

Form No.HCJD/C-121
ORDER SHEET

**IN THE LAHORE HIGH COURT, MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT**

Execution First Appeal No.13 of 2023

M/s Team Packages and others

Versus

MCB Bank Limited

S.No.of order/ Proceeding	Date of Order/ Proceeding	Order with signature of Judge, and that of parties' counsel, where necessary
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20.05.2024 Mr. Muhammad Manzoor-ul-Haq, Advocate for the appellants.
Syed Wasim Haider, Advocate for the respondent-Bank.

This is an appeal under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 ('Ordinance') whereby the appellants have assailed the order dated 23.11.2022 passed by the Judge Banking Court-II, Multan dismissing objection petition of the appellants with regard to the determination of the cost of funds.

2. Facts of the case briefly are that the respondent-Bank instituted Civil Suit No.179 of 2014 on 03.06.2014 for the recovery of Rs.26,59,813.32 which was decreed vide *ex parte* judgment dated 27.08.2014 by the Banking Court No.III, Multan for the recovery of Rs.12,71,512.67 in favour of the respondent-Bank against the appellants jointly and severally with costs and cost of funds was also awarded to the respondent-Bank from 01.09.2011 till the date of realization. During execution proceedings, the appellants/judgment-debtors deposited the decretal amount, however, controversy arose regarding determination of the cost of funds as the appellants filed an application for determination of the exact amount of cost of funds. On account of considerable delay in the decision, the appellants requested the Banking Court for permission to deposit under protest the cost of funds of Rs.5,11,012/- demanded by the decree-holder/Bank vide its application dated 30.01.2016, which was conditionally accepted on 12.02.2016 to the extent that if the judgment debtors deposited Rs.5,11,012/- then the decree-holder/Bank was to redeem the mortgaged property.

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Consequently, the appellants deposited the aforementioned amount of cost of funds. Accordingly, clearance certificate dated 07.09.2016 was issued stating therein that liabilities (as per Court decree with 100% cost of funds and legal charges) against the facility was fully adjusted and nothing was outstanding against the Running Finance Facility, which was recorded as such by the Banking Court in its order dated 08.09.2016. Subsequently, the Bank submitted its statement/calculation of cost of funds with the Court claiming therein difference of an amount of Rs.3,10,986/-. The appellants-judgment-debtors disputed the aforementioned difference in the statement submitted by the decree-holder/Bank while questioning the very basis of calculation made therein. The Banking Court obtained report from the *amicus curiae* which was submitted on 08.03.2018, who agreed with the statement submitted by the Bank. The appellants submitted their objections on the report of *amicus curiae* extra claim which were rejected on 23.11.2022 by the Banking Court, Multan-II in the following terms:-

"It is noteworthy to mention here that to resolve the difference between the statements of cost of funds submitted by both the parties, my learned predecessor appointed amicus curiae on 25.01.2018 and at that time the judgment debtor did not raise any objection as the appointment of Mr. Muhammad Ishaq Rana Advocate as amicus curiae. Moreover, the judgment debtor has failed to specify any entry with date that he has been charged with the cost of funds on the amount other than the principal amount. Amicus curiae has rightly relied upon the "EXPLANATIONS" of Sec 10(4) of the FIO 2001, which is reproduced as under:-

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

According to be aforesaid provision of law decree holder Bank has appropriated first the amount paid by the judgment debtor against other amounts such as mark up or cost of funds, which are relating to the finance and the balance amount paid by the judgment debtor was appropriated against the principal amount of the finance. Record nowhere reflects that bank has charged cost of fund against cost of funds etc. It appears that objection has been filed in order to linger on the execution petition. The decree under execution was passed in year 2014 and has not yet been satisfied till today. In these circumstances objections filed by the judgment debtor are not sustainable in the eyes of law".
 (Emphasis supplied by this Court).

3. Learned counsel for the appellants contends that the impugned order does not take into account the fact that the amount which was deposited by the appellants ought to have been adjusted against the principal amount. He further contends that the statement of account produced by the decree holder/Bank shows that amount of cost of funds was simultaneously being recovered from the appellants, which is impermissible being in contravention to the letter and spirit of Section 3 of the Ordinance. He maintains that Section 10(4)(b) of the Ordinance does not have any connection with cost of funds inasmuch as the said provision only relates to the leave granting stage before a decree is passed, whereas cost of funds has no existence at that stage of proceedings but becomes payable by operation of law i.e. Section 3 of the Ordinance once a decree is passed. He finally contends that the impugned order is liable to be set aside for clearly being unwarranted by law.

4. Conversely, learned counsel for the respondent-Bank has supported the impugned order for reasons stated therein.

5. Heard. Record perused.

6. The primary question of law involved in the instant appeal is whether the explanation contained in Section 10(4) of the Ordinance is applicable for the purpose of appropriation of cost of funds decreed under Section 3 of the Ordinance?

7. Entitlement of financial institutions to have cost of funds is provided in Section 3 of the Ordinance, which read as follows:

Duty of a customer. (1) it shall be the duty of a customer to fulfil his obligations to the financial institution.

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

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

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8. From perusal of the above provisions, it is manifest that while sub-section (1) of Section (3) casts a duty upon a customer to fulfill his obligations towards the financial institution, sub-section (2) of the said Section stipulates consequences of default in the discharge of obligation by a customer. Such consequences, in addition to other civil and criminal liabilities which a customer may incur under the contract or rules or any other law for the time being in force, include liability to pay the cost of funds for the period commencing the date of his default till realization. Section 3(3) of the Ordinance, however, clearly indicates that for the purposes of liability towards the cost of funds, a judgement against a customer under this Ordinance shall mean that he is in default of his duty under sub-section (1) and in such cases it has been made mandatory for the ensuing decree to provide for payment of the cost of funds as determined under sub-section (2). In other words, for the purposes of awarding the cost of funds, default means judicially determined default in duties under sub-section (1). Therefore, neither the amount of cost of funds could lawfully be determined by the respondent-bank prior to the decree passed in the suit for recovery filed against the appellants nor any amount deposited by the appellants could be adjusted thereagainst before passing of the judgment and decree. Reliance in this regard is placed on the case of Habib Bank AG Zurich through Manager Vs. Mustafa Shamsuddin Ghatilla and 2 others (2003 CLD 658). Be that as it may, where default of a customer in discharge of his obligation is judicially determined, liability for the cost of funds is mandatory which is specified in Section 3(2) of the Ordinance to be for the period from the date of default of the customer till realization. Reliance in this regard is placed on the cases of SME Bank Limited through Branch Manager Vs. Messrs Punjab Store through Proprietor and another (2022 CLD 251), Messrs Divine Developers (Pvt.) Ltd. And others Vs. Bank of Punjab (2019 CLD 489) and Habib Bank Limited through Authorized Attorneys Vs. Pak Poly Products (Pvt.) Ltd. And 3 others (2013 CLD 1661).

9. A suit for the recovery of finances instituted by the financial institutions can be defended only with leave of the Court as required under Section 10 of the Ordinance, which prescribes limitation, procedure

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and the form in which such leave is to be sought. Section 10(4) of the Ordinance, reads as follows:-

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

- (a) the amount of finance availed by the defendant from the financial institution; the amounts paid by the defendant to the financial institution and the dates of payments;*
- (b) the amount of finance and other amounts relating to the finance payable by the defendant to the financial institution upto the date of institution of the suit;*
- (c) the amounts of finance and other amounts relating to the finance payable by the defendant to the financial institution upto the date of institution of the suit;*
- (d) the amount if any which the defendant disputes as payable to the financial institution and facts in support thereof.*

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

The explanation in Section 10(4) of the Ordinance is expressly and exclusively for application thereof to clause (b) of the said sub-section to seek leave to defend a suit for recovery instituted by a financial institution. The requirement under Section 10(4)(b) of the Ordinance to specifically state the amount of finance and other amounts relating to finance payable by the defendant to the financial institution is for the period upto the date of institution of the suit, which is essentially for the purpose of determining liability for passing a decree.

10. Once a decree is passed, the financial institution has no discretion to appropriate the amount paid against other amounts including cost of funds. All repayments made by a judgment-debtor after passing of the decree have to be first adjusted towards decretal amount and surplus towards cost of funds. Conversely, if the option to adjust cost of funds is extended to the decree holder/Bank, it would always prefer to appropriate amounts paid for the adjustment of decretal amount towards cost of funds

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first to maintain outstanding claim of decree as a source of generating income perpetually, which would defeat the scheme and spirit of the Ordinance, including Section 3 thereof. Indeed, Section 10(4) of the Ordinance does not have any connection whatsoever with cost of funds, which obligation accrues once liability towards the financial institution is determined when the decree is passed. Furthermore, execution of decree passed by a Banking Court is governed by Section 19 of the Ordinance which contains no provision for applicability of the explanation contained in Section 10(4) *ibid.* Likewise, Section 3 of the Ordinance which prescribes duty of a customer to pay cost of funds of the financial institution makes no reference to the application of above explanation either.

11. In the instant case, the decree-holder/Bank has clearly erred in law in appropriating repayments made by the judgment-debtors firstly towards other amounts such as cost of funds instead of decadal debt on the pretext of applicability of the explanation in Section 10(4) of the Ordinance and the learned Judge Banking Court has acted manifestly unlawfully in approving the same, therefore, the impugned order dated 23.11.2022 is unsustainable in law thus liable to be set aside.

12. For the foregoing reasons, this appeal is **allowed**, the impugned order dated 23.11.2022 is set aside. The parties shall be free to move a fresh application before the Banking Court concerned for payment of remaining decadal debt or return of excess amount erroneously appropriated, if any, keeping in view the above determination. There shall be no order as to costs.

(***MUHAMMAD SAJID MEHMOOD SETHI (RAHEEL KAMRAN)***)
JUDGE **JUDGE**

Approved for reporting

JUDGE

JUDGE