



the Appellant and the Respondent No.2 alongwith costs of funds through the sale of described mortgage property. The Appellant appeared and filed PLA under Section 10 of the Ordinance for grant of unconditional leave to defend the suit by raising certain objections regarding the maintainability of the suit etc. After hearing both the parties, the said PLA was dismissed by the Banking Court and the case was fixed for evidence of the plaintiff. Hence, this Appeal.

### **Submissions of the Appellant**

3. The learned counsel for the Appellant, *inter alia*, contended that the Impugned Order is against the law and facts; that the Banking Court has not passed the Impugned Order keeping in view the facts and circumstances of the case in its true perspective; that the Banking Court has not applied its judicial mind while passing the Impugned Order as it is neither a judgment nor a decree which is against Section 10 of the Ordinance; that the Banking Court, while rejecting the PLA of the Appellant, has not taken into consideration that the matter required recording of evidence, as such the PLA was to be accepted and the Appellant should have been afforded an opportunity to produce his evidence.

### **Submissions of the Respondents**

4. On the other hand, learned counsel for the Respondent No.1 supported the Impugned Order and submitted that the PLA was rightly dismissed by the Banking Court because it was not fulfilling the requirements of the Section 10 of the Ordinance; that the PLA was

dismissed by the Banking Court after examining all the documents appended with the plaint as well as the grounds taken by the Appellant in the PLA.

5. We have heard the arguments of the learned counsel for the parties and perused the record.

**Conversion of Appeal into Writ Petition.**

6. At the very outset, before going into the merits of the case, it has been observed here that this Appeal has been filed against the order dated 01.06.2017 in which the Banking Court after dismissal of the PLA filed by the Appellant has fixed the case for evidence of the Plaintiff, as such on the face of it, this is an interim order. We are mindful of the fact that Section 22(6) of the Ordinance clearly reveals that the Appeal against the interim order is not maintainable. For the sake of brevity the said Subsection is reproduced below and is as follows:

*“(6) No appeal, review or revision shall lie against an order accepting or rejecting an application for leave to defend, or any interlocutory order of the Banking Court which does not dispose of the entire case before the Banking Court other than an order passed under sub-section (11) of section 15 or sub-section (7) of section 19.”*

In this view of the situation, the instant Appeal was not maintainable but to meet the ends of justice and to thrash out the core issues involved in the matter, this Court has been bestowed with the powers to convert the instant Appeal into the writ petition and or treat one kind of proceeding into another. We will fortify our view on this point while seeking guidance from the recent judgment of the Hon'ble Supreme Court of Pakistan passed in the case titled **Mian Asghar Ali v. Government of Punjab through Secretary (colonies) BOR, Lahore and others** (2017 SCMR 118) wherein it has been held that “*No fetters or bar could be placed on the High Court and or the Supreme Court to convert and treat one type of proceedings into another.*” The Similar issue was also brought before the Hon'ble Division Bench of the Sindh High Court in case titled **Asif Kudia and others v. Messrs KASB Bank Limited and others** (2015 CLC 1734) in which the Division Bench has held as under:

“16. It has been held time and again by the Hon'ble Supreme Court and High Courts that the Superior Courts have inherent and Constitutional powers to remedy and correct the wrongs committed by subordinate courts, and the High Court has vast powers in its inherent jurisdiction not only to mould the relief, but also to convert an Appeal, Constitutional Petition or Revision to any other remedy. The law cited on this point by the learned counsel for the appellant is fully applicable in the instant appeals. In this context, reference may be

*made to the case of Syed Ghazanfar Hussain through Legal Heirs and others v. Nooruddin and others, 2011 CLC 1303, decided by a learned Division Bench of this Court which has a binding effect on us. We may also refer to Mst. Mubarak Salman and others v. The State, PLD 2006 Karachi 678, which is also binding on us, wherein it was held inter alia by a learned Division Bench of this Court that once it has been found that Presiding Officers of the Courts have abused the process of the Court, then it is incumbent upon the Superior Courts, and it is one of the duties of the Superior Courts, to correct such wrongs of the subordinate courts by exercising whichever powers available with them either inherent, supervisory, revisional or Constitutional powers, either on the application of any party or under its suo motu jurisdiction ; the reason being that it was the act of the Court done in the abuse of process of Court, that is to be corrected by the Court itself or by the Superior Court as soon as it is brought to its notice through any source; and, except for the superior Courts, there is no other authority which can correct such act of the subordinate courts.*

17. *Regarding the objection as to the maintainability of these appeals, we have already held that the learned Banking Court failed to exercise the jurisdiction that was*

*vested in it by law, and the modes of service adopted by it were not in accordance with the mandatory provisions of section 9(5) ibid. Therefore, the ex parte order passed against the appellant and the order dated 7-8-2010 impugned in 1st Appeal No.121 of 2010 are liable to be set aside. In Habib Bank Limited (2011 CLD 1571) supra, a learned Division Bench of this Court was pleased to allow the Constitutional Petition against an interlocutory order passed by the Banking Court, by holding that no appeal or Constitutional Petition is provided in the Ordinance against an interlocutory order, but this Court in its extraordinary jurisdiction has power to correct the wrong, particularly where no efficacious remedy is available to the aggrieved party. In Messrs United Bank Limited (2012 CLD 1556) supra, wherein an interlocutory order passed by the Banking Court for consolidation of two Suits was challenged, a Division Bench of this Court held that Constitutional jurisdiction of this Court can be invoked by an aggrieved party who has no other remedy, and Constitutional Petition was maintainable as the Banking Court had failed to exercise the jurisdiction which was vested in it by the Ordinance. Both the above cases decided by the Division Benches of this Court are binding on us. In Bank of Punjab (PLD 2013 Lahore 487) supra, it was held by a learned Division Bench of the Lahore High*

*Court that Constitutional Petition would be maintainable in exceptional circumstances in order to meet the ends of justice where the petitioner could show a blatant illegality in the impugned order, such as the Banking Court had not followed the express mandate of law or had exercised its powers outside the jurisdiction conferred upon it.”*

Hence, in view of above, we convert the instant Appeal into writ petition and proceed into the matter towards the merits of the case.

#### **Moot Point in the Petition**

7. The perusal of record as well as the Impugned Order reveal that after hearing arguments from both the sides, the Banking Court dismissed the PLA filed by the Appellant and did not decree the suit forthwith rather fixed the same for evidence of the Respondent No.1/Defendant which is against the Section 10(11) of the Ordinance which clearly mention that when the PLA is rejected or dismissed, the Banking Court shall forthwith proceed to pass a judgment and decree. But in this case the Banking Court instead of proceeding to decree the suit forthwith, fixed the same for evidence of the Plaintiff. Hence, the moot point in the instant Petition is whether the Banking Court can adjourn the case for evidence after dismissing the PLA or should pass a judgment forthwith and if so, with application of judicial mind.

8. The Banking Court is established under Section 5 of the Ordinance having powers under Section 6 of the Ordinance. The Banking Court can decide the cases filed under Section 9 or other provisions of the Ordinance. In case the Banking Court rejects the PLA, it has to proceed to pass judgment and decree forthwith but if the PLA is allowed it has to decide the case after recording of evidence of both the sides under Section 13 of the Ordinance. The procedure laid down under Section 10 of the Ordinance is very clear where the structure, patron and format is defined in subsections 3 to 6 of the Ordinance. The Banking Court has the power under Section 10(7) of the Ordinance to reject the PLA if it does not comply with the requirements of subsections 3, 4 & 5 of the Ordinance. Subsections 9 & 10 of the Section 10 of the Ordinance deal with the granting of the PLA and the condition made therein. The subsection 11 of the Ordinance reads as follows:

*“Where the application for leave to defend is rejected or where a defendant fails to fulfill the conditions attached to the grant of leave to defend, the Banking Court shall forthwith proceed to pass judgment and decree in favour of the plaintiff against the defendant.”*

#### **Determination by the Court**

9. The word used in subsection 11 of the Ordinance can be defined into the following categories which may be as follows:

- i. When the PLA is granted under Section 10(9) of the Ordinance then certain conditions are imposed and if they are not fulfilled, then the Banking Court can pass judgment and decree forthwith in favour of the plaintiff.
- ii. The PLA is rejected if it does not comply with the provisions of the Ordinance. If the PLA is rejected the Banking Court shall proceed to pass judgment and decree forthwith in favour of the plaintiff.

10. The word forthwith means in legal dictionaries as follows:

- i. *a term found in contracts, court orders, and statutes, meaning as soon as it can be reasonably done. It implies immediacy, with no excuses for delay.*
- ii. *Forthwith means immediately or within a reasonable time under the circumstances of the case. or promptly or as quickly as reasonably possible or as soon as the nature of the case will permit. In short, when a thing is to be done forthwith, it means that it must be performed without delay.*

The word forthwith and shall mentioned in the Section 10(11) of the Ordinance has been discussed in detail by the Hon'ble Division Bench of the Sindh High Court in case titled **Merssrs United Bank Limited v. Banking Court No.II and 2 others** (2012 CLD 1556) in which it has been held as under:

*“After carefully examining the entire section 10 of the Ordinance and particularly its subsection (11), we have come to the conclusion that the word "forthwith" specifically mentioned in section 10(11) of the Ordinance was introduced by the legislature for the first time with a clear and specific object, that is, for expeditious disposal of a banking Suit whether filed by a financial institution or by a customer. The word "forthwith" is not meaningless and it cannot be ignored or interpreted casually. The word "forthwith" along with the word "shall" used in section 10(11) casts a duty upon the Banking Court to decree the Suit in favour of the plaintiff against the defendant immediately when defendant's application for leave to defend is rejected or where a defendant fails to fulfil the conditions attached to the grant of leave to defend. In our opinion the object of inserting this new provision was not to cause prejudice to any party, but was to provide an expeditious and equitable relief in banking Suits to the plaintiff after dismissal of defendant's application for leave to defend.”*

### **Analysis**

11. After receiving the PLA, the Banking Court has to decide the same keeping in view the claim of the Plaintiff and the grounds of the PLA as per requirements of the Ordinance. After the dismissal of the

PLA, the Banking Court has to apply its judicial mind after examining the documents filed by the parties as per strict requirements of Sections 9 & 10 of the Ordinance. The necessary documents appended with the plaint including the statement of accounts as well as the documents attached with the PLA including the finance agreements are to be taken into account while deciding the PLA. Section 9(2) of the Ordinance clearly states that the plaint shall be supported by a statement of account which in the case of a financial institution shall be duly certified under the Bankers Books Evidence Act, 1891 (XVII of 1891), (the “Act”) and all other relevant documents relating to the grant of finance. The copies of the plaint, statement of account and other relevant documents shall be filed with the Banking Court in sufficient numbers so that there is one set of copies for each defendant and one extra copy. The statement of accounts has not been defined in the Ordinance but only mentioned in Section 2(3) of the Act. Nevertheless, the statement of accounts has not been defined in the law but *Encyclopedia of Banking & Finance by Charles J. Woelfel* defined the statement of accounts in the following words:

*“Statement of Accounts. A continuous, daily posted record, showing in detail all debits and credits and balance as of the close of the period, usually one month. The statement of account is rendered by a commercial bank, broker, or other business to its customers. These accounts give dates and descriptions and permit the customer to verify the bank’s record with his own. If*

*differences occur, they can then be investigated when the customer reports back through the reconciliation blank usually enclosed with the statement.”*

### **Application of Judicial Mind**

12. When the Banking Court decides the case, the application of judicial mind is necessary which will keep in mind the requirements of the provisions of the Ordinance as mentioned above including the entries in the statement of account, examine the expiry of finance agreement, finance amount availed, finance amount paid, mark up paid, difference etc. It has now been well settled that markup more than the agreed rate and/or beyond the agreed period cannot be granted to the financial institution. Similarly, no other charges or amounts can be allowed to the financial institution to which the customer had not agreed. The Court must examine the claim of the financial institution in the light of the above before passing the decree.

13. The Hon’ble Division Bench of this Court in case titled **Silver Oil Mills Pvt. Limited through Chief Executive and 13 others v. Messrs Union Bank Limited through vice-President and 4 others** (2003 CLD 1658) has held as under:

*“The proceedings taken thereafter by the Banking Court on 25-11-2002 were merely consequential in nature. According to section 10(11) of the Financial Institutions (Recovery of Finances) Ordinance 2001 where a defendant fails to fulfill the conditions attached to the*

*grant of leave to defend, the Banking Court shall forthwith proceed to pass judgment and decree in favour of the plaintiff against the defendant.*

.....

*It is trite law that Banking Court upon application by a defendant is fully competent to grant leave to appear and defend the suit either unconditionally or subject, to such terms as it thinks fit. Such discretion to grant leave conditionally or unconditionally is left to the Court itself as contemplated under Order XXXVII, rule 3, sub-clause (2), C.P.C. Discretion so exercised is not to be interfered with lightly unless it is shown that the same was exercised in a fanciful or arbitrary manner. Nothing has been indicated from the record to suggest this position.”*

Furthermore, the Hon’ble Sindh High Court in case titled *Emirates Global Islamic Bank Limited v. Muhammad Abdul Salam Khan* (2013 CLD 1291) has held as under:

*Under section 10(11) of the Ordinance, the Banking Court has to pass judgment and decree in favour of the plaintiff against the defendant forthwith upon dismissal of the defendant's application for leave to defend. This view is fortified by the reported cases of Apollo Textile Mills Ltd. and others v. Soneri Bank Ltd., 2012 CLD 337 (Supreme Court), Messrs United*

*Bank Ltd. v. Banking Court No.II and 2 others 2012 CLD 1556, Mrs. Jawahar Afzal v. United Bank Ltd. 2003 CLD 119, Khawaja Muhammad Bilal v. Union Bank Ltd. 2004 CLD 1555 and Habib Bank Ltd. v. Messrs SABCOS (Pvt.) Ltd. 2006 CLD 244.*

*12. The dismissal of the application for leave to defend does not mean that the entire claim of the plaintiff in a Suit under the Ordinance should be decreed as prayed by the plaintiff without examining the claim of the plaintiff. In such an event, no doubt the plaintiff becomes entitled to a decree, but only to the extent of such amount which is permissible in law. It has now been well settled that markup more than the agreed rate and/or beyond the agreed period cannot be granted to the financial institution. Similarly, no other charges or amounts can be allowed to the financial institution to which the customer had not agreed. The Court must examine the claim of the financial institution in the light of the above before passing the decree.”*

14. In view of above, we have noted that the provisions of the Ordinance allow the Banking Court to pass a decree forthwith in terms by examining the plaint as well as the PLA filed under Sections 9 & 10 of the Ordinance but that power has to be exercised with proper application of judicial mind.

15. From the above, it is very much clear that when the PLA is accepted, the Banking Court shall treat the application as a written statement, and in its order granting leave shall frame issues relating to the substantial questions of law or fact, and, subject to fulfillment of any conditions attached to grant of leave, fix a date for recording of evidence thereon and disposal of the suit. Whereas if the PLA is rejected or where a defendant fails to fulfill the conditions attached to the grant of leave to defend, the Banking Court shall forthwith proceed to pass judgment and decree in favour of the plaintiff and against the defendant. It is to be noted here that the Banking Court while deciding the PLA or the suit has to take into consideration all the provisions of the Ordinance as well as material available on record with the proper application of judicial mind. The application of judicial mind is necessary and the Banking Court, while deciding the case, will keep in mind the requirements of the provisions of the Ordinance as mentioned above including the entries in the statement of account, examine the expiry of finance agreement, finance amount availed, finance amount paid, mark up paid, differences etc. including all the other documents tendered by both the parties by virtue of their respective claims. It has now been well settled that markup more than the agreed rate and/or beyond the agreed period cannot be granted to the financial institution. Similarly, no other charges or amounts can be allowed to the financial institution to which the customer had not agreed. The Court must examine the claim of the financial institution in the light of the above before passing the decree.

16. Moreover, the Hon'ble Supreme Court of Pakistan has time and again disapproved passing of perfunctory orders/judgments. It is settled law that 'judicial order" must be speaking order manifesting by itself that the Court has applied its judicial mind to the issues and points of controversy involved in the cases. Where the order is passed without application of judicial mind, the same is in contravention of law and is not sustainable. A plethora of judgments by the Hon'ble Supreme Court of Pakistan as well as this Court has been passed on this issue. Reliance in this regard can be placed on the case titled Adamjee Jute Mills Ltd. v. The province of East Pakistan and others (PLD 1959 SC (Pak) 272), Gouranga Mohan Sikdar v. The Controller Import and Export and 2 others (PLD 1970 SC 158), Mollah Ejahar Ali v. Government of East Pakistan and others (PLD 1970 SC 173), Muhammad Ibrahim Khan v. Secretary, Ministry of Labour and others (1984 SCMR 1014), Habib Bank Limited, Lahore v. Messrs Creative Enterprises (pvt.) Ltd. (2007 C L D 244), Messrs Faisal M. B. Corporation (pvt.) Ltd. v. Equity Participation Fund (2006 CLD 183), Khalid Shahbaz Chaudhry v. Prime Commercial Bank Ltd (2005 CLD 629), Messrs Mohib Exports Ltd. v. Trust Leasing Corporation Ltd. (2005 CLD 581), Messrs Sun Rise Textile Ltd v. Prime Commercial Bank Ltd. (2005 CLD 126) and Messrs Chancellors Overseas v. Muslim Commercial Bank Limited (2004 CLD 811).

17. We have gone through the impugned order minutely and observed that the same has been passed in a sketchy manner consisting of only a half of page coupled with the fact that the grounds taken by the Appellant in the PLA have not been tackled with sound reasoning. The impugned order has been passed without application of judicial mind and consequently, we are of the considered opinion that the Banking Court has passed the Impugned Order against the law.

18. The last but not least, we accept the Petition and set aside the Impugned Order. Resultantly, the case is remanded to the Banking Court which shall take into consideration all the material produced by both the parties as well as the grounds taken and arguments raised and then decide the PLA afresh as per the above referred provisions of law after proper application of judicial mind. Before deciding the case the Banking Court shall issue notice to both the parties and will provide an opportunity of final arguments.

**(Muzamil Akhtar Shabir)**  
**Judge**

**(Jawad Hassan)**  
**Judge**

Approved for reporting

**Judge**

**Judge**