

[AS PASSED BY THE SENATE]

A
BILL

further to amend the Financial Institutions (Recovery of Finances) Ordinance, 2001

WHEREAS it is expedient further to amend the Financial Institutions (Recovery of Finances) Ordinance, 2001 (XLVI of 2001) for the purposes hereinafter appearing;

It is hereby enacted as follows:-

1. Short title and commencement.- (1) This Act may be called the Financial Institutions (Recovery of Finances) (Amendment) Act, 2016.

(2) It shall come into force at once.

2. Amendment of section 2, Ordinance XLVI of 2001.- In the Financial Institutions (Recovery of Finances) Ordinance, 2001 (XLVI of 2001), hereinafter referred to as the said Ordinance, in section 2,-

(a) in clause (b), in sub-clause (i), for the word "fifty" the word "hundred" shall be substituted;

(b) in clause (c), after the words "financial institution", occurring for the first time, the words "within or outside Pakistan" shall be inserted;

(c) in clause (d), after sub-clause (vi), the existing two un-numbered sub-clauses shall be numbered as sub-clauses (vii) and (ix) respectively and after sub-clauses (vii), numbered as aforesaid, the following new sub-clause shall be inserted, namely:-

"(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;"

(d) after clause (f), the following new clause shall be added, namely:-

"(g) "willful default" means-

(i) deliberate or intentional failure to repay any finance, loan, advance or any financial assistance received by any person from a financial institution after such payment has become due under the terms of an agreement, law, rules or regulations issued by the State Bank of Pakistan;

(ii) utilization of finance, loan, advance or financial assistance or a substantial part thereof, obtained by any person from a financial institution for a purpose other than that for which such finance, loan, advance or financial assistance had been obtained and payment in part or full not made to the financial institution; or

- (iii) removal, transfer, misappropriation or sale of any assets collateralized to secure a finance, loan, advance or financial assistance obtained from a financial institution without permission of such institution.”.

3. Amendment of section 5, Ordinance XLVI of 2001.- In the said Ordinance, in section 5,-

- (a) for sub-section (4), the following shall be substituted, namely:-

“(4) A Judge of a Banking Court shall be appointed by the Federal Government after consultation with the Chief Justice of the High Court of the Province in which the Banking Court is established and no person shall be qualified for appointment as the Judge of a Banking Court unless he is, or has been, or is qualified to be a District Judge.”; and

- (b) after sub-section (9), the following new sub-section shall be added, namely:-

“(10) A Judge of a Banking Court shall submit to the Chief Justice of the High Court of the Province in which the Banking Court is established, reports on a quarterly basis regarding the number of cases filed, heard and disposed of by the Banking Court during each relevant quarterly period.”.

4. Amendment of section 8, Ordinance XLVI of 2001.- In the said Ordinance, in section 8, for sub-section (1), the following shall be substituted, namely:-

“(1) Subject to sub-section (2), and notwithstanding anything contained in the Limitation Act, 1908 (IX of 1908) or any other law, a financial institution may, within five years, file a suit for the recovery of any amount written off, released or adjusted under any agreement, contract, or consent, including a compromise or withdrawal of any suit or legal proceedings or adjustment of a decree between a financial institution and a customer, if it has reasons to believe that the amount was written off, released or adjusted for political reasons or considerations other than bona fide business considerations.”

5. Amendment of section 10, Ordinance XLVI of 2001.- In the said Ordinance, in section 10, after sub-section (4), the following new sub-section (5) shall be inserted and the existing sub-sections (5) to (12) shall respectively be re-numbered as sub-sections (6) to (13), namely:-

“(5) Where application for leave to defend submitted under the preceding sub-section is found to be materially incorrect at any stage of the proceedings, the defendant shall lose the right to defence and shall also be liable to pay penalty of not less than five percent of the amount of the claim, unless the defendant can establish that incorrect information was submitted as a result of a bona fide mistake.”.

6. Amendment of section 11, Ordinance XLVI of 2001.- In the said Ordinance, in section 11, for sub-section (1), the following shall be substituted, namely:-

“(1) If the Banking Court on consideration of affidavit under oath by the customer supported by certificate of a chartered accountant on the approved panel of auditors of State Bank of Pakistan under section 35 of the Banking Companies Ordinance, 1962 (LVII of 1962) is of the opinion that the dispute between the parties does not extend to the whole of the claim, or that part of the claim is either undisputed, or is clearly due, or that the dispute is mainly limited to a part of the principal amount of the finance or to any other amounts relating to the finance, it shall, while granting leave and framing issues with respect to the disputed amounts, pass an interim decree in respect of that part of the claim which relates to the principal amount and which appears to be payable by the defendant to the plaintiff.”.

7. Amendment of section 12, Ordinance XLVI of 2001.- In the said Ordinance, in section 12,-

- (a) after the word “served”, occurring for the second time, the words “nor published in newspapers” shall be inserted; and
- (b) for the words “or otherwise as it thinks fit” the words “which shall not be less than one third of the amount of the decree”, shall be substituted.

8. Substitution of section 15, Ordinance XLVI of 2001.- In the said Ordinance, for section 15, the following shall be substituted, namely: -

“15. Sale of mortgaged property.- (1) In this section, unless there is anything repugnant in the subject or context,-

- (a) “mortgage” means the transfer of an interest in specific immovable property for the purpose of securing the payment of the mortgage money or the performance of an obligation which may give rise to a pecuniary liability;
- (b) “mortgage money” means any finance or other amounts relating to a finance, penalties, damages, charges or pecuniary liabilities, payment of which is secured for the time being by the document by which the mortgage is effected or evidenced, including any mortgage deed or memorandum of deposit of title deeds;
- (c) “mortgaged property” means immovable property mortgaged to a financial institution; and
- (d) “reserve price” means forced sale value of the mortgaged property determined by a reputable valuation company under clause (a) of sub-section 4.

(2) In case of default in payment by a customer, the financial institution may send a notice to the mortgagor demanding payment of the mortgage money outstanding within fourteen days from service of the notice and failing payment of the amount within due date, it shall send a second notice of demand for payment of the amount within fourteen days. In case the customer on the due date given in the second notice sent, continues to default in payment, financial institution shall serve a

final notice on the mortgager demanding the payment of the mortgage money outstanding within thirty days from service of the final notice on the customer.

(3) When a financial institution serves a final notice of demand, all powers of the mortgagor in regard to recovery of rents and profits from the mortgaged property shall stand transferred to the financial institution until such notice is withdrawn and it shall be the duty of the mortgagor to pay all rents and profits from the mortgaged property to the financial institution:

Provided that where the mortgaged property is in possession of any tenant or occupier, other than the mortgagor, it shall be the duty of such tenant or occupier, on receipt of notice in this behalf from the financial institution, to pay to the financial institution the rent or lease money or other consideration agreed with the mortgagor.

(4) Where a mortgagor fails to pay the amount as demanded within the period prescribed under sub-section (2), and after the due date given in the final notice has expired, the financial institution may, without the intervention of any court and subject to any rules made by the Federal Government under sub-section (5), sell the mortgaged property or any part thereof by public auction and apply the proceeds thereof towards total or partial satisfaction of the outstanding mortgage money in the following manner, namely:-

- (a) the financial institution shall have the mortgaged property evaluated by a reputable valuation company on the panel of the Pakistan Banks Association as on the date of the final notice sent to the mortgagor under sub-section (2);
- (b) the financial institution shall cause to be published a notice in one reputable English daily newspaper with wide circulation and one reputable Urdu daily newspaper with wide circulation in the Province in which the mortgaged property is situated specifying the following, namely:-
 - (i) detailed particulars of the mortgaged property;
 - (ii) name and address of the mortgagor;
 - (iii) amount of the outstanding mortgage;
 - (iv) any encumbrances which the mortgaged property may be subject to which the financial institution is aware of;
 - (v) the financial institution's intention to sell the mortgaged property through a public auction;
 - (vi) the reserve price below which the mortgaged property cannot be sold;
 - (vii) the time and place at which the public auction is to take place, provided that the public auction shall take place in the city where the mortgaged property is located; and

- (viii) any other information, which may be relevant;
- (c) the financial institution shall send a notice with the information, specified in clause (b), to the mortgagor and to all persons who, to the knowledge of the financial institution, have an interest in the mortgaged property as mortgagees; and
- (d) the public auction for the sale of the mortgaged property shall not take place before the expiration of three business days of the publication of the notice as required under clause (b).

(5) In addition to its powers under sections 25 and 26, the Federal Government may, by notification in the Official Gazette, make rules specifying the mode, conduct or method of sale of the mortgaged property and in addition to the conditions stipulated in sub-section (4).

(6) The financial institution shall be entitled, in its discretion, to participate in the public auction and to purchase the mortgaged property for an amount ten percent higher than the highest bid obtained in the public auction, provided that where the financial institution chooses to purchase the mortgaged property at the highest bid obtained in the public auction, it shall issue notice to the mortgagor who shall have three business days from the service of the notice to match the financial institution's bid. If the mortgagor is able to match the financial institution's bid, he shall be allowed to purchase the mortgaged property.

(7) Where the mortgagor or his agent or servant or any person put in possession by the mortgagor or on account of the mortgagor does not voluntarily give possession of the mortgaged property sought to be sold or sought to be purchased or purchased by the financial institution, a Banking Court on application of the financial institution or purchaser shall put the financial institution or purchaser, as the case may be, in possession of the mortgaged property in any manner deemed fit by it:

Provided that the Banking Court may not order eviction of a person who is in occupation of the mortgaged property or any part thereof under a bona fide lease, except on expiry of the period of the lease, or on payment of such compensation as may be agreed between the parties or as may be determined by the Banking Court to be reasonable.

Explanation.-Where the lease is created after the date of the mortgage and it appears to the Banking Court that the lease was created so as to adversely affect the value of the mortgaged property or to prejudice the rights and remedies of the financial institution, it shall be presumed that the lease is not bona fide, unless proved otherwise.

(8) For purposes of execution and registration of the sale deed in respect of the mortgaged property, the financial institution shall be deemed to be the duly authorized attorney of the mortgagor and a sale deed executed and presented for registration by duly authorized attorneys of the financial institution shall be accepted for such purposes by the Registrar and Sub-Registrar under the Registration Act, 1908 (XVI of 1908):

Provided that no such sale deed shall be executed or registered until expiry of seven days after the completion of the public auction for the sale of the mortgaged property.

(9) Upon execution and registration of the sale deed of the mortgaged property in favor of the purchaser all rights in such mortgaged property shall vest in the purchaser free from all encumbrances and the mortgagor shall be divested of any right, title and interest in the mortgaged property.

(10) Net sale proceeds of the mortgaged property, after deducting all expenses of sale or expenses incurred in any attempted sale, shall be distributed ratably amongst all mortgagees in accordance with their respective rights and priorities in the mortgaged property. Any surplus left, after paying in full all the dues of mortgagees, shall be paid to the mortgagor.

(11) A financial institution which has sold mortgaged property in exercise of powers conferred herein shall file proper accounts of the sale proceeds in Banking Court within fourteen days of the sale.

(12) All disputes relating to the sale of the mortgaged property under this section including disputes amongst mortgagees in respect of the mode, conduct or method of the sale or the distribution of the sale proceeds, shall be decided by the Banking Court to the exclusion of any other court of law, including the High Court.

(13) The Banking Court may grant an injunction restraining the sale or proposed sale of mortgaged property, if-

- (a) it is satisfied that no mortgage in respect of the immovable property has been created; or
- (b) it is satisfied that there is fraud in the proposed mode, conduct or method of the sale, provided that no injunction shall be granted on the ground of fraud unless upon the facts proved the Banking Court is satisfied that the applicant has sustained substantial injury by reason of such fraud and such injury cannot be compensated by damages; or
- (c) all moneys secured by mortgage of the mortgaged property have been paid; or
- (d) the mortgagor or objector deposits in the Banking Court in cash the outstanding mortgage money.

(14) Where any mortgaged property has been sold, the mortgagor or any person entitled to a share in the rateable distribution of assets, or whose interest is affected by the sale, may apply to the Banking Court to set aside the sale on the ground of fraud:

Provided that no sale shall be set aside on the ground of fraud unless, upon the facts proved, the Banking Court is satisfied that the applicant has sustained substantial injury by reason of such fraud and such injury cannot be compensated by damages.

(15) An application for setting aside the sale under sub-section (14) must be made within seven days of completion of the public auction for the sale of the mortgaged property and shall not be entertained by the Banking Court unless the applicant deposits an amount equal to twenty-five percent of the reserve price or furnishes security for the same amount to the satisfaction of the court.

(16) The rights and remedies provided under this section are in addition to, and not in lieu of, any other rights or remedies a financial institution may have under this Ordinance.

(17) The provisions contained in this section shall have effect notwithstanding anything contained in this Ordinance or any other law for the time being in force or any judgment of any court and in case of any conflict between the provisions contained in this section, and any other law for the time being in force or any judgment of any court, the provisions contained in this section shall prevail."

9. Amendment of section 20, Ordinance XLVI of 2001.- In the said Ordinance in section 20,-

(a) for sub-section (6), the following shall be substituted namely:-

"(6) All offences, under this Ordinance shall be triable by a Banking Court, in accordance with section 7 of this Ordinance. All offenses, except for the offence of willful default shall be bailable, non-cognizable and compoundable."

(b) after sub-section (6), amended as aforesaid, the following new sub-sections shall be added, namely:-

"(7) Notwithstanding anything to the contrary provided in any other law for the time being in force, action in respect of an offence of willful default shall be taken by an investigating agency, to be nominated in this behalf by the Federal Government, on a complaint in writing filed by an authorized officer of a financial institution after it has served a thirty days notice upon the borrower demanding payment of the loan, advance or financial assistance.

(8) An offence of willful default shall be cognizable, non-bailable and non-compoundable and punishable with imprisonment which may extend to seven years or fine, not exceeding the amount of default, or with both.

(9) Any person convicted of the offence of willful default by a Banking Court shall not be eligible to receive any loan, advance or finance from any financial institution for a period of ten years and shall not be permitted to contest any election as a member of the Majlis-e-Shoora (Parliament), any Provincial Assembly or a local body for a period of five years, after serving out a sentence after conviction."

STATEMENT OF OBJECTS AND REASONS

The Financial Institutions (Recovery of Finances) Ordinance, (FIRO) was promulgated in 2001, primarily to deal with the recovery process of the bank loans and loan defaults. The FIRO, 2001 provided a comprehensive legal framework on foreclosure specially Section 15 which empowered the financial institutions to sale the mortgaged property. However, Supreme Court of Pakistan in its Order passed on December 10, 2013 declared Section 15 of the aforesaid Ordinance as ultravires to the Constitution of Islamic Republic of Pakistan.

2. State Bank of Pakistan (SBP) initiated the process of consultation among the relevant stakeholders to frame the amendments in the FIRO, 2001, in the light of the judgment of the Supreme Court and requirement of the financial institutions. Accordingly, Financial Institutions (Recovery of Finances) (Amendment) Bill, 2016 has been drafted.

3. The proposed amendments are meant to facilitate recovery process of bank loans so that loan defaults and incidence of written off loans could be minimized. The pecuniary limit of High Court cases is proposed to be enhanced to Rs. 100 million to reduce the burden of cases on superior courts. The loans availed from Pakistani banks in other countries would also fall under Recovery Ordinance. The willful default would be an offence under the Ordinance. The loans written off for reasons other than merit, would be open to trial at any stage without application of any limitation, knowingly submission of false information in the court would render the parties ineligible to defend the case and frivolous filing would be discouraged with fines.

4. The smooth recovery process would result in growth of healthy credit culture in the country, reduce risks of default and hence writing off of loans and would also create additional funds for lending to new segments of borrowers. These measures taken together would stabilize the financial system and contribute to sustainable economic growth in the country.

5. This Bill is designed to achieve the aforesaid purpose.

SENATOR MOHAMMAD ISHAQ DAR
Minister for Finance, Revenue, Economic
Affairs, Statistics and Privatization
Minister-in-charge