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EVIDENTIARY ISSUES IN BANKING LAWS OF PAKISTAN

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EXECUTIVE SUMMARY

Banking laws in Pakistan are subject to considerable contentions as there is ambiguity in interpretations of many laws. These contentions require resolutions especially when two concurrent laws govern the same issues. For this purpose, evidentiary standards must be clearly outlined. Moreover, emerging issues such as proliferation of technology also require that grey areas in terms of use of technology for evidentiary standards are removed. In addition, application of legal doctrines such as financial estoppels as well as use of blank documents also needs clarity. Lastly, there needs to be outlining in terms of evidentiary issues especially in case of filing of documents and intersection of laws when the financial institution is not bank.

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Table of Contents

INTRODUCTION.....	4
RELEVANT LAWS IN PAKISTAN.....	4
a) Financial Institutions (Recovery of Finances Ordinance) 2001 (The “FIO”)	4
b) Qanun-e-Shahadat Order 1984 (The “QSO”).....	5
c) Bankers` Books Evidence Act 1891 (The “BEA”).....	5
d) Electronic Transactions Ordinance 2002 (The “ETO”).....	6
CONTENTIONS IN BANKING CASES IN PAKISTAN	6
1) What are the requirements for the certification of a copy of the Statement of Accounts under Section 2(8) of BEA and Section 9 of FIO?	6
2) Is there any difference in relation to filing of document under FIO and Code of Civil Procedure 1908 (the “CPC”)?	7
3) What is the legal status of electronic documents in relation to Banking Laws and what requirements they need to comply under the relevant laws?	8
4) How the law under FIO will differ if the plaintiff is not a ‘bank’?	8
5) Does Financial Estoppel apply if the contents of the statement of accounts are challenged in a legal proceeding in Banking Courts?	9
6) Under what conditions a blank document can be submitted as evidence in purview of section 18 of FIO?	10
RECOMMENDATIONS	10

INTRODUCTION

The perusal of the relationship between banking laws and evidence laws raises many contentions which normally arise during adjudication before the superior courts of Pakistan. For the purposes of this legal policy brief, these contentions shall be framed as issues and the elaboration of the superior courts in various judgments shall be provided as answers to these issues. These answers shall demonstrate the way these contentions were resolved in different judgments. However, these issues mostly flow and arise from certain statutory laws. Therefore, for the sake of truly understanding these contentions, those specific laws need to be outlined and referenced.

RELEVANT LAWS IN PAKISTAN

a) Financial Institutions (Recovery of Finances Ordinance) 2001 (The “FIO”)

Section 9 of FIO *inter alia* allows a financial institution (the “FI”), which is subjected to default of finance to institute a suit in the banking court. The institution of the suit must be through filing a plaint which shall be verified on oath by the Branch Manager or any officer of FI who possesses the power of attorney from FI. Plaint must also be accompanied by a statement of accounts duly certified under the Bankers’ Books Evidence Act 1891 and all other documents which are related to the grant of finance. The plaint must mention the amount of finance availed by defendant; amount of finance paid by defendant and amount of finance payable by defendant.¹ Section 10 of FIO *inter alia* provides an exception to normal civil proceedings and provides that the defendant must file a leave to defend the suit. This leave to defend shall be allowed by the relevant banking court. The leave to defend shall be accompanied by the relevant documents which support the questions of facts and laws raised by the defendant. Moreover, it should also be in the form of a written statement and must mention the summary of substantial questions of facts and law which require the evidence to be recorded. If the leave to defend does not fulfill the aforementioned requirements, the court shall reject it.² Section 18 of FIO, further, *inter alia* states that financial agreements must be executed and attested in compliance with the provisions

¹ Financial Institutions (Recovery of Finances Ordinance) 2001, Section 9(1), Section 9(2), and Section 9 (3)

² Financial Institutions (Recovery of Finances Ordinance) 2001, Section 10(1), Section 10(3), Section 10(5), and Section 10(6)

of Article 17 of *Qanun-e-Shahadat* Order 1984 (the “QSO”). However, the banking court shall not refuse a document provided by FI if that document does not fulfil the requirements of Article 17 of QSO. Section 18 of FIO also forbids FI to take signatures of customers on banking documents which contain blanks in relation to important particulars.³

b) Qanun-e-Shahadat Order 1984 (The “QSO”)

Section 17 of QSO *inter alia* provides the rules of evidence and requires that the evidence must be led in accordance with the requirements of Islamic stipulations. Therefore, if financial obligations are reduced to writing, the witness must be two men or one man and two women.⁴ Section 72 of the QSO further allows the documents to be proved through primary and secondary evidence. Primary evidence means the document itself produced for inspection in court and generally means original copy of the document.⁵ Secondary evidence *inter alia* means the certified copies of the primary evidence.⁶ Section 79 of QSO specifically provides a provision for the admissibility of documents which needs to be attested and states execution of such a document must be proved through two witnesses. If any dispute arises in relation to the authenticity of signatures or handwriting, section 78 of QSO requires that handwriting or signature to be proved.

c) Bankers` Books Evidence Act 1891 (The “BEA”)

Section 2(3) of BEA defines bankers’ books to include ledgers, account books and all other books used in the ordinary course of bank’s businesses. Section 2(4) of BEA further defines a legal proceeding and includes any proceedings or inquiry under which evidence needs to be provided. The definition of a ‘certified copy’ is drafted in Section 2(8) of BEA and means *inter alia* a copy of an entry in the ordinarily used books of a bank with a certificate by the principal accountant or the manager of bank attesting that such a copy is a true copy. Section 4 of BEA further makes such a certified copy as admissible and *prima facie* evidence.

³ Financial Institutions (Recovery of Finances Ordinance) 2001, Section 18 (1), Section 18(2) and Section 18(4)

⁴ Qanun-e-Shahadat Order 1984, Article 17(1), and Article 17(2)(a)

⁵ Qanun-e-Shahadat Order 1984, Article 73

⁶ Qanun-e-Shahadat Order 1984, Article 73

d) Electronic Transactions Ordinance 2002 (The “ETO”)

Section 3 of ETO states that no electronic document or transaction shall be denied admissibility, validity, effect, and proof on the basis that it has not been attested by any witness. Section 4 of ETO further endows the effect of a written document to a document which is in electronic form. Moreover, if a certain law requires a certified copy of a document, the requirements of certification *inter alia* can be performed on the printouts of that document.

CONTENTIONS IN BANKING CASES IN PAKISTAN

1) What are the requirements for the certification of a copy of the Statement of Accounts under Section 2(8) of BEA and Section 9 of FIO?

In *Pakistan Oman Investment Company Limited*, it was opined that the object of the BEA is to render entries in bankers' books admissible in evidence and to enable copies of the entries to be used instead of compelling the bank to produce the original entries. Such a copy must be received as *prima facie* evidence not only of the existence of such entries but also of the matters, transactions and accounts recorded pursuant to section 4 of the BEA. Thus, authority is granted to a copy equal to the original, but the certified copy shall not have more authority than the original. If liability cannot be placed on the evidentiary value of original, it cannot be placed on the basis of the copy. Therefore, admissibility in evidence and sufficiency to charge with liability should not be confused and corroboration shall still be required in addition to a certified copy of a bank entry. This corroboration can be done through methods which include oral witnesses, examination of Statement of Account (“SOA”) in detail, admission, and handwriting analysis.

However, the presumption of truth shall be lost if the entries in such a certified copy are denied specifically by pin-pointing the transactions recorded. If entries in a statement of account are convincingly disputed by the borrower, then the bank should prove them through independent evidence. However, if the liability is admitted by the

defendant, then a suit can be decreed on the basis of admission of liability.⁷ For such a suit to be decreed, the requirements of a certified copy must be complied by the bank. These requirements include: certificate written at the foot of such a copy that it is a true copy of such entry; that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business; that such book is still in the custody of the bank; that a such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.⁸ Moreover, a certificate which is provided just at the end of the bank statement can also be considered sufficient for the purposes of certification under the provisions of BEA.⁹ Lastly, the phrase ‘an entry’ in the Bankers Books can also mean to include any form of permanent record relating to the Bank's business by any of the methods which include modern technology provided in particular by micro-film.¹⁰

2) Is there any difference in relation to filing of document under FIO and Code of Civil Procedure 1908 (the “CPC”)?

The superior courts have reasoned that section 9 of FIO compulsorily requires a plaintiff to support a plaint by a statement of account containing certification in accordance with BEA. The court observed that Order VII Rule 18 of CPC and Section 9(2) of FIO are different. CPC states that documents shall not be received at a subsequent stage of proceedings unless good cause is shown for non-production. Under CPC, the consequence of non-production of documents with a plaint is their inadmissibility as evidence in proceedings. However, the FIO completely suppresses the freedom of subsequent production of statements of accounts and other relevant documents. This is because the legislators did not use the word "produced" in section 9 of FIO as opposed to CPC and stated in FIO that the “plaint shall be supported by a Statement of Accounts and documents of finance.” Thus, even the institution of suit is

⁷ *Pakistan Oman Investment Company Limited v. Chenab Limited* 2016 CLD 1903 *Muhammad Siddiq and Muhammad Umar v. The Australasia Bank Ltd* PLD 1966 SC 684; *Farid Sons Ltd. v. Ghulam Farid Mohammad Saeed* PLD 1972 Lahore 311, *Agricultural Development Bank of Pakistan v. Mrs. Najma Parveen*, 2004 CLD 808 Lahore

⁸ *HABIB METROPOLITAN BANK LTD. VS ABID NISAR*, 2014 CLD 1367 [KARACHI]

⁹ 2017 CLD 552 LHC.

¹⁰ *NIB Bank v Highnoon Textile Limited* 2014 CLD 763

made dependent on the annexing of Statements of Accounts and documents of finance under FIO.¹¹

3) What is the legal status of electronic documents in relation to Banking Laws and what requirements they need to comply under the relevant laws?

In *United Bank Ltd*, the appellant argued that the statement of account filed by the appellant is not verified as per the requirement of section 9(2) of FIO. It was opined that the subordinate banking court has made an error in holding that certain documents are not signed by any banking officer as provided under section 9(2) of the FIO and the BEA. This is because, in modern banking, mostly the statement of accounts must be generated through an information system and such statements generated through the information system, being an electronic document does not require signature. Since the promulgation of the ETO, all electronic modes are recognized as evidence as per section 4 of ETO.¹²

The courts have further considered that certification of bank documents is required only for copies of the original document and not for the original documents itself. Computer generated accounts are not copies of any entry pursuant to ETO and are considered original. They are not required to be certified or attested by a witness for their legal recognition. Hence, statement of accounts through which complete picture of the credit facility obtained by the defendant is visible, would not be considered to be a document having no legal authenticity. The rationale for such a rule is that most of the system of banks have been replaced by new system where old systems of banks are replaced by new system in which such verification and attestation is not possible.¹³

4) How the law under FIO will differ if the plaintiff is not a 'bank'?

In *Pakistan Kuwait Limited Company*, the court rejected the argument which stated that a leave to defend only needs to be filed if a bank is plaintiff. In a suit where a non-bank is the plaintiff there will always, by definition, be a default, which would mean that in every such suit filed, the defendant would be automatically entitled to leave to

¹¹ *Bankers Equity Limited and others vs Bentonite Pakistan Limited and others*, 2003 CLD 931 LAHORE-HIGH-COURT-LAHORE; *Pakistan Oman Investment Company Limited v. Chenab Limited* 2016 CLD 1903

¹² *United Bank Ltd. v. Riaz Hussain* 2018 CLD 1476 Lahore

¹³ *Habib Metropolitan Bank Limited v. Faizan Ali*, 2017 CLD 1583 Lahore; *Tasleem Fatima v Bank of Punjab* 2017 CLD 552

defend. A suit filed by one type of financial institution (i.e., a bank) cannot be placed on a footing that is higher than an otherwise identical suit filed by another type of institution (i.e., a non-bank). Thus, a suit under the FIO filed by a non-bank would, in effect, be no different from an ordinary suit since the defendant would be guaranteed leave to defend.¹⁴

5) Does Financial Estoppel apply if the contents of the statement of accounts are challenged in a legal proceeding in Banking Courts?

In *Habib Bank*, the plaintiff has placed on record a certified copy of statement of account having a certificate under section 4 of BEA. There was no rebuttal of the Statement of Account in relation to any of its entry. The Lahore High Court reasoned that the SOA having a certificate under section 4 of the BEA is admissible *per se* specially when there is no opposition and there is no objection against any debit entry. Thus, in the absence of any rebuttal, the amount due as per statement of account will be deemed to be the correct liability of defendants.¹⁵ In such cases, a financial estoppel is applied generally, and defendant is not allowed to challenge the SOA later in the proceedings if not rebutted initially.

In *Allied Bank*, financial estoppel was further explained and was considered to include debarring a defendant from challenging the contents of SOA altogether. It was reasoned that when the customer is a big corporation which have substantial and regular financing agreements with the bank, then the customers are expected to regularly oversee the liabilities and assets *vis-à-vis* the bank and thus the statement of accounts.¹⁶ In such a case, the 'big' customer cannot challenge a SOA in their leave to defend altogether.

¹⁴ *PAKISTAN KUWAIT INVESTMENT COMPANY (PVT.) LIMITED VS ACTIVE APPARELS INTERNATIONAL*, 2012 CLD 1036 [SINDH]

¹⁵ *HABIB BANK LIMITED VS HAIDRI HOMES*, 2012 CLD 2016 [LAHORE]

¹⁶ *Naeem Zafar Industries v. Bank of Punjab* 2017 CLD 397; *Allied Bank v Chenab Limited* 2007 CLD 910

6) Under what conditions a blank document can be submitted as evidence in purview of section 18 of FIO?

The defence under section 18 of FIO that the document presented as evidence by bank was blank at execution would only hold if the defendant denied the finance agreement contained in that document altogether or denied the execution of that document. Moreover, that document must also form the basis of the suit and defendant has to make sure that it does not rely on that document for any purpose in the proceedings.

Pursuant to section 18 of FIO, a bank cannot make a customer sign a document containing blank statements. In *Naeem Zafar Industries*, the consequence of signing the blank documents were considered in relation to their admissibility in banking cases. The Lahore High Court reasoned that if it is asserted that signatures by the bank were procured on the blank documents, then such assertion cannot be believed unless cogent proof in this regard is produced. Since in this case, appellants/defendants availed the finance and has also not denied the signature on the documents purported to be blank on execution. Therefore, defendants also cannot deny the alleged blank documents. The proposition that blank documents cannot be admissible in a case would only hold well in case the financial agreements altogether or their execution is denied by either of the parties.¹⁷

RECOMMENDATIONS

- In section 9 of FIO, it must be clearly noted that this 'presumption of truth' to entries of a statement of account is predicated on the fact that it must be properly 'certified' in terms of section 2(8) of Bankers' Books Evidence Act, 1891. Moreover, it must also be mentioned that electronic entry is at par in terms of evidentiary value to written entry for the purposes of BEA.
- In section 9 of FIO, it shall be clearly stated that the rules of CPC shall not apply in terms of evidentiary matters in relation to filing of documents.

¹⁷ *Naeem Zafar Industries v. Bank of Punjab* 2017 CLD 397

- It must be clearly stated in section 9 of FIO that legal recognition and admissibility of electronic bank documents cannot be called in question for the reason that the same have not been attested by any witness.¹⁸
- In FIO, it must be clearly stated that a non-bank must also comply with all requirements for filing a plaint under section 9 of FIO. However, the only concession, a borrower as opposed to a bank can obtain is that SOA copy need not be certified in the manner prescribed in the BEA.¹⁹
- It should be made clear within FIO that financial estoppel shall specifically apply on 'normal customers' only when there is conclusive evidence clause in the written contract and not through implied contract. Moreover, a mere failure to act or silence on part of 'normal customers' in order to correct SOA shall also not result in financial estoppel to favour a bank. In summation, financial estoppel which erase the right to challenge SOA altogether shall apply on normal customers only when there is a properly worded clause which can serve the purpose of a conclusive evidence clause and financial estoppel shall apply on 'big customers' in all cases provided those 'big customers' have not objected to SOA before institution of suit.²⁰
- It must be made clear within FIO that if signatures were obtained on a blank document, it cannot be made as evidence when the suit is filed on the basis of another document and not on the basis of that blank document. Moreover, defendant can also not 'blow hot and cold' to simultaneously deny a blank document and also admit it by taking the defence that defendant has actually discharged liabilities mentioned in that document. Thus, if liabilities are accepted on the basis of blank document, then issues are not about the admissibility of document, and relate to the discharge of liabilities rather than proving that document was not in a blank state.²¹

¹⁸ 2013 PLD 104 Karachi.

¹⁹ *Muhammad Yusuf vs A.D.B.P*, 2002 CLD 1270 LAHORE-HIGH-COURT-LAHORE

²⁰ *Allied Bank v Chenab Limited* 2007 CLD 910

²¹ *Allied Bank v Chenab Limited* 2007 CLD 910