

IN THE HIGH COURT OF SINDH AT KARACHI
(APPELLATE JURISDICTION)

First Appeal No.54 of 2019

(*Pakistan Kuwait Investment Company (Pvt) Limited v. Amtex Limited & Others*)

A N D

First Appeal No.63 of 2019

(*Amtex Limited & Others v. Pak Kuwait Investment Company Limited*)

Before:

Muhammad Faisal Kamal Alam J
Sana Akram Minhas J

Appellant in First Appeal 54/2019:	Pakistan Kuwait Investment Company (Pvt) Limited Through, Mr. Waqar Ahmed, Advocate
Respondents:	(1) Amtex Limited (2) Khurram Iftikhar (3) Shehzad Iftikhar (4) Haji Iftikhar-ud-Din (5) Sheikh Akbar Ali (6) Nadeem Iftikhar Through, Mr. Muhammad Hameed Bakhsh, Advocate
Appellants in First Appeal 63/2019:	(1) Amtex Limited (2) Khurram Iftikhar (3) Shehzad Iftikhar (4) Nadeem Iftikhar (5) Haji Akbar Ali Through, Mr. Muhammad Hameed Bakhsh, Advocate
Respondent:	Pak Kuwait Investment Company Limited Through, Mr. Mr. Waqar Ahmed, Advocate
<u>Dates of Hearing / Re-Hearing:</u>	19-1-2026, 3-3-2026, 12-3-2026 & 22-8-2026
<u>Date of Decision:</u>	30-9-2026

J U D G M E N T

1. **Sana Akram Minhas, J:** Both Appeals – instituted under Section 22 of the *Financial Institutions (Recovery of Finances) Ordinance, 2001 (“FIO”)* – arise

out of the same Judgment dated 1.7.2019 and Decree dated 6.7.2019 (**collectively “Impugned Judgment”**) passed by the learned Banking Court No.1 at Karachi (**“Banking Court”**), whereby Suit No.179/2017 (*Pakistan Kuwait Investment Corporation (Pvt) Limited v. Amtex (Pvt) Limited & Others* – Old Suit No.B-111/2011) (**“Banking Suit”**), instituted by the Appellant (Plaintiff in proceedings below) i.e. Pakistan Kuwait Investment Corporation (Pvt) Limited (**“PKIC”**), was partly decreed.

2. The Banking Suit instituted by PKIC for recovery of Rs.97,903,568/- was decreed to the extent of Rs.73,391,604/- towards principal – jointly and severally against Respondent No.1, Amtex Limited (formerly Amtex (Pvt) Limited), and Respondents No.2 to 6, its Guarantors and Directors (**collectively, “Amtex”**) – together with cost of funds from the date of default until realization. The claims for costs of the Banking Suit and for repossession and sale of the leased assets were also allowed, whereas the claims for mark-up/overdue lease income (**“Mark-Up”**) and liquidated damages were declined.

Scope Of Challenge

3. The respective challenges in the two Appeals are set out below:
 - i) In First Appeal No.54/2019, PKIC challenges the Impugned Judgment only to the extent that its claim for Mark-Up was declined. This limited scope of challenge is borne out by the prayer clause of the memorandum of Appeal, the submissions advanced by learned Counsel for PKIC, and the position recorded in this Court’s order dated 22.8.2026 with respect to PKIC’s remaining prayer clauses in its Plaint.
 - ii) Conversely, First Appeal No.63/2019 has been instituted by Amtex challenging both:
 - (a) The Banking Court’s separate Order dated 1.7.2019 (**“Restoration Dismissal Order”**) dismissing its Application for Restoration presented on 17.10.2017 (**“Restoration Application”**). By the Restoration Application, Amtex had sought restoration of its Application for Leave to Defend (**“LD Application”**) dated 23.11.2011, bearing CMA No.11549/2011, which had, for the second time, been dismissed for non-prosecution on 25.4.2016; and

- (b) The consequent Impugned Judgment (also dated 1.7.2019), whereby the Banking Court decreed the Banking Suit in PKIC's favour following dismissal of Amtex's Restoration Application.

Facts

4. PKIC instituted its Banking Suit on 22.10.2011 – originally before the High Court of Sindh as Suit No.B-111/2011, but subsequently transferred to the Banking Court following the change in pecuniary jurisdiction and renumbered as Suit No.179/2017) – under Section 9 of the FIO for recovery of Rs.97,903,568/- against Amtex.
5. According to the Plaintiff:
 - i) The first lease-finance facility was sanctioned up to an aggregate limit of Rs.100 million under the Lease Agreement dated 31.8.2004 (**“First Lease Facility Agreement”**), of which Rs.76,807,111/- was availed.
 - ii) A second lease-finance facility, also up to an aggregate limit of Rs.100 million, was extended under the Lease Agreement dated 8.5.2008 (**“Second Lease Facility Agreement”**), of which Rs.60,440,000/- was availed.

Personal Guarantees and Demand Promissory Notes were also, inter alia, stated to have been executed as security for the two Lease Facilities.
6. Amtex appeared before the Banking Court and presented its LD Application. The Application was initially dismissed for non-prosecution on 3.12.2013, but was subsequently restored to its original position by consent on 4.2.2014. Thereafter, the LD Application was again dismissed for non-prosecution on 25.4.2016. Amtex presented its Restoration Application (on 17.10.2017), seeking restoration of the LD Application and setting aside of the order dated 25.4.2016. The Restoration Application was dismissed by the impugned Restoration Dismissal Order.
7. Following dismissal of Amtex's Restoration Application (and the resulting non-restoration of the LD Application), the Banking Court examined PKIC's claim and held that Rs.19,222,519/- remained payable towards principal under the First Lease Facility Agreement and Rs.54,169,085/- towards principal under the Second Lease Facility Agreement, aggregating to Rs.73,391,604/-. The Banking Suit was accordingly decreed for the said principal amount, together with cost of funds under the Impugned Judgment.

Respective Submissions

Submissions of PKIC

8. Learned Counsel for PKIC submitted that the Banking Court erred in declining Mark-Up for the agreed contractual period on the ground that it was awarding cost of funds. It was contended that cost of funds is not a substitute for, or an alternative to, Mark-Up and that PKIC was entitled to both in accordance with law.
9. With regard to the Restoration Dismissal Order (dismissing Amtex's Restoration Application presented on 17.10.2017), PKIC's Counsel submitted that Amtex's LD Application had twice been dismissed for non-prosecution; that its Restoration Application was filed after a prolonged delay and was, in any event, marred by a material contradiction regarding the date on which Amtex claimed to have learnt of the second dismissal for non-prosecution; and that Amtex had produced no documentary proof of its alleged first/earlier application for restoration purportedly presented in this Court on 23.1.2017, which even if assumed to have been presented, was itself belated.

Submissions of Amtex

10. The principal grievance of Amtex is that the Banking Court erred in dismissing its Restoration Application and, consequently, in decreeing the Banking Suit. Learned Counsel for Amtex contended that the Banking Court lacked territorial jurisdiction; that the Restoration Application was dismissed without due consideration of the material on record; and that, having filed the LD Application, the Banking Court was duty-bound to consider it on the merits and had no power under the FIO to dismiss it for non-prosecution.

Questions For Determination

11. The following points arise for determination:
 - i) Whether the Banking Court at Karachi had territorial jurisdiction to entertain the Banking Suit?
 - ii) Whether the Banking Court was competent to dismiss the LD Application for non-prosecution notwithstanding its having been filed within the prescribed period?

- iii) Whether Amtex's Restoration Application was liable to be dismissed for want of sufficient cause for restoration and/or as belated?
 - iv) Whether PKIC was entitled to recover Mark-Up for the agreed contractual period in addition to the cost of funds?
12. Having heard the learned Counsel and perused the record, we proceed to consider the matter.

Decision

Territorial Jurisdiction Of The Banking Court

13. Amtex raised an objection to the territorial jurisdiction of the Banking Court at Karachi, contending that parties cannot, by mutual consent, oust the jurisdiction vested in a court of law, nor confer jurisdiction upon a court which otherwise lacks it, relying upon authorities¹ in support of this contention. It was submitted that Amtex carried on business at Faisalabad; Respondents No.2 to 6, being private individuals, were residents of Faisalabad; the relevant documents were executed at Lahore/Faisalabad; and the alleged disbursements were made there.
14. PKIC, on the other hand, relied upon the jurisdiction clause (specifically, the identical Clause 22.15²), contained in the First and Second Lease Facility Agreements, as well as the Karachi-based aspects of the transaction. Counsel for PKIC submitted that the requests for Lease Finance Facilities and for disbursement/drawdown were made by Amtex to PKIC at its registered office in Karachi. The Sanction Letter was also issued at Karachi, and partial refinancing under the State Bank of Pakistan's ("**SBP**") Long Term Financing Facility for Export-Oriented Projects ("**LTF-EOP**") Scheme took place at Karachi. Amtex deposited overdue repayments into PKIC's account maintained with Meezan Bank Limited, FTC Branch, Shahrah-e-Faisal, Karachi, while the outstanding overdue amount remained unpaid in the said account. PKIC and Amtex further agreed, under Clause 22.15 of the two Lease Facility Agreement(s), to the jurisdiction of the courts at Karachi. It was,

¹ *Sprint Oil and Gas Services v. Oil and Gas Development Company Limited* (2024 SCMR 117); *Faqir Muhammad v. Khursheed Bibi* (2024 SCMR 107); *Eden Builders (Pvt) Limited v. Muhammad Aslam* (2022 SCMR 2044); *Karachi Dock Labour Board v. Quality Builders Ltd* (PLD 2016 SC 121); *Safe Mix Concrete Limited v. Pakistan* (2020 PTD 263); *State Life Insurance Corporation v. Muhammad Saleem* (1987 SCMR 393)

² Clause 22.15: It is agreed that the civil courts at Karachi, Sindh shall have the exclusive jurisdiction in respect of any matter, claim or dispute arising out of or in any way relating to this Agreement.

therefore, contended that a material part of the cause of action arose at Karachi and that the Banking Court has territorial jurisdiction to entertain the present matter.

15. The rival submissions must, however, be considered in light of the material on record concerning the Karachi-based aspects of the transaction. The following events are reflected in the Court record: (i) Amtex sent an undated³ letter to PKIC at its Karachi address, enclosing the duly signed and stamped original Term Sheet for a PKR 100 million First Lease Facility Agreement; (ii) by letter dated 18.7.2006⁴, Amtex requested PKIC, at its Karachi address, to swap its lease/long-term loan facility with the State Bank of Pakistan's ("SBP") Scheme for Long Term Financing for Export-Oriented Projects ("LTF-EOP"); (iii) by letter dated 28.12.2006⁵, Amtex requested PKIC, at its Karachi address, to release the refinance facilities under the LTF-EOP Scheme, enclosing the requisite application (iv) Amtex executed a Demand Promissory Note at Karachi on 20.12.2006⁶; (v) SBP disbursed the loan at Karachi, as confirmed by its letter dated 30.12.2006⁷ addressed to PKIC at its Karachi address; (vi) by letter dated 6.3.2009⁸, Amtex requested PKIC, at its Karachi address, to process its case with SBP for a one-year grace period under the LTF-EOP Debt Swap Scheme; (vii) SBP's letters/advice dated 31.12.2008⁹ and 31.3.2009¹⁰ to PKIC at its Karachi address reflecting debits to PKIC's current account; (viii) PKIC disbursed the facility at Karachi, and the funds were transmitted on 9.5.2009¹¹ to Amtex's bank account maintained with Meezan Bank Limited, Finance & Trade Centre, Shahrah-e-Faisal, Karachi; and (ix) by letter dated 11.5.2009¹², PKIC requested SBP at Karachi to grant Amtex a one-year grace period under the LTF-EOP Debt Swap Scheme.
16. The legal position regarding the effect of a contractual jurisdiction clause was considered by the Supreme Court in **Eden Builders (Pvt) Limited v. Muhammad Aslam**¹³, wherein it held:

³ At Court File Page 85

⁴ At Court File Page 137

⁵ At Court File Page 139

⁶ At Court File Page 157

⁷ At Court File Page 159

⁸ At Court File Page 161

⁹ At Court File Page 169

¹⁰ At Court File Page 171

¹¹ At Court File Page 173

¹² At Court File Page 163

¹³ *Eden Builders (Pvt) Limited v. Muhammad Aslam* (2022 SCMR 2044)

6. It is a settled proposition of law that the parties cannot by agreement confer jurisdiction upon any court when otherwise the court has no jurisdiction. No doubt, a party cannot be restrained to enforce his right in ordinary court of law but if by mutual agreement between the parties a particular court having territorial and pecuniary jurisdiction is selected for the determination of their dispute, there appears to be nothing wrong or illegal in it or opposed to public policy (Reference may be made to the case of Messrs Kadir Motors (Regd.) Rawalpindi v. Messrs National Motors Ltd., Karachi and 3 others (1992 SCMR 1174). In this view of the matter, when the agreement was arrived at between the parties and signed at Lahore and in furtherance of agreement the addendum and exchange deeds were executed and registered at Lahore, the jurisdiction also in this matter was with both the courts i.e. at Sargodha where the suit was filed as well as at Lahore where the document was got registered and some of the property was situated. In this backdrop, Clause 25 of the agreement dated 19.7.2013 is binding upon the parties, therefore, the civil court at Lahore has exclusive jurisdiction to entertain and try the suit, therefore, this petition is converted into an appeal and is allowed.

17. The principle emerging from the above authority is, therefore, clear: an agreement cannot create jurisdiction where none exists; however, parties may select, by agreement, a court that has territorial and pecuniary jurisdiction over the dispute. The contractual clause must, therefore, be considered in the context of the jurisdiction conferred by the cause of action.
18. The question in the present case, therefore, is not whether Clause 22.15, by itself, confers territorial jurisdiction upon the civil courts at Karachi, but whether a part of the cause of action arose within Karachi. If a material part of the cause of action arose at Karachi, the parties were competent to agree that their disputes would be subject to the jurisdiction of the courts at Karachi. Clause 22.15 of the Lease Facility Agreement(s) must, therefore, be examined in that context.
19. The record discloses a substantial jurisdictional nexus with Karachi. PKIC's registered office is situated in Karachi; Amtex's requests for the Lease Finance Facility Agreement(s) and disbursement/drawdown were made to PKIC at Karachi; the Sanction Letter was issued and partial refinancing under the LTF-EOP Scheme was undertaken at Karachi; and the facility was subsequently disbursed at Karachi, with the proceeds transmitted to Amtex's bank account maintained at Karachi. The execution of the Demand Promissory Note and the processing and transmission of the facility proceeds also took place at Karachi. These were material acts relating to the facility and not merely incidental events.
20. These circumstances disclose that a material part of the transaction, and consequently of the cause of action, arose within the territorial jurisdiction of the Banking Court at Karachi. The Karachi nexus is, therefore, not dependent upon Clause 22.15 but arises from the material facts of the transaction itself.

21. In these circumstances, Clause 22.15 does not purport to create jurisdiction where none exists; rather, it identifies Karachi as the agreed forum among the courts having jurisdiction over the dispute. The identical clause contained in both Lease Facility Agreement(s) is, therefore, relevant to the parties' agreed forum.
22. Therefore, this is not a case where the parties have, by agreement alone, attempted to confer jurisdiction upon a court lacking it. Karachi has an independent jurisdictional connection with the transaction, and Clause 22.15 validly reinforces the parties' agreement as to the forum.
23. Accordingly, Amtex's objection to the territorial jurisdiction of the Banking Court cannot be sustained and is, hereby, overruled.

Whether a Leave to Defend Application May Be Dismissed for Non-Prosecution

24. It has been argued that the Banking Court has no jurisdiction to dismiss an application for leave to defend for non-prosecution (in this case Amtex's LD Application) and that, once such an application has been filed within the prescribed period and in accordance with Section 10 of the FIO, the Court is bound to consider its contents, irrespective of whether a defendant thereafter pursues the application.
25. We are conscious of the divergent views¹⁴ expressed in various judgments of the Honourable High Courts of other Provinces, as well as in a judgment of a Single Bench of this Court. That line of authority has held that Section 10 of the FIO does not authorize the Banking Court to dismiss an application for leave to defend on account of non-prosecution and that, once such an application has been filed, the Court is under a statutory duty to consider the same, irrespective of whether a defendant or his counsel is present at the time of hearing.
26. We shall, however, turn to the authoritative pronouncements of the Division Benches of this Court, which have taken a different view. In **Admore Gas (Pvt) Limited v. Standard Chartered Bank**¹⁵, it has been held:

15. It appears that the attention of the learned bench was not drawn toward the provisions of subsection (1) *ibid*, which empowers the Banking Court to pass decree in favour of the plaintiff for default of the defendant to obtain leave. Failure to prosecute the leave to defend

¹⁴ *Ali Waqar Azeem v. Standard Chartered Bank* (2024 CLD 397); *Abid Aziz Khan v. Bank of Punjab* (2007 CLD 997); *United Bank Limited v. Mehmood Ilyas Khan* (2012 CLD 1372)

¹⁵ *Admore Gas (Pvt) Limited v. Standard Chartered Bank* (2013 CLD 423)

application amount to default in obtaining leave, such default is met by the consequences of passing of decree in favour of plaintiff, as discussed above. Therefore no exception could be taken for dismissal of leave to defend application for non-prosecution. In the instant case no doubt the defendants did file a leave to defend application but, from the record it is also evident that defendants neglected, failed and defaulted to pursue the leave application thus failed to obtain leave within the contemplation of subsection (1) of section 10 *ibid*; despite several and last opportunity given, consequently the application was dismissed and the suit on the basis of facts pleaded and material placed along with the in the *Plaint*, was considered and suit was decreed.

16.

17. Merely filing leave to defend application is not enough, to obtain the leave as mandated under subsection (1) of section 10 of the FIO, 2001, defendant cast an obligation on defendant to pursue, follow and plead the leave application consequence for not obtaining leave from the Court is provided under the subsection (1) *ibid*; in these words "in default of his doing so, the allegations of fact in the *plaint* shall be deemed to be admitted and the Banking Court may pass a decree in favour of the plaintiff on the basis thereof or such other material as the Banking Court may require in the interests of justice". Judgment and decree could only be passed in terms of subsection (11) of section 10 *ibid*; when either the leave application was rejected in terms of subsection (6) thereof, and or where the though the leave was granted but subject to certain conditions or limitations and, the defendant failed to comply or fulfil the condition/s. In either of the eventuality, the judgment and decree invariably follows, as envisaged by subsection (11) and not by subsection (1) of section 10 as contended by learned counsel for the appellant. In instant case it is recorded in the judgment that the decree is passed in terms of subsection (11) of section 10 of FIO, 2011, whereas fact of the present case shows that in instant matter defendant failed to obtain leave in terms of subsection (1) of section 10, FIO, 2001, the consequently it could be decreed under same provision. It is neither the case where the leave application was rejected under subsection (6) of section 10 *ibid*; nor the case where the conditional leave was granted and the defendant failed to fulfil the condition, therefore under given facts judgment, could be passed under section 10(1), FIO, 2001 and not under section 10(11), FIO, 2001. It is well entrenched and recognized principal of jurisprudence that merely wrong quotation of provision is of no consequence, when the impugned judgment and decree is well within the contemplation of subsection (1) of section 10, FIO, 2001 and is treated accordingly.

27. Similarly, another Division Bench of this Court in **Jamil Masood Usmani v. Askari Bank Limited**¹⁶ emphatically reiterated this position, holding that:

6. It is significant to mention that the F.I. Ordinance, 2001, is a special enactment and there is no specific provision provided in it which imposes any bar on the application of provisions of Civil Procedure Code, 1908, in the proceedings instituted under the Ordinance, 2001. It is well settled that Banking Courts adjudicate the financial lis strictly in accordance with the Ordinance, 2001, however, when the procedure for any specific purpose is not provided in the Ordinance, the Banking Court is not only fully competent to exercise its jurisdiction under the provisions of Civil Procedure Code, 1908, but to meet the ends of justice, the Court will exercise the provisions of Code, as a civil Court. In case of *M/s Agrocure and 3 others* (2011 CLD 990), it was observed that under section 7(2) of the Ordinance, 2001, the provisions of C.P.C. are applicable only where the Ordinance, 2001, is silent and no procedure has been laid down. In case of *Nisar Ahmed Afzal v. Muslim Commercial Bank and 14 others* (2014 CLD 390), it was observed that Banking Court has all powers vested in civil Court under Civil Procedure Code, 1908 in exercise of civil jurisdiction. It is well settled that

¹⁶ *Jamil Masood Usmani v. Askari Bank Limited* (2016 CLD 387)

each and every case shall be decided in view of its peculiar facts and circumstances to ensure the dispensation of justice. Consequently, considering the above scenario, we are of the opinion that the Banking Court is fully competent and empowered to dismiss application for leave to defend for non-prosecution if defendant deliberately fails to appear and comply with the directions of the Banking Court.

28. The aforesaid pronouncements of the earlier Division Benches of this Court, therefore, leave little room for doubt as to the legal position applicable to the present case. Following those authoritative rulings, we hold that mere filing of an application for leave to defend does not, in itself, entitle a defendant (in this case Amtex) to have the application considered on merits irrespective of its subsequent conduct. Where a defendant, despite opportunity, fails to appear, pursue the application or comply with the directions of the Banking Court, the Court is competent to dismiss the application for non-prosecution, with the consequences provided under Section 10 of the FIO, having regard to the circumstances of the particular case.

Twice Dismissed For Non-Prosecution: Amtex's Application For Leave To Defend (CMA No.11549/2011)

29. It bears emphasizing that Amtex's LD Application has twice been dismissed for non-prosecution.
30. On 3.12.2013, the LD Application was for the first time dismissed for non-prosecution, the record showing that Amtex's Counsel had remained absent on two earlier dates as well. The LD Application was, however, restored vide consent order dated 4.2.2014.
31. Thereafter, by order dated 25.4.2016, the LD Application was for the second time dismissed for non-prosecution, as no one appeared on behalf of Amtex on the preceding date as well, i.e. 30.3.2016; on that date, the matter having been adjourned with a specific note of caution.
32. Approximately eighteen (18) months thereafter, on 17.10.2017, Amtex filed its Restoration Application seeking restoration of its LD Application. Amtex asserted that:
 - i) It had earlier presented an identical restoration application on 23.1.2017 before the High Court, but that the same had not been placed on the Court file by the office of the High Court owing to the change in pecuniary jurisdiction and consequent transfer of the record to the Banking Court.
 - ii) It further asserted that, on 25.4.2016, the LD Application had not been dismissed but rather the Banking Suit had instead been "*discharged*"

in the presence of Amtex Counsel. Reliance was placed upon the print-out of online Diary/Order Sheet available on the High Court of Sindh's website, where the word "Discharged" allegedly appeared under the heading "STATUS".

33. The Restoration Application was dismissed by the Banking Court, vide its Restoration Dismissal Order (of 1.7.2019), as time-barred. The Banking Court also noticed a material contradiction in Amtex's own pleadings: in the Restoration Application, Amtex had stated that it learnt of the order dated 25.4.2016 (whereby its LD Application had been dismissed for non-prosecution), for the first time on 6.4.2017. If that assertion were correct, Amtex could not possibly have presented the alleged first/earlier application for restoration on 23.1.2017, i.e. more than two months before the date on which it claimed to have first acquired knowledge of the dismissal.
34. Counsel for Amtex sought to explain this contradiction before us by submitting that the reference to 6.4.2017 in the Restoration Application was a mere "*typographical error*", and that the correct date on which Amtex learnt of the dismissal order was 6.1.2017. According to Counsel, upon acquiring knowledge on 6.1.2017, Amtex immediately presented the alleged first/earlier application for restoration before the High Court on 23.1.2017.
35. Learned Counsel for PKIC, however, drew our attention to PKIC's Counter-Affidavit to the Restoration Application and submitted that, apart from the bare assertion that a first/earlier restoration application had been allegedly presented on 23.1.2017 but had not been placed on the Court file by the office of the High Court, Amtex produced no documentary proof of such presentation, nor, surprisingly, did it seek any explanation from the concerned branch or office of the High Court.
36. Counsel for PKIC further pointed out that the alleged first/earlier restoration application presents another unusual feature: while its first page bears the alleged High Court presentation date with an unidentifiable signature, its last page carries an undated seal/stamp of an unnamed "*Civil Judge, Lahore*", with the oath/verification clause also left blank and unfilled. According to PKIC's Counsel, this circumstance suggests that the original copy of the alleged first/earlier restoration application, after its alleged presentation before the High Court office, remained with Amtex's Counsel and was thereafter presented before the unnamed Civil Judge, Lahore, for obtaining the seal/stamp.
37. These allegations are serious and raise questions regarding the origin and actual presentation of the alleged first/earlier application for restoration. The circumstances surrounding the alleged application are, indeed, disquieting.

The document itself, the absence of any independent record of its presentation on 23.1.2017, the fact that Amtex did not seek any explanation from the concerned office of this Court as to why an application allegedly presented on that date was not placed on the Court file, and the undated stamp of an unnamed “*Civil Judge, Lahore*” on its last page warrant serious scrutiny. Significantly, the Restoration Application (presented on 17.10.2017) is itself silent as to when Amtex allegedly discovered that the first/earlier application, said to have been presented on 23.1.2017, had not been placed on the Court file or had allegedly been misplaced by the concerned office, and also offers no explanation for the further period of approximately nine (9) months before the present Restoration Application was filed. These circumstances do not establish, to our satisfaction, that the alleged application was in fact presented on 23.1.2017. Moreover, even if Amtex’s assertion in this regard were accepted, the material on record would still not satisfactorily explain its subsequent conduct or the delay in seeking restoration. Therefore, without returning any finding as to the correctness of Amtex’s explanation, and even if its explanation that the reference to 6.4.2017 was a typographical error and that it actually learnt of the dismissal on 6.1.2017 were to be taken into account, the difficulty confronting Amtex does not end there.

38. Amtex itself relies upon the print-out of the online Diary/Order Sheet to contend that the entire Banking Suit was “*Discharged*” on 25.4.2016, rather than its LD Application having been dismissed on that date. That same print-out, however, is material against Amtex for another reason. Following 25.4.2016, the matter admittedly continued to appear before the High Court on 30.8.2016, 27.9.2016 and 27.10.2016. Although Amtex has not annexed the Order Sheets of these three subsequent dates, the record shows that the matter remained on the Court’s Cause List, yet Amtex has offered no explanation for its failure to appear on those dates. This circumstance materially undermines Amtex’s explanation. If Amtex was in fact following the proceedings and genuinely believed that the matter had merely been “*Discharged*”, its failure to appear on the subsequent three dates remains unexplained. Conversely, had Amtex appeared on any of those dates, it would have had an opportunity to ascertain the status of its LD Application and, in any event, to discover the order dated 25.4.2016 much earlier.
39. Thus, even on Amtex’s own version, the alleged date of knowledge does not satisfactorily explain its prolonged inactivity. Nor does the explanation of an alleged typographical error cure the underlying delay.
40. The alleged first/earlier restoration application, the circumstances surrounding its alleged presentation, the date of knowledge, and the subsequent absence of Amtex from the proceedings thus form a chain of unexplained

circumstances which, taken together, fail to account for Amtex's prolonged inactivity.

41. The position that emerges, therefore, is that Amtex has twice failed to prosecute its LD Application and, on both occasions, has had to seek restoration. Following the second dismissal on 25.4.2016, however, it remained inactive for a prolonged period¹⁷. More importantly, the material on record does not disclose sufficient cause for its failure to pursue the LD Application or seek its restoration. Its explanation for the delay is not satisfactory and remains marred by material inconsistencies. Even if Amtex's explanation regarding the alleged first/earlier restoration application (allegedly presented on 23.1.2017) and the typographical error is accepted in its entirety and considered in the light most favourable to Amtex, even a shorter computation of the period does not alter the fact of delay, nor does it alter the fact that the grounds advanced by Amtex fail to disclose sufficient cause for restoration.
42. Consequently, there is no sufficient basis to interfere with the detailed and reasoned Restoration Dismissal Order dated 1.7.2019 passed by the Banking Court dismissing Amtex's Restoration Application for want of sufficient cause, which is further compounded by the belated filing of the Restoration Application. The present challenge to the said Order must, therefore, fail.

Mark-Up And Cost Of Funds

43. The entitlement to Mark-Up and cost of funds must be examined separately, having regard to the terms of the finance facility and the statutory scheme of the FIO. The Banking Court (in paragraph 5 of the Impugned Judgment), while declining Mark-Up for the agreed contractual period, appears to have proceeded on the premise that under the FIO, the award of cost of funds rendered any award of mark-up impermissible. That approach, however, does not correctly distinguish between the two concepts. Contractual mark-up represents the consideration agreed between the parties for the finance during the subsistence of the contract, whereas cost of funds¹⁸ is a statutory liability arising upon default under Section 3 of the FIO. The two are distinct in their

¹⁷ Since both of Amtex's restoration applications bear the caption "*Application Under Order IX Rule 13 Read With Section 151 Of CPC*", including the Restoration Application presented on 17.10.2017, the application was required to be made within thirty (30) days under Article 164 of the *Limitation Act, 1908*, computed from the date of the decree or, where the decree was not duly served, from the date of knowledge thereof. In the present case, Amtex itself, after explaining the reference to 6.4.2017 as a typographical error, claimed that it first acquired knowledge of the dismissal on 6.1.2017.

¹⁸ *United Bank Ltd v. Muhammad Amjad Hayat Khan* (PLD 2025 Lah 425); *Apollo Textile Mills Ltd v. Standard Chartered Leasing Ltd* (2016 CLD 2316)

nature and legal basis and cannot, therefore, be treated as interchangeable merely because a decree also carries cost of funds. The award of cost of funds upon default does not, by itself, extinguish a contractual entitlement to mark-up that had accrued during the contractual period.

44. The above distinction finds support in the judicial authorities. The Supreme Court, in **Asma Hassan v. Askari Bank Limited**¹⁹, upheld the award of contractual mark-up up to the agreed repayment date and the award of cost of funds thereafter. In **Habib Bank Ltd v. Karachi Pipe Mills Ltd**²⁰, it was recognized that, under the FIO, the contractually chargeable mark-up remains recoverable, whereas the power to award additional mark-up beyond the contracted period was replaced by the statutory regime of cost of funds. The same distinction was also recognised by the Peshawar High Court in **Muhammad Niqab v. National Bank of Pakistan**²¹, which held that the award of cost of funds under Section 3 of the FIO does not exonerate a customer from his contractual liability to pay mark-up; the customer remains liable for both cost of funds and contractual mark-up. These authorities, therefore, support the proposition that the award of cost of funds does not, in itself, exclude a bank's entitlement to contractual mark-up accruing during the contractual period.
45. In the present case, PKIC has claimed Mark-Up only for the contractual period²² and has not claimed Mark-Up beyond the period agreed between the parties. The award of cost of funds to PKIC from the date of default until realization of the decretal amount is not under challenge. The mere award of cost of funds could not, however, justify the refusal of PKIC's separate claim for Mark-Up which had accrued during the contractual period. The Banking Court, therefore, erred in declining PKIC's claim for Mark-Up on the ground that it had awarded cost of funds. PKIC is, accordingly, entitled to recover the agreed Mark-Up for the contractual period. The finding of the Banking Court to the contrary cannot, therefore, be sustained.

¹⁹ *Asma Hassan v. Askari Bank Limited* (2019 SCMR 1873)

²⁰ *Habib Bank Ltd v. Karachi Pipe Mills Ltd* (2006 CLD 842)

²¹ *Muhammad Niqab v. National Bank of Pakistan* (2023 CLD 222)

²² In the First and Second Lease Facility Agreement(s), Article I defines the "Lease Period" as "the period of the Lease as specified in Article III". Article III, in turn, provides that the "Lease Period" is the period for which the Lease Property has been leased as specified in Schedule II. Schedule II of the First Lease Facility Agreement provides for a lease period of 72 months from the date of disbursement, whereas Schedule II of the Second Lease Facility Agreement provides for a lease period of 60 months from the date of disbursement.

Conclusion

46. In view of the foregoing discussion, First Appeal No.54/2019 (instituted by PKIC for recovery of Mark-Up) is **allowed**, whereas First Appeal No.63/2019 (instituted by Amtex challenging the Impugned Judgment dated 1.7.2019 and Decree dated 6.7.2019, and the separate Order dated 1.7.2019 dismissing its Restoration Application) is **dismissed**. The Impugned Judgment and Decree are, accordingly, **modified** to the extent that PKIC shall also be entitled to recover the agreed Mark-Up for the contractual period. The decretal amount shall, accordingly, be recomputed by the learned Banking Court in terms of this Judgment.

JUDGE**JUDGE**