions Ordinance, 2001 leads us to find that the transaction in respect of which the 'banking company' comes to the court must be in Pakistan, as the words employed in section 2(a)(i)

"any associated or ancillary business in Pakistan through its branches within or outside Pakistan". In this view of the matter, it is necessary that the transaction must be in Pakistan and the branch of 'financial institution' may be outside Pakistan. In this case the transaction took place in Bahrain and the appellant-plaintiff is not registered with the State Bank of Pakistan and the transaction has been claimed directly by the plaintiff company in Bahrain and not through its any branch in Pakistan, therefore, we agree with the findings recorded by the learned trial Court, except the findings noted in the last line of Para 15 at page 25 of the judgment that for banking or associated or ancillary business in Pakistan a company must be incorporated in Pakistan."

4. **INVEST CAPITAL INVESTMENT BANK LTD. vs MESSRS HOUSE BUILDING FINANCE CORPORATION;**
   2015 CLD 1828 [Sindh];
   Before Aqeel Ahmed Abbasi and Muhammad Junaid Ghaffar, JJ

Para 11….Now adverting to the second leg of this definition that as to whether finance in question was provided by a financial institution or not so as to bring the transaction within the purview of the provisions of the Financial Institutions Ordinance, 2001, breach of which permits filing of a Suit before and under the Banking Jurisdiction of the Court as provided under section 9 of the Ordinance ibid. For this we need to examine the definition of Financial Institution as referred to hereinabove. From perusal of the aforesaid definition, it reflects that financial institution means and includes, any company whether incorporated within our outside Pakistan which transacts the business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a Government savings bank, (but excluding State Bank of Pakistan), a modaraba or modaraba management company, leasing company, investment bank, venture capital company, financing company, unit trust or mutual fund of any kind and credit or investment institution, corporation or company; and any company authorized by law to carry on any similar business, as the Federal Government may by Notification in the official gazette, specify. Here the use of the words in the definition clause that financial institution "means and includes" connotes a wider definition of a Financial Institution instead of being restrictive. It in fact broadens the scope of definition of a financial institution. It is a trite law that the use of the words "includes" in a definition clause, while interpreting a statute is generally used in order to enlarge the meaning of the words and phrases occurring in the body of the statute. Reliance in this regard may be placed on the case of Don Basco High School v. The Assistant Director E.O.B.I. and others (PLD 1989 SC 128), Messrs Usmania Glass Sheet Factory Limited, Chittagong v. Sales Tax Officer, Chittagong (PLD 1971 SC 205). Even otherwise, in our candid view, the respondent company is fully covered under the

definition of a 'Financing Company" as provided in section 2(a) (ii) of the Financial Institutions Ordinance, 2001 and does not require much deliberation by this Court.

Para 11... As regards the status of respondent is concerned, the same was initially governed by the House Building Finance Corporation Act, 1952, wherein, in terms of section 20 thereof, the respondent Corporation was authorized to invest its funds in such securities or in such other manner as may be prescribed and may sell or mortgage such securities. Thereafter, in the year 2006, the status of respondent has changed from a Corporation under the Act of 1952, to an unlisted Public Limited Company under the Companies Ordinance, 1984, and it no longer remained a Statutory Institution in terms of the Act of 1952. Now the Company is being managed under and through its own Memorandum and Articles of Association and is known as "House Building Finance Company Limited". It has been further brought to our notice that pursuant to Notification dated 25-7-2007, issued by the Government of Pakistan, Finance Division, in exercise of the powers conferred by section 3A of the Banking Companies Ordinance, 1962, (LVII of 1962), the Federal Government on the recommendations of State Bank of Pakistan has been pleased to specify House Building Finance Company Limited, as a financial institution for application of the provisions of the said section, whereby, several provisions. of the 1962 Ordinance are made applicable on the banking companies and or financial institutions and the State Bank of Pakistan has been given powers to monitor and regulate their affairs in relation to monetary and credit policy of State Bank of Pakistan. Pursuant to issuance of such Notification, the State Bank of Pakistan vide BPRD Circular No. 6 of 2014 vide clause 11, has notified House Building Finance Company Limited as "Development Financial Institution" (DFI), Therefore, in our view, it is in this perspective, read with the definition of "Customer", "Financial Institution" and "Obligations" (See section (e) of the Financial Institutions Ordinance, 2001), the nature and status of the transaction of lending money to the appellant in the instant matter has to be examined. As regards the status of appellant is concerned, it may be observed that, though the same being an Investment Bank would fall in section 2(a)(ii) of the Financial Institutions Ordinance, 2001."

5.2. SECTION 2 (c) OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

Definitions. - In this Ordinance, unless there is anything repugnant in the subject or context:

(c) "customer" means a person to whom finance has been extended by a financial institution and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety or an indemnifier;

CASE LAW UNDER SECTION 2(C) OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

5. BHAGWAN DASS vs HABIB BANK LTD.;
2021 CLD 406 KARACHI-HIGH-COURT-SINDH
Before Muhammad Junaid Ghaffar & Syed Irshad Ali Shah, JJ

"Para 9…. Coming to the very issue of maintainability of the Suit in question it is by now settled that for maintaining a Suit before a Banking Court under Financial Institutions Ordinance, 2001, there are certain prerequisites which are to be fulfilled and complied with. The Appellant was never a customer of the Bank within the meaning of section 2(c) ibid, and therefore. had no locus standi to file and maintain its Banking Suit. The learned Banking Court has neither appreciated the law itself: nor the precedents of the various High Courts on such aspect of the matter. There is a series of judgments which have now decided this issue that until and unless the person suing the Bank is a Customer as provided in Financial Institutions Ordinance, 2001. the Suit filed by such person would be incompetent before a Banking Court. This is besides the fact that even if a person is a customer, he has to fulfill other conditions such as availing of finance [s.2(d)] from a financial institution [s.2(a)]. In the case reported as Procter and Gamble Pakistan (Pvt.) Ltd., Karachi v. Bank Al-Falah Limited, Karachi (2007 CLD 1532) a learned Single Judge of this Court has decided this issue after a thread bare examination of Financial Institutions Ordinance, 2001. The relevant finding reads as under:

"Para 15… The second category of persons who come within the definition of "customer" are the persons. who avails non-fund based financial facility such as Guarantee or Letter of Credit i.e. the persons on whose behalf a Guarantee or a Letter of Credit has been issued by a financial institution. The persons for whose benefit such instruments are opened i.e. the beneficiary of such instruments are not included within the definition of section 2(c) of the Ordinance, 2001 as it, includes within its ambit as "customer" only such person on whose behalf a Guarantee or a Letter of Credit has been issued. The persons who are entitled to receive finance from a Financial Institution without any obligation to repay. such as a beneficiary of a Guarantee or better of Credit or a person who is entitled to receive payment from a financial institution in order to make supplies to a customer of a financial institution cannot be treated as a 'customer' of the financial' institution. There is no room for including the beneficiary of the non-fund based facility to be included in the definition of "customer". A beneficiary cannot be treated a customer of a financial institution as financial institution is not concerned as to who is the beneficiary of its Guarantee or Letter of Credit. It may not even come in contact with the beneficiary of a Guarantee or a Letter of Credit. The beneficiary has

merely figured in at the instance of the person on whose behalf the financial institution has issued a Guarantee or a Letter of Credit. Extending the meaning of the word "customer" to the beneficiary of an instrument would amount to doing violence to the provisions of section 2(c) and section 9 of the Ordinance, 2001.

Para 16... The third and the last category of persons who fall under the definition of "customer" are those who stand surety or indemnifier before a financial institution on behalf of direct customers of financial institutions. This last category of persons though not the direct customers of a financial institution, as is the case with the first two categories of persons, but through a deeming provision of section 2(c) of the Ordinance, 2001 they too have been made customers of the financial institutions as they have taken upon themselves the obligation to discharge the liability of a customer, who availed the financial facility from a financial institution.

Para 17... The above analysis of the meaning of the word "customer" as defined in section 2(c) of the Ordinance clearly leads to the conclusion that the word "customer" means and includes (a) a person to whom finance has been extended directly by a financial institution: (b) a person on whose behalf a financial "institution undertakes to make payment to a third party e.g. under a Guarantee or a Letter of Credit: and (c) a person who has taken upon himself the obligation to repay to the financial institution the defaulted sum in his capacity as surety or indemnifier. Therefore, only these three categories of persons come within the definition of "customer" and only they can sue or be sued under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. No person, no matter in what other capacity he is connected with a financial facility. if he does not fall within the definition of a "customer" as defined under section 2(c) of the Ordinance, 2001, he can neither sue nor be sued under section 9 of the Ordinance, 2001 and the legal remedy for and against, him lies before ordinary Civil Court.

Para 18... From the above discussion it is also evident that the definition of "customer" as provided under section 2(e) of Financial Institutions (Recovery of Finances) Ordinance, 2001 includes within its ambit only such persons against whom a Financial Institution has recourse in the Event of default in repayment of finance provided by it i.e. the persons, upon whom obligation is created to repay in case of default in repayment and no one else and it is for this reason that section 9 of the Ordinance envisages only a financial institution and its customer as party to a banking suit. Thus, the persons who ultimately become liable to make payment to a financial institution in case of a default in the repayment of finance are the persons who fall under the definition of "customer" and none else."

Para 10... In the case reported as Haji Dad Muhammad v. Muslim Commercial Bank Limited (2011 CLD 785) a learned Division Bench of the Balochistan High Court has been pleased to hold as under:

> In the above definitions, the word "customer" is limited to a person to whom finance has been extended and includes a person on whose behalf a guarantee or letter of assurance has been issued by a financial institution. It means, the persons, other than defined in section 2(c) of the Ordinance, do not come within the definition of a "customer". Merely being account-holders of the respondents, the Appellants cannot be considered as customers.

Para 19... Perusal of the aforesaid definition of section 2(c) of the 2001 Ordinance reflects that a Customer includes a person to whom finance has been extended by a Financial Institution and also includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution, as well as a surety or an indemnifier. From the aforesaid definition it emanates that there are in fact three categories of persons who can be called or termed as a Customer within the contemplation of the 2001 Ordinance. First, a person to whom finance is extended by a financial institution; second a person who avails non-fund based financial facility such as letter of credit; third and last a person who stands surety or indemnifier before a financial institution on behalf of a direct customer of the institution and in fact is somewhat different from a Customer of first two categories. These three categories of Customer as defined in section 2(c) of the 2001 Ordinance, have been elaborately explained by a learned Single Judge of this Court in the case of Procter and Gamble Pakistan (Pvt.) Limited, Karachi v. Bank AL-Falah Limited, Karachi and 2 others (2007 CLD 1532)."

6. MUHAMMAD SHOAIB ARSHAD vs FEDERATION OF PAKISTAN
2020 CLD 638 [Lahore]
Before Mammon Rashid Sheikh, C.J, Shahid Waheed, Muhammad Ameer Bhatti, Asim Hafeez & Abid Aziz Sheikh, JJ

"Para 37... The remedy provided to Mortgagee/Financial Institution, under re-enacted section 15, is with reference to a particular transaction and/or a class of person(s), which transaction and class of person(s) are classified on the basis of clearly defined criteria, based on an intelligible differentia, having justifiable considerations and differences. Apparently, there persists some confusion regarding concurrent use of expressions "customer" and "mortgagor" in subsection (2) of re-enacted section 15and occasionally in the Rules, 2018. Actually, no such confusion is found upon careful

reading of the definition of Customer in terms of section 2(c) of Ordinance, 2001. It is expedient to reproduce said definition for ease of reference, which reads as;

> "(c) "customer" means a person to whom finance has been extended by a financial institution [within or outside Pakistan] and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as surety or an indemnifier"

Customer includes a person to whom finance has been extended, i.e. benefactor and the person, who stood surety either through execution of personal guarantee or creation of mortgage charge. The expression Mortgagor and Mortgagee though not defined in the Ordinance, 2001 and re-enacted Section 15 would be interpreted in the light of the principle of literal Rule of interpretation by giving the expressions plain meaning. Therefore, Mortgagor is a surety-cum-customer, who has executed mortgage documents for creation of mortgage against immovable property for securing payment of mortgage money and against whom remedy under re-enacted section 15 can be invoked provided conditions prescribed are met. In nutshell, the remedy provided to the financial Institution under re-enacted section 15, in addition to other remedies, is with reference to the bargain / transaction negotiated by way of creation of mortgage charge on immovable property for securing the amount subject matter thereof. In these circumstances, irrespective of confusion qua nomenclature of the customer, either benefactor or surety, the remedy can be invoked if there is a transaction of mortgage executed and conditions provided are met. The Mortgagor, therefore, for the purposes of re-enacted section 15 is and shall be treated as customer."

7. INVEST CAPITAL INVESTMENT BANK LTD. and another vs Messrs. HOUSE BUILDING FINANCE CORPORATION;
2015 CLD 1828 [Sindh]
Before Aqeel Ahmed Abbasi and Muhammad Junaid Ghaffar, JJ

"Perusal of the aforesaid definition of section 2(c) of the 2001 Ordinance reflects that a Customer includes a person to whom finance has been extended by a Financial Institution and also includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution, as well as a surety or an indemnifier. From the aforesaid definition it emanates that there are in fact three categories of persons who can be called or termed as a Customer within the contemplation of the 2001 Ordinance. First, a person to whom finance is extended by a financial institution; second a person who avails non-fund based financial facility such as letter of credit; third and last a person who stands surety or indemnifier

before a financial institution on behalf of a direct customer of the institution and in fact is somewhat different from a Customer of first two categories. These three categories of Customer as defined in Section 2 (c) of the 2001 Ordinance, have been elaborately explained by a learned Single Judge of this Court in the case of Procter and Gamble Pakistan (Pvt.) Limited, Karachi v. Bank AL-Falah Limited, Karachi and 2 others (2007 CLD 1532)."

8. **SHEHZADA AKHTAR vs BANK ALFALAH LTD. and others;**
2013 CLD 1718 [Lahore];
Before Umar Ata Bandial and Muhammad Farrukh Irfan Khan, JJ

"Para 9... The case in hand poses a very unique question. Admittedly, at the time of filing the suit, the plaintiff-bank was fully aware of the fact that Mst. Shehzada Akhtar was the lawful owner of the mortgaged property and that the mortgage deed in favour of the bank was executed on her behalf by her alleged attorney. Section 2(c) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 provides definition of "customer" which is reproduced as follows:--

> "customer" means a person to whom finance has been extended by a financial institution and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution; as well as surety or an indemnifier."

In view of the above, the appellant who is claimed to be the mortgagor of security in favour of the respondent/bank squarely falls within the definition of "customer" who is a necessary party to the suit. The non-impleadment of the appellant as a party to the suit was, therefore, a gross error. Reliance is placed on Pakistan Water and Power Development Authority (WAPDA) through Authorized Signatory v. American Express Bank Limited 2005 CLD 1764."

9. **BANK OF KHYBER vs Messrs SPENCER DISTRIBUTION LTD.**;
2012 CLD 1336 [Lahore]
Before Umar Ata Bandial, J

"Para 4…The, PLA filed by defendant No.10 raised seven preliminary objections that are repetitious in their content particularly on the plea that the defendant No.10 is not a customer nor a beneficiary of the finance extended by the plaintiff bank and therefore she is not liable. That plea has no weight. The law does not contemplate that a mortgagor ought to be a beneficiary of a finance or ought to have nexus with the principal debtor in order to be liable on a mortgage ' executed by him/her."

10. Messrs HABIB BANK LTD vs Messrs SCHON TEXTILE LTD.;
2010 CLD 1819 [Karachi]
Before Muhammad Ali Mazhar, J

"Under Clause "c" of section 2 of the Financial Institutions (Recovery of Finances) Ordinance, 2001, the definition of customer means a person to whom finance has been extended by a financial institution includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety or an indemnifier. Section 128 of the Contract Act, 1872 provides that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. In the judgment reported in Rafique Hazquel v. Bank Alfalah Ltd. 2005 SCMR 72, the honourable Supreme Court in a banking matter has held that the liability of the guarantor is co-extensive with that of principal debtor in terms of section 128 of the Contract Act the petitioner is equally liable to make payment that even in terms of letter of guarantee tendered before the Bank at the time of grant of loan the petitioner is liable to make payment and that the guarantor is a customer in terms of section 2(c) of the Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001). The application for leave to defend filed by the defendants Nos. 2 to 8 is pending adjudication which will be decided on its own merits, however, if the plaintiff deems fit, it may also lodge its claim to the official liquidator against the defendant No.1 in accordance with law."

5.3. SECTION 2(d) OF FINANCIAL INSTITUTIONS ORDINANCE, 2001

"Finance" includes: (i) an accommodation or facility provided on the basis of participation in profit and loss, mark-up or mark-down in price, hire-purchase, equity support, lease, rent-sharing, licensing charge or fee of any kind, purchase and sale of any property including commodities, patents, designs, trademarks and copy-rights, bills of exchange, promissory notes or other instruments with or without buy-back arrangement by a seller, participation term certificate, musharika, morabaha, musawama, istisnah or modaraba certificate, term finance certificate;

(ii) facility of credit or charge cards;

(iii) facility of guarantees, indemnities, letters of credit or any other financial engagement which a financial institution may give, issue or undertake on behalf of a customer, with a corresponding obligation by the customer to the financial institution;

(iv) a loan, advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a financial institution to a customer;

(v) a benami loan or facility that is, a loan or facility the real beneficiary or recipient whereof is a person other than the person in whose name the loan or facility is advanced or granted;

(vi) any amount due from a customer to a financial institution under a decree passed by a Civil Court or an award given by an arbitrator;

(vii) any amount due from a customer to a financial institution which is the subject matter of any pending suit, appeal or revision before any Court;

(viii) any other facility availed by a customer from a financial institution.

CASE-LAW UNDER SECTION 2(d) OF FINANCIAL INSTITUTIONS ORDINANCE, 2001

11. LASANI BUILDERS vs BOLAN BANK LTD.

2015 CLD 236 LAHORE HIGH COURT

Before Amin-ud-din Khan & M. Sohail Iqbal Bhatti, JJ

"Para 11... The terms finance has been defined in section 2(d) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 which is reproduced as under:--

(d) "finance" includes--

(i) .....

(ii) .....

(iii) .....

(iv) a loan, advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a financial institution to a customer;

(v) .....

(vi) .....

Para 12... The perusal of definition of word finance in itself shows that the term finance is an exhaustive term and includes every conceivable transaction between a borrower and a Financial Institution even a financing agreement which obliges a banking company and a

customer to do certain acts constitutes the relationship of a customer and a banker/financial institution between the parties. As discussed above appellant's executed all the charge documents in favour of respondent-bank and in anticipation of grant of finance facility withdrew an amount of Rs.8.5 million and the withdrawal of this amount was given ex-post facto approval by the competent authority through sanction letter dated 23-7-2001."

12. **INVEST CAPITAL INVESTMENT BANK LTD. and another vs Messrs HOUSE BUILDING FINANCE CORPORATION**;
2015 CLD 1828 [Sindh];
Before Aqeel Ahmed Abbasi and Muhammad Junaid Ghaffar, JJ

"10. In the instant matter money has been borrowed by the appellant on a promise to pay markup and though it has been termed as deposit, however, it may be appreciated that the respondent from whom the money is being asked for or borrowed is not an ordinary account holder, whereas the appellant is also not a commercial bank but an Investment Bank who needs to borrow and generate money/funds to carry out its operations. Moreover, the respondent itself is a finance company having surplus funds/money to lend it to others, therefore, it could be safely said that the respondent in the instant matter is not a Customer, rather the appellant who has asked for a loan or deposit from the respondent on a certain rate of markup, is a Customer. Therefore, we are of the humble opinion that in the given situation, the case of the appellant on the touch stone of the aforesaid definition and the discussion in the case of Procter & Gamble (Supra) would fall in the first category i.e. the person to whom finance has been extended by a financial institution. We have also no doubt in our minds that in the given situation the money given by the respondent to the appellant would amount to "Finance" within the contemplation of section 2(c) of the 2001 Ordinance."

13. **Sh. ALTAN AZMAT vs HABIB BANK LTD.**
2014 CLD 1636 Lahore
Before Amin-ud-Khan & M. Sohail Iqbal Bhatti, JJ

"Paras9...In the present case if the-argument of learned counsel for the appellant is accepted that Deposit Growth Certificates fall within the definition of finance as given in section 2(d) of the Financial Institutions (Recovery of Finances) Ordinance, 2001; it remains as an undeniable fact that Deposit Growth Certificates are in the name of Mst. Nazir Begum and Sheikh Mohammad Amin Thapur. It is an established proposition of law that a Court or Tribunal, established under a special law, is a Court of limited jurisdiction and all the jurisdictional facts must exist before invoking the jurisdiction of a special Court or a Tribunal. If any of the jurisdictional fact is missing, the assumption of jurisdiction by special Court would amount to defective or excessive exercise of jurisdiction."

14. EMIRATES GLOBAL ISLAMIC BANK LTD. vs MUHAMMAD ABDUL SALAM KHAN;

2013 CLD 1291 [Sindh]; Before Nadeem Akhtar, J

"For many reasons, I am unable to convince myself to agree with the learned counsel for the plaintiff. There are various types of finance facilities that can be granted by a financial institution to the customer, and all types of finance facilities have been defined in section 2(d) of the Ordinance. Any facility or accommodation which is not covered by or defined in section 2(d) shall not be deemed to be or called as "finance", and as such the same cannot be claimed under the Ordinance. The cause of action for filing a suit under the Ordinance accrues only upon breach or non-fulfilment of an obligation by any of the parties in relation to a "finance" which is defined under the Ordinance as "finance". Charity has neither been defined as "finance" in section 2(d) or elsewhere in the Ordinance. Charity also does not fall within the definition of "obligation" contained in section 2(e) of the Ordinance. Moreover, the essential feature of "finance" is that some amount or facility is granted by the financial institution to the customer in any of the forms defined in section 2(d). In the present case, instead of granting any amount or facility, the plaintiff is claiming/demanding from the defendant an amount at a fixed rate in the name of charity in case of delay in repayment or default by him. Therefore, Clause 6.5 of the Agreement is nothing, but a penal clause, and the amount claimed thereunder is a penalty and not charity. It has now become a settled law that penalty or penal charges in any form cannot be claimed by the financial institution. In the case of Dawood Islamic Bank Limited v. Admore Gas (Pvt.) Limited and 6 others, 2012 CLD 263, it was held by this Court that the charity amount charged on the contract price was nothing, but markup under the guise of charity. The amount claimed as charity was declined in the said case."

5.4. SECTION 7 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

Powers of Banking Courts. -

(1) Subject to the provisions of this Ordinance, a Banking Court shall

a) in the exercise of its civil jurisdiction have all the powers vested in a civil Court under the Code of Civil Procedure, 1908 (Act V of 1908);

b) in the exercise of its criminal jurisdiction, try offences punishable under this Ordinance and shall, for this purpose have the same powers as are vested in a Court of Sessions under the Code of Criminal Procedure, 1898 (Act V of 1898):

Provided that a Banking Court shall not take cognizance of any offence punishable under this Ordinance except upon a complaint in writing made by a person authorized in this behalf by the financial institution in respect of which the offence was committed.

(2) A Banking Court shall in all matters with respect to which the procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1908 (Act V of 1908), and the Code of Criminal Procedure, 1898 (Act V of 1898).

(3) All proceedings before a Banking Court shall be deemed to be judicial proceedings within the meaning or sections 193 and 228 of the Pakistan Penal Code (Act XLV of 1860), and a Banking Court shall be deemed to be a Court for purposes of the Code of Criminal Procedure, 1898 (Act V of 1898).

(4) Subject to sub-section (5), no Court other than a Banking Court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Banking Court extends under this Ordinance, including a decision as to the existence or otherwise of a finance and the execution of a decree passed by a Banking Court.

(5) Nothing in sub-section (4) shall be deemed to affect

a) the right of a financial institution to seek any remedy before any Court or otherwise that may be available to it under the law by which the financial institution may have been established; or

b) the powers of the financial institution, or jurisdiction of any Court such as is referred to in clause (a); or require the transfer to a Banking Court of any proceedings pending before any financial institution or such Court immediately before the coming into force of this Ordinance.

(6) All proceedings pending in any Banking Court constituted under the Banking Companies (Recovery of Loans, Advances, Credits or Finances) Act, 1997 (XV of 1997), including suits for recovery of "loans" as defined under that Act shall stand transferred to, or be deemed to be transferred to, and heard and disposed of by, the Banking Court having jurisdiction under this Ordinance. On transfer of proceedings under this sub-section, the parties shall appear before the Banking Court concerned on the date previously fixed.

(7) In respect of proceedings transferred to a Banking Court under subsection (6), the Banking Court shall proceed from the stage which the proceedings had reached immediately prior to the transfer and shall not be bound to recall and re-hear any witness and may act on the evidence already recorded or produced before the Court from which the proceedings were transferred.

CASE LAW UNDER SECTION 7 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001:

15. NATIONAL BANK OF PAKISTAN vs Messrs KOHINOOR SPINNING MILLS and others;

2021 CLD 1112 Lahore Before Jawad Hassan, J

"Para 9… Before examining the facts of the instant suit and analyzing the legitimacy and merits of the claim and defense of the parties, it is deemed pertinent to take a precise note on the purpose and object of the "Ordinance" and the mechanism provided thereunder to settle the financial disputes between the financial institutions and customers who availed finance facilities therefrom. The Ordinance was promulgated with an aim to streamline and expedite financial disputes between a financial institution and its customers and separate independent forum of Banking Court was also established under the Ordinance to achieve the goal of speedy decisions and a mechanism was devised wherein traditional extensive course of litigation was curtailed to a composite summary procedure to make sure adjudication in expeditious manner but at the same time safeguarding and securing rights of the parties and that is why Banking Courts defined under section 2(b) and established under section 5 of the Ordinance is simultaneously vested with powers of a Civil Court under the Code of Civil Procedure, 1908 and powers of a Court of Session under the Code of Criminal Procedure, 1898 as per section 7 of the Ordinance.

Para 22... Again section 7 provides the procedure of the Special Court and is to the effect that suits before the Special Court shall come up for regular hearing 'as expeditiously as possible and except in extraordinary circumstances and on the grounds to be recorded, a Special Court shall in all suit before it, including suits based on mortgages of all kinds on statements of accounts for recovery of money paid to or to the order of the defendant, follow the summary procedure provided for in Order XXXVII in the First Schedule to the Code of Civil Procedure, 1908 (the "C.P.C."). The perusal of this section further shows that apart from suits ordinarily triable under Order XXXVII, C.P.C.. viz. suits on bills of exchange, hundi and promissory notes, suits in relation to Bank loans even on mortgages of all kinds or on statements of accounts have been made triable under the procedure provided for by Order XXXVII, C.P.C."

16. ASKARI BANK LTD vs IRFAN AHMED NIAZI;

2016 CLD 383 Lahore

Before Atir Mahmood, J

"Para 9…There are also certain legal aspects of the case which have been ignored by learned consumer court. Admittedly, the matter was between a customer of the bank

with the bank which is a financial institution. The matters pertaining to the financial institutions with their customers can only be taken up and decided by the banking court as provided under Section 7(4) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 which reads as under:

> "S.7(4) Subject to subsection (5) no court other than a banking court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of Banking Court extends under this Ordinance including a decision as to the existence or otherwise of a finance and the execution of a decree passed by a Banking Court."

Whereas the consumer court has no unfettered powers and there are certain restrictions as embedded in Section 3 of the Punjab Consumer Protection Act, 2005 which reads as under:

> "The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."

Keeping in juxtaposition the above two provisions of different statutes, there remains no doubt that the consumer court had no jurisdiction to deal with the matter, as such, it has transgressed its powers and erred in law while assuming its jurisdiction in the matter. On this score alone, the complaint was liable to be dismissed. Needless to mention here that being a Federal Statute, Financial Institutions (Recovery of Finances) Ordinance, 2001 has precedence over the Consumer Protection Act, 2005 which is Provincial Statute as provided under Article 143 of the Constitution of Islamic Republic of Pakistan, 1973."

17. Sh. ALTAN AZMAT vs HABIB BANK;
2014 CLD 1636 Lahore
Before Amin-ud-Din Khan and M. Sohail Iqbal Bhatti, JJ

"Para 12... It is correct that section 7(1)(a) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 provides that in exercise of its civil jurisdiction the Banking Court shall have all the powers vested in a Civil Court under the Civil Procedure Code 1908 but subsection (1) also provides that subject to the provisions of this Ordinance the Banking Court shall have these powers meaning thereby at the first instance the appellant is to establish that all other jurisdictional facts exist to invoke the jurisdiction of the Banking Court, and where the Banking Court has jurisdiction to adjudicate upon the matter it shall, in that case, have all the powers vested in a Civil Court."

18. NISAR AHMED AFZAL vs MUSLIM COMMERCIAL BANK;
2014 CLD 390 Lahore …..
Before Muhammad Khalid Mehmood Khan and Shujaat Ali Khan, JJ

Para 10. Section 7 (a) of the Financial Institutions Ordinance, 2001 provides that in exercise of civil jurisdiction, the Banking Court has all the powers vested in Civil Court under the Code of Civil Procedure.

Para 11. Section 7(2) of the Financial Institutions Ordinance, 2001 provides that a Banking Court shall in all matters where the procedure has not been provided in the Ordinance 2001 follow the procedure as laid down in the Code of Civil Procedure.

Para 12. The Financial Institutions Ordinance, 2001 is a Special Law enacted for the resolution of disputes between the customer and Financial Institution; the courts established under the Ordinance ibid are having the jurisdiction of civil and criminal both. Under section 7(2) the Banking Court has the powers of Code of Civil Procedure where the Ordinance does not provide any procedure; likewise in criminal jurisdiction if the special procedure is not available under the Ordinance 2001, the provisions of Code of Criminal procedure will be applicable. It is thus clear that where the Ordinance 2001 itself did not provide the specific procedure for resolving any dispute, the Code of Civil procedure will be fully applicable as per settled principle of law. Under Code of Civil Procedure, the Civil Court in addition to the powers under section 12(2), C.P.C. has the inherent powers to set aside, modify or correct the decree."

19. TARIQ HAMEED vs ADDITIONAL SESSIONS JUDGE and 5 others;
2013 CLD 2270 Lahore
Before Syed Muhammad Kazim Raza Shamsi, J

"Para 5. It is a rule of prudence as well as of interpretation of statute that special law shall have overriding effect over the general law, thus keeping in view this interpretation it can be said that the Financial Institutions (Recovery of Finances) Ordinance, 2001 being a special law shall have the overriding effect over the provisions of Pakistan Penal Code, 1860, particularly when the Ordinance (ibid) has itself provided the procedure for dealing with the matters of civil as well as criminal nature. In this connection when the provisions of section 7(b) of the Ordinance, 2001 are examined it comes to light that only Banking Court constituted under that Ordinance has jurisdiction to take actions upon the criminal acts performed by the parties. This specific provision, as provided by the Ordinance, has created a prohibition in respect of lodging of the criminal case under the provisions of Pakistan

Penal Code thus the learned Ex-Officio Justice of Peace was not within his jurisdiction when he had ordered for registration of the case against the petitioners under the provisions of Pakistan Penal Code. Another matter regarding the competency of the order passed by the Court on the application of the respondent is that respondent No.5 could not file an application under section 22-A, Cr.P.C. before the learned Ex-Officio Justice of Peace for the reason that the Banking Court in accordance with its own order had attached the bags of rice and had taken the same stock into its legal custody thus if any theft or misappropriation of that stock has been committed then it is the Court itself to initiate proceedings against the culprits and this jurisdiction cannot be bestowed upon the Manager of the branch of banking company to pray for the relief before the Court of ordinary jurisdiction in supersession of the available forum. It is also noticeable that up till now the suit for recovery filed by the banking company had been decreed in its favour and an execution petition against the petitioners is pending before the Court."

5.5. SECTION 9 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

Procedure of Banking Courts: (1) Where a customer or a financial institution commits a default in fulfillment of any obligation with regard to any finance, the financial institution or, as the case may be, the customer, may institute a suit in the Banking Court by presenting a plaint which shall be verified on oath, in the case of a financial institution by the Branch Manager or such other officer of the financial institution as may be duly authorized in this behalf by power of attorney or otherwise.

(2) The plaint shall be supported by a statement of account which in the case of a financial institution shall be duly certified under the Bankers Books Evidence Act, 1891 (XVII of 1891), and all other relevant documents relating to the grant of finance. Copies of the plaint, statement of account and other relevant documents shall be filed with the Banking Court in sufficient numbers so that there is one set of copies for each defendant and one extra copy.

(3) The plaint, in the case of a suit for recovery instituted by a financial institution, shall specifically state

a) the amount of finance availed by the defendant from the financial institution;

b) the amounts paid by the defendant to the financial institution and the dates of payment; and

c) the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution up to the date of institution of the suit.

(4) The provisions of section 10 of the Code of Civil Procedure, 1908 (Act V of 1908), shall have no application for and in relation to suits filed hereunder.

(5) On a plaint being presented to the Banking Court, a summons in Form No. 4 in Appendix 'B' to the Code of Civil Procedure, 1908 (Act V of 1908) or in such other form as may, from time to time, be prescribed by rules, shall be served on the defendant through the bailiff or process-server of the Banking Court, by registered post acknowledgement due, by courier and by publication in one English language and one Urdu language daily newspaper, and service duly effected in any one of the aforesaid modes shall be deemed to be valid service for purposes of this Ordinance. In the case of service of the summons through the bailiff or process-server, a copy of the plaint shall be attached therewith and in all other cases the defendant shall be entitled to obtain a copy of the plaint from the office of the Banking Court without making a written application but against due acknowledgement. The Banking Court shall ensure that the publication of summons takes place in newspapers with a wide circulation within its territorial limits."

CASE LAW UNDER SECTION 9 OF FINANCIAL INSTITUTIONS ORDINANCE, 2001

20. MUHAMMAD SAEE KHAN vs JUDGE BANKING COURT and 3 others
2021 CLD 536 Before Muzamil Akhtar Shabir, J

"Para 11... The collective reading of reasoning given in afore-referred judgments is that a plaint in a recovery suit in terms of section 9 of the Ordinance is required to disclose cause of action and failure to do not needful may lead to rejection of the plaint, which may also be rejected on the grounds if the plaint fails to conform to the mandatory requirements of the Ordinance or is otherwise found to be barred by law on the basis of averments of the plaint, irrespective of the fact that whether leave to defend has been obtained by the defendant or not and such power can also be exercised by the Court suo motu. However, if the plaint is sought to be rejected on the grounds other than the averments of the plaint, i.e. on the ground of defence taken by the defendant or other material, the defendant is required to obtain leave to defend before his plea for rejection of plaint, such as, plaint being barred by res-judicata or limitation, matter having been earlier finally decided by some other competent authority (as in the present case by the Banking Mohtasib, Pakistan), on the basis of said facts, is considered.

Para 15... In some other situation, the question may arise that although in a recovery suit filed by the Financial Institution a Banking Court is empowered under Section 16 of the Ordinance to pass orders of attachment of property, injunction and appointment of receivers on the application of the financial institution, whether it could be declared that it was precluded to pass order of injunction to save the property subject matter of the

finance from wastage on an application of the defendant, whether it be the Financial Institution or the customer, during the pendency of its/his application for leave to defend, when the Banking Court under section 7 of the Ordinance is empowered with the powers vested in a Court by Code of Civil Procedure, 1908 and can exercise the same when there is no express provision to deal with the particular situation and there is no express bar in following the said procedure. The obvious answer would be that the Banking Court had inherent jurisdiction to pass an appropriate orders in the given circumstances of the case. Reliance in this behalf is placed on "Gulistan Textile Mills Ltd and another v. Soneri Bank Ltd. and another" (PLD 2018 Supreme Court 322) wherein it has been held that:-

> "Therefore, a Banking Court is to follow the procedure laid down in the C.P.C. in all matters with respect to which the procedure has not been provided for in the ordinance, whereas the procedure to prevent property which has been pledged or hypothecated etc. from being transferred, alienated etc. has been duly and exhaustively provided for in section 16 of the Ordinance (save for section 16(4) thereof). Therefore, to this extent the application of the C.P.C. has been excluded."

The conclusions drawn from the discussion and judgments referred above are that;

(i) A plaintiff is not required to wait for the decision of an application for leave to defend before filing interlocutory applications which include and are not limited to application for interim injunctions, etc.;

(ii) the defendant in ordinary circumstances is generally barred from filing interlocutory applications before decision of application for leave to defend;

(iii) The bar on defendant on filing interlocutory applications during pendency of application for leave to defend though strict is not absolute and Banking Court has inherent jurisdiction to entertain such applications in exceptional circumstances, which may, inter alia, include but not restricted to (a) an application for restoration of an application for leave to defend dismissed for non-prosecution, (b) an application for rejection of plaint, etc.;

(iv) the application for rejection of plaint is a special kind of application, different from other interlocutory applications for the reason that the Court itself is vested with suo motu powers to reject plaint at any stage in case it does not disclose cause of action, does not conform to the provisions of the Ordinance or is otherwise barred by law;

(v) in cases the plaint shows cause of action, the plaint of suit may be rejected on the basis of the other material available on record or the defence taken by the defendant which ordinary is done after the application for leave to defend is decided;

(vi) grounds taken in application for rejection of plaint may also be treated as a ground for grant of application for leave to defend, which has to be considered on its own merits and if the circumstances of the case so require, leave may be granted on the said grounds; and

(vii) dismissal of application for leave to defend does not mean that the suit is to be decreed in all cases and the court retains the powers to reject the plaint of the suit or dismiss the same even thereafter if the plaintiff fails to make out a case for passing decree in the matter."

21. BANK OF PUNJAB vs MANSOOR QADIR
2021 CLD 1037

Before Muhammad Sajid Mehmood Sethi and Abid Hussain Chattha, JJ

"Para 9… From the above analysis of the law, it is clear that the Banking Court is empowered to examine the plaint to determine the breach of obligation by a financial institution or a borrower before it fixes a date of hearing to decide the PLA. The Banking Court is well within its legal right to reject or return a plaint by invoking any provision under the C.P.C. before summoning the defendant under section 9(5) of the Ordinance or before fixing a specific date of hearing of the PLA. However, once the Banking Court has examined the plaint, is satisfied that the same is in order as per the requirements of Section 9 and has proceeded to issue summons to the defendant under section 9(5) of the Ordinance, pursuant to which a defendant has filed the PLA and a date of hearing of the PLA has been fixed, it ceases to take any further step under the provisions of the C.P.C. without first deciding the PLA in accordance with the requirements of Section 10 of the Ordinance. The Banking Court is duty bound to first grant or reject the PLA in terms of section 10(9), 10(11) or 10(12) of the Ordinance before taking any other step towards the progress and continuation of the suit. After doing so, the provisions of the C.P.C. are again available to the Banking Court as the facts and circumstances of the case may warrant."

22. NATIONAL BANK OF PAKISTAN vs KOHINOOR SPINNING MILLS
2021 CLD 1112

Before Jawad Hassan, J

"Para 17. By examining the language and words of Section 9(1) of the Ordinance and the words used therein which have been explained above, it is unequivocal that the

Plaintiff Bank filed the suit for recovery of loan, which was based on the statements of accounts attached with the plaint and duly certified under the Bankers' Books Evidence Act, 1891 and the same was not rebutted by the Defendants with cogent reasons either through oral evidence or through documentary evidence. The Defendant Company has not denied availing of finance facilities nor has denied the documentation hence admitted the availing of finance facilities and its documents. The Plaintiff Bank however alleged that the Defendants have committed default in repayment thereof. Though the term willful default is defined under section 2(g) of the Ordinance, which means deliberate and intentional failure of the customer to repay financial assistance secured from a financial institution yet the requirement under section 9 is default simpliciter, which is not defined in the Ordinance, however, through the aid of literal interpretation referred above and analogy drawn from the definition of willful default under the Ordinance, a default means failure to fulfill the conditions of a contract to pay the loan, either whole or installments and includes an unfulfilled obligation. The existence of relationship between the parties and availing of finance facility by the Defendants from the Plaintiff Bank is well established through documentary evidence and the defendants failed to establish that they did not have committed any default in fulfillment of their financial obligation towards the Plaintiff Bank. The Plaintiff bank, as such, has established that the Defendants have committed default in fulfilment of their obligation regarding the finance facility availed by them.

28(sic.) Applying the above principles to the facts of the present case, it has been found that the grievances of the defendants revolve around the 'multiple allegations' and 'claims' mentioned in the PLA and highlighted during course of arguments. First objection of the defendants is with respect to the incompetent institution of this suit by an unauthorized person but perusal of the record reveals that suit was filed by the Plaintiff Bank through duly authorized attorneys, as their duly signed power of attorney is available on the record and therefore it is well within the requirements encapsulated under section 9(1) of the Ordinance. So this objection of the defendants is untenable and contrary to record. Reference in this regard may be made to the Muhammad Ramzan v. Agricultural Development Bank Of Pakistan (2004 CLD 1376).

23. MUHAMMAD AMIN vs NATIONAL BANK OF PAKISTAN LTD
2021 CLD 553

Before Muhammad Kamran Khan Mulakhail and Rozi Khan Barrech

"Para 7… Perusal of the aforesaid order sheet reveals that the service of the summons was held good upon the appellant only through publication in two daily newspapers. However, admittedly summons was not served upon the appellant through any one of the other modes, i.e. through personal service by Bailiff, registered

post/courier service or by way of passing on the given address. The provisions with regard to the service upon the defendant as contemplated by sections 9(5) and 10(2) of the Ordinance are not to be read disjunctively from the rule of natural justice "audi alteram partem" which is to be read into every statute regardless of whether or not the same is contemplated in the statute. The courts are required to interpret every provision of a statue in such a manner that it should suppress, mischief and advance remedy and not the other way around."

5.6. SECTION 10 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

"Leave to Defend: (1) In any case in which the summons has been served on the defendant as provided for in sub-section (5) of section 9, the defendant shall not be entitled to defend the suit unless he obtains leave from the Banking Court as hereinafter provided to defend the same; and, in default of his doing so, the allegations of fact in the plaint shall be deemed to be admitted and the Banking Court may pass a decree in favour of the plaintiff on the basis thereof or such other material as the Banking Court may require in the interests of justice.

(2) The defendant shall file the application for leave to defend within thirty days of the date of first service by any one of the modes laid down in sub-section (5) of section 9: -

Provided that where service has been validly affected only through publication in the newspapers, the Banking Court may extend the time for filing an application for leave to defend if satisfied that the defendant did not have knowledge thereof.

(3) The application for leave to defend shall be in the form of a written statement, and shall contain a summary of the substantial questions of law as well as fact in respect of which, in the opinion of the defendant, evidence needs to be recorded.

(4) In the case of a suit for recovery instituted by a financial institution the application for leave to defend shall also specifically state the following:

a. the amount of finance availed by the defendant from the financial institution; the amounts paid by the defendant to the financial institution and the dates of payments;

b. the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution up to the date of institution of the suit;

c. the amount if any which the defendant disputes as payable to the financial institution and facts in support thereof.

24. MUHAMMAD ALTAF AZIZ vs MCB BANK LTD.
2021 CLD 992
Before Shams Mehmood Mirza and Shahid Karim, JJ

"Para 3…The learned counsel for the appellant argued that the application for leave to defend ought to have been granted as precious rights of the appellant were involved. We have gone through the contents of the PLA filed by the appellant and find that it not only does not comply with the requirements of section 10 of the Ordinance but contains no meaningful ground challenging the liability set up in the plaint. Section 10 of the Ordinance by its terms imposes a mandatory requirement on the defendant to state all the particulars mentioned in its subsection (4) and to append all the necessary documents as mentioned in its subsection (5). Failure to meet the requirements of section 10(4) and (5) of the Ordinance by a defendant result in dismissal of his PLA (see Appollo Textile Mills Limited v. Soneri Bank Limited 2012 CLD 337). It was held in the said judgment that:

> "A defending customer is thus obliged to put in a definite response to the banks accounting and has under sections 10(3) and (4) to compulsorily plead in answer in the leave petition his accounts as well as the facts and amounts disputed by him as repayable to the plaintiff." (Emphasis supplied)

The PLA is not at all compliant of section 10(4) of the Ordinance and as such in terms of section 10(6) of the Ordinance is liable to be rejected. The consequence of such rejection of PLA is also spelt out in section 10(11) of the Ordinance, which clearly states that on such rejection the Banking Court shall forthwith pass judgment and decree in favour of the plaintiff. A similar consequence is also provided in section 10(1) of the Ordinance which states that dismissal of the PLA means that all the allegations made in the plaint shall be deemed to be accepted and the banking court is obliged to pass a decree thereon. The claim of the respondent bank is backed up by a duly certified statement of account and other documents including demand promissory note and mortgage documents whereas the appellant in his application for leave to defendant has only made bald allegations. The banking court, therefore, rightly passed the decree against the appellant."

25. Messrs FIQAS (PVT.) LTD. and others vs. HABIB METROPOLITAN BANK LTD. and others
2020 CLD 415 .. Before Muhammad Farrukh Irfan Khan and Ch. Muhammad Iqbal, JJ

"Para 4…Admittedly, the appellants in their petition for leave to defend admitted the availing of finance facility from the bank but the petition for leave to defend of the

appellants is not as per section 10(4) of the Financial Institutions (Recovery of Finances), Ordinance, 2001. For ready reference, provision of section 10(4) is reproduced as under: -

> "S.10 (4) in the case of a suit for recovery instituted by a financial institution the application for leave to defend shall also specifically state the following: --
>
> a) the amount of finance availed by the defendant from the financial institution; the amounts paid by the defendant to the financial institution and the dates of payments;
>
> b) the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution up to the date of institution of the suit;
>
> c) the amounts of finance and other amounts relating to the finance payable by the defendant to the financial institution up to the date of institution of the suit;
>
> d) the amount if any which the defendant disputes as payable to the financial institution and facts in support thereto:

Explanation. --- For the purposes of clause (b) any payment made to a financial institution by a customer in respect of a finance shall be appropriated first against other amounts relating to the finance and the balance, if any, against the principal amount of the finance."

When the appellants failed to comply with required parameters of provision of section 10(4) of the Ordinance, 2001 then penal clause of section 10(6) shall come into play and their leave to defend is necessarily liable to be rejected. For ready reference, section 10(6) is reproduced as under: --

> "S.10(6) An application for leave to defend which does not comply with the requirements of subsections (3), (4) where applicable and (5) shall be rejected, unless the defendant discloses therein sufficient cause for his inability to comply with any such requirement."

Respondent bank appended the agreement for financing, Demand Promissory Note, Letter of Hypothecation, Letter of Guarantee and Memorandum of Deposit of Title Deeds with the suit and these documents could not be rebutted by the appellants through any evidence, rather they admitted the availing of the finance facility. There is no document produced by the appellants which may show any re-payment of the amount due against the availed facility from the bank. When confronted as to whether the appellants/defendants have fulfilled the mandatory requirements of section 10(4) and (5) -of Ordinance, 2001 the learned counsel for the appellants remained unable to satisfy this Court. In view of the above

backdrop, the learned Judge Banking Court has rightly passed the impugned judgment and decree while invoking the jurisdiction as envisaged in penal clause of subsection (6) of section 10 of the Ordinance ibid and dismissed the petition for leave to defend. Reliance is placed on the case titled as Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd. (PLD 2012 SC 268) wherein it has been held as under: --

> "Para 19. In this case, the application for leave to defend the suit filed by the petitioners did not fulfil the requirements of section 10(3), (4) and (5) of the Financial Institutions (Recovery of Finances) Ordinance XLVI of 2001. It was admittedly not in conformity with the said mandatory provisions. No cause or the reason for inability to comply with said requirements was shown. Instead, it was expressly admitted by the learned Senior Advocate Supreme Court for the petitioners before the High Court and also before us that the petitioners failed to fulfill the mandates of the said provisions and did not plead the required Accounts. The petitioners/defendants thus attracted the prescribed legal consequences of: --
>
> (i) Rejection of their leave petition under section 10(6)
>
> (ii) Non-entitlement under section 10(1) to defend the suit for not obtaining leave to defend the suit in terms provided for in section 10;
>
> (iii) The allegations of fact in the plaint were deemed under section 10(1) to have been admitted by them; and
>
> (iv) A judgment and decree against them and in favour of the plaintiff bank under section 10(1) and (11) ibid.
>
> Reliance can also be placed on the 'cases titled as Shahid Farooq Sheikh v. Allied Bank of Pakistan Limited through Manager (2005 CLD 1489), Messrs Sadia Industries and 3 others v. Messrs Soneri Bank Limited (2014 CLD 1458) and KASB Bank Limited v. Muhammad Ahmed Ansari (2014 CLD 1518)."

26. MUHAMMAD AMJAD AZIZ vs. STANDARD CHARTERED BANK PAKISTAN 2019 CLD 558

Before Shams Mehmood Mirza and Jawad Hassan, JJ

"Para 6... In fact, while giving the particulars under section 10 of the Ordinance, it was admitted in the application for leave to defend that the principal amount availed by the appellant was Rs.12,500,000/-. The appellant did not bring to challenge any entry of the statement of account of the principal. Although it was stated that not only the entire amount of principal was repaid but extra amount of Rs.969,983/- had also been paid, the appellant did not furnish any details thereof as per the requirements of section 10 of the Ordinance.

Needless to point out that section 10 of the Ordinance obliges a defendant to state (a) the amount of finance availed by the defendant from the financial institution; the amounts paid by the defendant to the financial institution and the dates of payments; (b) the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution up to the date of institution of the suit; and (c) the amount if any which the defendant disputes as payable to the financial institution and facts in support thereof. The aforementioned particulars were not provided by the appellant. In the absence of any challenge to the entries of statement of principal account, the liability mentioned therein shall be deemed to have been admitted by the appellant."

27. MCB BANK LTD. vs. MUHAMMAD SAEED
2019 CLD 63

Before Shahid Mubeen and Muzamil Akhtar Shabir, JJ

"Para 11... As regards the question of passing an order of releasing the vehicle before deciding the application for grant of leave to defend to the respondent bank is concerned suffice it to say that in the present case the respondent (plaintiff) had filed the suit before the court and he was not required to obtain leave to defend the said suit before proceeding further in the matter, contrary to a defendant in a suit under the Financial Institutions Ordinance, 2001 who cannot affectively participate in the further judicial proceedings under the Financial Institutions Ordinance, 2001 without obtaining leave to defend the suit. Therefore, the Banking Court in order to preserve the property (vehicle in the present case) was not required to wait for decision of application for leave to defend before passing an order on the application for grant of temporary injunctions filed by the plaintiff because if such an interpretation of law is adopted it would be tantamount to placing a clog on the vested power of the court to grant interim relief to the plaintiff, where the same did not exist."

28. SONERI BANK LTD. through Principle Officers/General Attorneys vs. Messrs BISMILLAH AGRO INDUSTRIES (PVT.) LTD
2018 CLD 1503

Before Shams Mehmood Mirza, J

"Para 2. Section 10 of the Ordinance stipulates that if the defendants do not file their application for leave to defend despite service of summons, the allegations of fact in the plaint shall be deemed to be admitted and the Banking Court may pass a decree in favour of the plaintiff on the basis thereof."

29. KHURRAM FAROOQ vs. BANK AL-FALAH LTD and another
2018 CLD 1417

Before Jawad Hassan, J

"Para 8... The Banking Court can decide the cases filed under section 9 or other provisions of the Ordinance. In case the Banking Court rejects the PLA, it has to proceed to pass judgment and decree forthwith but if the PLA is allowed it has to decide the case after recording of evidence of both the sides under section 13 of the Ordinance. The procedure laid down under section 10 of the Ordinance is very clear where the structure, patron and format is defined in subsections (3) to (6) of the Ordinance. The Banking Court has the power under section 10(7) of the Ordinance to reject the PLA if it does not comply with the requirements of subsections (3), (4) and (5) of the Ordinance. Subsections (9) and (10) of the section 10 of the Ordinance deal with the granting of the PLA and the condition made therein. The subsection (11) of the Ordinance reads as follows:

> "Where the application for leave to defend is rejected or where a defendant fails to fulfill the conditions attached to the grant of leave to defend, the Banking Court shall forthwith proceed to pass judgment and decree in favour of the plaintiff against the defendant."

Para 9…. The word forthwith and shall mentioned in the section 10(11) of the Ordinance has been discussed in detail by the Hon'ble Division Bench of the Sindh High Court in case titled Messrs United Bank Limited v. Banking Court No. II and 2 others (2012 CLD 1556) in which it has been held as under:

> "After carefully examining the entire section 10 of the Ordinance and particularly its subsection (11), we have come to the conclusion that the word "forthwith" specifically mentioned in section 10(11) of the Ordinance was introduced by the legislature for the first time with a clear and specific object, that is, for expeditious disposal of a banking Suit whether filed by a financial institution or by a customer. The word "forthwith" is not meaningless and it cannot be ignored or interpreted casually. The word "forthwith" along with the word "shall" be used in section 10(11) casts a duty upon the Banking Court to decree the Suit in favour of the plaintiff against the defendant immediately when defendant's application for leave to defend is rejected or where a defendant fails to fulfil the conditions attached to the grant of leave to defend. In our opinion the object of inserting this new provision was not to cause prejudice to any party, but was to provide an expeditious and equitable relief in banking Suits to the plaintiff after dismissal of defendant's application for leave to defend."

Para 13... The Hon'ble Division Bench of this Court in case titled Silver Oil Mills Pvt. Limited through Chief Executive and 13 others v. Messrs Union Bank Limited through Vice-President and 4 others (2003 CLD 1658) has held as under:

> "The proceedings taken thereafter by the Banking Court on 25-11-2002 were merely consequential in nature. According to section 10(11) of the Financial Institutions (Recovery of Finances) Ordinance 2001 where a defendant fails to fulfill the conditions attached to the grant of leave to defend, the Banking Court shall forthwith proceed to pass judgment and decree in favour of the plaintiff against the defendant.
>
> It is trite law that Banking Court upon application by a defendant is fully competent to grant leave to appear and defend the suit either unconditionally or subject, to such terms as it thinks fit. Such discretion to grant leave conditionally or unconditionally is left to the Court itself as contemplated under Order XXXVII, rule 3, sub-clause (2), C.P.C. Discretion so exercised is not to be interfered with lightly unless it is shown that the same was exercised in a fanciful or arbitrary manner. Nothing has been indicated from the record to suggest this position."

Furthermore, the Hon'ble Sindh High Court in case titled Emirates Global Islamic Bank Limited v. Muhammad Abdul Salam Khan (2013 CLD 1291) has held as under:

Under section 10(11) of the Ordinance, the Banking Court has to pass judgment and decree in favour of the plaintiff against the defendant forthwith upon dismissal of the defendant's application for leave to defend. This view is fortified by the reported cases of Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd., 2012 CLD 337 (Supreme Court), Messrs United Bank Ltd. v. Banking Court No.II and 2 others 2012 CLD 1556, Mrs. Jawahar Afzal v. United Bank Ltd. 2003 CLD 119, Khawaja Muhammad Bilal v. Union Bank Ltd. 2004 CLD 1555 and Habib Bank Ltd. v. Messrs SABCOS (Pvt.) Ltd. 2006 CLD 244.

Para 12... The dismissal of the application for leave to defend does not mean that the entire claim of the plaintiff in a Suit under the Ordinance should be decreed as prayed by the plaintiff without examining the claim of the plaintiff. In such an event, no doubt the plaintiff becomes entitled to a decree, but only to the extent of such amount which is permissible in law. It has now been well settled that markup more than the agreed rate and/or beyond the agreed period cannot be granted to the financial institution. Similarly, no other charges or amounts can be allowed to the financial institution to which the customer had not agreed. The Court must examine the claim of the financial institution in the light of the above before passing the decree."

5.7. SECTION 11 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

Interim Decree: (1) If the Banking Court on a consideration of the contents of the plaint, the application for leave to defend of the defendant and the reply thereto, is of the opinion that the dispute between the parties does not extend to the whole of the claim, or that part of the claim is either undisputed, or is clearly due, or that the dispute is mainly limited to a part of the principal amount of the finance or to any other amounts relating to the finance, it shall, while granting leave and framing issues with respect to the disputed amounts, pass an interim decree in respect of that part of the claim which relates to the principal amount and which appears to be payable by the defendant to the plaintiff.

(2) The interim decree passed under sub-section (1) shall, for all purposes including appeal and execution, be deemed to be a decree passed under this Ordinance, and any amount covered thereby or recovered in execution thereof shall be adjusted at the time of the final decree:

Provided that it shall be open to the Banking Court notwithstanding the pendency of any appeal, to modify, in part or in whole, or reverse, the terms of the interim decree at the time of the final disposal of the suit and pass such order as it may deem just and proper:

Provided further that neither the Banking Court nor the High Court acting under sub-section (3) of section 22 shall stay execution of an interim decree unless the judgment-debtor deposits in cash with the Banking Court the amount or amounts admitted by the judgment-debtor to be payable to the financial institution under clause (c) of sub-section (4) of section 10, and furnishes security for the balance decretal amount if any, inclusive, in the case of a suit filed by a financial institution, of cost of funds determined under section 3, and other costs.

CASE LAW UNDER SECTION 11 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001:

30. Messrs ZAMINDAR RICE MILLS through Partners and others vs. FAYSAL BANK LTD through Attorneys and others
2015 CLD 219
Before Amin-ud-Din Khan and Shams Mehmood Mirza, JJ

"Para 15. The ratio of the above judgments coupled with the language of section 11 of the Ordinance makes it quite clear that the matters dealt with by the Interim Decree were conclusive and final and were unalterable through any proceedings that were taken subsequently in the suit filed by the respondent bank. A fortiori, the Interim Decree did not merge in the Final Decree and both the decrees retained their independent legal status in terms of filing of execution and appeals. We also observe that in the present appeal the

appellants did not challenge the Interim Decree and also did not append the certified copy of the Interim Decree with the appeal. We are also of the opinion that with the dismissal of R.F.A. No. 236 of 2007, without adjudication on merits, the basis for challenging the Final Decree is no longer available to the appellants. The Final Decree was passed merely as a consequence for non-fulfillment of the condition attached to the grant of leave to defend the suit. This Court in present proceedings cannot go behind the Final Decree and pass judgment on the merits of the Interim Decree, which did not merge with the Final Decree and was never challenged by the appellants in the present appeal. The judgments relied upon by the learned counsel for the appellants had no relevance to the facts of this case."

31. BANK ALFALAH LTD vs. Messrs CALLMATE TELIPS TELECOM LTD. and 5 others

2015 CLD 691 Before Syed Saeed-ud-Din Nasir, J

"Para 16... Under section 11(1) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 it is provided that if the Court is of the opinion on consideration of the contents of the plaint, the application for leave to defend of the defendant and the reply thereto, that the dispute between the parties does not extend to the whole claim, or that part of the claim is either undisputed or is clearly due, it can, while granting leave with respect to the disputed amounts, can pass an interim decree in respect to the amount appears to be payable by the defendant. Section 11(1) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 is reproduced as under: --

> "11. Interim Decree. (1) If the Banking Court on a consideration of the contents of the plaint, the application for leave to defend of the defendant and the reply thereto, is of the opinion that the dispute between the parties does not extend to the whole of the claim, or that part of the claim is either undisputed, or is clearly due, or that the dispute is mainly limited to a part of the principal amount of the finance or to any other amounts relating to the finance, it shall, while granting leave and framing issues with respect to the disputed amounts, pass an interim decree in respect of that part of the claim which relates to the principal amount and which appears to be payable by the defendant to the plaintiff."

5.8. SECTION 12 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

Power to set aside Decree**:** In any case in which a decree is passed against a defendant under sub-section (1) of section 10 he may, within twenty-one days of the date of the decree, or where the summons was not duly served when he has knowledge of the decree, apply to the Banking Court for an order to set it aside; and if he satisfies the Banking Court that he was prevented by sufficient cause from making an application under section 10, or that the summons was not duly served, the Court shall make an order setting aside the decree against him upon such terms as to costs, deposit in cash or furnishing of security or otherwise as it thinks fit and allow him to make the application within ten days of the order.

PRECEDENT/CASE-LAW

32. SONERI BANK LTD. vs. MESSRS BISMILLAH AGRO INDUSTRIES (PVT.) LTD.
2019 CLD 1004 Before Shams Mehmood Mirza, J

"Para 7… This Court erroneously passed the order on 24.05.2018 for repeating service of summons on the defendants as it overlooked the fact that service had already been affected on them. Be that as it may, even if the second service is taken into account, the application for leave to defend was still time-barred. The service through courier was affected on 29.05.2018 and summons were published in newspaper on 31.05.2018 and 01.06.2018. According to the notification of summer vacations issued by the office, the vacation period lasted from 02.07.2018 to 01.09.2018. The application for leave to defend filed on 03.09.2018 was barred by limitation.

Para 8... The judgment and decree by this Court on 07.09.2018 was passed on merits after going through the record and as such the only remedy available to the defendant was to file an appeal against the said decree."

33. AYESHA JAVID alias AISHA ALTAF vs. ASKARI BANK LTD
2018 CLD 1253
Before Ayesha A. Malik and Jawad Hassan, JJ

"Para 5… The grounds for filing application for setting aside the said ex parte judgment and decree were that the ex parte judgment and decree has been obtained on the basis of fraud and misrepresentation. It is well settled principle that if fraud is alleged in an application for setting aside ex parte judgment and decree, its necessary ingredients must be pleaded, so as to subsequently prove the same. Mere general and bald allegations of fraud and misrepresentation, could not form basis to upset a decree, otherwise validly passed by a Court of competent jurisdiction. From the material made available with this file, no case for interference in the impugned order is made out. The Appellant has failed to prove the fraud and misrepresentation by the Respondent Bank for obtaining impugned judgment and

decree against her. It is evident from the record that the judgment and decree was passed on the basis of banking documents appended with the plaint including the finance agreement etc. In Ireno Wahab v. Lahore Diocesan Trust, (2016 CLC Note 85) this Court held that Applicant was required to prove that fraud and misrepresentation was procured during proceedings in the court; that alleged fraud was due to false statement and concealment of facts and that judgment was obtained on the basis of forged documents and decree was collusively obtained."

34. Messrs ARBAB COTTON INDUSTRIES AND OIL MILLS vs. NATIONAL BANK OF PAKISTAN

2017 CLD 1657

Before Shams Mehmood Mirza and Abdul Sattar, JJ

"Para 6... The judgment and decree passed on merits could not be set aside under section 12 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. The only remedy available to the appellant was to file the appeal against the said judgment and decree. This court has already expressed views in the cases "Mst. Tahira Yasmeen and another v. Muslim Commercial Bank through Branch Manager and 6 others (2005 CLD Lahore 927), Messrs Sahib Gas Ways through Partner and 4 others v. The Bank of Punjab through Manager (2013 CLD Lahore 501) and Messrs Ammar Rice Dealers and 2 others v. National Bank of Pakistan and others (2003 CLD Lahore 857) that in a similar situation as in this case the application for setting aside ex parte judgment and decree is not maintainable, therefore, FAO in hand cannot succeed, which is dismissed."

35. Abdul Sattar vs. The Bank of Punjab

2017 CLD 1247

Before Shahid Karim and Muzamil Akhtar Shabir, JJ

"Para 3..The service on the appellant was validly effected and the appellant was served through bailiff and upon his refusal to receive the summons, he was served through a fixation at the door of his residence. This is sufficient and proper service and conform to the requirements of law. Further, in the banking dispensation, service by either of the three modes is considered as good service sufficient to draw an inference that a person has been served in due course of law. A publication which is one of the modes of service is also considered as a valid service and it is not necessary to prove service through all three modes simultaneously and any one of them should be sufficient in this regard. The Banking Court rightly held that the affidavit of the bank manager from whom the appellant obtained knowledge regarding pendency of the suit has not been filed nor relied upon by the appellant."

36. RASHID YASIN vs. DUBAI ISLAMIC BANK and others
2017 CLD 250

Before Shahid Karim and Jawad Hassan, JJ

"Para 4…Remarkably, it is not denied from perusal of record that ex parte Judgment and Decree was passed as far back as on 24.06.2011 and application for setting aside the said decree was submitted on 28.08.2014, which is time barred by more than three years and two months, which under law has to be filed within 21 days from the passing of the impugned Judgment and Decree under section 12 of 2001 F.I.O. …. Moreover, from the record, the report of Bailiff dated 03.05.2011 is very much relevant which reveals that service of the Appellant was effected through affixation which is sufficient to prove that Appellant was properly served. Reliance in this respect is placed upon Messrs Naqvi Developers and others v. Habib Bank Limited (2007 CLD 1194), in which the Division Bench of this Court dismissed the F.A.O. by holding as under: -

"Admittedly, the application of the appellant under sections 12 and 7 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 for setting aside ex parte judgment and decree dated 28.2.1995 had been moved on 18.7.2006 after a lapse of a period of more than 11 years after passing of the ex parte judgment and decree against the appellant. The learned Judge Banking Court No.II, Lahore, vide order dated 20.7.2006 has held that after passing of the ex parte decree the appellant's company Messrs Naqvi Developers and Builders as well as the respondent-Bank were in liquidation and Builders as well as the respondent-Bank were in liquidation proceedings before the learned Company Judge of Lahore High Court Lahore and concluded from this fact that the parties were undeniably in litigation for a long period and it was not believable that the appellant was not aware of passing of the ex parte judgment and decree dated 28.2.1995. Learned Judge Banking Court further held that after passing of the ex parte decree the execution proceedings were initiated in the year 1996 wherein legal proceedings including notices had also been issued and the publication of the schedule of auction had also been published. The execution proceedings were being conducted also for a long duration of ten years as such it was unbelievable that the appellant came to know about the ex parte decree on 4-7-2006 for the first time; that there has been no explanation of delay. The petition of the appellant was dismissed being barred by time by 11 years. It was further observed that it was only when the warrants of arrest of the appellant were issued for the satisfaction of the decree that the appellant had submitted the instant application for setting aside the ex parte decree. The learned counsel for the appellant has not been able to substantiate his claim that the appellant had changed his residence prior to the filing of the suit. The learned counsel for the appellant stated that the appellant was

living abroad in London and thereafter he relied upon the letter dated 9-6-1993 wherein the letter addressed by the respondent Bank to the appellant is of the address at Islamabad."

5.9. SECTION 13 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

(1) A suit in which leave to defend has been granted to the defendant shall be disposed of within ninety days from the day on which leave was granted, and in case proceedings continue beyond the said period the defendant may be required to furnish security in such amount as the Banking Court deems fit, and on the failure of the defendant to furnish such security, the Banking Court shall pass an interim or final decree in such amount as it may deem appropriate.

(2) The requirement of furnishing security under sub-section (1) shall be dispensed with if, in the opinion of the Banking Court, the delay is not attributable to the conduct of the defendant.

(3) Suits before a Banking Court shall come up for regular hearing as expeditiously as possible and except in extraordinary circumstances and for reasons to be recorded, a Banking Court shall not allow adjournments for more than seven days.

(4) Where leave to defend is granted and evidence is to be recorded, the parties may file affidavits in respect of the examination-in-chief of any witness who is not to be summoned through the Banking Court, and where such affidavits are filed, the Banking Court shall give notice thereof to the other contesting parties and on the date fixed for recording evidence, shall, subject to such modification as may be required for purposes of production and exhibiting of documents, or otherwise in accordance with law, treat the affidavit as examination-in-chief and allow the contesting parties an opportunity for cross-examination on the basis thereof.

CASE LAW UNDER SECTION 13 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

37. Bank of Punjab vs. Messrs Saadullah Khan
2017 CLD 515

Before Shahid Karim and Jawad Hassan, JJ

"Para 4... The learned Single Bench returned a finding that the settlement agreement did not have any nexus with the suit pending before this Court as also that the terms of the settlement agreement did not make a mention regarding the suit which was pending before the learned Single Bench. Having returned this finding, the learned Single Bench while dismissing the application, in the same vein proceeded to dispose of the suit as well precisely

on the ground that the parties had settled their dispute without the permission of the Court. This was a contradiction in terms. Moreover, the suit which was pending before the learned Single Bench was to be decided on its own merits and there is no concept of a suit being disposed of in the manner in which it has been done by the learned Single Bench vide the impugned order. However, we do not find any substance in the submissions made by the appellant with regard to the refusal by the learned Single Bench to allow the necessary amendment to be made in the plaint. If the appellants had a cause of action under the settlement agreement, certainly a fresh suit could be brought in respect of that default and there was no cause for seeking an amendment in the plaint of the pending suit.

Para 5… In view of the above, this appeal is partly allowed. The impugned order as regards the dismissal of the application for seeking an amendment in the plaint is sustained. However, the part of the order by which the suit was disposed of as having become infructuous is set aside and the matter is remanded to the learned Single Bench for decision of the suit C.O.S. No.196 of 2009 on its own merits. The respondents shall be at liberty to seek the rejection of the plaint or the dismissal of the suit in case the respondents consider the matters between the parties to have been settled by the settlement agreement. However, that will be for the learned Single Bench to determine on its own merits."

38. Bank of Punjab vs. International Ceramics LTD
P L D 2013 Lahore 487
Before Mrs. Ayesha A. Malik and Abid Aziz Sheikh, JJ

"Para 7... We have reviewed the cases cited by the learned counsel for the petitioner and find that the common ground in all the cited cases is one of illegality or lack of jurisdiction. To our minds these cases represent the exception to the general rule being that no constitutional petition would lie against an order granting or rejecting leave. We are of the opinion that a constitutional petition would be maintainable in exceptional circumstances, where the petitioner could show a blatant illegality in the order, such that the Banking Court has not followed the expressed mandate of law or that the Banking Court has exercised its powers outside the jurisdiction conferred. In such a situation in order to meet the ends of justice and to prevent a gross miscarriage of justice a constitutional petition would be maintainable."

5.10. SECTION 14 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

Decree in suits relating to mortgages. - Where the suit filed by a financial institution before the Banking Court is for the enforcement of a mortgage of immovable property the Banking Court will not be required to pass a preliminary decree as provided in

Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908 (Act V of 1908), but shall directly pass an interim or final decree for foreclosure or sale.

CASE LAW UNDER SECTION 14 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

39. Messrs HANIF METAL STORE vs BANK OF PUNJAB;
2017 CLD 447 Lahore
Before Abid Aziz Sheikh and Shahid Karim, JJ

"Para 4…The attachment of property is a protective measure taken by Court to keep property intact so as to enable the decree holder to satisfy the decree therefrom. The object of attachment is also to give notice to the judgment debtor not to alienate his property and general public not to accept any alienation from him. These precautionary and protective measures are not required regarding mortgaged properties, firstly for reason that when a mortgage decree is passed, there is adjudication on the footing that the property in question belongs to the mortgager and secondly in mortgage decree, there is a final adjudication about the rights of the judgment debtor and executing Court cannot go behind said decree. In execution of a mortgage decree, only the in-corporal right is brought to sale and not the physical property whereas in juxtaposition to this, in execution of a money decree the physical or the real property is brought to sale. In case of Muhammad Shahid v. Sajida Khatoon and others (2004 MLD 296) and Union Bank of the Middle East Ltd. v. Sa'ad Carpets Ltd. (1986 MLD 482), it was held that objection petition under Order XXI, Rule 58, C.P.C. is not maintainable against mortgage property as there was no requirement of attachment for mortgage property. The same view was also expressed in Indian Bank, Kovvur v. Nallam Veera Swamy and others (2014 AIR CC 2728 (AP) and Punjab and Sindh Bank v. State Bank of India 2002 (I) RCR (Civil) 273.

Para 5. Section 15(a) of the Ordinance define "mortgage" means the transfer of an interest in specific immovable property in favour of the mortgager for the purpose of securing the payment of mortgaged money or the performance of an obligation which may give rise to pecuniary liability. The dishonest alienation or transfer of possession of mortgaged property is an offence under section 20(c) of the Ordinance. Mortgaged property being already secured, the Court was not required to adopt protective measures through attachment in respect of mortgaged properties. There is no cavil with the settled proposition that once Executing Court opted and invoked provisions of C.P.C., then it cannot avoid its express provisions. However, as already discussed above, provision of Order XXI, Rule 54 or section 60, C.P.C. does not specifically required attachment of mortgaged property, therefore, Court was not bound to attach the mortgage property before its sale in execution.

Para 6. We have also noted that sale of mortgaged property is specifically governed under provision of sections 14 and 19 of the Ordinance. For convenience, the aforesaid provisions are re-produced hereunder:-

14. Decree in suits relating to mortgages:- Where the suit filed by a financial institution before the Banking Court is for the enforcement of a mortgage of immovable property, the Banking Court Banking Court will not be required to pass a preliminary decree as provided in Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908 (Act V of 1908), but shall directly pass an interim or final decree for foreclosure or sale.

19. Execution of decree and sale with or without intervention of Banking Court:- (1) Upon pronouncement of judgment and decree by a Banking Court, the suit shall automatically stand converted into execution proceedings without the need to file a separate application and no fresh notice need be issued to the judgment-debtor in this regard. Particulars of the mortgaged, pledged or hypothecated property and other assets of the judgment-debtor shall be filed by the decree-holder for consideration of the Banking Court and the case will be heard by the Banking Court for execution of its decree on the expiry of 30 days from the date of pronouncement of judgment and decree:

The perusal of aforesaid provisions show that in respect of mortgaged property, learned Banking Court will directly pass an interim or final decree for foreclosure or sale. Further on pronouncement of judgment, the decree shall automatically convert into execution proceedings. No fresh notice need to be issued to judgment debtor in this regard but only the particulars of mortgaged property be filed by the decree holder and case be heard for the execution of a decree. Even under aforesaid provisions, there is no need for attachment of mortgaged property before its sale in execution. The case law relied upon by the petitioner pertains to period prior to promulgation of the Ordinance, therefore, same is not relevant to facts and circumstances of this case."

40. BANK OF PUNJAB vs GENERTECH PAKISTAN LTD
2008 CLD 765 …
Before Syed Hamid Ali Shah, J

"Para 10... Defendant No.1 mortgaged the property by signing the memorandum of deposit of title deed dated 28-6-2002, wherein as per clause 4, plaintiff bank with other consortium banks, was Pari Passu security partner for the property mentioned in schedules 1 and 2 of the memorandum of deposit of title deed. The charge on the mortgaged property is also created under section 129 (3) of the Companies Ordinance, 1984 in a prescribed form XVI. Charge certificate was issued by security and Exchange Commission of Pakistan do 2-7-2002.

Para 11. Adverting to the mortgage of the property on the basis of memorandum of deposit of title deed, defendant No.1 originally mortgaged the property vide deposit of title deed dated 30-6-2001. When the equitable mortgage was created to secure running finance facility. Subsequently second supplemental memorandum of deposit of title deed was signed and executed on 28-6-2002. In view thereof, defendant No. 1, being mortgagor through supplemental memorandum of deposit of title deed, mortgaged and secured the loan to the tune of Rs. 123,000,000. It is settled law that to create equitable mortgage, a valid mortgage in the eyes of law is one, which is in present i.e. disbursement of loan, signing of memorandum and delivery of the deposit of title deed has taken place at one and the same time. Here in the case in hand, the agreement of finance was signed and executed on 19-7-2003, while memorandum was signed on 28-6-2002. The mortgage does not cover agreement dated 19-7-2003 and the same is not a valid mortgage. The property is, however under charge, as a charge has been created and registered with SECP, therefore, the property will remain encumbered."

41. MAZHAR HUSSAIN vs ZARAI TARIQATI BANK LTD. (ADBP); 2007 CLD 710

Before Sh. Azmat Saeed and Umar Ata Bandial, JJ

"Para 6…Suit for recovery was filed in which the appellants had been impleaded as defendants. In the plaint it is alleged that the appellants were guarantors and also secured facility through mortgage of the property. Mortgage deed was appended with the plaint. Appellants never entered appearance and the suit was decreed. Perusal of the decree reveals that it is for recovery of money only inter alia against the appellants. No doubt the executing Court has the jurisdiction to examine all the documents on record to ascertain true import of the decree but it cannot travel behind the decree. A Contentions now being raised by the learned counsel for the appellants pertain to interpretation of a document filed before the Tribunal where the appellants never entered appearance or replied to the show-cause notice and decree was eventually passed. To permit the appellants to raise this issue at this stage would amount to a retrial of the suit, which is not possible in execution proceedings and the Court executing the decree cannot sit in appeal against the decree sought to be executed before it. In these circumstances, application of the appellants has been rightly dismissed vide the order impugned.

For the foregoing facts and reasons, this appeal being devoid of any merit stands dismissed accordingly".

42. MUBARAK ALI vs FIRST PRUDENTIAL MODARABA;
2006 CLD 927

Before Anwar Zaheer Jamali and Muhammad Athar Saeed, JJ

"Para 14...On 28-1-2004, Suit No.6 of 2004 was instituted by the respondent First Prudential Modaraba only against the appellant which was mainly based on the memorandum of deposit of Title Deed, dated 4-2-1998, admittedly signed and executed by the appellant. In this suit, service on the appellant was held good and upon his failure to move the Banking Court for leave to defend in the suit by impugned judgment and decree suit was decreed against him. As observed above, application for setting aside ex parte decree subsequently moved by the appellant was dismissed by the Banking Court vide order, dated 25-2-2006 and such order was maintained by this Court vide its order, dated 22-3-2006 passed in HCA No.15 of 2006. Thus the please of the appellant with reference to non-invoking of arbitration clause of the agreement, alleged signing of Memorandum of Deposit of Title Deeds in the blank form; passing of decree allegedly on the basis of only Photostat copies of the document; and institution of suit by a person not duly authorized on behalf of respondent, are not tenable in law at this stage. Even otherwise, Mr. Nadeem Akhtar, in his reply arguments, has satisfactory repelled such legal pleas of the appellant. As regards the plea of Mr. Jhamat Jethanand, with reference to the applicability of Order II, rule 2, C.P.C. and section 11, C.P.C. It will be seen that none of the two provisions of law referred by him, have any relevancy or applicability to the facts and circumstances of the present case. As admittedly the appellant was not party to Suit No.2/2001 and further the respondent had never relinquished any part of their claim against the appellant at the time of institution of said suit. Mere fact that at the time of institution of Suit No.2 of 2001 the respondent had not impleaded/arrayed the present appellant as one of the defendants in the suit will not justify a conclusion that the claim against. the appellant based on equitable mortgage vis-a-vis the memorandum of deposit of title A deeds executed by him on 4-2-1998 was relinquished. In our view creation of equitable mortgage and execution of deed of deposit of title documents has given an independent cause of action to the respondent for obtaining a decree against the appellant for sale of his mortgaged property. The plea of Mr. Jhamat Jethanand, with reference to Order XXXIV, rule 14, C.P.C. has also no force as the decree passed in earlier suit was not a money decree against the appellant and the respondent had, therefore, independent right against the appellant to file a separate suit for recovery of decretal amount from him to the extent of equitable mortgage created by him in their favour, if they so choose, Mr. Jhamat Jethanand has not been able to cite any provision of law which had debarred the respondent from filing of such suit against the appellant separately at a later stage."

43. MUHAMMAD NAEEM BHATTI and others vs UNITED BANK LTD. and 2 others;

2005 CLD 643

Before Mian Saqib Nisar and Tanvir Bashir Ansari, JJ

"Para 8. We have heard learned counsel for the parties. As for the submission that the bank should have enforced the mortgage clause, suffice it to say that no law or the agreement between the parties, requires that to be essentially done. Notwithstanding the insurance and the mortgage clause, obviously, the bank in the light of the judgments referred to above, was entitled to independently enforce the finance agreement, rather than seeking the amount from the insurance company, particularly, in the situation, when the company has doubted about the incident and bona fide of the claim. We also do not find any force in the submission that because of the Act of God, the principal borrower is exonerated from the liability and thus the other defendants/appellants in the other appeal, stand discharged as sureties/mortgagors. The submission by the appellants in R.F.A. No.82 of 2003, that they never stood as guarantors/mortgagors, for the present finance, as the above document pertains to the financing year 1999, is repelled and controverted by the documents available on the record duly executed by them and the argument is bald and baseless. It is established that for each finance, which was obtained by the principal borrower, they remained to be the guarantors and the mortgagors of the same.

In the light of above, we do not find that any case for grant of leave has been made out by the appellants and therefore, these appeals have no merit and the same are hereby dismissed."

44. Messrs ASIF BROTHERS, JHANG SADDAR vs MUSLIM COMMERCIAL BANK LTD.;

2005 CLD 236

Before Syed Jamshed Ali and Muhammad Sayeed Akhtar, JJ

"Para 7...As far as the objection petition under rule 90, filed by the appellants is concerned, we have carefully examined the record. Vide order dated 28-5-2001, a notice was directed to the appellants under rule 66 of the Order XXI of the Code of Civil Procedure and according to the order dated 28-6-2001, the notice had been issued through registered post and the postal receipts were on the file Neither there is any copy of the notice on the record nor there was any postal receipt on the record. No proclamation was drawn up by the Court as required under rule 66 of the Code of Civil Procedure. There is an unsigned paper at page.47 of the record of the learned trial Court describing the conditions of the auction. It

is a printed pro forma and blanks have been filled in, in ink This is not signed by the learned Judge. Therefore, we do not find that the provisions of rule 66 of Order XXI of the Code of Civil Procedure, had been complied with. We have also taken note of the 'fact that if at all the Court auctioneers had chosen to issue a public notice in al newspaper, it should have been issued in any newspaper, being published from Jhang, where the property was situated. We could not find any justification for publication of notice of sale in a weekly newspaper being published from Faisalabad. Besides error in the description of the property which may not be material, the amount to be recovered by the sale of the two properties was not indicated in the said public notice.

Para 8…To support the application under rule 90 of the Code of Civil Procedure, affidavits of a number of persons were filed, according to which Court auctioneers did not visit the spot and it later transpired that the auction was conducted at the places which were not mortgaged with the Bank. The learned Banking Court was of the view that since the proceedings of the Court auctioneers were signed by appellant No.2, the auction must have been held at the spot, however, it was a seriously disputed matter which could only be resolved by the recording of evidence and not summarily as has been done by the learned Executing Court."

45. BANK ALFALAH LTD.vs Messrs BILAL SPINNING MILLS LTD;
2005 CLD 206 Karachi
Before Mushir Alam, J

Page 213. (b) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)-----

"No distinction for the purpose of execution in mortgage or money decree exists. Contention that money decree could not be executed by executing it against the mortgaged was repelled.

As far as first purported error pointed out by learned, counsel that money decree, cannot be executed by executing it against the mortgaged property. I had already examined this issue in another Execution No.35 of 2001 United Bank Limited v. Kyoto Capital Goods Fund (Pvt.) Ltd. was held therein there appears to be no distinction for the purpose of execution in mortgage or money decree. No appeal against above observation has been preferred. Even otherwise unless such finding is reversed I am bound by my above view."

5.11. SECTION 15 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

Sale of mortgaged property. - (1) In this section, unless there is anything repugnant in the subject or context;

a) "mortgage" means the transfer of an interest in specific immovable property for the purpose of securing the payment of the mortgage money or the performance of an obligation which may give rise to a pecuniary liability;

b) "mortgage money" means any finance or other amounts relating to a finance, penalties, damages, charges or pecuniary liabilities, payment of which is secured for the time being by the document by which the mortgage is effected or evidenced, including any mortgage deed or memorandum of deposit of title deeds; and

c) "mortgaged property" means immovable property mortgaged to a financial institution.

(2) In case of default in payment by a customer, the financial institution may send a notice on the mortgagor demanding payment of the mortgage money outstanding within fourteen days from service of the notice, and failing payment of the amount within due date, it shall send a second notice of demand for payment of the amount within fourteen days. In case the customer on the due date given in the second notice sent, continues to default in payment, financial institution shall serve a final notice on the mortgager demanding the payment of the mortgage money outstanding within thirty days from service of the final notice on the customer.

(3) When a financial institution serves a notice of demand, all the powers of the mortgagor in regard to recovery of rents and profits from the final mortgaged property shall stand transferred to the financial institution until such notice is withdrawn and it shall be the duty of the mortgagor to pay all rents and profits from the mortgaged property to the financial institution.

Provided that where the mortgaged property is in the possession of any tenant or occupier other than the mortgagor, it shall be the duty of such tenant or occupier, on receipt of notice in this behalf from the financial institution, to pay the rent or lease money or other consideration agreed with the mortgagor to the financial institution.

(4) Where a mortgagor fails to pay the amount as demanded within the period prescribed under sub-section (2), and after the due date given in the final notice has expired, the financial institution may, without the intervention of any Court, sell the mortgaged property

or any part thereof by public auction and appropriate the proceeds thereof towards total or partial satisfaction of the outstanding mortgage money:

Provided that before exercise of its powers under this sub-section, the financial institution shall cause to be published a notice in one reputable English daily newspaper with wide circulation and one Urdu daily newspaper in the Province in which the mortgaged property is situated, specifying particulars of the mortgaged property, including name and address of the mortgagor, details of the mortgaged property, amount of outstanding mortgage money, and indicating the intention of the financial institution to sell the mortgaged property. The financial institution shall also send such notices to all persons who, to the knowledge of the financial institution, have an interest in the mortgaged property as mortgagees.

(5) The financial institution shall be entitled, in its discretion, to participate in the public auction, and to purchase the mortgaged property at the highest bid obtained in the public auction.

(6) Where the mortgagor or his agent or servant or any person put in possession by the mortgagor or on account of the mortgagor does not voluntarily give possession of the mortgaged property sought to be sold or sought to be purchased or purchased by the financial institution, a Banking Court on application of the financial institution or purchaser shall put the financial institution or purchaser, as the case may be, in possession of the mortgaged property in any manner deemed fit by it:

Provided that the Banking Court may not order eviction of a person who is in occupation of the mortgaged property or any part thereof under a bona fide lease, except on expiry of the period of the lease, or on payment of such compensation as may be agreed between the parties or as may be determined to be reasonable by the Banking Court.

CASE LAW UNDER SECTION 15 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

46. MUHAMMAD SHOAIB ARSHAD vs FEDERATION OF PAKISTAN;

2020 CLD 638 Lahore

Before Mamoon Rashid Sheikh, C.J., Shahid Waheed, Muhammad Ameer Bhatti, Asim Hafeez and Abid Aziz Sheikh, JJ

"Para 24...Their lordships while reviewing the question of constitutionality of original section 15, observed that "the most significant aspect of said provision is not what is provided thereunder but what is conspicuous by its absence". The elemental question is that whether re-enacted section 15 has equipped the mortgagors with adequate rights and

remedies qua the conduct of auction sales of the mortgaged properties, both prior to the conduct of sale and, in particular, after the fall of the hammer. There is no cavil that some remedies were available under the original section 15, but were held ineffective, insufficient and feeble to counter a blitzkrieg by the financial institutions. Upon perusal of re-enacted section 15 it is evident that fundamental right of redemption is acknowledged and secured through provisioning of corresponding remedies to the mortgagor, which inter alia included remedy to raise disputes regarding creation of mortgage and outstanding mortgage money, demanded through statutory notices. The legislature, while re-enacting section 15 of the Ordinance, 2001, has conspicuously provided remedies, before and after the conduct of auction sales. A reference is made to subsections (13), (14) and (15) of re-enacted section 15, to indicate the scope of restitution remedies. The mortgagor under clauses (a) and (c) of subsection (13) of re-enacted section 15 may object to the creation of mortgage and quantum of the outstanding mortgage money claimed - sufficiency of the cause to be determined by the Banking Court. In terms of clause (d) of subsection (13) of re-enacted section 15 the mortgagor can exercise right of redemption of property, subject to the payment of outstanding mortgage money. Banking Courts possess exclusive jurisdiction in terms of subsection (12) of section 15 to entertain and adjudicate upon the disputes raised. The remedies provided are subjected to the conditions prescribed.

Para 25...One of the key requirement for the conduct of auction sale relates to the determination and fixation of reserve price before the conduct of auction - which was discussed in paragraphs 40 and 41 of the judgment in the case of SAF Textile Mills Limited (supra), wherein reference was made to the judgment in the case of Messes Lanvin Traders Karachi v. Presiding Officer, Banking Court No.2, Karachi and others (2013 SCMR 1419). Re-enacted section 15 caters for the requirement of evaluation of the mortgaged property and provides mechanism of its determination under clause (a) of subsection (4) of section 15 and Rule 3(b) of Rules, 2018. The mortgagor can always object to the evaluation determined for the purposes of fixing reserve price by resorting to remedy under clause (b) of subsection (13) of re-enacted section 15, and establish fraud and substantial injury to the satisfaction of the Banking Court - a remedy similar in the nature of remedies under subsection (7) of section 19 of Ordinance, 2001, and under Order XXI, Rule 66 of the Code.

Para 30…It is evident that the mortgagor can avail remedies under section 9 of the Ordinance, 2001 read with the remedies under re-enacted section 15 - depending upon the nature of the claim and relief sought. The nature/format of the claims raised by the mortgagors before the Banking Courts require no adjudication, we are only examining

the factum of availability/existence of the Right and corresponding remedy. It is apparent that remedies to be availed by the mortgagor are always and shall be regulated and governed under the conditions prescribed in re-enacted section 15, to which exclusive and non-obstante effect is extended under subsection (17) of section 15."

47. MUHAMMAD ISMAIL vs DUBAI ISLAMIC BANK PAKISTAN LTD;
2016 CLD 5 Karachi
Before Aqeel Ahmed Abbasi and Muhammad Junaid Ghaffar, JJ

"Para 10…In view of herein above, whereby the provision of section 15 of the Ordinance, 2001, has been declared to be ultra vires by the Hon'ble Supreme Court, there is no substance in the contention of learned Counsel for the respondent bank, whereby an objection has been raised on behalf of the respondent that since the auction proceedings had been completed, the judgment of the Hon'ble Supreme Court would not be applicable in the instant matter, as the auction was carried out before pronouncement of judgment of the Hon'ble Supreme Court. We have already observed that instant matter is not a past and closed transaction, therefore, the observations of the learned full bench of the Lahore High Court in the case of Muhammad Umer Rathore supra which has been duly approved by the Hon'ble Supreme Court as referred to hereinabove, are fully attracted in the instant matter. In view of such settled position, in our opinion, the auction proceedings carried out by the Respondent Bank in the instant matter, without issuance and proper service of mandatory Notice(s) in terms of section 15 of the Ordinance, 2001, cannot be sustained and the same is liable to be set aside.

Para 11...We may also observe that in terms of the then section 15(2) of the Ordinance, 2001, in case of default in payment by a customer, the Financial Institution was required to send a Notice to the mortgagor, demanding payment of the mortgaged money outstanding, within fourteen days from service of the Notice, and failing payment of the amount within due date, it was further required to send a second Notice for payment of the amount within fourteen days. Further, in case the customer on the due date given in the second Notice, continues to default in payment, Financial Institution was required to serve a Final Notice (third) on the mortgager, demanding payment of the mortgage money outstanding, within thirty days from service of the Final Notice on the customer. Whereas, in the instant matter, it appears that the first Notice was purportedly sent by the respondent on 2.5.2008 for which a courier receipt dated 5.6.2008 has been placed on record. The second Notice was purportedly issued by the respondent on 16.6.2008 again for which a courier receipt dated 17.6.2008 has been placed on record. Though courier receipts in respect of these two Notices have been placed on record, but no report regarding service or otherwise, including the tracking report of the courier company has been placed on record by the respondent

bank. Thereafter, the third Notice dated 2.7.2008 was purportedly issued by the respondent bank for which surprisingly, no receipt of courier or any other mode of sending the Notice to the appellant has been placed on record. It appears that after this third Notice the respondent bank has proceeded further, by publication of the auction Notice in the Newspaper and has conducted the auction on 9.10.2008, wherein, purportedly four bids were received including the bid of the respondent bank, and the bid of the bank being highest, has been declared to be a successful bid, whereafter, the bank settled the account of the customer and placed the same before the learned Banking Court and filed two applications under sections 15(6) and 15(10) of the Ordinance, 2001. From perusal of the provisions of section 15(2) of the Ordinance, 2001 and the material placed before us, we are of the view that since in the instant matter the mortgaged property of the appellant was being auctioned privately by the bank itself, without any indulgence from the Banking Court, therefore, proper service of Notice is a vital and important ingredient in conducting auction of the mortgaged property. We are of the opinion that the learned Banking Court, before issuing writ of possession, was required under law, to examine and ascertain with a higher degree of caution, that as to whether, proper Notice(s) as required under section 15(2) of the Ordinance, 2001 have been duly served or not. The record placed before us, does not support that as to whether, the third Notice was ever sent to the appellant and even mere sending of the third Notice, in our opinion is not sufficient as the law requires that the Notice has to be served upon the customer, whereas, the learned Banking, Court did not bother to ascertain and examine such crucial fact regarding service of the third Notice, whereas, insofar as first and second Notices are concerned, merely the receipt issued by the courier company, in absence of any delivery report, is not a sufficient proof to reach to a definite conclusion that the Notice had been served or not. Therefore, in our view, the learned Banking Court ought not to have issued writ of possession merely, on the basis of receipt of Courier Company regarding dispatch of Notice, instead of a proper acknowledgment of Notice or service of the same or otherwise, on the appellant.

Para 13…On the other hand, insofar as the placing of record/account of sale proceeds is concerned, the respondent has merely submitted the account of the customer with it, including the details of finance availed and repayments, the balance outstanding and settlement of the account after crediting the sale proceeds. Whereas section 15(10) requires the respondent to submit account of sales proceeds, which in our view, includes the details pertaining to the entire sale/auction of the mortgaged property, the names and identification of the bidders, their offers along with details of earnest money deposited through bank drafts and or pay orders etc., so that it could be ascertained by the Banking Court that the auction has been carried out in a transparent manner and the same is not dubious on the face of it. In cases, wherein, the Bank itself has participated in the auction and has also been declared as the highest bidder, the exercise of auction has to be carried out in a more lucid

and transparent manner, for the reason that otherwise, it may deprive the customer, the full benefit and the maximum sale price of its property which is being sold by the Bank. In the instant matter, in our view, whereby the bank had participated in the auction proceedings which had been conducted by the Bank itself, does not appear to be transparent as required under the law, and creates doubts on the credibility of the entire process of biding/auction of the mortgaged property. In view of hereinabove facts, in our opinion, even on merits, the impugned orders cannot be sustained and are liable to be set aside being totally against the mandatory requirements of the provision of section 15 of the Ordinance, 2001."

48. IRFAN NAWAB vs SONERI BANK LTD.;

2013 CLD 1922 Karachi

Before Mushir Alam, C.J. and Muhammad Shafi Siddiqui, J

"Para 22…In terms of subsection (12) of section 15 of the Ordinance, 2001 the appellant is required to show a positive evidence that all amounts secured by the mortgaged property has been paid.

Para 26...The subsection (2) of section 15 ibid deals with the issuance of three notices to assume the powers in terms of subsection (4) of section 15 ibid, empowers the financial institution to sell the mortgaged property or any part thereof without intervention of any Court by way of public auction and to appropriate the proceeds thereof towards total and or partial satisfaction of the outstanding mortgaged money as the case may be. It is settled law that when an act it required to be done in a particular way, it is to be performed in the manner provided under special law. If an act provided to be performed in a particular way is followed by some consequence, then it no more remains mere procedural requirement, but assumes mandatory requirement. Now this subsection (4) of section 15 ibid confirms that the provisions of subsection (2) of section 15 ibid are mandatory and its strict compliance is inevitable.

Para 31...It is difficult to accept such presumption particularly when the law which is under discussion is a special law and the wordings of subsection (2) of section 15 of the Ordinance, 2001 is such that notice and its service is inevitable before the financial institution could assume powers to sell the mortgaged property under subsection (4) of section 15 of the Ordinance, 2001. The assumption of powers under subsection (4) of section 15 of the Ordinance, 2001 are of such nature that it takes away certain valuable rights of the borrower/mortgagor and hence the compliance of the provisions of subsection (2) of section 15 of the Ordinance, 2001 becomes mandatory. The articulation and the purpose behind the scheme of subsection (2) of section 15 of the Ordinance, 2001 appears to be unambiguous and nothing was left in doubt. A similar question was faced by the Hon'ble

Supreme Court in the case of E.A. Evans v. Muhammad Ashraf (PLD 1964 SC 536). The relevant part is as under:--

> "It is difficult to accept upon the wording of this section that such a notice could even be implied notice or information received aliunde. In face of the language of the proviso, which requires that the notice should be served "by registered post (acknowledgement due)" such an interpretation is not possible. To hold that, notwithstanding such clear and unambiguous words, even implied notice would be sufficient to render the words "by registered post (acknowledgement due)" in the proviso redundant, which cannot be done. Every word in a statute has to be given a meaning and the only meaning that these words are capable of bearing is that express notice in writing must be given in the manner prescribed."

49. YAWER KADIR vs BANKING COURT NO.V, PAKISTAN SECRETARIAT, KARACHI and 3 others;

2013 CLD 488 Karachi

Before Sajjad Ali Shah and Riazat Ali Sahar, JJ

"Page 497. Though strictly speaking the procedure prescribed for public sale under the Code of Civil Procedure in the circumstances is that the bidder after having been declared purchaser by the officer conducting sale under Order XXI, Rule 84, C.P.C. has to deposit 25% of the offered amount and thereafter in the same breath he is granted, under Rule 85, fifteen-days time for deposit of balance sale price. However, the Court sales are normally conducted by the Nazir or Commissioner appointed by the Court, who has no authority whatsoever to either accept or reject any bid, his function is only to place the list of the bidders, the amount offered by such bidder before the Court by pointing out the highest bidder. Once the sale report is placed before the Court then in terms of Order XXI, Rule 84, C.P.C. the Court declares the highest bidder and directs for payment of balance sale price and for this reason time for deposit of balance sale price does not commence from the day. Nazir declares a bidder highest in order but such time commences once the Court accepts any of the bids. Admittedly on 23-7-2012 the appellant was not declared purchaser of the subject property, though the Court adjourned the case to 2-8-2012 for deposit of balance sale price which per Nazir report was already deposited on 18-7-2012, therefore, the order itself was superfluous and of no consequence, the other important fact which negates the case of the appellant that by directing deposit of balance sale price his bid was accepted on 23-7-2012 appears to be that on 2-8-2012 the case was again adjourned to 27-8-2012 for considering Nazir report i.e. accepting or rejecting appellant's bid and not for confirmation of sale which order admittedly was never impugned, therefore, we are of the considered view that in fact and circumstances the Order dated 23-7-2012 whereby the Court adjourned the

case to 2-8-2012 for deposit of balance sale price cannot be termed as acceptance of bid. The order accepting the bid or declaring a bidder "purchaser" must be unequivocal and specific leaving no doubt as to the status of highest bidder and of course should reflect application of mind."

50. IRFAN NAWAB vs SONERI BANK LTD.;
2012 CLD 1976 Karachi
Before Munib Akhtar, J

"Para 4…I have heard learned counsel as above, examined the record with their assistance and considered the case-law relied upon. I first take up the matter of the Jinnah Society Property and the question as to whether it is covered by the definition of "mortgage money" as given in section 15(1)(b). The first point to note, and this has been correctly accepted by learned counsel for the plaintiff, is that there is no dispute with regard to the mortgage by way of deposit of title deeds that has been created on this property. The only question is whether the specific definition of "mortgage money" as given in subsection (1)(b) of section 15, and hence the section itself, is applicable, which would enable the defendant to sell the property without the intervention of the court.

Page 15...When the definition is considered, the first point to note is that it uses the word "means". The use of this word in a definition has the effect that is too well known to require any elaboration. Although subsection (1) states that the definitions therein are to have effect "unless there is anything repugnant in the subject or context", in my view this saving provision does not apply to the present definition and it is therefore the meaning of "mortgage money" as given in clause (b) that must be applied. When clause (b) is considered, it is clear that there must be some document which can be related to the definition. Absent such document the definition will not apply, or in other words, there will be no "mortgage money" within the meaning of section 15. The crucial point, as presently relevant, is to note the use of the definite article "the" in relation to the document. It is not simply "a" (or "any") document that will suffice. The definition, in other words, particularizes and specifies the document. What is this document? It is the document that must refer both to the amount of the financing and also the mortgage, either by creating the mortgage itself or evidencing its creation. Why? Because the definition requires, by using the words "of which", that the payment of the financing is secured "for the time being" by this document. At the same time, it is the document "by which" the mortgage is effected or evidenced. It is only such a document, and none other, that can meet the requirements of the definition. I cannot therefore accept the submission made by learned counsel for the defendant that any document (such as the various examples given by him) will do for purposes of the definition as long as it is relatable to the mortgage. The juxtaposition of the words "effected" and

"evidenced" and also the use of the words "by which" in relation to the document clearly establish that the section requires the existence of that specific document which must have been created for the sole (or at the very least primary) purpose of either creating the mortgage itself or evidencing it. In other words, any collateral document which refers to the mortgage is insufficient for the purposes of the definition, and this would include a document that may be necessary to be prepared, filed or maintained to meet any statutory requirement. Insofar as the last portion of the definition, where the word "including" is used on which such emphasis was laid by learned counsel, is concerned, in my view that does not materially alter this position. The reason is that the documents referred to in the last portion, i.e., the mortgage deed and memorandum of deposit of title deeds are those very documents by which a mortgage is either effected or evidenced in the sense just explained. These words cannot in my view be used ejusdem generis as, it would seem, is being contended by learned counsel for the defendant. The last portion of the definition does not expand the scope of the preceding words, but serves only to clarify and explain them and, it would seem, was added only by way of abundant caution.

Para 18…Insofar as section 15(12) is concerned, it is of course well established that any provision which seeks to oust the jurisdiction of a court is to be strictly and narrowly construed. In my view, if there has been any failure to comply with the mandatory requirements of any of the subsections of section 15, or a matter does not otherwise come within its terms, the bar contained in subsection (12) cannot possibly apply.

Para 21...Furthermore, section 69 applies generally to the mortgagees (of the requisite description) and moneys advanced or repayable in terms of the T.P. Act, whereas section 15 relates only to "mortgage-money" as specifically defined in, and for the purposes of that section, and as has just been seen, it there has a rather narrower (and it could even be said, more artificial) meaning."

51. Mst. PATHANI vs HABIB BANK LTD. and another

2012 CLD 1957 Karachi

Before Faisal Arab and Nadeem Akhtar, JJ

"15. Section 15(6) of the Ordinance provides that where the mortgagor, his agent, servant, or any person put in possession by the mortgagor, does not voluntarily give possession of the mortgaged property sought to be sold or purchased, the Banking Court on application of the financial institution or purchaser shall put the financial institution or purchaser, as the case may be, in possession of the mortgaged property in any manner deemed fit by it. Under the Proviso of the said section 15(6), Banking Court has the discretion not to order eviction of a person if such person is in occupation of the mortgaged

property or any part thereof under a bona fide lease, except on expiry of the period of lease. Thus the protection provided under the Proviso of the said section 15(6) of the Ordinance is available only to such person who is in occupation of the mortgaged property or any part thereof under a bona fide lease, and such protection will be available only till the expiry of the period of the lease. The prerequisite for seeking protection by a person under the Proviso of the said section 15(6) of the Ordinance is to show that there is a bona fide lease in his/her favour, and the burden to show this lies exclusively upon such person."

52. MUHAMMAD UMER RATHORE vs FEDERATION OF PAKISTAN;
2009 CLD 257 Karachi
Before, Sayed Zahid Hussain, C.J, Syed Hamed Ali Shah and Syed Asghar Haider, JJ

"Para 13. An analysis of above provision of the Ordinance, gives a clear inference that: --

(i) the provision is invoked against the mortgagor for recovery of mortgage money, which includes finance, penalties, damages, charges or pecuniary liabilities,, in case of default in payment by customer/mortgagor. The Financial Institution can proceed for the sale of the mortgage property, after serving three notices upon him (mortgagor).

(ii) By issuance of notice of demand, the power of mortgagor regarding collection of rents and profits vests with Financial Institution.

(iii) Financial Institution, after issuance of notice and in the event of non-payment in response thereto, can proceed to sell the mortgaged property without intervention of Court.

(iv) Financial Institution is entitled to:-

a. participate in auction;
b. purchase mortgage property;
c. take its possession;
d. apply to the Banking Court to be put in possession of mortgage property, if there is resistance by mortgagor;
e. execute sale deed and get it registered;
f. transfer the mortgage property without encumbrance;
g. adjust all expenses of sale; and
h. distribute sale proceeds amongst the mortgagees and pay to the mortgagor surplus, if any.

(v) Financial Institution is required to file accounts and disputes relating to mortgage and the detail of distribution of the proceeds amongst the mortgagees are to be resolved by the Banking Court. An embargo has been placed on the powers of the Banking Court and also of the High Court, to issue or grant injunction restraining sale, unless

the Court is satisfied that no mortgage has been created or mortgage money has been paid or the same is deposited in the Banking Court."

53. NUSRULLAH vs UNITED BANK LTD.;
2009 CLD 1383 Karachi
Before Arshad Noor Khan and Muhammad Ismail Bhutto, JJ

"Page 1388. As the process of selling the property to satisfy the decree has gone much ahead, therefore, no relief at this stage can be granted to the petitioners."

The dictum laid down by the Supreme Court in the aforesaid case is fully applicable to the circumstances of the present case. The case of Muhammad Ikhlaq Memon, supra, is also applicable in the circumstances of the present case.

After going through the material available on record as well as the impugned order, we are of the opinion that no ground has been made out to interfere in the order passed by the learned executing Court. In view of aforesaid reasons and circumstances we do not find any merit in, this appeal, which is hereby dismissed along with the listed-application, with cost."

54. IZHAR ALAM FAROOQI vs SHEIKH ABDUL SATTAR LASI;
2008 SCMR 240…. Supreme Court of Pakistan

"Para 7...The contention of the learned counsel for the petitioners that sale of mortgaged property under section 15(4) of the Ordinance by the financial institution without the intervention of Court has no nexus with the pecuniary jurisdiction of the Banking Court and power under section 15(6) of the Ordinance is invariably available to the Banking Court in all such cases as an executing agency, has no substance. The plain reading of the provisions of law under discussion would unambiguously show that the jurisdiction of the Banking Court either for the purpose of satisfaction of claim of the financial institution or disposal of allied matters must be determined in the light of provision of section 2 (b) of the Ordinance which is not confined only to the suits involving financial disputes rather all matters directly or indirectly connected with the satisfaction of the claim of financial institution or the financial liability of a person are covered and Banking Court is not supposed to entertain the proceedings under section 15 (6) in a case involving claim beyond its pecuniary jurisdiction.

Para 8…The financial institution subject to the compliance of mandatory requirement of law is empowered to sell the mortgaged property under section 15(4) of the Ordinance without the intervention of Court and in addition to the furnishing of the necessary particulars of the mortgaged properties and detail of. the outstanding liability of the mortgagor is also required to send notices to all concerned and file proper accounts of sale proceeds in term of section 15(10) of the Ordinance."

55. Mst. SHAMIM AKHTAR vs MUHAMMAD RIAZ and another;
2008 CLD 186 Lahore
Before Maulvi Anwarul Haq and Syed Asghar Haider, JJ

"Para 5...The Financial Institutions (Recovery of Finances) Ordinance, 2001 is a special law, therefore, every provision contained therein has to be strictly construed and meticulously adhered to. The manner and mode of auction without intervention of Court has been clearly spelt out in. section 15 of the Ordinance, 2001. It is initiated by resorting to the provisions as contained in section 15(2) by serving notice upon the mortgagor, calling for payment. It clearly envisages service upon "customer" as defined in the Ordinance. Thereafter another notice demanding payment has to be issued within 14 days of service and lastly, in case, of contumacious default in payment, the Financial Institution is required to serve a final notice within 30 days. The proviso to section 15(4) of the Ordinance makes it imperative that before venturing upon the exercise of sale by auction of mortgaged property, a notice is required to be " published in an English and Urdu daily "Newspaper", in the Province where the mortgaged property is located: The proclamation is required to contain the name, and address of the mortgagor, the details of the mortgaged property, the amount of outstanding mortgage money and intention of sale of mortgaged property. This exercise also entails a requirement of sending notice to all .persons, who, to the knowledge of Financial Institution, have an interest' in the mortgaged property as mortgagees. After fulfilling these requirements the Financial Institution, has power to sell the mortgaged property and thereafter, file proper accounts of sale proceeds, with the Banking Court, within 30 days of sale."

5.12. SECTION 16 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

Attachment before judgment, injunction and appointment of Receivers. -

(1) Where the suit filed by a financial institution is for the recovery of any amount through the sale of any property which is mortgaged, pledged, hypothecated, assigned, or otherwise charged or which is the subject of any obligation in favour of the financial institution as security for finance or for or in relation to a finance lease, the Banking Court may, on application by the financial institution, with a view to preventing such property from being transferred, alienated, encumbered, wasted or otherwise dealt with in a manner which is likely to impair or prejudice the security in favour of the financial institution, or otherwise in the interest of justice ¾

a) restrain the customer and any other concerned person from transferring, alienating, parting with possession or otherwise encumbering, charging, disposing or dealing with the property in any manner;

b) attach such property;

c) transfer possession of such property to the financial institution; or

d) appoint one or more Receivers of such property on such terms and conditions as it may deem fit.

(2) An order under sub-section (1) may also be passed by the Banking Court in respect of any property held benami in the name of an ostensible owner whether acquired before or after the grant of finance by the financial institution.

(3) In cases where a customer has obtained property or financing through a finance lease, or has executed an agreement in connection with a mortgage, charge or pledge in terms whereof the financial institution is authorized to recover or take over possession of the property without filing a suit, the financial institution may, at its option:

a) directly recover the same if the property is movable; or

b) file a suit hereunder and the Banking Court may pass an order at any time, either authorising the financial institution to recover the property directly or with the assistance of the Court:

Provided that in the event the financial institution wrongly or unjustifiably exercises the direct power of recovery hereunder it shall be liable to pay such compensation to the customer as may be adjudged by the Banking Court in summary proceedings to be initiated on the application of the customer and concluded in thirty days.

(4) Nothing in sub-sections (1) to (3) shall affect the powers of the Banking Court under Order XXXVIII Rules 5 and 6 of the Code of Civil Procedure, 1908 (Act V of 1908) to attach before judgment any property other than property mentioned in sub-section (1).

CASE LAW UNDER SECTION 16 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

56. ALI RAZA vs MCB BANK LTD.

2021 CLD 986 Islamabad

Before Lubna Saleem Pervez, J

"Para 8…Plain reading of the above provision reveals that the provision of the Ordinance, 2001, is invoked for non-fulfillment of the obligation with regard to finance by or against any financial institution. Whereas, the suit filed by the appellant invoking provision of Section 9 of the Ordinance, 2001, revealed that he had sought declaration for revival of the schedule of payment and mandatory injunctions for restoring the

possession of the subject vehicle and permanent injunction and directions for the respondents/Bank from auctioning the subject car which declaration in view of the mandate and purpose of the Ordinance is outside the scope of the Ordinance, 2001. Learned Judge, Banking Court, Islamabad, has rightly referred section 16(3) of the Ordinance, 2001, whereby the proviso entitles the appellant/the customer for compensation in case the leased vehicle has been wrongly and unjustifiably repossessed by the financial institutions. Section 16(3) of the Ordinance, 2001 and its proviso is reproduced hereunder for reference:-

Para 16...Attachment before judgment, injunction and appointment of Receivers.

(3) In cases where a customer has obtained property or financing through a finance lease, or has executed an agreement in connection with a mortgage charge or pledge in terms whereof the financial institution is authorized to recover or take over possession of the property without filing a suit, the financial institution may, at its option..

(a) directly recover the same if the property is movable; or

(b) file a suit hereunder and the Banking Court may pass an order at any time, either authorising the financial institution to recover the property directly or with the assistance of the court:

Provided that in the event the financial institution wrongly or unjustifiably exercises the direct power of recovery hereunder it shall be liable to pay such compensation to the customer as may be adjudged by the Banking Court in summary proceedings to be initiated on the application of the customer and concluded in thirty days."

Para 9...Hon'ble Lahore High Court Rawalpindi Bench in a case having similar facts and circumstances bearing F.A.O. No. 76/2015 titled as Ch. Saeed Tahir v. The Bank Al-Falah Ltd. and others has observed as under:-

"Para 6…Bare perusal of the above provision of law will make it manifest that the bank has been authorized in case of finances, lease or agreement to recover or take over possession of the mortgage/leased property without filing a suit. At the same time right of customer has been protected by adding proviso to subsection (3) of section 16 of the F.I.O. through which the legislature has authorized him to pray for compensation against the bank if the financial institution/bank has wrongly or unjustifiably exercised the direct power of recovery.

Para 7...The appellant claimed that the action taken by the respondent-bank for re-capturing his car was unauthorized as he was regularly paying installments and was not at

default and no notice was issued to him before aforesaid illegal action. However, while entering witness box as AW.1 he conceded during cross-examination that he was withholding payment of three installments towards "finance facility for motor vehicle on Modharba basis" and that as per terms and conditions of said agreement in such eventuality the bank had a power to recapture the car.".

Para 10...In another case bearing R.F.A. No. 25 of 2016, titled as Umar Farooq v. Bank Al-Falah dated 15.01.2018, the Hon'ble Lahore High Court has observed as under:-

> "Even otherwise, it is settled law that where the parties are in a contractual relationship, any declaration in respect thereto cannot be granted by the courts. Reliance in this regard is placed on judgments reported as Alavi Sons Ltd v. The Government of East Pakistan and 2 others PLD 1968 Karachi 222 Buro Distributors Establishment, Lugano Switzerland v. Bank of Credit and Commerce International London and others 1982 CLC 2369. The parties hereto were in contractual relationship and, therefore, the appellant could not have filed the suit for declaration. Be that as it may, the appellant sought the declaration that he was the absolute owner of the vehicle in question, which prayer was in negation of the contents of the plaint. Similarly, the relief permanent and mandatory injunction could also not been granted as the vehicle in question had already been auctioned by the respondent bank prior to the filing of the suit."

57. Haji ABDUL RAZZAK (DECEASED) vs FAYSAL BANK LTD.;
2020 CLD 238 Karachi
Before Irfan Saadat Khan and Mrs. Kausar Sultana Hussain, JJ

"Para 9. The arguments of Mr. Asim Mansoor could be summarized on two primary aspects, which are (1) dismissal of the application bearing C.M.A. No.14242 of 2016 filed under Order XXXVIII, Rule 5 read with section 151, C.P.C. and (2) dismissal of C.M.A. bearing No.11182 of 2010 filed under section 16 of the Financial Institutions Ordinance, 2001. We will first take his objection with regard to dismissal of C.M.A. No.11182 of 2010. In this regard the learned counsel has accepted that this application could only be filed by a financial institution and not by a borrower but stated that if there is no bar then provisions of general law would prevail. We are afraid this is not the position in the instant mater, since the suit has been filed by the present appellant against the respondent under section 9 of the Financial Institutions Ordinance, 2001 hence for all practical purposes since this is a banking matter provisions of Financial Institutions Ordinance, 2001 would apply and the matter has to be proceeded in view of the provisions contained in the Financial Institutions Ordinance,

2001 and when it is an admitted position that the application under section 16 could only be filed by a financial institution and not by the borrower hence we see no justification to enter into this controversy and reject the contention of the learned counsel that if there is no bar then general law would prevail, whereas in the instant matter there is a bar that the matters pertaining to financial institutions are to be proceeded as per Financial Institutions Ordinance, 2001 to provide speedy measures for deciding the matter between the bank and its customer. The decision relied upon by the learned counsel for the appellant in the case of Haji Abdul Wali Khan (quoted supra) is not applicable since the appellant himself has filed the suit against the respondent under section 9 of the Financial Institutions Ordinance, 2001 and the matter, in our view, has to be dealt with under the provisions of Financial Institutions Ordinance, 2001, subject to certain limitations, which are not present in the instant matter and so far as this aspect of the matter is concerned we see no reason to interfere in the order passed by the learned Single Judge which stands affirmed and the present Special High Court Appeal on this aspect is hereby dismissed."

58. GULISTAN TEXTILE MILLS LTD. vs SONERI BANK LTD
2018 CLD 203

Supreme Court of Pakistan;
Present: Mian Saqib Nisar, C.J., Faisal Arab and Ijaz ul Ahsan, JJ

Page 213. "In case of a suit for the recovery of any amount through sale of property which has been pledged, hypothecated, etc. in favour of a financial institution as security for finance (or for or in relation to a finance lease), Section 16 of the Ordinance empowers a Banking Court to pass an order before judgment, upon an application by the financial institution, to prevent such property from being transferred, alienated, encumbered, wasted or otherwise dealt with in a manner which is likely to impair or prejudice the security in favour of the financial institution or otherwise in the interests of justice. The types of orders that the Banking Court could pass are provided for in section 16(1) of the Ordinance:- it may (a) restrain the customer (and any other concerned person) from transferring, alienating, parting with possession or otherwise encumbering, charging, disposing or dealing with the property in any manner; (b) attach the property; (c) transfer possession of such property to the financial institution; and (d) appoint one or more Receivers of such property on such terms and conditions as it may deem fit. Section 16(2) of the Ordinance empowers the Banking Court to pass similar orders to those mentioned in Section 16(1) ibid with respect to any property held benami in the name of an ostensible owner. Where movable property is concerned, Section 16(3) allows for direct recovery by a financial institution in cases where a customer has obtained property/financing through a finance lease or in those situations where the financial institution has been authorized to recover or take over possession of the property without filing a suit. The relevant provision for the purposes of the instant case is

section 16(1) of the Ordinance, a plain reading of which makes clear that the Banking Court does not have any power to sell goods which are pledged, hypothecated etc. prior to passing of the judgment in a suit for recovery through sale filed by the financial institution. The qualified powers given to the Banking Courts in this respect have been specifically mentioned in parts (a) to (d) of section 16(1) of the Ordinance which are essentially orders of restraint, attachment, transfer of possession and appointment of Receiver(s).

Section 16 ibid can be compared with Section 19 of the Ordinance, which provides for execution of decree and sale. In juxtaposition with section 16, section 19(3) has specifically used the words sell/sold with respect to mortgaged, pledged or hypothecated property in terms of what the financial institution (with or without the intervention of the Banking Court) may do for the purposes of total or partial satisfaction of the decree. The use of the word sell in this Section [and the failure to use it in section 16 ibid] is indicative of the fact that the legislature used such word only where it intended that sale be permitted. Thus the legislature has permitted a financial institution to sell goods only after it has attained a decree in its favour, for total or partial satisfaction thereof. Therefore, we are sanguine in our view that the absence of the words sale or sell (or any variant thereof) coupled with the specificity of the types of orders that a Banking Court can pass under section 16, speaks to the legislative intent; that sale not be permitted during the pendency of a suit for recovery by sale before the Banking Court."

59. ALLIED BANK LTD. vs JUDGE BANKING COURT
2018 CLD 1086 Lahore
Before Ayesha A. Malik and Shahid Bilal Hassan, JJ

"Para 8. We note that the learned Judge Banking Court has rightly dismissed the application of the Petitioner Bank being premature. A bare review of the application itself shows that no reasons have been provided whatsoever in the application as to why the Petitioner Bank wants to secure its finance facility and how it claims that it has insufficient security to secure the facilities provided to the Respondents. Furthermore, the suit is still pending and at this stage it cannot be said that the suit will be decreed in favour of the Petitioner Bank. The impugned order considered the arguments of the Petitioner and dismissed the application on the ground that there is no prima facie case made out nor is there any apprehension or probability expressed in the application for alienation of the property or that the Respondent will remove himself from the jurisdiction of the court."

60. SONERI BANK LTD. vs PUNJAB ENGINEERING SERVICES (PVT.) LTD;
2016 CLD 440 Karachi

Page 443. "In my humble opinion, Section 16 of the Ordinance cannot be looked into or applied in isolation in view of section 23 of the Ordinance, which provides that pending final

decision of the Suit filed by the financial institution under the Ordinance in which summons under section 9(5) of the Ordinance have been published, no customer shall, without the prior written permission of the Banking Court, transfer, alienate, encumber, remove or part with the possession of any of his asset or property furnished to the financial institution as security by way of mortgage, pledge, hypothecation, charge, lien or otherwise ; and, any such transfer, alienation, encumbrance or other disposition by the customer in violation of section 23 ibid shall be void and of no legal effect. Thus, while deciding an application under section 16 ibid, the Banking Court must also keep in mind the mandatory provisions of section 23 ibid.

The defendants are duty-bound under section 23 ibid not to transfer, alienate, encumber, remove or part with the possession of any of the assets or properties of defendant No.1 furnished to the plaintiff as security by way of hypothecation, without the prior written permission of the Banking Court. Even otherwise, it is the duty of the parties to ensure that the hypothecated assets are not wasted or destroyed during the pendency of a Suit in which the same are the subject matter, and it is duty of the Banking Court to enforce such duty of the parties. In view of the above and also as the defendants have not disputed the execution of any of the letters of hypothecation and they have not filed any counter affidavit or objections to oppose this application, this application is allowed as prayed."

61. MUHAMMAD ASLAM and 2 others vs NATIONAL BANK OF PAKISTAN;
2015 CLD 933 Lahore
Before Amin-ud-Din Khan and M. Sohail Iqbal Bhatti, JJ

"Para 10. The Banking Court at the most could have exercised powers under Section 16 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 which is reproduced below:-

"16…ATTACHMENT BEFORE JUDGMENT, INJUNCTION AND APPOINTMENT OF RECEIVER.- (1) Where the suit filed by a financial institutions is for the recovery of any amount through the sale of any property which is mortgaged, pledged, hypothecated, assigned, or otherwise charged or which is the subject of any obligation in favour of the financial institutions as security for finance or for or in relation to a finance lease, the Banking Court may, on application by the financial institutions, with a view to preventing such property from being transferred, alienated, encumbered, wasted or otherwise dealt with in a manner which is likely to impair or prejudice the security in favour of the financial institutions, or otherwise in the interest of justice--

a) restrain the customer and any other concerned person from transferring, alienating, parting with possession or otherwise encumbering, charging, disposing or dealing with the property in any manner;

a) attach such property;

b) transfer possession of such property to the financial institutions; or

c) appoint one or more Receivers of such property on such terms and conditions as it may deem fit.

(2) ……..

(3) ……...

a) ……..

b) ……..

(4) ……."

Para 11. The bare perusal of the above referred provision of law manifests that the powers under this Section could only have been exercised with a view to prevent mortgaged property from being transferred, alienated, encumbered, wasted or otherwise dealt with in a manner which is likely to impair or prejudice the security in favour of the bank. The application filed by respondent No.1/bank does not refer to any of the pre-requisites mentioned in section 16(1) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 as transfer of the possession of mortgaged property is based upon the pre-conditions mentioned in subsection (1) of section 16 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 respondent No.1/plaintiff bank has not mentioned in its application that the mortgaged property is dealt with in any manner which was likely to impair or prejudice the interest of respondent No.1/plaintiff bank.

11(sic.) for what has been discussed above, this appeal is accepted and the impugned order dated 2-12-2013 is set aside. Before parting with this judgment, it is directed that the amount deposited by the appellants with respondent No.1/bank be returned to the appellants and the appellants may avail their remedy in pursuance to the agreement to sell dated 15-5-2002."

62. MCB BANK LTD. vs Messrs ATLAS RUBBER AND PLASTIC INDUSTRIES PVT. LTD;

2011 CLD 1550 Karachi

Before Munib Akhtar, J

"Para 5. After having heard learned counsel as above, I ultimately came to the conclusion that the C.M.A. under consideration ought to be dismissed. As noted above, learned counsel for the plaintiff bank abandoned his claim in terms of section 16(1) of the 2001 Ordinance and focused exclusively on Order XXXVIII, rules 5 and 6, C.P.C.

Also as noted above, the defendant No.3 has been sued only as a guarantor in the suit on the basis of the personal guarantee that has been given by him to the plaintiff bank in respect of the finance facilities made available to the defendant No.1. It is, of course, settled law that simply because a person has given a personal guarantee in respect of an outstanding loan, that does not mean that he therefore stands precluded from dealing with his properties and assets in accordance with law and in such manner as he deems appropriate. Simply because a suit has been filed against a guarantor does not in and of itself entitle the creditor to come forward and; in effect, restrain the guarantor from dealing with his properties. The creditor must show something specific and additional as required in terms of Rule 5 of Order XXXVIII, i.e., that the concerned defendant is disposing off, or is about to dispose off his property with intent to defeat or delay any decree that may be made in the suit. A mere bald assertion in this regard is not enough. In the facts and circumstances of the present case, it appears that the only reason why the plaintiff bank seeks relief by way of attachment before judgment is on account of the advertisement that appeared with regard to the subject property and the sale transaction in respect thereof. In my view, this is insufficient to entitle the plaintiff bank to obtain attachment before judgment. If at all the plaintiff bank succeeds against the defendant No.3, it would be entitled to a personal decree against him in respect of the amount decreed against him. In such an eventuality (and of course, it is to be noted that this is something that remains yet to be decided), if the defendant No. 3 fails to make payment of the decretal amount, the plaintiff bank would be required to pursue execution proceedings against the said defendant in the manner required by law. In my view, simply on the basis of a bald assertion, and without anything more, the plaintiff Bank cannot be allowed to bypass the process of the law and, in effect, obtain something against the defendant No.3 to which it is not directly entitled, i.e., an immediate judicial order in respect of his property. Of course, had the subject property been mortgaged or otherwise charged with the plaintiff bank, the situation would have been entirely different. However, since that is admittedly not the case, the matter falls to be decided simply in terms of Rules 5 and 6 of Order XXXVIII, C.P.C. and I am not at all satisfied that the plaintiff bank was able to make out any case in terms thereof. Accordingly, in my view, the application was without merit, and was dismissed by me by means of the short order noted above."

63. MCB BANK LTD vs MILLENNIUM SECURITIES AND INVESTMENT PRIVATE LTD;

2011 CLD 1355 Islamabad

Before Iqbal Hameed-ur-Rehman, C.J.

"Para 10 Allowing the instant applications would infact adversely affect the business of the defendants and the impact would that their business would come to an halt, as

such, same cannot be justified in any manner whatsoever in the presence of sufficient security being available to the applicant/plaintiff in the form of mortgage property. Even on legal plane the applications cannot sustain as section 16(1) of Financial Institutions (Recovery of Finances) Ordinance, 2001, clearly indicates that the same is not applicable to the properties mortgaged/pledged and in the instant case the applicant has sought attachment of properties other than mortgaged/ pledged properties, hence the instant applications are not sustainable. Moreover, under Order XXXVIII, Rule 5, C.P.C. no order for attachment before judgment can be passed on mere apprehensions/presumptions Reliance in this regard is also placed on the judgment reported as **Messrs MEC Shipbreakers Ltd. v. Messrs Peason Investment Inc. and another (PLD 1982 Karachi 701)** wherein it was held that:--

> "Order XXXVIII, Rr.5 & 6---Attachment before judgment---Object of O.XXXVIII, R.5---To provide safeguard to plaintiff if defendant with intention to delay or defeat decree does any offending act mentioned therein and not to paralyse normal and bona fide transactions, business and commercial activities---Mere presumption and apprehensions of plaintiff as to indulgence of defendant into such offending acts---Cannot justify attachment before judgment."

5.13. SECTION 17 OF FINANCIAL INSTITUTIONS ORDINANCE, 2001

Final Decree. - (1) The final decree passed by a Banking Court shall provide for payment from the date of default of the amounts found to be payable on account of the default in fulfillment of the obligation, and for costs including, in the case of a suit filed by a financial institution cost of funds determined under section 3.

(2) The Banking Court may, at the time of passing a final decree, also pass an order of the nature contemplated by sub-section (1) of section 16 to the extent of the decretal amount.

CASE LAW UNDER SECTION 17 OF FINANCIAL INSTITUTIONS ORDINANCE, 2001

64. BANK OF PUNJAB vs MANZOOR QADIR and another;
2021 CLD 1037 Lahore
Before Muhammad Sajid Mehmood Sethi and Abid Hussain Chattha, JJ

"Para 11…The next question is that in case no amount or even excess amount has been paid by a borrower to a financial institution, does it preclude the Banking Court to determine cost of funds under section 3 of the Ordinance and to pass a Decree under

section 17 of the Ordinance to this effect. Cost of funds is basically the cost that a financial institution is entitled to recover from the borrower on account of funds which as per the terms of the 'Finance' or the law ought to have been in the custody of a financial institution but happened to be in the custody of the customer after default on the rationale that the financial institution has been deprived from placing the funds somewhere else for its financial benefit which is the core business of a financial institution. Section 3(2) of the Ordinance stipulates that where a customer defaults in the discharge of his obligation he is liable to pay for the period from the date of his default till realization of the cost of funds of the financial institution as certified by the State Bank of Pakistan from time to time. Section 3(3) of the Ordinance further states that a Judgment against the customer under this Ordinance shall mean that he is in default of his duty to fulfill his obligation and the ensuing Decree shall provide for payment of the cost of funds. Since cost of funds is attached to the provisions of funds, therefore, cost of funds are not awarded to a customer even where a customer establishes a breach of obligation on the part of the financial institution. But cost of funds is granted only to a financial institution under section 3 of the Ordinance on the principle that funds are only provided by a financial institution and not by a customer. Section 17 of the Ordinance provides that the final Decree shall be passed with respect to payment from the date of default of the amounts determined to be payable by the Banking Court on account of default in fulfillment of the obligation and for costs including in the case of a suit filed by a financial institution cost of funds determined under section 3 of the Ordinance. It, therefore, follows that the Banking Court has committed gross illegality in refusing to determine the date of default and grant of cost of funds from the date of default with reference to 'Finance'. The case titled, Habib Bank AG Zurich through Manager v. Mustafa Shamsuddin Ghatilla and 2 others, 2003 CLD 658, relied upon by learned counsel for the Respondents is differentiable since the claim of cost of funds was denied on the ground that no Judgment was passed in terms of section 3(3) of the Ordinance. The said case does not specifically bar the passing of Judgment with respect to determination of date of default and grant of the cost of funds on merits through passing of Judgment and Decree by the Banking Court, if the same was otherwise made out. We, therefore, hold that where no amount is payable by the borrower or even excess amount has been paid by the borrower, the Banking Court can and should pass a Decree regarding the cost of funds subject to offsetting the excess amount, if any, which can be determined at the stage of execution."

65. NATIONAL BANK OF PAKISTAN vs MUHAMMAD RAIES AHMAD and others;
2020 CLD 784 Lahore
Before Shahid Karim and Rasaal Hasan Syed, JJ

"Para 5…The objection of the bank appears to be sound in view of the clear provisions of sections 3 and 17 of the Ordinance. Section 3(2) of the Ordinance contemplates that in the event of default on customer's part in discharge of his obligations he shall be liable to pay, for the period from the date of his default till realization, cost of funds of the financial institution as certified by the State Bank of Pakistan from time to time. Similarly section 17 of the Ordinance mandates that the final decree of the Banking Court shall provide for the payment from the date of default of the amount found to be payable on account of default in fulfillment of the obligations and costs of suit by a financial institution, with cost of funds as determined under section 3 of the Ordinance. In this view of the unambiguous provision of law which mandates that a customer is liable to pay the costs of funds on the amount of default and the costs of the suit, from the date of default till realization, the learned Judge Banking Court committed error of law in limiting the right of decree-holder to realize the cost of funds from the date of institution of the suit instead of then entitlement to receive it from the date of default. To this extent, therefore, the decree against respondent No.1 needs to be modified which is accordingly allowed. It is observed that the date of default has not been specifically determined; nevertheless, the learned Banking Court as executing court is competent to determine the date of default on the basis of documents and other materials available on record. Reference can be made in this respect to the rule in "Habib Bank Limited through its Authorized Attorneys v. Pak Poly Products (Pvt.) Limited and 3 others" (2013 CLD 1661). In result, the respondent No.1 shall now be liable to pay the decretal amount, with costs and cost of funds from the date of default till realization of decretal amount. The decree against respondent No.1 is accordingly modified to the extent that appellant bank shall now be entitled to recover the decretal amount with cost of funds, as certified by State Bank of Pakistan from time to time, from the date of default till realization of decree."

66. Messrs DIVINE DEVELOPERS (PVT.) LTD vs BANK OF PUNJAB;
2019 CLD 489 Lahore
Before Shams Mehmood Mirza and Jawad Hassan, JJ

"Para 7...Section 3 of the Ordinance clearly stipulates that the customer who is in default of his obligations is liable to pay costs of funds for the period from the date of his default till realization. In identical circumstances, a learned Division Bench of this Court in a judgment

reported as Habib Bank Limited v. Pak Poly Products (Pvt.) Limited 2013 CLD 1661 clearly held that the costs of funds was payable on the outstanding amount from the date of default till realization. A similar view was taken by learned Division Bench of the Sindh High Court in the case of Trycot Synthetic Fiber Company through Proprietor v. Habib Bank Limited 2012 CLD 1670. It is thus clear that the learned Banking Judge of this Court fell in error in awarding costs of funds in the decree from the date of filing of the suit.

Para 8...In the result, the appeal filed by the appellant herein is partially allowed by deducting the amount of Rs.2,169,633/- from the decree. The appeal filed by the respondent bank (appellant in R.F.A. No.1561 of 2014) is allowed by holding that the costs of funds in the judgment and decree are to be granted from the date of default till the date of realization. Judgment and decree dated 29.04.2014 shall stand modified to the extent that it shall be deemed to have been passed for an amount of Rs.21,826,857/- together with costs of funds from the date of default till realization. Rest of terms and conditions of the judgment and decree shall remain intact."

67. ALLIED BANK LTD. vs Messrs FAZAL VEGETABLE GHEE MILLS and others; 2019 CLD 441 Islamabad

Before Shaukat Aziz Siddiqui and Athar Minallah, JJ

"Para 13. Decree has been defined in section 2(2) of the C.P.C. as meaning "a formal expression of an adjudication, which so far as regards the Court expressing it, conclusively determines the rights of the parties with regards to all the matters in controversy in the suit or any of the matters in controversy in the suit." A decree may be preliminary or final. The explanation of section 2(2) of C.P.C. draws the distinction between a preliminary and final decree. In the case of the latter, the adjudication completely disposes of the suit, while the former does not have such an effect. The powers of an executing Court are provided under section 47 of the C.P.C. It, inter alia, provides that all questions arising between the parties to the suit, in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court having jurisdiction to execute the decree. Order XXI of the C.P.C. governs the procedure for the execution of decrees and orders. A combined reading of the provisions unambiguously shows that after a decree has been drawn up, the same is to be executed. The decree drawn up following a judgment is distinct and separate. It is by now settled law that a decree, by definition, is an expression of conclusively determining the matters placed before a Trial Court for adjudication. It is settled law that even if the judgment and decree are pursuant to an agreement, but the terms thereof are not mentioned in the Decree, though recorded in the judgment, yet such terms cannot be read in the Decree as having been granted. Reliance

is placed on "Ghulam Muhammad v. Sultan Mahmud and others" PLD 1963 SC 265 and "Mst. Ashraf Bibi v. Barkat Ali" PLD 1956 Lahore 27.

Para 14. Following the principles laid down in the Ghulam Muhammad case Supra, the august Supreme Court has consistently held that an executing Court cannot extend its jurisdiction to go behind the decree and question its correctness. Reference may be made to the cases "Syed Riaz Ahmad Shah and another v. Dayal Singh College Trust Society and another" [1972 SCMR 237], "Muhammad Ali and others v. Ghulam Sarwar and others" [1989 SCMR 640], "Mst. Naseem Akhtar and 04 others v. Shalimar General Insurance Company Ltd. and 02 others" [1994 SCMR 22], "Fakir Abdullah and others v. Government of Sindh through Secretary to Government of Sindh, Revenue Department Sindh Secretariat and others" [PLD 2001 SC 131], "Allah Ditta v. Ahmed Ali Shah and others" [2003 SCMR 1202], "Rehmat Wazir and others v. Sher Afzal and others" [2005 SCMR 668] and "Muhammad Ali v. Zakir Hussain" [PLD 2005 Lahore 331]. Two judgments have referred to exceptions to the established rule an executing court cannot look beyond the decree or look into the judgment, and the same are as follows:

(1) When the decree is silent regarding what property was the subject matter of execution, then only in such an eventuality the executing court can look into the judgment in order to find the said property. 2003 SCMR 1202.

(ii) The executability of a decree can be questioned by the executing court if it is satisfied that (a) the decree is a nullity in the eyes of the law, (b) it has been passed by a Court having no jurisdiction (c) the execution of the decree will not infringe the legal rights of the decree holder, if refused to be executed or (d) the decree has been passed in violation of any provision of law. PLD 2001 SC 131."

68. Messrs CHIEF SARHAD CARGO SERVICE vs JUDGE BANKING COURT NO. II, LAHORE and others;

2017 CLD 1269 Lahore

Before Amin-ud-Din Khan and M. Sohail Iqbal Bhatti, JJ

"Para 7…A bare reading of section 17 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 clearly provides that in a suit filed by a Financial Institution under Financial Institutions (Recovery of Finances) Ordinance, 2001 awarding of cost of funds is mandatory from the date of commission of default by the borrower/customer in fulfillment of the obligation. It is established from Para No.7 of the plaint wherein it has been specifically mentioned that the appellants committed default in fulfillment of their obligation on 6.4.2006. The learned Division Bench of the Sindh High Court in a judgment

reported in Habib Bank Limited v. Tauqeer Ahmed Siddiqui and another (2009 CLD 312) [Karachi] has observed as under:-

> "The view regarding the awarding of cost of funds in terms of section 17 read with section 3 of the Ordinance of 2001, being mandatory, also finds support from a recent judgment of this Court in Ist Appeal No.74 of 2007 (supra), wherein the scope of sections 17 and 3 of the Ordinance of 2001 was examined in a case where the Banking Court had omitted to award cost of funds in favour of the financial institution. It was held that grant of such relief to financial institution is mandatory in nature, therefore, Banking Court had no option but to award such cost of funds from the date of default, according to the State Bank circular as regards cost of funds, issued from time to time."

Para 10. But any interpretation of decree made by the Executing Court under section 47 of the C.P.C. is to be made in accordance with the mandatory provisions of section 17 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. Any other interpretation made while contravening the mandatory provisions of section 17 would be a nullity. At this stage, it would be appropriate to refer to a judgment reported in Miss Reeta v. Government of Sindh and others (2001 CLC 1825) [Karachi] wherein the learned Division Bench of Sindh High Court while following the dictum laid down by the Hon'ble Supreme Court of Pakistan has held that even a decree passed in contravention to mandatory provisions of law shall be treated as a nullity. The learned Banking Court while passing the impugned order dated 17.5.2010 has admitted this fact that while passing the initial order dated 15.12.2009 the date of default mentioned as 6.4.2006 had completely escaped from its notice. Thus, at the best the order impugned in this appeal can be termed as retracing of steps by the learned Banking Court No-II, Lahore in accordance with law."

69. Messrs ZAMINDAR RICE MILLS and others vs FAYSAL BANK LTD.;
2015 CLD 219 Lahore
Before Amin-ud-Din Khan and Shams Mehmood Mirza, JJ

" 11. INTERIM DECREE:---(1) If the Banking Court on a consideration of the contents of the plaint, the application for leave to defend of the defendant and the reply thereto, is of the opinion that the dispute between the parties does not extend to the whole of the claim, or that part of the claim is mainly limited to a part of the principal amount of the finance or to any other amounts relating to the finance, it shall, while granting leave and framing issues with respect to the disputed amounts, pass an interim decree in respect of that part of the claim which relates to the principal amount and which appears to be payable by the defendant to the plaintiff."

Para 7. Similarly section 17(1) of the Ordinance deals with passing of the final decree by a banking court and reads as follows:--

"17. FINAL DECREE:---(1) The final decree passed by a Banking Court shall provide for payment from the date of default of the amounts found to be payable on account of the default in fulfillment of the obligation, and for costs including, in the case of a suit filed by a financial institutions costs of funds determined under section 3."

Para 8. The above provisions of the Ordinance clearly show that the Banking Court is empowered to pass an interim decree for an amount which is undisputed after consideration of the pleadings of the parties as also the documents appended therewith. In this regard, reference may be made to paragraphs 15 and 44 of judgment dated 25-4-2007 (Interim Decree), which are reproduced hereunder.

Para 11. It is, therefore, clear that the learned Banking Judge had passed the Interim Decree for Rs.12,398,584 and the Final Decree was passed in the sum of Rs.38,075,958. These two decrees were distinct and independent and were passed in respect of two separate amounts constituting the entire claim of the respondent bank in the suit. It is equally clear that the Final Decree was not adjudication on merits but was passed in consequence of the default by the appellants in submitting the bank guarantee. In the circumstances, it cannot be said that with the passing of the Final Decree the Interim Decree had merged into it entitling the appellants to challenge the same.

Para 13. The principle of merger of decrees is limited to situations where the decree of a lower court is modified or altered by the appellate Court, which results in merger of the decree of the lower court with that of the higher Court. While discussing the scope of preliminary and final decree(s) and the appeals filed there-against, the Peshawar High Court in a judgment reported as Gul Muhammad and others v. Habib Muhammad Khan and another PLD 1960 (W.P.) Peshawar 37 held as follows:--

> "Preliminary decrees in cases where the statute makes a provision for them stand on and independent footing as independent entities and there is no question of merger of these decrees in the final decrees that follow them..... A preliminary decree does not become extinct after the passing of the final decree, nor does the latter affect the maintainability of an appeal against the former and this will be so even if the appellant has not asked for stay of proceedings after the institution of his appeal or has not filed an appeal against the final decree."

Similarly, the Hon'ble Supreme Court in a judgment reported as Sultan Ali v. Khushi Muhammad PLD 1983 SC 243 held that "... the preliminary decree stands on its own terms

and the Court after taking further proceedings thereon cannot go behind it, nor can the final decree passed in such proceedings amend or go behind the preliminary decree on a matter determined by the latter...."

Para 14. In the same vein, the Indian Supreme Court in a judgment reported as Venkata Reddy and others v. Pethi Reddy AIR 1963 SC 992 held that "A preliminary decree passed, whether it is in a mortgage suit or partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive."

Para 15.The ratio of the above judgments coupled with the language of section 11 of the Ordinance makes it quite clear that the matters dealt with by the Interim Decree were conclusive and final and were unalterable through any proceedings that were taken subsequently in the suit filed by the respondent bank. A fortiori, the Interim Decree did not merge in the Final Decree and both the decrees retained their independent legal status in terms of filing of execution and appeals. We also observe that in the present appeal the appellants did not challenge the Interim Decree and also did not append the certified copy of the Interim Decree with the appeal. We are also of the opinion that with the dismissal of R.F.A. No. 236 of 2007, without adjudication on merits, the basis for challenging the Final Decree is no longer available to the appellants. The Final Decree was passed merely as a consequence for non-fulfillment of the condition attached to the grant of leave to defend the suit. This Court in present proceedings cannot go behind the Final Decree and pass judgment on the merits of the Interim Decree, which did not merge with the Final Decree and was never challenged by the appellants in the present appeal. The judgments relied upon by the learned counsel for the appellants had no relevance to the facts of this case."

70. HABIB BANK LTD. vs TAUQEER AHMED SIDDIQUI;

2009 CLD 312 Karachi

Before, Anwar Zaheer Jamali, C.J. and Ghulam Dastagir Shahani, J

"Para 5. We have carefully considered the submissions of learned counsel and perused the relevant record, which reveals that after passing of judgment and decree in the two suits, due to non-awarding of cost of funds, the appellant had moved separate applications in the two suits mentioning therein the error/omission committed by the Court in non-awarding of cost of funds, which in terms of section 17 of the Ordinance of 2001 was mandatory in nature. In order to appreciate the legal contention raised by the learned counsel, it will be useful to reproduce hereunder the two provisions of the Ordinance of 2001, which read thus:--

> "17. Final Decree.--(1) The final decree passed by a Banking Court shall provide for payment from the date of default of the amount found to be payable on

account of the default in fulfilment of the obligation, and for costs including, in the case of a suit filed by a financial institution cost of funds determined under section 3.

(2) The Banking Court may, at the time of passing a final decree also pass an order of the nature contemplated by subsection (1) of section 16 to the extent of the decretal amount."

"(3) Duty of a customer.--(1) It shall be the duty of a customer to fulfil his obligation to the financial institution.

(2) Where the customer defaults in the discharge of his obligation, he shall be liable to pay, for the period from the date of his default till realization of the cost of funds of the financial institution as certified by the State Bank of Pakistan from time to time, apart from such other civil and criminal liabilities that he may incur under the contract or rules or any other law for the time being in force.

Para 3. For purpose of this section a judgment against a customer under this Ordinance shall mean that he is in default of his duty under subsection (1) and the ensuing decree shall provide for payment of the cost of funds as determined under subsection (2)."

(underlining is for emphasis)

Para 6. A bare reading section 17 relating to preparation of final decree clearly provides that in a suit filed by a financial institution awarding of cost of funds, as contemplated under section 3 of the Ordinance of 2001 is mandatory from the date of commission of default by the borrower/customer in the fulfilment of the obligation. Subsection (2) to Section 3 further elucidates this position as regards the cost of funds to be awarded in each case where borrower/customer is found to have committed default in the payment of the claim of financial institution."

71. HABIB BANK LTD. vs. PAK POLY PRODUCTS (PVT.) LTD

2013 CLD 1661 Lahore

Before Mrs. Ayesha A. Malik and Abid Aziz Sheikh, JJ

"Para 6. The provisions of sections 3 and 17 of the Financial Institutions Ordinance, 2001 deals with cost of funds. It is expedient to reproduce section 3 and section 17 of Financial Institutions Ordinance, 2001 which reads as under:--

"3. Duty of a customer:---(1) It shall be the duty of a customer to fulfill his obligations to the financial institution.

(2) Where the customer defaults in the discharge of his obligation, he shall be liable to pay for the period from the date of his default till realization of costs of funds of the financial institution as certified by the State Bank of Pakistan from time to time, apart from such other civil and criminal liabilities that he may incur under the contract or rules or any other law for the time being in force.

(3) For purposes of this section a judgment against a customer under this Ordinance shall mean that he is in default of his duty under subsection (1) and the ensuing decree shall provide for payment of the costs of funds as determined under subsection (2) and said section 17.

"17…Final Decree.---(1) The final decree passed by a Banking Court shall provide for payment from the date of default of the amounts found to be payable on account of the default in fulfillment of the obligation, and for costs including, in the case of a suit filed by a financial institution cost of funds determined under section 3.

(2) The Banking Court may, at the time of passing a final decree, also pass an order of the nature contemplated by subsection (1) of section 16 to the extent of the decretal amount".

Para 7. From the plain reading of the above noted provisions, it is conspicuously clear that the, customer will liable to pay cost of funds from the date of his default till realization of cost of funds as certifier by State Bank of Pakistan.

Para 8. In the present case, the Banking Court while passing the decree dated 7-3-2011 granted cost of funds under sections 3 and 17 of Financial Institutions Ordinance, 2001. Although the specific date of default is not mentioned in the decree, however, the date of default has been defined therein. The relevant para of the decree dated 7-3-2011 is reproduced hereunder:--

> "Claim of the plaintiff to the tune of Rs.589,071 in respect of markup charged after the date of default is declined."

Para 9. From the above finding in the decree dated 7-3-2011, it is evident that the Banking Court was mindful of the date of default at the time of passing the decree, after which date no markup was allowed to the appellant. The statement of account shows that the relevant date of default after which markup of Rs.589,071 was not allowed in the decree by the Banking Court was 10-7-2009, which is to be taken as date of default for the purpose of section 3 of Financial Institutions Ordinance, 2001.

Para 10. The arguments of learned counsel for the respondents that cost of fund should be from the date of institution of the suit is not tenable for two reasons, firstly that under

section 3 of IFO 2001, the cost of fund will be from the date of default and secondly the date of default is already determined in the decree dated 7-3-2011. No doubt the executing Court could determine the date of default under section 47, C.P.C. if no such date was defined in the decree but in the present case date of default is defined and can be ascertainable from the decree. The impugned order is not sustainable in view of the settled principle of law that an Executing Court could not go behind the decree and it is obliged to execute the decree as it is. In this context reliance is placed on Zahid Industries v. Habib Bank (2007 CLD 618), Muhammad Ali v. Zakir Hussain (PLD 2005 Lah 331), Ayesha Bibi v. National Logistic Cell (2002 CLC 747), Hassan Masood Malik v. Additional District Judge and others (1994 MLD 1877) and Messrs Dawood Cotton Mills Ltd. v. KF Development Corporation Ltd. (2004 CLC 671)."

5.14. SECTION 18 OF FINANCIAL INSTITUTIONS ORDINANCE, 2001

Banking Documents. -(1) No financial institution shall obtain the signature of a customer on banking document which contains blanks in respect of important particulars including the date, the amount, the property or the period of time in question.

(2) Finance agreements executed by or on behalf of a financial institution and a customer shall be duly attested in the manner laid down in Article 17 of the Qanun e-Shahadat Order, 1984 (P.O. 10 of 1984);

(3) Nothing contained in sub-section (1) and (2) shall affect the validity of a document executed prior to the date of enforcement of this Ordinance;

(4) Notwithstanding any thing contained in this section or any other law, the Banking Court shall not refuse to accept in evidence any document creating or purporting to create or indicating the creation of a mortgage, charge, pledge or hypothecation in relation to any property or assumption of any obligation by a customer, guarantor, mortgagor or otherwise merely because it is not duly stamped or is not registered as required by any law or is not attested or witnessed as required by Article 17 of the Qanun-e-Shahadat Ordinance, 1984 (P.O. 10 of 1984) and no such document shall be impoundable by the Banking Court or any other Court or authority:

Provided that nothing contained in this sub-section shall operate to defeat the legal rights of a bona fide purchaser for value without notice of a document which ought to have been registered.

CASE LAW UNDER SECTION 18 OF THE FINANCIAL INSTITUTIONS ORDINANCE, 2001

72. HABIB BANK LTD vs DYNASEL LTD. and 7 others

2018 CLD 1256 Karachi

Before Muhammad Junaid Ghaffar, J

"Para 5...I have heard both the learned Counsel and perused the record. This is a Suit for recovery of Rs. 197,509,580/- along with mark-up and other costs and charges under section 9 of Financial Institutions Ordinance, 2001, and in the leave to defend application, the defendant has admitted an amount of Rs.80,035,009/- payable as principal, and Rs.10,134,487/- payable as mark-up, and at very outset I may observe, that in the given facts, an interim decree could also have been passed by this Court in terms of section 11 of the Financial Institutions Ordinance, 2001. However, for one reason or the other, it could not. Nonetheless, it is of utmost importance to observe that the objections raised on behalf of the defendants are to be dealt with while keeping in mind the admission in the leave to defend application. Insofar as the first objection regarding merger of the erstwhile Barclays Bank PLC with the present Plaintiff is concerned, the same appears to be misconceived and unreasonable. It is not that if a bank is merged into another, the entire plaint always ought to be amended. It is only the title which could be permitted to be amended, as mere merger does not even otherwise entitle the Plaintiff to seek amendment in the plaint, barring certain exception(s) which is not the issue in hand. The plaintiff except change in name has not sought any further or additional relief for which plaint might require amendment. In fact it is a novel proposition on behalf of the defendant in this case, and in fact appears to be an attempt to avoid payment of liability which has not been seriously disputed, except objections of purely technical nature, having no basis. If such objection is sustained, then perhaps it will negate the entire law on mergers and amalgamation. Section 48(6) of the Banking Companies Ordinance, 1962, caters to this objection as well, and provides that on the sanctioning of a scheme of amalgamation by the State Bank of Pakistan, the property of the amalgamated banking company shall by virtue of the order of sanction, be transferred to and vest in, and liabilities be transferred to and become the liabilities of the Banking Company which is to acquire the business of the amalgamated Bank. In the present case the claim of the merged bank when filed at the relevant time was competently done so, and it is only that the present Plaintiff has stepped into the shoes of the merged bank, therefore, this objection is hereby repelled. As to the other objection regarding competency and maintainability of the Suit, again the same appears to be misconceived inasmuch as if an employee has left service of a company; the same would not render a Suit as incompetent before the Court. When the Suit was filed, the person was competently doing so on behalf of

the bank, and the Suit remained alive. At the most, it is only at the subsequent stage of the proceedings, (if needed), that any other employee would come and proceed further on the basis of a fresh authority. Therefore, this objection is also hereby repelled. The other objection regarding various debit entries in the statement of accounts and the same being not in conformity with the requirements of law including Financial Institutions Ordinance, 2001 as well as Bankers' Book Evidence Act, 1891 is concerned; the same also appears to be devoid of any merits. The Plaintiff has annexed the entire current account of the Defendant No.1 which reflects all transactions of the finance facility from time to time as well as charging of markup and other expenses. It is important to note that never ever any such entry was objected to by the Defendants and I had specifically confronted the learned Counsel on this point and he could not satisfactorily respond, but argued that this is a legal objection and can be raised at any stage and is to be decided by the Court. However, with utmost respect, I am not impressed with such line of arguments on the ground that if one does not object to an entry in its account at the relevant time, then the same is deemed to be accepted. Once the borrower avails the facility and does not dispute it while availing such facility, or for that matter later, then subsequently on default, these objections are not to be appreciated. It has in fact become a common practice on the part of borrowers to raise such objections through leave to defend, whereas, when such facility is being advanced, and availed, they keep silent and mum. On perusal of the statement of accounts and the summary of transactions it reflects that the finance was availed and utilized, therefore, these petty objections at this stage of the proceedings are not to be considered. In fact the availing of finance facility and its disbursement has not been denied, but only the quantum.

Para 6. Perusal of the aforesaid stance of the Defendants itself reflects that an amount of Rs. 144,778,393/- was availed and then it has been claimed that certain amount was paid towards principal. The amount of markup has also been disputed; however, the learned Counsel for the Defendants has failed to refer to any supporting documents in respect of the above claim that any such amount was ever paid. Learned Counsel also failed to support the contention with any documents regarding payment of the entire markup. He could also not refer to any document or statement of account which could substantiate the claim that, neither any markup, nor other amount in respect of the principal is outstanding. Insofar as the objections in respect of guarantees pertaining to the year 2008 and being utilized subsequently, it may be observed that perusal of the guarantees reflect that they have been executed in respect of current facility as well as future facilities. It is by now settled that in banking transaction(s), even if there are certain documents which are empty/ blank or have not been properly filled, once the borrower avails the facility and does not dispute it while availing such facility, then subsequently on default, these objections are not to be appreciated. When such facility is being advanced, the documents are signed without any

objection to that effect and subsequently objections are raised. Furthermore section 20 of the Negotiable Instruments Act, 1881, caters to it and provides a complete answer to such objection. Reliance in this regard may be placed on a decision of Division Bench of this Court in the case reported as Muhammad Imran v National Bank of Pakistan (2016 CLD 2093). Moreover it is not the case of the Defendants that the earlier finance facility was discharged in full, and if that had been the case, the guarantees would have been returned to them duly discharged. Therefore, this objection is also misconceived. As to the stance of Defendant No.5 that he was never in the country when the guarantees were signed, firstly, such alleged forgery cannot be attributed to the Plaintiff as the signatures of other Defendants have not been denied. Moreover it is not necessary that the guarantee must have been signed by the said Defendant on the very date when it was presented; therefore, the contention that he was out of country at the relevant time is also misconceived. Additionally, he is in possession of two Passports of different countries, and therefore, it cannot be ruled out he may have travelled out on one passport and returned on another. The objection of limitation also appears to be misconceived inasmuch as the liability has been admitted in the leave to defend application, whereas, the limitation is to run from the date of last default and not from the date of disbursement or agreement as contended. The first agreement in question was to mature on 12.11.2011, whereas, the last on 6.5.2012, and even from such date(s), the Suit is otherwise within limitation; hence this objection is also of no avail. Lastly as to the deficient stamping a complete answer is provided in section 18(4) of Financial Institutions Ordinance, 2001, whereas, a sub-lease property can be mortgaged or not is not a question for this Court to adjudicate presently, as this pertains to execution proceedings."

73. ALLIED BANK LTD vs CHENAB LTD and 20 others

2017 CLD 910 Lahore … Before Shahid Karim, J

"Para 15. The learned counsel for the defendants raised legal submission that in terms of section 18 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 the banks are prohibited from retaining blank documents from the customers. The precise submission was that the plaintiff-Bank had retained certain documents as blank documents and the defendants were forced to submit those documents which was ultra vires the powers of the plaintiff-Bank. A reference was made to a document at page 252 with the application for leave to defend which is a blank document and by comparing it to a document at page 278 of the plaint, it has been sought to bring home that the same document was later on filled in and relied upon by the plaintiff-Bank. I am not convinced by the argument raised by the defendants in this regard. This is clearly an afterthought and contradiction in terms. The entire liabilities due from the defendants have been brought forth in the last facility offer letter of 14.12.2009 and the defendants cannot now turn around and say that the basis of the suit is certain blank document and obtained by the plaintiff-Bank. Moreover, the defendants

have alleged that they have made the entire payment of the liabilities under the finance facilities disbursed to Chenab and, therefore, the defendants cannot blow hot and cold by stating on the one hand that they have repaid the finance facilities availed from the plaintiff-Bank while on the other hand challenging the very documents on which the finance facilities were predicated.

Para 16. There is an aspect of financial estoppel which arises in this case and to which I shall allude to. The nub of the challenge by Chenab (and other defendants) is to entries in bank statements which tend to arise in two situations (as stated by counsel for Chenab). In the first, Chenab challenges the accuracy of an entry and disputes that any payment was in fact made such as to justify a particular debit entry. In the second situation, Chenab states in respect of a few entries that ABL was not entitled to debit the account at all. The question arises whether there is an account stated.

> "In the strict sense of the term, an account stated describes the position where an account contains items both of credit and debit, and the figures are adjusted between the parties and a balance struck."
>
> [Camillo Tank Steamship Co Ltd. v. Alexandria Engineering Works (1921) 38 TLR 134 per Viscount Cave at 143]

Para 17…There is a duty on the bank to send periodic bank statements to its customers giving details of the state of the account in the light of the transactions since the last statement. The bank's obligations in this regard have been set down in the Circulars issued by the State Bank of Pakistan from time to time. It has not been set up as a defence by Chenab that it was not given access to the bank statement by ABL and it is inconceivable, in any case, that Chenab did not check its monthly or periodic bank statements given the sweep and extent of the finance facilities being availed by it. By any stretch of imagination, the ABL's lending to Chenab was quite substantial and it is a foregone conclusion that Chenab's team of accountants and auditors must have pored over the accounts and bank statements before agreeing to renewals and restructuring of liabilities. This may not be expected of an ordinary customer but Chenab, by no means, is an ordinary customer and is a corporate customer of immense financial muscle and thus is aided by the ablest and the most efficient of professionals in their respective fields. It would thus be legitimate to invoke the doctrine of estoppel when Chenab raises the challenge to accuracy of entries in bank statements.

Para 18…However, whether there is a corresponding duty, either in contact (by way of implied term) or in tort, owed by a customer to check his monthly (or other periodic) bank statements so as to notify the bank of any items which were not, authorized by him. Since Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd., [1986] AC Committee 80; [1985] 2

All ER 947, PC, it is well-settled that the relationship of banker and customer does not give rise to such a duty to exist. The Privy Council held against the bank on the alleged duty to check bank statements, so that there was no liability of the customer available for set-off against the liability of the banks. It was further held that it was not possible to establish an estoppel from the customer's mere silence and failure to act."

74. ALLIED BANK LTD vs BANKERS EQUITY LTD;
2017 CLD 663 Lahore
Before Shahid Karim, J

"Para 14. The views expressed by us hereinabove are also supported by the decisions of the Superior Courts. Reference may be made to case of Siddique Woolen Mills and others v. Allied Bank of Pakistan (2003 CLD 1033), wherein the honourable Supreme Court was pleased to hold that since the petitioners in the said case had not denied their liability towards the respondent, therefore, the trial Court had rightly passed the impugned order; in case of Messrs Aima Industries (Pvt.) Ltd. and others v. Allied Bank of Pakistan Ltd., (2003 CLD 1770), a learned Division Bench of Peshawar High Court has held that the defendant was not able to point out any wrong or bogus entry in the statement of account creating doubt in one's mind regarding its authenticity and the appeal filed against the judgment of the trial Court, decreeing the suit of plaintiff-bank, was dismissed; in case of Travel Kings (Pvt.) Limited through Chief Executive and 4 others v. Union Bank Limited and 2 others, (2004 CLD 460), the decree passed by the Banking Court was upheld by a learned Division Bench of Lahore High Court as the defendants had admitted the availing of loan facilities; in case of Tariq Javed and another v. National Bank of Pakistan (2004 CLD 838), a learned Division Bench of Lahore High Court has held that bare assertion of incorrectness of statement of accounts can in no way be, given any weight or made basis for grant of leave to defend the suit; and, in case of National Bank of Pakistan through Zonal Chief and others v. Messrs Power Textile Industries Ltd. through Chief Executive and others (2004 CLD 1239) a learned Division Bench of Lahore High Court, has held that:-

> "Para 5. ..... the allegations that the documents are fabricated and manufactured, are bald allegations and also contradict the case of the appellant, because on the one hand, they have not denied the availing of the facilities and also claim to have paid certain amounts towards the discharge of their liability, but on the other hand, have denied the documents in vague and general terms by not raising any specific plea qua the fabrication or forgery of the particular documents. They have also not denied to the execution of the guarantees and the mortgage documents, executed in favour of the plaintiff-Bank."

Para 15...The case laws relied upon by the learned counsel for the appellants being distinguishable on facts and circumstances of the case in hand, are not attracted to this case and all of them are also prior to the above dictum laid down by the Hon'ble Supreme Court in case of Apollo Textile Mills Ltd. (supra).

Para 16...In view of what has been discussed above and the law laid down by the Hon'ble Supreme Court and the decisions of the Superior Courts supra, we are of the considered view that the appellants had failed in raising any substantial question of law or fact, therefore, the Banking Court was fully justified in dismissing their application for leave to defend and decreeing the Suit against them, and as such, the impugned judgment and decree do not require any interference by this Court and the instant appeal filed by the appellants is liable to be dismissed."

75. Shaikh AFTAB AHMAD vs GOVERNMENT OF PAKISTAN

2016 CLD 544…. Federal Shariat Court

Before Riaz Ahmad Khan, C.J., Dr. Allama Fida Muhammad Khan, Sheikh Najam ul Hasan and Zahoor Ahmed Shahwani, JJ

"Para 8. We have given our anxious consideration to the points raised by both sides and have perused the comments. We have minutely gone through the relevant law as well. Before we proceed further to discuss the merits of instant Shariat Petition, it may be relevant to mention here that, since independence of Pakistan, the Evidence Act 1872 remained in vogue till 20th October, 1984 when the Qanun-e-Shahadat Order, 1984 (hereinafter referred to as the "said Order") was promulgated. The said Order revised, amended and consolidated the law of evidence and brought it in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (S.A.W). In this connection, however, it is notable that the said Order was made applicable with immediate effect and it did not invalidate any transaction made previously under the former Evidence Act. Instead, Article 17(2) of the said Order provided exception to some specific laws. It opens with the following words:-

> "Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law".

The said Ordinance of 2001 is admittedly a special law and as such the exception provided in Article 17(2) is equally applicable to the documents exempted from attestation as required under section 18(2) of the said Ordinance. It is worth mentioning that the rule of evidence incorporated in Article 17 of the said Order also does not debar the Court to accept or act on the testimony of one man or one woman or such other reliable evidence as

the circumstances of the case may warrant. In other words it grants tacit approval to the fact that the court may also consider the circumstantial evidence brought on record in proof of a fact. The aforementioned exception provided in the said Order establishes the fact that any document creating financial liability or future obligation or, for that matter, even pertaining to financial transactions will not be void or legally invalid even if it was not reduced to writing provided that the parties/persons concerned were in full agreement about the terms and conditions of their deal. Section 18(2) of the said Ordinance, after its promulgation would, however, be necessarily applicable as a requisite proof for all financial transactions, if the concerned parties dispute and bring the matter to the court for judicial decision. It is also worth consideration that prior to the impugned section in the said Ordinance (of 2001) and after the promulgation of Qanun-e-Shahadat Order, 1984, there must have been thousands of financial matters creating future liabilities in-between the parties, persons and companies and in case retrospective effect was given to sections 18(1) and 18(2) of the said Ordinance, that would have certainly created a legal chaos. It could have opened a flood gate of litigation and caused the Courts over burdened with endless disputes impossible to be judiciously resolved.

Para 9...The background that gave rise to the legislation of the impugned section was the fact that earlier there had been active debate amongst the legal circles with regard to the applicability of the requirements of Article 17 of the said Order, to certain classes of documents used in banking and financial transactions. Such debate urgently needed to be legally resolved and, by virtue of the provisions of section 18 of the Ordinance of 2001, the controversies have been amicably settled. The provisions of section 18(3) of the said Ordinance, 2001 have been framed in the larger public interest to protect the interest of the banking companies and financial institutions (who are the custodian of the funds belonging to general public) and to avoid the abuse of process of law by the defaulters.

Para 10...The scheme of legislation in Islam, based on Quranic Injunctions, is very simple, logical and practical. There are dozens of personal, fiscal and ritual laws mentioned in the Holy Quran and Sunnah of the Holy Prophet. The principle adopted there is consistently maintained prospective in nature so that compliance with the Injunctions is facilitated and hardships are removed as, obviously, undoing of what had already happened in the past was next to impossible. For example the evil practices of indulging in interest-based financial transaction/bargaining etc. or marrying a step mother or combining of two sisters in wedlock at the same time or killing of game in "Ihram", were prohibited with immediate effect and stopped forthwith. It is, however, seriously notable here that the said injunctions which prohibited various evils and stopped unjust practices/transactions forthwith were followed, respectively, by the words ("What has passed is allowed for him" 2.275) (Except what has passed. "4.22),(Except what has passed. "4.23), ("Allah has forgiven

what has passed." 5.95). Obviously these verses expressly provides that the past and closed transactions were left untouched and, rather, waived off, even from the "Akhirath" point of view as well. In this connection the following Ahadith are also worth consideration:-

> Narrated Abdullah ibn Abbas: The Prophet said: An estate which was divided in pre-Islamic period may follow the division in force then, but any estate in Islamic times must follow the division laid down by Islam.
>
> Narrated on the authority of: Abdullah bin Umar (R.A) that the Messenger of Allah (SAWS) said: "Whatever division of inheritance was made during the Ignorance period, stands according to the division of the Ignorance period, and whatever division of inheritance was made during Islam, it stands according to the division of Islam.

Para 11...Before parting with the judgment we may point out that this Court performs its functions under the jurisdiction conferred by Article 203A of the Constitution of Islamic Republic of Pakistan. Under the provisions Article 203D, this Court delivers judgments on Shariat Petitions, in respect of repugnancy or otherwise of any law or provision of law as defined in Article 203-B(c), but it is pertinent to mention that the judgment in respect of repugnancy of any law or provision of law is always prospective i.e. from some date fixed in future, whereafter the law so declared repugnant ceases to have effect on that date onward unless the judgment is challenged in appeal before Hon'ble Shariat Appellate Bench. Thus the principle of effectiveness of a law to be brought in conformity with Injunctions of Islam from a prospective date has been maintained in the Constitution as well."

76. MUHAMMAD AKHTAR HOOKMANI vs FAYSAL BANK LTD

2015 CLD 227 Karachi

Before Nadeem Akhtar and Sadiq Hussain Bhatti, JJ

"Para 12. In view of the execution of the documents filed by the respondent and the categorical admissions made by the appellants in their application for leave to defend that the amounts were availed by them and the amount payable by them was Rs.10,000,000.00, and also in view of their failure in not disclosing the amounts and dates of payments, the objections raised by them in relation to the respondent's claim and statement of account had no basis. Moreover, no specific entry in the statement of account was pointed out by the appellants in their application for leave to defend in order to make the respondent's claim doubtful. Therefore, no substantial question of law or fact existed before the Banking Court requiring evidence, and as such there was no occasion for granting leave to defend to the appellants. It is well-settled that if the defendant admits availing of the facility, execution of

documents and liability to pay is not disputed, the defendant would be deemed to have failed to make a case for the grant of leave to defend.

Para 13. Some cases are briefly discussed here in support of the above views expressed by us. In Siddique Woolen Mills and others v. Allied Bank of Pakistan, 2003 CLD 1033, the honourable Supreme Court was pleased to hold that since liability towards outstanding amount of the bank was not denied by the customers, the Banking Court had rightly passed the judgment and decree. In Messrs Aima Industries (Pvt.) Ltd. and others v. Allied Bank of Pakistan Ltd., 2003 CLD 1770, decided by a learned Division Bench of Peshawar High Court availing of financial assistance and execution of documents by the defendant in favour of the bank had not been denied by the defendant. It was held that the defendant was not able to point out any wrong or bogus entry in the statement of account creating doubt in one's mind regarding its authenticity; therefore, judgment and decree of the Banking Court were proper and well-reasoned. In Travel Kings (Pvt.) Limited through Chief Executive and 4 others v. Union Bank Limited and 2 others, 2004 CLD 460, the decree passed by the Banking Court was upheld by a learned Division Bench of Lahore High Court as the defendants had admitted the availing of loan facilities and execution of all documents on the basis of which Suit had been filed against them and entries and statement of account had not been denied. In Tariq Javed and another v. National Bank of Pakistan, 2004 CLD 838, decided by a learned Division Bench of Lahore High Court, availing of loan facility was admitted and execution of documents was not denied by the defendants. It was held that bare assertion of incorrectness of statement of account could in no way be given any weight or made basis for grant of leave. In National Bank of Pakistan through Zonal Chief and others v. Messrs Power Textile Industries Ltd. through Chief Executive and others, 2004 CLD 1239, it was held by a learned Division Bench of Lahore High Court that leave application was rightly dismissed and the Suit was rightly decreed by Banking Court as the defendants had not denied the availing of loan facilities and also claimed to have paid certain amounts towards discharge of their liability, but had denied execution of loan documents in vague and general terms by not raising any specific plea regarding fabrication or forgery in the documents; and, they had also not denied execution of guarantees and mortgage documents.

Para 14. In our opinion, the case of Messrs Kinza Fashion (Pvt.) Ltd. (supra) relied upon by the learned counsel for the appellants is not applicable in the instant case as in the said case, the application for leave to defend was dismissed by the Banking Court in a hasty manner without examining in detail the defence put up by the defendant and in the absence of material with regard to one of the facilities. Likewise, the case of Messrs Shaz Pakages (supra) relied upon by the learned counsel for the appellants is of no help to him as the Banking Court in the said case had not exercised its jurisdiction properly and had dismissed

the defendants application for leave to defend in perfunctory and cursory manner, without application of mind and without appreciating the questions of law and facts raised by them."

77. Messrs AL-BARKA ISLAMIC BANK LTD vs Messrs JAVED NAZIR BROTHERS 2014 CLD 1228 Lahore

Before Umar Ata Bandial, C.J.

"Para 17. It is clear from the reading of section 18(3) ibid that Article 17 of the QSO does not affect validity of the documents executed prior to the date of enforcement of Financial Institutions Ordinance, 2001. Each of the documents questioned by the learned counsel for the defendants is executed prior to the Financial Institutions Ordinance, 2001. On the foregoing exemption learned counsel for the defendant maintains that the Banking Companies (Recoveries of Loan, Advances, Credits and Finances) Act, 1997 ("Act") also contains the same provision in section 17(2) thereof. Consequently, it is urged that the aforenoted agreements violate the rule laid down in the said Act.

Para 18. Section 18(4) of the Financial Institutions Ordinance, 2001 answers the said objection wherein a document that fails to comply the requirements of Article 17 of QSO or any other law may, nevertheless, be received in evidence by a Banking Court. The provisions of section 18(4) dilute the effect of section 18(2) of the Act by excluding consequences of inadmissibility in evidence in a case where Article 17 of QSO is not satisfied. In a case where Article 17 ibid is applied strictly, an unattested document pertaining to a financial or future obligation cannot be exhibited in evidence. However, Article 17(2) of QSO expressly declares that a special law may otherwise provide for the consequence of non-attestation. The terms of Article 17 of QSO are therefore subject to the provisions made in other laws regarding the consequence of non-observance of the condition of attestation by two witnesses of documents involving financial or future obligation. Section 18(4) of the Financial Institutions Ordinance, 2001 deals precisely with the aspect of consequence of non-attestation of a document in a banking matter. It is expressly provided that notwithstanding such non-attestation of a charge document indicating mortgage, charge, pledge or hypothecation or assumption of any obligation by a customer such document shall nevertheless be admissible in evidence.

Para 19. In addition to the foregoing legal view, it is also established on record that the aforenoted general finance agreements are corroborated by supplementary documentation admittedly executed by the defendants. These documents include promissory notes dated 25-4-2000, 13-2-2001, 25-10-2000, letters of guarantee executed by the defendants dated 13-2-2001, mortgage deeds including MODTD dated 1-8-1998, 24-3-2000, 14-10-2000 and general power of attorney dated 3-8-1998 in exercise of which admitted sale of Karachi

property was effected. It may also be observed that the defendants admit the signing of general finance agreement but allege that the same were signed in blank. In view of the foregoing factual and legal observations there is no substance in the objection raised by the learned counsel for the defendants with reference to Article 17 of the QSO."

78. MESSRS AMBROSIA CHEMICALS vs BANK OF PUNJAB

2014 CLD 1005 Lahore

Before Syed Iftikhar Hussain Shah and Shoaib Saeed, JJ

"Para 7. Appellants have failed to point out any contradiction/discrepancy in the statement of account which reflects the amount of encashed guarantees created as Force Demand Finance as the appellants despite request/demands of respondent/bank for adjustment failed. Instrument of bank guarantee and other documents are on court record which prove that those were issued at the behest of the appellants. Margin was retained in respect of the bank guarantees issued. Entries reflected in the statement of account duly reflect that those originated in account on default made by the appellants. Instrument of bank guarantee favouring Solex Chemicals Pvt. Ltd. reveals that it was meant for the benefit of the appellants. In bank guarantee cases, Agreement for Finance is not required. The bank guarantees issued were in the shape of limit from which the appellants were entitled to issuance of bank guarantees as and when they required so there was no need to obtain counter guarantee in respect of every issue. Individual counter guarantees arc obtained in single transaction in bank guarantee cases. Signatures of appellants Nos.3 and 4 being mortgagors/guarantors of appellant No.1(borrower) on counter guarantees were not required. The judgments relied upon being quite distinguishable from facts and circumstances of this case are not helpful to the appellants."

79. NATIONAL BANK OF PAKISTAN vs MESSRS MUJAHID NAWAZ COTTON GINNERS

2007 CLD 678 Lahore

Before Mian Hamid Farooq and Iqbal Hameed-ur-Rehman, JJ

"Para 5. We have minutely examined the statement of accounts and find that the same has not been certified as required under the law. The certificate given at the bottom .of the statement of accounts is reproduced below:

"Certified on oath that all the entries are correct as per ledger which is still in our custody."

"Certified copy" has been defined under section 2(8) of Bankers' Books Evidence Act, 1891, which reads as follows:-

"Certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the Bank with his name and official title."

It flows from the bare perusal of the said provision of law that a certificate, which is to be given at the foot of copy of statement of account, so as to make it certified copy of the statement of Accounts, must state the following facts:

a) it is true copy of the such entry;
b) such entry is contained in one of the ordinary books of bank;
c) it was made in the usual and ordinary course of business;
d) such book is still in the custody of the bank;
e) it must be dated; and
f) subscribed by the principal accountant or manager of the bank with his name and official title.

Placing the definition of "certified copy", as reproduced above, in juxtaposition with the certificate given by the bank on the copy of the statement of accounts, one leads to the irresistible conclusion that the certificate is not in accordance with the aforesaid provision of law. Thus the statement of accounts is not "certified copy" as contemplated under section 2(8), ibid. Consequently, the said copy cannot be received as prima facie, evidence of the existence of such entry and cannot be admitted as evidence of the matters, transaction and accounts as required under section 4 of the Bankers' Books Evidence Act, 1891. On the basis of this statement of accounts, which is not the certified copy, the respondents cannot be held liable to pay the amounts claimed by the appellant."

5.15. SECTION 19 OF FINANCIAL INSTITUTIONS ORDINANCE, 2001

Execution of decree and sale with or without intervention of Banking Court. -

(1) Upon pronouncement of judgment and decree by a Banking Court, the suit shall automatically stand converted into execution proceedings without the need to file a separate application and no fresh notice need be issued to the judgment-debtor in this regard. Particulars of the mortgaged, pledged or hypothecated property and other assets of the judgment-debtor shall be filed by the decree-holder for consideration of the Banking Court

and the case will be heard by the Banking Court for execution of its decree on the expiry of 30 days from the date of pronouncement of judgment and decree:

Provided that if the record of the suit is summoned at any stage by the High Court for purposes of hearing an appeal under section 22 or otherwise, copies of the decree and other property documents shall be retained by the Banking Court for purposes of continuing the execution proceedings.

(2) The decree of the Banking Court shall be executed in accordance with the provisions of the Code of Civil Procedure, 1908 (Act V of 1908) or any other law for the time being in force or in such manner as the Banking Court may at the request of the decree-holder consider appropriate, including recovery as arrears of land revenue.

Explanation.- The term assets or properties in sub-section (2) shall include any assets and properties acquired benami in the name of an ostensible owner.

(3) In cases of mortgaged, pledged or hypothecated property, the financial institution may sell or cause the same to be sold with or without the intervention of the Banking Court either by public auction or by inviting sealed tenders and appropriate the proceeds towards total or partial satisfaction of the decree. The decree passed by a Banking Court shall constitute and confer sufficient power and authority for the financial institution to sell or cause the sale of the mortgaged, pledged or hypothecated property together with transfer of marketable title and no further order of the Banking Court shall be required for this purpose.

(4) Where a financial institution wishes to sell mortgaged, pledged or hypothecated property by inviting sealed tenders, it shall invite offers through advertisement in one English and one Urdu newspaper which are circulated widely in the city in which the sale is to take place giving not less than thirty days time for submitting offers. The sealed tenders shall be opened in the presence of the tenderers or their representatives or such of them as attend:Provided that the financial institution shall be entitled in its discretion, to purchase the property at the highest bid received.

(5) The provisions of sub-sections (5), (6), (7), (8), (9), (10), (11) and (12) of section 15 shall, mutatis mutandis, apply to sales of mortgaged, pledged or hypothecated property by a financial institution in exercise of its powers conferred by sub-section (3).

(6) The Banking Court and the financial institution shall be entitled to seek the services and assistance of the police or security agency in the exercise of powers conferred by this section.

(7) Notwithstanding anything contained in the Code of Civil Procedure 1908 (Act V of 1908), or any other law for the time being in force;

a) the Banking Court shall follow the summary procedure for purposes of investigation of claims and objections in respect of attachment or sale of any property, whether or not mortgaged, pledged or hypothecated, and shall complete such investigation within 30 days of filing of the claims or objections;

b) if the claims or objections are found by the Banking Court to be malafide or filed merely to delay the sale of the property, it shall impose a penalty upto twenty percent of the sale price of the property.

c) the Banking Court may, in its discretion, proceed with the sale of the mortgaged, or pledged or hypothecated property if, in its opinion the interest of justice so require:

Provided that the financial institution gives a written undertaking that in the event the objections are found to be valid, or are sustained, it shall in addition to compensating the aggrieved party by the payment of such amount as may be adjudged by the Banking Court also pay a penalty upto twenty percent of the sale proceeds and such amounts shall be recoverable from the financial institution in the same manner as in execution of decrees passed hereunder.

CASE LAW UNDER SECTION 19 OF FINANCIAL INSTITUTIONS ORDINANCE, 2001

80. MOHAMMAD WAJID MURSHID vs SILK BANK LTD

2021 CLD 744 Lahore (Multan Bench)

Before Ch. Muhammad Iqbal and Jawad Hassan, JJ

"Para 11. Speaking generally, execution is the enforcement of a decree by a judicial process which enables the decree holder to realize the fruits of the decree and judgment passed by the competent Court in his favor.

Para 12. Section 19 of the Ordinance deals with execution of decree of Banking Court and chalked out instances when execution can be carried out by the Bank itself without intervention of the Court and the circumstances wherein execution is carried out by the Court. A decree of the Court is a mere declaration of right unless through the process of execution such determination is transformed into actual realization. Without execution, a decree is an expression of recognition of right of relief, however, when the same gets

executed through the process of law, it then culminates into attainment of dispensation of justice in actual and palpable terms. Perhaps that is why, when a decree is executed successfully, it is called satisfaction of decree.

Para 13. Under the Ordinance, in a case where execution of decree is not undertaken by the financial institution itself and sought its execution through the intervention of the Court, then in such a situation the Court, which passed the decree is transformed into a Court of execution fully equipped and empowered to adopt any mode for the purposes of execution as provided under section 19 of the Ordinance with the sole purpose and object to get the decree fully satisfied. Satisfaction of the decree under execution is the ultimate thing and target chalked out for an executing Court by the law that is why under the Ordinance different modes for the execution of decree are provided for the Court, so that it never runs short from legislative support to expeditiously satisfy the decree.

Para 14. In the case in hand, the Banking Court, while executing the decree, which has attained finality upto this Court was even otherwise competent to take measures for full satisfaction of the decree and from that very standpoint, even the impugned order was valid, justified and appropriate."

81. GHULAM FAREED vs MUSLIM COMMERCIAL BANK LTD

2019 CLD 437 Lahore (Bahawalpur Bench)

Before Masud Abid Naqvi and Rasaal Hasan Syed, JJ

"Para 5. The decree in this case, was undeniably passed under the provisions of special law, which provides procedure to carry out the execution. Section 19(1) of F.I.R.O. mandates that upon pronouncement of the judgment and decree by the Banking Court, the suit shall automatically stand converted into execution proceedings without the need to file a separate application and no fresh notice need be issued to the judgment-debtor in this regard. The objective of the law appears to be to provide a forum to the Financial Institutions as well as the customers against default in fulfilling of their obligations towards each other with regard to any Finances and give a special mechanism to enforce the decree. In view of the special procedure prescribed in the Ordinance, there appears to be no requirement for the decree-holder bank to file a separate execution-petition, as it is the duty of the court to itself convert the decree into execution without waiting for separate application for execution from the decree-holder. The application, even if filed by the Bank for execution, at best be construed as a request to activate the proceedings for execution, by converting the suit into the execution-petition in terms of section 19 of F.I.R.O., which had to be taken to its logical end till the decree is satisfied; and there was no room for its dismissal for non-prosecution. The act of the court, in allegedly dismissing the petition for non-prosecution, could not prejudice the decree-holder and it was for this reason, as it

appeared, that the learned Judge Banking Court, on the report of Ahlmad, proceeded to rectify the error which erupted due to the act of the court and restored the proceedings to convey the execution of decree in continuation of the proceedings under section 19 of F.I.R.O. and no exception could be taken thereto."

82. MCB BANK LTD vs EDEN DEVELOPERS (PVT.) LTD

2019 CLD 219 Lahore

Before Shahid Karim, J

"Para 7. Be that as it may in terms of section 19 the decree once passed by a Banking Court is converted into an execution petition. Section 19 says that:

> "Para 19. Execution of decree and sale with or without intervention of Banking Court.---(1) Upon pronouncement of judgment and decree by a Banking Court, the suit shall automatically stand converted into execution proceedings without the need to file a separate application and no fresh notice need be issued to the judgment-debtor in this regard. Particulars of the mortgaged, pledged or hypothecated property and other assets of the judgment-debtor shall be filed by the decree-holder for consideration of the Banking Court and the case will be heard by the Banking Court for execution of its decree on the expiry of 30 days from the date of pronouncement of judgment and decree."

Para 8. Although in the instant case no specific order was made and a consent decree was passed, even then any execution petition filed by the decree-holder would be deemed to be in continuation of the proceedings under the decree, as the tenor of section 19 is without equivocation and the conversion is statutorily mandated. The arguments proffered by the applicant will have the effect of nullifying the intent of the legislature. If it is deemed that the conversion took place under the law, then any payment made out of court shall trigger the procedure laid down in Order XXI, Rule 2, C.P.C. and the question of jurisdiction does not arise.

Para 9. The entire reliance of the learned counsel for the applicant was on the judgment of a learned Single Judge of this Court reported as Habib Bank Limited through Attorneys v. Messrs Rehmania Textile Mills (Pvt.) Ltd., Jhang Road Faisalabad and 30 others (2003 CLD 689). However, the facts in the cited precedent are distinguishable from the facts in the present case and, therefore, the said judgment cannot form a binding precedent for the purposes of the present case. In Messrs Rehmania Textile Mills the judgment and decree was passed by the Banking Tribunal, Faisalabad (as it then was under the Banking Tribunals Ordinance, 1984) for a sum of Rs.4,36,06,891/-. On appeal, the Division Bench of this Court allowed the appeal and modified the terms of the decree as a result of a compromise between the parties. The

execution petition was filed by the decree holder for enforcement of the modified judgment and decree dated 18.3.1999. However, the fact remains that the claim filed by the plaintiff was for a higher sum and the consent decree was passed for lesser amount. The holding of the learned Single Judge was swayed by the definition of the term "Banking Court" given in section 2(b) of the Financial Institutions (Recovery of Finances) Ordinance, 2001. However as distinguished above, in the present case the consent decree was for an amount of Rs.125 Million which was within the pecuniary jurisdiction of this Court. Thereafter certain amounts were paid out of Court and as observed in the preceding paragraph, they were merely required to be certified by the decree holder or the judgment debtor as the case may be and an execution for the rest of the amount after deducting the certified amount is liable to take place. In my opinion, the present case does not turn on the definition of Banking Court as relied upon in Messrs Rehmania Textile Mills. Moreover, the learned Single Judge did not advert his full attention to the concept envisaged by the Ordinance, 2001 whereby the decree passed by this Court is automatically converted into an execution petition. One may also visualize a situation where the amount of decree ultimately passed by this Court may be much less than the amount claimed in the suit by a plaintiff and which amount may fall below the threshold of pecuniary limit for the High Court to exercise its jurisdiction. Can it be said in that case that the execution of the decree be transmitted to the Banking Court for further proceedings? Clearly the answer to this question is in the negative and the proceedings will be held in the High Court which passed the decree in the first place. The correct view has been taken in Mashriq Bank v. Messrs Amtul Rehman Industries (Pvt.) Limited and others (2002 CLD 336) where under similar circumstances, it was held that:

> "5. No doubt, subsequently, the then Banking Tribunal proceeded to pass a decree for the recovery of Rs.3,03,25,593.66, however, it has been incorporated in the decree-sheet that the amount claimed was Rs.1,76,80,544.45, but the decree was passed for Rs.3,03,593.66. In this case jurisdictional value, originally fixed by the decree-holder was Rs.1,76,80,544.45, which will determine the forum of appeal/revision, which definitely falls within the pecuniary jurisdiction of the Banking Court. It is settled law that the valuation of the suit, itself fixed by the plaintiff in the plaint, determines the jurisdiction of the Court and will subsequently be the basis for determination of the forum for the purposes of filing of the appeal etc. Valuation, which also means the subject-matter of the suit, of the relief claimed by the plaintiff' in the plaint determines the forum of appeal. It has been held in Government of Pakistan v. Messrs Allah Bakhsh 2000 CLC 1598 and Ditta Khan v. Muhammad Zaman and others 1993 MLD 2105 that forum of appeal will depend not only on the amount mentioned in the

suit as per Order VII, Rule 2, C.P.C. but also on the valuation fixed by the plaintiff himself for the purposes of court-fee and jurisdiction.

In view of the case-law cited by the learned counsel of both the parties I am of the considered view that the determining factor, for the purposes of jurisdiction, shall be the amount fixed by the plaintiff' in the suit and on which amount the subject-matter of the suit has been valued. Once the plaintiff determines the value of the suit/relief in the plaint that shall be conclusive for the purpose of determining the forum of appeal etc.

In view of the above conclusions and findings I am of the considered view that this Court can neither entertain this execution petition nor undertake the execution proceedings on account of lack of pecuniary jurisdiction. In this case the Banking Court, which initially assumed the jurisdiction on the basis of the value fixed by the decree-holder in the plaint itself, is the only Court which has the pecuniary jurisdiction to execute the decree, to decide the other matters relating to the execution, discharge and satisfaction of the decree and to deal with all the ancillary matters relating thereto. The net result is that the objection of the learned counsel of the judgment-debtors regarding the want of pecuniary jurisdiction prevails, thus, I am constrained to hold that this Court has no jurisdiction to try this execution petition and, therefore, the decree shall stand transferred to the Banking Court No.4, Lahore, for its execution. Resultantly, the execution petition shall deemed to be pending before the Banking Court No.IV, Lahore, who shall take cognizance of the matter, decide the pending applications, including C.M. No.395-B of 2001 and shall proceed to execute the decree, of course, in accordance with law."

Para 10…Thus, the Division Bench of this Court held that the Banking Court which initially assumed the jurisdiction on the basis of the value fixed by the decree holder in the plaint was the only forum which had the pecuniary jurisdiction to execute the decree and to decide all ancillary matters relating to the execution, discharge and satisfaction of the decree."

83. GULISTAN TEXTILE MILLS LTD. vs SONERI BANK LTD

2018 CLD 203 Supreme Court of Pakistan

Present: Mian Saqib Nisar, C.J., Faisal Arab and Ijaz ul Ahsan, JJ

"Para 5….In case of a suit for the recovery of any amount through sale of property which has been pledged, hypothecated, etc. in favour of a financial institution as security for finance (or for or in relation to a finance lease), Section 16 of the Ordinance empowers a Banking Court to pass an order before judgment, upon an application by the financial institution, to prevent such property from being transferred, alienated, encumbered, wasted or otherwise dealt with in a manner which is likely to impair or prejudice the security in

favour of the financial institution or otherwise in the interests of justice. The types of orders that the Banking Court could pass are provided for in section 16(1) of the Ordinance:- it may (a) restrain the customer (and any other concerned person) from transferring, alienating, parting with possession or otherwise encumbering, charging, disposing or dealing with the property in any manner; (b) attach the property; (c) transfer possession of such property to the financial institution; and (d) appoint one or more Receivers of such property on such terms and conditions as it may deem fit. Section 16(2) of the Ordinance empowers the Banking Court to pass similar orders to those mentioned in Section 16(1) ibid with respect to any property held benami in the name of an ostensible owner. Where movable property is concerned, Section 16(3) allows for direct recovery by a financial institution in cases where a customer has obtained property/financing through a finance lease or in those situations where the financial institution has been authorized to recover or take over possession of the property without filing a suit. The relevant provision for the purposes of the instant case is section 16(1) of the Ordinance, a plain reading of which makes clear that the Banking Court does not have any power to sell goods which are pledged, hypothecated etc. prior to passing of the judgment in a suit for recovery through sale filed by the financial institution. The qualified powers given to the Banking Courts in this respect have been specifically mentioned in parts (a) to (d) of section 16(1) of the Ordinance which are essentially orders of restraint, attachment, transfer of possession and appointment of Receiver(s).

Section 16 ibid can be compared with Section 19 of the Ordinance, which provides for execution of decree and sale. In juxtaposition with section 16, section 19(3) has specifically used the words sell/sold with respect to mortgaged, pledged or hypothecated property in terms of what the financial institution (with or without the intervention of the Banking Court) may do for the purposes of total or partial satisfaction of the decree. The use of the word sell in this Section [and the failure to use it in section 16 ibid] is indicative of the fact that the legislature used such word only where it intended that sale be permitted. Thus the legislature has permitted a financial institution to sell goods only after it has attained a decree in its favour, for total or partial satisfaction thereof. Therefore, we are sanguine in our view that the absence of the words sale or sell (or any variant thereof) coupled with the specificity of the types of orders that a Banking Court can pass under section 16, speaks to the legislative intent; that sale not be permitted during the pendency of a suit for recovery by sale before the Banking Court."

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