**IN THE SUPREME COURT OF PAKISTAN**
(APPELLATE JURISDICTION)

**PRESENT:** MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE IJAZ UL AHSAN

**CIVIL APPEAL NO.552 OF 2015**
(Against the judgment dated 10.3.2015 of the Lahore High Court, Lahore passed in RFA No.395/2005)

Habib Bank Ltd.

...Appellant(s)

**VERSUS**

WRSM Trading Company, LLC and others

...Respondent(s)

For the appellant(s): Ms. Ayesha Hamid, ASC

For respondents No.1 & 3: Ex-parte

For respondent No.2: Mr. M. Shahzad Shaukat, ASC

For respondent No.4: Syed Waqar Hussain Naqvi, ASC

For respondent No.5: Mr. Abdul Hameed Chohan, ASC
Mr. M. S. Khattak, AOR

Date of hearing: 2.7.2018

**JUDGMENT**

**MIAN SAQIB NISAR, CJ.-** This appeal challenges the order dated 10.03.2015 passed by the Lahore High Court whereby R.F.A. No.395/2005 filed by the appellant was dismissed. The facts as stated by the appellant are that respondent no.1, on 22.1.2001, availed finance from the appellant bank's branch in Dubai, UAE. On 22.11.2002 the appellant filed Suit No.105/2002 before Banking Court No. 1, Lahore for recovery of UAE Dirhams 2,042,059.22 *(PKR 33,285,565.28)*. Respondents No.2 to 5 were impleaded on account of being the directors of the respondent no.1 company and in their capacity as guarantors for the finance availed by the said respondent. *Vide* order-in-original dated 15.07.2005 the Banking Court returned the plaint for presentation in the Court of proper jurisdiction. The appellant challenged the Banking Court's order through R.F.A. No.395/2005 which was dismissed *vide* impugned order dated

10.03.2015 passed by the Lahore High Court. The points raised in the impugned order being one of first impression, leave was granted *vide* our order dated 04.06.2015.

2. The impugned order holds that the appellant is not a financial institution within the meaning of Section 2(a) of the Financial Institutions (Recovery of Finances) Ordinance 2001 *(FIO, 2001)* as it did not undertake the transaction in Pakistan and that the appellant would have been entitled to file a recovery suit under Section 9 of the FIO, 2001 **only** if it had transacted business **within** Pakistan. Further, it holds that no interest based transaction could take place in Pakistan after 01.01.1985 in violation of State Bank of Pakistan *(SBP)* Banking Control Department *(BCD)* Circulars No.13 dated 20.06.1984 and No.32 dated 26.11.1984, as pursuant to Sections 3-A, 25 and 41 of the Banking Companies Order, 1961 the said circulars have the force of law and the interest-based agreements entered into by the appellant providing finance(s) to the respondents in Dubai were void in terms of Section 23 of the Contract Act, 1872 *(Contract Act)* as they were based on interest. It further holds that Section 20 of the Civil Procedure Code, 1908 *(CPC)* is procedural in nature and the same is not applicable to the FIO, 2001.

3. Ms. Ayesha Hamid, ASC appearing for the appellant bank contended that the Banking Courts are creatures of statute and they derive their power/jurisdiction from Section 7(4) read with Sections 9(1), 2(a), 2(c), 2(d), 2(e) and 4 of the FIO, 2001. She stated that the provisions of Section 20 of the CPC vest jurisdiction in **all courts of civil nature** *(including the Banking Court)* over persons **residing within** their territorial limits. The Banking Court, being a court of a civil nature, can therefore exercise jurisdiction over the respondents, who at the time of filing of the suit, resided within the territorial jurisdiction of the Banking Court, and continue to do so now. She relied on **Hussain Bakhsh Vs. Settlement Commissioner, Rawalpindi and others (PLD 1970 SC 1)**. She stated that

Section 9 of FIO, 2001 entitles a financial institution to file a recovery suit against a defaulting customer before a Banking Court once the threshold of jurisdictional events is crossed, i.e. nature of parties, relating to finance and occurrence of a default. She relied upon **Mian Mehmood Ahmad Vs. Hong Kong and Shanghai Banking Corporation Ltd. through Manager and 6 others (2010 CLD Lah 293)**. She stated that the principle of forum non-conveniens supports adjudication of a *lis* in the country with which it has the most real and substantive connection. Furthermore, the BCD Circulars No.13 and 32 issued by SBP did not have the force of law and therefore the agreements for finance could not be held to come within the mischief of Section 23 of the Contract Act. She submitted that the Banking Court could not frame a preliminary issue with respect to territorial jurisdiction and decide the matter forthwith without recording of evidence in the light of Section 10(10) of the FIO, 2001 and also because territorial jurisdiction is a mixed question of law and fact. In this regard she relied upon **Bank of Credits and Commerce and others Vs. Asrar Hassan and others (2007 SCMR 852)**.

4. Mr. Waqar Sheikh, ASC appeared on behalf of the legal heirs of respondent No.4. He supported the impugned order and the order in original and made submissions to the effect that the appellant bank is not a financial institution as defined in the FIO, 2001 and that no interest based transaction was enforceable in Pakistan. Upon the Court's query he did not deny that finance was availed from the appellant and that a default had occurred and that the respondents were present in Pakistan and not in Dubai, UAE.

5. Mr. Shahzad Shaukat, ASC appeared on behalf of respondent No.2 and candidly stated that he would not defend the impugned order and instead threw himself on the discretion of the court and requested that the matter may be sent to the Banking Court to decide.

6. The questions involved in the instant opinion are:-

i. Whether Section 20 of the CPC is applicable to banking courts when exercising their jurisdiction?

ii. Whether branches abroad of financial institutions incorporated in Pakistan fall within definition of financial institutions *[Section 2(a) of the FIO, 2001]*?

iii. Whether loans extended by such branches in Pakistan fall within the definition of finance *[Section 2(d) of FIO, 2001]*?

iv. Whether Section 9 of the FIO, 2001 entitles a financial institution to file a recovery suit against a defaulting customer before a banking court once the threshold of jurisdictional events is crossed, i.e. (i) the nature of the parties (ii) if relating to finances (iii) and occurrence of a default?

v. Whether the principle that creditors follow debtors is applicable to the assumption of jurisdiction by banking courts in the case of financial institutions incorporated in Pakistan, with branches abroad?

vi. Whether the principle of forum non-conveniens supports adjudication of *lis* in a country with which it has the most real and substantive connection?

vii. Whether the SBP BCD Circulars No.13 *(20.06.1984)* and No.32 *(26.11.1984)* have the force of law? *(with reference to Sections 3A, 25, 41 of Banking Courts Ordinance, 1962)*?

viii. Whether interest based agreements made outside Pakistan are void in terms of Section 23 of Contract Act?

7. The Preamble to the CPC does not mention/define specific Courts, but instead makes reference to the all-encompassing Civil Judicature:-

> *"Whereas it is expedient to consolidate and amend the laws relating to the **procedure of the Courts of Civil Judicature**; it is hereby enacted as follows:-"*
>
> *[Emphasis supplied]*

Since the CPC does not specify/refer to any court therefore we have to turn to Section 9 of the CPC:-

> *"9. Courts to try all Civil Suits unless barred.– **The Courts shall** (subject to the provisions herein contained) **have jurisdiction to try all suits of a civil nature** excepting suits of which their cognizance is either expressly or impliedly barred or for which a general or special law is in force..*
>
> *Explanation.– A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies."*
>
> *[Emphasis supplied]*

The question then arises, what are suits of a 'civil nature' which the Civil Courts are to try? It is the nature of the dispute being adjudicated by the court which is relevant. We need look no further than the case of **Hussain Bakhsh** *(supra)* in which it was held:-

> *"The Civil Procedure Code regulates civil proceedings. The nature of the proceeding does not necessarily depend on the nature of the jurisdiction of the Court invoked. **In order to determine whether a proceeding is a civil proceeding or not, it is necessary to see what are the questions raised and decided in the proceeding**. If the proceeding involves the assertion or enforcement of a civil right, it is a civil proceeding."*
>
> *[Emphasis supplied]*

Where special statutes regulating the civil rights of citizens are silent on some matter the CPC will apply and will fill the lacunae/vacuum. In this regard the CPC will apply to **all** Courts whether of plenary or restricted jurisdiction. The right of the appellant bank to sue for recovery of money lent by it is a civil right which could be enforced in the civil courts notwithstanding the fact that the money may have been lent outside Pakistan. Does the right cease to be a civil right simply because some

portion of the plenary jurisdiction of the civil courts has been carved away by a special law, i.e. the FIO, 2001? Plenary jurisdiction of the civil courts means that it is full, entire, complete, absolute, perfect and unqualified. A special statute simply slices away some of this jurisdiction in respect of certain persons or certain matters. Therefore to our mind the answer to the question *ibid* is a resounding no.

We are fortified in our view by **Mst. Yasmeen Nighat and others Vs. National Bank of Pakistan and others (PLD 1988 SC 391)** which held that the amendments to the banking laws in 1979 and 1983 show that *"the legislature by enacting section 6(4) of Ordinance XIX of 1979 intended to oust the jurisdiction of all other Courts in the matter of banking loans and to confer exclusive jurisdiction on Special Courts in respect of the matters which were made triable by the said Courts…"*

8. The forum where a suit is filed is a matter of procedure. Section 7(2) of the FIO, 2001 categorically provides that where the FIO, 2001 does not prescribe a particular procedure with respect to a matter, the proceedings under the FIO, 2001 are to be governed by the CPC. Section 7 of the FIO, 2001 provides that a Banking Court shall:-

> *"7. Powers of Banking Courts. (1) Subject to the provisions of this Ordinance, a Banking Court shall–*
>
> *(a) in the exercise of its civil jurisdiction have all the powers vested in a civil Court under the Code of Civil Procedure, 1908 (Act V of 1908);*
>
> *7(2) **A Banking Court shall in all matters with respect to which the procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1908** (Act V of 1908), and the Code of Criminal Procedure, 1898 (Act V of 1898)."*
>
> *[Emphasis supplied]*

In the case reported as **Adnan Afzal Vs. Capt. Sher Afzal (PLD 1969 SC 187)** Hamood ur Rahman, J set out what manner of things are to be considered matters of procedure:-

> *"The next question, therefore, that arises for consideration is as to what are matters of procedure. It is obvious that matters relating to the remedy, the mode of trial, the manner of taking evidence and forms of action are all matters relating to procedure…This is what is meant by saying that a change of forum by a law is retrospective being a matter of procedure only."*

9. The Banking Courts are creatures of statute and they derive their power/jurisdiction from Section 7(4) read with Section 9(1), 2(a), 2(c), 2(d), 2(e) and 4 of the FIO, 2001. Section 7(4) of the FIO, 2001 reads as under:-

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

Section 9(1) of the FIO 2001 reads as under:-

> *"9. Procedure of Banking Courts. (1) Where a customer or a financial institution commits a default in fulfillment of any obligation with regard to any finance, the financial institution or, as the case may be, the customer, may institute a suit in the Banking Court by presenting a plaint which shall be verified on oath, in the case of a financial institution by the Branch Manager or such other officer of the financial institution as may be duly authorized in this behalf by a power of attorney or otherwise."*

Section 2(a) of the FIO, 2001 defines a financial institution. Section 2(c) of the FIO, 2001 defines a customer. Section 2(d) of the FIO, 2001 defines finance and Section 2(e) thereof defines obligation. Section 4 of the FIO, 2001 reads as under:-

> *"**4. Ordinance to override other laws.** The provisions of this Ordinance shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*

10. It is pertinent to note that the law has over time gradually expanded to include within the definition of a "banking company"/ "financial institution," banks transacting business outside Pakistan. Reference is made to the following amendments in the banking laws, and the eventual articulation of the definition of a "financial institution" in the FIO, 2001:-

***Banking Tribunals Ordinance, 1984***

*"S. 2(a) "banking company" means–*
*(ii) **a company incorporated outside Pakistan** and transacting the business of banking in Pakistan;"*

***Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997***

*"S.2(a) "banking company" means*
*(i) **any company whether incorporated within or beyond Pakistan which transacts** the business of banking or any associated or ancillary business in Pakistan and includes a government savings bank;"*

***FIO, 2001***

*S.2(a) "financial institution" means and includes–*
*(i) **any company whether incorporated within or outside Pakistan which transacts the business of banking or any***

> ***associated or ancillary business in Pakistan through its branches within or outside Pakistan****…"*
>
> *[Emphasis supplied]*

The law must provide a purposive interpretation to Section 2(a) of the FIO, 2001, in light of the amendments made to the law in the Banking Tribunals Ordinance, 1984 *(the Ordinance, 1984)* and the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 *(the Act, 1997)*, to include financial institutions incorporated in Pakistan, which transact business both **inside and outside Pakistan**. The appellant is clearly a company incorporated in Pakistan, which transacts the business of banking in Pakistan. It would be illogical to conclude that where the particular transaction has been transacted outside of Pakistan, the appellant, for the definitional purposes of Section 2(a) of the FIO, 2001 ceases to be a company incorporated within Pakistan transacting the business of banking.

11. A perusal of the earlier provisions of law, which defined a borrower/customer, indicates that these did not restrict jurisdiction of the Banking Courts to include only those persons to whom loans/finance were advanced in Pakistan:-

> ***Banking Companies (Recovery of Loans) Ordinance, 1978***
>
> *S.2(b) "borrower" means a person who has obtained a loan from a Banking company and includes a surety or an indemnifier, but does not include the Federal Government or a Provincial Government;*

> ***Banking Companies (Recovery of Loans) Ordinance, 1979***
>
> *S.2(b) "borrower" means a person who has obtained a loan from a banking company and includes a surety or an indemnifier;*

> ***Ordinance, 1984***
>
> *S.2(c) "customer" means a person who has obtained finance from a banking company or is the real beneficiary of such finance, and includes surety and an indemnifier;*

The Act, 1997 altered the definition of a borrower:-

> *S.2(c) "borrower" means a person who has obtained a **loan** under a system **based on interest** from a banking company and includes a surety or an indemnifier;*
>
> *(d) "customer" means a person who has obtained finance under a system which is not based on interest from a banking company or is the real beneficiary of such finance, and includes a surety or an indemnifier*
>
> *[Emphasis supplied]*

The FIO, 2001 *(prior to the 2016 Amendment)* defined a customer as:-

> *"S.2(c) "customer" means a person to whom **finance has been extended by a financial institution** and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety or an indemnifier."*
>
> *[Emphasis supplied]*

The amendments made to Section 2(c) of the FIO, 2001 in 2016, which added the phrase "within or outside Pakistan" in the definition of a customer, further strengthens the conclusion that the jurisdiction of the Banking Courts extends to finance availed within or outside Pakistan:-

> *"S.2(c) "customer" means a person to whom finance has been extended by a financial institution **within or outside Pakistan** and includes a person on whose behalf a guarantee or letter of credit has been issued by a financial institution as well as a surety or an indemnifier…"*
>
> *[Emphasis supplied]*

12. It is appropriate to also look at the manner in which the definition of finance has been expanded from 1979 to date. The recent amendments to the definitions of "finance" in the FIO, 2001 further supplement the argument that the jurisdiction of the Banking Courts

extends to finance availed within or outside Pakistan. The Ordinance, 1984, promulgated on 31.12.1984, provided in Section 2(e):-

> *"2(e) "finance" includes an accommodation or facility* ***under a system which is not based on interest*** *but provided on the basis of participation in profit and loss, mark-up or mark-down in price…"*
>
> *[Emphasis supplied]*

The Act, 1997 introduced the definition of a loan:-

> *"S.2(f) "loan" means a loan, advance* ***and credit under a system based on interest and includes****–*
>
> *(i) an advance, cash credit, overdraft, packing credit, a bill discounted and purchased or any other financial accommodation provided by a banking company to a borrower;"*
>
> *[Emphasis supplied]*

The FIO, 2001 sets out the following definition of finance:-

> *"S.2(d) "finance" includes–*
>
> *(viii)* ***any amount of loan or facility availed by a person from a financial institution outside Pakistan who is for the time being resident in Pakistan****."*
>
> *[Emphasis supplied]*

It is pertinent to mention that the aforementioned part (viii) of Section 2(d) of the FIO, 2001 was introduced through the Financial Institutions (Recovery of Finances) Amendment, Act 2016 *(promulgated on 15.08.2016)* which enlarged the definition of finance to include finance availed **outside Pakistan**.

13. The appellant is undoubtedly a financial institution which is stated to have extended finance to respondent no.1, its customer, therefore, the suit filed by the appellant before the Banking Court No.1 in Lahore crosses the threshold of events which must take place before the

jurisdiction of the Banking Court is invoked. The fact that the Courts at Dubai may also have jurisdiction over the parties is not a valid reason to deny the jurisdiction of the Banking Courts at Lahore. While the Act, 1997 had a more restricted definition of a banking company/financial institution, this was amended in the FIO, 2001 to include the words "through its branches **within or outside** Pakistan". Therefore it is self-evident that the law makers have now included finance extended to customers outside Pakistan. This amendment is deliberate. To ignore it would render the said amendment futile and the Courts must make every effort to interpret the law in such a manner as to render amendments effective rather than nugatory. Reliance in this regard may be placed on the case cited as **Dr. Raja Aamer Zaman Vs. Omar Ayub Khan and others (2015 SCMR 1303)** in which this Court held that *"The Courts in Pakistan have always preferred a purposive rather than a literal interpretation of Statutory Instruments."* We would not like to thwart the clear intent of the legislature on account of a narrow construction of the statute. The same question viz. which court is to assume jurisdiction when the above mentioned jurisdictional facts have occurred has been considered in the **Hong Kong and Shanghai Banking Corporation** case *(supra)* in the following terms:-

> *"However for the exercise of such jurisdiction, it is fundamental, imperative, essential and sine qua non that two conditions must be met, co-exist and fulfilled, firstly, the special Court should have jurisdiction over the subject-matter, which means that the cause of action propounded in the plaint must be for redressal of the grievance qua the enforcement of the right or the complaint about the breach of obligation on part of the defendant, but relatable to the "finance", this can be termed to the subject-matter jurisdiction…The second facet of the jurisdiction is over the parties to the lis, which may be termed as jurisdiction over the parties, and connotes that the banking Court shall only have the jurisdiction in the cases, where the relationship of the "financial institution" and that*

> *of the "customer" exists between the parties; considering both these aspects of jurisdiction, 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 fulfil its/his obligations in relation to the "finance", which is so specifically, lucidly and clearly mentioned in section 9 of the Ordinance, 2001, which is the key provision of the special law and can be termed as the jurisdictional clause of the enactment;…"*

We hold that the reasoning and the ratio of the above cited case is the correct law. The factors to be considered by a special court before the assumption of jurisdiction are firstly whether it has jurisdiction over the subject matter of the *lis* and secondly whether the parties to the *lis* are subject to its jurisdiction. In this case the subject matter is **finance** and the parties before the Banking Court are a financial institution and its customer. There is no quibbling with the fact that a default has occurred: the learned counsels for the respondents admit the same, though there appears to be considerable dispute betwixt the respondents as to who is responsible for the same. We would not like to comment on this aspect of the matter lest any prejudice be caused to the respondents. Our interest is strictly limited to the fact that once a default occurs the final piece of the puzzle falls into place and the jurisdictional facts which the banking court is to consider stand complete. The Banking Court is then duty bound to assume jurisdiction.

14. We need not belabour the point that it is a settled principle that creditors follow debtors. Whether indeed those debtors are in Pakistan may be determined by recourse to some of the factors cited in **Miss Amtul Naseer Sami Vs. Secretary, Health, Government of Baluchistan and others (1975 SCMR 265)**:-

> *"…residence must answer a qualitative as well as a quantitative test, and that the Courts have regarded*

> *naturalization, purchase of house or burial ground, exercise of political rights, financial expectations, establishment of children in business, the place where a man's wife and family reside as indecia (sic) of his intentions in regard to residence."*

If the debtors no longer maintain a presence in Dubai and as stated by the appellant they reside in Pakistan, what useful purpose would be served by forcing the appellant to file recovery proceedings in Dubai? There can be no cavil with the fact that the Civil Courts at Lahore would have jurisdiction in this matter on the basis of the fact that the respondents are presently in Pakistan, despite the fact that the loan was availed outside Pakistan or the cause of action took place outside Pakistan. From this accepted and undisputed position we have simply to consider whether that plenary jurisdiction of the civil courts has been carved away by a special statute, i.e. the FIO, 2001, and wrested some of the jurisdiction away to the Banking Courts created under the same. The answer as stated above is in the affirmative.

15. It is a settled principle of private international law that the forum, which has the most real and substantial connection with the *lis* must exercise jurisdiction over it. When the appellant bank and the respondents are present in Pakistan then it is the courts in Pakistan which must assume jurisdiction. In the English case reported as **Spiliada Maritime Corporation Vs. Cansulex Ltd** **{[1986] 3 WLR 972}** Lord Goff stated that:-

> *"…a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is **some other available forum, having competent jurisdiction**, which is **the appropriate forum** for the trial of the action, i.e. in which the case may **be tried more suitably for the interests of all the parties and the ends of justice**."*
>
> *[Emphasis supplied]*

The primary consideration before the Court must be where the ends of justice in this case will be best served. The factors to consider in this regard are the convenience or expense *(including the availability of witnesses)* and others, such as which law governs the relevant transactions, or the respective places of residence or business of the parties and finally where a decree would be most effective. Were the appellant to obtain a decree against the respondents in the UAE would this be of any avail to them? Would they be forced to pursue the assets of the respondents in Pakistan for purposes of actually executing the decree? If so, then it does not behove the courts in Pakistan to shirk their duty to adjudicate the *lis*. We may take this opportunity to observe that no situation should or ought to be created where citizens of Pakistan avail finance(s) outside Pakistan and retreat to Pakistan safe in the knowledge that there is no effective redress against them. Comity amongst nations requires that we in Pakistan do our best to ensure that there is effective redressal and recovery of finances and loans from the defaulting customers of financial institutions. The economic health of our great nation and confidence in the banking sector is dependent upon an effective machinery for the recovery of monies from defaulting customers because in the absence of the same there is reluctance on the part of the public to place their trust in the banking system.

16. At this point we would like to clarify that in the normal course of events the question of territorial jurisdiction would require the recording of evidence. In the case of **Bank of Credits and Commerce** *(supra)* this Court held:-

> *"…the High Court has rightly refrained from dilating on the question relating to the territorial jurisdiction and maintainability of the suit against the petitioners in Pakistan. This may be noted that the question of fact or a mixed question of law and fact, cannot be effectively decided without recording*

> *the evidence and learned counsel for the petitioners has not been able to satisfy us that in the facts of the present case, the question relating to the jurisdiction of Courts in Pakistan to entertain the suit and adjudicate the claim of respondent against the petitioners is patently a question of law."*

Certain jurisdictional facts may require to be established through evidence. But this is not a rule set in stone because at times, as in the instant case there are admitted facts which on the basis of interpretation of law lend themselves to a clear cut answer as to the question of which court is to assume jurisdiction in the matter. Whilst courts ought not to adopt arbitrary procedures and ignoring established practices is to be deprecated but at the same time we must not lose sight of the fact that courts must not become slaves to technicalities and create a fetish of procedures to the obvious detriment of litigants.

17. The impugned judgement proceeds on the understanding that the transaction being based on interest, does not qualify as "finance" for the purposes of the FIO, 2001. In terms of the history of the banking laws, till 1984, there was no reference in the legal definition of a finance/loan provided under the law to a non-interest based system. Thereafter SBP issued the two aforementioned BCD Circulars No.13 dated 20.06.1984 and No.32 dated 26.11.1984. It is to be noted that the transaction in question between the appellant and the respondents was entered into in March 2001, prior to the enactment of the FIO, 2001 in October 2001. The transaction in question was therefore governed by the terms of the Act, 1997, which clearly included within its ambit "loans" under a system based on interest. Section 2(f) of the Act, 1997 provided:-

> *"S.2(f) "loan" means a loan, advance* ***and credit under a system based on interest and includes****…*
>
> *[Emphasis supplied]*

The fact the transaction in question was based on interest does not therefore detract from its status as a "loan" with regard to which the Banking Court could exercise jurisdiction. Since the governing law at the time unequivocally recognised the transaction(s) in question, i.e. interest based loans as being legally binding and treated the same as recoverable under the law, the assertion that the transaction(s) in question were void under Section 23 of the Contract Act for not having a lawful purpose, is entirely flawed and illogical. Reliance in this regard is placed on **Azam Wazir Khan Vs. Messrs Industrial Development Bank of Pakistan and others (2013 SCMR 678)** per Sarmad Osmany, J.:-

> *"…In such capacity the State Bank from time to time issues guidelines and advices in the shape of BCD circulars and consequently it would be safe to conclude that the main function of the State Bank is to ensure and secure stability of the financial system in the country. Such powers and functions given to the State Bank are entirely divorced from the laws enacted from time to time for recovery of outstanding loans by the banks and the other development financial institutions.* ***Hence it cannot be said that after 1st of January, 1985 no loans previously given by any company/DFI on the old interest bearing system could not be recovered as such. This is readily apparent from a perusal of section 15 of the 1997 Act which does provide that both interest and mark up could be recovered and the same is reflected in section 29 of the 2001 Act****. There is no gainsaying the fact that BCD Circulars/instructions issued by the State Bank of Pakistan from time to time are binding upon all concerned in terms of section 25 of the Banking Companies Ordinance, 1962. However as stated above the functions of the State Bank of Pakistan are to regulate the finance and banking sector in the country which is entirely different from the mode and method of recovery of loans which is provided for in the various Acts/instruments of Parliament…"*
>
> *[Emphasis supplied]*

For the sake of convenience Sections 3A, 25, and 41 of the Banking Companies Ordinance, 1962 *(Ordinance, 1962)* are reproduced as under:-

> *"**3A. Limited application of Ordinance to certain financial institutions.** (1) The provisions of sections 6, 13, 25, 25A, 25AA, 29, 31, 32, 33, 40, 41, 41A, 41B, 41C, 41D, 42, 47, 48, 49, 51, 58, 83, 84 and 94 shall, with such modification as the State Bank may determine from time to time in relation to activities which have implications for the monetary or credit policies of the State Bank, apply to the Pakistan Industrial Credit and Investment Corporation, the Bankers Equity Limited, the Pak-Libya Holding Company Limited, the Saudi-Pak Industrial and Agricultural Investment Company Limited, the Pak-Oman Investment Company (Pvt.) Limited, the Pakistan Kuwait Investment Company Limited and such other companies, corporations or institutions or class of companies, corporations or institutions, as the Federal Government may, from time to time, by notification in the official Gazette, specify in this behalf."*
>
> *(2) All notifications issued by the Federal Government which are inconsistent with the provisions of sub-section (1) including such notifications in respect of the National Development Leasing Corporations, Leasing Companies and Modaraba Companies shall stand rescinded with immediate effect.*
>
> ***25. Power of State Bank to control advances by banking companies**.— (1) Whenever the State Bank is satisfied that it is necessary or expedient in the public interest so to do, it may determine the policy in relation to advances to be followed by banking companies generally or by any banking company in particular, and, when the policy has been so determined, all banking companies or the banking company concerned, as the case may be, shall be bound to follow the policy as so determined.*
>
> *(2) Without prejudice to the generality of the power conferred by sub-section (1), the State Bank may give*

*directions to banking companies either generally or to any banking company or group of banking companies in particular.—*

*(a) as to the credit ceilings to be maintained, credit targets to be achieved for different purposes, sectors and regions, the purposes for which advances may or may not be made, the margins to be maintained in respect of advances, the rates of interest, charges or mark-up to be applied on advances and the maximum or minimum profit sharing ratios; and*

*(b) prohibiting the giving of loans, advances and credit to any borrower or group of borrowers on the basis of interest, either for a specific purpose or for any purpose whatsoever; and each banking company shall be bound to comply with any direction so given.*

*(3) If any default is made by a banking company in complying with the policy determined under sub-section (1) or direction given under sub-section (2), every director and other officer of the banking company and any other person who is knowingly a party to such default shall, by order of the State Bank, be liable to a penalty of an amount which may extend to twenty thousand rupees and, where the default is a continuing one, of a further amount which may extend to one thousand five hundred rupees for every day after the first during which the default continues.*

*(4) Without prejudice to the provisions of sub-section (3), the State Bank may, for the purposes of securing implementation of any special credit schemes or monetary policy or observance of credit ceiling by a banking company, by order in writing require banking companies generally, or any banking company in particular, to make special deposits with it for such amount and on such terms and conditions as may be laid down by the State Bank in this behalf.*

*(5) The amount deposited with the State Bank under sub-section (4) or any part thereof may, at the discretion of the State Bank, be released by it to the banking company which deposited it as and when the State Bank deems fit either unconditionally or on such terms and subject to such*

*conditions as the State Bank may, by order in writing, determine from time to time.*

*(6) Any penalty imposed under sub-section (3) shall be payable on demand made by the State Bank and, in the event of refusal or failure by the director, officer or other person concerned to pay on such demand, shall be recoverable as arrear of land revenue.*

***41. Power of the State Bank to give direction.—*** *(1) Where the State Bank is satisfied that—*

*(a) in the public interest; or*

*(b) to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company; or*

*(c) to secure the proper management of any banking company generally;*

*it is necessary to issue directions to banking companies generally or to any banking company in particular, it may, from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.*

*(2) The State Bank may, from time to time, issue direction, guidelines and instructions with respect to activities and operations of banks and the institutions mentioned in section 3A as may be deemed necessary by it for carrying out purposes of this Ordinance and matters ancillary thereto.*

*(3) The State Bank may, on representation made to it or on its own motion, modify or cancel any direction issued under sub-section (1), and in so modifying or cancelling any direction may impose such conditions as it thinks fit, subject to which the modification or cancellation shall have effect."*

18. The BCD Circulars are in the nature of instructions issued by the SBP to regulate the business of banking companies. Sections 3A, 25, and 41 of the Ordinance, 1962 do not give instructions issued by the SBP

the force of law. Nothing in the Ordinance, 1962 leads to the conclusion that violation of these instructions would void an agreement. Therefore we do not find any merit in the finding of the learned High Court that the transaction was violative of Section 23 of the Contract Act on account of the Circulars *ibid*.

19. In the light of the above, the impugned order of the learned High Court is set aside and the instant appeal is allowed. Let the matter be fixed before the Banking Court in the first week after the summer vacations for decision afresh on the basis of the plaint and the leave applications already filed by the respondents within a period of one month positively, with intimation to the Registrar of this Court of due compliance. The aforementioned are the reasons for our short order of even date which reads as under:-

> *"For the reasons to be recorded later, this appeal is allowed and the matter is remanded to the Banking Court with a direction to decide the matter within a period of three months without fail. Barring the question of jurisdiction which has been settled and shall be elaborated in the detailed judgment, the respondents shall have the right to raise any legal and/or factual objections before the Court."*

CHIEF JUSTICE

JUDGE

JUDGE

**Islamabad, the**
2nd of July, 2018
Not Approved For Reporting
Waqas Naseer / *