A *SHARIAH* AND LEGAL APPRAISAL OF "THE FINANCIAL INSTITUTIONS (RECOVERY OF FINANCES) ORDINANCE 2001"

THESIS
LL.M Islamic Commercial Law

Supervised By

Dr. Abdullah Rizk Al Muzaini
Assistant Professor Shariah

Submitted By

Yasir Nazir
Reg No. 103 FSL-LLMICL/F12

DEPARTMENT OF SHARIAH
FACULTY OF SHARIAH & LAW
INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD

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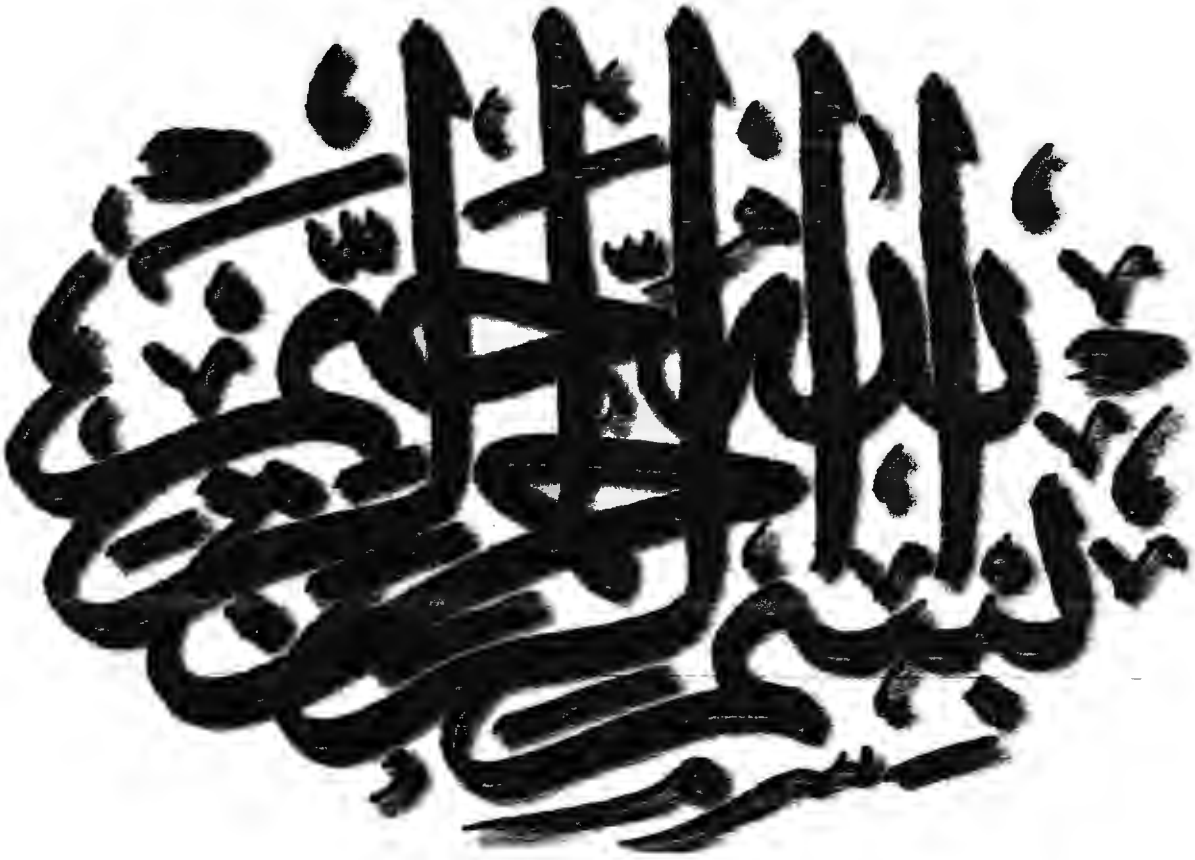

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طريق الهجرتين وباب

السعادتين لابن القيم رحمه الله

ص 582

DEDICATION

I dedicate my work

To my loving grandparents, my grandfather Mr. Abdul Ghafoor who has always been a source of inspiration for me as he is my teacher since my childhood and my grandmother Mrs. Shamshad Akhtar who brought me up and cared me more than my mother in my childhood.

To my Loving parents, my father Mr. Nazir Hussain Nasir who is the most beloved to me in this world and my mother Mrs. Khalida Nazir who always prayed for my success in life.

And to all my loving family members who always love me a lot.

APPROVAL SHEET

A *SHARIAH* AND LEGAL APPRAISAL OF THE FINANCIAL INSTITUTIONS (RECOVERY OF FINANCES) ORDINANCE, 2001

By

YASIR NAZIR
103-FSL/LLMICL/F12

Accepted by the Viva Exam Committee, International Islamic University, Islamabad, in the partial fulfillment of the requirements for awarding the degree of LL.M (Shariah) in discipline of Islamic Commercial Law.

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DECLARATION

I Yasir Nazir s/o Nazir Hussain Nasir , holding Registration No. 103-FSL/LLMICL/F12 hereby declare that "A *SHARIAH* AND LEGAL APPRAISAL OF THE FINANCIAL INSTITUTIONS (RECOVERY OF FINANCES) ORDINANCE, 2001"

submitted by me in partial fulfillment for the degree of LL.M Islamic Commercial law is my original work and has not been submitted or published earlier. All sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Student: Yasir Nazir

Signature: _____

Dated _____

ACRONYMS

AIR	All India Review
PLJ	Pakistan Law Journal
CLC	Civil Law Cases
PTD	Pakistan Tax decisions
CLD	Corporate Law Decisions
YLR	Yearly Law Reports
H.C	High Court
D.B	Division Bench
MLD	Monthly Law Digest
P.L.D	Pakistan Legal Decisions
S.C	Supreme Court
SCMR	Supreme Court Monthly Review
AAOIFI	Auditing and Accounting OF Islamic Financial Institutions

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ABSTRACT

Recovery of debts is one of the biggest problems for financial institutions. This research has paved the way for successful recovery according to the rules of Shariah. It is recommended that all defaulters are not willful defaulters. The person who is in default due to poor condition must not be treated as willful defaulter and nothing can be imposed as penalty to compensate financial institution upon the customer who has committed default. Powers of banking court are tilted in favor of banks and courts have no powers to facilitate the customer under the cover of law. All the provisions of this ordinance must be strictly adhered and followed by the courts in order to decide the cases in minimum time period. There should be discretionary ample powers with banking court to secure ends of justice.

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THESIS STATEMENT

The issue of recovery of debts is important in financial institutions, the law relating to recovery of debts "The Financial Institutions (Recovery of Finances) Ordinance, 2001"[1] has many legal lacunae, some of its provisions are inconsistent with Islamic law, hence it requires thorough review and examination from both *Shariah* and legal perspective.

INTRODUCTION

Banks and financial institutions play a vital role in the economy of a country. The issue of recovery of debts is very important in the business of financial institutions. The current law relating to the issue of recovery of loans and debts is "The Financial Institutions (Recovery of Finances) Ordinance, 2001." The law was promulgated for ensuring speedy and successful recovery of debts from debtors. It is a debate that this law has many legal lacunae some of them I would like to mention here as example.

- Firstly, section 15 of the ordinance was declared null and void by the Lahore High Court[2], it was mandatory that some of its sub-sections were to be read with section 19, now there is no judgment for section 19.
- Sub- clause B, C of Sub-section 4 of section 10 is repeated and same.[3]
- Section 10 states that where application for leave to defend is rejected or where defendant fails to fulfill the conditions attached to the grant of leave to defend, the banking court shall forthwith proceed to pass

[1] ORDINANCE NO. XLVI of 2001 at 30-09-2001.
[2] 2009 CLD 257
[3] Section 10 of The Financial Institutions (Recovery of Finances) Ordinance, 2001.

judgment and decree in favor of the plaintiff against the defendant.[4] This is clear violation of Right of fair trial which has been guaranteed under the Constitution of Pakistan.[5]

- The world "shall" has been used for everything to be done but there is no penal clause for the person who will not abide by it because courts held that every 'shall' is not binding and mandatory.[6]
- This law was made for speedy recovery of finances, section 13 of the ordinance states that court shall dispose of the case after granting leave to defend in ninety days but the whole ordinance is silent about time frame when application for leave to defend is rejected.[7]

In the third chapter of this dissertation, these lacunae shall be analyzed in the light of principals of law and recommendations shall be given in this behalf. Pakistan is one of those countries which have taken major steps towards the Islamization of their legal system particularly in economic and financial sector. The most important measures taken for Islamization in Pakistan are as follows:

- Article 2 of the constitution of Pakistan, according to this article Islam shall be state religion.[8]
- Creation of the Council of Islamic Ideology to bring all existing laws in conformity with injunctions of Islam as laid down in the Holly Quran and *Sunnah*.[9]

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[4] Ibid
[5] Article 10 A of The Constitution of Pakistan, 1973.
[6] 2004 CLD 817 (DB) P.820 B
[7] Section 13 ibid
[8] Article 2 of the Constitution of Pakistan, 1973.
[9] Article 227 of the Constitution of Pakistan.

- Through eighth amendment in the Constitution of 1973 creation of Federal *Shariat* Court(F.S.C)[10] was taken plaace.

Usury and banking interest have been included in definition of *Riba* which is war against Allah and His prophet (P.B.U.H) as declared in The Holy Quran in these words It was held by the *Shariah* appellate bench of Supreme Court of Pakistan[11] while discussing the following verse of The Holy Quran "O ye who believe! Observe your duty to Allah, and give up what remainth (due to you) from usury if you are true believers and if ye do not, then be warned of war (against you) from Allah and His Messenger. And if ye repent then ye have your principal (without interest) wrong not and ye shall not be wronged."[12]

يَا أَيُّهَا الَّذِينَ آمَنُوا اتَّقُوا اللَّهَ وَذَرُوا مَا بَقِيَ مِنَ الرِّبَا إِنْ كُنْتُمْ مُؤْمِنِينَ فَإِنْ لَمْ تَفْعَلُوا فَأْذَنُوا بِحَرْبٍ مِنَ اللَّهِ وَرَسُولِهِ وَإِنْ تُبْتُمْ فَلَكُمْ رُءُوسُ أَمْوَالِكُمْ لَا تَظْلِمُونَ وَلَا تُظْلَمُونَ.

As a result of above mentioned historical steps which were taken for Islamization of our system, there is desperate need to make our financial system according to Islamic law particularly the law relating to procedure of recovery of debts owing to its enormous importance in banking system. On the other hand, it is essential requirement to eliminate legal lacunae and all contradictions from the law relating to recovery of debts named as" The financial institution (recovery of finances) ordinance, 2001".Some of the provisions of the ordinance are inconsistent with

[10] Eighth Amendment in the Constitution of Pakistan,1973 (Gazette of Pakistan, extraordinary,11th November,1985).

[11] *PLD* 2000 SC 225.This case has been remanded in Federal Shariat Court for retrial and pending still.

[12] Al Baqara verse no 278,279,THE GLORIOUS QURAN TEXT AND TRANSLATION,ISLAMIC RESEARCH INSTITUTE,INTERNATIONAL ISLAMIC UNIVERSITY ISLAMABAD,Year not known.

Islamic law I would like to mention some issues which need examination from *Shariah* point of view.

- In Pakistani law every default is willful default[13], same procedure for both the debtors who commits default willfully while having capacity to pay his debt and the debtor who is in default due to his poor financial condition. Islamic law prohibits punishment for poor debtor and suggests an extension of time for his repayment.(وإن كان ذو عسرة فنظرة إلى ميسرة)[14]
- The issue of liability of guarantor needs comparative study in the light of *Shariah* and law.
- Section 3 states the duty of customer is to fulfill his obligations to financial institution, the word " obligation" means in the Ordinance extension of time in repayment, renewal of finance and cost of funds which is *Riba* and against Islamic law.[15]

SIGNIFICANCE OF RESEARCH

The issue of recovery of debts is of paramount importance in the businessof banking and financial institutions because they play a vital role in the economy of a country. Islamic law has provided the best way for the treatment of debtor for recovery of debts after the default by the debtor. Islamic law also guides us how to deal with delinquent debtor and treatment of debtor who is not willful defaulter. The Financial Institutions (Recovery of Finances) Ordinance, 2001 is insufficient law regarding treatment of delinquent and insolvent debtor. There is need is to make the Ordinance of 2001

[13] PLD 1964 Peshawar 101
[14] Verse no 280 Al Baqara chapter no 2, *Al Quran*
[15] Section 2,3. ibid

consistent with Islamic law because it is demand of the Constitution of Pakistan 1973. There is immense need to eliminate legal lacunae from the Ordinance. There is a great debate of legal scholars that this law is very harsh and tilted in favor of banks. This research will make it efficient for successful recovery of debts and will make this law consistent with Islamic law.

STATEMENT OF THE RESEARCH PROBLEM

- What are the legal lacunae in the Financial Institutions (Recovery of Finances) Ordinance, 2001?
- Is the Financial Institutions (Recovery of Finances) Ordinance, 2001 consistent with Islamic law?
- What is the treatment of delinquent debtor in Islamic law and the ordinance?
- What is the treatment of poor debtor in Islamic law and the ordinance?
- What is the solution for making this law effective and complaint with Islamic law?

HYPOTHESIS

- There are no legal lacunae in "The Financial Institutions (Recovery of Finances) Ordinance, 2001" and this law is consistent with Islamic law.
- There are some legal lacunae in "The Financial Institutions (Recovery of Finances) Ordinance, 2001" and this law is entirely inconsistent with Islamic law.
- The financial Institutions (Recovery of Finances) Ordinance, 2001 is partially consistent with Islamic law.

LITERATURE REVIEW

The debate over the issue of recovery of debts is not new. Many *Shariah* scholars and legal researchers have written much about in different aspects of this topic because it is issue of paramount importance in the field of financial institutions because recovery always has been an issue of great importance when we talk about the Islamization of our financial system in order to make it according to injunctions of Islam as laid down in the Holy Quran and *Sunnah*. There is a research gap which I want to fill up is that no one has done work on the issue of recovery from Shariah and legal perspective. This research shall make this law in consistent with Islamic law and shall make it effective for successful recovery after elimination of legal lacunae from this Ordinance.

- **Khwaja Ahmad Hosain wrote an article named "Financial Institutions (Recovery of Finances)Ordinance,2001.**[16]

  The current law for recovery of debts in Pakistan is "The Financial Institutions (Recovery of Finances) Ordinance, 2001. This law was promulgated on 30th of august 2001 and this law repealed previous law named "The Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act 1997". The writer of this article made comparative study of both the laws and pointed out legal lacunae in previous law for which new law was needed to be promulgated for speedy, efficient and successful recovery of debts . The

[16] Khwaja Ahmad Hosain, "Financial Institutions(recovery of finances)ordinance, 2001 ",*CLD* Vol.:3 (2002),8-14.

writer holds opinion that the Act of 1997 was denounced as a draconian law having many legal lacunae. It was hoped that new law would ensure quick recovery of debts. The Ordinance of 2001 does contain some provisions which are harsh for customers and, in particular, for judgment debtors.

There is still room to work upon current law of recovery for elimination of legal lacunae from it and for making this law efficient for successful recovery.

- **Saalim Salam Ansari wrote an article named "Financial Institutions (Recovery of Finances) Ordinance,2001." A critical study.**[17]

  In this article, the writer discussed this ordinance critically and pointed out many legal lacunae and serious contradictions from the ordinance. The writer made the legal study of the ordinance. He neglected the aspect of Islamic law. In the end of all discussion the writer suggested the re-promulgation of said ordinance with modifications.

- **M.M. Malik advocate wrote an article on the topic "Banking Courts and Recovery of Loans."**[18]

  The writer of this article holds opinion that the special law for speedy recovery of loans is tilted against the bank defaulters. He also pointed out some points which are against the spirit of law. The writer threw light on the issue of auction and highlighted its problems which are faced during the auction proceeding.

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[17] Saalim Salam Ansari, "Financial Institutions (recovery of finances) ordinance,2001", *CLD.*: vol.3(2002),30-32.

[18] M.M.Malik Advocate, "Banking courts and recovery of loans", *CLD.*: vol.3 (2003)15-18.

- ***''Qarz Na Dahindgi K Masail Or Inka Shari Hal*** **''This research was published in** [19]**البیان**

  This article points out that both the solvent and insolvent debtor are being treated in the same manner which is against the spirit of Islamic law. There must be different treatment for solvent and insolvent debtor. This article throws light on the reasons for default of payment of debts. It is also suggested that how to avoid default of debts. This article also tells us the different treatment for solvent and insolvent debtor along with some recommendations in this regard.

- ***''Ghair Soodi Bank Kari Mutailqa Fiqhi Masail Ki Tehqiq or Ishkalat Ka Jaeza''*** **written by Mufti Muhammad Taqi Usmani**[20]

  In the above mentioned book, the writer responded after a fatwa was brought before the people in support of illegitimacy of Islamic banking .The writer replied all objections relating to Islamic banking in detail supporting his arguments from the Quran, *Sunnah* and books of classical literature of *fiqh* from different schools of Islamic law. He has devoted one chapter of his book on the topic of compulsory charity which is awarded to debtor through his own statement in case of willful delay in paying off his debt. He argued the legitimacy of compulsory charity and held opinion that it is best option for successful recovery in Islamic law till now. He holds opinion that there are

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[19] Research council of al Madina Islamic research center, "*Qarz na Dahindgi k Masail or Inka Shari Hal*" *Al Bayaan* 7/6 (2013), 288-300.

[20] Mufti Muhammad Taqi Usmani, *Gher soodi bankari mutaleqa fiqhahi masial ki tehqeqor ishkalat ka jaeza* (Karachi: Quranic studies publishers, 2009), 280.

certain conditions for legitimacy of compulsory charity, firstly, the delay in payment by debtor must be willful not because of genuinely inability to pay off debt. Secondly, the amount received in case of compulsory charity must be spent for charitable purpose under the supervision of *Shariah* supervisory board of that bank. The bank cannot use that amount for its own purpose at any cost.

- **''Door E Hazar K Mali Muamlat Ka Shari Hukam'' this book is written by Hafiz Zulafqar Ali** [21]

  This book is worth reading for a student who wants to know about modern Islamic commercial law. The writer very beautifully discussed very important issues of modern commercial problems and application of Islamic law to them. He devoted last chapter of his book relating to my topic which is recovery of debts. He, on his first instance, laid stress on paying off debt by debtor according to his promise which he made with creditor. Secondly, the writer quoted many Hadiths in the support of argument that demanding debt is not appreciated by Islamic law. It should be done in desperate need. He also discussed the hadith of our beloved Holy prophet (PBUH) that all sins will be forgiven from martyr but not his debts. He threw light on the matter of pledge in case of debts and its *Shariah* rulings.

- **''Understanding Islamic Finance'' book written by Muhammad Ayub**[22]

  This is book is a thorough study of Islamic finance. The writer elucidated Islamic finance and proved its need in modern era. One complete chapter of

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[21] Hafiz Zulafiqar Ali, *Door e hazir k mali muamlat ka shari hukam* (Lahore: Abu Hurrera Acadmy,2010 3rd Addition), 232-240.

[22] Muhammad Ayub, *Understanding Islamic finance* (London: John Wily &Sons, 2007), 710.

his book is related to my topic which is chapter no.7. In this chapter, the writer discussed the issue of debts and loan in detail. He stated basic guidelines for debtor and for creditor in the light of the *Quran* and *Sunnah*. He also discussed the issue of remitting a part of loan and payment. He threw light on the issue of penalty on default in paying off debt and the issue of insolvency of debtor. He also discussed the issues of time value of money in debts and loans, gracious payment of debt, assignment of debt, guarantee in debts and pledge in debts lastly explained the issue of sale of debt. It was a broader study on the issue of debts as far as my topic is concerned it is a specific area which deals with solvent debtor and insolvent debtor in the light of *Shariah* and law. There is need to work upon this topic more.

- **A.A.O.I.F.I Shariah Standards**[23]

Accounting and Auditing Organization for Islamic Financial Institutions is the organization which has made forty nine standards on different issues of *Shariah* in Islamic banking. Standard no.3 deals with treatment of delinquent debtor, the issue of punishment in the shape of money in case of default and non-material punishment in case of default has been discussed in detail with arguments from the *Quran* and *Sunnah*.Standard no. 43, on the other hand, deals with insolvent debtor with arguments supported by the *Quran* and *Sunnah* on the issue of restriction on insolvent debtor and sale of properties of him after being declared insolvent by the court. Pakistani law for recovery of

[23] Shariah Standards. Accounting and Auditing Organization for Islamic Financial Instititions,1429 H, 2008 A.D

debts has same procedure for delinquent and insolvent debtor. There must be separate procedure for treatment of the both.

OBJECTIVES OF RESEARCH

- This research will pave the way for elimination of legal lacunae and loopholes from "The Financial Institutions (Recovery of Finances) Ordinance, 2001." Which are being exploited by parties, creditors and debtors, for their ill benefits.
- This study will point out legal lacunae and contradictions from "The Financial Institutions (Recovery of Finances) Ordinance, 2001.
- This research will point out contradictions of this law which are inconsistent with Islamic law.
- This study will be helpful in making this law fully consistent with Islamic law.
- This study will ensure the efficient, prompt and successful recovery procedure for the recovery of debts at the end of this research.

RESEARCH METHODOLOGY

This research will be descriptive in nature. It will be analytical and comparative study of Pakistani law in *Shariah* perspective. The primary sources of Islamic law will be consulted along with the books of classical literature of *Fiqh* of different schools of Islamic law. Secondary sources such as books, articles, statues, case laws and journals of western and Muslim writers would be used in this research. Opinion of jurists and eminent scholars will be used in this research. I will rely on library material as well as internet will also be used for the collection of data. The study is supposed to consist of four main chapters with the conclusions and recommendations at the end

CHAPTER –I

Introduction to Recovery of Debts

1.1. Introduction

The purpose of enacting law is to regulate the society and law recognizes rights and duties of everyone who is living in that politically organized society which is called state or country in this modern age. Banks and financial institutions play a vital role in the economy of a country. The issue of recovery of debts is very important in the business of banks and financial institutions. In this dissertation, the recovery procedure of debts under "The Financial Institutions (Recovery of Finances) Ordinance 2001" will be analyzed and studied from legal and *Shariah* perspective. The area of my research shall be confined to the FIO 2001, the recovery of debts of individuals and other legal entities under other laws will not be brought under discussion.

In case of default the financial institutions first try to recover the outstanding loan/finances without intervention of the court. In this regard, in the beginning they first issue letters and legal notices for payment. Further financial institutions put pressure on the defaulters through visits/follow up by their recovery agents. Meanwhile the parties may at any time try to negotiate and make settlement and they may do this in any manner that they want to resolve their dispute.[24] If after using all said means the financial institutions fail to recover their amounts, then they have to go to banking courts where they file a suit for recovery against the defaulter under "The Financial Institutions (Recovery of Finances) Ordinance 2001" (FIO 2001). This law was promulgated for the

[24] Roger Mason, The Complete Guide to Debt Recovery (London:Thorogood Publishers Ltd.,2006),8

successful recovery of debts from defaulters. It provides summery procedure for banking court to decide the cases within short time period of ninety days after granting leave to defend to defendant. This law has many legal lacunae and some of its provisions are inconsistent with *Shariah*. This research will pave the way to eliminate the legal lacunae and loopholes which are being exploited by the parties(debtors and creditors) and point out provisions which are inconsistent with *Shariah*.

1.2. Brief History of Recovery laws in Pakistan

There was no special law for recovery of debts for banks and finantional institutions after the creation of pakistan. They used to use the forum of civil courts under The Code of Civil Procedure, 1908 for recovery of defaulted debts and settlement of disputes with their customers where they were treated as ordinary litigants. No special privilege was attached to them. A lengthy procedure was required to redress their grievances in recovery proceedings. A long time was required to decide the recovery cases. In this way, the defaulters used to get their ill benefits by procrastinating the process of law. It was difficult for banks to attain justice in a short time[25].

The first special law was made in this regard for speedy disposal of disputes of banking companies with their customers, Banking companies (Recovery of loans) Ordinance 1978 was promulgated, which was further re-enacted with certain modifications and repealed ordinance came into force on 27th of March, 1979. It was first time, special banking court was established to decide the cases. This law was followed by Banking Tribunals Ordinance 1984. Further development was made on 2nd of June 1997

[25] Shahid Ikram Siddiqi,Practical Approach To The Banking Laws in Pakistan(Lahore;Kashif Law Book House,Year not Known)

when Banking Companies (Recovery of loans, Advances, Credits and Finances) Act 1997 was promulgated. This law was repealed and new law was promulgated on 30th of August 2001 "The Financial Institutions (Recovery of Finances) Ordinance 2001." Special banking court has been established and summary procedure has been adopted under this law to decide the cases in ninety days after granting leave to defend to defendant. Many laws deal with the procedure of recovery of debts in Pakistan, civil courts have powers to entertain suits for recovery under section 9 of C.P.C 1908. The procedure of recovery of arrears of land revenue has been prescribed under section 80 to 90 of The West Pakistan Land Revenue Act, 1967. Order xxxvii (37) of C.P.C deals the procedure of recovery of debts created under negotiable instruments. My area of study is the present law which provides special procedure for banks and financial institutions for recovery of debts "The Financial Institutions (Recovery of Finances) Ordinance 2001."

1.3. Some Terms Defined in the Light of Law

1.3.1. What is Loan

Black's Law dictionary defines loan in these words "Loan is an act of lending; a grant of something for temporary use, a sum of money lent at interest"[26]. Loan has been defined in another way in these words as "Money advanced to a borrower, to be repaid at a later date, usually with interest"[27]. "The act of giving money, property or other material goods to another party in exchange for future repayment of the principal amount along with

[26] Black's Law Dictionary, Ninth Edition,2009 P.1019
[27] http://www.answers.com/topic/loan (Last visited January 2015)

interest or other finance charges. A loan may be for a specific, one-time amount or can be available as open-ended credit up to a specified ceiling amount"[28].

Another online dictionary defined loan that "An amount of money that is given to someone for a period of time with a promise that it will be paid back"[29]. In a case decided by Lahore High Court the word loan has been defined in these words "It is not necessary to constitute a loan that money should be handed over to borrower, money advanced in past can be a loan"[30]. In another case division bench of Lahore High Court stated that "loan is a sum to be returned after a certain or uncertain period with or without interest"[31]. After studying all these definitions we can say that loan is related to money which is mostly giving of money to any person, who is called debtor, for his use to get benefit from it then giving it back to the real owner of that money who is called creditor. The contract of loan is restricted to money.

1.3.2. What is Debt

Debt has been defined in Black's Law dictionary in these words "Liability on a claim; a specific some of money due by agreement or otherwise or a nonmonetary thing that one person owes another such as goods or services"[32]. Online legal dictionary defines debt as "Money, goods, or services that one party is obligated to pay to another party"[33]. Another dictionary states debt in these words "Debt includes any liability in respect of any obligation to repay capital sums by way of annuity. It also means any pecuniary liability weather payable presently or in future under a decree or order of civil court or revenue

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[28] http://www.investopedia.com/terms/l/loan.asp(Last visited January 2015)
[29] http://www.merriam-webster.com/dictionary/loan(Last visited January 2015)
[30] PLD 1979 Lahore 252
[31] 2006 PTD 386(DB) P.393
[32] Black's Law Dictionary, Ninth Edition,2009.P.462
[33] http://www.answers.com/topic/loan(Last visited January 2015)

court"[34]. Sardar Iqbal while defining legal terms defined debt as "When pecuniary liability has come into existence and has been qualified or is capable of quantification on the basis of an admitted contract or principles embodied in law, a debt come into existence"[35].

In a case court defines debt that "A fixed and certain obligation to pay money or some other valuable thing or things either in present or in future is debt"[36]. We can say that debt is a liability which the debtor is bound to discharge by, it might be in terms of money or to give some service. We can say that debt is a wider term than loan because loan is specific to obligations relating to money. As a result we can say that every loan is debt but every debt is not loan because debt is wider term than loan.

1.3.3. **The Term 'Finance' Defined**

The Black's law dictionary defines it "That aspect of business concerned with the management of money, credit, banking and investment"[37]. The F.I.O. 2001 defines finance in these words "Finance includes any amount due from customer to a financial institution under a decree passed by civil court or an award by an arbitrator; any other facility availed by a customer from a financial institution"[38]. We can say that finance is the name of liability which must be discharged by customer according to contact with financial institution, it is debt upon customer.

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[34] P Ramanatha Aiyar's Concise Law Dictionary (Nagpur:Lexis Nexis Butterworths Wadhwa ,2012),327

[35] Sardar Muhammad Iqbal Khan Mokal,Law Terms and phrases(Lahore:Law Publishing Company ,1982)292

[36] 1987 CLC 2536 P.2540 B

[37] Black's Law Dictionary, Ninth Edition,2009.P.706

[38] Section 2(d), of Financial Institutions (Recovery of Finances) Ordinance, 2001 XLV of 2001.(FIO,2001)

1.3.4. **The Term 'Obligation' Defined**

The term obligation defined in a case in these words "This obligation would mean only an obligation vis-à-vis the "finance" and nothing more"[39]. Under FIO, 2001 obligation is restricted to pay off the finance to financial institution according to contract. We can say that obligation is also the other name of debt within the meaning under F.I.O, 2001.

1.4. The Term Creditor and Financial Institution

The term creditor and Financial Institution are considered to be synonyms in this dissertation. Creditor is defined in these words "Creditor is one to whom a debt is owed; one who gives credit for money or goods."[40] Financial institution is defined in the Ordinance in these words "Any company whether incorporated within or outside Pakistan which transacts the business of banking or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a government savings bank, but excludes the State Bank of Pakistan, 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"[41]. 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 when a customer defaults in discharge of his obligations relating to finance under the Financial Institutions (Recovery of Finances) Ordinance, 2001.

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[39] 2003 CLD 1007

[40] Black's Law Dictionary, Ninth Edition,2009.P.424

[41] Section 2(a) of FIO, 2001

1.5. The Term Debtor Includes Borrower and Customer

The term borrower and customer can be called debtor because debtor is broader term than these two. "Borrower is a person or entity to whom money or something else is lent"[42]. In F.I.O customer has been defined as "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"[43].

"Debtor is a person who owes an obligation to another; obligation to pay money"[44]. In the light of these definitions, we can say that customer becomes debtor and financial institution becomes creditor after taking finance from financial institution. Under F.I.O, the only parties to a suit in banking court are customer and financial institution.

1.6. The Term Debt Includes Loan, Obligation and Finance

After studying the above all definitions we can conclude that Debt is a wider term which includes loan, obligation and finance. The area of our study is specified on the recovery procedure by the financial institutions under The F.I.O. 2001. We shall not discus recovery of personal debts by individuals.

[42] Black's Law Dictionary, Ninth Edition,2009.P.209
[43] Section 2(c) of FIO, 2001
[44] Black's Law Dictionary, Ninth Edition,2009.P.464

1.7. The Term Default and Willful Default Defined

"Default is the failure to fulfill contractual obligation."[45] Peshawar High Court defined default while saying " I would like to pursue the discussion little further to show that the term default means willful default. The word "default" has not been defined in the ordinance and we have therefore to fall back on dictionary meanings of this word. It is held that default means willful default and not one which may have been unavoidable."[46]

1.8. *Qaraz* (قرض) and *Dayn* (دین) in The light of *Shariah*

In order to know about these two terms in the light of *Shariah,* we firstly know about their literal meaning, secondly we shall see that in what sense these two words have been used in The Holy *Quran* and in the literature of Hadith and lastly it will be known that how these words have been discussed in the literature of classical *Fiqh* by our jurists.

1.8.1. Literal Meaning of *Dayn* and *Qaraz*

Arabic language dictionary *Al Sihaa* (الصحاح) defines that "*Qaraz* (قرض) is giving of some *Maal*(مال)(property) to others which can be demanded back."[47] It defined *Dayn* as "*Dayn* (دین) plural of it is *Dyoun*(دیون), I gave loan to someone who after taking it became *Madeen* (مدین)and the person who gives *Dayn* is called *Daayin*(دائن)."[48] Another dictionary defines these words "*Al -Qaraz* (القرض) is providing something from *Maal* (مال)(property) which can be asked to be returned."[49]

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[45] Black's Law Dictionary, Ninth Edition,2009 P.480
[46] PLD 1964 Peshawar 101
[47] Abi NasarIbrahim Bin Hammad Al-Johari, *Al Sihaa*(Beruit:Darul Fikar,1998)1st addition Vol-1,P.861
[48] Ibid vol-2 p.1555
[49] Mohibu din Muhammad Murtaza Al Hussaini, *Taaj Ul Uroos Min Jowahir al Qamoos* (Beruit:Darul Fikar,1994) Vol-10,p.137.

"*Al-Dayn* (الذين) for which there is certain time limit , *Al- Dayn al-sahii* which does not lose its legal value unless it is returned by *Madyoon*(مديون)(debtor) or when *dayain* (creditor) absolve *Madyoun* (debtor) of his liability and *Al- Qaraz* (القرض) for which there is no specified time limit."[50] Another dictionary named *Tehzeebul Sihaa* (تهذيب الصحاح) defines it as "*Qaraz* (قرض) is to make separate, which is given to a person to be demanded back."[51] And defined *dayn* as "*Al- Dayn*(الدين) is a singular of *Al-Dayoon*(الديون), when a person buys something(to pay price) with a specific time then he(buyer) becomes *Madyoon*(مديون) (debtor). When a person takes loan then he becomes *Madyoon*(مديون) (debtor)."[52] In the light of these definitions we can say that in literal terms *Qaraz* is related to money and *Dayn* is name of obligation which can be in the shape of paying money. These were Arabic language dictionaries from where we can understand that *Dayn* is a broader term which includes *Qaraz* in itself.

Now, we see that how these two words have been explained and translated in these dictionaries, an Arabic to English dictionary says "*Dayn* (دين) to be debtor, owe money; obligation in money, *ale he dain*(عليه الدين) He who owes money (debtor)[53]". On the other hand it defined *Qaraz* as " *Qaraz* means to cut; lend money, *istiqraz* (استقراض) try to make loan ,borrow money."[54] Another Islamic legal dictionary states that "*Dayn* (دين) is

[50] Ibid Vol-12 P.214
[51] Mahmood Bin Ahamad Al-zanjani, *Tehzeebu Al-Sihaa* (Dar Ul Muaarif: Egypt, year not written) Vol-1 p.439.
[52] Ibid Vol-2 p.834,835
[53] A Learner's ARABIC –ENGLISH Dictionary, F.Steingass (Librairie Du Liban:Beruit,1972)P.381
[54] Ibid P.829

debt; liability; obligation is called debt."[55] While it defined *Qaraz* that "*Qaraz* means Loan[56]". "*Dana* (دان) means to lend, to give a loan; *dayaan* is debt."[57]

"*Qaraza* (قرض)means to cut and *Qaraz* (قرض)means loan.[58]" Now we are going to consult another Arabic to English dictionary which is regarded as authority by scholars in this regard, the word Dayn has been defined that أخذ دينا means he took or received a loan or he demanded loan.دين : means, A debt: Such as the price of a thing sold by which the purchaser is under an obligation to pay. In the language of law but not in the proper language *dayn* (دين) is also applied to a debt incurred but a thing taking unjustly, injuriously or by violence and is also signifies anything that is not present meaning that anything to be paid or done at a future time."[59] *Qaraz* has been defined in these words " اقرضه means he gave him or granted him loan, قرض means to cut, المال اقرضهmeans he gave or lent him the property to demand its return[60]".

The study of said definitions informs that *Qaraz* is a type of *Dayn* which is broader term having vast meanings, we can also say that *Qaraz* can be translated into English with the word of loan and *Dayn* can be translated into the word of debt, as we studied from above mentioned dictionaries.

1.8.2. Legal Meaning of *Dayn* and *Qaraz*

Now we see these terms in the *Quran* and in the *Sunnah* of the Holy Prophet(P.B.U.H), The *Quran* says " فا ن كان لهن ولد فلكم الربع مما تركن من بعد وصية يو صين بها أو دين ,But if they

[55] Modern Dictionary Arabic to English,Elias A. Elias(Elias Modern Press:Cairo,1954)7th Edition P.229
[56] Ibid P.535
[57] AL-FARAID Arabic English Dictionary(CATHOLIC PRESS:Beruit,1964)P.224
[58] Ibid P.598
[59] ARABIC-ENGLISH LEXICON, Edward William Lane(London:WILLIAMS AND NORGATE,1863)Vol-1,p.943,944
[60] Ibid vol-2,P.2515

leave a child Ye get a forth; after payment of legacies and debts"[61] here debt has been defined as liability upon him and the word debt has been used in the translation of *dayn* (دين).

Two dimensions of debt has been discussed in following Hadiths as under, one is debt regarding to Allah and second is debt which relates to persons. In first sense Hadith was narrated by Hazrat Ali bin Abbas (May Allah be please with him) that "A person came to the Holy Prophet and asked that his mother died in a condition in which she was under a debt of observing fasts of one month, can I observe fasts on behalf of my mother to remove my mother's liability? The Holy Prophet replied that yes you can do so, (دين الله أحق أن يقضى) Debts regarding the matters of Allah needs to be discharged."[62] This hadith was about debts and liabilities regarding the matters of Allah in a broader perspective.

In another hadith, we can understand the word of *dayn* has been used in the same meaning as monetary liability regarding the matters of other persons. It is reported by Abu Salma Bin Abdul Rehman that the Holy Prophet (P.B.U.H) refused to say funeral prayer of every person who died under the liability of debt to be paid by him, One day the Holy prophet (P.B.U.H) came to say funeral prayer of a person and asked that had he under debt to be paid, the people replied yes he was under debt of two *dirhams* then the Holy prophet (P.B.U.H) refused to do so, upon that Hazrat Abu *Qatada* Ansari (May Allah be please with him) owed the liability upon him then the Holy prophet (P.B.U.H)

[61] Al-Nisa 4/12 The Holy Qaran Translation and Commentary by Abdullah Yusaf Ali(Islamabad;Dawa Acadmy,International Islamic university Islamabad)

[62] Muhammad Bin Ismail Bukhari, *Al Jama Al Sahii Bukhari* (Beruit:*Dar Tuqu Najat*,1422 Hijri)Vol-3 Hadith number 1953

said his funeral prayer.[63] Allama Tibri defines *Qaraz* that it means when a person gives in possession of another person his property so that he would be returned in original shape when demanded back.[64]

After above study we can conclude that debt is very broader term which can be used for every kind of liability likewise we see in first reported hadith it was used for the obligation as creation of Allah in the form of *Ibadat*, there was no any kind of monetary liability but in second reported hadith this concept was elaborated that after taking the liability of dead man Hazrat Abu Qatada (May Allah be please with him) became debtor though he did not personally take that loan from creditor but after taking liability upon him he became debtor. In the literature of our classical *fiqh* these terms have been discussed regarding their status in Islamic law and rules have been discussed for their regulation.

Allama Ibne Abadin Shami says "Loan is a thing which is given and it can be demanded back, specific time for repayment is compulsory in all ديون (debts) but it cannot be made in a contract of قرض (loan). He further added that loan is a type of debt."[65] Imam kasani who is a prominent jurist from Hanafi school of Islamic law, defined it "literal meaning of loan is making a thing separate from other thing, we say it a contact of loan in which a certain amount of money is separated and given it to debtor after an agreement with him[66]". Another jurist *Ibne Nujaam* defines dayaan in his book in these words "الدين (debt) consists of property (مال) as liability upon a person which is

[63] Ibid Hadith number 2295

[64] Abi Jaffar muhammad Bin Jarrer Tibri,Jamaeul Biyaan En Taweel Ayatul Quran(Beirut:Darul Fikar,1988)Vol.2, p.592

[65] Muhammad Amin Bin Omar Bin Abdul Aziz Abidin Al Hanfi,Radul Muhtaar ala aldurelMukhtaar(Beruit:Darul Ahya Turaath al Arabi,1998)Vol-7,P.292,293.

[66] Alao Din Abubakar masood al Kasani,*Baday Wasanay Fi Tarteebisharay*(Beruit:Dar Ul kutab Ilmia,1982),Vol.7 p.394

created by contact of loan or as compensation (after destroying) or as any other way.[67]" During the proceedings court defined Islamic concept of loan in these words "A loan is not a business transaction but is a form of sadaqa or charitable transaction and the money returned must be the same as the money given."[68] The last definition clearly states that debt can be created by a contact of loan and some other ways to create a debt which is a liability upon a person to discharge it.

1.8.3. Difference in *Qaraz* and *Dayn*

In law loan is purely a transaction which is related to money but debt refers to any liability which might be in shape of money or services. On the other hand Sheikh Wahbatu Zuhali differentiated between *Qaraz* and *Dayn* while saying that *Dayn* is broader term than *Qaraz* and *Qaraz* is a type of *Dayn*. *Dayn* is liability upon a person which might be in terms of money as price of purchased asset, rent of the house, giving back of loan and may be compensation at the time of making loss. Another aspect of *Dayn* is liability other than money like to offer prayer and observe fast. A debt can be created by a contract like contact of sale, contract of loan or created by legal capacity of a person in Islamic law to obey the orders of Allah.

On the other hand, Loan is a specific contract to repay the same property.[69] In the end, we can say that *Dayn* is equal to English word debt which has certain time limit in *Shariah*, is related to liabilities in the shape of money or other services while *Qaraz* is equal to loan which has no certain time limit, is specifically related to money to be repaid

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[67] Zainu Din Bin Ibrahim Ibne Nujaam, *Al Ashbaha wa Nazair*(Beruit:Darul Kutub Ilmia,1419 Hijri)Vol-1,P.354.

[68] 2001 MLD 1351 P.1388 M

[69] Whbatu Zuhali, *Al Muamlat Al Malia Al Muasra*(Beirut: Darul Fikar,2002)P.190,191

to creditor. Debt is a broader term which includes loan in it. In our study finances are debt, it has certain date upon which it becomes due upon debtor to pay to creditor.

1.9. BASIC GUIDELINES OF SHARIAH FOR DEBTOR AND CREDITOR

The first and foremost commandment for debtor is to pay off his debt abiding by his promise[70]which he made with creditor. Second principle is the saying of the Holy Prophet (PBUH) "Procrastination in payment by debtor who is capable of paying is unjust)(مطل الغني ظلم)."[71] According to another saying "The debtor who is able to pay but does not repay the debt, he can be arrested and embarrassed. " [72] (ليّ الواجد يحل عرضه وعقوبته)

The Holy Quran encourages creditors to give more time for payment by saying that "And if the debtor is in straitened circumstances, then (let there be) postponement to the time of ease". (وإن كان ذوعسرة فنظرة إلى ميسرة)[73] The Holy prophet (P.B.U.H) said that "Allah has granted mercy upon the person who is kind when he sales, purchases and while demanding his right.(رحم الله رجلا سمحا إذا باع وإذا اشترى وإذااقتضى)[74] In case of debt with a settled due date, creditor cannot ask for early payment so long as the debtor does not transgress the terms and conditions.[75] However if the creditor is not inclined to give more time for payment ,he cannot be compelled to do so and the debtor would then be required to pay one way or another. A number of instances in the early history of Islam

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[70] *Al-Quran* 17/34

[71] Muhammad Bin Ismail Bukhari, *Al jamy Al Sahi,* Translated by Qari Muhammad Adil,Kitab Fil Istaqraz Wa Ada Al Dayoun Wal Hajar Wal Taflees Bab Matlul Ghani Zulmun (Lahore: Deni Kutab Khana , 1977)

[72] Ibid bab Li Sahibul Haq Muqal.

[73] *Al-Quran* 2/280

[74] Muhammad Bin Ismail Bukhari,Al Sahi Al Jamy Al Bukhari, Kitabul Bayu Bab Al Sahoola Wal Samaha Fi Al Shira Wal Bay Wa Man Taba Haqahyu Fa Yatlubuhu Fil Afaf,(Al Ridh: Dar UL Salam Linashar Wal Tizeh,1999)

[75]Abu Muhammad Ali bin Ahmad Ibn E Hazm, *Al Muhalla Bil Asaar* (Beirut: Darul Kitabul Ilmia, 1988) Vol.6 Page 353.

lead us to the point that even a destitute debtor is not entitled to be given more time as his right.[76] He will not be remitted of the payment of debt and whatever he earns over and above his normal food needs should go towards repayment of debt.[77] We can say that debtor is ordered to pay his debt and creditor should extend the time for payment if debtor is in difficulty.

1.10. Conclusion

The above discussion leads us on a point that we can use the word debt to translate Arabic word *Dayn*(دين) and loan can be used to translate *Qaraz* (قرض). We firstly studied different definitions of debt and loan as literally defined, Secondly we consulted legal dictionaries and case laws where the superior courts elaborated these words then we came to the Quran and *Sunnah* to know their meanings and lastly we consulted books if classical *fiqh* literature to know their meanings from where we can conclude that loan is a type of debt, loan is giving money to another to be demanded back any time because there can be no specific time limit in loan according to our jurists. On the other hand debt is broader term which is called obligation and liability. The words like finance and obligation, are called debt in the eye of Islamic law, which have been used in "The Financial Institutions (Recovery of Finances) Ordinance 2001."A debtor is under a liability to discharge himself from liability by paying his debt. In the second chapter of my dissertation I shall analyze "The Financial Institutions (Recovery of Finances) Ordinance 2001." From legal perspective and in third chapter I shall study it from *Shariah* perspective. Then in the end I shall give recommendations from legal and *shariah* perspective to amend this law in order to make speedy and successful recovery.

[76] *Ibid*, 1988,6,pp.420,421.
[77] *Ibid*, 1988,6,pp.423,424.

CHAPTER II

Shariah Appraisal of "The Financial Institutions (Recovery of Finances) Ordinance, 2001

1.1. Introduction

In the first chapter of this dissertation, the terms *Qaraz* and *Dayn* have been discussed, their meanings from Arabic language dictionaries and their interpretation from *shariah* point of view from the books of many jurists of Islamic law. On the other hand, debt and loan have been discussed, how they are different to each other and how the superior courts defined these two words. In the end of first chapter, it was concluded that *Dayn* can be translated into debt and loan into *Qaraz* . Debt includes loan in it because it is broader term than loan, every loan is debt but every debt is not loan. It is liability of debtor to pay his debt according to his agreement with creditor. If a person does not pay his debt to his creditor then there is specific procedure for recovery under "The Financial Institutions (Recovery Finances) Ordinance, 2001."

In this chapter we shall discuss some provisions of this Ordinance in the light of *Shariah* in order to know that those provisions are in consistent with Islamic law or not. The basic objective to write this dissertation is to make recommendations to make this Ordinance in accordance with the spirit of Islamic law because it is the requirement of the Constitution of Pakistan, 1973 and for this purpose two constitutional institutions have been made as Federal *Shariat* Court and Council of Islamic Ideology. These two institutions are doing their work as assigned by the constitution. In this chapter I shall discuss three issues in the light of *Shariah.*

i) Treatment of customer when he is in default in the light of *Shariah* and law.

ii) The liability of guarantor in the light of *Shariah* and law.

iii) *Shariah* status of cost of Funds.

2.2. Treatment of Customer when he Commits Default to Fulfill his Obligations

2.2.1. Duty of Customer

First of all, according to the provisions of this Ordinance, duty of customer has been defined in these words "It shall be the duty of customer to fulfill his obligations to the financial institutions".[78]After the plain study of section 9 of F10, 2001 the banking court is empowered to adjudicate upon the matter, "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."[79]

After institution of plaint by plaintiff in banking court, the defendant is informed according to law through summons to defend the suit. "The defendant shall not be entitled to defend the suit unless he obtains leave form the banking court as here in after provided to defend the same; and, in default of his doing so, the allegations of the fact in the plaint shall be admitted and the banking court may pass a decree in favor of the plaintiff on the basis thereof or such other material as the banking court may require in the interests of justice"[80]After reading of these two provisions, we can understand that after institution of suit in banking court, it is compulsory upon

[78] Section3 Clause (1) of FIO,2001
[79] Section 9 sub-section(1) Ibid
[80] Section 10 Sub-Section(1) Ibid

defendant to get leave to defend the suit because the word "shall' has been used in the Ordinance which is mandatory in nature.

In a reported case, the court holds opinion in these words "on examining the scheme of section 10 of F10, 2001 it becomes clear that obtaining leave to defend is since qua non or condition precedent to defend a banking suit. The defendant is obligated to obtain leave to defend without obtaining leave, F10, 2001 does not permit defaulting defendant to contest the claim set up in a banking suit"[81] Another division Bench of Lahore High Court decided "Stated precisely the summons issued under the ordinance 2001 in a banking suit, only allow the defendant a limited right to enter the court for seeking its leave to defend the suit. The defendant has not right to enter the suit it is only on the leave of the court that the defendant gets the right to enter the suit for its defense."[82]

Obtaining leave for defendant is compulsory, every defendant is not entitled to contest the suit without obtaining leave to defend by banking court. It is the discretion of banking court to grant leave until the satisfaction of the court that substantial questions of law and facts have been raised in the leave to defend application.[83] Lahore High Court said that the banking court shall first consider and decide the leave application filed by the defendant and then proceed to decide the question of its jurisdiction and the suit in accordance with law.[84]Another division bench decided that after the institution of suit in banking court, obtaining leave to

[81] 2013 CLD 423 (DB) P. 430 A
[82] 2007 CLD 492 (DB) P. 499 H
[83] 2013 CLD 423(DB) P. 430B
[84] 2007 CLD 492(DB) P. 500 k

defend the suit is compulsory. It is the discretion of court to decree the suit in favor of plaintiff upon dismissal of application for leave to defend the suit.[85]

In a case, mandatory direction held by division bench that "Where a defendant fails to fulfill the conditions attached to the grant of leave to defend, the banking court shall forth with proceed to pass Judgment and decree in favor of plaintiff against the defendant"[86]. Another view held by division bench substantiated this view while saying that "In our humble view, after dismissal of that application of the appellant, refusing to permit her to defend to suit, trail court was left with no option but to decree the suit"[87]. After above discussion we can say that obtaining leave to defend the suit after institution of plaint is compulsory and mandatory in nature and it is discretion of banking court to grant leave to defend or not. If the defendant fails to obtain leave to defend or that application is dismissed by court, then the court may pass a decree in favor of plaintiff against defendant.

The obligation of customer has been defined as "Further in fact the word "obligation' says amounts relating to finance. Under section 9 of the Ordinance,2001 it is clear that the legislature uses the word "obligation with regard to finance. The obligation would mean, only an obligation vis-à-vis the finance and nothing more"[88]. When a person becomes defaulter and decree is passed against him by a competent court, then procedure for recovery as defined by Honorable Supreme Court of Pakistan "It clearly appears to be that in the event of substantial dispute between the

[85] 2004 CLD 732 (DB) P. 736B
[86] 2003 CLC 1658 (DB) P. 1665 A
[87] 2003 CLD119 (DB) P. 123 A
[88] 2003 CLD 1007 P. 1018 B

parties, the procedure of recovery of amount by way of land revenue arrears would be available only where the amount claimed was found due, ascertained and determined by a competent judicial forum."[89] We can say that when decree is passed against debtor by banking court that amount can be recovered as arrears of land revenue as it is held by the Supreme Court of Pakistan.

2.3. Treatment of Debtor after Default in the Light of *Shariah*

On the other hand, *Shariah* has different treatment for debtor against whom amount is due.The Quranic verse وإن كان ذوعسرة فنظرة إلى ميسرة "And if the debtor is poor, he must be given respite till he is well off."[90] While elaborating this verse in Dr. Aslam Khaki case *Shariat* Appellate Bench of Supreme Court of Pakistan said "However, if the purchaser has delayed the payment despite his ability to pay, he may be subjected to different punishment."[91] In this case the court allowed punishment with a condition of ability of paying debt otherwise any punishment is not allowed. Now, we discuss this verse of the Holy *Quran*, how it is elaborated by scholars of different schools of thought of Islamic law then we can conclude that this verse is obligatory or optional for giving time to poor debtor who is not in capacity to pay his debt.

Sayed Ameer Ali says that if debtor is in difficulty, he has time till he is able to pay debt. According to majority of Jurists this verse is in general sense for every debtor when he is in trouble, then debtor shall have extension of time. If creditor demands his debt and debtor says that I am not able to pay it now due to poor

[89] 203 CLD 1620 (DB) P.1624 B
[90] Verse No 280 Chatper 2 Al Baqara. Al Quran
[91] PLD 2000 SC 225 this case has been remanded for retrial by Supreme Court.

condition, that debtor shall not be imprisoned.[92] This point of view holds soft corner for the debtor who is in trouble. Allama Maraghi in his *Tafseer* while interpreting this verse says "If the debtor is found in very poor condition, for you to give him extension of time until he is able to pay his debt."[93] Maulana Mudodi says "If a person is unable to pay his debt, then court of law shall compel the creditors to give him time and in some circumstances that court of law shall have the authority to waive full or part of that debt."[94]

Imam *Ibne Kathir* who was great pupil of Imam *Ibne Taymia* holds his opinion while elaborating this verse that Allah is giving order to restrain yourself when you have a debt upon a poor person who is not able to pay his debt. *Ibne Abi Laila* said that some of you say to your debtors upon the due date of debt that would you like to pay or increase the debt. It is better to extend his time without any increase. This act is matter of great reward and piousness.[95] After studying these view points, we can say that in Islamic law there are two types of debtors. First, who are willful defaulters and other are who are in default due to their bad circumstances. Islamic law has different treatment for both because reasons for default are different for both.

Allama Nawab Saddiqe Ul Qanoji says that "All the Jurists are agree upon the application of this verse on all debts. Giving extension of time for the person who is

[92] Allama Sayed Ameer Ali, Muwahibur- Rehman (Lahore: Maktaba Rashidia Ltd, year not known) vol. 1, p.78
[93] Ahmad Mustafa Al-Maraghi, Tafseer Maraghi (Beriut: Darul Ahya Turas Al Arabi, 1365 Hijri) vo. 1. P. 68
[94] Abul Ala Mudodi, Tafheemul Quran (Lahore: Maktaba Tamer Insaniyat, 1984) vol. 1, P. 218
[95] Abi Fida Ismail Ibne kasir, Tafseerul Quran Al-Azeem (Quetta: Maktaba Rashidiaya, year not Known) vol. 1 P. 653

in difficulty till his ability to pay his debt has been appreciated for the creditor."[96] The scholars have difference of opinion upon the status of this verse that giving extension of time is restricted only for debts of *Riba* or it is for all debts. There are two groups of scholars upon this point, first group consists of Ibne Abbas, Shurah and Zahaq who are of the view that this verse is related to debts of *Riba* and second group consists of Majahid and a group of *Mufasrian* who holds the view that this verse is for all debts where debtor is in difficulty and is not able to pay debt.[97]Imam Shafi says procrastination of rich is unjust is a Hadith by the Holy Prophet (P.B.U.H.) in matter of recovery of debts.

He further adds "There is no way out for the debtor who is in difficulty till his ability to pay because Holy Prophet declared unjust only in a condition where he willfully does not pay debt and when it is known that he has nothing to pay, he cannot be imprisoned."[98] Imam *Sharbini* says that if debtor is in difficulty and not able to pay his debt then debtor has right to be given an extension of time till his ability to pay.[99] Meaning of *Sadqah* in this verse is to give time, from this verse giving extension of time is obligatory and waiving full or part of debt has been appreciated. This verse is related to all debts not only debts of Riba.[100]

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[96] Abi Tayyab Saddique bin Hassan bin Ali Al-Hussain Al-Qanuji, Fathul Biyan Fi maqsid ul Quran (Beirut: Al Maktaba Tul Asriya, 1992) vol. 2 P. 144

[97] Ala u Din Ali bin Muhammad Bin Ibrahim, Tafseer Al-Khazan Al Musama Lababu Tavel Fi Mani Al Tanzel (Beirut: Darul Kutbal Alimia, 1995) Vol. 1, P. 212

[98] Dr. Ahmad bin Mustafa, Ph.D thesis Named Tafseer Imman Shafi (Riyadh: Daru Tadmirya, 2006) Vol 1,P. 438

[99] Muhammad Bin Ahmad Khateeb Sharbini, Tafseer Al-Khteeb Al-Sharbini Al-Musama Al Sirjaul Munir Fi Al Aanatu Ala Marafat Bazul manni Kalam Rabana Al-Hakeem Al-KHabeer(Beirut:j Darul Kitab ilmia, 2004) vo. 1 P.214

[100] Abi Fazal Shabudin Al sayed Mehmood Al- Aloosi, Rohuul Manni Fi Tafseer Quran Al Azeem wa Sabe Al-Masani (Beirut: Darul, Fikar, 1993) vol. 3 P. 88

Again these scholars laid stress on the point that poor debtor who is not willful defaulter must be treated in a different way from willful defaulter. Sayed Qutab holds opinion while interpreting this verse in these words that there is no doubt according to rules of *Shariah* the debtor who is in difficulty, no legal action cannot be taken against such debtor. He further adds that the Muslim society should not leave such person who is in difficulty while having debt upon him. Allah invites creditor to do favor for debtor as act of kindness. It would be better for him and for his debtor if he knows the reality and depth of order of Allah. Here matter is related to stipulation that there is wait for creditor until debtor has ability to pay his debt. Besides that it is appreciated that creditor should waive his debt in full or in part for debtor who is in difficulty.[101]

Imam Sayooti while discussing this *Aya* says "It is reported by Saeed Bin Jubair that who waives his debt shall earn a lot of reward and who does not waive, he has not done any wrong and who sends the debtor to prision who is in default due to his difficult financial circumstances, has committed sin."[102] We can say that giving extension of time is not obligatory for poor debtor but punishment for such debtor is not allowed according to majority of jurists.

Allama Abu Bakar Al Jassas Says that there is extension of time for the debtor who is in trouble. There is a group of scholars who say this verse is related to all

[101] Sayed Qutab, Fi Zalalil Quran (Place not known: Darul Sharook, 1980) vol. 1 P. 333
[102] Jalalu Din Abdul Rehman Bin Abi Bakar Al Sayuti, Al Dure Mansoor Fi Al Tafseer Al Masoor (Beirut: Darul Kutûb Ilmia, 1990) vol. 1 P. 651

debts and some say it is specifically related to *Riba*, it can be extended to all debts after applying the methodology of *Qiyas*. [103]

He further says that according to Imam Malik any slave or free man cannot be imprisoned for debt and inquiry cannot be conducted to know about their financial position. Anyhow, if there is allegation upon debtor that he has concealed money then he can be imprisoned and if creditor does not find anything from him then he shall be get free from prison because lawful condition for his imprisonment is having ability to pay, only in this case he shall be liable to go to prison as punishment only due to his procrastination while having enough property to pay debt. [104] While applying this verse Qazi Shureh holds the opinion that besides debt of *Riba* all debtors shall be imprisoned even if they are in financial difficulty.[105] Imam Qurtabi says that this verse is generally applied to all debts. According to Hazrat Abu Hurerah , Ata and Rabi bin Khasam that this verse is applicable to all debtors if they are in financial difficulty, then they should be given extension of time.[106]

Imam Shafi, Imam Abu Hanifa and some of their companions say that the person who is in financial difficulty shall be imprisoned unless he proves by evidence in a court of law that he has no money or property to pay his debt.[107] The Holy Prophet said "It is lawful to disgrace the respect and punishment for a rich debtor who

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[103] Allama Abu Bakar Ahmad Bin Ali Al Razi Al Jassass , Ahkamul Quran, Translated by Abdul Qayyum, (Islamabad: Shariah Academy, 1999) vol. 2, p. 407
[104] Ibid, p. 413
[105] Ibid, p. 416
[106] Abu Abdullah Muhammad Bin Ahmad Bin Abu Bakar Qurtabi , Tafseer Quratbi, Translated by Committee of Scholars.(Lahore; Ziaul Quran Publications, 2012) vol. 2, p. 445
[107] Ibid. p. 447

procrastinate."[108] While elaborating this hadith Mufti Taqi Usami says that the only thing which makes disgracing the respect and punishment lawful is having ability and property to pay the debt because having property or money is condition for punishment.[109]

It is reported by Hazrat Huzefa(R.A) that the Holy prophet said a man died in long past, angels asked about good deeds when they met his soul. He replied nothing special with me but I ordered my servants not to be harsh upon debtors and give time to the debtor for payment who is not in ability to pay and do favor for him even he has ability to do so.[110]Another Hadith reported by Hazrat Abu Hurrerah that there was a trader who used to give loan to the people. When he used to see a person in difficulty then he used to say to his men to waive debt, for that Allah may forgive us. When he died, Allah forgave him.[111]

Dr. Abdul Kabir Mohsin while discussing *Ayat* 280 of *Al Baqara* Quoted *Tibri* and Ata that giving time to person who is in difficulty is compulsory upon creditor. Punishment and imprisonment is out of Question in this condition.[112] Another hadith quoted by Hazrat Ayesha (R.A) that the Holy Prophet heard the voices of quarrelling near the door. One person demanding extension of time while other one replied By

[108] Supranote number 48.
[109] Mufti Muhammad TAqi Usmani, Inamul Bari (Karachi; maktaba Hira, year not known) Vol. 7 P. 676
[110] Allama Waheed u Zaman, Taseerul Bari Translatin and commentary of Sahi Bukhari Sharif(Lahore: Amjid Academy, Year not known) vol. 2, P. 363
[111] ibid
[112] Dr. Abdul kabir Mohsin, Tafseerul Bari Sharh Sahi Bukhari (Lahore; maktaba Islamia, 2008) vol. 3 PP. 283,284

Allah I shall not do it, then the Holy Prophet came out and asked about the person he swore and ordered him that the debtor has right whatever he is demanding.[113]

Imam Shokani while discussing a hadith that punishment is lawful for a rich procrastinator. He says that it is lawful to imprison the rich procrastinator if he has ability to pay, disgracing the honor and imprisonment cannot be awarded to the person who is not in a condition to pay due to his financial circumstances, acting upon the verse 280 of *Al Barqara.*[114] Imam Sarkhsi says "Debtor shall be imprisoned in all debts because due to having money and procrastination he has become cruel, his imprisonment and punishment is lawful."[115] He further quoted that Imam Abu Hanifa says that when a person is imprisoned for two months it shall be asked from him about his financial condition, his opinion in this regard is that if Judge finds information that he has no money to pay he should be set at liberty and if it is found that he has some money concealed then order for his imprisonment is lawful because after procrastination he has become cruel. It is lawful to punish him.[116]

It is reported about Hazrat Ali (R.A) that when any debtor is brought before him after default, he used to send him to prison until it is being made clear that he has money or property or not to pay the debt and when it is to known that he has no money, he used to set him at liberty while saying when you have money, pay it to your creditors. He also used to say imprisonment is only for him until authorities

[113] Ibid, vol4, P. 171
[114] Muhammad Din Ali Bin Muhammad Al-Shokani, Nelul Autork Sharah Muntaqal Akhbar Min Ahadith Sayed Al Akhyar (Egypt: Darul Wafa, 2008) vol. 4 p. 137
[115] Abi Bakar Muhammad Bin Abi Sahil al Sarkhsi, Al Mabsoot (Quetta: Makata Rashidia, year not Known) Vol. 20 P. 95
[116] Ibid P. 98

know about his real condition about paying debt. It is also reported by Hazrat Abullah Bin Umar that when a person used to take his debtor to Hazrat Ali (RA) and asks for his imprisonment. He used to ask creditor that had he any property from where he can pay, then creditor said yes he had concealed his assets. Upon this Hazrat Ali used to demanded evidence from creditor upon it or used to say if you donot provide evidence then we shall take oath from debtor for not having money or property to pay the debt.[117] After this discussion we can conclude that all the *Shariah* scholars are agree upon the point that a person who is not willful defaulter, it is not allowed to punish him because he is in default owing to his poor condition. On the other hand, physical punishment is allowed for a person who is willful defaulter because procrastination of a person who has ability to pay his debt is declared unjust by the Holy Prophet (PBUH).

On the other hand, according to this Ordinance there is no distinction between a person who committed default willfully and who is in default due to his poor financial condition. The law treats the both debtors in a same manner . Peshawar High Court held "I would like to pursue the discussion little further to show that the term default means willful default. The word "default" has not been defined in the ordinance and we have therefore to fall back on dictionary meanings of this word. It is held that default means willful default and not one which may have been unavoidable."[118] We can say that our legal system does not differentiate between a person who is willful defaulter and who is in default due to poor financial condition. The amount of finance

[117] Dr. Muhammad Rawas Qila Jee, *Fiqh Hazrat Ali*, Translated by Mulana Abdul Qayyum, (Lahore; Institute Muraful Islami Mansoora, 1992), P. 325
[118] Supra Note no 46

due upon customer can be recovered as arrears of land revenue as decided by Supreme Court of Pakistan.[119] The recovery procedure for the recovery of arrears of land revenue has been prescribed from section 80 to 90 of West Pakistan Land revenue Act, 1967.

First of all, "A notice of demand may be issued by Revenue officer on or after the day following that on which an arrear of land-revenue accrue."[120] After the fifteen days of first notice under section 81, the revenue officer may issue further notice of demand upon defaulter and if after thirty days of second notice the amount is still unpaid then the revenue officer may issue warrant of arrest of that defaulter.[121] While on other hand, the Holy Prophet (PBUH) said in his hadith reported by Jabbir Bin Abdullah that Allah has blessed a person who is kind while buying, selling and demanding debt. [122]

We can say that Pakistani legal system is totally contradict on the point of physical punishment of a person who is not a willful defaulter. Islamic law directs that reasons of default must be known before sending a debtor to prison. If he has concealed some property to avoid legal action against him then imprisonment is lawful for him. The debtor who is defaulter due to his poor condition should be given extension of time for repayment as recommended by majority of jurists but giving extension is not obligatory in nature. The banking court should conduct independent judicial inquiry to know the reasons of default of every debtor. There should be

[119] Supra note no 89
[120] Section 81 of West Pakistan Land Revenue Act (XVII) of 1967
[121] Ibid, Section 82.
[122] Supra Note No 74

different treatment for both debtors. In this way we shall make this procedure according to *Shariah*. The imprisonment for such debtor should be declared illegal.

2.4. The Issue of Liability of Guarantor according to law

The contract of Guarantee has been defined in contract Act 1872 as "It is a contract to perform the promise, or discharge the liability of a third person in case of his default. The person who gives guarantee is called the "Surety" the person in respect of whose default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the creditor." [123]

According to FIO, 2001, surety fall within the definition of customer as defined "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."[124] Principal debtor and surety are both customers declared by this Ordinance. After, being a customer now surety fall within the jurisdiction of banking court. Superior courts elaborated these provisions as "For ascertaining the jurisdiction of this court under the Ordinance, 2001 it is necessary that plaintiff should be customer or financial institution and the subject matter of the claim should be the finance."[125] Two conditions need to be fulfilled to exercise the jurisdiction of banking court under this Ordinance, Firstly the parties to the case must be customer on one side and financial

[123] Section 126 of Contract Act IX of 1872
[124] Section 2 clause(c) of FIO,2001
[125] 2011 CLD 186 P. 190 B

institution on the other side as plaintiff and defendant. Secondly the subject matter must be relating to finance.[126]

After above discussion we can say that surety fall within the definition of customer and banking court can exercise its jurisdiction upon surety as he is customer according to law. Now, we are going to understand the liability of surety as defined by the law and interpretation of relevant laws by the superior courts. The duty of customer has been told in section 3 of this Ordinance that to fulfill the obligations relating to finance. In case of breach of their duty, legal action is taken against them in banking court under FIO, 2001. We are going to discuss the point of liability of guarantor in Pakistani legal system is according to *Shariah* or not. Now, we are going to study that what are rules for liability of surety or guarantor in our legal system. It is stated in law that "The liability of surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract."[127]

In one of the cases upon the issue, where financial institution in execution proceedings started proceedings against guarantor along with principal debtor. Guarantor filed objection petition stating that proceedings must be started against principal debtor, after him then against guarantor. While deciding this case honorable Supreme Court of Pakistan said "In absence of specific stipulation in the contract of loan or any consideration of equity, the guarantor cannot take up the plea that the bank should enforce the liability against principal debtor before proceedings against

[126] 2010 CLD 293 P. 305 + 2008 CLD 856
[127] Section 128 of Contract Act, 1872

the guarantor."[128] In this reported case it is stated that creditor has choice to initiate proceedings either against principal debtor or against guarantor. There is no rule of preference to initiate proceedings. Does law bound creditor to start proceedings first against principal debtor then after his default, he is entitled to go to court against guarantor. The Supreme Court answered this question in these words "It is not open for the petitioner to wriggle out of it and raise the plea that the principal debtor should be proceeded against first for the recovery of loan."[129]

In another case surety was defined and declared as customer within the meaning of section 2 (c) of F10, 2001. Then court held that according to the provisions of section 128 of contract Act 1872, the liability of surety/guarantor is co-extensive with principal debtor.[130] The clear direction in the interpretation of section 128 of Contract Act 1872 is "The right of action against surety would generally arise at the same time as right of action against principal debtor."[131]

The court considered the liability of both guarantor and principal debtor is equal for the purpose of initiation of legal action against both of them. The Contract Act, 1872 states about discharge of surety in these words "The surety is discharged by any contract between the creditor and principal debtor, by which the principal is released or by any act or omission of the creditor the legal consequence of which is the discharge of principal debtor."[132]

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[128] 2005 CLD 95 P. 99 B + 2001 YLR 625
[129] 2005 SCMR 72 P. 75 A
[130] 2005 CLD 1359 P. 1364 A + 2005 CLD 1680 P. 1682
[131] 2013 CLD 558 page 564 B
[132] Section 134 of the contract Act 1872.

"A contract between the creditor and the principal debtor by which the creditor makes composition with or promises to give time to, or not to sue the principal debtor, discharges the surety unless the surety assent to such contract"[133] According to legal system of Pakistan the liability of guarantor who is surety is co-extensive with principal debtor.

The suits relating to recovery of finances under F10,2001 the creditor has option to file suit after the default in fulfillment of obligations relating to finance, both either against the principal debtor or against guarantor. The superior courts enforced this principle as we discussed in previous case law study because principal debtor and surety or guarantor are both customers as defined in clause (c) of section 2 of F10, 2001. Secondly we studied that when creditor discharges principal debtor from his liability to pay debt as a consequence of discharge of principal debtor, the surety or guarantor is automatically discharged from his liability because guarantor/surety gave the guarantee of liability of principal debtor. When liability of principal debtor comes to an end by waiver of creditor then the liability of guarantee is out of question. After waiver to principal debtor the creditor has no right to ask from guarantor under the provisions of contract Act,1872 as we studied before.

2.5. Liability of Guarantor in the Light of *Shariah*

Now, there is a need to compare these two concepts with *Shariah* we are going to study the books of classical jurists of all school of thoughts of *Fiqh*, how they defined the concept of contract of guarantee in their books, the issue of liability of

[133] Ibid, Section 135

guarantor with principal debtor and lastly how guarantor is free from his liability and in the end, after the comparison of Pakistani legal system with *Shariah,* we shall be able to give opinion as to consistency of Pakistani law with *Shariah* in said issues in the contract of guarantee.

A great Hanfi Jurist defines contract of guarantee as "Combination of liability of guarantor with principal debtor absolutely at the time of demand."[134] This concept is same as in our legal system as held by courts that it is the choice of creditor to initiate legal action first either against principal debtor or against guarantor. Another prominent Hanbali jurist says "Guarantee is combination of two liabilities guarantor and for whom guarantee has been given (principal debtor). It is proved against both equally and the person having right (creditor) to ask anyone from both after default."[135] He further added that when guarantee is given by guarantor, the principal debtor is still under liability to pay his debt. But the right of creditor is proved against both equally, the creditor has right to ask anyone of them to pay debt after debt becomes due lawfully. He further adds "Imam Malik in one of his opinions of the view that debt can only be demanded from guarantor after the default of principal debtor."[136] Allama Ibne Qudammah substantiated the view of Allama Ibne Abadain while interpreting the concept of guarantee:

He further says "If creditor absolves principal debtor from his liability then guarantor is also discharged from liability and if he discharges guarantor then

[134] Muhmmad Ameen Bin Umar Bin Abdul Aziz Abadin, Radul Muhtar Alaldurl Mukhtar (Beruit: Darul Ahya Turas Al Aabi, 1198) vol. 7 P. 430
[135] Muwaqfo-Din Abi Muhammad Abdullah bin Ahmad Bin Muhammad Bin Qudammah, Al-Mugni (Cairo: Hajar, 1992) Vol. 7 P,.81
[136] Ibid P.86

liability of principal debtor is still upon him."[137] Imam Sarkhsi is of the view that if a person has debt of one thousand *Dirham* upon another and after due date if he does not pay that debt on due date the liability is upon mine as said by third person at the time of giving of loan. This contract is lawful according to rules of *Shariah* because guarantee is taking of liability.[138]He further elaborates "When a person gives guarantee for another for monetary obligation. The person having right (creditor) has right to ask anyone of them and demanding from one does not absolve other one form his liability"[139]

Imam Sarkhsi says that taking liability of other person is lawful according to *Shariah.* His view upon co-extensive liability of both principal debtor and guarantor is as same, we studied in the judgments of superior courts. Another Hanfi jurist defines contract of guarantee as "It is to combine the liability with another liability. Debt is proved against the guarantor and still proved against principal debtor as he is not free from his liability."[140]He said that after taking liability of another person in the matter of debt, both the guarantor and principal debtor becomes equally liable for that debt. Taking guarantee does not mean that now principal debtor has become free and liability is only upon guarantor. In fact guarantee is combination of two liabilities. When contract of guarantee has been made and debt becomes due according to contact upon the person for whome guarantee has been made (creditor) has the option to demand his debt either from guarantor or from principal debtor according to

[137] Ibid p. 87
[138] Abi Bakar Muhammad Bin Ahmad Bin Abi Sahil Al-Sarkshi ,Al-Mabsoot (Quetta: Maktabas Rashidia, Year not known) vol. 20 P. 31
[139] Ibid P. 32
[140] Kamal-din Muhammad Bin Abdul Wahid Ibn Hamam, Sharah Fathu Qadar Ala Hidya (Egypt: Mustafa Ababi al Halabi wa Auladuhu, 1970) vol. 7, P. 163

his will, most of jurists hold this opinion but Imam Malik says that guarantor can only be asked after the default from principal debtor not before.[141] There is no difference of opinion among the jurists that if creditor makes principal debtor free from his liability, it automatically makes guarantor free from his liability because liability of guarantor is attached with liability of principal debtor.[142]

It means that guarantor takes liability of principal debtor upon him for the satisfaction of creditor and as security of debt. When main liability which is the liability of principal debtor comes to an end then the second liability which is liability of guarantor also comes to an end because its base now has ceased to exist. Imam Zalaie says about the contact of guarantee "It is guarantee of principal debtor and his liability comes to an end after payment or waiver of debt and same rule for guarantor."[143] He further adds that if a person owes the liability of the debt of another person then he is bound for what he made in contract. If principal debtor proves that he is no more debtor in a competent court of law then principal debtor and guarantor are both under no liability to pay debt.[144] A great Maliki Jurist says "All jurists are agree upon that if the person for whome guarantee has been given vanishes or defaults then guarantor is liable. Most of jurists say creditor has right to demand debt from anyone of both guarantor or principal debtor but Imam Malik holds from guarantor only in default from principal debtor."[145] Imam Malik holds another opinion in favour of majority of jurists majority of Jurists who are Imam Shafi, Imam

[141] Ibid, p. 182
[142] Ibid, p. 192
[143] Fakhar Din Usman Bin Ali Al Zalaie, Tabyeen ul Haqaiq Sharah Kanzu Dakaik (Multan; Maktab Imdadia, Year not known), vol. 4 p. 156
[144] Ibid, p. 159
[145] Ibne Rushd Maliki, Bidayatul Mujtahid Wa Nihayatul Muqtasid(Lahore: Darul Tazker, 2005) Translated by Ubaid Ullah Falahi, p. 988.

Abu Hanifa, Saori, Ishaq and Imam Ahmad. According to Saori only guarantor is liable after contract of guarantee has been made because two persons cannot be held liable for same transaction, Ibne-Shubrama is also with him.[146]It is Ijma of all jurists that guarantor is liabable when debt is proved against principal debtor by confession or by evidence in a court of law.[147]

Imam Kasani says "A thing can be demanded from guarantor for which principal debtor is liable. It debt only upon principal debtor not upon guarantor but it can be demanded from anyone of them. "[148] He further says that if creditor waives his right against principal debtor then he has no right to recourse to guarantor. But if he waives his right against guarantor then he can demand debt and enforce his right against principal debtor.[149] This point of view is as same in our legal system. There is no contradiction in *Shariah* and law on this point. Another Hanifi Jurist says "Creditor has right to demand debt from principal debtor or from guarantor because principal debtor is liable for his debt and guarantor is liable due to the contract of guarantee he had made with creditor for the security of debt."[150]

A contemporary jurist of Sharfi school of thought who wrote a very famous book upon comparative study of schools of Islamic law. While discussing contract of guarantee he wrote " If the guarantee is for debt, demand can be made from guarantor

[146] Ibid P. 989
[147] Ibid P. 989
[148] Alaudin Abu Bakar Masood Al-Kasani, Badi Al Sanaie Fi TArtab Al Sharaie(Lahore: Research centre Diyal Sing Trust Library, 1992) Translated by Dr. Abdul Wahid, vol 8, p. 27
[149] Ibid P. 30
[150] Maulana Naseeb Ullah Ibne Al haj Abdul Samad, Tasheel ul Haqaiqk Sharah Urdu Kanzu Daqaiq (Quetta: Maktaba ul Arshad, 2013) vol. 2 P. 141

for debt because of his contract of guarantee."[151].He wrote that after the contract of guarantee made with the condition that principal debtor is free from liability because of contract of guarantee, according to him, this condition is unlawful because it is against the object of contract. [152]

As a result of this discussion, we can say that he is of the view that the liability of guarantor and principal debtor is co-extensive, consequently, creditor has right to demand his debt either from guarantor or from principal debtor according to his will. While talking about how the contract of guarantee comes to an end he holds opinion that after waiver of right from guarantor or from principal debtor by creditor makes end of contract of guarantee, and if creditor waives his right from guarantor even then principal debtor is under liability to pay his because debt is upon him not upon guarantor who is under no liability because when basic rule is void then all rules formed from it are also void.[153]

In A.A.O.I.F.I *Shariah* standards, the scholars hold opinion "The creditor is entitled to claim the amount of his debt from either the debtor or the guarantor and he has the choice of claiming his right from either of them"[154]In the discharge of guarantee scholars said "If the creditor discharges the debtor from the debt, the guarantor is also discharged automatically from his liability. However, if he creditor discharges the guarantor from liability, the debtor remains in debt."[155]

[151] Wahatu Zuhali, Al Fiqhul Islami wa Adilatuhu (Beriut; Darul Fikar, year not known) vol.5, P. 39
[152] Ibid P. 41
[153] Ibid P. 43
[154] Auditing and Accounting organization for Islamic financial institutions November 2007, standard no. 5 Guaranties 3/3
[155] Ibid.

In the end, we can say that there is no contradiction in the issue of liability of guarantor in *Shariah* and law. That the liability of guarantor is co-extensive with principal debtor. Creditor has right and choice to demand debt anyone of them after due date because guarantee is the combination of two liabilities, in a contract of guarantee, guarantor takes liability of principal debtor upon him.

When creditor waives his debt to principal debtor then he cannot demand debt from guarantor, on the other hand, when he waives his right from guarantor, then principal debtor is still under liability to pay debt because guarantor was not debtor, debt is the base to demand from guarantor, when base comes to end then things based and attached with base are out of question. To conclude that *Shariah* and law have no difference on the issue of liability of debtor and guarantor.

2.6. Shariah Status of Cost of Funds

2.6.1. History of Cost of Funds

I. Prior to Islamization of Banking Interest was Allowed

Pakistan is an Islamic state as declared by its Constitution 1973. Objective resolution, 1949 which is article 2-A of the constitution of 1973 claims that all the laws shall be made according to injunctions as laid down by The Holy *Quran* and *Sunnah*, for this purpose constitutional institutions like Federal *Shariat* Court and Council of Islamic Ideology were established in this regard. We see a lot of efforts were done for Islamization of laws in the period of president Zia ul Haq. Before 1984, bank financing was purely based upon interest. If a debtor makes delay in paying his

debt to bank, the banks used to apply agreed interest rate against the time of default for that debtor. It was purely time related financing.[156]

II. Interest Based Financing Abolished

In 1984, Islamic system of financing was introduced through BCD Circular No. 13 issued by The State Bank of Pakistan in 1984. It abolished the interest based financing with effect from 1985 while introducing permissible modes of financing including mark up in price.[157]

III. Effect of Islamic Financing

All the financial institutions were not allowed to charge any additional amount due to delay caused by customer in the repayment of obligation created under mark up based agreement. It was held by the court that "The mark up can only be charged under the agreement between the parties or if permissible under the law and not otherwise"[158]"It is now well established that plaintiff can claim mark up on a facility only to the extent agreed upon under the contract of finance."[159]

In this way courts decided cases in the light of BCD circulars no. 13 of SBP. As a result of this new system of financing, financial institutions were prevented from charging any additional amount which they were earlier entitled under the interest

[156] 2006 CLD 842, P. 847
[157] http://www.sbp.org.pk/departments/pdf/IBD-OldCircular/BCD-cir13-1984.pdf (Last visited on July 2015)
[158] 2007 CLD 435 (DB) P. 437 B
[159] 2007 CLD 1374, P. 1376B

based financing. Any delay in repayments cannot bring any monetary gain for financial institutions.[160]

IV. Introduction of compensation Mechanism for Financial Institutions

The legislature empowered the courts to grant mark up over and above contractual period under the provisions of Banking Tribunal Ordinance, 1984. The courts started awarding 210 days mark up with dectrital amount to compensate financial institutions while BCD circulars Nos. 13, 32 do not allow any mark up beyond contracted period. In this way financial institutions were compensated under legal cover by courts for delay caused in repayments.[161]

2.6.2. Purpose of Cost of Funds

I. Concept of Cost of Funds

Under the Ordinance of 1984 and Act of 1997 courts were empowered to grant mark up over and above contractual period to compensate the financial institutions for delay in repayments, whereas F10, 2001 withdrew the power to award only cost of funds. Replacement of power of court to award mark up with power to award cost of funds was intended to get rid of the perception that allowing mark up beyond contracted period was in reality reintroduction of interest based financing.

Cost of funds mean to compensate the financial institutions for the cost they had to bear for their struck up finances. The court defined it in these words "On the other hand, from the date of default until the date of realization, the F10, 2001 creates for

[160] Supera note 131 P. 848
[161] Ibid P. 848

unpaid creditor financial institutions an entitlement to compensate through cost of funds as determined under the provisions of section 3 of said Ordinance".[162]

II. Court Only Can Grant Cost of Funds

Under the provisions of FIO, 2001 court cannot grant mark up but only cost of funds which are determinated under section 3 of said ordinance.[163]It is considered as alternative of interest which is named as *Riba* in Islamic law.

2.6.3. Duty of Customer to Pay Cost of Funds

It is defined "Where the customer defaults in discharge of his obligations, he shall be liable to pay, for the period from the date of his default till realization of the cost of Funds for financial institution as certified by the State Bank of Pakistan from time to time."[164]The courts defined that cost of funds are against default period as "As per the scheme of the ordinance, 2001, if a customer commits a default or fails to fulfill obligations to financial institution such default not only incur cost of funds under section 3(2) but also actionable under section 9 of FIO 2001."[165]

2.6.4. Cost of Funds Mandatory

Division bench of Sindh High Court Said "A bare reading section 17 relating to preparation of final decree clearly provides that in a suit filed by financial institution awarding of cost of funds as contemplated under section3 of the ordinance of 2001 is mandatory from the date of commission of default by the borrower/customer in

[162] 2012 CLD 961, P. 962C
[163] 2005 CLD 1676 P. 1678 A
[164] Sub-Section(2) of Section 3 of F10, 2001.
[165] 2011 CLD 1655,P.1670 B + 2004 CLD 117,P.124

fulfillment of obligation subsection (2) of section 3."[166] It is only awarded to customer in case of his default because it is mandatory provision of law.

1. Cost of Funds can only be awarded if judgment and decree passed

In a case, after service of summons respondents filed application for leave to defend the suit stating that they have paid the entire amount. In reply, appellant admitted this plea of respondents. The appellant demanded cost of funds and cost of suit other than the payments made by respondents. That is why, The appellant filed this appeal to avail the remedy against the order of trail court. It was held that default within the meaning of subsection (1) (2) will occur when a judgment has been rendered against the customer and a decree passed upon such judgment entitled for payment of cost of funds. Now , no judgment has been passed because the amount paid and admitted by respondents thus default is out of question in this case.[167]

2.6.5. Calculation of Cost of Funds

The bare reading of section 3 of FIO , 2001 tells that "He shall be liable to pay, for the period from the date of his default till realization of cost of funds of financial institution as certified by the State Bank of Pakistan from time to time."[168] Division bench of Sindh High Court said in calculation of cost of funds "The cost of funds is to be calculated only on the defaulted sum at the rates applicable form time to time from

[166] 2009 CLD 312 (DB) P. 315 A
[167] 2003 CLD 658 (DB)
[168] Supera Note no.139

the date of commission of default till the defaulted sum was deposited in the banking court."[169]

I. Determination of Cost of Funds

Reading of Section 3 of F10, 2001 tells that it is the duty of the state Bank of Pakistan to determine cost of funds from time to time.Sindh High Court holds opinion that plaintiff is not entitled to recover mark up/interest at a fixed rate for the years it will be unjust if they are deprived of the cost of funds. The cost of funds to be determined by the state Bank of Pakistan after taking into consideration all necessary factors involved in this regard. The plaintiff is entitled to recover the amount of cost of funds so determined by the State Bank of Pakistan on the principal amount."[170]

II. Cost of Funds Should be Awarded from

Division bench of Sindh High court decided a case, in which appellant challenged judgment and decree passed by banking court with cost of funds from the date of institution till realization. The counsel for respondent argued that there are discrepancies in the amount claimed and decreed by the court. He further added that accounting and calculation was not done by the respondent as per statement filed the counsel for appellants concedes to such statement likewise learned counsel for respondents concedes that the cost of funds could not have been granted by the learned trail court from the date of institution of suit. In terms of sub-section (2) of

[169] 2012 CLD 1670 P. 1675 C
[170] 2006 CLD 940 P. 945B

seciton3 of F10, 2001 cost of funds could only be granted from the date of default till realization.[171]

III. Recovery of Cost of Funds as Decree

After the whole study we are on the point that cost of funds determined by the State Bank of Pakistan, awarded from the date of default till realization of amount to compensate the financial institution against defaulted period. It is also mandatory upon banking court to award cost of funds in favor of financial institution. Section 21 of FIO, 2001 tells us that banking court may impose any fine or costs under this ordinance, that shall be deemed to be a decree passed under this ordinance for purpose of execution.[172]

2.6.6. Circulars issued by The State Bank of Pakistan are binding upon all Banks

In a decision of division bench of Sindh High Court, the court said "Mr. Sharif u Din Pirzada further contended that Circulars issued by the banking control department of State Bank of Pakistan were issued in exercise of powers conferred by section 25 of Banking Companies ordinance , 1962 and that they were in the nature of the instructions and or directives to the commercial banks whether private of Govt. owned and they were under a bounder duty to observe such instructions/circulars. We do not disagree with the contention advanced by Sharif u Din Pirzada"[173]

[171] 2010 CLD547 (DB)
[172] Section 21 of FIO,2001
[173] 2001 CLC 166 (DB) P. 191 J

The time for implementation of Islamic system of banking told in these words "The laws by which the banking business was to be conducted were set moving from 1962 and a concrete law was enforced form 1-1-1985 BCD circular NO. 13 categorically states that a transitional period is given to the banks for the purposes of transition from the old system of banking into Islamic system of Banking"[174]

2.7. Status of Cost of Funds in *Fiqh*

I. Meaning Of Riba

We are going to discuss Literal meaning of Riba which has been defined by Allama Al Razai in these words "Make addition in a thing (ربا) in other words (ا ربیت) I took more than that I gave."[175] It is also defined as " ربا الشئ means increase in a thing and و الر بیة means the earth which is curved up as it means addition."[176] The Holy Quran defined Riba in these words " يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَأْكُلُوا الرِّبَا أَضْعَافًا مُضَاعَفَةً"[177] which means O you Who believe do not take addition doubled and multiplied. We can say that meaning of Riba is to add to something. We observed that *Riba* has been defined literally as addition to something.

II. Definition of *Riba* by Different Jurists of *Fiqh*

Many prominent jurists defined *Riba* in legal way in their books, some of the definitions we are going to study them. There are two types of *Riba* named as *Riba*

[174] 2001 MLD 1351 P. 1377 B

[175] Muhammad bin Abu Bakar Bin Abdul Qadar Al Razi, Mukhtar Ul Al Siaha(Istanbol Turkey, Dar Ul Al Dawah,Year not known)P.231

[176] Muhammad Abdul Latif and Muhaudin Abdul Hameed, Al Mukhtar Min Siha Al Lugha(Tehran,Year and Publisher not known)p.184-

[177] Al Quran Chapter 3 Al Imran verse no 130.

Nisya and Ribal Fadal. A great Hanfi jurist Allam Ibne Abidin defines Riba and says that every loan which causes gain is unlawful (*haram*) if such gain is contracted and if it is not stipulated then it is allowed.[178] Allam Ibne Qudama Hanbli says that literal meaning of *Riba* is more than original and in *Shariah* it is getting more in specific things, it is unlawful proved by The *Quran, Sunnah* and Ijma.[179] A Shafi Jurist Khateeb Shirbini defines *Riba* as literal meaning of it is to progress, to get more and in *Shariah* it is a contract upon unknown counter value equal to *Shariah* standard or to make deferred one of the counter values or both.[180]

Abne Al Arabi a famous Maliki Jurist defines *Riba* that literal meaning of *Riba* is to get more and legally it is to get more over the principal amount. In old ages people used to get more when the date of debt becomes due, creditor asks the debtor that will you pay or adds to principal amount as against time. Thus Allah has prohibited all kinds of *Riba.*[181] Imam Abu Bakar Jassas says that literally *Riba* means more and in old ages the Arabs used to give loan to debtors with an agreed upon condition to return more than principal amount that is why in verse 39 of Al Room all said "Whatever you give *Riba* to make more properties of the people that cannot get progress according to Allah."[182] Imam Kasani who is great Hanfi jurist defines Riba and says that there must be no condition to get any kind of profit stipulated with loan otherwise such transaction shall be unlawful. Any stipulation which causes

[178] Supra Note vol, 7 P. 298
[179] Supra Note Vol. 6, P. 51
[180] Shamsu Din Muhammad Bin Al-Khateeb Shiribini, Mughni Muhtaj Ala Murafat Maini Al Alfaz Alminhaaj (Beirut: Darul Marsafat 1997) vol. 2, P. 30
[181] Abu Bakar Muhammad bin Abdullah Famous As Ibnul Arabi, Ahkamul Quran (place not known: Esa Ababi Halbi and Co; Year not known) vol 1,p. 241
[182] Abu Bakar Amad Bin Ali al Razi. Al jassess, Ahkaamul Quran (Beirut: Darul Kutb Ilmia,1994) vol 1,P. 563

gain to creditor is (*Harm*) illegal. Our Holy Prophet (PBUH) forbade such contract of loan which causes gain to creditor. In a contract of loan stipulated gain is *Riba* because this gain is against no consideration and it is compulsory to avoid it. If debtor pays more than principal amount to creditor without any stipulation with his own free will as *Husan-Qaza* then it is lawful and Halal in *Shariah.*[183] This stipulated gain on principal amount without any consideration against it is *Riba.*

Imam Qurtabi says "*Shariah* defines two types of *Riba, Ribau Nisa* and *Ribaul Fadal,* the most of the Arabs used to do, at due date of debt, asked the debtor, pay no or extend time and money? The creditor took more amounts against extension of time. All the scholars agreed upon it is (*Haram*) unlawful."[184] Allama Sabooni who is contemprary *Shariah* scholar says that Riba Nisya was known kind of Riba from age of ignorance It means to take stipulated addition on loan from debtor against the extension of time. He also says that this type of Riba is used by financial institutions.[185] Dr. Muhammad Tahir Mansoori Defines *Riba* "It is a Loan, given for stipulated period, with stipulated increase, on the principal, payable by the loaner."[186]

After the above discussion we can conclude that all scholars of Islamic law are agree on the point that every kind of gain to creditor without any consideration is not allowed.

[183] Supra note no , Translated by Khan Muhammad Chawla Vol. 7, P.892

[184] Abu Abdullah Muhammadk Bin Ahmad Al Ansari Al Qurtbi, Al Jame Al Ahkamul Quran (Damscus: Maktabtul Ghazali, Year not known) vol .2 p. 348

[185] Muhammad Ali Al Sabooni, Riwal biyan Tafseer Ayatul Ahkam Minal Quran (Beirut; Mosasia Minahilul Irfan, 1980) vol. 1 p. 383

[186] Muhammad Tahir Mansoori, Shariah Maxims Modern application in Islamic Finance (Islamabad: shariah Acadmey , 2012) p. 209

III. Shariah View Point about Awarding of Financial Penalty to Compensate Creditor

Before analyzing point of view of Shariah about imposition of penalty upon debtor to compensate creditor, debtors can be divided into two types after default in paying debt. One is who does not default willfully, his poor financial condition is reason of his default. It is agreed principal that a person who is not willful defaulter cannot be punished. He should be given extension of time to repay his debt. This view was discussed in the start of this chapter.[187] On the other hand willful defaulter can be disgraced and physically punished like imprisonment due to his procrastination and having enough property to pay his debt.[188] The imposition of penalty upon debtor after his default against the time period of his default is Riba and not allowed in Islam as stated in this verse.[189] وأحل الله البيع وحرم الربا

There is a group of scholars who allows imposition of financial penalty upon debtor, who is willful defaulter while having capacity to pay his debt, to compensate creditor against actual loss caused to him owing to default. Dr. Saddique Zareer sys that it is permitted to make financial penalty clause upon customer after his willful default by financial institution in a contact of debt. That penalty can be awarded after determination and calculation of actual loss occurred to financial institution during the period of default. If parties are not agree on determination of

[187] Supera note no. 69,71,73,74,75.
[188] Supera note no.86
[189] Al Quran Chapter 2 Al Baqara verse 275.

loss occurred to financial institution, that question can be determined by the court of law.[190] This view point is stipulated with determination of actual loss due to default.

Sheikh Mustafa Zarqa is contemprary scholar of *Shariah* is of the view that the concept of imposition of financial penalty upon willful defaulter to compensate creditor for his loss during the period of default is appreciated in *Fiqh*. There is no principle or objective of *Shariah* against this concept, on the other way physical punishment is allowed for such debtor because his default is unjust and not allowed.[191] Sheikh Mustafa Ahmad Zarqa and sheikh Saddique Zareer are of the view that imposition of financial penalty upon willful defaulter is allowed to redress the harm and loss of creditor. They say that this is only way to compensate creditor.[192] We can say that against period of default financial penalty is not allowed. Some jurists allow it in a case where there is actual loss is occurred to creditor and that loss can be determined then imposition of such penalty is allowed. Cost of funds is purely calculated from time of default by the customer.

IV. Is Cost Of Funds *Riba*

After the study of all definitions of *Riba* we can say that *Riba* is to charge more upon principal amount from debtor against time with no consideration. All the jurists are agree upon this definition of *Riba* and cost of funds are awarded to compensate the financial institution against the defaulted period as penalty upon debtor in the event of default in fulfillment of his obligations. These are calculated as per time of default,

[190] Al Shartul Jazai fi Uqood wa asarohu muamlat al masrfiya al Islamia, M.phil thesis written by Farkhanda Nasir at International Islamic University Islamabad,2007 to 2009 session. P. 62 to 66
[191] Supera note No.47
[192] Supera note 162

it is *Riba* that is *Haram* in *Shariah*. It is reported by Hazrat Jabbar (R.A) that Holy Prophet (PBUH) cursed the person who take *Riba* and give it and also the person who writes it and who gives testimony upon it. They are equal in this regard.[193]

2.8. Conclusion

In the second chapter of my thesis, we discussed three points in the light of *shariah* and law. Firstly, we discussed that there is contradiction in law and *Shariah* on the point to deal with the debtor who commits default. Our legal system says that every default is willful default. All the debts which are determined by a competent judicial forum shall be recovered as arrears of land revenue. On the other hand, all the jurists are agree on the point that a person who is not willful defaulter cannot be physically punished his imprisonment is not lawful unless it is proved that he has concealed some property to avoid legal action against him. After the default by customer there must be judicial inquiry about reasons of default of debtor. If he is in default due to his poor circumstances he should be given extension of time to pay his debt. Secondly, we discussed the issue of liability of guarantor in the light of *Shariah* and law. There is no contradiction in *Shariah* and law on this issue.

Lastly, we discussed the status of cost of funds in the light of *Shariah*. There is a view by some contemrory *Shariah* scholars to impose financial penalty to compensate creditor against actual loss occurred to him. We are of the view that cost of funds is *Riba* because they are awarded to compensate the bank against the period of default as a penalty to customer. It is calculated against period of default by customer. No

[193] Sayed Muhammad Bin Ismail Sanaani,Soobulo Alsalam Sharah Balooghol Maraam, Urdu Translation by Mulana Abdul Qayyum(Islamabad:Shariah Acadmy,2004)Vol 3,P.85

actual loss is determined in awarding of cost of funds. All the jurists of Islamic law are agree on the point that any kind of gain or profit which is taken against no consideration is *Riba* under the principles of Islamic law. Riba based financing has been prohibited by The State Bank of Pakistan in BCD Circular 13.We are of the view that cost of funds is *Riba* which is prohibited by *Shariah* and it is the violation of circulars of State Bank of Pakistan . The Circulars issued by The State Bank of Pakistan are binding upon courts to be followed in order to decide the cases according to law. This Ordinance must be amended to abolish the power of banking court of awarding of cost of funds.

CHAPTER III

Legal Appraisal of the financial Institution (Recovery of Finances Ordinance, 2001

3.1. Introduction

In the last chapter of our dissertation, we studied thoroughly and reviewed the F10, 2001 from *Shariah* perspective, we identified three issues, first of all there is no difference between a person who has committed willful default and a person who is in default due to his difficult poor circumstances. This law has same procedure to deal with both type of debtors, on the other hand *Shariah* has different treatment for both debtors. Secondly, we studied the issue of liability of guarantor in *Shariah* and law, we find our law is according to *Shariah* in this regard. Lastly, we identified the status of cost of funds in *Shariah*, after the study, we came to the conclusion that this is *Riba* which is clearly prohibited by the *Quran* and *Sunnah,* all the jurists are agree upon the prohibition of this kind of *Riba.*

In this chapter, we are going to study this Ordinance from legal perspective. This Ordinance has been criticized by many legal researchers, advocates and jurists as this law is titled towards financial institutions and banking court is only court for financial institutions. Debtors/Customers are being persecuted under the cruel provisions of this law. This law is against the basic principles of natural justice as *Audi Altem Partem* which means nobody should be condemned unheard. Section 10 of this Ordinance is contradict with article 10A of the constitution of Pakistan 1973. The banking court has no discretionary powers in the trail of suit to secure ends of justice under F10, 2001.

3.2. The Issue of Establishment and limited Jurisdiction of Banking Court

The banking court which has been constituted under section 5 of F10, 2001 exercise its jurisdiction under section 9 as states "Where a customer or a financial institutions commits a default in fulfillment of any obligation with regard to any finance, the financial institution, or as the case may, the customer may institute a suit in the banking court by presenting a plaint."[194]

3.2.1. Conditions to Exercise Jurisdiction of Banking Court

A close scrutiny of section 7(4) and 9(1) of the Ordinance would reveal that a customer or a financial institution will be entitled to file a suit in banking court when any of the both parties commits default in fulfilling any obligation with regard to finance. The first requirement is that the parties should either be a customer of financial institution. A customer is person to whome finance has been extended and includes a person who is surety or indemnifier. The second condition for bringing a suit must arise from default in fulfilling of any obligation with regard to finance.[195] The scope of jurisdiction of banking court is very narrow as we studied in this judgment.

The court further said "If the transaction is outside the scope of finance even then any default in fulfillment of obligation will not bring a suit within the jurisdiction of Banking court."[196] Another court decided that "To attract the jurisdiction of banking

[194] Section 9 of FIO,2001
[195] 2003 CLD 363, P. 378 H +2002 CLD 65 8+ 2011 CLD 186, P.190B
[196] Ibid

court under section 9(4) of the Ordinance there may be a default in fulfillment of any obligation with regard to any finance between a customer and financial institution."[197]

In another decision court said "The Jurisdiction of banking court is only attracted where a customer or a financial institution commits a default in fulfillment of any obligation with regard to any finance the suit in a banking court could be instituted by presenting the plaint."[198] We can say that there is a triangle to exercise the jurisdiction of banking court, customer and financial institution are at both ends while default in fulfillment obligations with regard to finance is at third corner. Whenever there is default from any side banking court is empowered to exercise its jurisdiction.

3.2.2. Scope of Jurisdiction of Banking Court

Lahore High Court defines that the second type of jurisdiction is over the parties and connotes that the banking court shall only have the jurisdiction in cases where relationship of financial institution and that of the customer exists between parties, the broad question of jurisdiction shall be that the dispute should be between the customer and the financial institution as defined in law, in respect of the failure of the defendant to fulfill his obligations in relation to finance which is specifically and clearly mentioned in section 9 of the Ordinance which is key provision of the special law and can be termed as jurisdictional clause of the enactment.[199]

The court further added while saying that "If the relationship between the parties to the suit is not that of customer and financial institution and subject matter is not about

[197] 2003 CLD 1026 P. 1032E
[198] 2003 CLD 1843, P. 1848 A
[199] 2010 CLD 293, P. 305 A

finance, the special court shall have no jurisdiction."[200]In the said decision the court told that the banking court has limited jurisdiction because it is a special court to deal with special matters.

3.2.3. Definition of Customer is Limited

"It is manifest and clear that the customer is that person to whom finance has been extended by a financial institution or a person on whose behalf a guarantee or letter of credit has been issued by a financial institution or is a surety or an indemnifier"[201] Division bench of Quetta High Court said that the word "Customer is limited to a person to whom finance has been extended and includes a person on whose behalf a guarantee or letter of assurance has been issued by a financial institution. It means the person other than defined in section 2(c) of Ordinance, do not come within the definition of a customer.[202] In another case court elaborated this concept in these words "Merely being account holders of the respondents the appellants cannot be considered as customers and the amount allegedly deposited by the appellants also does not come within the purview of finance. Similarly, any facility defined in the definition provided by a financial institution covers within the ambit of finance, Hence, opening of an account and deposition of amount by an account holder would not be considered as finance"[203]

Parties to a banking suit under FIO, 2001 are specifically mentioned as customer or financial institution. This is a special law, the scope of it is confined to the parties who are entitled to invoke jurisdiction of banking court are only two. Other than these two if a

[200] ibid
[201] 2011 CLD 186, P. 191 C
[202] 2011 CLD 785 (DB) + 2012 CLD 483 (DB) + 2005 CLD 1352
[203] 2011 CLD 785, P.789 C

person is connected in any way with a transaction falling under the definition of finance, that person not being customer is not entitled to invoke jurisdiction of banking court under section 9 of the Ordinance.[204] The court further said "No person, no matter in what other capacity he is connected with financial facility, if he does not fall within the definition of a customer as defined in section 2 (c) of the Ordinance, he can neither sue nor be sued under section 9 of the Ordinance, 2001 and the legal remedy for and against him lies before ordinary civil court."[205]

Banking court is special court to deal with disputes arising out of bank customer relations in the matters of recovery of finance. If a dispute arises other than finance between the parties then they can approach ordinary courts to resolve their disputes according to law.

3.2.4. Damages are not Finance

The court decided that "In a view of the settled law pointed out by learned counsel for the defendant that tortuous damages cannot form a claim in a suit filed under the Ordinance the said relief for Rs 111.00 million prayed in the plaint is liable to be struck out and is so done."[206] In a suit filed by customer for rendition of accounts against bank along with demanding cost for mental torture caused by bank due to basses and incessant demand. Banking court decreased suit in favor of plaintiff with sum of 50, 000 Rs. The appellate

[204] 2007 CLD 1532 P. 1539 D + 2008 CLD 385 (DB)
[205] Ibid, P.1541 H
[206] 2006 CLD 1147 P. 1149 A

court held that no legal jurisdiction was available with the banking court to award any compensatory cost to plaintiff.[207]

Division Bench of Sindh High Court decided "We are of the considered view that credit card falls within the term of finance, the case of appellant arising out of tortuous liability, banking court has no jurisdiction over a tort case based upon the damagers.[208] Now we can say that scope of jurisdiction of banking court is restricted only a matter relating to finance in the light of these reported judgments.

3.2.5. Withholding of Account Balance is not Finance

In a case where bank with hold the amount of foreign currency account of customer. The customer filed suit in banking court to avail legal remedy. The court elaborated the term finance and held that "Without any lawful justification the balance amount available in their foreign currency account maintained with defendant bank was withheld. These facts do not determine the status of plaintiff as borrower or customer but only a foreign currency account holder."[209] He was not declared as customer by the court. Account holder is not a customer under law and withholding of balance sum available in their account is not matter related to fulfillment regarding obligations with regard to finance. Thus banking court has no jurisdiction over the matter.[210]

Consequently, customer was not allowed to avail remedy through banking court. Account holder filed suit for damages alleging that his account was not properly maintained and bank failed to fulfill its liabilities and bank also failed to credit some

[207] 2009 CLD 1564 P. 1568 B
[208] 2009 CLD 49 (DB) P. 52D
[209] 2003 CLD 601 P. 1609 E
[210] ibid

amounts in their account claimed that bank illegally detained their money. In the end, court said account holder is not covered with the definition of customer and matter is not related to finance, banking court has no jurisdiction in the case.[211]

3.2.6. It is a Special and Summary Procedure

Division Bench of Sindh High court said "The scheme of the special enachtment is clear manifestation of the object and procedure of FIO, 2001 namely a summary procedure and speedy remedy for recovery of outstanding finance to avoid lengthy litigation under the general, provisions of law."[212]"The financial institutions (Recovery of Finances) ordinance, 2001 is a special law, therefore, every provision contained therein has to be strictly construed and meticulously adhered."[213]"The Banking courts which were established under section 5 of ordinance, 2001, are the creature of the statute and of course are bound by the provisions of that statute."[214] Another court said "The object of the Ordinance was to provide machinery for expeditious recovery of money."[215]

A person filed the suit for malicious prosecution against bank on the ground that suit for recovery filed by bank against their predecessor was frivolous and they in capacity of legal heirs suffered losses. The court held that they are not customers and matter is not relating to finance thus they are not entitled to invoke jurisdiction of banking court.[216] In the end, after all study, we can conclude that F10, 2001 is a special law having summary procedure regarding the disputes of recovery of debts between

[211] Supera note 168 , P. 785
[212] 2013 CLD 423,P. 430 A
[213] 2011 CLD 1655 (DB), P. 1670 A
[214] 2003 CLD 245, P. 248B
[215] 2009 CLD 661, P.664 B
[216] 2007 CLD 571 (DB)

customers and financial institutions. If the scope of jurisdiction of banking court has been made wider then banking court would become as ordinary court and it cannot dispose of matters as early as possible. The object of this Ordinance is to solve the matters within minimum time, thus it is very apt here that jurisdiction of banking court is limited only to customer and financial institutions and matters relating to finance. Other persons should not be entitled to interfere with these proceedings. But the scope of banking court should be broader to deal with all matters arising out of banker customer relationship.

Other than these parties or other than matter related to fiancé can avail remedy from ordinary civil court under the provisions of general law. Under this special law banking courts have status of federal courts and federal Government has authority to establish as many baking courts as it considers necessary.[217] This is complete discretionary power because Federal Government does not have any consultation with judiciary in establishment of these courts. Now currently 29 banking courts are working in Pakistan.[218]

This is very astonishing figure because is it possible for only 29 banking courts to provide speedy justice in the population of 180 million people[219] where 80 banks[220] with thousands of branches having millions of account holders are working. Likewise Karachi and Lahore which are the financial hubs of Pakistan having population more than 30 million only have 9 banking courts. It is available figure, however actually sometimes in the absence of judges and delay in appointments this figures remains law. Banking courts

[217] Section 5 of F10, 2001
[218] http://www.pljlawsite.com/2011art5.htm (Last visited July 2015)
[219] http://countrymeters.info/en/Pakistan (Last visited July 2015)
[220] http://masoodandmasood.com/list-of-banks-operating-in-pakistan/ (Last visited July 2015)

have narrow scope which is directly affecting the performance of financial institutions as well as other judicial forums in Pakistan. Three conditions to invoke the jurisdiction of banking court are that plaintiff must be financial institution or customer, one of them has committed default in fulfillment of obligation in a matter relating to finance.[221]

Besides it, financial institutions are also providing various other service to their customers like internet banking, collection of various bills and bank as an agent in international trade, any dispute arising under these services does not come in the jurisdiction of banking court which directly creates multifarious proceedings before different other judicial forums.

Another problem in this law is the appointment of judges, all appointment are made by federal government, the duration of office of banking court judges is three years[222]. These courts have special status but there is no provision for special qualification for the appointment of judges and there is no provision to appoint specialist lawyers in this field as judge in these courts. Sometimes, inexperienced judges are appointed having no qualification and experience relating to banking matters which create problem in deciding cases. Banking court is a special court and division bench Sindh High Court said "The jurisdiction conferred on the high court under the Ordinance is banking jurisdiction and while exercising such jurisdiction the high court bears the fictional character of a banking court as defined in the Ordinance."[223]

The original jurisdiction of high court and distinct court is unlimited but when district judge or judge of high court acting as banking court his jurisdiction is confined

[221] 2003 CLD 363,P.378 H+2011 CLD 186,P.190 B
[222] Section 5 F1O, 2001
[223] 2003 CLD 1822 (DB) P. 1836 D

to fifty million rupees. As court decided "High court as banking court cannot deal with any other cases except those in which claim exceeds 50 million rupees while for claims not exceeding 50 million rupees, jurisdiction has only been confined to the banking court established under section 5 thereof"[224] In the light of above case law it seems that High Court has been upon a matter which is less than 50 million and High Court judge working as judge of banking court is restricted to 50 million which is against dignity of High Court.

We recommend that there must be a single judicial forum with all powers to resolve all disputes between customers and banks. There is immense need to increase number of banking courts in other cities as well to provide justice at door step. There must be certain qualification to be a judge of banking court regarding experience in banking sector. There should be specific provision to appoint specialist lawyers as judges of banking courts having experience not less than ten years. It will help to provide a speedy justice due to their well versed qualification and experience. There should be single judicial forum to deal with disputes arising out of banker customer relations.

3.3. The Issue of Leave to Defend

Section 10 of FIO, 2001 deals with leave to defend. It states that after due service of summons upon defendant, he is not entitled to defend the suit unless he obtains leave from banking court to do so and if he fails in obtaining leave, the allegations of fact in the plaint shall be deemed to be admitted and banking court may pass a decree in favor of plaintiff.[225] Some legal scholars criticized leave to defend' stating that it must not be

[224] 2003 CLD 67 P. 72A
[225] Sub-section (1) of section 10 of FIO, 2001.

compulsory, defendant should have the right to defend the suit as matter of right because it is his fundamental right secured by constitution of Pakistan article 10-A. Now, we are going to discuss this issue in detail is it contradict to fundamental right of fair trial or not.

3.3.1. Obtaining Leave to Defend is Compulsory

While interpreting section 10 of this Ordinance, division bench of Sindh High Court decided in these words "On examining the scheme of section of 10 of FIO, 2001 it becomes clear that obtaining leave to defend is sine qua non to defend a banking suit. Without obtaining leave FIO, 2001 does not permit defaulting defendant to contest the claim set up in a banking suit."[226] Another division bench held that "Section 10(1) of the said Ordinance, 2001, lays down in specific terms that where summons have been served as prescribed in section 9(5) thereof the defendant shall not be entitled to defend the suit unless he obtains leave from banking court, as provided in the said provisions of law."[227]

In a case, court decided that it is compulsory upon banking court to decide the leave application first in either way accepting or rejecting it. Then proceed further in the case according to law.[228] Division bench of Lahore High Court decided "It is well-established that without deciding the applicant for leave to appear and defend the suit on its own merits, the learned judge banking court could not embark upon the suit."[229] In the light of above stated decisions of courts, we are of the view that obtaining leave to appear and defend the suit after due service of summons upon defendant is compulsory under the provisions of FIO, 2001. The courts further held that without deciding leave application,

[226] 2013 CLD 423 (DB) P. 430
[227] 2007 CLD 469 (DB) P. 470B
[228] 2003 CLD 245 + 2005 CLD 1494
[229] 2006 CLD 1568 (DB) P. 1569 A

court cannot proceed further in proceeding of suit. The first duty of court to decide the leave to defend application first of all then proceed further under the provisions of this law.

3.3.2. Failure to obtain leave to Defend

When defendant fails to apply for leave to defend after due service of summons or his leave application has been dismissed by court, then banking court may pass a decree in favor of plaintiff against defendant. The court decided that when after service of summons, the defendant has not come to court to obtain leave to defend the suit, it means that the contentions of plaintiff have gone unrebutted and unchallenged, the court decreed the suit in favor of plaintiff.[230]

Division Bench of Lahore High Court decided that "It is also settled principle of law that the appellant has to file an application for leave to defend within prescribed period under banking laws which admittedly not was filed by appellant, thereof, banking court was justified to decree the suit."[231] It is the discretion of court to decree suit when defendant does not approach to court to obtain leave to defend or when his leave application dismissed by court. After failure to obtain leave, is not a mandatory for court to decree the suit.

In a case, court decided that during the arguments counsel for defendant did not say a single word to challenge the order of dismissal or leave application. After dismissal of leave application, trail has no option but to decree the suit.[232] Furthermore where some

[230] 2002 CLD 242 P. 245A
[231] 2004 CLD 202 (DB) P.205 A
[232] 2003 CLD 119 (DB) 123 a 2005 CLD 653(DB), P.657A

conditions are attached to get leave from court, those conditions must be fulfilled, division bench of Lahore High Court said that "Where defendant fails to fulfill conditions attached to the grant of leave to defend, the banking court shall forthwith proceed to pass judgment and decree in favor of the plaintiff against the defendant"[233] We are of the view that obtaining leave to defend is compulsory. If defendant fails to obtain or his application for leave to defend is dismissed by court, then banking court may pass a decree in favor of plaintiff presuming that defendant admitted the contents of plaint.

3.3.3. Service of Summons

It is a well known principle of law that no one should be condemned unheard. It is a principle of natural justice that judge must decide the matter after hearing both parties because judge must not be biased. Presumption of innocence of accused has been recognized by common law unless he is proved guilty by an independent evidence in a court of law. Both the parties to a case have right to present themselves before court through counsels and provide evidence in their favor.

Audi Alteram Partem "No man shall be condemned unheard" It has been a received rule that no one is to be condemned, punished or deprive of his property in any judicial proceedings unless he has had an opportunity of being heard."[234]

The process of service of summons has been prescribed by law to inform the defendant to come to court and defend himself. F10, 2001 is a special law having summary procedure for recovery of debts. It has special provision to inform defendant that suit has been filed against him, now come and defend the suit. Section 9(5) says that

[233] 2003 CLD 1658 (DB) P. 1665A

[234] Herbert, A Selection of Legal Maxims(London Sweet and Maxwel Ltd, 1939)P. 65 66

defendant shall be served through the bailiff or process server of banking court or by registered post acknowledgment due or by courier or by publication in one English language and one Urdu language daily newspaper and service duly affected in anyone of the said modes shall be deemed to be a valid service for purposes of this Ordinance.[235] In a case service was effected through publication in newspaper, counsel of borrower argued that it is not valid service because only one way was adopted for service.

Division bench of Lahore High Court decided service through anyone of four modes prescribed in section 9(5) deemed to be lawful service. The argument of defendant rejected by court. [236]Another division bench of Lahore High Court said that service affected in any of said modes to be a valid service.[237]About the personal service upon defendant the court held that limitation to file leave to defend run against defendant when service is affected through any of modes said bylaw. Personal service is not compulsory in this regard.[238]

In another cased decided by division bench of Lahore High Court overruled these decisions. In this case, *exparte* decree was passed against defendant, banking court dismissed the application of defendants to set aside exparte decree which was challenged on the basis that summons were not served according to law. The learned judge of banking court issued summons to defendant through registered post and by proclamation in two news papers after that he passed exparte decree against defendant. High Court set aside exparte decree and remanded case to banking court to decide it according to law.

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[235] Section 9 (5) of F10, 2001
[236] 2005 CLD 1705 (DB) P. 1707 A
[237] 2004 CLD 393 (DB) P. 396
[238] 2001 MLD 1859

The court further interpreted section 9(5) of FIO, 2001 and held that summons shall be issued to a defendant through four modes of service. The judge of banking court thought it fit in his own wisdom to issue summons through two modes. The judge of banking court has no jurisdiction to deviate from the procedure laid down in section 9 (5).[239]

As we see that this decision overruled previous decisions and interpreted section 9(5) in a different way. We are of the view that this interpretation of this provisions is more convenient to meet the ends of justice. All modes of service must be used in the light of this judgment.

3.4. Right of Fair Trail

Right of fair is a principal of natural justice. Constitution of Pakistan says "For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process".[240] This fundamental right has been guaranteed by Constitution of Pakistan. Some legal jurists are of the view that the principle of leave to defend is violation of right of fair trial.

According to FIO,2001 obtaining leave to defend is compulsory, when defendant fails or his application for leave to defend is rejected by banking court the court may pass a decree in favor of plaintiff. Furthermore, it is not necessary for court to record evidence in each a very case as court decided that "It may be construed that the learned judge banking court in each and every application for setting aside the exparte decree is obliged under the law to automatically record evidence of parties, but it has been left to the discretion of banking court to record evidence or not, as the circumstances of the case

[239] 2007 CLD 687 (DB) P. 692A
[240] Article 10-A of Constitution of Pakistan,1973.

require."[241]This decision of division bench laid down the principle that recording evidence in each case is discretion of banking court. The court is not bound to record evidence in each case. Now, we are going to study the concept of right of fair trial. How the courts interpreted this provisions of law. Then in the end we shall analyze "Leave to Defend' with 'Right of Fair Trail".

Lahore High Court held that law recognizes right of both parties to be heard and to have a fair trial. The object of law and duty of court to do justice and justice cannot be done without hearing both parties.[242] In section 10(1) of FIO, 2001 where defendant fails to obtain leave or their leave dismissed, the court has discretion to pass a decree in favor of plaintiff. This provision of FIO, after bare reading seems to be violation of right of fair trial because banking court decides the matter without hearing other party. In another case court decided that every citizen must be dealt with in accordance with law and fair trial. It is the duty of court to protect innocent people from unlawful and unjustified involvement in litigation.[243]

In this case court held that presumption of innocence for defendant must be held by court, unless claim is proved against defendant through evidence. It is held that every trial or action of court must be in accordance with law. Supreme Court of Pakistan held that it is cornerstone of the administration of justice that all people who appear before Supreme Court to be innocent or guilty are entitled to the due process of law and they are deemed to be innocent until proven guilty after a fair trial.[244] In another case Supreme

[241] 2006 CLD1403 (DB) P.1405 B
[242] 2011 YLR 2705 P. 2709 H
[243] PLJ 2013 Lahore 43 P. 48 B
[244] PLD 2012 SC 664 P.674 + 2013 CLC 185 P.190

Court decided that judge should not have tentative opinion about the case before trail because having tentative opinion on merits of the case violates a litigant's fundamental right which has been guaranteed under article 10-A of the Constitution of Pakistan.[245] Division bench of Lahore High Court held that "The mere absence of a provision as to notice cannot override the principal of natural justice that an order affecting the rights of a party cannot be passed without an opportunity of hearing to that party. The principal of natural justice do not contemplate only a hearing but also a reasonable opportunity to be heard.[246]

Full bench of Supreme Court of Pakistan held that when the non-application of principles of natural justice makes the decision null and void, principles of natural justice must be applied to all cases to secure ends of justice.[247] After discussing relevant cases of article 10-A , we are of the view that no one should be condemned unheard. Both parties must be given opportunity to be heard by the court. The court must not have tentative mind before the trail of case. Every person is innocent unless he is proved guilty by providing evidence against him. The decision made by courts neglecting principles of natural justice, ever held null and void by superior courts because right fair trail is a fundamental right guaranteed under the Constitution of Pakistan.

3.5. Is 'Lave to Defend' Contrary to 'Right to Fair Trail'

Now, we are going to study that is leave to defend is violation of fundament right of fair trial or it is in consistent with principle of fair trial. While deciding a case, Sindh High Court held that the scheme of FIO, 2001 is to decide suits between customers and

[245] PLD 2012 SC 553, P.581 F
[246] PLD 1969 Lahore 53 P. 65F
[247] 2005 SCMR 678 (FB)+ 2012 CLC 1236

financial institutions expeditiously in a summary manner. The object of framing section 10 is that all vexatious and mala fide pleas of defence should be curtailed, so that proceedings may be completed within shortest possible time in order to achieve the scheme.[248] The court decided in a case that when financial institution files a suit for recovery of fiances by fulfilling the requirements of section 9 of FIO, and submits all documents required by law as statement of account, amount of finance availed and repaid by customer with dates and amount payable till the date of institution of suit. The burden to dislodge the said claim shifts upon the customer, who is required by law to file leave to defend application which would be treated as written statement after the grant of leave[249] Division bench of Peshawar High Court decided that leave to defend cannot be granted mechanically in each case, the leave is granted to the specific issue raised by the defendant in his application. Leave to defend requires that the defendant should come up with a positive defence of a particular fact which has to be supported by certain documentary evidence to convince the court that there were sufficient ground for granting leave to defend.[250]

After studying above cases, we can say that full opportunity of being heard is provided to defendant. If a serious questions of law and fact are raised on a specific issue which require evidence to be recorded then court grant leave to defendant. Arguments of defendant upon leave application are sufficient to comply with the principles of natural justice. If no serious or bona fide question or issue is raised by defendant then banking court is justified in dismissing his leave application for leave to appear and defend,

[248] 2006 CL D 244 P. 250
[249] 2013 CLD 1165 P. 1173B (DB)
[250] 2005 CLD 1367 P. 1370 A (DB) + 2005 CLD 521 (DB)

division bench of Sindh High court said "After going through the entire pleadings of parties, it is obligatory upon the banking court to decide question of law raised in the leave to defend application and not to dismiss or reject the leave to defend application in perfunctory and cursory manner."[251] Full bench of Supreme Court of Pakistan held that discretion must be exercised by rule of reasons which must be guided by law and must not used in an arbitrary, vague and fanciful manner. It should be honest, legal and in the sipirit of statute. In judicial matters, exercise of discretion must be based on good and substantial reason.[252]

In the light of these stated judgments, we can conclude that though granting leave and passing judgment in favor of plaintiff after dismissal of leave to defend application is discretion of banking court but it is not violation of article 10-A of the constitution because banking court hear the contention of defendant in leave application . The leave cannot be granted in each case as a matter of right. Superior courts defined principles and boundaries in which court can exercise discretion. Power of exercising discretion also has certain limitations in which courts are bound to follow those principles and guidelines explained by superior courts. Discretion cannot be exercised in arbitrary and fanciful manner. After examination of record of documents and proper hearing of defendant in leave to defend application banking court decides leave application according to law.

3.6. Duties of Banking Court While Deciding Leave Application

When defendant fails or his application for leave to defend is dismissed by banking court, consequently banking court may pass a decree in favor of plaintiff against defendant on

[251] 2011 CLD 790 (DB) P.803A
[252] 2004 SCMR 1747 P. 1752 A

the basis of material provided by plaintiff or may require other material as it thinks fit in the interest of justice.[253] In a case, division bench of Lahore High Court decided that requirements of law must be fulfilled in plaint. In a recovery suit, statement of accounts submitted by bank was not in accordance with the provision of section 2 (8) of Bankers Books evidence Act , 1891 that was not certified copy as contemplated by law and such copy of statement could not be considered as prima facie evidence of existence of entries in the statement of account by bank. The defendants could not be held liable to pay amounts claimed.[254] In other case court held that filling of statement of accounts along with plaint is mandatory for plaintiff which must be duly certified under bankers books evidence Act, 1891, otherwise plaint would be considered incomplete and cannot be the basis for evidence of plaintiff.[255]

In these stated cases we can conclude that plaint must be in accordance with mandatory provisions of law otherwise bank cannot prove its claim. Division bench of Lahore High Court held that disorganized and incomprehensible statement of accounts needs strong corroboration to receive judicial acceptance.[256] Full bench Lahore High Court said 'The presumption attached to the statement of account is rebuttable and entries in the statement of accounts alone are not sufficient to prove the claim of the plaintiff bank and corroboration is necessary".[257] Same court held that "The other exception to the judgment with utmost reverence and regard is that the statement of account cannot be

[253] Section 10 (1) of FIO, 2001
[254] 2007 CLD 678 (DB) P. 682 B + 2005 CLD 1186 (DB)
[255] 2003 CLD 931,P.940 J
[256] 2005 CLD 569 P. 578 B
[257] 2009 CLD 257 (FB), P. 291 F

taken as gospel's truth; the presumption of correctness attached to its entries is rebuttable."[258]

This decision of full bench made the status of statement of account clear that it must be clear and according to mandatory provisions of law. Its presumption is rebuttable by adducing evidence by customer in banking court. In another case, court decided that on dismissal of application for leave to defend, it does not mean that plaintiff is entitled of decree of entire claim as prayed by him. In such case plaintiff is entitled get decree for the amount which is permissible in law.[259]Now, to conclude the discussion, we can say that section 10 of F10, 2001 is formed for expeditious disposal of suit within time said by law. It is not the violation of right to fair trial because when application for leave to defend is rejected, the court examine the original documents and properly hears the contention of defendant in application for leave to defend and appear in suit and then decree the suit according to law.

3.7. Is Banking Court an Absolute Civil Court

Banking court has been established under section 5 of F10, 2001 to settle the disputes between financial institutions and customers relating to their obligations of finance. Baking court, while exercising its criminal jurisdiction, it can try offences punishable under this Ordinance, for this purpose it has same powers as are vested in a court of sessions under the Code of Criminal Procedure, 1898, while, in exercise of its civil jurisdiction it has all powers vested in a civil court under Code of Civil Procedure

[258] Ibid P. 287 B

[259] 2013 CLD 672, P. 676 B + 2013 CLD 1291

1908.[260] In exercise of criminal powers by banking court, there has been no ambiguity that in exercise of such powers, banking court can and cannot exercise such and such powers. In exercise of its civil jurisdiction. There is a variance of opinion by the superior courts that banking court is not civil court. The Code of Civil Procedure states that "Where a person challenges the validity of a judgment, decree or order on the plea of fraud, mis-representation or want to jurisdiction, he shall seek his remedy by making an application to the court which passed the final judgment, decree or order and not by a separate suit".[261] The plain reading of this provision tells us that fresh suit cannot be brought but application to same court shall be filed if a person wants to challenge the validity of a judgment, decree or order on the basis of fraud, misrepresentation or want to of jurisdiction.

In a case defendant accepted the claim of plaintiff and court passed decree. The decree holder contended that judgment debtor did not disclose that only one loan was satisfied and the other two loans were yet to be paid off. His contention was that the order passed by executing court was obtained by misrepresentation. The court decided "Such misrepresentation was a fraud played on the court which led to the passing of the order of satisfaction of decree, such misrepresentation and fraud perpetuated on the court to obtain orders fell within the scope of 12 (2) CPC. Order passed by the executing court was set aside."[262]

In another case, division bench of Lahore High Court decided "Since the special law takes case of various situations itself, application under general law, section 12(2) of

[260] Section 7(1) of F10,2001
[261] Section12 (2) of the Code of Civil Procedure V of 1908
[262] 2002 CLD 904 P. 914 A

CPC would not be competent"[263]In another case division bench decided that section 12(2) of CPC is not applicable to the cases of banking court.[264]About the application of CPC in banking cases the court said that if provisions of special law is contrary to provisions of CPC, the provisions of Special law.would be applicable to exclusion of provisions of CPC. Where provisions of special law is silent about a situation then the special law would give way to that extent to the provisions of CPC which would be applicable.[265] In a case decided by division bench of Lahore High Court where an *exparte* decree was passed against guarantor, the High Court converted the application of guarantor as application under section 12(2) CPC and directed the banking court to decide the same[266]

Division bench decided that F10, 2001 is a special law to resolve banking disputes between financial institutions and customers. Banking court has jurisdiction of civil courts and criminal courts under FIO, 2001. If any procedure has not been provided by FIO, 2001 then the banking court would follow the procedure of CPC, 1908.[267]In the same case the court held "The logical conclusion of the above said discussion is that applicability of section 12 (2) of code of civil procedure has not been debarred under the FIO, 2001.[268] Sindh High Court said that "It is held that the provisions contained in section 12(2), CPC are applicable to the proceedings arising out of the banking laws in the appropriate cases and application under section 12 (2) CPC is maintainable.[269]

[263] 2000 MLD 421 P.424 C (DB) + 2004 CLD 1573
[264] 2004 CLD 1573 P. 1577 B (DB) + 2002 CLD 365
[265] 2002 CLD 1431, P. 1445 D
[266] 2004 CLD 1672 (DB) P. 1676B
[267] 2014 CLD 390 (DB), P.396 C
[268] Ibid, p. 397 E
[269] 2003 CLD 326 (DB) P. 348K

There is a difference of opinion about the application of 12(2) in banking cases. The court said that provisions of 12(2) CPC could only be pressed into service when fraud had been practiced upon the court and judgment was obtained on basis of such fraud.[270] Division of bench of Lahore High Court held "The provisions of section 12(2) of code of civil procedure have no applicability to the proceedings arising under the Financial Institutions (Recovery of Finance) Ordinance, 2001."[271] On the other hand a contrary view can be seen in a case decided by division bench of Sindh High Court that provisions of section 12(2) of CPC are applicable to the decrees passed by the banking court there is no express bar in law in the application of 12(2) CPC.[272]

It is crystal clear form above discussion that banking court follow the summary procedure of F10, 2001, in a civil matter where no procedure has been provided in FIO, the banking court shall follow the code of civil, procedure 1908 and in criminal cases shall follow code of criminal procedure 1898. There is immense need, a *Suo Motu* notice should be taken by Honorable Supreme Court of Pakistan to authoritatively pronounce and settle the law on application of 12(2) of CPC in the cases of banking courts. In this way this confusing issue shall be made clear for subordinate courts.

3.8. Is Banking Court a Court of Customer

Banking court has been established under section 5 of F10, 2001, it is a special law having summary procedure to resolve. The disputes within a period of ninety days after granting leave to defend to defendant. Banking court can exercise its jurisdiction when

[270] 2003 CLD 996
[271] 2005 CLD 438 (DB) P. 443D
[272] 2004 CLD 279 (DB) P. 282 A

there is a default in fulfillment of obligations relating to finance. Banking court has been criticized that it is not a court of customer, it is only a court for financial institution.

Its powers are titled in favor of financial institutions against customers. Section 9 of F10, 2001 states that where a customer or financial institution commits default in fulfillment of any obligation with regard to any finance, then both parties may institute a suit in banking court.[273] Obligation of customer has been defined in section 3 of FIO but the whole Ordinance is silent about the obligations of financial institution. In a case court held that F10, 2001 has been enacted to provide remedy to banks for the recovery of their debts, likewise to the customers to approach court if they have any grievance against banks.[274] In a banker customer relationship bank provides facility of finance to its customer. After availing that fiancé the customer is duty bound to pay back and return that amount to financial institution according to terms of contract which was executed between them.

A necessary condition to institute a plaint is that plaint must be supported by a statement of account.[275] The world "shall" has been used in the Ordinance which means it is mandatory provision of law. Statement of account is purely banking document. It can be taken from bank. It is not in the possession of customer if a customer want to file a suit against bank it is impossible for him to comply with this mandatory provision. On the other hand court said that when a customer wants to institute a suit against bank, under section 9 procedure has been prescribed for both customer and bank. No separate procedure has been provided for customer to file suit. As decided in a case that same

[273] Section 9(1) of F10, 2001
[274] 2006 CLD 1314
[275] Section 9(2) F10, 2001

procedure is applicable to banks has also to be stretched to the suits filed by customer.[276] The court decided that two separate duties are cost upon plaintiff in a suit filed under section 9 FIO firstly to state in plaint the finance availed and amount paid back and balance amount outstanding due. Plaint must be supported by statement of account, there are certain more conditions for statement of account by financial institution under banker's book evidence Act, 1891. All debts and credit entries must be clearly known.[277]

Statement of account must be attached with plaint either suit filed by bank or by customer. Statement of account is purely banking document its attachment should not be compulsory for plaint filed by customer because it is a document which is always in possession of bank, he cannot take it without consent of bank.

I. Cost of Funds For financial Institution

If a customer commits default in fulfillment of his obligations, he shall be liable to pay cost of funds from the date of default till realization as certified by the State Bank of Pakistan from time to time.[278] It is compulsory for banking court to award cost of funds to customer on his default because the word 'shall' has been used in the Ordinance. In a case court awarded cost of funds to bank. In the appeal, division bench of Sindh High Court said that from plain reading of section 3(2) of FIO, 2001, "It is evident that benefit of awarding of cost of funds has only been extended in favor of financial

[276] 2009 CLD 432 P. 442 A
[277] 2009 CLD 856 P. 866A
[278] Section 3 (2) of F10, 2001

institution and against customer who commits default in the discharge of his obligation and not vice versa"[279]

In another case division bench held that under section 3(2) of F10, 2001, banking court is empowered to award costs of funds in favor of financial institutions and such benefit had not been conferred by statute to customer.[280] As we studied in our second chapter that cost of funds are awarded to compensate bank against default period. It is very harsh law that no provision is made to compensate the customer if bank commits default. This law is tilted in favor of banks in this regard.

II. Duty of Customer

"It shall be the duty of a customer to fulfill his obligations to the financial institutions"[281] The duty of customer has been told in section 3 of ordinance and penalty also has been prescribed if a customer commits default in his duty. The whole Ordinance is silent about the duty of financial institution. We can say that it was presumed by the law makers that financial institution cannot commit any default that why no penalty has been told for default of financial institution. This law cannot be said as equal for the benefit of bank and customer unless it describes duties for both equally and penalty in default of duty equally.

III. Criminal Powers of Banking Court

While exercising criminal powers banking court has all powers vests in court of sessions under Code of Criminal Procedure 1898. The banking court cannot take cognizance of

[279] 2004 AC 810 (DB) P.812 A
[280] 2005 CLD 122 (DB) P.125 C
[281] Section 3(1) of FIO. 2001

any offence punishable under this Ordinance unless a complaint is made in writing by a person authorized in this behalf by the financial institution.[282] A plain reading of this provision tells us that procedure has been told for banking court to take cognizance of offence. This law presumes that offence can be done by customer only because according to the procedure told in it, financial institution can be complainant. No procedure has been told if an offence is committed by banker. The customer cannot avail remedy, if banker commits offence, under the provisions of this Ordinance.

IV. Need of Ample Powers of Banking Court

This Ordinance is criticized that it is very harsh towards the customers. On the issue of execution law says "Upon pronouncement of judgment and decree by a banking court, the suit shall automatically stand converted into execution proceedings without the need to file a separate application and no fresh notice need be issued to the judgment debtor in this regard."[283] The full bench of Supreme Court held "The proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy."[284]

The whole Ordinance is silent on the powers of banking court to make installments for judgment debtor. When a person takes loan form bank to invest it in some business. If he bears loss in business and commits default due to his poor financial condition. In this case, law should have soft corner for him, in the shape of extension of time for repayment or installments must be made for his convenience. Because in full

[282] Section 7 (1) of FIO, 2001
[283] Section 9 (1) of F10, 2001
[284] PLD 1963 SC 382

bench decision of Supreme Court we can understand the object of law and procedure administration of justice is to help the people not to punish them.

This procedure must be amended to help the debtors who have committed default due to huge loss in business. The banking court must have powers to make installments of decree for judgment debtor or extend the time for repayment without any penalty. Otherwise, this law is titled in favor of Financial institutions and harsh for customers which is against the object of law.

3.9. Disposal of Suit

The Financial Institutions (Recovery of Finances) Ordinance, 2001 is a special law to deal with matters where customer commits default in fulfillment of his obligations relating to finance. The summary procedure has been adopted to dispose of the cases. In a suit where leave to defend has been granted to defendant. The banking court shall dispose of that case within a period of ninety days.[285] Plain reading of this provision tells us that this is mandatory provision of law because the word 'shall' has been used in it. Furthermore that if proceedings continue beyond the said period, the banking court may require security from defendant to furnish in court and if the defendant disobeys order of court to furnish security, the banking court may pass interim or final decree as it thinks fit.[286]

The order of banking court to furnish security to defendant if suit is not decided within ninety days is unjust. The fore most duty of banking court should be to determine the factors due to them, a suit has not been decided by the court within ninety days. If

[285] Section 13(1) of FIO, 2001
[286] Ibid.

delay is caused by defendant then the order of security is just and proper. On the other hand if delay is caused by the act other than defendant, the order for furnishing security is very harsh, improper and against the spirit of law because defendant facing the penalty on a wrong which was not committed by him. In support of my claim I am quoting a case decided by division bench of Sindh High Court in which court held "It is well-settled principle of law that no party shall be made to suffer due to the act or omission of the court in the performance of its duties."[287]

3.9.1. Appeal Against Interim Decree

The Ordinance says that after the examination of pleadings of the parties, banking court is of the view that the dispute does not extend to the whole of the claim, or some part of claim is admitted by defendant or clearly due, the banking court while granting leave and framing issues, shall pass interim decree to that extent, and such decree for purpose of appeal and execution deemed to be a decree passed under this Ordinance.[288] We can draw conclusion from bare reading of this section that consent decree which is passed after the admission by defendant. Such decree which is passed after admission of claim, it can be executed and aggrieved party can file an appeal against such decree. There are two issues in such decree, firstly the words used in the text that the amount which is clearly due after examination of pleadings, court can pass decree to that extend and that decree can be executed like final decree.

There is no standard prescribed for banking court to determine the amount which is clearly due upon defendant. No ample powers have been prescribed by the law for

[287] 2005 CLD 187 (DB) P. 190 A
[288] Section 11 of FIO, 2001

banking court that without taking evidence how a court can determine that this portion of amount is clearly due upon defendant. The banking court should not have such discretion which is harsh for defendant and this vast discretion is against the spirit of law. Discretion of court must be subject to certain limitations and should be exercised to secure ends of justice. Secondly, interim decree can be passed for undisputed amount which means that to extend of the amount which is admitted by defendant when he filed application for leave to defend. Appeal can be filed against such consent decree within thirty days of pronouncement of its judgment. The right of appeal should be exercised against such interim decree with final decree. First of all under the provisions of general law, "No appeal shall be from decree passed by the court with consent of parties."[289]

While interpreting this provision the division bench hold "After the passing of the consent decree, which is not even appealable under section 96(3) C.P.C nobody can challenge the terms of the decree and both the parties are bound to execute the same as it is".[290] In another case court says that when defendant admits the claim of plaintiff in his pleadings and decree is pass then he has no right to file appeal against such decree.[291]

We can say that right of appeal against decree passed by the admission of parties is against the principles of general law held by superior courts. If we give right of appeal against interim decree passed after admission of amount by defendant it shall prolong the proceedings and cases cannot be decided within period prescribed by law of ninety days.

3.9.2. The Issue of Mandatory Provisions

i) Disposal of Suit in Ninety Days

[289] Section 96(3) of CPC
[290] 2003 CLD 259 (DB) P. 263 E
[291] 1985 CLC 2039 P. 2043 +1989 SCMR 1826

It is mandatory provision in this Ordinance that after granting leave case shall be decided within ninety days because the word 'shall' has been used in Ordinance. There is no solution prescribed if proceedings exceed ninety days. While no time period has been prescribed in a suit where leave is not granted. We have now two type of cases, firstly,where leave has been granted and case is pending in banking court No.2 Lahore after four years of granting leave yet not decided.[292] After filing of this case leave to defend the suit was granted after two years. After five years of granting leave , it is still pending for decision. In our humble view that when a suit is not decided in ninety days after granting leave to defendant, there should be mandatory provision for day to day hearing until the decision comes. Secondly, I have some cases pending in banking court No. 2 Lahore for many months to be decided, where leave is not granted. I selected two cases as proof.[293] The law should prescribe some time limit for those suits where leave is not granted to meet its objective for speedy disposal of suits with shortest period of time.

ii) The "shall' used in Ordinance is mandatory or not. It is recognized principle of law that shall is used for a thing which is binding and compulsory to do. The law says "the plaintiff shall be given an opportunity of filing a reply to the application for leave to defend, in the form of a replication."[294] We can understand after the plain reading of this provision that one opportunity shall be given to plaintiff for reply but this rule, which is mandatory because the

[292] HBL Vs Khalidk Rafique, Suit Filed on 31-1-2008 leave was granted on 15-2-2010 and still not decided on 10-7-2015

[293] I) Summit Bank Ltd Vs Messers K.K. Trading international, suit was filed on 06-02-2012
II) Dubai Islamic Bank vs Mirza Mujahid Rafiqu Mughal, suti was filed on 18-03-2014 both cases are pending on 10-07-2015

[294] Section 10 (7) of FIO, 2001.

word shall has been used in it, is not followed by courts strictly. The courts give more than one opportunity to plaintiff for reply sometimes in the shape of adjournments or otherwise. These should be clear law on this point.

On another issue, law says that the defendant shall be given a period of twenty one days to file amended application for leave to defend where such application for leave to defend was filed before enforcement of this Ordinance.[295] This is also mandatory provision of law. While explaining this provision court says that filing amended application is mandatory in nature, non compliance of this provision would entail penal consequences of rejection of leave application.[296] On the other hand, there are contradictory and conflicting judgments on the point that this provision is not mandatory in nature, it can be treated as discretionary.[297] While interpreting this provision court held 'Nevertheless, no consequence for not filing the written statement within above mentioned period has been provided therefore the said provision can be treated as discretionary."[298] There is immense need to make clear this point that every shall is mandatory or not. Where "shall" is mandatory in nature in this Ordinance 2001 there should be some penal clause for not abiding that "shall".

[295] Section 10 (12) of FIO, 2001
[296] 2005 CLD 327 P.332 A
[297] 2004k CLD 817 (DB) P. 820B+ 2004 CLD 782 (DB), -. 783A
[298] 2006 CLD 244 P. 248 A

3.10. Conclusion

In this third and last chapter of my thesis, we discussed The Financial Institutions (Recovery of Finances) Ordinance, 2001 from legal perspective. We pointed out many points on which this ordinance needs to be amended. Firstly, the scope of jurisdiction of banking court is limited only to the default in the matter of finance. If a person avail remedy other than a matter relating to finance, he shall have to approach to ordinary civil court. In our view, there should be a single forum to decide the disputes arising out of bank and customer relationship. Secondly, we discussed the issue of leave to defend which is compulsory under section 10 of FIO. It is considered the violation of right of fair trial which has been guaranteed under article 10A of The Constitution of Pakistan 1973.Hearing of leave application by banking court is providing the defendant full opportunity to be hear and argue his claim before the court. The banking court grant leave to those where substantial questions of law and fact have been raised by defendant. We are of the view that section 10 of FIO is not in violation of article 10A of constitution.

Lastly, we are of the view that for appointment of judges of banking courts certain qualifications must be considered and term of their office must be extended. There should be a mechanism for direct appointment of prominent banking lawyers as judges of banking courts because they are experienced in this field. Banking court should have discretionary powers to facilitate the parties to meet the ends of justice likewise in execution proceeding making installments of decree. Some points are vague as applicability of 12(2) of CPC in baking cases. There is a need of decision by Supreme Court on these points and courts must decide cases in time prescribed by section 13 of FIO, 2001.

CHAPTER IV

Conclusions and Recommendations

4.1. Conclusions

The financial Institutions (Recovery of Finances) Ordinance, 2001 was promulgated on 30th August 2001. This is special law for successful recovery of debts, having a summary procedure which is adopted by banking court to decide the cases. Defendant is given the time of thirty days to file application for leave, to defend the suit after service of summons upon him, when plaint is filed with banking court. Banking court grants leave to defend to defendant, where there is serious dispute between the parties which require recoding of evidence because it is the discretion of court. The court decides suit and passes decree in favor of plaintiff when leave is not granted to defendant. When leave is granted then banking court shall decide the case in ninety days and after the expiration of thirty days if appeal is not filed, the decree of banking court is automatically converted into execution after the expiration of said period.

In this dissertation we studied this Ordinance from *Shariah* and legal perspective. We discussed three issues from *Shariah* point of view. Firstly, there is no distinction in law between a person who commits willful default and the person who becomes defaulter due to poor financial condition, on the other hand *Shariah* holds different opinion on this point that a person who is defaulter due to his poor condition should be given extension of time and he cannot be imprisoned like willful defaulter. Secondly, we discussed the issue of liability of guarantor in the light of *Shariah* and law. There is no conflict in *Shariah* and law on this point. Lastly, we identified that cost

of funds is clearly *Riba* which is prohibited by *Shariah* and also prohibited by the State Bank of Pakistan in circular No. 13 which was issued in 1984.

In our third chapter, we discussed many legal points which need attention of legal scholars. Firstly, we highlighted that the scope of jurisdiction of banking court is very limited that plaint can be filed by bank or customer on default of fulfillment of obligation only relating to finance. Other disputes arising out from bank and customer relation cannot come within the jurisdiction of banking court. The main issue in this Ordinance which is criticized by legal scholars is leave to defend. It seems that leave to defend is violation of basic principle of natural justice "Nobody should be condemned unheard" which has been guaranteed under article 10-A of the Constitution of Pakistan, 1973. After the study, we concluded that banking court hear both parties, in leave application defendant argues his contention before banking court, if there is no dispute which requires evidence to be recorded then court may refuse to grant leave to defendant and pass a decree in favor of plaintiff because it is requirement of special law for early disposal of cases in short span of time. There are many points on which conflicting judgments are on record, there is need that all those points must be clearly elaborated by honorable supreme court of Pakistan through *Suo Moto* notice, like issue of applicability of 12(2) CPC in banking cases. The last issue is that this court seems to be a court only for financial institution not a court for customer due to some reasons.

The banking court can award cost of funds only in favor of bank not in favor of customer. Duty of customer is defined in law but no duty of bank has been told. The court has no ample powers to fecilitate the parties like order for making installments of decree in execution proceedings to help judgment debtor. The word "Shall" has been

used mostly here in law every shall is not binding unless there is penal provision is attached with it otherwise it can be treated as discretionary. There law points need to be amended and clearly elaborated by the Supreme Court of Pakistan. In this way, we can make this law more efficient for successful recovery of debts within minimum time period and according to meet ends of justice.

4.2. Recommendations

1) We are of the view that after the default by customer there must be an independent judicial inquiry to find out the reasons of default by customer, The court may appoint any local commission for this purpose which shall submit its report in three days. If it is found that he is not willful defaulter, then he should be given extension of time to repay his debt. Imprisonment in such a case should be considered illegal.

2) According to our findings cost of funds is the other name of *Riba*. It is not allowed by *Shariah* and the circulars of the State Bank of Pakistan. Section 3 of this ordinance should be declared null and void.

3) The scope of jurisdiction of banking court should be extended to all disputes arising out of banker customer relationship so that the ordinary courts should not be overburdened.

4) We are of the view that banking court must be given powers to make installment of decree in appropriate cases where it is in the interest of justice.

5) The supreme court of Pakistan must take serious notice on ambiguous points of this ordinance like applicability of 12(2) of CPC in banking cases because the High Court difference of opinion on this point.

6) Banking courts should work under the supervision of High Courts as other subordinate courts.

7) Mostly district judges are appointed as judge of banking court with a term of three years. They are not familiar with banking matters. They are transferred to another place when they are trained in banking matters after and of their term of three years. There is need to appoint prominent banking lawyers as judge of banking courts and term of their office must be extended. Judges must be trained before their appointment to meet ends of justice.

8) Section 13 of F10, 2001 must be strictly followed by the courts, after expiry of ninety days, the court must continue with suit on the basis of day to day hearing. It has been observed that most of the time delay tactics have been used on the ground that counsel is busy in other court; such plea should be checked to know the reality.

9) We are of the view that this ordinance needs to be amended, if bank officials do any wrong relating to transaction of giving loan and who securitize and give loan should be held responsible in banking court if prescribed procedure and rules are not followed.

10) After delay in the decision of suit defendant should be asked for security if delay is caused by him otherwise imposition of security upon him is against the principles of natural justice.

11) We are of the view that adjournment of recovery proceedings should not be allowed except under unavoidable circumstances on an application moved by party supported by affidavit. In such cases adjournment should not be made for a period exceeding three days in order to dispose of banking cases in minimum time period.

12) 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.

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