RECOVERY OF LOAN IN PAKISTAN

(MODE AND PROCEDURE)

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A loan is a type of debt which is payable by the Debtor to the Creditor. [8]"In a loan, the borrower initially receives or borrows an amount of money, called the principal, from the lender, and is obligated to pay back or repay an equal amount of money to the lender at a later time. Typically, the money is paid back in regular installments, or partial repayments; in an annuity, each installment is the same amount. The loan is generally provided at a cost, referred to as interest on the debt, which provides an incentive for the lender to engage in the loan. In a legal loan, each of these obligations and restrictions is enforced by contract, which can also place the borrower under additional restrictions known as loan covenants". [9]"Acting as a provider of loans is one of the principal tasks for Financial Institutions. For other institutions, issuing of debt contracts such as bonds is a typical source of funding".

1.3 What is Finance

Finance is a broader term than loan. It is defined as that aspect of business concerned with the management of money, funded and nonfunded facility, obligation, credit, banking and investments. To raise or provide funds is also known as finance[10]. Finance is a general definition and wide terminology than loan.

1.4 The Term Recovery of Loan shall mean the Term Recovery of Finances

For the purposes of our study the term recovery of loan shall mean the term recovery of finance. It is pertinent to state here that the term recovery of finances is a wider terminology as against the term recovery of loan and in our this study the term recovery of finances shall stand for the term recovery of loan. Our study pertaining to recovery of loan shall stand for recovery of finances being extended by the banks and other Financial Institutions to its customers. This study shall not cover the recovery of loan or finances being outstanding by one individual to another individual person.

Modern day business is concerned with finances, their lending and repayment, so for the purpose of this thesis the term recovery of loan shall mean the term

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[8] http://www.answers.com/topic/loan (Last Visited March, 2010)
[9] http://www.toplest.com/loan-secured/ (Last Visited March, 2010)
[10] Black Law Dictionary, Eighth Edition,2004

recovery of finances. The definition clause mentions that finance includes [11]"a loan, advance, cash credit, overdraft, packing credit, bill discounted and purchased, obligations, funded or" non funded facility [12]"or any other financial accommodation provided by a Financial Institution to customer." So the term recovery of loan shall mean recovery of finances, as finance means a loan as provided by the definition clause of the Financial Institutions (Recovery of Finances) Ordinance, 2001.

1.5 Applicable Recovery Laws in Pakistan

The applicable recovery law in Pakistan is the Financial Institutions (Recovery of Finances) Ordinance, 2001 .The cases of default of loans are dealt by this law, Financial Institutions (Recovery of Finances) Ordinance, 2001. It provides a mechanism for the recovery of loans from the loan defaulters and invests Banking Courts with huge powers in this regard. It entitles the Banking Court to proceed with the case expeditiously so that loan is recovered in the shortest possible time with interest or markup and cost of funds thereon. Where securities have been deposited with Financial Institutions it invests the Financial Institutions to proceed with the sale of securities on its own. Financial Institutions (Recovery of Finances) Ordinance, 2001 is a special law which is heavily tilted in favor of the Financial Institutions to recover back its finances. There are certain provisions which deal with the Offences and in this regard the Banking Court has powers of Criminal Court to deal with these Offences. Besides this law, National Accountability Bureau Ordinance also contains provisions regarding recovery of loans and prescribes punishment for the offence of default of loans which may extend to fourteen years in jail.

1.6 Introduction to Financial Institutions (Recovery of Finances) Ordinance, 2001

The preamble of the Financial Institutions (Recovery of Finances) Ordinance, 2001 states that it is [13]"an Ordinance to repeal and with certain modifications, re-enact the Banking Companies (Recovery of Loan, Advances, Credits and Finances Act,

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[11] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited June, 2010)
[12] ibid.
[13] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited June, 2010)

1997." The purpose of the repeal is [14]"that circumstances exist which render it necessary to take immediate action therefore in pursuance of the proclamation of emergency of fourteenth day of October, 1999 and provisional constitutional order no 1 of 1999 read with the constitution order no 9 of 1999 and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance."

Section 1 of the [15]"Financial Institutions (Recovery of Finances) Ordinance, 2001 states that it extends to the whole of Pakistan and it shall come into force at once." This has been made the prevailing Ordinance all over Pakistan including the federating units, immediately after its enactment. Section lays stress on the immediacy of the Ordinance that it would be operational from the time it has been enacted, deleting the previous Act.

It was held that the object of banking law is to provide speedy measures for recovery of outstanding loans of banking companies, as the recovery suits remain pending in civil courts for years together. The special law has been enacted to improve the economic situation which has arisen in the country on account of default in payment of loans and finances by the borrowers and customers of banking companies. It was further provided that the Ordinance being a special statute would have overriding effect on the provisions of general law[16]. This Ordinance has an overriding effect so that it would prevail over the previous laws, which are being deemed as inept for the purpose of banking loans. This was so deemed that country needs a new Ordinance for recovery of loans as the country was facing an economic downslide due to non payment of loan by the defaulters but eventually now it is seen that the object of enacting this new Ordinance for recovery of outstanding loans did not achieve its purpose as huge amounts of loans were later written off by the Financial Institutions because recovery of loans could not be effected.

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[14] http://www.crawford.anu.edu.au/degrees/pogo/discussion_papers/PDP06-10.pdf (Last Visited May, 2010)

[15] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited June, 2010)

[16] 2002CLD577

1.6.1 The Definitions under the Financial Institutions (Recovery of Finances) Ordinance, 2001 shall stand the Definitions for this Dissertation (Thesis)

This thesis will be primarily concerned with recovery of loan by the Financial Institutions under the Financial Institutions (Recovery of Finances) Ordinance, 2001 so the definitions under the Financial Institutions (Recovery of Finances) Ordinance, 2001 shall stand the definitions for this dissertation. Finance under the Financial Institutions (Recovery of Finances) Ordinance, 2001 includes a loan so the definitions mentioned in the Ordinance will be the definitions for the purposes of this thesis. Finance is the new term which has been used in the Financial Institutions (Recovery of Finances) Ordinance, 2001 while previously term loan had been used in the Recovery of Loan Act, 1997.

1.6.2 Financial Institutions

It means [17]"any company whether incorporated within or outside Pakistan that 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, a modaraba or modarba 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"[18].

Therefore Financial Institution under this new Ordinance of 2001 is primarily a banking company involved in the process of transacting the business of banking. It was held in Amjad Polythene Bag Industries vs Punjab Small Industries Corporation that corporation fell within the definition of Financial Institutions[19]. Provision of S.2 (d)(iii) of Financial Institutions (Recovery of Finances) Ordinance, 2001 related to [20]"facility of guarantees, indemnities, letters of credit or any other financial engagement which a Financial Institutions might give, issue or undertake on behalf of the customer" to the Financial Institutions. Defendant

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[17] http://www.pide.org.pk/pdf/Working%20Paper/WorkingPaper-57.pdf (Last Visited May, 2010)
[18] Financial Institutions (Recovery of Finances) Ordinance, 2001, Section 2.
[19] 2005CLD1790
[20] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited June, 2010)

company in circumstances was a Financial Institution and the plaintiff was customer[21].

1.6.3 The term Creditor and Financial Institutions

The term creditor and Financial Institution are synonyms in the sense that creditor is one to whom a debt is owed or one to whom any obligation is owed whether contractual or otherwise[22]. Financial Institutions act as creditor when a debt is owed to them after they have advanced finance or when they institute a suit in the Banking Court for recovery of loan under the Financial Institutions (Recovery of Finances) Ordinance, 2001.

1.6.4 Banking Court

Section 2(b) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 states that Banking Court means a court to try the case of the value of fifty million or below and for a value more than this the Banking Court shall be the High Court. It was held by a division bench of the Karachi that Banking Courts had exclusive jurisdiction in respect of banking matters and it was possessed of jurisdiction to hear matter in miscellaneous application[23]. The procedure for establishment of Banking Court is provided in section 5 of the Ordinance. Section 7 of the recovery of finances Ordinance explains the powers of Banking Courts. It was held in Abdul Sattar Lasi vs Judge Banking Court that in case of grave violation in observance of substantive provisions of law, even consent could not confer jurisdiction upon a forum which was never vested in it. Constitutional petition was maintainable where Banking Court had wrongly assumed jurisdiction[24].

1.6.5 Banking Documents

Banking documents have been defined under Section 18 of the Financial Institutions (Recovery of Finances) Ordinance, 2001. In respect of blanks documents Sub-section (1) of Section 18 says that [25]"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."

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[21] 2005CLD510
[22] Black"s Law Dictionary, Eighth edition, 2004
[23] PLD1994Kar67
[24] 2007CLD69(d)
[25] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited June, 2010)

In respect of attestation Sub-section (2) of Section 18 says that Finance agreement [26]"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);"

With regard to the validity Sub-section (3) of Section 18 says that [27]"nothing contained in preceding sub-section shall affect the validity of any document executed prior to the date of enforcement of this Ordinance;"

In respect of admissibility and acceptance of documents Sub-section (4) of Section 18 says that [28]"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"[29].

1.6.6 Customer

[30]"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." The customer is a person from whom recovery has to be affected in case of default or his failure to repay the amount with interest charged thereon. Any person keeping an account or deposit is entitled to the description of customer. The word customer signifies a relationship in which duration is not of essence and this relationship of banker and customer begins as soon as the first transaction is entered into. A bank

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[26] ibid.
[27] ibid.
[28] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited June, 2010)
[29] Section 18, Financial Institutions (Recovery of Finances) Ordinance, 2001.
[30] http://secp.gov.pk/divisions/Portal_CS/PDF/LegalRegulatoryReport.pdf (Last Visited April, 2010)

can itself be the customer of another bank. The word customer is not defined in the Negotiable Instrument Act 1881. So far as banking transactions are concerned he is a person whose money has been accepted on the footing that the banker will honor up to the amount standing to his credit, irrespective of his connection being short or long standing"[31]. It was held in Procter and Gamble vs Bank Alfalah that beneficiary of letter of credit and guarantee would not fall within definition of customer as given in S.2(c) of the Ordinance. Legal remedy for and against person not being a customer would lie before ordinary civil court but not before Banking Court[32]. It was held by a division bench that successors of a customer do not fall in the definition of customer[33].It was also held that the definition of customer includes a surety and an indemnifier[34]. Section 2(c) of the Ordinance also refers to [35]"a person to whom finance has been extended"[36].

1.6.7 The term Borrower and Customer

Borrower is a person or entity to whom money or something else is lent[37]. It [38]"means a person who has obtained a loan under a system based on interest from a banking company and includes a surety or an indemnifier[39]." He is a person liable for the repayment of the sums advanced. Borrower is synonymous with customer as customer is the person who has to return the defaulted money to the Financial Institution as money was lent to him.

1.6.8 Finance

Finance under the Ordinance means [40]"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, trade marks and copy rights, bills of exchange, promissory notes or other instruments

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[31] A.I.R.1970Kerala80
[32] 2007CLD1532(c)
[33] 2007CLD571
[34] 2006CLD1571,2005CLD569(e)
[35] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited June, 2010)
[36] 2005CLD1352(c)
[37] Black"s Law Dictionary, Eighth edition, 2004

[38] http://www.lawfirm.org.pk/Bank-html/bank2.html (Last Visited June, 2010)
[39] The Banking Companies(Recovery of Loan, Advances, Credits and Finances) Act,1997
[40] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited June, 2010)

with or with out buy back arrangement by a seller, participation term certificate, musharika, morabaha, musawama, istisnah, modarabah certificate, term finance certificate, facility of credit or credit or charge cards and includes facility of guarantees, indemnities, letters of credit or any other financial engagement which a Financial Institutions may give to undertake on behalf of a customer to the Financial Institutions. A loan, advance, cash credit, overdraft, packing credit, bill discounted and purchased or any other financial accommodation provided by a Financial Institution to customer and a beanami loan or facility that is a loan or facility the real beneficiary whereof is a person other than person in whose name the loan or facility is advanced or guaranteed. Lastly any amount due from a customer to Financial Institution under a decree passed by a civil court or an award given by an arbitrator , amount due to a customer which is the subject matter of any pending suit , appeal or revision before any court and other facility availed by a customer from a Financial Institution." It was held by a division bench that no one could invoke jurisdiction of Banking Court except Financial Institutions and its customer, but only regarding dispute relating to financial facility defined as "finance" under S. 2(d) of Financial Institutions (Recovery of Finances) Ordinance, 2001[41].

1.6.9 Obligation

Obligation under the Financial Institutions (Recovery of Finances) Ordinance, 2001 includes [42]"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 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 finance or performance of an undertaking or fulfillment of a promise and the duties imposed on the customer under the Ordinance."

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[41] 2007CLD1532

[42] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited May, 2010)

1.6.9 The term Finance, Obligation and Loan

Finance is a generalized term for money while loan is a specific term signifying debt. Obligation is a duty cast upon by law and signifies a corresponding duty. The terms finance, obligation and loan can be used interchangeably because they all signify something which is due. Finance is any facility provided to customer that has to be returned and obligation signifies the duty to return the facility provided to the customer while loan is a debt so all these three terms connotes something which is returnable. Finance and loan mean the samething while obligation is the duty cast upon the customer to return the finance or loan.

1.7 Default and Willful Default

[43]"The failure to live up to the terms of a contract is known as default. Generally default is used to indicate the inability of a burrower to pay the interest or principle of a debt when it is due." [44]"If a person or institution responsible for repaying a loan or making an interest payment fails to meet that obligation on time, that person or institution is in default[45]."

Willful default means failing to live up to the terms of the contract deliberately. To make out willful default three elements must concur viz 1. The doer or abstainer of the act or omission must be a free agent. 2. He must be conscious of what he is doing or not doing and the probable result which might arise from his act or omission 3. This default may range from a state of mind all the way from supine indifference to conscious violation as a result of deliberation[46]. Willful default is indicative of some misconduct in the transaction of business or in the discharge duty of omitting to do something either deliberately or by reckless disregard of the fact whether the act or omission was or was not a breach of duty[47]. In short in case of willful default the defaulter has the capacity and capability to pay the outstanding and defaulted amount but he willfully avoid to pay and clear the same.

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[43] http://financial-dictionary.thefreedictionary.com/default (Last Visited April, 2010)
[44] http://en.mimi.hu/business/default.html (Last Visited May, 2010)
[45] www.wikipedia.com (Last Visited June, 2010)
[46] 67Mad.L.W.929
[47] A.I.R.1954 Mad 514.

CHAPTER-2

Banking Courts and Its Recovery Procedure under Financial Institution (Recovery of Finances) Ordinances 2001

2.1 Establishment of Banking Court

Under the Financial Institution (Recovery of Finances) Ordinance, 2001 the Federal Government may establish Banking Courts to exercise its jurisdiction and appoint a Judge for each such Court. The number of Banking Courts to be established would be decided by the Federal Government on the basis of requirements of the particular areas. Section 5 of the Financial Institution (Recovery of Finances) Ordinance, 2001 deals with the establishment of Banking Courts and appointment of Judges[48]. It says that [49]"federal Government may, by issuance of notification in the official gazette, establish as many Banking Courts as it considers necessary to exercise Jurisdiction under this Ordinance and appoint a Judge for each of such courts. The federal Government shall define the territorial limits of each of the Banking Courts, however where the Federal Government establishes more than one Banking Courts, it shall specify in the notification the territorial limits within which each of the Banking Court shall exercise its jurisdiction." Sub section 2 of this Section further says that [50]"where more Banking Courts than one have been established to exercise jurisdiction in the same territorial limits the Federal Government shall define the territorial limits of each such courts."

We are of the view that the Banking Courts established under the Financial Institution (Recovery of Finances) Ordinance, 2001 are the creature of the statute and no question can be raised against its legality. Hence its establishment can not be challenged under the provisions of the Constitution or any other law. Although Banking Court has been created under special law but it is not devoid of inherent

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[48] Financial Institution (Recovery of Finances) Ordinance 2001, Section 5.
[49] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[50] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

character and status of Court and exercising its powers in terms of Art.175, 112 of the Constitution. Banking Court cannot be held to be and/or equated to fora of administrative nature or domestic Tribunal[51].

Sub Section 3 of Section 5 says that where more Banking Courts than one have been established in the same or different territorial limits, the High Court may, if it considers it expedient to do so in the interest of justice or for the convenience of the parties or of the witnesses, transfer any case from one Banking Court to another.

The powers of the High Court under the above stated Sub- section 3 of Section 5 have its limitation in nature and do not extend to the transfer of case from Banking to the High Court being Banking Court. Therefore transfer of case within meaning of one Banking Court to another does not mean the transfer of case from one Banking Court to the High Court working as Banking Court.

Transfer of suit from Banking Court to the High Court was sought before the High Court on the plea that another suit was pending in the High Court between the same parties and leave to defend the suit had been granted in the said suit and copy of leave granting order was also submitted. The suit pending before the Banking Court was ordered to be transferred to the High Court[52]. It was held that Banking Court being creature of statute, is bound by the provisions and procedure provided under that particular statute[53]. Power of High Court to transfer cases under S. 5(3) of Financial Institution (Recovery of Finances) Ordinance, 2001 was confined to exercising the same for transfer of cases from one Banking Court to the other as established under S. 5(1) and defined in S.2 (b) (ii) of the said Ordinance. Such power could not, therefore be enlarged to include transfer of a case from such Banking Court to High Court acting as Banking Court[54].

Regarding the appointment of Judges subsection 4 of Section 5 says that the [55]"judge of a Banking Court is appointed by the federal Government after consultation with the chief justice of the respective province in which the Banking

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[51] 2010CLD293
[52] 2009CLD172
[53] 2003CLD245(DB)
[54] 2003CLD67
[55] http://www.paksearch.com/Government/BANKING%20LAW/BC11.html (Last Visited July, 2010)

Court is established and no person shall be appointed a Judge of Banking Court unless he has been a Judge of a High Court or is or has been a district judge."

Regarding sitting of Banking Court Sub-section 5 of Section 5 says that a [56]"Banking Court shall hold its sitting at such places within its territorial jurisdiction as may be determined by the federal Government.

Regarding term of a Banking Court Sub-section 6 of Section 5 says that [57]"a Judge of Banking Court not being a district judge shall be appointed for a term of three years from the date on which he enters upon his office.

In respect of Salary and other terms and conditions of service of a Judge of Banking Court Sub section 7 of section 5 says that the salary or allowances of a person appointed as a judge of Banking Court shall be the same as that of a High Court judge." The privileges of a banking judge are same as that of a High Court judge.

Sub section 8 of Section 5 provides that the court may on its discretion appoint amicus curiae for its assistance. The amicus should have [58]"ten years experience at senior management level in a Financial Institution or state bank of Pakistan and have a degree in commerce, accounting or business administration or has completed a course in banking from institute of bankers Pakistan." This excludes lawyers from becoming amicus curiae which is unjust on the part of lawmakers as lawyers earn their bread and butter by practicing in Banking Courts.

Sub Section 9 of Section 5 provides [59]"remuneration of amicus curiae and by whom it will be paid is determined by the Banking Court keeping in view the circumstances of the case."

It is a matter of record that Federal Government appoints generally district judges as Judges of Banking Courts and it has never been noticed that a Judge of High Court has been appointed as Judge of Banking Court. The District Judges appointed as Judges of Banking Court have mostly never remained familiar with the financial and banking transactions. Therefore they face great difficulties in understanding of the banking matters while deciding banking litigations.

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[56] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[57] ibid.
[58] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[59] ibid.

As stated above that the term of the Banking Court Judges is three years. This does not seem appropriate because when the Judges are getting familiarity and clarity with the Banking matters and litigations they usually get transferred and new Judges are appointed on their places. It would be in the interest of Justice that once the [60]"District Judge is appointed as Judge of Banking Court", he should remain in the banking field and should not be called back to the District litigations. However he may be transferred from one Banking Court to another so that he may not serve at one particular Banking Court for the period of more than 3 years.

It would also be in the interest of justice if the Federal Government may appoint the High Court Judges as Judges of the Banking Court who are more experienced and knowledgeable so that they will handle the banking matters and litigations expeditiously.

All suits, which were filed by borrower or customer under [61]"Banking Companies (Recovery of Loans) Ordinance, 1979 or under Banking Tribunal Ordinance, 1984," as counter claim or as set off against banking companies have been transferred to Banking Court established under the section[62]. All suits deemed to be pending and to be decided afresh pertaining to matters falling under Financial Institution (Recovery of Finances) Ordinance, 2001 shall be entertained by courts constituted and having jurisdiction under the said legislation[63].

2.2 Powers of Banking Courts

Financial Institution (Recovery of Finances) Ordinance, 2001 "Recovery Ordinance 2001" defines and confers the powers of the Banking Court under section 7 which says that [64]"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

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[60] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[61] http://www.pakistaneconomist.com/issue1999/issue47/cover2.htm (Last Visited July, 2010)
[62] 1998CLC1263
[63] 2004CLD949
[64] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

Court of Sessions under the Code of Criminal Procedure, 1898 (Act V of 1898):

Provided that 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."

The above proviso needs explanation because under this proviso any Criminal case can not be registered with out the Order of the Banking Court. For example bouncing of Cheque is Criminal Offence under the provision of the Recovery Ordinance 2001 and most of the Financial Institution try to Register FIR directly with concern Police Station which is against the provisions of this law. In such a case written complaint shall be filed before the Banking Court and upon the passing of order of the Banking Court, a case will be registered.

It was held that registration of case with the police on written application of bank's officer was not in accordance with law on the subject because cognizance of offence in case would only be taken by Banking Court and that too on the complaint in writing by a person authorized by the Financial Institution[65].

In case any procedure has not been given or provided in respect of civil or criminal matters Section 7 (2) says that [66]"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)."

For the purposes of the Banking Court to be considered as Court of Criminal Procedure Section 7 (3) says that [67]"all proceedings before a Banking Court shall be deemed to be judicial proceedings within the meaning of 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)[68]."

The above provisions empowered the Banking Courts with wide powers. The powers of the Banking Courts extend to all and every proceeding relating to and

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[65] 2005CLD436

[66] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[67] http://www.paksearch.com/Government/BANKING%20LAW/BC11.html (Last Visited July, 2010)

[68] Financial Institution (Recovery of Finances) Ordinance, 2001, section 7(3).

arising out of matters falling within its jurisdiction including determination of existence or non existence of loan and execution of decree passed by a Banking Court[69]. A Banking Court subject to the conditionalties of the Act is invested with all the powers of a civil court as visualized in the code of civil procedure. The powers getting extended as the provisions of the Ordinance and subject to anything to the contrary in the Act itself are in addition to and not in derogation of any other law already in operation. More specifically pursuant to section 19 of the Act, court may in execution direct recovery in accordance with [70]"code of civil procedure or any law for the time being in force or in such other manner as the Banking Court may deem fit[71]." There is no reason why a Banking Court while dealing with a case which is cognizable by it under the provision of the Ordinance cannot grant a relief which a civil court could grant under S.9 of C.P.C[72].

With respect of the exclusive jurisdiction of the Banking Court Sub-section (4) of Section 7 says that [73]"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 Recovery Ordinance, 2001 including a decision as to the existence or otherwise of a finance and the execution of a decree passed by a Banking Court."

It may be noted that section 7(4) deals with the exclusive jurisdiction of the Banking Court. However the jurisdiction of the Banking Court has its limitation and exception confers and explains under section 7 (5) which says that [74]"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

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[69] PLD1983KAR467

[70] http://www.lawfirm.org.pk/Bank-html/bank2.html (Last Visited July, 2010)

[71] 1998SCMR1899

[72] 1985CLC630

[73] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[74] ibid.

any proceedings pending before any Financial Institution or such Court immediately before the coming into force of this Ordinance."

In connection of pending proceedings in Banking Court established under the previous law Section 7 (6) provides that [75]"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."

With respect of the already initiated and transferred proceedings Section 7 (7) says that [76]"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[77]."

2.3 Suit for Recovery of written off finances, etc

Financial Institution are empowered to recover its written off finances, etc subject to the condition that if it can prove that the loan was written off on political basis or on considerations other than business. Section 8 authorizes the Financial Institution to institute a suit in the Banking Court for recovery of loan if it can establish that loan was written off on political grounds or on considerations other than business before the coming into force of this Ordinance and after the first day of January, 1990. This section says that [78]"Subject to sub-section (2), and notwithstanding anything contained in the Limitation Act, 1908 (IX of 1908) or any other law, a Financial Institution may, within three years from the date of coming into force of this Ordinance, file a suit for the recovery of any amount written off, released or adjusted under any agreement, contract, or consent, including a compromise or withdrawal of any suit or legal proceedings or adjustment of a decree between a

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[75] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[76] ibid.
[77] Financial Institution (Recovery of Finances) Ordinance 2001, Section 7(7).
[78] http://www.jamilandjamil.com/publications/FINANCIAL_INSTITUTIONS_ORD_2001.html (Last Visited July, 2010)

Financial Institution and a customer on any day on or after the first day of January, 1990 and before the coming into force of this Ordinance, if it can establish that the amount was written off, released or adjusted for political reasons or considerations other than bona fide business considerations."

Sub-section (2) of Section 8 says that [79]"no suit under sub section (1) shall be filed unless its filing has been approved by—

(a) The Board of Directors, in the case of a Financial Institution incorporated within Pakistan,

(b) Or the chief executive (by whatever name called or designated) of the Financial Institution in Pakistan, in the case of a Financial Institution incorporated outside Pakistan[80]."

Bank by virtue of S.8 can effect recovery of finance from borrower, which had been [81]"written off or adjusted for political reasons other than bona fide business transaction[82]." Bank cannot recall demands finance on a ground other than those specified in finance agreement[83]. It was held that plaintiff/bank having discharged its burden whereby proving that the transaction between the parties and procured arrangement was unconscionable, without consideration and being not bona fide was also in violation of S.8 Financial Institution (Recovery of Finances) Ordinance, 2001. Suit having been filed with approval of the board of directors of the bank, same was maintainable against the defendants[84].

As the section contains words notwithstanding anything contained in the limitation Act or any other law therefore plaintiffs had the option to file suit for recovery under S.8 of the Financial Institution (Recovery of Finances) Ordinance, 2001, inaddition to the right available to them under S.25 of the modaraba Ordinance, 1980[85]. Limitation prescribed under S.8 is for filing suit for recovery of any

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[79] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[80] Ibid, Section 8.
[81] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[82] 2006CLD258
[83] 2001CLJ275
[84] 2009CLD1398
[85] 2006CLD927(DB)

amount which was written off, released or adjusted under any agreement or was due on account of withdrawal of any suit or proceedings[86].

2.4 Recovery Procedure of Banking Court

Section 9 of the Financial Institution (Recovery of Finances) Ordinance, 2001 provides the procedure to be adopted in Banking Courts for Recovery of Finances. It says that [87]"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."

Section 9(2) says that the [88]"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."

Section 9(3) says that [89]"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 upto the date of institution of the suit."

It is worth mentioning that Section 9(4) provides that the [90]"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."

The procedure for service of summons on the Defendant is contained in Sub-section 5 of Section 9 which says that [91]"on a plaint being presented to the Banking

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[86] 2002CLD53

[87] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[88] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[89] Ibid.

[90] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

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[92]."

It would not be out of place to state the similarity in applicable procedure to be followed by the Banking Court created under the Financial Institution (Recovery of Finances) Ordinances, 2001 and the Banking Court created under the previous laws (i) Banking Companies Act, 1997 and (ii) Banking Companies Ordinance 1979. As such it must be recorded that procedure to be followed and the powers to be exercised in deciding case by a Banking Court under the Banking Companies Act, 1997 are similar and analogous to the corresponding provisions and powers conferred on the special court constituted under the banking companies Ordinance 1979 and Recovery Ordinance 2001[93]. Procedure of the Banking Court regulating the exercise of its jurisdiction is covered by civil procedure code, would apply to the court. Even in respect to forums where some or more of the provisions of the civil procedure court have been expressly excluded, principles and provisions of civil procedure code are in consonance with equity, justice, and fairplay in a lis would still apply[94]. Therefore provisions of civil procedure code, 1908 except so far as excluded by the terms of Recovery Ordinance 2001 would apply to suits instituted under the Ordinance.

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[91] ibid.
[92] Ibid, Section 9.
[93] 2002CLD137(DB)
[94] 1990MLD309

Therefore S.10 C.P.C to stay proceedings in a suit in order to avoid conflicting judgments does not apply to suits under Recovery Ordinance 2001. Courts are required to follow procedure prescribed in C.P.C and particularly that provided in order XXXVII for summary disposal of cases. Suits relating to mortgages of immovable property are regulated by the provisions of order XXXIV C.P.C[95]. Almost complete procedure has been provided in Recovery Ordinance 2001 for working of Banking Courts.

Where specific provisions are not available than by virtue of section 141 of CPC the procedure provided in the code of civil procedure, 1908 is applicable[96]. Banking Court had no jurisdiction to try a suit for damages based upon tort[97]. For exercise of jurisdiction as Banking Court, it is fundamental, imperative, essential and sine qua non that two conditions must be met, co-exist and fulfilled. Firstly Special Court should have jurisdiction over the subject-matter, which means that cause of action propounded in plaint must be for redressal of grievance regarding enforcement of right or complaint about breach of obligation on the part of defendant but relatable to "finance" as such the same can be termed to be "subject-matter of jurisdiction". If dispute inter se "Financial Institution" and "customer" or vice versa is not based upon "finance" and far failure of obligation in relation thereto, the Special Court does not have jurisdiction in the matter. Second facet of jurisdiction is over parties to his, which may be termed as "jurisdiction over the parties" and connotes that Banking Court has only jurisdiction in cases, where relationship of "Financial Institution" and that of "customer" exists between parties. Considering both aspects of jurisdiction, broad question of jurisdiction is that dispute should be between "customer" and "Financial Institution" as defined in law, in respect of failure of defendant to fulfill its/his obligations in relation to "finance", which has been specifically, lucidly and clearly mentioned in S.9 of Financial Institution (Recovery of Finances) Ordinance, 2001, which is key provision of the special law and' can be termed as jurisdictional clause of the enactment. If relationship between parties to suit is not that of "customer" and

[95] PLD1989SC136,NLR1989SCJ460
[96] 2009CLD432
[97] 2009CLD49

'Financial Institution" and is not about 'finance" Special Court does not have jurisdiction[98].

2.5 Leave to Defend

Under Section 10 of Recovery Ordinance 2001, grant of leave for the Defendant is mandatory to defend the Suit. In this regard Section 10(1) says that [99]"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."

It has been observed that where some of the defendants failed to file application for leave to defend the suit as provided under the law, the allegations made in the plaint shall be deemed to be admitted by the said defendants. Suit was decreed in favor of the bank and against the said defendants[100]. Further the application of Section 10 (1) of the Recovery Ordinance 2001 provided that where summons have been served as prescribed in the Ordinance, [101]"defendant shall not be entitled to defend the suit unless he obtained leave from the Banking Court." For purposes of raising any defence in a suit obtaining of leave to defend was a condition precedent for setting up the same[102].

The provision with regard to the period for filing of application for leave to defend is contained in Section 10 (2) which says that the [103]"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 effected 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."

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[98] 2010CLD293

[99] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[100] 2004CLD973

[101] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[102] 2007CLD469

[103] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

The time period of 30 days for filing of application for leave to defend seems reasonable and the more important point is that it can only be extended if the summon is effected and served through publications only. Banking Court allowed suit as no leave to defend application was filed within requisite time. Court held that service of the defendant in a suit under Financial Institution (Recovery of Finances) Ordinance, 2001 in any of the forms was proper and adequate service. Plea that summons were issued on 13-3-2002 and the requisite period of thirty days had not yet expired, when the decree was passed on 3-4-2002 was of no avail, as the publication in the newspapers had taken effect on 1-3-2002, thus the period for filing the application for leave to defend commenced from that date. Appeal was dismissed accordingly[104].

Defendant was required to file application for leave to defend within thirty days of the date of first service of summons by anyone of the modes. No good ground for condonation of delay was shown. Leave application was dismissed for having been filed out of time[105].

Section 10 (3) deals with the form and nature of leave to defend which says that the [106]"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."

Section 10 (4) deals with the form and nature of leave to defend if the recovery suit is filed by the Financial Institution. It says that [107]"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 upto the date of institution of the suit;

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[104] 2004CLD1569
[105] 2006CLD261
[106] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[107] ibid.

(c) The amount if any which the defendant disputes as payable to the Financial Institution and facts in support thereof:

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."

Sub-section (5) of Section 10 says that the [108]"application for leave to defend shall be accompanied by all the documents which, in the opinion of the defendant, support the substantial questions of law or fact raised by him."

Regarding the compliance of the requirements of the above provisions Section 10(6) says that an [109]"application for leave to defend which does not comply with the requirements of sub-sections (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."

If the defendant fails to comply with the requirements of subsections (3), (4) where applicable and section (5) his application for leave to defend shall be rejected unless he discloses in the application itself sufficient cause for his inability to comply with such requirement. Such provisions were mandatory and non compliance thereof would entail rejection of application for leave to defend suit[110].

Application for leave to defend the suit was to be rejected under S. 10 (6) of Financial Institution (Recovery of Finances) Ordinance, 2001 for failure of the defendant to meet with the requirement of S. 10(3) (4) of Ordinance 2001 as the provisions were mandatory in nature. Cushion was available to the defendant who failed in this behalf to disclose sufficient cause for his inability to meet the requirements[111].

Section 10(7) provides that the [112]"plaintiff shall be given an opportunity of filing a reply to the application for leave to defend, in the form of a replication."

Section 10(8) deals with the grant of leave to defend. It says that [113]"subject to section 11, the Banking Court shall grant the defendant leave to defend the suit if

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[108] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[109] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[110] 2006CLD244
[111] 2004CLD1741
[112] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

on consideration of the contents of the plaint, the application for leave to defend and the reply thereto it is of the view that substantial questions of law or fact have been raised in respect of which evidence needs to be recorded."

Upon filing of application for leave to defend the suit by a defendant, the Banking Court as per the provisions of section 10 (8) of the Ordinance 2001 shall grant the defendant leave to defend the suit if it finds that the substantial questions of law and facts have been raised in respect of which evidence needs to be recorded[114].

Section 10 (9) says that [115]"in granting leave under sub-section (8), the Banking Court may impose such conditions as it may deem appropriate in the circumstances of the case, including conditions as to deposit of cash or furnishing of security."

Section 10(10) provides that [116]"where the application for leave to defend is accepted, the Banking Court shall treat the application as a written statement, and in its order granting leave shall frame issues relating to the substantial questions of law or fact, and, subject to fulfillment of any conditions attached to grant of leave, fix a date for recording of evidence thereon and disposal of the suit."

Section 10 (11) says that [117]"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."

Section 10(12) says that [118]"where an application for leave to defend has been filed before the coming into force of this Ordinance, the defendant shall be allowed a period of twenty-one days from the date of coming into force of this Ordinance, or from the date of first hearing thereafter, whichever is later, for filing an amended application for leave to defend in accordance with the provisions of this Ordinance[119]."

We must say that Section 10 gives commendable powers to the Banking Court . If leave to defend is not allowed then the court shall proceed to pass judgment. This gives exemplary powers to Banking Courts which can pass judgment without

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[113] ibid.
[114] 2005CLR338
[115] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[116] ibid.
[117] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[118] ibid.
[119] Financial Institution (Recovery of Finances) Ordinance 2001, Section 10.

accepting leave to defend the suit. In such a case suit is decided with in time frame of 90 days as provided and desired in this law. The defendant may not get a chance to record his evidence against the claim of the plaintiff. Previously the section 10 of the Recovery of Loan Act, 1997 did not contain detail particulars of the ingredients of leave to defend but in the Ordinance of 2001 detail particulars as to what should a leave to defend specify have been mentioned in the section besides this it also mentions as to what would become of the leave to defend on acceptance or in case of rejection. Previously for acceptance of leave to defend the defendant had to make out a serious and bonafide dispute but in the Financial Institution Recovery of Finances Ordinance, 2001 the [120]"Banking Court shall grant the defendant leave to defend the suit if on consideration of the contents of the plaint, the application for leave to defend and the reply thereto it is of the view that substantial questions of law or fact have been raised in respect of which evidence needs to be recorded."

In order that suit is decided expeditiously and summarily and all mala fide and vexatious pleas of defence are curtailed, Section 10 has been framed to put check upon the defence led by the defendant[121]. The legislature gave a prescription for weeding out this at the very outset in financial matters because a major portion of financial transactions as covered by Financial Institution (Recovery of Finances) Ordinance, 2001 is to be backed by proper documentation[122]. Defendant after service of process filed an application under S.10 of Financial Institution Ordinance for grant of leave to defend which was dismissed for non prosecution. Defendant filed an application for setting aside the said order and to decide the application on merits. Plea raised was that the counsel for the defendant was busy before the principal seat of High Court at Karachi on the said date. Counsel for the defendant had filed his personal affidavit deposing therein that he had actually made appearance before the principle seat of High Court at Karachi. Petition was allowed, application under S.10 of the Ordinance and was restored for its disposal subject to payment of costs[123].

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[120] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[121] 2006CLD244
[122] 2005CLD244(DB)
[123] 2009CLD169

It has been observed that most of the time delay tactics have been adopted on the basis of one reason or another specially on the grounds that the Counsel is busy in High Court. Such plea should be checked to know the reality. Further if the Counsel is really busy then in this regard rules may be prescribed that how many times an adjournment can be given on this ground to avoid unnecessary delay in process of the Banking Court proceedings.

2.6 Interim Decree

The Banking Court shall pass an interim Decree pertaining to the amount which is not disputed and clearly payable by the Defendant. In this regard Section 11(1) says that [124]"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."

Sub-section (2) of Section 11 says that the [125]"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

[124] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[125] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

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[126]."

The above section clearly signifies the powers of the Banking Court regarding the interim decree which can be passed pertaining to the amount being not disputed between the parties and payable by the Defendant to the Plaintiff. However at the same time leave to defend can be granted to the Defendant for the disputed amount. The interim decree shall be a decree to be a decree passed under this Ordinance for all purposes including appeal and execution. It is further clarified that the amount covered and or recovered under the interim decree can be adjusted at the time of the final decree.

Finance of a certain amount guaranteed by the responded Bank to the appellant Bank, however, recovering from the appellants through the Banking Court an amount higher than the Finance guaranteed. Plea of the appellants was that Bank should not recover a higher amount than that financed. Bank's record showing a call by the third party of a lower finance amount than what was being recovered from the appellant. Failure of the Bank to show any call by third party for any further finance. Interim decree was passed in favor of the appellants making them liable to pay only the sum finance under the guarantee by the Bank and not more than that and case was remanded to the Banking Court and leave granted to the appellants to defend against the excess amount being recovered by the Bank[127].

Banking Court is empowered to pass an interim decree in respect of the part of a claim, which appears to be payable by the defendants to the plaintiff. Provision of S.11(2) of the Recovery Ordinance 2001 provide that the interim decree shall be executable and appealable as a decree passed under the Financial Institution (Recovery of Finances) Ordinance, 2001. If, however any amount is recovered by way of interim decree it shall be adjusted at the time of final decree[128]. Provision of section 11 specifically refers to that part of the claim which is undisputed between the parties. Where the principal amount was admitted by the defendants in his application and on the strength of the admitted documents the trial court ordered

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[126] Financial Institution (Recovery of Finances) Ordinance 2001, Section 11.
[127] 2004 CLD Lah.918
[128] PLD2003LAH106

for payment of specified amount. The order was only with respect to the admitted amount while the remaining claim was kept pending for further adjudication. Order of the trial court fell within the definition of interim decree in the situation and was an appealable order[129].

2.7 Power to set aside Decree

The powers of the Banking Court pertaining to set aside Decree have been explained in Section 12. It says that [130]"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[131]."

The above Section describes two different situations in which the Banking Court can set aside the Decree passed under Sub-section 1 of Section 10 on application of the Defendant. These situations are:

1. where a decree has been passed after due service
2. where summons have not been duly served

In case of decree that had been passed after due service of summons as explained in Situation 1, the period for filing of application by the Defendant is 21 days started from the date of decree itself. However in this case the applicant had to satisfy "Banking Court that he was prevented by sufficient cause from making application under section 9."

In case of decree that had been passed where the summons had not been duly served in terms of situation 2, the period for filing of application by the Defendant is started from date of knowledge. In this situation the applicant had only to show that the summons were not duly served on him.

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[129] 2005CLD1571(DB)

[130] http://www.paksearch.com/Government/TAX/SROs/Miscellaneous/2001/MIS-F2NO.htm (Last Visited July, 2010)

[131] Financial Institution (Recovery of Finances) Ordinance 2001, Section12.

Both the situations were governed by the same period of limitation i.e. 21 days. Where application was filed beyond 21 days after the date, the applicant acquired knowledge of decree, such application was rightly dismissed as time barred by the Banking Court[132].

The applications for leave to defend having been filed after the expiry of 21 days from service by publication and by registered post were barred by limitation[133]. It is the duty of party applying for condonation of delay to explain delay of each and every day. Mere statement that such party came to know about the case on a particular date was not sufficient unless source from which such information was received was also disclosed[134].

An application which was filed after a long delay was dismissed in the absence of any plausible explanation for such delay and suit filed by plaintiff was decree accordingly[135].

Suit filed by the plaintiff bank having been decreed exparte, defendants had filed application for setting aside of exparte decree. Banking Court having dismissed said application defendant had filed appeal against the judgment of Banking Court contending that he was not properly served. Appeal was allowed and impugned order passed by the Banking Court was set aside with the result that application under S.12 of Financial Institution Ordinance filed by the defendant was allowed and exparte judgment and decree passed by the Banking Court against defendant stood set aside[136].

Where nothing was urged in application as to when the defendant had come to know of the decree in question. Mere mentioning of a date of knowledge not supported by an affidavit of other defendants was vague. Since two of the defendants had appeared before court there was no force in the argument that defendants were not served by trial court before passing exparte decree. Trial court treating the application under O.IX R 13 C.P.C as under S. 12 of the Financial

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[132] 2002CLC298
[133] 1993MLD54
[134] ibid
[135] 1991CLC1146
[136] 2009CLD1699

Institution Recovery of Finances Ordinance 2001 had rightly dismissed the application being barred by limitation[137].

2.8 Disposal of Suit

Financial Institution (Recovery of Finances) Ordinance 2001 has provided provision for disposal of suits. In this regard Section 13 subsection (1) says that [138]"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."

Sub-section (2) of Section 13 says that [139]"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."

In respect of adjournments Section 13(3) says that [140]"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."

Sub-section (4) of Section 13 says [141]"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[142]."

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[137] 2007CLD86

[138] http://www.sbp.gov.pk/publication/R-Ordinance.htm

[139] http://sbp.org.pk/publication/R-Ordinance.htm

[140] ibid.

[141] ibid.

[142] Financial Institution (Recovery of Finances) Ordinance 2001, Section 13.

The above section basically gives time frame for deciding cases within 90 days. It also clarifies that the Suits in which leave to defend is granted shall be finalized and disposed of within 90 days from the day on which leave is granted. It means that the Suits in which leave to defend is not granted shall be disposed of in a shorter period of 90 days. However in any case the Suits shall be disposed of within 90 days.

It is very unfortunate that the implementation of the above provisions has never been noticed practically in litigation of recovery cases. The Defendants due to delay tactics gain time and the Suits are not disposed of within this given period of 90 days. This period seems extremely reasonable as compared to the other laws in the country. The minimum period for all the summary suits is usually six months like in the case of family suits or to recover possession of immovable property under the illegal dispossession property Act.

Despite of the above provisions, still the suits pending in Banking Courts take years to complete. The court is empowered under the Ordinance to ask the defendant to furnish security if the proceedings continue beyond a period of ninety days due to lapse on the part of the Defendant and it may pass interim or final decree if the defendant fails to furnish such security. This would only be dispensed with if the delay is not attributable to the defendant. Such a power is only available to the Banking Courts which can compel the defendant to ensure his presence on each and every date. Normally in other civil suits small amount of fine is imposed but in banking suits, defendant may have to deposit the entire claimed amount if it fails to appear on the prescribed date. The court has got ample powers under the Ordinance to make sure that the suit is proceeded within due course of time besides other powers that are available to it under the code of civil procedure such as imposition of fines. The adjournment granted by the Banking Court shall not extend beyond seven days in ordinary circumstances and reasons need to be recorded for any adjournment which extends beyond such period. In practice these procedures are not being followed which is a reason for delay of suits pending before banking judges. On the insistence of defendant, dates are provided to them without imposition of any cost.

The mode of recording of evidence provided under the Ordinance is that parties would adduce their respective evidence and a witness who is to be summoned by a party may file affidavit which will be treated as examination in chief of that witness and other party will be given opportunity to cross examine on the basis of that affidavit. The witness would not be required to record his statement as examination in chief in such circumstances. The affidavits are deemed sufficient statement for the purpose of examination in chief. This provision is also similar to the one in the Act of 1997 except that proviso 4 has been added in the Ordinance of 2001 which provides for the filing of affidavits.

We are of the view that the provision of this section should be implemented in its true spirit so that the Plaintiffs get their money back in a reasonable time instead of long awaited time in recovery procedure.

2.9 Decree in Suits relating to Mortgages

In Pakistan Banks usually secure their advances and finance facilities by mortgages of immovable properties. Section 14 of the Financial Institution (Recovery of Finances) Ordinance, 2001 is pertaining to the [143]"decree in Suits relating to mortgages. It says that 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[144]."

The above section has not curtailed powers of Banking Courts by restraining it from passing preliminary decree in mortgage suit. On the other hand this section enables Banking Court to pass final decree for sale in mortgage suit, thus bypassing impediments prescribed under Order xxxv, C.P.C. Filing of revised statement of account pursuant to direction of court would, in no way operate to prejudice claim of any party, nor could it leave to finding that any pleas had been abandoned. Statement of account was to be filed on basis of entries regularly

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[143] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[144] ibid, Section 14.

maintained in books of Bank and same were entitled to be delivered unless shown otherwise[145].

Application for leave to defend the suit was dismissed and suit was decreed with cost of funds at the rate notified by the state bank of Pakistan. Recoveries were ordered to be effected first through sale of mortgaged properties belonging to the defendant company, in case the value of mortgaged properties was not sufficient to cover the decretal amount, then recoveries were to made from the assets of the rest of the defendants except one who stood guarantor to company's liability and a consent order was passed in the connected suit whereby it was agreed by the parties that recovery of the decretal sum shall not be made from the guarantor but shall first be made from the rest of the defendants and only if any sum still remained to be recovered out of the decretal amount only then recovery shall be made from the guarantor[146].

Creation of equitable mortgage and execution of deed and deposit of title documents had given an independent cause of action to the respondents for obtaining a decree against the appellant for sale of mortgaged property. Decree passed in earlier suit being not a money decree against the appellant the respondent had independent right against him to file a separate suit for recovery of decretal amount from him to the extent of equitable mortgage created by him in its favor, if it so chose[147].

2.10 Attachment before Judgment, Injunction and Appointment of Receivers

The attachment of mortgage property before Judgment, injunction and appointment of Receivers are dealt under Section 16 of Financial Institution (Recovery of Finances) Ordinance 2001. Sub-section 16 (1) says that [148]"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 favor of the Financial Institution as security for finance or for or in relation to a finance lease, the

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[145] Muhammad Aslam Hayat, Bank Recovery Law, Irfan Law Book House, Lahore, 2005, p. 140.

[146] 2007CLD1348

[147] 2006CLD927

[148] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

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 favor of the Financial Institution, 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;

(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."

In respect of property being held benami, Section 16(2) says that [149]"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."

In respect of repossession of property 16(3) says that [150]"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 authorizing 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.

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[149] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[150] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

(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) [151].

'The above section has empowered the Banking Court to restrain the Mortgagors from misappropriation of the mortgage properties. The Banking Court has the powers to pass orders for attachment of the mortgage properties even before the Judgment to save the interest of the Financial Institutions. The Banking Court also has the powers to pass injunction restraining the Mortgagors not to transfer or alienate the mortgage properties to safeguard the interest of the Financial Institution. Furthermore the Banking Court can also appoint Receivers in connection of the mortgage properties.

Financial Institutions can after filing of suit file an application under S.16(1) to restrain customer from transferring, altering, parting with possession of property which has been mortgaged, pledged, hypothecated or assigned or which is subject to any obligation. Where property in question was neither under mortgage of plaintiff nor plaintiff had any charge over it nor same was subject to any obligation in favor of plaintiff, therefore application under S.16(1) of the Ordinance was not maintainable[152]. Taking over of possession of said property by the Bank. Petitioner was the purchaser of vehicle from Bank after its possession from its defaulting financee. Defaulting financee thereafter filed a suit for declaration and permanent injunction against the auction of the vehicle and for the return of its possession to him. Petitioner who claimed to have purchased the vehicle in question, was impleaded as defendant in the said suit. Submission of petitioner was that a banking suit was maintainable by or against only the parties to a finance, namely, the creditor Financial Institution and its customer. Petitioner was not a customer, but a third party to whom vehicle in question had been sold by the Bank free from encumbrance. Petitioner had contended that he having no connection with the finance in question, was not liable to be impleaded as a party in the suit. Suit was still at the stage of determination of the dispute raised therein. By order passed by

[151] Financial Institution (Recovery of Finances) Ordinance, 2001, Section 16.
[152] 2007CLD175

Banking Court, petitioner was asked to produce the vehicle in question in the court for the entrustment of its custody to the entitled person. Counsel for the petitioner had contended that said order of Banking Court had violated the mandatory jurisdictional limits. Validity, proviso to S.16 (3) of Financial Institution (Recovery of Finances) Ordinance, 2001 had provided compensation as an appropriate mode of relief to a disappointed lease finance rather than the return of the financed asset in question. Keeping that proviso in mind, impleading of petitioner in the suit before the Banking Court, was contrary to law-High Court declared that the impugned order fell into error in concluding that petitioner's impleadment was lawful. Said order was declared to be without lawful authority and of no legal effect[153].

An order under Section 16(1) may also be passed in [154]"respect of a property held benami in the name of an ostensible owner whether acquired before or after the grant of finance by the Financial Institution." This provision has provided in the present Ordinance which will be helpful in Recovery of Finances and the defaulters would be compelled to pay the finances of the Banks.

[155]"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 interms whereof the Financial Institution is authorized to recover or take over possession of the property without filing a suit," it was held that before taking any action for recovery/re-possession of the car from the lessee no notice or intimation was given by the leasing company or by its agents nor any reasonable opportunity at any time was given to the alleged defaulter in lease, therefore the action by both the leasing company and its agents was totally unjustified and they had wrongly exercised direct power to recover the lease article in terms of S.16 (3)(a), Financial Institution (Recovery of Finances) Ordinance, 2001. Lessee may seek its remedy as provided by proviso to subsection (3) of S.16 of the Ordinance[156].

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[153] 2010CLD274
[154] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[155] ibid.
[156] 2007CLD1365

2.11 Final Decree

The Banking Courts are empowered to pass final decree under Section 17. Section 17 (1) says that the [157]"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."

Sub-section (2) of Section 17 says that the [158]"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[159]."

The above section basically provides for nature of the final decree. Under provision of sub-section 1, the Banking Court can pass a decree regarding the defaulted amount from the date of default and in case the Suit is filed by the Financial Institution the decretal amount shall also include the cost of fund. However the cost of fund shall be determined by the State Bank of Pakistan. Further while passing final decree, the Banking Court can also pass an order pertaining to previous order if any under Sub-section (1) of section 16 to the extent of the decretal amount.

Awarding of cost in terms of S.17 read with S.3 of Financial Institution Recovery of (Finances Ordinance), 2001 was mandatory. Banking Court in its judgment had not observed that bank was not entitled to such cost from date of default till realization of decretal amount. Bank was entitled to such cost. High Court accepted appeal in circumstances[160].

Advertisement published by Banking Court was itself defective. Auction purchaser had participated in auction and deposited earnest money under a wrong impression. High Court directed Banking Court to refund earnest money deposited by auction purchaser[161]. Production of incomplete accounts of the subject matter loan fails to meet the object of Financial Institution (Recovery of Finances) Ordinance, 2001[162].

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[157] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[158] http://www.lawfirm.org.pk/Bank-html/bank2.html (Last Visited July, 2010)
[159] Section 17, Financial Institution (Recovery of Finances) Ordinance, 2001.
[160] 2009CLD312
[161] 2008CLD338
[162] 2007CLD1424

First execution application was dismissed for non prosecution. Second execution petition was dismissed for the reason that band had issued a certificate regarding recovery of decretal amount. Subsequently decree holder filed third execution petition seeking recovery of cost of funds, which petition was also dismissed by Banking Court.

Conduct of decree holder bank showed that it felt satisfied from the order passed in second execution petition and did not challenge the same at any point in time. Executing court did not go beyond the decree. If any loss was caused to decree holder, it was because of negligence, carelessness and conduct of its own functionaries who could not point out, at the time of dismissal of second execution petition, that costs of funds were still to be recovered or/and also failed to file appeal against such order. Decree holder even did not even choose to assail such order in the instant appeal. Order passed by executing court was legal and did not require interference by High Court, thus same was maintained. Appeal was dismissed in circumstances[163].

[163] 2006CLD1393

CHAPTER-3

Execution of Decree and Other Provisions including Certain Offences Under Financial Institutions (Recovery of Finances) Ordinances 2001

3.1 Execution of Decree

Execution of Decree under the Financial Institutions (Recovery of Finances) Ordinance, 2001 has been prescribed in section 19 and subsection 1 of section 19 says in this regard that [164]"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 to 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.

The issuance of notice to the judgment debtor for purposes of execution has been dispensed with under section 19(1)". This provision is appreciable in recovery matters because it saves time in concluding of the execution proceedings generally the defaulters change their addresses and become untraceable to the Financial Institutions when they take legal action against them. Fresh notice to the Judgment Debtor is just the waste of time. It should be the responsibility of the Defaulters to provide their current addresses to the Creditors. In case the Defaulters change their addresses and do not intimate the same to the Creditors and the notice is served on

[164] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

the defaulter on the previous available address then service of notice should be deemed as served in terms of applicable law.

We are of the view that notices should not be issued to judgment debtor. Upon pronouncement of judgment and decree by Banking Court, the suit itself stands converted to execution proceedings and on expiry of thirty days the court is expected to proceed with the execution of decree. The period of thirty days obviously has been made available to judgment debtor to avail the remedy of appeal[165].

Subsection 2 of Section 19 describes the applicable law in case of execution and says that the [166]"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[167]."

In view of section 7(1) (a), 7(2) and 19(2) of the Ordinance, whereby the provisions of C.P.C have been made applicable to all the nature of the proceedings before the Banking Court, and the decree has to be executed in accordance with the provisions of C.P.C, except where there is some other law on the subject or a different manner is adopted by the court, any sale conducted and made absolute in violation of rules provided in C.P.C could be validly challenged[168].

Judgment debtor is bound by the terms of decree and the executing court is bound to execute the decree till full recovery is made[169]. Courts are bound to do justice and not allow technicalities to come in their way and deprive decree holder of the fruit of the decree[170]. Upon pronouncement of judgment and decree the claim in the case or suit stands duly adjudicated and incorporated in the decree and not the

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[165] 2004CLD215

[166] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[167] Financial Institutions (Recovery of Finances) Ordinance 2001, Section 19(2).

[168] 2003CLD571

[169] 2001MLD1996

[170] 2001CLC1769

plaint of the suit, which is converted into execution proceedings[171]. This was held that plaintiff in order to frustrate the execution of decree could not seek setting aside of the decree as the same would tantamount to review of the consent order. Proper remedy for plaintiff was to assail consent decree in appeal[172].

3.2 Sale of Mortgaged, Pledged or Hypothecated Property with or without Intervention of Banking Court

Sub section 3 of section 19 empowers Financial Institutions to proceed with sale of mortgaged, pledged or hypothecated property with or without intervention of Banking Court and says that [173]"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."

If a Financial Institution intends to sell the mortgaged property on its own under subsection 3 then permission can be granted by the Banking Court to do so[174].

We are of the view that sale of mortgaged, pledged or hypothecated property by the Financial Institutions on its own is impracticable in most of the cases as the Defaulter does not handover or leave the possession of their property. Financial Institutions require the services of police or other security agency to proceed with sale and auction of mortgaged property. In this regard Section 19(6) should be implemented as and when required in its true spirit so that Financial Institutions are always accompanied by police or personnel from other security agency when they are proceeding with sale of mortgaged, pledged or hypothecated property.

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[171] 2003CLD689
[172] 2009CLD115
[173] http://www.jamilandjamil.com/publications /FINANCIAL_INSTITUTIONS_ORD_2001.html (Last Visited July, 2010)
[174] 2004CLD1281

Subsection 4 of section 19 provides a mode and procedure for sale of mortgaged, pledged or hypothecated property by the Financial Institution and says that [175]"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."

Sale of mortgaged property can be made by decree holder with or without intervention of court. This is subject to essential condition that the sale should either be brought through sealed tender or public auction[176].

The property which is sold for the purposes of execution has much less value as is estimated earlier for the purposes of loan and the amount that is recovered does not meet the defaulted amount. We are of the view that where sale of mortgaged property which does not meet the outstanding amount should not deter the Banking Court from proceeding with execution, and other assets of the judgment debtor should be put to auction. Amendment needs to be carried out in law to that affect.

Section 19(5) talks about the applicability of section 15 in cases of sale of mortgaged, pledged or hypothecated property and says that [177]"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)."

It transpires from section 15(6) read with section 19(5) that in its application for delivery of possession, has to be shown that the property is mortgaged, the mortgagor or his agent or servant or any person put in possession of the mortgaged property, Financial Institution has sought sale or purchase of the mortgaged property and that banking institution has filed the application for allowing possession of such property. Upon the accomplishment of the aforenoted

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[175] http://www.jamilandjamil.com/publications/FINANCIAL_INSTITUTIONS_ORD_2001.html (Last Visited July, 2010)
[176] PLJ2006LAH519
[177] http://www.jamilandjamil.com/publications/FINANCIAL_INSTITUTIONS_ORD_2001.html (Last Visited July, 2010)

components the Banking Court shall put the Financial Institution or purchaser in possession of the mortgaged property. If all the aforenoted ingredients are in existence then the Banking Court is empowered to order for delivery of possession of the mortgaged property to a Financial Institution as purchaser[178].

Subsection (5) of section 19 by reference incorporates the provisions of subsections 5, 6, 7, 8, 9, 10, 11, 12 of section 15 and makes them applicable to sales of mortgaged, pledged, or hypothecated properties by a Financial Institution. In case of any possible conflict and repugnancy i.e. section 19(3) and section 15 as adopted by section 19(5), the later in sequential order will prevail.[179]

Section19(6) confers on the Banking Court the power to seek assistance of police or security agency for the purposes of execution and says that the [180]"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."

This should be made mandatory incase of sale of mortgaged pledged or hypothecated property as in such a case breach of peace is always suspected. The proviso confers vast powers on Banking Courts and it can direct arrest of a person for purposes of execution.

Subsection 7 of section 19 explains the limitations and powers of Banking Court while proceeding with sale of mortgaged, pledged or hypothecated property and says that [181]"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.

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[178] 2006CLD812(DB)
[179] 2004CLD215
[180] http://www.jamilandjamil.com/publications /FINANCIAL_INSTITUTIONS_ORD_2001.html (Last Visited July, 2010)
[181] http://www.jamilandjamil.com/publications/FINANCIAL_INSTITUTIONS_ORD_2001.html (Last Visited July, 2010)

(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[182]."

Under provision of Section 19(7) it is for the Banking Court to investigate claims and objections in respect of attachment or sale of any property whether mortgaged or not and all questions concerning right, title or interest of person whether or not party to decree in attached property, have to be adjudicated upon and determined by Banking Court executing the decree and not by any other court[183].

No period of limitation has been prescribed for filing objections to order of attachment under S. 19(7)[184].

3.3 Sale of Mortgaged Property

Section 15 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 provides for sale of mortgaged property by the Financial Institution, and section 15(1) lays down the definitions of the terms mortgage, mortgage money and mortgaged property for that purpose and says that [185]"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

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[182] Financial Institutions (Recovery of Finances) Ordinance 2001, Section 19(3)(4)(5)(6)(7).
[183] 2004CLD736
[184] 2003CLD1511
[185] http://www.jamilandjamil.com/publications/FINANCIAL_INSTITUTIONS_ORD_2001.html (Last Visited July, 2010)

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."

The Financial Institution can demand mortgage money through notices from the Customer. In this regard section15 (2) says that [186]"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."

We are of the view that recovery procedure under Section 15(2) seems suitable for the Financial Institutions. It requires that in case of default in payment by customer, Financial Institution might send a notice to mortgagor demanding payment of mortgaged money outstanding within 14 days from service of notice and second notice in this regard is to be served within the next 14 days. Mortgagor if fails to pay the amount after service of second notice, then Financial Institution has to serve a final notice demanding payment within 30 days from service of notice on customer. Upon service of final notice, Financial Institution acquires right to recover rent and profit from mortgaged property till the time notice was withdrawn and to sell mortgaged property without intervention of court by public auction. Three notices served upon plaintiffs would satisfy requirements of S. 15(2) of the Ordinance[187]. We think that this provision of law is helpful for recovery provided it is implemented without any hurdles such is stay from the superior courts and other administrative hurdles.

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[186] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[187] 2007CLD232

Regarding conferring powers of mortgagor on Financial Institution after service of notice of demand on the mortgagor section15(3) says that [188]"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."

Section 15(3) needs to be substantiated as tenant or occupiers are unwilling to deposit rents and profits with the Financial Institution after service of notice of demand. We are of the view that the tenant or occupier in such a case should be bound to deposit the rents or profits with the Financial Institution as provided in the above proviso.

Section15 (4) empowers the Banking Court to proceed with the sale of mortgaged property without intervention of Banking Court after service of final notice incase mortgagor does not pay the outstanding amount. It says that [189]"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

[188]http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[189]http://www.paksearch.com/Government/TAX/SROs/Miscellaneous/2001/MIS-F2NO.htm (Last Visited July, 2010)

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."

Section15 (5) says that the Financial Institution shall be entitled, in its discretion, to participate in the public auction, [190]"and to purchase the mortgaged property at the highest bid obtained in the public auction."

When a mortgaged property was proposed to be sold either with intervention of court or without intervention of court, under the provisions of S. 15(5) in that case legislature has conferred discretion upon decree holder to participate in public auction without obtaining permission of executing court and to purchase mortgaged property at the highest bid[191].

Section15(6) says that [192]"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.

Explanation.- (1) Where the lease is created after the date of the mortgage and it appears to the Banking Court that the lease was created so as to adversely affect the value of the mortgaged property or to prejudice the rights and remedies of the Financial Institution, it shall be presumed that the lease is not bona fide, unless proved otherwise."

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[190] http://www.jamilandjamil.com/publications /FINANCIAL_INSTITUTIONS_ORD_2001.html (Last Visited July, 2010)
[191] 2006CLD970
[192] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

Subsection (6) of section 15 provides that where mortgagor or any person put in possession by the mortgagor does not voluntarily give possession of the mortgaged property sold or sought to be sold a Banking Court shall put the Financial Institution or purchaser in possession of the mortgaged property[193].

Under S. 15(6) decree holder can only get possession of property which is mortgaged in his favor by judgment debtor. Where property in question was not mortgaged with plaintiff, therefore there was no legal justification for delivering possession of property to decree holder/plaintiff[194].

The word 'Banking Court' used in S. 15(6) of the Financial Institutions (Recovery of Finances) Ordinance, 2001 could be High Court only where amount involved is more than Rs. 50 million and not the Banking Court[195]. But a suit in which subject matter does not exceed rupees five million is exclusively triable by Banking Court. Plaint of such suit filed in High Court in its original civil jurisdiction was returned to plaintiff after sustaining office objection that such suit was exclusively triable by Banking Court[196].

The words used in section 15(6) sought to be sold are of great significance. Before passing order for delivery of possession it is not necessary that the mortgaged property must have already been sold but it also includes the mortgaged property, which is yet to be sold and a Financial Institution seeks sale of the mortgaged property[197].

Section15(7) provides for the status of Financial Institution in case of sale of mortgaged property and says that [198]"for purposes of execution and registration of the sale deed in respect of the mortgaged property, the Financial Institution shall be deemed to be the duly authorized attorney of the mortgagor and a sale deed executed and presented for registration by duly authorized attorneys of the Financial Institution shall be accepted for such purposes by the Registrar and Sub-Registrar under the Registration Act, 1908 (XVI of 1908)."

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[193] 2006CLD812
[194] 2006CLD1574
[195] 2007CLD69
[196] 2005CLD510
[197] 2006CLD812
[198] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

This is a beneficial provision for the Financial Institutions in case of sale of mortgaged property as the Financial Institution does not go through the hassle of proving its status and vendees have also been facilitated as property is easily transferred on their name.

Section15 subsection (8) explains the rights of purchaser in case of sale of mortgaged property and says that [199]"upon execution and registration of the sale deed of the mortgaged property in favor of the purchaser all rights in such mortgaged property shall vest in the purchaser free from all encumbrances and the mortgagor shall be divested of any right, title and interest in the mortgaged property."

Section 15(9) describes the distribution of [200]"net sale proceeds and says that net sale proceeds of the mortgaged property, after deducting all expenses of sale or expenses incurred in any attempted sale, shall be distributed ratably amongst all mortgagees in accordance with their respective rights and priorities in the mortgaged property. Any surplus left, after paying in full all the dues of mortgagees, shall be paid to the mortgagor."

All disputes relating to sale of mortgaged property under S.15 of Financial Institutions Recovery of Finances Ordinance 2001 were to be decided by Banking Courts. Financial Institution was required to file under S. 15(9) of Financial Institutions Recovery of Finances Ordinance proper account of sale proceedings in Banking Court about net sale proceeds after taking into consideration all expenses incurred for sale[201].

Section15(10) says that [202]"a Financial Institution which has sold mortgaged property in exercise of powers conferred herein shall file proper accounts of the sale proceeds in a Banking Court within thirty days of the sale."

Where Banking Court had failed to file proper accounts of sale proceeds within 30 days of sale as required be S. 15(10). It was held that alleged auction of property in question was not public auction as property had been thrown away much below

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[199] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[200] http://www.centralbank.gov.af/pdf/Last%20version%20of%20MOL55%20english.pdf (Last Visited July, 2010)
[201] 2009C LD1571
[202] http://www.sbp.gov.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

market value and that bank had failed to file statement of accounts as required under S. 15(10)[203].

Objector sought setting aside of sale on the ground that statement of account was not filed within 30 days as required under S. 15(6) of Financial Institutions Recovery of Finances Ordinance 2001. It was held that Financial Institutions selling mortgaged property in exercise of powers conferred upon them under S. 15 of Financial Institutions Recovery of Finances Ordinance 2001 were under obligation to file proper account of sale proceeds in Banking Court within 30 days of sale. Purchaser of property for valuable consideration could not be non suited due to default of Financial Institutions in filing of statement of account within a period provided by S.15 (10) of Financial Institutions (Recovery of Finances) Ordinance 2001[204].

Regarding disputes relating to sale of mortgaged property, section15(11) says that [205]"all disputes relating to the sale of the mortgaged property under this section including disputes amongst mortgagees in respect of distribution of the sale proceeds, shall be decided by the Banking Court."

Order which are passed under section 15(11) have been saved and thus if any order is passed under the said provision of law, the appeal would be competent[206].

Section15(12) explains the limitations of Banking Court in granting injunction regarding sale of mortgaged property and says that [207]"neither the Banking Court nor the High Court shall grant an injunction restraining the sale or proposed sale of mortgaged property unless

(a) It is satisfied that no mortgage in respect of the immovable property has been created; or

(b) All moneys secured by mortgage of the mortgaged property have been paid; or

(c) The mortgagor or objector deposits in the Banking Court in cash the outstanding mortgage money."

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[203] 2007CLD69
[204] 2009CLD1571
[205] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[206] 2005CLD1400
[207] http://www.jang.com.pk/thenews/investors/may2003 /spot.htm (Last Visited July, 2010)

Legislature in its wisdom has framed a special law for expeditious recovery of dues of Financial Institution. In section 15 the legislature has used negative language. The negative, prohibitory and exclusive words or terms are indicative of legislative intent that the statute is to be mandatory. While interpreting a law, Courts have to find out the intention of the law makers, from the words used in the statute, and as such while interpreting section 15(12) of the Ordinance, it has to be interpreted in a way which advance the intention of law makers and not in a way which defeat the very object of special law, resulting that subsection 12 of section 15 is a mandatory provision restraining the court from granting injunction to restrain the proposed sale of the mortgaged property, except when condition of clauses (a), (b) and (c) of subsection 12 of section 15 are attracted[208].

Subsection 12 provides that neither [209]"Banking Court nor High Court is to grant an injunction restraining the sale or proposed sale of mortgaged property unless court is satisfied that no mortgage in respect of immovable property has been paid or mortgagor or objector deposited in Banking Court in cash the outstanding mortgage money[210]."

Section15(13) says that the [211]"rights and remedies provided under this section are in addition to, and not in lieu of, any other rights or remedies a Financial Institution may have under this Ordinance."

It may be highlighted that rights granted by section 15 are in addition to [212]"any other rights that a Financial Institution has under the Ordinance." Financial Institution is at liberty either to proceed under this section or any other section of the Ordinance for enforcement of its rights.

Last provision of section 15 says that the [213]"provisions contained in this section shall have effect notwithstanding anything contained in this Ordinance[214]."

Section 15 did not exist in the recovery of loan Act of 1997 but exists in section 69 of Transfer of Property Act. It has been incorporated in Financial Institution (Recovery of Finances) Ordinance, 2001 to facilitate the Financial Institution to

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[208] 2007CLD232
[209] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[210] 2007CLD232
[211] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[212] ibid.
[213] ibid.
[214] Financial Institutions (Recovery of Finances) Ordinance 2001, Section 15.

effect recovery without the intervention of Banking Court. However recoveries are rarely affected by recourse to this mode due to difficulties in getting possession of the mortgaged property. Provisions of S.15 of the Financial Institutions Recovery of Finances Ordinance 2001 have been declared repugnant to the provisions of the constitution and in conflict with fundamental rights. Sales which had not attained finality were declared illegal and set aside[215].

3.4 Restriction on Transfer of Assets and Properties

In respect of restriction on transfer of assets and properties section 23 subsection (1) says that [216]"after publication of summons under sub-section (5) of section 9, no customer shall, without the prior written permission of the Banking Court transfer, alienate, encumber, remove or part with 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 pending final decision of the suit filed by the Financial Institution under this Ordinance, and any such transfer, alienation, encumbrance or other disposition by the customer in violation of this sub-section shall be void and of no legal effect:

Provided that the customer may sell any such asset or property which has been retained by or entrusted to him for purposes of dealing with the same in the ordinary course of business subject to the terms of the letter of hypothecation or trust receipt or other instrument or document executed by him, or for purposes of effecting their sale and depositing the sale proceeds with the Financial Institution:

Provided further that the customer before making the sale shall file in the Banking Court a statement supported by affidavit, containing full particulars of such asset or property, and within three days after the sale shall submit a full account thereof to the Banking Court and the Financial Institution."

This provision of Financial Institutions (Recovery of Finances) Ordinance, 2001 is similar to section 52 of transfer of property act and explains the doctrine of lispendens. Section 52 of transfer of property act prohibits any transfer of property during the pendency of any suit.

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[215] 2009CLD257

[216] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

Provisions of S.23 (1) are applicable after publication of summons under S. 9(5) of the Ordinance while subsection (2) of S. 23 of the Ordinance will come into operation after the pronouncement of judgment and decree by the Banking Court. Section 23(2) of the Ordinance will also apply when an interim decree under the Ordinance is passed and binds all judgment debtors from transferring, alienating, encumbering or parting with possession of any assets or property without prior written permission of the Banking Court. Any transfer, alienation and encumbrance or other disposition of assets or property by a judgment debtor in violation of section 23 of the Ordinance is to be treated as void and of no legal effect[217]. Any sale subsequent to the decree by a mortgagor was void. It was void sale by virtue of the provisions of S.23[218].

Section 23(2) binds the judgment debtor with respect to his property in case of decree and it says that [219]"after pronouncement of judgment and decree by the Banking Court, including an interim decree under section 11, no judgment-debtor shall without the prior written permission of the Banking Court transfer, alienate, encumber or part with possession of any assets or properties and any such transfer, alienation, encumbrance or other disposition by a judgment-debtor in violation of this sub-section shall be void and of no legal effect."

Restriction put up by S. 23(1) of Financial Institutions (Recovery of Finances) Ordinance, 2001 on customer relates only to assets or properties furnished to Financial Institutions as security by way of mortgage, lien, etc. whereas under S.23 (2) of Financial Institutions (Recovery of Finances) Ordinance, 2001 transfer or alienation of any property by judgment debtor is void transfer having no legal effect[220].

Where property was sold out, decree holder had filed objection to the effect; that property could not be sold out being hit by S. 23(2). It was declared that property would remain in the position it was before it was sold out[221].

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[217] 2005MLD1358
[218] 2006CLD206
[219] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[220] 2009CLD915
[221] 2006CLD771

Section 23(2) is fully applicable on properties and assets of a judgment debtor irrespective of the fact whether it is mortgaged property or not and will also apply on money decree[222].

Section 23(3) says that [223]"the provisions of sub-section (1) shall also apply to a person who has furnished any security on behalf of a customer to the Financial Institution on the basis of which finance was granted, provided such person is a defendant in the suit filed under section 9 or is added as a defendant thereafter[224]."

Section 23 is a new provision which has been incorporated in the Financial Institutions (Recovery of Finances) Ordinance, 2001 which does not exist in the previous Act of 1997. Financial Institutions Recovery of Finances Ordinance,2001 had no retrospective effect. Where the sale deed in the matter was executed on 28-3-2001, the decree in the suit had been passed on 26-6-2001, Financial Institutions Recovery of Finances Ordinance 2001 was enforced on 30-8-2001 shall not cover or affect any transaction which had been accomplished before its enforcement[225].

3.5 Provisions of Certain Offences

Section 20 illustrates provisions of certain offences, which may be committed in relation to the implementation of this Financial Institutions (Recovery of Finances) Ordinance, 2001 and relating to the provisions of the Ordinance. In this regard section 20 subsection (1) says that [226]"whoever

(a) dishonestly commits a breach of the terms of a letter of hypothecation, trust receipt or any other instrument or document executed by him whereby possession of the assets or properties offered as security for the re-payment of finance or fulfillment of any obligation are not with the Financial Institution but are retained by or entrusted to him for the purposes of dealing with the same in the ordinary course of business subject to the terms of the letter of hypothecation or trust receipt or other instrument or document or for the purpose of effecting their sale and depositing the sale proceeds with the Financial Institution; or

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[222] 2005MLD1358

[223] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[224] Financial Institutions (Recovery of Finances) Ordinance 2001, Section 23.

[225] 2009CLD1038

[226] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

(b) makes fraudulent mis-representation or commits a breach of an obligation or representation made to a Financial Institution on the basis of which the Financial Institution has granted a finance; or

(c) subsequent to the creation of a mortgage in favour of a Financial Institution, dishonestly alienates or parts with the possession of the mortgaged property whether by creation of a lease or otherwise contrary to the terms thereof, without the written permission of the Financial Institution; or

(d) subsequent to the passing of a decree under section 10 or 11, sells, transfers or otherwise alienates, or parts with possession of his assets or properties acquired after the grant of finance by the Financial Institution, including assets or properties acquired benami in the name of an ostensible owner shall, without prejudice to any other action which may be taken against him under this Ordinance or any other law for the time being in force, be punishable with imprisonment of either description for a term which may extend to three years and shall also be liable to a fine which may extend to the value of the property or security as decreed or the market value whichever is higher and shall be ordered by the Banking Court trying the offence to deliver up or refund to the Financial Institution, within a time to be fixed by the Banking Court, the property or the value of the property or security.

Explanation - Dishonesty may be presumed where a customer has not deposited the sale proceeds of the property with the Financial Institution in violation of the terms of the agreement between the Financial Institution and the customer."

Section 20(2) provides for punishments in case of false statements and says that [227]"whoever knowingly makes a statement which is false in material respects in an application for finance and obtains a finance on the basis thereof, or applies the amount of the finance towards a purpose other than that for which the finance was obtained by him, or furnishes a false statement of stocks in violation of the terms of the agreement with the Financial Institution or falsely denies his signatures on any banking document before the Banking Court, shall be guilty of an offence

[227] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

In respect of punishment for creating obstruction in execution of decree subsection 3 of section 20 says that [228]"whoever resists or obstructs, either by himself or on behalf of the judgment debtor, through the use of force, the execution of a decree, shall be punishable with imprisonment, which may extend to one year, or with fine, or with both."

With regard to the punishment for dishonest issuance of cheque for fulfillment of an obligation section 20(4) says that [229]"whoever dishonestly issues a cheque towards re-payment of a finance or fulfillment of an obligation which is dishonoured on presentation, shall be punishable with imprisonment which may extend to one year, or with fine or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque."

Section 7 Financial Institutions (Recovery of Finances) Ordinance, 2001 had conferred criminal jurisdiction to the Banking Court to try offences punishable under the Ordinance. Whenever an offence was committed under S. 20(4) of the Ordinance Banking Court would take cognizance upon a complaint filed by the authorized person and complaint would be tried by concerned Banking Court, appeal against which was provided before High Court. F.I.R against the customer under S. 489 F P.P.C or allowing the same to exist was only wastage of time and abuse of process of law. High Court directed the police not to take law in its own hands in cases covered within the ambit of Financial Institutions Recovery of Finances Ordinance 2001[230].

The objective to legislate S.20 (4) of Financial Institutions (Recovery of Finances) Ordinance, 2001 was different than objective to legislate S. 489F P.P.C but S. 489F P.P.C has not been legislated/drafted differently. Purpose of enacting these

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[228] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[229] ibid.
[230] 2009CLD1422

laws was to provide speedy measures for the recovery of outstanding loans and finances[231].

Section 20(5) states that [232]"where the person guilty of an offence under this Ordinance is a company or other body corporate, the chief executive by whatever name called, and any director or officer involved shall be deemed to be guilty of the offence and shall be liable to be prosecuted against and punished accordingly".

Section 20(5) clearly stipulates that [233]"where the person guilty of an offence is a company or other body corporate, the chief executive by whatever name he be called and any director or officer involved shall be deemed to be guilty of such offence and shall be liable to be prosecuted and punished accordingly." But before any prosecution can be launched against such persons, it would have to be shown that they were involved in the offence in question[234].

Section20 subsection (6) makes the offences bailable and provides that [235]"all offences under this Ordinance shall be bailable, non-cognizable and compoundable."

Before any prosecution can be launched against such persons it would have to be shown that they were involved in the offence in question viz letter of hypothecation and leasing out of mortgaged properties. Needless to say it would further have to be shown that the applicants with a guilty mind had indulged in such offence. Recovery of loan Act of 1997 prescribed punishment of one year for these offences in addition to fine which has been enhanced to three years with or without fine in the Financial Institutions (Recovery of Finances) Ordinance, 2001. Banks are the Financial Institutions and if an offence regarding dishonest issuance of cheque was committed to satisfy the loan secured from a banks then S.20 of the Financial Institutions Recovery of Finances Ordinance 2001 would be applicable and the bank would be required to file complaint before the Banking Court in that case and registration of case before police, its investigation and submission of

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[231] 2006CLD1314

[232] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[233] ibid.

[234] 2005CLD1794

[235] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

challan in pursuance thereof would not be in accordance with law and trial court would be debarred from taking cognizance of the offence[236].

3.6 Application of Fines and Cost

Application of fines and cost has been provided by section 21 and its subsection (1) provides the modes in which cost or fine imposed during proceeding can be utilized. It says that a [237]"Banking Court may direct that the whole or part of any fine or costs imposed under this Ordinance shall be applied in or towards

(a) Payment of costs of all or any proceedings under this Ordinance; and

(b) Payment of compensation to an aggrieved party."

The provisions of section 1 of section 21 are not mandatory and court can proceed with the disposal of fine and cost imposed under the Ordinance in the variety of modes. We are of the opinion that cost and fines imposed under the Ordinance should be utilized to compensate the other party.

Subsection (2) of section 21 says that [238]"an order under sub-section (1) shall be deemed to be a decree passed under this Ordinance for purposes of execution[239]."

3.7 Appeal

Appeal has been prescribed under section 22 of the Financial Institutions Recovery of Finances Ordinance,2001 and subsection (1) of section 22 provides for the time period of appeal. It says that [240]"subject to sub-section (2), any person aggrieved by any judgment, decree, sentence, or final order passed by a Banking Court may, within thirty days of such judgment, decree, sentence or final order prefer an appeal to the High Court."

An order passed by the Banking Court in execution application whereby the court allowed attachment of the property of the appellant could not be treated as a final order as envisaged under the provisions of S.22(1)(6) of the Ordinance and no appeal lies against such an interlocutory order[241].

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[236] 2009CLD1425

[237] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[238] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[239] Financial Institutions (Recovery of Finances) Ordinance 2001, Section 21.

[240] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[241] 2005CLD1571

Whereas per subsection (1) of S.22 of Financial Institutions (Recovery of Finances) Ordinance, 2001, against the final order the appeal would be filed within 30 days[242].

The recovery of loan act 1997 had a limited scope in relation to appeal and provided that [243]"any person aggrieved by a decree or an order refusing to set aside a decree, or an order permitting or preventing the sale of property, or a sentence passed by a Banking Court established under section 4 may, within thirty days of such order, decree or sentence, prefer an appeal to the High Court." For grant of stay the court could ask the appellant to deposit the amount in cash or security wherein under the new Ordinance the court could only ask for deposit of security[244].

Subsection (2) of section 22 provides for notice in case of appeal and says that the [245]"appellant shall give notice of the filing of the appeal in accordance with the provisions of Order XLIII Rule 3 of the Code of Civil Procedure (Act V of 1908) to the respondent who may appear before the Banking Court to contest admission of the appeal on the date fixed for hearing."

This is a beneficial provision for the Financial Institutions as they get a chance to contest the appeal on the very first date. Financial Institutions appear before the court to contest admission and show to the court that appeal is devoid of merits. This enables Financial Institutions to proceed quickly against the judgment debtor in case appeal is not admitted.

Parties were aware of impugned order, which was seriously contested be them before Banking Court. Service of notice had not been disputed. Neither appeal had been admitted nor any order had been passed without hearing respondent, who had already received notice of appeal. High Court fixed appeal for katcha peshi while directing appellant to provide memo of appeal along with all annexures within three days to respondent. Objection as to non service of memo of appeal raised by respondent was overruled in circumstances[246].

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[242] 2010CLD10

[243] http://www.lawfirm.org.pk/Bank-html/bank2.html (Last Visited July, 2010)

[244] Banking Companies (Recovery of Loan) Act 1997, Section 21.

[245] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[246] 2008CLD326

As to the mode of admission of appeal section 22(3) says that the [247]"High Court shall at the stage of admission of the appeal, or at any time thereafter either suo motu or on the application of the decree holder, decide by means of a reasoned order whether the appeal is to be admitted in part or in whole depending on the facts and circumstances of the case, and as to the security to be furnished by the appellant:

Provided that the admission of the appeal shall not per se operate as a stay, and nor shall any stay be granted therein unless the decree-holder has been given an opportunity of being heard and unless the appellant deposits in cash with the High Court an amount equivalent to the decretal amount inclusive of costs, or in the case of an appeal other than an appeal against an interim decree, at the discretion of the High Court furnishes security equal in value to such amount; and in the event of a stay being granted for a part of the decretal amount only, the requirement for a deposit in cash or furnishing of security shall stand reduced accordingly."

Provisions of section 22(3) of Ordinance of 2001 are not as stringent and harsh as were in the earlier statutes relating to recovery of loans/advances of Financial Institutions and it cannot be said that precondition of furnishing of security, for which a reasoned order will have to be made by High Court in its capacity as appellate authority, would automatically render remedy of appeal as nugatory, inefficacious and inadequate, the provisions of section 22(3) have given vast power to appellate court for stating or declaring the reason and conditions for furnishing the security. Appellate court after taking into consideration the facts and circumstances of each case and examining the extent of liability of aggrieved party will be absolutely free to determine easy and soft terms for furnishing of security[248].

Section 22(4) says that [249]"an appeal under sub-section (1) shall be heard by a bench of not less than two Judges of the High Court and, in case the appeal is admitted, it shall be decided within 90 days from the date of admission."

Section22 (5) provides for appeal in case of exparte decree and says that [250]"an appeal may be preferred under this section from a decree passed ex-parte.

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[247] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[248] 2003CLD1447
[249] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

This provision is a source of relief to the judgment debtor as he has the option either to proceed with setting aside of decree or prefer an appeal if he is not satisfied from the order of Banking Court."

Subsection 6 of section 22 talks about appeal in case of interlocutory order whether it is maintainable or not. It says that [251]"no appeal, review or revision shall lie against an order accepting or rejecting an application for leave to defend, or any interlocutory order of the Banking Court which does not dispose of the entire case before the Banking Court other than an order passed under sub-section (11) of section 15 or sub-section (7) of section 19."

We are of the view that this provision of subsection (6) of section 22 is harsh on the parties as they do not get a chance to contest the interlocutory order in the higher forum which can affect the rights of parties. Interlocutory orders protect precious rights of parties if prima facie case is made out and a chance should have been given to the parties under the Financial Institutions Recovery of Finances Ordinance to contest acceptance or rejection of interlocutory order at the higher forum.

Under subsection (6) of S.22 of Financial Institutions (Recovery of Finances) Ordinance, 2001, interim/ interlocutory order, which did not decide the entire case, no appeal, review or revision would lie nor against an order accepting or rejecting an application for leave to defend or any interlocutory order of the Banking Court[252].

In case of time period of stay granted in execution, section 22(6) says that any order of stay of execution of a decree passed under sub-section (2) shall automatically lapse on the expiry of six months from the date of the order whereupon the amount deposited in Court shall be paid over to the decree-holder or the decree-holder may enforce the security furnished by the judgment-debtor[253].

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[250] ibid.

[251] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)

[252] 2010CLD10

[253] Financial Institutions (Recovery of Finances) Ordinance 2001, Section 22.

3.8 Finality of Order

Section 27 provides for the finality of order and as such the immunity of judgment of Banking Courts from being challenged in other fora and says that [254]"subject to the provisions of section 22, no Court or other authority shall revise or review or call, or permit to be called, into question any proceeding, judgment, decree, sentence or order of a Banking Court or the legality or propriety of anything done or intended to be done by the Banking Court in exercise of jurisdiction under this Ordinance:

Provided that the Banking Court may, on its own accord or on application of any party, and with notice to the other party or, as the case may be, to both the parties, correct any clerical or typographical mistake in any judgment, decree, sentence or order passed by it[255]."

Evidently the legislature in its anxiety to protect the orders of Banking Court, has gone to the extent of ordaining that no authority other than the appellate forum shall even allow to throw a challenge to the validity of such order. Combined effect of these provisions is that judgment and orders passed by a Banking Court cannot be assailed before any forum except by way of appeal[256]. Proceedings of Banking Courts are immune under the act and cannot be called in question before any forum. Section 27 of recovery of loan Act contained a similar provision except the fact that immunity had been extended to the banking mohtasib also[257]. Non specification in the judgment and decree the date of default by the Banking Court, by no stretch of interpretation can be construed as typographical error etc, rather it is a simple case of slip/omission of the court and had it been the judgment decree of the civil court, the provision of S. 152 C.P.C could be validly invoked. But for the supply of such an omission/slip, Banking Court had no jurisdiction under proviso to S.27 Financial Institutions (Recovery of Finances) Ordinance, 2001 and impugned order of the Banking Court being beyond the scope of proviso to S. 27 could not sustain. Cases pertaining to any error in the judgment and decree etc. of the court shall only be regulated by the proviso to S. 27 Financial Institutions

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[254] http://sbp.org.pk/publication/R-Ordinance.htm (Last Visited July, 2010)
[255] Financial Institutions (Recovery of Finances) Ordinance 2001, Section 27.
[256] 2003CLD1822(DB)
[257] Banking Companies (Recovery of Loan) Act 1997, Section 27.

(Recovery of Finances) Ordinance, 2001 rather the general and inherent power under S.152 C.P.C which shall not be applicable in the presence of specific provision of proviso to S. 27 of the Ordinance. Proviso to S. 27 of the Ordinance however is restricted in empowering the court to correct the typographical error etc. and unlike S. 152 C.P.C does not provide for supplying any accidental slip or omission[258].

[258] 2009CLD36

CHAPTER-4

Recovery Procedure under National Accountability Bureau Ordinance, 1999

4.1 Introduction

The preamble of the National Accountability Bureau Ordinance, 1999 hereinafter referred to as (Accountability Ordinance) provides that one of the aims of the Ordinance is that [259]"there is an emergent need for the recovery of outstanding amounts from those persons who have committed default in the repayment of amounts to Banks, Financial Institutions, Government and other agencies[260]." Hence one of the basic purpose of National Accountability Bureau Ordinance, 1999 is to effect recovery from the loan defaulters who have committed default.

The word Accused under the Accountability Ordinance means [261]"a person in respect of whom there are reasonable grounds to believe that he is or has been involved in the commission of any offence triable under this Ordinance and or is subject of an investigation/inquiry by the National Accountability Bureau, or concerned Agency[262]."

The word Assets has been defined under Section 5(c) which means that assets acquired through illegal means from a Financial Institution or constitute the property of accused. It says that [263]"assets means any property owned, controlled by or belonging to any accused, whether directly or indirectly, or held benami in the name of his spouse or relatives or associates, whether within or outside Pakistan, for which they cannot reasonably account, or for which they cannot prove payment of full and lawful consideration[264]."

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[259] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)
[260] National Accountability Bureau Ordinance, 1999, Preamble.
[261] http://www.nab.gov.pk/Downloads/Doc/NAB%20ORD%202002.pdf (Last Visited July, 2010)
[262] Ibid.Section 5a.
[263] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)
[264] Ibid. Section 5c.

A person is said to commit an offence of willful default under section 5(r) of National Accountability Ordinance, 1999 [265]"if he does not pay or return or repay the amount to any bank, Financial Institution, cooperative society, or a Government department or a statutory body or an authority established or controlled by a Government on the date that it became due according to the laws, rules, regulations, instructions, issued or notified by a bank, including the State Bank of Pakistan, Financial Institution, cooperative society, Government Department, statutory body or an authority established or controlled by a Government, as the case may be, and a period of thirty days has expired thereafter. Provided that it is not willful default under this Ordinance if the accused was unable to pay, return or repay the amount as aforesaid on account of any willful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, Financial Institution, cooperative society or a Government department or a statutory body or an authority established or controlled by Government[266]."

It was held by the court that mere non payment or default in payment of loan cannot be equated with willful default so as to bring it within ambit of S.5(r)[267]. However the definition is clear on this point that any default of loan which means where money is outstanding against the Financial Institution comes within the purview of willful default and is as such with in the jurisdiction of National Accountability Bureau as well as accountability courts. We are of the view that the definition of willful default should be elaborated so that every case of default of loan comes within the purview of National Accountability Bureau so that default of loan becomes deterrence to the willful defaulters.

4.2 Corruption and corrupt practices

Section 9 defines corruption and corrupt practices and section 9(a)ii says that a person is said to have committed the offence of corruption and corrupt practices [268]"if he accepts or obtains or offers any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or likely to be, concerned in any proceeding or business

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[265] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)
[266] Ibid.Section 5r.
[267] NLR2003CrLAH361
[268] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)

transacted or about to be transacted by him, or having any connection with his official functions or from any person whom he knows to be interested in or related to the person so concerned; or as elaborated under section 9(a)vi, misuses his authority so as to gain any benefit or favor for himself or any other person, or to render or attempt to do so; or if he commits an offence of willful default as defined under section 9(a)vii[269]."

Corruption and corrupt practices under the Ordinance include a person who commits the offence of willful default and a person who obtains loan for himself or his beneficiary using his official position, for a security which is far below the value of the loan. Corruption and corrupt practices has been exhaustively defined under the (Accountability Ordinance) to cover the cases of default of loan. On the one hand it provides that the offence of willful default comes within the ambit of corrupt practices which includes the instance of nonpayment of outstanding loan after thirty days has expired and it also provides a mode of action in case where the security amount fails to meet the outstanding amount. In such a case the National Accountability Bureau can proceed against the banker and also the customer for his failure to deposit proper security for the amount undertaken to be repaid due to his official position or utilizing illegal gratification for that purpose to obtain a loan depositing security far below the value of loan.

It was held by the court that word person as used in S. 9 includes every person[270] and not only holder of public office but also any other person can be tried for offence under S.9[271]. Word misuse of authority means a wrong and improper exercise of authority for a purpose not intending by law[272]. Bank officials guilty of negligence in matters of finance may be liable for an administrative action under relevant rules/regulations of the bank however they would not be penally liable for offence under S.9 for their negligence in matters of finance[273].

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[269] National Accountability Bureau Ordinance, 1999, Section 9.
[270] PLD2003LAH593
[271] NLR2003CrLAH321
[272] PLD2002LAH233
[273] NLR2003CrLAH361

4.2.1 Punishment for corruption and corrupt practices

Section 10(a) prescribes the punishment for corruption and corrupt practices and says that [274]"a person who commits the offence of corruption and corrupt practices shall be punishable with imprisonment for a term which may extend to 14 years, or with fine, or with both, and such of the assets and property of such person which is found to be disproportionate to the known sources of his income or which is acquired by money obtained through corruption and corrupt practices whether in his name or in the name of any of his dependents, or benamidars shall be liable to be forfeited to the appropriate Government.

Section 10(b) says that any person giving illegal gratification, or abetting, assisting or aiding a holder of a public office, or receiving or holding any property obtained or acquired by a holder of public office, through corruption or corrupt practices, or being a beneficiary of any asset, property or gain obtained through corruption or corrupt practices shall fall within the scope of this section and shall be liable to the same or a lesser punishment that may be awarded to a holder of a public office as may be deemed fit by the Court[275]."

Section 11 provides for quantum of fine awarded to an accused and says that [276]"where a person found guilty of an offence is sentenced to pay a fine, irrespective of whether or not a sentence of imprisonment is imposed, the amount of the fine shall in no case be less than the gain derived by the accused or any relative or associate which may be set off against the forfeited or frozen assets and property[277]."

The [278]"amount of fine can in no case be less than the gain derived by the accused or any relative or associate which might be set off against the forfeited or frozen assets and property according to" S.11[279].

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[274] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)
[275] National Accountability Bureau Ordinance, 1999, Section 10.

[276] http://www.pakistan.gov.pk/law-division/publications/pdf_folder/XVIII-1999.pdf (Last Visited July, 2010)
[277] Ibid.Section 11.
[278] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)
[279] PLD2002SC39

4.3 How to initiate Recovery Cases against willful defaulters?

Section 31 D describes the process of initiating recovery cases against willful defaulters. It says that recovery cases against willful defaulters are [280]"initiated or conducted by the National Accountability Bureau against any person, company or Financial Institution on reference from the Governor State Bank of Pakistan. No inquiry, investigation, or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or Financial Institution without reference from the governor state bank of Pakistan[281]." The filing of reference by the governor state bank of Pakistan with the National Accountability Bureau is preceded by sending of two notices to the defaulter demanding outstanding amount. The first notice is sent by the president of the Financial Institution demanding payment of outstanding amount within thirty days. If no reply is given to the thirty day demand notice than the president of Financial Institution after following the directions as contained in the circulars of state bank refers the matter to the governor state bank of Pakistan who shall send a seven day notice to the defaulter demanding outstanding amount. If no reply is given to the seven day demand notice than the governor state bank of Pakistan proceeds to file a reference with the national accountability bureau. The National Accountability Bureau than proceeds to conduct investigation in the case. The investigation is conducted by the deputy chairman National Accountability Bureau on reference from the Chairman within a period of seventy five days. After the investigation is completed the case is filed by the Chairman National Accountability Bureau with the accountability court for trial. The process of investigation and reference has been outlined in section 18 of (Accountability Ordinance).

Section 31 C says that [282]"no Court established under this Ordinance shall take cognizance of an offence against an officer or an employee of a bank or Financial Institution for writing off, waving, restructuring or refinancing any financial

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[280] http://www.nab.gov.pk/Downloads/Doc/NAB%20ORD%202002.pdf (Last Visited July, 2010)
[281] National Accountability Bureau Ordinance, 1999, Section 31-D.
[282] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)

facility, interest or markup without prior approval of the State Bank of Pakistan[283]."

Filing of reference before the accountability court is like filing of complaint/challan in the court of competent jurisdiction within the contemplation of S. 173 CrPC[284]. The filing of reference is followed by the start of trial. Trial conducted under the Ordinance is governed by the provisions of CrPC (code of criminal procedure, 1898). Section 17(a) says in this regard that [285]"notwithstanding anything contained in any other law for the time being in force, unless there is anything inconsistent with the provisions of this Ordinance, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1989), shall mutatis mutandis, apply to the proceedings under this Order. Subsection (b) says that Subject to sub section (a), the provisions of Chapter XXIIA of the Code shall apply to trials under this Ordinance and subsection (c) provides that notwithstanding anything contained in sub-section (a) or sub- section (b) or in any law for the time being in force, the Accountability Court may, for reasons to be recorded, dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case[286]." Trial conducted under the provisions of code of criminal procedure means that after filing of reference with the accountability court the accused is supplied with statements pertaining to the case and following this charge is framed against him. Than the prosecution proceeds with the recording of evidence against the accused after which the statement of accused is recorded and he is asked as to whether he wishes to produce evidence in his defense. The court than hears the argument of counsels of both the sides and records an order of conviction or acquittal.

The time period for trial of a scheduled offence under the Ordinance is thirty days and trial takes place before an accountability court. Section 16 (a) says in this regard that [287]"notwithstanding anything contained in any other law for the time being in force, the Chairman NAB may apply to any court of law or tribunal that any case involving a scheduled offence under this Ordinance pending before such

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[283] Ibid. Section 31-C.
[284] PLD2003PESH94
[285] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)
[286] National Accountability Bureau Ordinance, 1999, Section 17(a)(b)(c).
[287] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)

court or tribunal shall be transferred to a Court established under this Ordinance, then such other Court or Tribunal shall transfer the said case to any Court established under this Ordinance and it shall not be necessary for the Court to recall any witness or again to record any evidence that may have been recorded[288]."

4.4.1 State Bank of Pakistan's Circular No.8 regarding Legal Notice for Recovery Dated June 11, 2002

Circular no. 8 regarding legal notice for recovery pertains to the procedure that has to be ensured by the governor state bank of Pakistan in order to satisfy himself that cases referred to him for onward referral to National Accountability Bureau are genuine and correct. It says that [289]"as you are aware the Governor, State Bank of Pakistan has to satisfy himself that the cases referred to him by the banks, DFIs and Financial Institutions under Section 31-D of the NAB Ordinance, 1999 in fact pertain to willful default. In order to assist him in this task the following procedure has been laid down which should be strictly adhered: -

1. President/Chief Executive will give his detailed comments with regard to correctness or otherwise of statements contained in reply/ies (if any) (the "Reply") to thirty (30) day's Notice given by concerned bank/NBFI pursuant to the first proviso of Section 5 (r) of the NAB Ordinance.
2. If no reply to thirty (30) days' Notice has been given, then President/Chief Executive should give his detailed comments with regard to correctness or otherwise of contentions, if any, earlier raised by or on behalf of the alleged defaulters disputing banks/NBFIs claim in whole or in part.
3. If the matter has been subject to negotiations for settlement, it should be confirmed that no settlement has been reached.
4. Amount due to bank/NBFI, i.e. defaulted loan, should be clearly and correctly stated.
5. If quantum of the amount said to be due is disputed, then President's/Chief Executive's views on merits of such dispute should be stated. Further, amount admitted and amount disputed should be separately stated.

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[288] Ibid. Section 16(a).

[289] http://paksearch.com/Government/SBP/BPD/2002/CL8.htm (Last Visited July, 2010)

6. If defaulted loan is subject to litigation/s, then particulars of claims and contentions of the parties and their merits should be furnished.

7. It should be confirmed that no order restraining the initiation of proceedings under the NAB Ordinance has been passed by any competent court of law.

8. Cases where persons are notoriously known to have defrauded and/or have without any plausible argument deliberately failed to pay amounts due to banks and other Financial Institutions should be given priority. Before forwarding the case to the Governor, this aspect needs to be examined by President/Chief Executive.

9. Procedure prescribed in this Circular should be strictly adhered to in all future cases.

10. In cases where banks/NBFIs have already requested the Governor to make a reference to NAB, following procedure should be followed:

    (a) Further letter from President/Chief Executive setting out details as stated in paragraph 1 to 8 above should be sent to the Governor.

    (b) President/Chief Executive should specify cases which are to be given priority on the basis of the criteria stated in this circular.

11. Please note that procedure prescribed in this circular letter is in addition to procedures set out in Circular Letter No. 17 dated July 19, 2001 and Letter No. BSD/RU-55/X/NAB/14084/2001 dated October 2, 2001.

12. Whilst approaching the Governor to make a reference to NAB, President/Chief Executive should expressly and specifically confirm that prescribed procedures as notified from time to time have been strictly followed."

The notification no 8 regarding legal notice of recovery outlines the procedure to be adopted by the president of the Financial Institution to submit his reference to the governor state bank of Pakistan for onward reference to the national accountability bureau. It says that the governor state bank of Pakistan will make sure that the president of the Financial Institution against whom default has been committed files his comments on the reply of the customer to the thirty days

notice of the Financial Institution or if no reply has been given than to the comments if any of the customer on default of loan. This should be confirmed by the Financial Institution whether any settlement took place relating to the outstanding amount and the defaulted amount should be clearly stated for observance of the governor state bank of Pakistan. This should be mentioned as to how much amount is disputed and how much amount is admitted and which is not subject to dispute. The president should file his views on the disputed amount. Whether any litigation is pending on the defaulted amount should also be mentioned and if any stay has been granted by any court of law. Where persons are notorious for defrauding banks and other Financial Institutions or are defaulting without any due cause the president of the Financial Institution will give preference to such cases for reference to governor because of the serious nature of the crime. President has to certify in the end that procedures as prescribed in the Ordinance have been fully complied with before making a reference to the governor state bank of Pakistan.

We are of the view that procedures as prescribed in the circular no 8 regarding legal notice of recovery are helpful for recovery from the defaulters by the Financial Institutions/Banks. The concerned authorities should try to implement it in its true spirits so that the defaulted amounts of the Banks are recovered from the defaulters which is indispensible for the Country Economy.

4.4.2 State Bank of Pakistan's Circular No.17 regarding Legal Notice for Recovery Dated July 19, 2001

[290]"In the recent judgment delivered by the Honorable Supreme Court of Pakistan against (Accountability Ordinance), the Hon'ble Supreme Court held that before initiating any action against the willful defaulters, the authorities should give 30 days demand notice to the defaulter to pay up failing which the matter can be brought to the notice of the Governor State Bank of Pakistan, who will then issue a 7 days notice to the defaulter. All cases referred either directly to NAB or to State Bank in the past and under process should be dealt with afresh as per above procedure. This supersedes the instructions contained in Circular Letter No. 29

[290] http://sbp.org.pk/bsd/2001/cir-let-17-of-19-07-01.htm (Last Visited July, 2010)

dated 12th October 2000 and Circular Letter No. 01 dated 05th January 2001 of this Department."

Circular no 17 regarding legal notice for recovery prescribes that before the case will be referred to the governor state bank of Pakistan for reference by the Financial Institution, it shall send a thirty days demand notice on the defaulter demanding payment of outstanding amount failing which the matter would be brought to the notice of the governor state bank of Pakistan who will then send a seven day notice to the defaulter demanding outstanding amount or explain his position regarding default. This procedure has been prescribed on the direction of honorable Supreme Court of Pakistan. The matter is brought to the notice of governor state bank of Pakistan by following the procedure as has been outlined in the circular no 8. This circular no 17 is of further importance to the defaulter as the case keeps on lingering and the defaulter gets further time in the form of seven days notice. This notice is in addition to the process of reconciliation of liability under the National Accountability Bureau Ordinance and a defaulter who is well versed with law can get a chance to defeat the provisions of law as so many modes has been provided to him for reconciliation of his liability.

4.4.3 State Bank of Pakistan's Circular No.25 regarding Legal Notice for Recovery Dated June 27,2001

[291]"The Honorable High Court of Sindh in a judgment on Constitution Petition No. D-1896/2000 has issued following directions:

Quote: " We are of the considered opinion that the only pragmatic and practicable solution is that in all such cases the pending proceedings should be kept in abeyance with directions to the concerned authorities to serve a 30 days statutory notice on each alleged willful defaulter providing opportunity to submit explanation if any or to pay or return or re-pay the amount to any Bank, Financial Institution, cooperative society or a Government department or a statutory body or any authority established or controlled by the Government, the amount due and if the amount due is paid, returned or re-paid within 30 days of the service of statutory notice then it would not be a case of willful default and necessary steps shall be taken for withdrawal from prosecution and release of the accused. If the

[291]http://www.sbp.org.pk/dprd/2001/cir-25-06-01.htm (Last Visited July, 2010)

amount due is not paid with 30 days of the service of statutory notice as above, then a 7 days notice shall be served on the alleged defaulter to satisfy the Governor State Bank of Pakistan, that he has not committed any default. If an alleged defaulter is able to satisfy the Governor State Bank of Pakistan that he has not committed a willful default then the recommendations of the Governor State bank of Pakistan recorded in writing with reasons therein shall be submitted for final decision of the Accountability Court. If an alleged defaulter fails to pay or return or re-pay the amount due to the Bank, Financial Institution etc, with in the statutory period of 30 days of service of notice and alleged defaulter further fails to satisfy the Governor State Bank of Pakistan within additional 7 days period that he has not committed any willful default and the Governor State Bank of Pakistan holds the alleged defaulter to have prima-facie committed the guilt of willful default in his recommendations for the reasons recorded therein the Accountability Court may re-commence the proceedings from the stage where it was kept in abeyance." Unquote. The Banks/NBFIs are advised to comply with above orders of Hon'ble High Court of Sindh."

Circular no 25 serves as an explanation to circular no 17 regarding legal notice for recovery. It outlines the procedure to be followed by the Financial Institution and governor state bank of Pakistan while serving the demand notices. It says that after service of thirty days demand notice by the Financial Institution or seven day notice by the governor state bank of Pakistan, the defaulter is able to show that his case does not come within willful default or returns the defaulted amount than efforts shall be made for release of the accuse in case of thirty days demand notice and in the later case where seven day notice has been served the defaulter case will be referred to accountability court for further order for reconciliation of accused.

The notice no 25 needs to be amended as when the Financial Institution serves the thirty day demand notice the accused is not in custody because the arrest takes place after the governor state bank of Pakistan has filed a reference with the National Accountability Bureau on failure of the defaulter to respond to the seven days notice by the governor. Prosecution starts when the reference has been filed with the National Accountability Bureau as it is the job of the bureau to conduct prosecution and make arrest.

4.5 The Role of Conciliation Committee

Section 25 provides for the function of conciliation committee and 25(a) says that [292]"where a person has been arrested or is in the custody of NAB on the charge that he is guilty of committing the offence of willful default on account of non-payment of dues to a bank or Financial Institution or cooperative society, he may apply to the Chairman NAB for the reconciliation of his liability through Conciliation Committee and the Chairman NAB may refer the matter to a Conciliation Committee."

Section 25(b) says that the [293]"Conciliation Committee shall consist of a nominee of NAB, who shall be the Chairman of the Commission, a nominee of the Prosecutor General NAB, an officer of the Banking Cell of NAB nominated by the Chairman NAB, a nominee of the Governor of the State Bank of Pakistan being a senior officer of the State Bank well qualified in the profession of banking, a Chartered Accountant appointed by the State Bank of Pakistan, a Chartered Accountant appointed by the accused who will represent him and a Chartered Accountant appointed by the lender." Section 25(c) provides that "Conciliation Committee after examining the record and accounts of the bank and the written evidence produced by the accused through his Chartered Accountant, if any, shall determine the amount outstanding against the accused calculated in accordance with law, circulars, rules and regulations of the State Bank of Pakistan and the manner and schedule of repayment. The accused, if he so desires, shall be heard at the commencement and before the conclusion of proceedings provided that the Chartered Accountant representing the accused shall have access to him for obtaining instructions during the proceedings of the Conciliation Committee."[294]

Section 25(d) prescribes the time frame for conclusion of reference and says that [295]"the Conciliation Committee shall conclude the reference within thirty days and its recommendations shall be recorded by its Chairman and shall contain the views of all members of the Committee. The recommendations of the Conciliation Committee shall be submitted to the Chairman NAB."

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[292] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)
[293] http://www.sbp.gov.pk/l_frame/NAB_Ord_1999.pdf
[294] http://www.sbp.gov.pk/l_frame/NAB_Ord_1999.pdf (Last Visited July, 2010)
[295] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)

Subsection (e) says that [296]"the Chairman NAB shall consider the recommendations submitted to him. The Chairman NAB may accept the recommendations or may, for reasons to be recorded, pass such appropriate order including rejecting or modifying the same as he may deem fit." Subsection (f) provides that [297]"where the accused undertakes to repay the amount as determined by the Conciliation Committee or the Chairman NAB, as the case may be, the Chairman NAB may release the accused for the purpose of this Ordinance."

Section 25(g) says that "notwithstanding anything contained in this Ordinance or any other law for the time being in force, if the Chairman NAB is satisfied that any agreement entered into between a bank or a Financial Institution, a cooperative society and a lender is vitiated by the provisions of section 23 or any other provision of the Contract Act, 1872 (IX of 1872), or any other law or the same is collusive or is against public interest, he may refuse to take such agreement into consideration for the purposes of Conciliation Committee or the conclusion drawn by them."[298]

Subsection (h) provides that [299]"in the event of failure either of the Conciliation Committee to conclude the reference within thirty days of the commencement of the conciliation proceedings or the failure of the accused to accept and implement the decision of the Chairman NAB regarding the payment and matters relating thereto, the case shall be proceeded with and referred to the Accountability Court[300]."

4.6 Proceedings in respect of imprudent bank loans

Section 31D provides for proceedings in respect of imprudent bank loans and says that an [301]"inquiry, investigation or proceedings in respect of imprudent loans shall be initiated or conducted by the National Accountability Bureau against any person, company or Financial Institution on reference from the governor state bank of Pakistan[302]." NAB courts will proceed with the case of recovery of imprudent loans as is the case in recovery of other outstanding amounts. No special procedure

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[296] ibid.
[297] ibid.
[298] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)
[299] ibid.
[300] National Accountability Bureau Ordinance, 1999, Section 25-A.
[301] http://www.nab.gov.pk/Downloads/Doc/NAB%20ORD%202002.pdf (Last Visited July, 2010)
[302] National Accountability Bureau Ordinance, 1999, Section 31-D.

has been prescribed for cases involving imprudent loans. Imprudent loans are loans which have been advanced against the dictates of prudence e.g. loans forwarded on improper documentation or loan against a weak security.

We are of the view that imprudent loans need to be qualified in the definition clause of (Accountability Ordinance) as well as in the Financial Institutions recovery of finances Ordinance, 2001. The procedure regarding recovery of imprudent loans also needs further explanation as no procedure has been outlined. Only provision regarding initiation of case with regard to imprudent loans has been provided which is not sufficient.

4.7 Jurisdiction of Accountability Courts

Section 22 provides for jurisdiction of accountability courts and section 22(a) says that the [303]"Chairman NAB may inquire into and investigate any suspected offence which appears to him on reasonable grounds to involve serious offences as given in the Schedule to National Accountability Bureau Ordinance, and has been referred to him, or of his own accord."

Section 22(b) says that the [304]"Chairman NAB may, if he thinks fit, conduct any such investigation in conjunction with any other agency or any other person which/who is, in the opinion of the Chairman NAB, a proper Agency or person to be concerned in it[305]." The jurisdiction of accountability court extends to the offences listed in the schedule to the National Accountability Bureau Ordinance as courts take cognizance of offences on a reference from the National Accountability Bureau or the governor state bank of Pakistan as per the directions contained in the circulars of the state bank of Pakistan.

Accountability courts have been established in each of the province by the Government. The jurisdiction of the accountability courts is determined where offence cognizable by the accountability courts has taken place. If the offence in question takes place in the frontier province than the accountability court of Peshawar would have jurisdiction.

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[303] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)
[304] ibid.
[305] Ibid.Section 22.

4.8 Plea for bargaining

This is also known as voluntary return. In this regard section 25(1) says that [306]"where at any time whether before or after the commencement of trial the holder of a public office or any other person accused of any offence under this Ordinance, returns to the NAB the assets or gains acquired through corruption or corrupt practices; if the trial has not commenced, the Chairman NAB may release the accused; and if the trial has commenced, the Court may, with the consent of the Chairman, release the accused." This is known as plea bargaining.

Section 25(2) says that [307]"the amount deposited by the accused with the NAB shall be transferred to the Federal Government or, as the case may be, a Provincial Government or the concerned bank or Financial Institution, etc., within one month from the date of such deposit.

Accused can be persuaded without pressure or threat to agree on a settlement figure subject to the provisions of the Ordinance[308]." Person availing benefit of S.25 would be deemed to have been convicted under NAB and would stand disqualified for a period of ten years[309]. Plea of bargaining entered by accused during investigation, or at a subsequent stage, on acquittal must face the consequence given in S. 15 of the Ordinance viz disqualification to contest election or holding public office[310]. In the matter of plea of bargaining National Accountability Bureau has to consider the offer made by the accused person[311].

During earlier investigation, accused entered into plea bargain and after making down payment, they were released. After their release, accuse did not pay remaining installments of their plea bargain amount. Authorities issued notices under S.5(r) of (Accountability Ordinance) to the accused for the recovery of defaulted installments. Under plea bargain accused had offered sums which were accepted by the chairman NAB. Matter was referred to court and the court approved the amount of plea bargain, therefore, such amounts were determined by the court under the provisions of national accountability Ordinance, 1999. Special

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[306] http://pakistani.org/pakistan/legislation/1999/NABOrdinance.html (Last Visited July, 2010)
[307] ibid.
[308] PLD2000SC607
[309] PLD2003QUETTA1
[310] PLD2003SC837
[311] PLD2003PESH94

provision would prevail over general provision. Amount which had come within the scope of 33E of national accountability Ordinance, 1999 was required to be recovered as provided under the provision. Proceedings of willful default pending against the accused were abuse of process of law. Proceedings were quashed in circumstances[312].

Plea bargain could be entered into by the holder of a public office or by any other person on his behalf which would imply that it could be entered into on behalf of other persons by any person who made good said loss. Once the agency authorized plea bargain and the loss was made good, then the agency had to follow what was prescribed by S. 25 of national accountability Ordinance, 1999 which was to discharge such person from all liability in respect of matter or transaction in issue and could not go any further. Loss having been made good, intention of law and its spirit would demand that a similar treatment be extended to petitioner which was extended to other co accused who had been discharged of their liability after they paid entire loss. Matter was referred back to the trial court for arithmetical calculation of loss and recovery effected. If loss had been made goof, petitioner would also be discharged in accordance with law[313].

We are of the view that if the accused is a willful defaulter of the Bank/Financial Institutions and he is liable to repay the loan amount to the Bank/Financial Institutions than the bargain plea should be finalized with the written consent of the concerned Bank/ Financial Institutions. In case of no consent by the Bank/Financial Institutions the plea for bargain should be turned down.

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[312] PLD2008Kar38
[313] 2006PCr.LJ1115

CHAPTER-5

Conclusion and Recommendations

5.1 Conclusion

The Financial Institutions had been facing a great difficulty in recovery of its defaulted loans in Pakistan. Due to non existence of good law for recovery, it has become impossible to recover bed debts and efforts have been made to have helpful law for recovery many time. In this regard many laws for recovery of bed debts have been enacted but of no use and there was no good result of recovery.

The Financial Institutions (Recovery of Finances) Ordinance, 2001 is a special law that was enacted to meet the situation that had arisen in the country due to poor economic conditions and default of loans. It was promulgated to effect recovery from the loan defaulters in the shortest possible time. The court after receiving the plaint allowed 30 days to defendant to file leave to defend. If leave to defend is not filed the court had the power to proceed exparte. On filing of leave to defend the court would allow plaintiff to file reply to leave to defend. The arguments are heard by Banking Court on leave to defend and either leave to defend is allowed or case is decreed. Then evidence is recorded by the court of both the parties and arguments are heard before decision on the case. In the process, the court may award interim decree or the case may be compromised by the parties. Court could impose cost and ask the defendant to deposit the security amount where defendant delayed the outcome of the trial. On pronouncement, decree is automatically converted into execution proceedings in Banking Court. The decree holder is required to file detail of assets and court appoints an auctioneer. After the conduct of auction proceedings detail of auction proceedings are required to be filed before court and objection to auction proceedings are heard. If there is no security for enforcement, court may issue warrant of arrest of judgment debtors. Banks can sell mortgaged properties under section 15 of Financial Institutions (Recovery of Finances) Ordinance, 2001 which requires issuance of three legal notices and showing intention to sell properties. This is followed by publication of auction notice and inviting of sealed bids. Despite all these provisions, Banking Courts have failed to achieve their objectives.

In this special law of recovery Section 15 and Section 19 were incorporated whereby the Financial Institutions can sell the properties without the intervention of the Banking Court. However in case of Section 15 the Financial Institutions can send notices for demanding outstanding amount directly without having Decree against the Defaulter and whereas in case of Section 19 there would be a Decree against the Defaulter and the mortgage property can be sold by the Financial Institution with or without the intervention of the Court either by public auction or by inviting sealed tenders and appropriate the proceeds towards total or partial satisfaction of the Decree. Apparently these provisions seem to be favorable for the Financial Institutions to recover their bed Debts but unfortunately it has never been noticed that a recovery has been made under these provisions. Therefore it is necessary to make such provision of law under which these provisions can be implemented in its letter and spirits and recovery is made thereof by the Financial Institutions.

In this special law certain offences were defined under which the defaulters are supposed to be tried in the Banking Court under the provision of Criminal Procedure Code but again it is unfortunate that it has never been noticed that any person has been convicted under these provisions. Hence provisions are required for implementation of these provisions.

Under the Provision of Financial Institutions (Recovery of Finances) Ordinances, 2001 the Recovery Suit are supposed to be disposed of within 90 days but it has never been happened. Therefore provisions are required to implement these provisions so that the Banking Courts are able to dispose of suits within 90 days.

The National Accountability Bureau Ordinance, 1999 intends to establish National Accountability Bureau to eradicate corruption and corrupt practices that include default of loans and hold accountable all those persons accused of such offence and matters ancillary thereto as spelt out in the preamble of the Ordinance.

5.2 Recommendations

1. The Banking Courts need to do away with the old procedure due to which cases linger on for years in courts. We are of the view that they need to enforce the provisions of Financial Institutions (Recovery of Finance)

Ordinance, 2001 to expedite recovery and disposed of Recovery Suits within 90 days as provided in Section 13 of Financial Institutions (Recovery of Finances) Ordinance, 2001. It has been observed that most of the time delay tactics have been adopted on the basis of one reason or another specially on the grounds that the Counsel is busy in High Court. Such plea should be checked to know the reality. Further if the Counsel is really busy then in this regard rules may be prescribed that how many times an adjournment can be given on this ground to avoid unnecessary delay in process of the Banking Court proceedings.

Despite of the above provisions to dispose of Recovery suits within 90 days, still the suits pending in Banking Courts take years to complete. The court is empowered under the Ordinance to ask the defendant to furnish security if the proceedings continue beyond a period of ninety days due to lapse on the part of the Defendant and it may pass interim or final decree if the defendant fails to furnish such security. This provision should be implemented.

2. The Federal government appoints generally district judges as Judges of Banking Courts and it has never been noticed that a Judge of High Court has been appointed as Judge of Banking Court. The District Judges appointed as Judges of Banking Court have mostly never remained familiar with the financial and banking transactions. Therefore they face great difficulties in understanding of the banking matters while deciding banking litigations.

   The term of the Banking Court Judges is three years. This does not seem appropriate because when the Judges are getting familiarity and clarity with the Banking matters and litigations they usually get transferred and new Judges are appointed on their places. It would be in the interest of Justice that once the District Judge is appointed as Judge of Banking Court, he should remain in the banking field and should not be called back to the District litigations. However he may be transferred from one Banking Court to another so that he may not serve at one particular Banking Court for the period of more than 3 years.

It would also be in the interest of justice if the Federal government may appoint the High Court Judges as Judges of the Banking Court who are more experienced and knowledgeable so that they will handle the banking matters and litigations expeditiously.

3. The High Courts should supervise the process of Banking Court as to whether law laid down by the Financial Institutions (Recovery of Finances) Ordinance, 2001 is being followed or not.
4. We are of the view that to ensure effective realization of securities, banks need to introduce a system where bank officers who scrutinized the securities for repayment of loan are also held liable in case of loss to bank where securities were below the value of loans and prescribed procedure is not followed.
5. The State Bank of Pakistan should provide guidelines to all Banks that the Bank officers who monitor securities against loans should adopt such a procedure where a legal advice must be obtained from a legal Advisor in each case and according to the legal advice all the documents of loan and security documents should be obtained. Before making a disbursement all the documents must be vet by the Legal Advisor and a final legal advice must be made mandatory in each case certifying that the Security documents are executed properly and the interest of the bank is safe.
6. We are of the view that banking law needs to be amended so that bank officials who scrutinized and awarded the loans should also be held responsible in case if prescribed procedure and rules are not followed.
7. In most of the cases the Defendants file a false statements and documents due to which the cases are delayed. Such false statements and documents should be declared as Offences. Hence there must be a provision in law under which these Offences would be punishable with imprisonment and fine.
6. Notices should not be issued to judgment debtor. Upon pronouncement of judgment and decree by Banking Court, the suit itself stands converted to execution proceedings and on expiry of thirty days the court is expected to

proceed with the execution of decree. The period of thirty days obviously has been made available to judgment debtor to avail the remedy of appeal. .

7. The recovery procedure under Section 15(2) seems suitable for the Financial Institutions. It requires that in case of default in payment by customer, Financial Institution might send a notice to mortgagor demanding payment of mortgaged money outstanding within 14 days from service of notice and second notice in this regard is to be served within the next 14 days. Mortgagor if fails to pay the amount after service of second notice, then Financial Institution has to serve a final notice demanding payment within 30 days from service of notice on customer. Upon service of final notice, Financial Institution acquires right to recover rent and profit from mortgaged property till the time notice was withdrawn and to sell mortgaged property without intervention of court by public auction. Three notices served upon plaintiffs would satisfy requirements of S. 15(2) of the Ordinance. We think that this provision of law is helpful for recovery provided it is implemented without any hurdles such is stay from the superior courts and other administrative hurdles.
8. The sale of mortgaged, pledged or hypothecated property by the Financial Institutions on its own would be helpful if it is made practicable. But in most of the cases as the Defaulter does not handover or leave the possession of their property. Financial Institutions require the services of police or other security agency to proceed with sale and auction of mortgaged property. In this regard Section 19(6) should be implemented as and when required in its true spirit so that Financial Institutions are always accompanied by police or personnel from other security agency when they are proceeding with sale of mortgaged, pledged or hypothecated property.
9. We are of the view that Banking Court while granting leave may impose such conditions as deemed appropriate including the condition of deposit of cash or furnishing of securities. This clause should be implemented meticulously so that Financial Institutions get benefit out of it.
10. The parties should be made to submit their examination in chief by way of affidavit so that time consumed in recording of evidence is curtailed.

11. The Banking Court and other Financial Institutions are empowered to seek assistance of police or other security agencies. We are of the view that procedure should be prescribed in banking laws by adopting which a bank can secure the assistance of police.
12. We are of the view that the provision of section 13 Financial Institutions Recovery of Finances Ordinance, 2001 regarding time frame of suit should be implemented in its true spirit so that the Plaintiffs get their money back in a reasonable time instead of long awaited time in recovery procedure.
13. We are of the view that where sale of mortgaged property which does not meet the outstanding amount should not deter the Banking Court from proceeding with execution, and other assets of the judgment debtor should be put to auction. Amendment needs to be carried out in law to that affect.
14. The provisions of section 1 of section 21 of Financial Institutions (Recovery of Finances) Ordinance, 2001 are not mandatory and court can proceed with the disposal of fine and cost imposed under the Ordinance in the variety of modes. We are of the opinion that cost and fines imposed under the Ordinance should be utilized to compensate the court staff. This would lesson the incidence of corruption within the courts.
15. We are of the view that if the accused is a willful defaulter of the Bank/Financial Institutions and he is liable to repay the loan amount to the Bank/Financial Institutions than the bargain plea under the (Accountability Ordinance) should be finalized with the written consent of the concerned Bank/ Financial Institutions. In case of no consent by the Bank/Financial Institutions the plea for bargain should be turned down.
16. [314]"Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court should have powers notwithstanding such default to proceed to decide the suit forthwith."

[314]http://www.parliament.go.tz/Polis/PAMS/Docs/49-1966.pdf (Last Visited July, 2010)

17. [315]"The parties should be bound to produce their witnesses for purposes of their respective cross examination on the day fixed by the court."
18. The appeals against the interim orders of the Banking Courts and resort to constitutional jurisdiction against orders at intermediate stages arising out of recovery proceedings should be discouraged by the higher courts.
19. We are of the view that adjournment of recovery proceedings should not be allowed except under unavoidable circumstances on an application moved by a party supported by affidavit. In such cases adjournment should not be made for a period exceeding three days.
20. The counsels of both the parties should be bound by rules to file wakaltnama of an assistant lawyer in the Banking Court to help the judge in their absence when they are busy due to any reason. This would expedite the process beside training young lawyers in the profession of advocacy.
21. The salaries of not only judges of Banking Courts and their staff but even those of secretarial/personal staff, attached with the judges of Banking Courts are extremely low. This seriously impairs administration of justice and needs to be remedied at the earliest by the government.
22. We are of the view that provision should be made so that progress of all recovery cases which involve huge amounts beyond a certain limit should be submitted to the High Court after a time period. This would ensure a check on the processes of Banking Courts.
23. The Chief Justices in each of High Court should issue appropriate instructions to the Banking Courts for expeditious disposal of old cases and other categories of cases to be decided by them within a specified time.

[315] http://www.dawn.com/2000/03/01/nat3.htm (Last Visited July, 2010)

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