

**JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT**

RFA No.40272 of 2021

SME Bank Limited

Versus

M/s Punjab Store & another

J U D G M E N T

Date of hearing: 29.09.2021.
Appellant-Bank by: Mr. Muhammad Yousaf Chaudhary,
Advocate.
Respondent No.2: Mr. Ghulam Hussain Chaudhary,
Advocate.
Barrister Ameer Abbas Ali Khan,
Assistant Advocate General on Court's
call.
Research by: Mr. Ahmad Zia Ch., Civil Judge /
Research Officer, LHCRC.
Mr. Muhammad Imran Sh. Addl. District
Judge / Senior Research Officer, LHCRC.

MUHAMMAD SAJID MEHMOOD SETHI, J.- Through instant Appeal, appellant-bank has assailed order dated 18.09.2019, passed by learned Banking Court, Lahore, whereby appellant's suit was held infructuous disentitling the bank to get cost of funds or any other charges / costs of the suit.

2. Brief facts of the case are that appellant-bank instituted suit for recovery of Rs.3,306,023.18 against respondents asserting therein that initially the bank sanctioned Running Finance Facility of Rs.1,000,000/- in favour of respondents vide letter dated 22.03.2007 and respondent No.2 furnished personal guarantee as well as mortgaged his property. Finance Agreement dated 03.04.2007 was accordingly executed between the parties. Later on, aforesaid facility was renewed and enhanced to Rs.1,200,000/-, Rs.1,750,000/- & Rs.2,750,000/-, from time to time. It was asserted

that besides execution of Finance Agreements regarding enhanced facilities, respondents also executed personal guarantees and mortgage deeds, however, defaulted in their repayment obligations. The suit was contested by respondents by filing application for leave to appear and defend the suit. During proceedings of the suit, respondents paid principal amount as well as mark-up total Rs.3,205,505/-. In these circumstances, learned Banking Court held the suit infructuous and disentitled the bank to get cost of funds as well as costs of the suit vide order dated 18.09.2019. Hence, instant appeal.

3. Learned counsel for appellant-bank submits that suit has been decided without deciding leave application, which is not legally justified. Adds that issue regarding award of cost of funds has already been decided by another learned Division Bench of this Court vide order dated 24.05.2017, passed in RFA No.1287 of 2015, but this aspect of the matter has been overlooked by learned Banking Court. Further submits that learned Banking Court was required to decide the question of cost of funds on merits after framing issues and recording evidence of the parties. In the end, he submits that impugned order is unsustainable in the eye of law.

4. Conversely, learned counsel for respondents defends the impugned order and submits that learned counsel for appellant has failed to point out any illegality or legal infirmity in the same, which is liable to be upheld.

5. Arguments heard. Available record perused.

6. It is not disputed that Running Finance Facility with its renewals and enhancements was availed by respondents. Record shows that during pendency of the suit, respondent No.2 submitted Call Deposit Receipt dated 28.09.2018 of Rs.27,50,000/-, the principal amount, before learned Banking Court and mark-up amount of Rs.455,505/- in shape of Pay Order was paid on 04.09.2019, thus, there was default on part of respondents in repayment obligations. In suchlike scenario, Section 3 of the

Financial Institutions (Recovery of Finances) Ordinance, 2001 comes into play, which casts duty upon a customer to fulfill the obligations to the financial institution and in case of default, imposes a further obligation upon a customer to pay cost of funds. The aforesaid provision of law is reproduced hereunder:-

“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 payment of the cost of funds as determined under sub-section (2).”

It is provided in Section 3 *ibid* that customer at default in fulfillment of obligations shall be liable to pay cost of funds for the period from date of default till realization as certified by the State Bank of Pakistan, besides other liabilities accrued under the law. The aforesaid provision is not procedural in nature as it imposes a pecuniary burden on a defaulting customer and entails a substantive obligation. Banking Court has been empowered to award cost of funds as compensation to the financial institution for the finance blocked / stuck up due to breach in the fulfillment of obligation by the customer, after determining the date of default. Reference can be made to Habib Bank Limited through aAuthorized Attorneys v. Pak Poly Products (Pvt.) Ltd. and 3 others (2013 CLD 1661), Shamil Bank of Bahrain E.C v. Mian Ayaz Anwar and 6 others (2015 CLD 893), Ghulam Jaffar Phulpoto v. Messrs Allied Bank Limited and another (2015 CLD 1416), Bank Alfalah Limited v. Syed Zulfiqar Ali Rizvi and 3 others (2016 CLD 618), Pak Libya Holding Company (Private) Limited v. Maxco (Pvt.) Limited and 2 others (2016 CLD 1147), Bank of Punjab through Attorney v.

Dewan Salman Fiber Limited (2017 CLD 451), Messrs Habib Metropolitan Bank Limited v. Messrs Faizan Ali And Company (Pvt.) Ltd. through Chief Executive Officer and others (2017 CLD 1583), Messrs Divine Developers (Pvt.) Ltd. and others v. Bank of Punjab (2019 CLD 489), Messrs Cie Computers through Proprietor and 2 others v. NIB Bank Limited through Manager (2019 C L D 760)=(2020 PCTLR 1278), National Bank Of Pakistan through Branch Manager v. Muhammad Raies Ahmad and others (2020 CLD 784), Muhammad Saleem Shaikh v. Messrs Kasb Bank Limited (2020 CLD 981), Messrs Rose Associates v. Messrs Saudi Pak Industrial and Agricultural Investment Company Limited (2020 CLD 1320), Askari Bank Limited v. M/s. Fatima Enterprises Limited and others (PLJ 2021 Lahore 442), Orix Leasing Pakistan Ltd v. M/s. Muhammad Noor Dairies & 3 others (2021 LHC 1980).

7. It is well settled principle of interpretation of statutes that when a statute creates rights and obligations and prescribes the mode of its enjoyment or enforcement, such provision is considered mandatory and that the Legislature intends compliance of such provision to be essential to the validity of the act or proceedings. Earl T. Crawford in his book *The Construction of Statutes* Chapter XXIV *Mandatory and Directory Or Permissive Statutes* (Published by Pakistan Law House, 2014) stated that a statute which creates a new right, privilege or immunity, and regulates the manner of its exercise, will be construed as mandatory; such right can be exercised only in the manner and within the time prescribed; and similarly, when a statute gives a new right and prescribes a particular remedy for its recovery, such remedy must be strictly pursued. Under Section 3 of the FIO, 2001, it is the duty of the customer to fulfill his obligations to the financial institution. In case of default he being principle debtor along with his surety / guarantor would be under legal obligation to discharge the debts along with cost of funds. Default in discharge of such obligation not only incurs the cost of funds under Section 3(2) but is also

actionable under Section 9 of the FIO, 2001. Section 3 of the FIO, 2001, being mandatory in nature, is required to be strictly adhered to, followed and enforced without interpreting / construing it in any manner liberally. Reference can be made to Rana Muhammad Tajammal Hussain v. Rana Shaukat Mahmood (PLD 2007 Supreme Court 277), Human Rights Cases Nos.4668 of 2006, 1111 of 2007 and 15283-G of 2010 (PLD 2010 Supreme Court 759), Messrs Saleem Sons Ltd. v. The Second Sind Labour Court, Karachi and another (PLD 1973 Karachi 1), Ghulam Mustafa and another v. Abdul Malik (PLD 2008 Lahore 4), Habib Bank Limited v. Tauqeer Ahmed Siddiqui and another (2009 CLD 312), Messrs Industrial Development Bank of Pakistan (IDBP) through Authorized Officer v. The Learned Judge, Banking Court No.III, Lahore and others (2015 CLD 1089) and Hemayatullah Mayar District Nazim, Mardan and another v. Chief Minister Khyber Pakhtunkhwa through Chief Secretary and 5 others (2017 YLR 11182).

8. So far as reference of learned Banking Court to the case reported as Habib Bank AG Zurich through Manager v. Mustafa Shamsuddin Ghatilla and 2 others (2003 CLD 658) is concerned, it was observed by this Court in the said case that Bank was not entitled to all cost of funds as claimed by it in the light of Section 3 of the FIO, 2001, where-under default would occur when a judgment had been rendered against customer and it was upon said judgment that a decree to be passed had to provide for payment of cost of funds. In the said case, no judgment was passed as entire amount had already been paid as admitted by the Bank, therefore, cost of funds was not awarded. In the instant case, there was default on part of respondents to make re-payment within stipulated time, therefore, learned Banking Court was obliged to pass decree to this effect and grant cost of funds as per law.

9. In view of the above, this appeal is allowed and impugned order dated 18.09.2019 is set aside. Consequently, appellant's suit

is decreed to the extent of cost of funds from the date of default till the date of realization to be determined and calculated by learned Banking Court as per law.

(Abid Aziz Sheikh)
Judge

(Muhammad Sajid Mehmood Sethi)
Judge

Sultan

APPROVED FOR REPORTING

Judge