Form No: HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

R.F.A. No.1538/2015

National Bank of Pakistan Versus M/s Brite Chemicals, etc.

S.No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties of counsel, where necessary
	21.09.2023	Mr. Irfan Ali Sheikh, Advocate for the appellant. Ch. Muhammad Awais Zafar, Advocate for respondents. This Regular First Appeal (Appeal) challenges legality of judgment and decree dated 29.04.2014, whereby suit for recovery of overdue finance, instituted by Financial Institution (appellant), was decreed for Rs.560,000/- with costs of suit, but only to the extent of respondents No.9 to 13 and suit against respondents 1 to 8 was dismissed. 2. Suit for recovery was instituted on 01.10.1998, wherein leave to defend was allowed on 07.06.1999 and same was decreed on 29.04.2014. ***Controversy-in-issue*** 3. Cost of Funds was declined to the appellant on the premises that suit was instituted under Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 (***Act***

of 1997) but at the time of decree the applicable law is Financial Institutions (Recovery of Finances) Ordinance, 2001 ***(Ordinance of 2001)*** therefore no cost of funds could be awarded by extending retrospective effect to section 3 of the Ordinance, 2001.

4. Learned counsel for appellant submits that Court erred in law while declining cost of funds, otherwise permissible in lieu of Mark-up-based finances. Adds that decision in the case of ***National Bank of Pakistan through Manager*** vs. ***Messrs Footcare (Pvt.) Limited through Chief Executive and others*** (2005 CLD 1114) is a bad law.

5. Learned counsel for respondents wholly relied on the dicta laid down in the cases of ***National Bank of Pakistan through Manager*** vs. ***Messrs Footcare (Pvt.) Limited through Chief Executive and others*** (2005 CLD 1114) and ***Messrs A.M. Rice Corporation through Sole Proprietor and another*** vs. ***Bank of Punjab through Manager as Attorney*** (2005 CLD 1569).

6. Heard - No other point, except dispute qua question of refusal to grant cost of funds was pressed / argued.

7. The controversy in issue was contextualized in preceding paragraphs. Cost of funds was declined by Banking Court while relying on the ratio settled in referred cases, decisions by the coordinate Bench of this Court, wherein declaration against retrospective application of the provisions of the Ordinance of 2001, particularly section 3 thereof was made. We have examined said decisions. With all respect, it is noted that while deciding the referred cases, simplicitor the effect of section 3 of Ordinance of 2001 was considered without appreciating the scope, mandate and effect of section 29 of the Ordinance of 2001. Decisions were made without adverting to nature of the facility, either interest-based or mark-up-based. It is evident that Act of 1997 defines and maintains conspicuous distinction between two kinds of financing. We are dealing with markup-based financing. For dilating upon controversy, it is expedient to reproduce sections 3 and 29 of the Ordinance of 2001,

> "**Section *3* - *Duty of a Customer:***
>
> *(1) It shall be the duty of a customer to fulfill his obligations to the financial institution.*
>
> *(2) Where the customer defaults in the discharge of his obligation, he shall be liable to pay, for the period from the date of his default till realization of*

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 purposes of this section a judgment 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 the payment of cost of funds as determined under sub-section (2).

*"**Section 29 – Repeals:***

(I)The Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 (Act XV of 1997) is hereby repealed.

(2) Notwithstanding the repeal of the (Recovery of Loans, Advances, Credits and Finances) Act, 1997 (Act XV of 1997) and the provisions of this Ordinance, decrees in cases relating to interest-bearing loans which have not been converted into finance shall be passed in accordance with the provisions of section 15 of the said Act."

[Emphasis supplied]

8. In terms of sub-section (2) of section 29 of Ordinance, 2001, no decree could lawfully be passed under the Act, 1997 with respect to mark-up-based finance. And only interest-bearing-loans could be decreed under section 15 of Act of 1997. Hence, if at all decree had to be passed regarding mark-up-based finance, in all possibility, it had to be under Ordinance of 2001. Section 29 is the bridge for dealing with adjudication of claims of mark-up-based finances under the provisions of Ordinance of 2001, notwithstanding institution of suits under provisions of Act of 1997.

9. In view of the above, it is evident that Banking Court committed error of law while declining cost of funds on erroneous assumption that section 3 of the Ordinance of 2001 has no application.

Now we discuss the effect of ratio settled in the judgments referred in the context of expressive legislative intent expressed through section 29 of Ordinance of 2001. We have threadbare examined referred judgments, wherein neither existence of section 29 of the Ordinance of 2001 was acknowledged nor effect thereof was raised, argued, discussed and adjudicated. This attracts the doctrine of "*Sub-Silento"*. See the case of *Lancaster Motor Company (London) Ltd. v. Bremith Ltd.* ([1941] 1KB 675). With all respect, conspicuous absence of reference to or discussion qua section 29 of Ordinance of 2001 renders the judgments *per incuriam* – wherein section 29 of the Ordinance of 2001 escaped attention of learned coordinate Bench. Since, judgments referred are *per incuriam* therefore there was no necessity of seeking constitution of larger Bench – since we are not required to make a choice between two different set of judgments

but dealing with the *per incuriam* judgments. Ratio settled in the case of "***MULTILINE ASSOCIATES v. ARDESHIR COVASJEE and 2 others***" (PLD 1995 Supreme Court 423), is not attracted, wherein it was settled that reference to larger Bench is required if Bench of coequal judges do not agree with earlier judgment by the Bench of coequal judges. Conversely, guidance is solicited from the ratio settled in the case of ***Gulshan Ara*** vs. ***The State*** (2010 SCMR 1162), relevant portion wherefrom is reproduced hereunder as,

> *"4. It appears that a contrary view was taken by two other Benches of equal number of Judges in the cases of Muhammad Hashim and Amanat Ali (supra). In such a situation, apparently the rule laid down by the case of Multiline Associates v. Ardeshir Covasjee PLD 1995 SC 423 was required to have been followed which is that if a Bench of equal Judges does not agree with the earlier Bench of equal Judges, then the matter should be referred to a larger Bench. It appears that earlier decisions of this Court in the cases of Nadir Khan and Ali Muhammad (supra) were not brought to the notice of the Benches in the cases of Muhammad Hashim and Amanat Ali (supra), therefore, the principle laid down in the said cases was never discussed. In such a situation this Court in the case of Province of the Punjab v. S. Muhammad Zafar Bukhari PLD 1997 SC 351 observed as under:--*
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> > *"Halsbury's Laws of England, Fourth Edition, volume 26 in paras 577-578, has commented on the "judgment per incuriam" as under:*
> >
> > *"**A decision is given per incuriam** when the Court has acted in ignorance of previous decision of its own or of a Court of coordinate jurisdiction which covered the case before it in which case it must decide which case to follow or when it has acted in ignorance of House of a Lords' decision, in*

> *which case it must follow that decision or* ***when the decision is given in ignorance of the terms of statute or rule has statutory force****."*
>
> [Emphasis supplied]

10. Reference is made to decision in the case of leaned Supreme Court of India in the case of *STATE OF U.P AND ANR. v. M/S SYNTHETICS AND CHEMICALS LTD. AND ANR.* [1991 SCC (4)139], relevant paragraph is reproduced hereunder,

> *'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis.* ***The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority****. (1944 1KB 718 'Young v. Bristol Aeroplane Ltd……..*
>
> [Emphasis supplied]

11. We, hold that judgment impugned to the extent of denying of cost of funds is legally defective and result of misconstruction of law. We, affirm the determination of principal liability of Rs.560,000/- and order of dismissal of suit against the respondents No.1 to 8, to which extent no illegality is pointed or found.

12. In view of aforesaid, this appeal is partly allowed and decree to the extent of denial of claim of cost of funds is set-aside against

respondents No.9 to 13 only. Banking Court will determine cost of funds in accordance with the mandate of section 3 of the Ordinance of 2001, after hearing the parties, preferably within the period of ninety days of receipt of copy of this judgment.

(Muhammad Sajid Mehmood Sethi) Judge **(Asim Hafeez) Judge**

M.S.Aleem

APPROVED FOR REPORTING

Judge