

**IN THE HIGH COURT OF SINDH AT KARACHI**

Present:  
Muhammad Shafi Siddiqui  
& Jawad Akbar Sarwana JJ

**H.B.F.C. v. and Major Muhammad Abdul Aziz & Another  
(Appellate Banking Jurisdiction)**

**First Appeal No.88 of 2016**

Appellant:	House Building Finance Corporation Ltd. through Muhammad Aslam Advocate
Respondent No.1:	Major Muhammad Abdul Aziz (in person)
Respondent No.2:	Banking Court No. V, at Karachi, Nemo
Date of hearing:	08.11.2023
Date of decision:	08.11.2023

**J U D G M E N T**

**Jawad A. Sarwana, J:** The Appellant/Plaintiff-Bank, House Building Finance Company Ltd. (“HBFC”), has filed this First Appeal No.88 of 2016 under Section 22 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter referred to as “the FIO, 2001”) against the Banking Court No.5 at Karachi’s Judgment dated 04.05.2016 and Decree dated 05.05.2016 in Banking Suit No.107/2015 passed against Respondent No.1-Customer (Major @ Muhammad Abdul Aziz). HBFC seeks modification of the amount of the said judgment and decree on the ground that the cost of funds of Rs.1,288,148 are contrary to law and has prayed to set aside the Judgment and Decree and to enhance the cost of funds or future rent at the rate of Rs.14,856/- per month from 01.12.2015 till realisation of

the outstanding amount. The Appellant-Bank claims no other relief in the prayer clause.

2. The brief facts are that on 18.12.2015, HBFC filed Banking Suit No.107/2015 against Respondent No.1-Customer under Section 9 of FIO, 2001, for recovery of finance facility of Rs.4,379,455/-. The Respondent No.1-Customer filed leave to defend application on 29.01.2006, while HBFC filed its Replication on 09.03.2016. The learned Judge of the Banking Court passed judgment in the sum of Rs.1,771,340 (being net of principal outstanding against the Customer) plus Rs.1,288,148 (as cost of funds assessed by the Banking Court (Total Payable as per Judgment - Rs.3,057,488). HBFC is aggrieved with the assessment of costs of funds.

3. HBFC's Counsel contended that the cost of funds assessed by the Banking Court is improper as the learned Judge did not apply the cost of funds declared by the State Bank of Pakistan and also did not grant the cost of funds from the date of default. The Respondent No.1-Customer present in person submitted that during the course of arguments before the Banking Court, he informed the learned Judge that he was ready to pay the outstanding amount if it is calculated fairly and justly (paragraph 8 of the impugned Judgment). He further submitted that the judgment stated that if he made payment of the decretal amount, he would not be liable for the cost of funds for the month of May 2016. Accordingly, he satisfied the decretal amount with the deposit of Habib Metropolitan Bank Ltd. cheque dated 06.05.2016 in the sum of Rs.3,057,488 in favour of the Banking Court No.5 at Karachi. Nothing was, therefore, due and payable to HBFC in relation to the impugned Judgment and Decree.

4. We have heard the learned Counsel for HBFC and Respondent No.1-Customer and have also reviewed the record as available in the appeal file.

5. HBFC filed the suit for recovery of Rs.4,379,455 against Respondent No.1-Customer regarding a finance facility sanctioned on 25.03.2004. A letter of acceptance was also issued on 19.03.2004, which shows that the finance facility was payable over 17 years. While the finance facility extended by HBFC to the Appellant-Customer was scheduled to expire on 18.03.2021, it transpires that Respondent No.1-Customer defaulted, and HBFC filed the banking suit on 18.12.2015. The learned Judge of the Banking Court passed Judgment in relation to the cost of funds as follows:

“The suit of the plaintiff is decreed in the sum of Rs.1,771,340/- being principal outstanding and cost of suit Rs.31,425/- and cost of fund Rs.1,288,148/-. Cost of fund for the years 2010, 2012 to April 2016 is calculated @12.74% as per State Bank of Pakistan circular dated 05.07.2011. Cost of fund from the period of 2011 is calculated @14.33% as per State Bank of Pakistan Circular dated 01.12.2012. The plaintiff organization does not have approved rate for cost of fund for the years 2012 to 2016 and therefore rate of 2010 is applied. Reason for doing so is that rate of cost of fund of commercial banks is continuously decreasing. During current year National Bank’s rate is about 7%. However, if the defendant has paid an amount after September 2010; such amount shall be adjusted towards outstanding liabilities determined hereinabove. At the time of announcement of judgment, the defendant was present and he undertook to make payment of decretal amount within fifteen (15) days from the date of judgment. In case payment is made by 15.05.2016, cost of fund for the month of May 2016 will not be charged otherwise the plaintiff will be allowed to charge cost of fund till realization of above liability. . . .”

6. The cost of funds determined by the learned Banking Court appears to be out of sync with Section 3 of FIO, 2001, which states as follows:

"Section 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 purpose of this section a judgment against a customer under this Ordinance shall mean that he is in default of his duty under subsection (1) and the ensuing decree shall provide for payment of the cost of funds as determined under subsection (2).”

7. First, Section 3(2) of FIO, 2001 mandates that the cost of funds payable is “the cost of funds of the financial institution as certified by the State Bank of Pakistan from time to time.” Thus, there was no need for the learned Banking Judge to exercise his discretion and apply his own formula of cost of funds, and not the cost of funds as certified by the State Bank of Pakistan. Secondly, there was also no need to examine the rate of cost of funds of commercial banks, such as the National Bank of Pakistan. And finally, no basis was provided for bifurcating the period for which the cost of funds was due and payable. Accordingly, we are not satisfied with the criterion for calculating the cost of funds adopted by the learned Judge of the Banking Court.

8. Apart from the above issue, the learned Banking Judge in the impugned Judgment has applied the cost of funds for 2010 and 2012 to April 2016, but there is no mention of the cost of funds for 2011. No explanation is provided for the gap year of 2011, and none was submitted by either HBFC or Respondent No.1-Customer, who was present in person during the arguments.

9. Section 3(2) of FIO, 2001 clearly provides that a customer who has defaulted in the discharge of his obligation shall be liable to pay the cost of funds from the date of default till the realization of the amount. Thus, the cost of funds is to be determined from the “date of

default” in the discharge of the customer’s obligation till the realization of the decretal amount. Although the impugned Judgment is silent regarding the precise date of default, Respondent No.1-Customer, in paragraph 101 of the Written Statement, has stated that:

“As per the same record the HBFC shall find that I have paid my instalments regularly from 2004 till 2010. . . .”

(available on page 27 of WS, page 183 of the appeal file)

10. While this shows that the learned Judge has correctly granted HBFC cost of funds from 2010 onwards in the Judgment, which, according to Respondent No.1-Customer’s admission, was the date of default, there is no explanation why the learned Judge proceeded to apply a varying rate of cost of funds as already discussed herein above. Therefore, HBFC’s claim that the learned Judge of the Banking Court has not granted the cost of funds from the date of default is incorrect. Be that as it may, the Banking Court did not grant HBFC the cost of funds as certified by the State Bank of Pakistan from time to time from 2010 till the date of Judgment in May 2016.

11. HBFC, as per the audit sheet at the time of filing of the suit, had also claimed rent of Rs.1,668,154, GIP/PIP<sup>X</sup> of Rs.152,718, and appreciation charges of Rs.1,869,928. HBFC has repeated the heads of claim in Banking Appeal; but has not prayed for the same at the appellate stage. The learned Banking Judge did not discuss the aforesaid claims in the impugned Judgment except for the insurance claim, which he rejected. HBFC’s abandonment of their claim for appreciation charges in the prayer clause of the appeal is in line with reported judgments of the Superior Courts of Pakistan.<sup>1</sup> Hence, HBFC’s claim for appreciation charges stands withdrawn. This is also the case for HBFC’s claim for rental payment. As the Banking Court

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<sup>X</sup> GIP = General Insurance Premium; PIP = Proper Insurance Premium (debit entries).

<sup>1</sup> House Building Finance Company Limited through Authorized Officer v. Muhammad Iqbal and Another, 2021 CLC 1416 (Lahore – DB).

allowed the cost of funds to HBFC, the latter was/is not entitled to claim rental payments either.<sup>2</sup>

In view of the above, the instant appeal is allowed. The impugned Judgment and Decree passed by the Banking Court No.5, Karachi, is set aside. The case is remanded to the Banking Court to determine the cost of funds amount payable to HBFC in terms of section 3(2) of the FIO, 2001. There shall be no change in the already decreed principal outstanding amount of Rs.1,771,340 and the costs of the suit of Rs.31,425, which will remain the same. The Respondent No.1-Customer has already paid HBFC through the Banking Court a total sum of Rs.3,057,486, which comprised of the old decretal (i) principal outstanding amount, (ii) the disputed cost of funds amount, and (iii) the costs of the suit. The Banking Court shall adjust the payment already made by Respondent No.1-Customer to HBFC of Rs.3,057,486 against the fresh cost of funds to be determined by it and pass an amended Decree, accordingly. All the other terms and conditions of the Decree dated 05.05.2016 shall remain intact. The Banking Court shall decide this matter after hearing the parties and in accordance with law within a period of three months of receipt of the certified copy of this Judgment.

Parties shall bear their own costs.

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<sup>2</sup> *House Building Finance Corporation v. Amir Rafi and Others*, 2022 CLC 892 (Lahore – DB)