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STUDY OF PAKISTAN'S FORECLOSURE MORTGAGE LAWS

- REPORT NO. 1
- DRAFT ANALYSIS

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Study of Pakistan's Foreclosure Mortgage Laws

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Introduction:

The Government of Pakistan has been advocating during the past ten years, increased participation of the private sector in housing finance. The National Seminar on Housing Finance held in August 1990 also re-emphasized the need for issuance of a legal framework for establishment of housing finance companies and as a first step, the Ministry of Finance issued an SRO No. 1356 (1)/90 on December 31, 1990. Another SRO No. 137(1)/91 was issued on February 18, 1991 notifying the manner in which applications were to be submitted to the Federal Government for permission to launch housing finance companies. Soon therafter, the Federal Government invited applications from interested firms. About two dozen applications were received. Permission was given to only two applicants after several months. It is understood that additional two or three firms have been permitted to set up HFCs. Notwithstanding the fact that legal infrastructure has been laid for setting up and operations of housing finance companies (HFCs) very little progress has been made by the sanctioned HFCs and commercial banks to make headway in the field of housing finance. One very important factor is the ineffective legal framework/system for recovery of loans.

This study has been launched for the purpose of analysing the impact of the current ineffective legal framework and for recommending institutional arrangements and a draft legislation for developing an effective system for recovery of loans advanced for housing purposes against mortgage of property.

The study will be divided into three parts and this Report (No. I) will be devoted to an analysis of the current ineffective legal framework/system and its impact on lending institutions borrowers, and other concerned agencies.

The following persons were interviewed/consulted in the course of preparing this Report:

01. Mr. Inamul Haq
    Chairman NDFC

02. Mr. Tahir Abbas
    Managing Director PICIC

03. Mr. Abdul Rehman
    Chairman IDBP

04. Mr. Inam Elahi
    President National Bank of Pakistan

05. Mr. Jamil Sheikh
    EVP NDF

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06. Mr. Ather Hussain
SVP NBP

08. Mr. Azizuddin Khan
EVP MCB

09. Mr. Mubashir Akhtar
Managing Director, National Development Leasing Corporation

10. Mr. Khurshid Sohail
President, Indus Bank Ltd.

11. Mr. M. W. Faruqi
Managing Director, Ist Mehran Modaraba

12. Mr. S. Nasim Ahmed
Former President National Bank of Pakistan

13. Justice (Retd) KMA Samdani
Former Secretary, Ministry of Law
Government of Pakistan

14. Justice (Retd) Fazl-e-Ghani

15. Mr. Hamid L. Sharif
Advocate

16. Mr. Saleem Saigol
Advocate

17. Mr. Nasir Hussain Jaffri
Advocate

18. Mr. Nazar Abbas Siddiqui
Chairman HDFC

19. Ms. Bilquis Fatima
Director HBFC

20. Mr. Zahid Hussain
General Manager Operations HBFC

21. Mr. M. Arif Zia
SVP., Habib Bank Ltd

22. Mr. Aneeq Khawar
Country Representative
Citi Bank

23. M/s. Zaidi Abid & Co
Architects and Builders, Karachi

24. M/s. Ruknuddin Associates
Builders & Developers, Karachi.

25. M/s. Hydri Cotton Gining & Pressing Factory
Rawalpindi

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26. M/s. Trade and Industry Publications, Karachi.

02. Mortgage/Foreclosure laws in Pakistan:

In order to carry out this study it has been considered necessary to reproduce at one place (in the form of Annex I to this Report) all the relevant laws related to foreclosure/recovery of loans advanced against mortgage of property. Annex I comprises the following laws:

i) Transfer of Property Act 1882: Chapter IV Sections 58, 67 and 69

ii) Order 34 of the Civil Procedure Code.

iii) Companies Ordinance 1984: Section 119

iv) Registration Act 1908: Sections 17, 48 and 49.

v) Banking Companies (Recovery of Loans) Ordinance, 1979: Sections 6, 6A and 7.

vi) Banking Tribunal's Ordinance, 1984: Section 4, 5 and 6.

vii) House Building Finance Corporation Act 1952: Sections 28 and 30.

viii) Industrial Development Bank of Pakistan Ordinance 1961: Sections 39 and 40.

ix) Agricultural Development Bank of Pakistan Ordinance, 1961: Section 25.

03. Remedies available under current laws for default in payment of mortgage money:

Ordinarily the remedies available to a Mortgagee are governed under the Transfer of Property Act and Order 34 of the Civil Procedure Code. (See Annex I). Under Section 67 of the Transfer of Property Act, the following two remedies are available to a Mortgagee in case of default in payment of the mortgage money:

(a) a right to file a suit for foreclosure; and

(b) a right to file a suit for sale of mortgaged property.

The Transfer of Property Act 1882 (hereinafter referred to as the Act) is based upon the English law of mortgages. Thus the bias of equity in protecting the mortgagor's Equity of Redemption in the mortgaged property, is reflected in the provision of the Act and correspondingly the right of foreclosure has been virtually eliminated. The term "foreclosure" as used in the Act is used as a term of art, to refer to the extinguishment of the mortgagor's right to the equity of redemption in the property. Distinct from the right to foreclosure is the more usual remedy of right to sell the mortgaged property and to adjust the sale proceeds

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against the outstanding amounts due to the mortgagee. In usual parlance, the term foreclosure is used to include the latter distinct remedy as well, and in dealing with the provisions of the Act, it is important to bear this distinction in mind.

The right to file a suit for foreclosure has been restricted under Section 67(a) of the Act to only cases of mortgage by conditional sale and anomalous mortgages where, under the terms of the mortgage deed, the mortgagee is entitled to foreclosure. In all other cases except those of mortgages by conditional sale and usufructuary mortgage, a mortgagee's right is limited to filing a suit for sale of the mortgaged property. Hence for all practical purposes, a lender in Pakistan, in case of default, invokes the remedy to sell the mortgaged property.

04. Pre-Mortgage Stage/Title to land/property:

Determination of title to land in Pakistan is elusive despite the fact that an elaborate and well developed system of record-keeping for the purposes of collection of land revenue exists from the Moghal era. The Land Revenue Department in each Province maintains a "Record of Rights" in relation to property of the particular locality. However, this Record of Rights by itself is not conclusive or irrebuttable evidence of valid title. At best the Record of Rights maintained by the Land Revenue Department gives rise to a rebuttable presumption of valid title to land in favour of the person whose name is recorded therein as the owner. Title to and ownership of land is thus not derived from the record kept by the Land Revenue Department as the latter is merely an inconclusive and indefinite record of the same.

Title documents most often rise from sale deeds, gift deeds or valid decrees obtained from the civil courts in the course of litigation usually in the form of a decree obtained in a suit for Administration and Partition of land. All documents creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property (with the exception of a Memorandum of oral gift by a Muslim) which convey title in land are compulsorily registerable under the Registration Act, 1908.

Failure to register documents renders them ineffective. The Registrar maintains five registers including a "Register of non-Testamentary documents relating to immovable property". In this register the entries are numbered in consecutive series which commence and terminate with the year. A fresh series is commenced at the beginning of each year. In respect of this particular Register an index No. I is also maintained by the Registrar containing the names and addresses of all persons executing and of all persons claiming under every document entered or Memorandum filed in the said Register. It is however, pertinent to note that registration under this Act is not relatable to any compulsory system of land registration which is in vogue in many other countries under which a Property Register,

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Proprietory Register or a Charges Register in respect of each property is separately maintained. Under the Act, only the particular document is registered as opposed to registration of a mutation, charge or lien in a register pertaining to that particular property. To fully secure their rights after registration of the document under the Registration Act, 1908, people do get the necessary change affected in the Land Revenue record to reflect the mutation, charge or lien etc. However, there is no sanction if a party fails to do so since rights of parties, as noted above, are primarily derived from the title documents and the revenue record can at best only raise a rebuttable presumption as to ownership. There is a general tendency especially in cases of inheritance, for actual changes in ownership of land not to be reflected in the revenue record for years on end. This indolence of the public not to register changes in revenue records efficiently and promptly, is further fuelled by the corruption historically prevalent amongst officials of the Land Revenue Department and the corresponding public fear/aversion which it thus instills.

In case of urban areas where land has often been acquired by a development authority (e.g. Lahore Development Authority or the Capital Development Authority or the Karachi Development Authority), the land so acquired comes to rest in the Authority free of any encumbrances or charges thereon. On sale of land to individuals the Authority also maintain its own record in respect of each property but as in the case of land revenue records, the records maintained by the Authority are not conclusive or irrebuttable evidence of title. Subsequent sale or alienation of land by individual owners is affected through title documents compulsorily registerable under the Registration Act. The new owners may or may not get the changes effected in the record of the Authority since there is no sanction against failure to effect changes in the Authority's records. In fact, the high charges/fee levied by such authorities (e.g. CDA) for registration of subsequent transfers coupled with the high registration fees payable under Registration Act, 1908, act as a disincentive to get the changes effected in the record of such Authorities.

The practical effect of the above situation is that:

i) there is no single record in respect of each property available with any Authority which is a conclusive and irrebuttable evidence of title. It is important to note that an important document viz Memorandum of Oral Gift executed by a Muslim is not compulsorily registerable.

ii) the lack of a compulsory system of land registration means that a gateway for fraud is left wide open. It is indeed not unknown for an owner to sell the same land to more than one person as evident from the prolific litigation pending in the civil court in this area of law.

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In rural areas of the Punjab, this perplexing situation is further confounded by the fact that oral sales of land are legally permissible.

05. Valuation of land:

Under the present system valuation of land is also problematic since the high rates of stamp duties on conveyancing have given rise to a tendency to understate the actual sale price of the property sold. Thus the registered sale deed does not reflect the true value of the land and any prospective lender will have to make an evaluation of the price afresh. In practice the evaluation of land is often exaggerated under political pressure or connivance of bank staff with the borrower. This problem is well illustrated by in Case Study No. (Annex II wherein there was a big discrepancy between the value realized on sale of the property and the amount actually due to the bank.

In the prevalent situation while a prudent lender can at his own expense, make an accurate evaluation of the market value of the land, he can only minimise but not eliminate the aforementioned title risk which is inherent in a system where there is no compulsory system of land registration.

06. Origination of Mortgages:

A number of mortgages are described under Section 58 of the Act. In practice the most important are equitable mortgage, simple mortgage and English mortgage. The rest are rarely used. Under Section 17 of the Registration Act, 1908, mortgages are compulsorily registerable. However an equitable mortgage is not compulsorily registerable; hence a borrowerds preference for an equitable mortgage which is created by deposit of title deeds with the lender as security for the amount borrowed. The creation of the equitable mortgage is subsequently recorded in a memorandum which is not compulsorily registerable. Under the proviso to Section 48 of the Registration Act 1908, as an exception to the general rule, it is provided that an equitable mortgage shall take effect against any mortgage deed subsequently executed and registered which relates to the same property. Other mortgages are compulsorily registerable and registration creates a prima facie right in rem. Registered mortgages thus provide greater security for the lender specially when coupled with creation of an equitable mortgage so that title deeds remain with the lender.

07. Suits in relation to mortgaged property:

All suits in relation to mortgaged property are procedurally governed by Order 34 of the Civil Procedure Code 1908 (CPC). Rule 1 of Order 34 lays down that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. Thus impleading and service of such part. or a necessary party is vital to the progress of a suit in relation to mortgaged property. Under the ordinary law

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service of summons and processes issued by the court can be a prolonged procedure since the defendant will avoid service and court bailiffs are often willing parties ready to connive with the defendant. Suits relating to mortgaged property under CPC 1908, are to be tried under the normal procedure with an automatic and unconditional right to the defendant to defend the suit. With the host of procedural ploys available to a defendant's counsel, the actual filing of a written statement can in a normal suit be delayed for months or even years depending on the ingenuity of the counsel.

08. Special Banking Courts:

The delays associated with the ordinary civil courts prompted the introduction of new legislation for speedy trial of cases pertaining to banking cases. Thus under the Banking Companies (Recovery of Loans) Ordinance, 1979, Special Banking Courts have been established with the following improved procedures:-

(i) Under Rule 5 of Banking Companies (Recovery of Loans) Rules, 1980, the mode of service of summonses and notices has been made more effective by simultaneous service through bailiff of the court, by registered post acknowledgement due, and by publication in newspapers. Service through any one of those modes is deemed proper and valid. This is contrary to the ordinary civil procedure where a defendant, intent upon avoiding service, can cause delay of several months or more.

(ii) All proceedings brought by a Banking Company are further to be tried under the Summary Procedure of Order 37 CPC. Under this Order, a defendant does not have an automatic or unconditional right to defend but he must appear and apply for leave to defend the suit which may be granted conditionally or unconditionally. In the grant of leave the court is generally liberal though conditions are usually imposed. Unless requirement of deposit of cash or bank guarantee are imposed, it is very easy for a party to furnish other securities and thus contest the suit. Once leave to defend is granted, the suit then becomes subject to all the vagaries of the CPC and the innumerous delaying tactics which lawyers are able to adopt thereunder, (See Case studies - Annex II).

(iii) Proceedings under the Banking Companies (Recovery of Loans) Ordinance, 1979, are supposed to come up for regular hearing as "expeditiously as possible" and the case is not to be adjourned except in "extra ordinary circumstances" and on grounds to be recorded by the Special Court. Practice has shown that this is at the best a pious hope of the legislature since paucity of courts and the consequent heavy load of work with which the Special Courts are burdened, coupled with the delaying tactics of defendants counsel, has practically rendered this provision a dead letter i.e.

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(iv) Under Section 6A, limitation periods ordinarily applicable to cases coming before the Special Court are extendable by two years at the discretion of the Special Court.

09. Banking Tribunals for trial of cases for recovery of loans not involving interest:

In anticipation of the introduction of interest-free banking from 1st January, 1985, the Banking Tribunals Ordinance, 1984, was introduced whereunder ostensibly a separate judicial forum for cases arising out of banking transactions not based on interest was established. The composition of the Tribunal, its working and procedure has recently been further streamlined by the Banking Tribunals (Amendment) Act, 1991. Until the recent amendments, a Banking Tribunal was to be composed of at least 3 Members one of whom was the Chairman. Now the Tribunal is to consist of only one Member. The salient features of the system introduced are as under:-

(i) All suits are to be disposed of within ninety days of filing of plaint failing which the defendant shall be asked to furnish a bank guarantee in the suit amount within 15 days. If a defendant fails to furnish the bank guarantee, the Banking Tribunal "shall" pass a decree in favour of the Banking Company. Should the case continue for a further period of 120 days, the defendant "shall" deposit with the Banking Tribunal in cash, the suit amount, within 15 days failing which a decree "shall" be passed against the defendant.

(ii) On filing of a suit, the same mode and manner of service as for the Special Court, is followed.

(iii) Within 10 days of service of notice, the defendant is required to show cause as to why decree as prayed for in the plaint should not be passed against him. If the Defendant fails to file a reply or if his plea is rejected, the Tribunal is required to pass a decree in favour of the Banking Company.

10. The Legal Machinery In Action:

A bare perusal of the Banking Companies (Recovery of Loans) Ordinance, 1979 and the Banking Tribunals Ordinance, 1984, may suggest a highly efficient and formidable legal machinery for the recovery of loans and finances. Reality, however, is a far cry from this position. The provisions of these statutes designed for early disposal of recovery suits have, it seems, been blunted and practically rendered ineffective. A survey of tendency of suits both in the Special Courts and the Banking Tribunals shows a colossal back-log of cases. The rate of institution of new suits in the Banking Tribunals at least far exceeds the disposal of pending suits.

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For the purposes of our survey the relevant record of the following Special Courts/Banking Tribunals, was examined and the results are indicated in the tables I to V.

(1) Sindh High Court, Karachi

(2) Lahore High Court, Lahore

(3) Special Court Banking, Karachi

(4) Special Court Banking, Lahore

(5) Banking Tribunal, Karachi

(6) Banking Tribunal, Lahore.

Delay in the ordinary legal system in Pakistan is ubiquitous and it was precisely to overcome such delay that the aforementioned special legal forums were established.

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TABLE I

Pendency of Suits In Lahore High Court, Special Courts/Banking Tribunal at Lahore as in April, 1992.

Forum	No. of cases Pending.
Lahore High Court (Jurisdiction under the 1979 Ordinance)	650
Special Court Banking	3,000
Banking Tribunal	17,000

TABLE II

PENDING CASES IN THE HIGH COURT OF SINDH

S.No.	Year of Pendency	No. of Cases	Amount of Claim
1.	1982	116	12,97,44,305
2.	1983	121	11,28,21,135
3.	1984	130	12,41,03,248
4.	1985	98	2,29,17,32,334
5.	1986	106	2,40,39,16,022
6.	1987	114	71,25,12,536
7.	1988	53	35,19,99,967
8.	1989	122	4,02,17,397
9.	1990	53	3,38,36,994
10.	1991	122	5,58,60,641
11.	1992 April	13	3,59,35,143
		1048	629,26,79,722

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TABLE III

CASES FILED IN THE BANKING TRIBUNAL AT KARACHI

Court No. 1

S.No.	Year	No. of Cases filed	No. of Cases disposed off	Pending Cases	Amount of Claim in cases filed
1.	1987	40	9	31	21,339,103.00
2.	1988	1456	1137	319	107,067,357.00
3.	1989	1587	826	761	385,673,711.00
4.	1990	1702	631	1071	348,775,257.00
5.	1991	2188	1453	735	440,706,430.00
6.	1992 upto April	950	631	319	167,773,809.00
		7923	4688	3236	1,471,395,667.00

TABLE IV

CASES FILED IN THE BANKING TRIBUNAL AT KARACHI

Court No. 2

S.No.	Year	No. of Suit	Amount of Claim
1.	1991	10	167,49,576.00
2.	1992 Up to April	156	27,11,37,613.00
		166	28,78,87,189.00

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TABLE V

CASES PENDING IN THE SPECIAL BANKING COURT KARACHI

S.No.	Year of Pendency	No. of Cases	Amount of Claim
1.	1982	343	59,111,305.00
2.	1983	205	55,915,864.00
3.	1984	57	14,623,033.00
4.	1985	73	66,672,276.00
5.	1986	8	2,019,912.00
6.	1987	96	16,532,247.00
7.	1988	537	52,425,814.00
8.	1989	832	70,661,953.00
9.	1990	406	33,220,066.00
10.	1991	319	73,417,638.00
11.	1992	224	13,333,629.00
		3100	457,933,737.00

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11. Causes of delay in courts:

The causes of delay in courts should be a matter of concern for both the lenders and the Government. For the purposes of the present study, the causes of delay were investigated by contacting the legal departments of banks and financial institutions and legal practitioners. One thing which seems to emerge is that perhaps there is nothing drastically wrong with the law but it is the working of the legal system created thereunder which needs to be improved. In case of Banking Tribunals for example, all banks/DFIs and legal practitioners pointed out to the inadequacy of the number of Banking Tribunals and the nonfunctioning of such Tribunals for a period of two years or more on account of non-appointment of judicial officers for the same. Some bank officials bitterly pointed out the inadequacy of number of Tribunals. For example, there are only two Tribunals at Karachi and only one at Lahore, for the Province of Sindh and Punjab respectively. This means that bank officials, the defendants and witnesses of parties must often travel long distances from such commercial centres as Faisalabad or Sialkot in the Punjab or Hyderabad. Nawabshah and Sukkur in Sindh. The location of the Tribunals thus adds an extra financial burden for the parties and in case of banks/DFIs, it means a loss of valuable management time. The situation is further confounded by the fact that even after travelling all the way to Karachi or Lahore, the parties cannot be certain that any progress in the case will be made since it is usual for the case to be adjourned for one reason or the other. Most lawyers also complained about the lack of resources made available to the Special Courts/Banking Tribunals which function with inadequate staff and basic back-up services such as word-processors, photocopiers etc.

Officials of Banks/DFIs on the other hand complained bitterly about delaying tactics adopted by defendants' counsel. Frequent adjournments were sought on most frivolous of grounds, the most typical being pre-occupation of the counsel in higher courts, illness or bereavement in the family. What is surprising in the whole process is the ease with which such adjournments are granted even though under the law there must be a "sufficient reason" for an adjournment. The court is further empowered to grant adjournment at the cost of the party seeking it yet this power is hardly every invoked and even then the costs imposed are nominal and not actual or punitive. The laxity of the Special Courts/Banking Tribunals in granting adjournments without costs, has led most lawyers to take these forums for granted. The readiness of the courts to grant such adjournments is explained by the fact that they are often over-burdened and the opposing counsel may not always vehemently oppose such an adjournment. Lawyers being a fraternity are likely to accommodate each other since a plaintiff's counsel realises that he may be defendant's counsel in another case and vice - versa. Hence it is rare for the plaintiff's counsel to insist upon costs for adjournment.

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Talking to counsels of banks/DFIs revealed that there is a perception that they are not always properly assisted by the Banks/DFIs. Quite a few counsels observed that bank officials are disinterested and do not instruct counsel properly. For example in one case a counsel bitterly complained that he as the Bank's counsel had been forced to take adjournments since the concerned bank officials were not rendering proper assistance for presentation of the bank's evidence. Similarly, another counsel complained that, despite obtaining a decree; no execution proceedings could be filed since the concerned Bank officials were unable to point to any assets of the defendant (in this case the tangible security in form of pledged goods had already been sold and no further tangible security had been taken by the Bank).

Interestingly some counsels noted that in their opinion the bank officials were often in connivance with the defendants right from sanctioning of the loan at which stage the value of the property may be over-estimated, to execution of a decree. An illustrative case of over-valuation of property is Case-Study No. 4 (Annex II).

Disinterestedness of Bank counsel also flows from the low fees paid by banks/DFIs. This has the effect of lawyers booking more cases than they can handle with their consequent tacit consent to the hide-and-seek played between defendants' counsel and court and the innovative approach to procuring adjournments to which this practice gives rise.

Pendency of large number of cases before these special forums is further explained by adoption of tactics other than the simple adjournment by defendant's counsel. In the recent past, one tendency has been to challenge the validity of proceedings in writ jurisdiction or before the Federal Shariat Court on the pretext that the recovery suit seeks to impose a contract based on riba (interest) which is not permissible under Islamic law. In some of these cases the High Court has ordered stay of proceedings on the condition that the principal amount or, where a decree has been passed, the decretal amount is deposited in court within a certain period.

12. <u>Problems in execution of decree</u>:

Innovation of the defendant and his counsel comes to full fruition at the passing of a decree in favour of the bank. As an English Judge of Privy Council stated "In India, the problems of the litigant start on obtaining a decree in his favour". At the execution stage attempts are made to create problems by getting parties claiming interest in the mortgaged property to intervene in the execution proceedings, and even independent suits may be filed. Though legally speaking such applications or fresh suits may be doomed from inception, the effect is that the whole recovery procedure is pushed through another legal loop, complete with its own dilatory tactics. Apart from adoption of delaying tactics in court, a powerful or influential party

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of a particular area may make the auction proceedings ineffective by frightening interested parties away. Thus no one may turn up at an auction! Such parties can successfully manage this because they know that the bank will not enforce a decree obtained against them in their personal capacity. Such a decree would have to be executed by sending the defaulter to civil prison which is an exercise which the civil administration/Collector Land Revenue, would not pursue enthusiastically against a powerful or influential party.

Even a successful sale at an auction is not free from the last ditch efforts of the defendant and his counsel to further delay matters. For example in case study No. 1 (Annex II) - though sale through auction has been made the same has not yet been confirmed by court despite deposit into court of 25% of the price and lapse of thirteen months. Another ploy to delay recovery is for the defendant to enter into negotiations with the bank for a compromise. This serves as a useful pretext on which to get adjournments and even when a compromise has been reached, further time may be wasted in getting the same confirmed from the court. (See case study No. 2 (Annex II).

13. Extent of Delays in securing and execution of decrees:

In our survey of cases the time taken to obtain a decree in banking cases may vary from about 18 months to 12 years or more. Decrees are normally obtained relatively quickly in cases were there is no tangible security with the bank and in such cases it is at the execution stage that problems start since assets of the defendant may not be readily identifiable. See HBL Vs. M/s. Raza Brothers. Case Study No. 8 (Annex II)

From the institution of a suit to actual realization of the decree amount through sale of mortgaged property a time period of 6 to 12 years or even more may be involved.

14. Costs of Litigation:

Court fees are charged under the Court Fees Act. In Punjab and Sindh Court fee is chargeable as shown in Table VI and Table VII. In addition to court fees other miscellaneous and incidental costs for a suit range between Rs. 2,000/- and Rs. 5,000/- between Rs. 2,000/- and Rs. 5,000/-.

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TABLE VI

Court Fee rates in Punjab

i) Suits for recovery of loans not exceeding Rs. 25,000/-	Nil
ii) Suits for recovery of loans ranging between Rs. 25,001/- to Rs. 200,000/-	@ 7.5%
iii) Suits for recovery of loans exceeding Rs. 200,000/-	Rs. 15,000

TABLE VI

Courts Fee rates in Sind

i) Suits for recovery of loans upto Rs. 1,000/-	@ 7.5%
ii) Suits for recovery of loans ranging between Rs. 1,001/- and Rs. 30,000/-	@ 5%
iii) Suits for recovery of loans exceeding Rs. 30,000/-	@ 2.5% But subject to a maximum of Rs. 15,000/-

Financial institutions usually have a panel of legal advisers. Professional fees by most banks/DFIs are fixed according to a Schedule maintained by them. The fees in the Schedule are not directly related to the amount claimed in the suit. The fee ranges between Rs. 2,000/- and Rs. 25,000/-. In exceptional cases depending on the importance of the case and standing of the counsel engaged, a Bank/DFI may deviate from its Schedule and pay higher fees. Even so, the higher end of the fees paid by banks/DFIs does not normally exceed Rs. 50,000/-. In contrast, again depending on the standing of the counsel and importance of suit to the defendant, a counsel for the defendant can hope to get a relatively higher fee. A good counsel may charge a daily rate in addition to the lump-sum agreed. Even for a relatively minor case a good counsel may get anything from Rs. 50,000/- upwards.

15. Extent of Recovery of loans:

The delaying tactics adopted by defendants are often with a view to tire the plaintiff down with an eventual settlement in mind. In most suits, negotiations at some stage are entered into and a settlement reached with remission of interest by the bank depending on the case of the bank, the standing of the customer and the political and other pressures the defendant can bring to bear on the bank. In

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case of genuine hardship (e.g.a widow) banks do take a lenient view. Through compromise a bank can at the best realise whole of its principal and usually a substantial part of the interest as well.

In cases where the mortgaged property has been over-valued by the bank officials the actual recovery made by a bank through sale of the mortgaged property can be much lower than the claim of the bank. In any event, a sale by auction does not usually yield the price which may be available on an ordinary sale in the market. The amount recovered by a bank in such a way may vary from 50% to 100% of the mortgaged money depending on the margin kept by the bank.

16. <u>Strategies & techniques employed by lenders for speedy recovery of the mortgaged money</u>:

In order to by-pass recourse to courts of law, lenders especially banks & DFIs, often obtain from the Mortgagor, an irrevocable Power of Attorney authorising the lender to sell the mortgaged property. Unscrupulous lenders such as the Cooperative Societies went as far as to get actual sale deeds executed in their favour and cases are known where the same were made use of. However, the main-stream banking sector has not resorted to such techniques and even the aforementioned technique of obtaining power of attorney has never been tested by actually selling off the mortgaged premises as an attorney of the owner. The reasons are obvious. The prospective purchaser from the bank in such a case will usually be buying a "problem" i.e. a property of which the bank is admittedly not the owner and whose possession vests with an owner who is enimical to the very sale sought to be made by the bank.

It is surprising that banks have not resorted to use of Section 69 Transfer of Property Act, 1882, which allows for a mortgagee in certain cases, to sell the property without intervention of the court. Section 69 recognizes the right to sell without intervention of the court in three cases:-

(a) where the mortgage is an English mortgage and neither mortgagor nor mortgagee is a Hindu, Muhammadan, Budhist or a member of any other sect, rare tribe or class specified by the Provincial Government. This provision has distinct colonial overtures and is of no practical significance.

(b) where the mortgagee is the Federal Government or a Provincial Government or a banking company as defined in Banking Tribunals Ordinance, 1984. This provision was introduced by the Finance Act (I of 1986). It is significantly different from the earlier provisions which required that the power to sell without intervention of the court should be specifically mentioned in the mortgage deed. The deliberate omission of these words in the new amendment would imply a clear intention of the legislature to do away with such requirement. This power is subject to any conditi

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which may be prescribed by the Provincial Government. No such conditions have been imposed.

(c) where such a power is conferred on the mortgagee by the mortgage deed and the mortgaged property or part thereof on execution of the mortgage deed was situate in Karachi or any other town or area notified by the Provincial Government.

In exercising the power of sale, Section 69(2) lays down the condition that either the amount due should remain unpaid for three months despite service of notice or that the amount due exceeding Rs. 500 should have been in arrear and unpaid for three months after becoming due. Any sale made in accordance with Section 69(1) is further protected in that the title of the purchaser cannot be impeached on the ground that no case had arisen for exercise of the power or that requirements of Section 69(2) had not been complied with or that the power has been exercised improperly or irregularly.

It is surprising that powers under Section 69 especially Section 69(1) (b) have not been invoked by banks. One reason for this is that such a sale would not yield a reasonable price as the mortgaged premises are still in the possession of the mortgagor and no prospective purchaser would want to enter into a dispute, legal or otherwise, with the mortgagor. However, even so, it is surprising that such powers have not been invoked where the amount due is small compared to the value of the property mortgaged. Another reason for the non-use of this provision may well be that many bank officials, in-house lawyers or counsel of the Bank are not familiar with this provision as indicated in our conversation with many lawyers.

A similar provision for sale of property without intervention of court is also available under Section 119 of the Companies Ordinance, 1984. Under this Section, such a power if incorporated in a Trust Deed executed in respect of an issue of redeemable capital, is valid and legally enforceable in case the issuer of redeemable capital fails to pay the redeemable amount or any interest thereon. Our queries with DFIs and banks showed that not only that such a power has not been used but it seems that the provision of Section 119(3) Companies Ordinance, 1984, have not even been noted by them since in Agreement/Trust Deeds for issue of redeemable capital, a power of sale without intervention of the Court has not been incorporated therein.

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17. Problems faced by Banks, DFIs and HBFC in the field of lending:

The foreign banks operating in Pakistan hardly lend money against mortgage of property. The problems faced by Pakistan banks and DFIs in the field of lending against mortgage of property have been discussed in detail in the preceeding paragraphs. It was possible to carry out indepth study in the recovery of mortgaged loans of one of the DFIs (IDBP) as well as of HBFC.

The Case of IDBP:

IDBP is a development bank. Like any other financing institution it goes to court of law when all possible measures for recovery from borrowers are exhausted. Doors for a compromise are kept open including settlement on suit amount, waiver of penal interest and extension in period of recovery etc. Under Sections 39 and 40 of the IDBP Ordinance 1961, a summary procedure for recovery of bank's dues is available to IDBP. On an application in term of S. 39(2) before the concerned District Judge the Bank can, by way of an ad-interim relief, get the mortgaged property attached and also a receiver appointed. Thereafter the borrower is called upon to show cause why the interim orders should not be made absolute and the property sold. If by no cause is shown by the borrower, the court can make the order absolute and direct the mortgaged property to be sold. In case a cause is shown, a regular trial in terms of the Civil Procedure Code is then held.

Despite the aforementioned remedy available to IDBP, as on June 30, 1991 as many as 285 cases involving a suit amount of Rs. 2,102 million were still pending. This represented an increase of 25% over the previous year as shown in the following table:

TABLE VIII

Position of cases of IDBP under litigation

As on 30.06.1990		As on 30.06.1991	
No of cases	Suit amount	No of cases	Suit amount
228	Rs. 1,362 million	285	Rs. 2,102 million

Out of the 285 cases under litigation, 200 projects involving a suit amount of Rs. 1,440 million had alrady closed down and there was little chance of recovery by compromise in High Courts.

The court wise distribution of litigation cases is given in the following table.

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TABLE IX

Court wise distribution of cases of IDBP

High Courts		District Courts		Special Banking Courts		Banking Tribunals	
No of cases	Suit amount	No of cases	Suit amount	No of cases	Suit amount	No of cases	Suit amount
132	Rs. 1,425 million	85	Rs. 524 million	64	Rs. 134 million	4	Rs. 19 million

The age-wise distribution of the pending cases is given in table X below:

TABLE X

AGEING OF PENDING CASES OF IDBP

Ageing of the case	No. of cases	Suit amount
Below 1 Year	58	Rs. 761 million
1 to 3 Years	116	Rs. 874 million
3 to 6 Years	61	Rs. 272 million
6 to 9 Years	21	Rs. 57 million
About 9 Years	29	Rs. 138 million
	285 cases	Rs.2102 million

The Case of HBFC:

HBFC is the only specialised agency in the formal sector which operates in the field of house finance in Pakistan. It provides finances for house construction; house purchase; and housing projects. It also provides repair, upgradation and rehabilitation loans. HBFC is a public sector entity set up in 1952 under an Act of Parliament. It advances loans by accepting land/immovable property on which construction is to be undertaken as collateral. Under Section 24 (1) of HBFC Act, no investment shall be made unless it is fully secured by assignment of the land and the house constructed or to be constructed thereon or by such guarantee as may be prescribed. According to Section 24 (2) of HBFC Act no property shall be accepted for assignment unless it is free from all encumbrances

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and charges. The first stage of processing the case is to check the title to land/property. In order to ensure that title to the land/property is clear, absolute and enforceable in law, following documents in original together with photo stat copy of each is to be submitted with investment/loan proposal

i) Lease deed or Sub License or Agreement for Sale or Grant; mutation certificate.

ii) Non encumbrance certificate in the prescribed form from the date of lease deed to the date proposal is made.

iii) Permission to assign in the prescribed form.

The title to land/property has to be thoroughly examined by Legal Advisor at field offices and Manager Law of the Zonal offices, and further action is taken after title to property has been declared in order.

HBFC operated interest bearing scheme for financing its operations until July 1979 and thereafter, financed its investments on partnership basis (PLS basis). According to the Report of Asian Bank Consultants on HBFC, mortgages held by HBFC under the two types of loans were 135,000 as on 30th June, 1988 as detailed below:

	Interest bearing	PLS	Total
1) Number of Accounts in 000	33,600	101,600	135,200
2) Book Value of Accounts in million Rs.	1484	9,795	11,279
3) Book Value of Accounts overdue in million Rs.	923	1757	2,680
4) Overdue Acts as % of total portfolio	62%	18%	24%

This is a very serious position when Rs. 2.68 billion i.e. 24% of the total portfolio was over due. The position appeared alarming when 92.4% of the over due amount was over one year due and 54% over three years. Ageing of non recovered amount of Rs. 2.68 billion is given below:

Out standing for	1 Yr.	3 Yrs.	5 Yrs.	7 Yrs.	9 Yr s.	12 Yrs.	Over 12 Years	Total
Total amount in Rs. million	304	1018	527	383	247	156	145	2,680

According to the Report, the situation has reached a stage, where one third of its borrowers become new defaulters or delay their payments every year. Each year the number of mortgages/borrowers increases on an average by about 20,000; and hence the number of mortgages held by HBFC in 1992 would be around 200,000.

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The recovery procedure and powers enjoyed by HBFC are quite comprehensive. HBFC officials in Sind enjoy the powers of Assistant Collector under the Land Revenue Act 1967.

In Other Provinces, of Punjab and NWFP Tehsildars have been deputed to HBFC by the Provincial Boards of Revenue and enjoy the powers of Assistant Collector under Land Revenue Act 1967. After issuing notices they can take following action with the assistance of local authorities

a) arrest defaulter for 10 days; and

b) attach moveable property in the presence of a Government auctioneer.

In addition these officers can

a) get the period of arrest extended with the permission of collector; and
b) apply to Board of Revenue for auctioning the property if default persists beyond 12 monthly instalments.

Under Section 30 of its charter, the HBFC can apply to the District Judge for taking over physical possession of property. If the house is on rent, the rent of the house could be attached for payment of monthly instalment of loan/investment. In case tenant defaults in making payment of rent, tenancy agreement can be cancelled, house got vacated and attached through the collector for auction.

The above powers indicate that HBFC can proceed against defaulters under the Land Revenue Act 1967 as well as under Section 30 of its own Charter. During the last forty years, however, these powers have been used very sparingly and half - heartedly. Under the Land Revenue Act the cooperation of local authorities, collector and Board of Revenue is usually not forthcoming. The cases when filed under Section 30 do not hold ground due to inaccurate/irreconciled customer accounts, corrupt practices of local staff, court officials, local pressures etc. Total number of cases pending in courts under Section 30 as on April 30, 1992 were 446 only. The number of cases is totally insignificant in the light of a huge number of defaulters. Out of the 446 cases the ageing of these cases is reported to be as follows:

	1 Year old	2 Year old	3 Year old	4 Year old	5 Year old	6 Year old	7 Year old	Over 7 Years	Total
Number of cases	133	188	56	45	7	3	11	9	446

This indicates that 70% cases are only two years old and 93% of cases are not more than four year old.

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The legal powers vested in officials of HBFC under the Land Revenue Act 1967 and under Section 30 of its charter are quite adequate. It is the question of keeping accurate and reconciled customer accounts and taking all necessary steps detailed in HBFC Manual of Office Procedure (1984) Volume I, not only in recovery of defaulted amount but also in legal scrutiny of clear title to property to be mortgaged and evaluating the repayment capacity/creditworthiness of the borrower.

18. Problems in expanding credit:

Almost all the development finance institutions in Pakistan are directly or indirectly supported by government in their lending operations. Their credit limits are controlled by the government/SBP through National Credit Consultative Council (NCCC). They are semi-government organisations although some of them may be functioning as private or public limited companies. While these institutions are expected to be profit oriented, they are not entirely at par with private sector institutions in their approach and methodology. Even the two banks which were privatised recently may not have been able to entirely shed the public sector appraoch so far. Some of the DFIs are mobilising deposits through special schemes and also retail banking but a major chunk of their funds - specially foreign exchange credit comes through the government. In view of their limited resources and the ever increasing requirements of credit for project/ trade financing, the banks and DFIs cannot afford to let their funds remain tied up for long periods in litigation. The financing institutions face the following constraints due to delays in recovery of loans:

i) Loss of income by way of stop page of interest/mark up;

ii) Decrease in the intrinsic value of money as the cases are decided after considerable delays;

iii) Reducing the ability of the institutions in expanding credit facilities;

iv) Unnecessary expenses in pursuing court cases.

v) Loans for housing finance are long-term - 15 to 20 years duration and collateral is landed property where foreclosure present a problem.

19. Constraints imposed by current laws on mortgage lending for home construction/purchase:

A perusal of the current laws on mortgage lending listed at Annex I would indicate that prima facie there seems to be no serious constraint in the laws on mortgage lending for home construction. Nevertheless there are a number of factors which limit the ability of financing institutions in this direction or create other bottlenecks.

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Foreign banks as a matter of practice do not indulge in mortgage lending particularly for home construction. As for the Pakistan banks, with the exception of lending to their employees, they are not allowed by the State Bank of Pakistan to lend more than Rs. 300,000 for home construction/purchase. There are hardly any delinquencies in this region.

The different factors obstructing the flow of mortgage lending have already been discussed in the preceeding paragraphs and are again briefly listed below:

i) the record kept by the Land Revenue Department provides only a rebuttable presumption of valid title to land in favour of the person whose name in mentioned in the Record of Rights;

ii) In cases of inheritance, changes in ownership of land are usually not reflected in the revenue record for a long time;

iii) Records maintained by Development Authorities are also not conclusive evidence of title. While subsequent sales are compulsorily registerable, the new owners are not obliged under law to get the changes effected in the record of the Authority.

iv) The high charges levied by the Authorities for registration of transfers and the high registration fee payable under the Registration Act are disincentives for effecting transfer/registration.

v) Lack of a compulsory system of land registration leads to avenues for fraud. Cases are not rare when the owner sells the same land to more than one person.

vi) Oral sales of land are legally permissible.

vii) There are no set rules for valuation of land and employees of lending agencies can and do connive with the borrowers in inflating the value of land.

viii) The State Bank of Pakistan does not accord priority for housing while setting credit ceilings.

ix) The registration of mortgage is subject to exorbitant stamp duties.

x) Under the CPC anyone with an interest in the mortgaged property is required and/or entitled to be joined in the proceedings.

xi) Under the present laws it is almost impossible to have a property vacated even after the decree for sale has been secured.

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20. <u>Impact of the Current Laws on the feasibility of developing an effective and viable housing finance system:</u>

Presently there is no market oriented housing finance company in the formal sector in Pakistan. The only institution providing credit for housing is the HBFC and its role and problems have already been discussed in para 18 above.

In any case the HBFC is a government undertaking which is financed by the government and has no access to the private capital market.

The firms which have been permitted to set up Housing Finance Companies in the private sector are yet to start their operations although initially permission was given to a foreign bank and the a DFI. In addition to the specialised institution of housing finance, commercial banks in Pakistan are reluctant to enter the field of housing finance due to the present ineffective recovery mechanism Recommendations for improvement in the present laws/system will be made in Report No. 2 of the current study and an attempt is also proposed to be made to suggest amendments in the current laws which will be the subject of Report No. 3 of this study.

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ANNEXURE

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TRANSFER OF PROPERTY ACT 1882
Chapter IV: Sections 58, 67 and 69

58. "Mortgage," "mortgagor." "mortgagee," mortgage-money," and "mortgage-deed" defined. (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money and the instrument (if any) by which the transfer is effect is called a mortgage-deed:

(b) Simple mortgage, __ Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale, __ Where the mortgagor ostensibly sells the mortgaged property__

on condition that or default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage, __ Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

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(e) English mortgage, __ Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfer the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds. __ Where a person in the town of Karachi and in any other town which the Provincial Government concerned may, by notification in the official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

(g) Anomalous mortgage. __ A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

67. Right to foreclosure or sale. __ In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed__

(a) to authorize any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclosure, to institute a suit for foreclosure, or an usufructury mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or

(b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

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(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

69. Power of sale when valid. __ A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely:

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Provincial Government in the official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the Government or a Scheduled Bank as defined in section 2 of the State Bank of Pakistan Act, 1956 (XXXIII of 1956);

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the town of Karachi or in any other town or area which the Provincial Government may, by notification in the official Gazette, specify in this behalf.

(2) A power under subsection (1) shall not be exercised unless and until__

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due:

Provided that the power of a Scheduled bank under clause (b) of subsection (1) shall further be subject to such conditions as may be prescribed in this behalf by notification in the official Gazette by the Central Government in consultation with the State Bank of Pakistan.

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(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeach. able on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior in cumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharges of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

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REGISTRATION ACT 1908
Sections 17, 48 and 49

17. The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act 1877, or this Act, came or comes into force, namely:-

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments wwhich purport or operate to create, declare, assign, limit or exinguish, whether in present or in futere, any righ, title, or inerest, whether vesed or coningent of the value of one hundred rupees and upwards, to or in immovable property ;

Explanation-In the case of an assignment of a mortgage the consideration for the deed of assignment shall be deemed to be the value for registration ;

(c) non testamentary instruments (other than the acknowledgment of a receipt or payment made in respect of any transaction to which an instrument registered under clause (e) related) which acknowledge the receipt or payment of any consideration on account of the creation, declaration, right, title or interets ; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent ;

Provided that the (Provincial Government) may, by order published in the (official Gazette), exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purport or operates to create, declare, assign, limit or extingusih, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property :

(2) Nothing in clauses(b)and(c)of sub-section(1) applies to-

(i) any composition deed ;or

(ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property ; or

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(iii) any debenture issued by any such Company and not creation, declarign, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures ; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company ; or

(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such rightm title or interest ; or

(vi) any decree or order of a court (except a decree or order expressed to be made on a compromise and comprisign immovable property other than that which is the subject matter of the suit or proceeding) ; or

(vii) any grant of immovable property by (the Government) ; or

(viii) any instrument of partition made by a Revenueofficer ; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Loans Act, 1883 ; or

(x) any order granting a loan under the (West Pakistan Agriculturists' Act, 1958 (W.P. Act XVII of 1958) the Agricultural Development Bank Ordubabcem 1961 (Ordinance No. IV of 1961), or under any other law for the time being in force relating to the advancement of loans for agricultural purposes, or any instrument under which a loan, is granted by a co-operative society for any such purpose, or any instrument made for securing the repayment of a loan so granted ; or

(xi) any endorsement on a mortgage-dead acknowledgrig the payment of the while or any part of the mortgage-money, and any other receipt for payment or money due under a mortgage ; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue officer ; or

(xiii) any counterpart of a lease, where the lease corresponding thereto has itself been registered).

Explanation-A document pruporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.

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(3) authorities to adopt a son, executed after the first day of January 1872, and not conferred by a will, shall also be registered.

48. All non-testamentary documents duly registered under this Act, and relating to any property, whether movable or immovable, shall take effect against any oral agreement or declaration relating to such property, unlesss where the agreement or declaration has been accompanied or followed by delivery of possession (and the same constitutes a valid transfer under any law for the time being in force :

Provided that a mortgage by deposit of title-deeds as defined in section 58 of the Transfer of Property Act, 1882, shall take effect against any mortgage-deed subsequently executed and registered which related ot the same property).

Symopsis

1. Scope.
2. Oral agreement of declaration.
3. Oral agreement and possession.
4. Proviso.
5. Notice of oral agreement effect.

1. Scope Section 58, T.P.Act must be read subject to this section and S. 50

The section does not apply where there is a competition between two registered documents or between two unregistered transactions, or where there is no conflict of any transaction with any registered document, or where there is no proof of any oral agreement.

Registration, notice by. A registered deed though operates as notice in rem yet while making statement before Registrar transferor must produce before him very cogent proof in support of his claim to be owner of property under transfer or sale and must also accept responsibility to meetclaim of any body as may assert his ownership to property. Where a person did not produce any proof before Registrar at the time of execution of will in favour of his wife to establish his claim to such effect. The Court could not hold that mere registration was sufficient notice in rem as to ownership of property by the executant.

2. Oral agreement or declaration. The words "oral agreement in the section are not restricted to bare agreements which are executory, but include transfers based on such agreements. It must be noted that an unregistered agreement, unless it operates as a present demise does not of itself, create any interest or charge on the subject-matter of the agreement and is not admissible for enforcing specific performance unless it is registered.

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Declaration The word declaration" means the declaration of a party's wishes with reference to his property not amounting to a contract and which the party is at liberty to recall, whereas by "an agreement" is meant something which if correct in point of form, is binding on the maker.

3. Oral agreement and possession. Section 48 makes it clear that a registered documents shall take effect against an oral agreement or declaration relating to any property only when the said agreement or declaration has not been accompanied or followed by delivery of possession. But an oral agreement or an unregistered written agreement as to sale of immovable property followed by delivery of possession without any registered document with respect thereto, shall effect the validity of the subsequent sale of the same property. Therefore where a purchaser of immovable property under an unregistered kabala has paid the agreedprice to the vendor, and is placed in possession, in the absence of circumstances showing that such purchaser was not entitled to sue his vendor for specific performance, a subsequent purchaser of the property under a registered conveyance cannot succeed in a suit to recover possession of the property from such pruchaser. Where a verbally agreed to sell property to B and asked his tenants to attorn to B, and the tenants agreed to pay rent to B. It was held, that this was sufficient delivery of possession for this section.

When a transferee under a verbal contract is already in possession in some other character the case would be one of "oral agreement accompanied by possession" within the meaning of this section and such transfer would prevail against any subsequent registered transfer. Thus an oral agreement to sell to the mortgagee in possession can be enforced against a subsequent registered purchaser because the previous possession of the mortgagee together with the agreement to sell, is equivalent ot a transfer of possession under the agreement of sale. But oral agreement is not admissible if no previous possession is proved.

Possession delivered after Registration of subsequent deed. An oral agreement carried out by delivery of possession before the registration of the subsequent instrument but after its execution will not prevail against the latter.

Lease. A lease though unregistered can be used to determine the nature of possession and the landlord's title.

Possession not delivered. Where the contract is such that possession was not delivered under it, this section would not apply. Thus where a first made a usufructuary mortgage in favour of B, then orally sold the equity of redemption to C and then again sold the same by a registered document to D ; D's title would prevail over Cs.

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.. Proviso. A mortgage by deposit of title deeds cannot be looked upon as a mere oral transaction as the act of deposit is the essential part of it. In fact the intention to create security is inferred in such cases from the mere deposit of deeds coupled with the loan without more, without writing, and without words of mouth. A mortgage of this type does not fall within the purview of S. 48.

5. Notice of oral agreement effect. A subsequent purchaser knowing the prior agreement sell gets to right the property. Therefore an oral contract to sell may be enforced by specific performance against a subsequent transferee with notice.

No notice to subsequent purchaser. A subsequent registered document cannot be pleaded in bar of a prior unregistered document or a prior oral agreement to sell if the registered document has been taken with notice of the latter. The provision as to delivery in S. 48 does not preclude the party to the oral agreement from relying on the doctrine of notice when there has been no delivery of possession. Where an oral agreement is not followed by possession and there is no notice of the previous transaction to the subsequent transferee, by registered document ; the Registered document will prevail under this section over the oral agreement.

Onus of proof of notice. The onus of proof that the registered transferee, had notice of the prior oral agreement is on the person claiming under the oral transfer. If the property to be sold is not in he possession of the vendor, but of another person it is the duty of the purchaser to make enquiries from that peron, and he is bound by all the equities which the party in possession may have in the property. The underlying principle of S.48 is that possession is tantamount to notice of the interest or clam in the property of the person in possession and whoever deals with such property is put on enquiry as to the title of person in possession. If, therefore, the factum of possession is proved notice to the transferee of the claim or interest of the person in possession must be assumed. That being so, he is put on the enquiry as to the claim to the property and when no enquiry is made, there is a postponementof the claim. Where A, the owner of a house worth more than Rs. 100, gave it to the defendant in satisfaction of a debt, and put the latter in possession. A sold the house afterwards by registered deed to the plaintiff who sued for possession ; It was held that as the house was given over to the defendant in satisfaction of a debt and he was in possession, the plaintiff must have had notice of the defendants right and therefore could not claim any superior right.

[49. No document required to be registered under this Act or under any earlier law providing for or relating to registration of documents shall.

(a) operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, to or in immovable property, or

(b) confer any power to adopt, unless it has been registered].

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Synopsis

1. Scope.
2. Effect of unregistered deed after possession is delivered.
3. "Unless it has been registered."
4. Award.
5. Proof of transaction independent of document.
6. Suit to compel registration.

registered can be admitted in evidence for collateral purpose of finding out if parties agreed to refer the dispute to arbitration.

Document not creating any right, etc. Non-regsitration of the deed in question which doesn ot intend to create new rights, but which has in the past created certain right in favour of the petitioner is not inadmissible in evidence under this section.

Pending proceedings. Pending proceedings would be governed by the amended section 49 of the Registration Act and a document would be saved from inadmissibility owing to elimination of sub-clause (c) from that section.

2. Effect of unregistered deed after possession is delivered. No equitable doctrine, such as provided in section 53-A, Transfer of Property Act, 1882 could override specific provisions of section 49, Registration Act, so as to makie an unregistered document create title, if the same required registration under section 49. WWhere purchaser was let into possession by vendor under an unregistered document pursuant to an oral agreement to sell under mistaken belief that the transaction was complete, whereas, in fact it was incomplete, for want of registration of instrument purporting to effect transfer. Such purchaser must be regarded to be a purchaser under a contract for sale which was yet to be completed. Such purchaser though wwould have a charge on property for the amount paid by him towards purchase of property in question.

3. "Unless it has ben registered". A document registered in wrong office or in fraud of Registration Law wiwll not be considered to be a "registered" document for the purposes of this section. A document which does not require to be registered is not affected by procedure of inadmissibility. Thus where a husband executed a dower deed not intending to create new rights but having created certain rights in favour of the wwife in the past, the deed was not inadmissible for wwant of the registration.

Curable defect in Registration, Registration wwhich is not in strict accordance with some of the provisions of the Act, the defect being, merely one of procedure curable under S. 87 is a registration "in accordance with the provisions of this Act" and is a valid registration for the purposes of this section. Therefore the mere fact that the registering officer after registering the document makes a remark that he is not satisfied as to the heirship of a party to the document does not affect the validity of the registration.

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Time of Registration. It is enough if the deed is registered at the time when it is sought to be proved. WWhere sale-deed is registered at the time when ti is sought to be proved or given effect to, S. 49 of the Registration Act and Art. 102 of Qanun-e-Shahadat will not stand in the way of proof of the document or giving effect to the sale.

4. Award. An arbitration Award, even if unregistered, could be used for the collateral purpose of showing the nature of the respondent's possession, as contemplated by the proviso to section 49. Under amended section 49 a document wwwhich is compulsorily registrable under section 1; of that Act is no longer inadmissible. An unregistered award effecting immovable property of value more than Rs. 100 is now, therefore, admissible in evidence. That being so, once it is filed in Court it becomes the duty of the Court to deal with it under the provisions of the Arbitration Act, 1940.

5. Proof of transaction independent of document. A person claiming title under a documetn which is unregistered may, independently of the document, prove his title and succeed in getting relief. Thus the factum of a mortgage can be proved by entries in jamabnndi. Similarly the factum of previous partition can be proved by other evidence.

6. Suit to compel registration. Apart from S. 77 a suit to compel the registration of a document will not lie.

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THE COMPANIES ORDINANCE 1984
Section 119

119. Power and liabilities of trustee. (1) The trustee nominated or appointed under the truste-deed for securing an sissue of debentures shallo, if so empowered by such deed, have the right to sure for all reddemption monies and interest in the following cases, namely:-

(a) Where the issuer of the debentures as mortagager binds himself to repay the debenture loan or pay the accred interest thereon, or both to repay the loan and pay the interest thereon. in the manner provied on the due dat;

(b) Where by any cause otber than the wrongful act or default of the issuer the mortagaged propery is wholly or partially desteroyed or the secrity is rendered insuffcient within the meaning of S. 66 of the Transfer of Property Act, 1882 (Act IV of able opportunity of providing further security adequate to render the whole security sufficient and the issuer has failed to do so:

(c) Where the trustee is deprived of the whole or part of the security by or in consequence of any wrongful act or default on the part of the issuer: and

(d) Where the trustee is entitled to take possession of the mortaged property and the issuer fails to deliver the same to him or to secure the possission thereof uhith disturgance by the issuer or any person claiming under a title superioor to that of the issuer.

(2) Where a suit is brought under clause (a) or clause (b) of sub-section(1) the Court may at its discertion stay the suit and all proceedings therein notwitstanding any contract to the contrary, until the trustee has exhausted all his available remedies against the mortgaged property or what remains of it unless the trustee abandons his security andd, if necessary, retransfer the morgaged property.

(3) Notwithstanding anything containedd in sub-sections (1) and (2) or any other, law for the time being in force, the trustee of any person acting on his behalf shall, if so authorised by the trust-deed, sell of concur in sellin, without intervention of the Court the mortaged property or any part therof in default of payment according to re-payment scheddule of any redemption amount or in the payment of any accrued interest on the due date by the issuer.

Explanation "Issuer", in sub-sections (1), (2) and (3), shall mean the company issuing debentures and securing the same by mortgage of its properties or assets, or both its properties and assets, andd appointing a trustee under a trust deed.

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(4) Subject to the provisions of this section, any provision contained in a trust deed for securing and issue of debentures, or in any contract wirth the holders of debentrues secured by a truse-deed, shall be void in so far as it would have the effect of exempting a trustee thereof from, or indemnifying him against, liability for breach of trust, where he fails to show the degree of care and diligence required of him as trustee, having regard to the provisions or the turst deed conferring on him any power, authority of discretion.

(5) Sub-section (4) shall not invalidate-

(a) any release otherwise validly given in repect or anything done or omitted to be done by a trustee before the giving of the release; or

(i) on the agreement thereto of a majoritgy of not less than three-fourths in value of the debenture holders present and voting in person or, where proxies are permitted by proxy, at a meeting summoned for the purpose and

(ii) either with respect to specific acts or omissions or on the trustee dying or ceasing to act.

(6) Sub-section (4) shall not operate-

(a) to invalidate any provision in force immediartely before the commencement of this Ordinance, so long as person then entitled to the benefit of that provision or after wards given the benefit thereof undder sub-section (7) remains as trustee of the deed in question; or

(b) to deprive any person of any exemption or right to be imdemnified in respect of anything done or omitted to be done by him while any such provision was in force.

(7) While any trustee of a trust-deed remains entitled to the benefit or provsion saved by sub-section (6), the benefits of that provision may be given either-

(a) to all trustees of the deed, present and future;or

(b) to any named turstees or propesed trustees therrof;
by a resolution passed by a majority or not less than threefourths in value of the debenture-holders present in person or where proxies are permitte, by proxy, at a meeting called for the purpose in accordacne with the provisions of the deed or, if the eed makes no provisions for calling meetings, at a meeting called for the prupose in any manner approved by the Court.

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INDUSTRIAL DEVELOPMENT BANK ORDINANCE 1961

Sections 39 & 40

39. Special provisions for enforcement of claims by the Bank:

(1) Where the Bank becomes entitled to require the immediate payment of any loan, [...] by reason of the breach of any condition of any agreement between the Bank and an industrial concern to which the loan has been granted or any person liable for [repayment] of that loan fails to repay the loan or where an industrial concern to which any loan has been granted or any person liable for [repayment] of that loan fails to repay the loan [in terms thereof] or in compliance with the notice under Section 38, an officer of the Bank, generally or specially authorised by the Board in this behalf, may apply to the District Judge within the local limits of whose jurisdiction the concern carries on the whole or a [...] part of its business, or the office or branch of the Bank from which the loan was disbursed is situated, for one or more of the following relief, namely:]

[(a) an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Bank as security for the loan and any other properties, disclosed or undisclosed, of the industrial concern or the properties, disclosed or undisclosed, of persons liable for the repayment of the loan, including guarantors; or

(b) an order for the transfer of the management of the industrial concern to the Bank or its nominee, provided that when such management is so transferred to the Bank, the Bank shall be deemed to be the agent of the industrial concern and shall manage the industrial concern on its behalf and all actions taken by the Bank on such transfer shall be deemed to be those of the industrial concern; or

(c) an injunction ad interim where there is apprehension that machinery or equipment may be removed from the premises of the concern without the permission of the Board].

[(2) An application under sub-section (1) shall state particulars of the loan and the sums claimed in respect of the same particulars of the concern and any other person or persons liable for the repayment of the loan and such other particulars as may be prescribed by rules.

(3) Where the application is for the relief mentioned in clause (a) of sub-section (1), the District Judge shall,—

(a) pass an order ad interim attaching such properties referred to in clause (a) aforesaid as are likely in the estimation of the Court to fetch, on being sold, an amount equivalent to the sums claimed by the Bank together with the costs of the proceedings taken under the Section; and

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(b) pass an order appointing one or more Receivers of the properties referred to in clause (a) aforesaid wherein the application filed by the Bank such remedy is specifically sought.

(4) The Bank shall have the option to seek an order under clause (b) of sub-section (3) in the first instance or at any subsequent time prior to grant of the relief mentioned in clause (a) of sub-sec. (1).

(4.A) Where the application is for the relief mentioned in clause (b) of sub-sec. (1), the District Judge shall grant an injunction ad interim restraining the concern or the person liable for repayment of the loan from transferring any of the properties, including machinery, equipment and stocks, without the permission of the Bank and shall issue a notice calling upon the concern and the person liable for repayment of the loan to show cause on a date to be specified in the notice why the management of the concern should not be transferred to the Bank].

(5) Before passing any order under sub-section (3) or sub-sec. (4), the District Judge may, if he thinks fit, examine the person making the application.

(6) At the time of passing an order under sub-section (3), the District Judge shall issue to the concern a notice accompanied by a copy of the order, the application and evidence, if any, recorded by him and calling upon it to show cause on a date to be specified in the notice why the order of attachment ad interim should not be made absolute or the injunction be not confirmed.

(7) If no cause is shown on for before the date specified in the notice under sub-section (4) or sub-section (6), the District Judge shall forthwith make the order ad interim absolute and direct the sale of the attached property or transfer the management of the concern to the Bank or confirm the injunction.

(8) If cause is shown the District Judge shall proceed to investigate the claim of the Bank and the provisions of the Code of Civil Procedure, 1908 (Act V of 1908), shall as far as practicable, apply to such proceedings.

(9) On completing an investigation under sub-section (8) the District Judge shall pass an order__

(a) confirming the order of attachment or directing the sale of the attached propery, or

(b) varying the order of attachment so as to release a portion of the property from attachment and directing the sale of the remainder of the attached property, or

(c) releasing the property from attachment, if he is satisfied that it is not necessary in the interests of the Bank to retain it under attachment, or

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(d) confirming or vacating the injunction, or

(e) transferring or refusing to transfer the management of the concern to the Bank:

Provided that when making any order under clause (c), the District Judge may make such further orders as he thinks necessary to protect the interests of the Bank and may apportion the cost of the proceedings in such manner as he thinks fit:

Provided further that unless the Bank intimates to the District Judge, that it will not appeal against any order releasing any property from attachment such order shall not be executed until the expiry of the period mentioned in sub-section (11), or if an appeal is preferred, unless the High Court otherwise directs, until the appeal is disposed of.

(10) An order under this section for the attachment or sale of property shall be carried into effect as far as may be in the manner provident in the Code of Civil Procedure, 1908 (Act v OF 1908), for the attachment or sale of property in execution of a decree as if the Bank were the decree-holder.

(11) Any party aggrieved by an order under sub-section (7) or sub-section (9) may, within thirty days from the date of the order appeal to the High Court or, where the order is of a Judge of a High Court exercising original civil jurisdiction, to the Court to which an appeal from a judgment of such Judge lies, and upon such appeal the appellate Court may, after hearing the parties, pass such orders as it thinks proper.

(12) Nothing in this section shall be construed, where proceedings for liquidation in respect of the industrial concern have commenced before an application is made under sub-section (1), as giving the Bank any preference over other creditors of the concern not conferred on it by any other law for the time being in force.

40. Rights of Banks in cases of default: (1) Where an industrial concern which is under a liability to the Bank under an agreement makes any default in payment or otherwise fails to comply with the terms of its agreement with the Bank, the Bank may, notwithstanding anything contained in Section 39, take over the management of the concern, and may sell or realise any property pledged, mortgaged, hypothecated or assigned by the concern to secure its liability to the Bank.

(2) Any transfer of property made by the Bank in exercise of its powers of sale or realisation under sub-section (1) shall vest in the transferree all rights in or to the property transferred as if the sale had been made by the owner of the property.

(3) The Bank shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of any security held by it as it has with respect to the original goods.

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[(4) Where the Bank takes over the management of an industrial concern under sub-section (1) it shall be deemed to be the agent of such industrial concern for the purposes of suits by or against the industrial concern.]

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AGRICULTURAL DEVELOPMENT BANK OF PAKISTAN ORDINANCE 1961
Section 25

25. Recovery of Bank dues: (1) Where any agriculturist who is under liability to the Bank under agreement makes default in repayment or otherwise fails to comply with the terms of his agreement with the Bank, such default or failure not being due to natural calamity, the Bank may, subject to any rules made in this behalf, take over the management or the concern of the agriculturist and sell or realise any property pledged, mortgaged, hypothecated or assigned by the agriculturist to secure his liability to the Bank.

(2) All sums due to the Bank shall be recoverable as arrears of land revenue.

(3) [Omitted by the Agricultural Development Bank Ordinance, XLV of 1978.]

(4) Sums due from a co-operative society and recoverable under sub-section (1) may be recovered in accordance with the provisions of law for the time being in force relating to the recovery of such sums due from a co-operative society to Government.

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HOUSING BUILDING FINANCE CORPORATION ACT, 1952
Sections 28 and 30

28. (1) When a borrower or a partner of the surety of either of them makes default, in repayment or otherwise fails to comply with the terms of the agreement or letter of guarantee with the Corporation, the Corporation may sell, or realise any property pledged, mortgaged, hypothecated or assigned by the borrower or the Partner or the surety of either or them to the Corporation by way of security.

(2) Any transfer of property made by the Corporation in exercise of its powers under sub-section (1) shall vest in the transferee all rights in or to the property transferred as if the property had been sold to the transferee by the owner.

(3) All sums due to the Corporation from a borrower or a partner or the surety of either of them shall be recoverable as arrears of land revenue.

30. (i) Where by reason of the breach of any agreement by the borrower or the partner the Corporation becomes entitled to require the immediate payment of the amount due by the borrower or the partner to the Corporation, any officer of the Corporation authorised generally or specially by the Board in this behalf may apply to the District Judge within the local limits of whose jurisdiction the borrower's or the partner's house is situated for any one or more of the following reliefs, namely:-

(a) an order for the delivery to the Corporation of the vacant possession, or for the sale of any property or properties pledged, mortgaged, hypothecated or assigned to, the Corporation as security for the sums due by the borrower or the partner.

(b) for an injunction restraining the borrower or the partner or the surety of either of them from, in any manner, removing, transferring or disposing of any of the properties referred to in clause (a).

(c) for an ad interim attachment the properties referred to in clause (a) above and such other properties of the borrower or the partner or the surety of either of them as in the opinion of the District Judge were sufficient to cover the claim of the Corporation against the borrower or the partner, including cost, interest, share in rental income, share in capital gains and demand charges as the case may be.

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(2) An application under sub-section (1) shall state the nature and extent of the liability of the borrower[3] or the partner and the surety of either of them to the Corporation, the grounds on which it is made and such other particulars as may be prescribed.

(3) The District Judge may, if he thinks fit, hear the applicant and where the reliefs mentioned in clauses (b) and (c) of sub-section (1) are prayed for in the application shall pass ad interim orders granting such reliefs as in the opinion of the District Judge are sufficient to safeguard the full claim of the Corporation against the borrower or the partner[4].

(4) At the time of passing his orders under sub-section (3) the District Judge shall order notice of the application to issue to the borrower or the partner[4] or the surety of either of them together with copies of the application, the order passed by the District Judge under sub-section (3), and any evidence which may have been recorded at the time of the order under sub-section (3), calling upon the borrower or the partner or the surety of either of them to show cause on a date to be specified in the notice, why the interim orders passed should not be confirmed and the reliefs sought in the application be granted

(5) If no cause is shown on or before the date specified in the notice under sub-section (4)[1] the District Judge shall dispose of the application.

(6) If the borrower or the [4]partner and the surety of either of them appear and show cause, the District Judge shall grant them and the Corporation reasonable opportunity to produce their evidence relating to the reliefs claimed in the application; and after considering such evidence and hearing the parties the District Judge shall pass his order disposing of the application.

(7) When passing his order under sub-section (5) or sub-section (6) the District Judge shall:-

(a) record his finding as to the [5]total amount due by the borrower or the partner to the corporation and the interest payable thereon;

(b) direct or refuse to direct the sale of the properties attached:

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(c) confirm, discharge or vary any ad interim orders passed restraining the borrower or the partner and the surety of either of them or attaching their properties; and

(d) pass any other incidental orders.

(8) No order passed by the District Judge ordering the release of any property of the borrower or the partner and the surety of either of them form attachment shall be given effect to until after expiry of 30 days from the date of that order except with the written consent of the Corporation, or where an appeal has been preferred to the High Court, under the order of the High Court.

(9) An order under this section for the attachment or sale of property shall be carried into effect as far as may be in the manner provided in the Code of Civil Procedure, 1908, (V of 1908) for attachment or sale of property in execution of a decree as if the Corporation were the decree holder.

(10) Any party aggrieved by an order under sub-section (5) or sub-section (6) may within thirty days from the date of the order appeal to the High Court, and upon such appeal the High Court may after hearing the parties pass such orders as it thinks proper.

EXPLANATION - Where the extent of the liability of the borrower or the partner and the surety of either of them to which the application relates exceeds fifty thousand rupees, this section shall, in its application to the Karachi District, have effect as if reference therein to "District Judge" were reference to "High Court".

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CODE OF CIVIL PROCEDURE 1908
ORDER XXXIV

Suits Relating to Mortgages of Immovable Property

1. Parties to suits for foreclosure, sale and redemption: Subject to the provisions of this Code, all persons having an interest either in the mortgages security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Explanation: A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

Code of Civil Procedure, 1908

2. Preliminary decree in foreclosure suit: (1) In a suit for foreclosure, it the plaintiff succeeds, the Court shall pass a preliminary decree____

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for___

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses property incurred by him up to that date in respect of his mortgage security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing__

(i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant appoints, all documents in his possession or power

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relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant at his cost free from the mortgage and from all encumbrances created by the plaintiff or any person claiming under him or, where the plaintiff claims by derived title, by those under whom he claim and shall also, if necessary, put the defendant in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

3. Final decree in foreclosure suit: (1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the

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defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a final decree under sub rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

4. Preliminary decree in suit for sale: (1) in a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof, be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charge, expenses and interest.

(3) Power to decree sale in foreclosure suit: In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights or, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in From No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix F with such variations as the circumstances of the case may require.

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5. Final decree in suit for sale: (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance a final decree passed under sub-rule (3) of this rule, the defendant, makes payment into Court of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order ...

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary, ...

(b) ordering him to transfer the mortgaged property as directed in the said decree,

and, also, if necessary, ...

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for re-payment of the amount of the purchase money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

6. Recovery of balance due on mortgage in suit for sale: Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance.

7. Preliminary decree in redemption suit: (1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree ...

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for ...

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

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(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing—

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10 together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required retransfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

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8. Final decree in redemption suit: (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order___

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary,

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,___

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for re-payment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,___

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred form all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property of a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

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8-A. Recovery of balance due on mortgage in suit for redemption: Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of property sold, pass a decree for such balance.

9. Decree where nothing is found due or where mortgagee has been overpaid: Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has beforeoverpaid, the Court shall pass a decree directing the defendant: if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

10. Costs of mortgagee subsequent to decree: In finally adjusting the amount to be paid to mortgagee in case or a foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

11. Payment of interest: In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:

(a) interest up to the date on or before which payment of the amount found of declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage__

(i) on the principal amount found or declared due on the mortgage, __ at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee,__at such rate as the Court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage money,__at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates at nine per cent. per annum; and

(b) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable__

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(i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause; and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10.

12. Sale of property subject to prior mortgage: Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

13. Application of proceeds: (1) Such proceeds shall be brought into Court and applied as follows:—

first, in payment of all expenses incidental to the sale of property incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee, on account of the prior mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the said was directed, and of the cost of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by Section 57 of the Transfer of Property Act, 1882.

14. Suit for sale necessary for bringing mortgage property to sale: (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order 11, r. 2.

(2) Nothing in sub-rule (1) shall apply to any territories to to which the Transfer of Property Act, 1882, has not been extended.

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15. Mortgages by the deposit of title deeds and charges: All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title deeds within the meaning of Section 58, and to a charge within the meaning of Section 100 of the Transfer of Property Act, 1882.

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THE BANKING COMPANIES
(RECOVERY OF LOANS)
ORDINANCE XIX of 1979
Sections 6, 6A and 7

6. Powers of the Special Court: (1) A Special Court shall—

(a) in the exercise of its civil jurisdiction, have in respect of a claim filed by a banking company against a borrower or by a borrower against a banking company in respect of, or arising out of, a loan all the powers vested in a Civil Court under the Code of Civil Procedure, 1908 (Act V of 1908);

(b) in the exercise of its criminal jurisdiction, try the offences punishable under this Ordinance and shall, for that purpose have the same powers as are vested in the Court of Sessions under the Code of Criminal Procedure, 1898 (Act V of 1898);

Provided that a Special Court shall not take cognizance of any offence punishable under this Ordinance except upon complaint in writing made by a person authorised in this behalf by the banking company in respect of which the offence was committed; and

(c) exercise and perform such other powers and functions as are, or may be conferred upon, or assigned to it by or under this Ordinance.

(2) Nothwithstanding anything contained in sub-section (1), a Special Court shall have no civil jurisdiction in a case in which—

(a) [Omitted by the Banking Companies (Recovery of Loans) Ordinance, II, 1983];

(b) arbitration proceedings in respect of the loan are pending before an arbitrator; or

(c) the loan was sanctioned under an agreement between the banking company and the borrower which provides for a dispute between the parties being referred to arbitration.

(3) All proceedings before a Special Court shall be deemed to be judicial proceedings within the meaning of Sec. 193 and 286 of the Pakistan Penal Code, 1860 (Act XLV of 1860), and the Special Court shall be deemed to be a Court for the purposes of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898).

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(4) No Court other than a Special Court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Special Court extends under this Ordinance, including a decision as to the existence or otherwise of a loan and the execution of a decree passed by a Special Court: and all proceedings, including proceedings following the filing of an arbitration award and proceedings for the execution of a decree within the jurisdiction of a Special Court, by whatever Court passed, which may be pending in any Court immediately before the commencing day shall stand transferred to the Special Court:

*[Provided that nothing in this sub-section shall be deemed to affect___

(a) the right of a banking company to seek any remedy before any Court that may be available under the law by which the banking company may have been established or under that law as amended from time to time; or

(b) the jurisdiction of any Court such as is referred to in clause (a), or to require the transfer to a Special Court of any proceedings pending before any such Court immediately before the commencing day.]

(5) In respect of proceedings transferred to a Special Court by virtue of sub-section (4), the said Court shall not, by reason of the said transfer, be bound to re-call and re-hear any witness who has given evidence before the transfer and may act on the evidence already recorded by or produced before the Court from which the proceedings are so transferred.

*[6-A. Extension of limitation : A suit for the recovery of a loan other than a loan referred to in Section 4 may be entertained by a Special Court within two years of the expiration of the period of limitation applicable to such suit if the Special Court is satisfied that the Banking Company filing the suit had sufficient cause for not filing it within the said period.]

7. Procedure of Special Court: (1) Suits before the Special Court shall come up for regular hearing as expeditiously as possible and, except in extraordinary circumstances and on grounds to be recorded a Special Court shall not allow adjournment.

(2) In the exercise of its civil jurisdiction, the Special Court shall in all suits before it, including suits based on mortgages of all kinds on statement of accounts for recovery of money paid to, or to the order of, th defendant, follow the summary procedure provided for in Order XXXVII in the First Schedule to the Code of Civil Procedure, 1908 (Act V of 1908).

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Section 28; 30 and 30A of HBFC Act No. XVIII of 1952

28. (1) When a borrower or a partner or the surety of either of them[1] makes default, in repayment or otherwise fails to comply with the terms of the agreement or letter of guarantee with the Corporation, the Corporation may sell, or realise any property pledged, mortgaged, hypothecated or assigned by the borrower or the [1]Partner or the surety of either of them to the Corporation by way of security.

(2) Any transfer of property made by the Corporation in exercise of its powers under sub-section (1) shall vest in the transferee all rights in or to the property transferred as if the property had been sold to the transferee by the owner.

(3) All sums due to the Corporation from a borrower or a [1]partner or the surety of either of them shall be recoverable as arrears of land revenue.

30 (i) [1]Where by reason of the breach [2]of any agreement by the borrower or the [2]partner the Corporation becomes entitled to require the immediate payment of [3]the amount due by the borrower or the [2]partner to the Corporation, any officer of the Corporation authorised generally or specially by the Board in this behalf may apply to the District Judge within the local limits of [4]whose jurisdiction the borrower's or the [4]partner's house is situated for any one or more of the following reliefs, namely:-

(a) an order[5] for the delivery to the Corporation of the vacant possession, or for the sale of any property or properties pledged, mortgaged, hypothecated or assigned to the Corporation as security for the sums due by the borrower or the partner[7].

(b) [4]for an injunction restraining the borrower or the [4]partner or the surety of either of them from, in any manner, removing, transferring or disposing of any of the properties referred to in clause (a).

(c) for an ad interim attachment the properties referred to in clause (a) above and such other properties of the borrower or the [4]partner or the surety of either of them as in the opinion of the District Judge were sufficient to cover the claim of the Corporation against the borrower or the partner, including cost, interest, share in rental income, share in capital gains and demand charges as the case may be[7].

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(2) An application under sub-section (1) shall state the nature and extent of the liability of the borrower[3] or the partner and the surety of either of them to the Corporation, the grounds on which it is made and such other particulars as may be prescribed.

(3) The District Judge may, if he thinks fit, hear the applicant and where the reliefs mentioned in clauses (b) and (c) of sub-section (1) are prayed for in the application shall pass ad interim orders granting such reliefs as in the opinion of the District Judge are sufficient to safeguard the full claim of the Corporation against the borrower or the partner[4].

(4) At the time of passing his orders under sub-section (3) the District Judge shall order notice of the application to issue to the borrower or the partner[4] or the surety of either of them together with copies of the application, the order passed by the District Judge under sub-section (3), and any evidence which may have been recorded at the time of the order under sub-section (3), calling upon the borrower or the partner or the surety of either of them to show cause on a date to be specified in the notice, why the interim orders passed should not be confirmed and the reliefs sought in the application be granted.

(5) If no cause is shown on or before the date specified in the notice under sub-section (4)[1] the District Judge shall dispose of the application.

(6) If the borrower or the [4]partner and the surety of either of them appear and show cause, the District Judge shall grant them and the Corporation reasonable opportunity to produce their evidence relating to the reliefs claimed in the application; and after considering such evidence and hearing the parties the District Judge shall pass his order disposing of the application.

(7) When passing his order under sub-section (5) or sub-section (6) the District Judge shall:-

(a) record his finding as to the [5]total amount due by the borrower or the partner to the corporation and the interest payable thereon;

(b) direct or refuse to direct the sale of the properties attached;

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(c) confirm, discharge or vary any ad interim orders passed restraining the borrower or the partner and the surety of either of them or attaching their properties; and

(d) pass any other incidental orders.

(8) No order passed by the District Judge ordering the release of any property of the borrower or the partner and the surety of either of them form attachment shall be given effect to until after expiry of 30 days from the date of that order except with the written consent of the Corporation, or where an appeal has been preferred to the High Court, under the order of the High Court.

(9) An order under this section for the attachment or sale of property shall be carried into effect as far as may be in the manner provided in the Code of Civil Procedure, 1908, (V of 1908) for attachment or sale of property in execution of a decree as if the Corporation were the decree holder.

(10) Any party aggrieved by an order under sub-section (5) or sub-section (6) may within thirty days from the date of the order appeal to the High Court, and upon such appeal the High Court may after hearing the parties pass such orders as it thinks proper.

EXPLANATION - [1]Where the extent of the liability of the [3]borrower or the partner and the surety of either of them to which the application relates exceeds fifty thousand rupees, this section shall, in its application to the Karachi District, have effect as if reference therein to "District Judge" were reference to "High Court".

30A. [1]ACT TO OVERRIDE OTHER LAWS ETC - Notwithstanding any thing to the contrary contained in any law, custom or usage for the time being in force it shall be lawful for:-

(a) a person to pledge, mortgage, hypothecate or assign in favour of the Corporation any property, movable or immovable, as security for the construction, purchase, repair or reconstruction of a house, or for the purchase or development of land for constructing a house thereon; and

(b) the Corporation to accept such pledge, mortgage, hypothecation or assignment for such purpose and to sell or realise any property pledged, mortgaged, hypothecated or assigned and to enforce its rights in accordance with the provisions of section 30.

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BANKING TRIBUNAL'S ORDINANCE 1979
Sections 4, 5 and 6

4. Establishment of Banking Tribunals: (1) The Federal Government may, by notification in the official Gazette, establish as many Banking Tribunals as it considers necessary, and where it establishes more than one Banking Tribunal, shall specify in the notification the territorial limits within which each of them shall exercise jurisdiction under this Ordinance.

(2) A Banking Tribunal shall consist of a person who is, or has been, or is qualified for appointment as Judge of High Court or a District Judge or an Additional District Judge, who shall be the Chairman, and two members, to be appointed by the Federal Government.

(3) To constitute a sitting of a Banking Tribunal, the presence, of the Chairman and not less than one member shall be necessary.

(4) A decision of a Banking Tribunal shall be expressed in terms of the opinion of the majority of its members, including the Chairman, or, if the case has been decided by the Chairman and only one of the members and there is a difference of opinion between them, in terms of the opinion of the Chairman.

(5) A Banking Tribunal shall not, merely by reason of a change in its composition, or the absence of any member from any sitting, be bound to recall and rehear any witness who has given evidence, and may act on the evidence already recorded by or produced before it.

(6) A Banking Tribunal may hold its sitting at such places within its territorial jurisdiction as the Chairman may decide from time to time.

(7) No act or proceeding of a Banking Tribunal shall be invalid by reason only of the existence of a vacancy in, or defect in the constitution of, the Banking Tribunal.

5. Powers of Banking Tribunals: (1) A Banking Tribunal shall__

(a) In the exercise of its civil jurisdiction, have in respect of a claim filed by a banking company against a customer in respect of, or arising out of, finance, provided by it, all the powers vested in a civil Court under the Code of Civil Procedure, 1908 (Act V of 1908);

(b) In the exercise of its criminal jurisdiction, try the offences punishable under this Ordinance and shall, for this purpose, have the same powers as are vested in the Court of Session under the Code of Criminal Procedure, 1898 (Act V of 1898):

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Provided that a Banking Tribunal shall not take cognizance of any offence punishable under this Ordinance except upon complaint in writing made by a person authorised in this behalf by the banking company in respect of which the offence was committed; and

(c) exercise and perform such other powers and functions as are, or may be, conferred upon, or assigned to it, by or under this Ordinance;

(d) A Banking Tribunal shall, in all matters with respect to which procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1908 (Act V of 1908) and the Code of Criminal Procedure, 1898 (Act V of 1898).

(2) All proceedings before a Banking Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Pakistan Penal Code (Act XLV of 1860), and the Banking Tribunal shall be deemed to be a Court for the purposes of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898).

(3) No Court other than a Banking Tribunal shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Banking Tribunal extends under this Ordinance, including a decision as to the existence or otherwise of finance and the execution of a decree passed by a Banking Tribunal:

(a) the right of a banking company to seek any remedy before any Court or otherwise that may be available under the law by which the banking company may have been established or under that law as amended from time to time, or

(b) the power or jurisdiction of the banking company or any Courts such as is referred to in clause (a);

_____ require the transfer to a Banking Tribunal of any proceeding pending before the banking company or any such Court immediately before the commencing day.

6. Procedure of Banking Tribunal: (1) Where a customer commits default in fulfilling any obligation to a banking company, the banking company may file against such customer with the banking tribunal a plaint which shall be verified on oath by the Branch Manager or an officer of the rank of Assistant Vice President or Assistant Manager or such other officer as the Board of Directors of the banking company may authorise in this behalf.

(2) On a plaint being filed with the Banking Tribunal in accordance with the provisions of sub-section (1), the Banking Tribunal shall issue notice requiring the defendant to show cause, within ten days of the service of such notice, as to why decree as prayed for in the plaint should not be passed against him.

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(3) The notice under sub-section (2) shall be served on the defendant in accordance with the procedure for service of notice laid down in sub-section (3) of Section 4 of the Banking Companies (Recovery of Loans) Ordinance, 1979.

(4) Upon the defendant failing to file a reply within the time given in the show cause notice under sub-section (2) or upon rejection by the Banking Tribunal of the plea taken by him in the reply, the Banking Tribunal shall pass a decree in favour of the banking company, as prayed for in the plaint.

(5) In the event of the Banking Tribunal passing a decree against the defendant failing to give a reply to the show cause notice within the period specified in sub-section (2), the Tribunal may, on the application of the defendant filed within thirty days of the passing of the decree, set aside the same and permit the defendant to file his reply under that sub-section provided it is satisfied that there was sufficient cause for the defendant not having filed the reply within the specified period.

[1][(6) All suits filed in the Banking Tribunal shall be disposed of within ninety days of the filing of the plaint and, in case the proceedings continue beyond the said period, the defendant shall be asked to furnish a bank guarantee acceptable to the Banking Tribunal to the extent of the claim in suit and, on failure of the defendant to furnish such bank guarantee within a period of fifteen days, the Banking Tribunal shall pass a decree in favour of the banking company as prayed for in the plaint:

Provided that, where the claim of the banking company is based on default of the defendant in payment of agreed instalments, the bank guarantee shall be to the extent to the amount of instalments in default:

Provided further that, in case the proceedings continue beyond a further period of one hundred and twenty days, the defendant shall deposit with the Banking Tribunal in cash the amount claimed in the plaint and, on failure of the defendant to make such deposit within fifteen days, the Banking Tribunal shall pass a decree in favour of the banking company as prayed for in the plaint]:

(7) Any amount deposited by the defendant with the Banking Tribunal under sub-sec. (6) [before the commencement of the Finance Act, 1990] may be withdrawn by the banking company upon an undertaking to refund the same to the Banking Tribunal is so ordered at any time.

(8) Where the claim filed before the Banking Tribunal is for the enforcement of a mortgage of immovable property, "decree" shall mean final decree for foreclosure, sale or redemption, as the case may be, as provided in Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908.

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(c) exercise and perform such other powers and functions as are, or may be, conferred upon, or assigned to it, by or under this Ordinance;

(d) A Banking Tribunal shall, in all matters with respect to which procedure has not been provided for in this Ordinance, follow the procedure laid down in the Code of Civil Procedure, 1908 (Act V of 1908) and the Code of Criminal Procedure, 1898 (Act V of 1898).

(2) All proceedings before a Banking Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Pakistan Penal Code (Act XLV of 1860), and the Banking Tribunal shall be deemed to be a Court for the purposes of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898).

(3) No Court other than a Banking Tribunal shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Banking Tribunal extends under this Ordinance, including a decision as to the existence or otherwise of finance and the execution of a decree passed by a Banking Tribunal:

(a) the right of a banking company to seek any remedy before any Court or otherwise that may be available under the law by which the banking company may have been established or under that law as amended from time to time, or

(b) the power or jurisdiction of the banking company or any Courts such as is referred to in clause (a);

_____ require the transfer to a Banking Tribunal of any proceeding pending before the banking company or any such Court immediately before the commencing day.

6. Procedure of Banking Tribunal: (1) Where a customer commits default in fulfilling any obligation to a banking company, the banking company may file against such customer with the banking tribunal a plaint which shall be verified on oath by the Branch Manager or an officer of the rank of Assistant Vice-President or Assistant Manager or such other officer as the Board of Directors of the banking company may authorise in this behalf.

(2) On a plaint being filed with the Banking Tribunal in accordance with the provisions of sub-section (1), the Banking Tribunal shall issue notice requiring the defendant to show cause, within ten days of the service of such notice, as to why decree as prayed for in the plaint should not be passed against him.

(3) The notice under sub-section (2) shall be served on the defendant in accordance with the procedure for service of notice laid down in sub-section (3) of Section 4 of the Banking Companies (Recovery of Loans) Ordinance, 1979.

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(4) Upon the defendant failing to file a reply within the time given in the show cause notice under sub-section (2) or upon rejection by the Banking Tribunal of the plea taken by him in the reply, the Banking Tribunal shall pass a decree in favour of the banking company as prayed for in the plaint.

(5) In the event of the Banking Tribunal passing a decree against the defendant failing to give a reply to the show cause notice within the period specified in sub-section (3), the Tribunal may, on the application of the defendant filed within thirty days of the passing of the decree, set aside the same and permit the defendant to file his reply under that sub-section provided it is satisfied that there was sufficient cause for the defendant not having filed the reply within the specified period.

[1][(6) All suits filed in the Banking Tribunal shall be disposed of within ninety days of the filing of the plaint and, in case the proceedings continue beyond the said period, the defendant shall be asked to furnish a bank guarantee acceptable to the Banking Tribunal to the extent of the claim in suit and, on failure of the defendant to furnish such bank guarantee within a period of fifteen days, the Banking Tribunal shall pass a decree in favour of the banking company as prayed for in the plaint:

Provided that, where the claim of the banking company is based on default of the defendant in payment of agreed instalments, the bank guarantee shall be to the extent to the amount of instalments in default:

Provided further that, in case the proceedings continue beyond a further period of one hundred and twenty days, the defendant shall deposit with the Banking Tribunal in cash the amount claimed in the plaint and, on failure of the defendant to make such deposit within fifteen days, the Banking Tribunal shall pass a decree in favour of the banking company as prayed for in the plaint];

(7) Any amount deposited by the defendant with the Banking Tribunal under sub-sec. (6) [before the commencement of the Finance Act, 1990] may be withdrawn by the banking company upon an undertaking to refund the same to the Banking Tribunal is so ordered at any time.

(8) Where the claim filed before the Banking Tribunal is for the enforcement of a mortgage of immovable property, "decree" shall mean final decree for foreclosure, sale or redemption, as the case may be, as provided in Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908.

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CASE STUDIES

Case Study No.1

Lahore High Court

COS No. 7/85 (Allied Bank vs. Ahmed Autos)

i) No. of hearings & adjournments 48

ii) Time involved from institution to final decision
from 17-3-85 4-6-92
Decreased on 4-6-85

iii) Causes of delay in decision

Borrower contested the suit upto Supreme Court of Pakistan in its Review Jurisdiction and obtained frequent adjournments on the ground of change of counsel etc.

iv) Cause of delay in securing decree, no delay

v) Cause of delay/problems in execution of decree

Execution proceedings still continue. judgment debtor causing obstancles in confirmation of auction sale of mortgaged property.

vi) a) Amount of loan Rs.11,80,190/84
b) Value of mortgaged property; and Rs. 2 Million
c) Costs incurred Appx.Rs.150,000/-

Case Study No.2

Lahore High Court

COS No.13/88 (National Bank of Pakistan vs Gul Steel Corporation).

i) No. of hearings and adjournments 19

ii) Time involved from institution to final decision.
from 26.5.88 to 6.5.92.

iii) Cause of delay in decision

Frequent adjournments obtained by the judgment debtor.

iv) Causes of delay in securing decree as above.

v) Cause of delay/problems in execution of decree

At final stage of execution proceedings the judgment debtor settled out of court and arrangement payment of settled amount to avoid auction of the mortgaged property.

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(6)

vi) a) Amount of loan Rs.29,85,904/-

b) Value of mortgaged property: and Rs.3.5 million

c) Costs incurred Approx.Rs.150,000/-

Case Study No.3

Sindh High Court

Suit No.53 of 1986 (Execution No.35 of 1983)
(National Bank of Pakistan vs M/s. XYZ)

Execution No.53 of 1983 was filed by Karachi Gas Company against Mehar Gas Works in order to obtain satisfaction of a decree obtained against Mehar glass Works in Suit No.1230 of 1980 in 1982. National Bank of Pakistan already held a decree against Mehar Glass Works and this is dated:28th May, 1986. However, National Bank of Pakistan could not file any execution proceeding against Mehar Glass Works as the Defendents properties were untraceable. Upon filing of execution 35 of 1983 by Karachi Gas Company, National Bank of Pakistan applied to be made a party to the said execution which application was granted. Finally, the mortgaged property i.e. belonging to Mehar Glass Works was sold in the sum of Rs.34,00,000/- by Nazir of the High Court of Sindh and this amount given to National Bank of Pakistan upon no objection being given by M/s. Karachi Gas.

(i) Time involved from institution to final decision approximately 5 months.

(ii) Causes of delay in decision - in this case there was hardly any delay as the suit was failed on 30th December, 1985 and the decree was obtained on 28th May, 1986.

(iii) Causes of delay in securing decree - No delay.

(iv) Causes of delay/problems in execution of decree - As noted above, the bank did not file any execution proceedings, since the Defendants property could not be identified. It was only on 30th April, 1989 that the Bank was made a party to Execution No.35 of 1983 filed by Karachi Gas Company. Thereafter, the auction procedure in the High Court was delayed because the Defendant created obstacles in the confirmation of the sale of mortgaged property. Finally, the property was sold on 15th July, 1991 but again the Bank only received the cheque on 7th May, 1992 as it was unable to execute the redemption deed in favour of the auction purchaser only because the concerned officer was not available/displayed no interest.

(v) a) Amount of Loan - Rs.78,712,386/=

b) Value of mortgaged property approx. Rs.3.00 million

c) Cost incurred - approx. Rs.100,000/-

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Case Study No.4

Sindh High Court

Suit No.440 of 1978 (Execution No.100 of 1986)
(Habib Bank Limited vs Ghafoor Textile Mills Ltd. and other)

(i) No. of hearing and adjournments - Approximately 70

(ii) Tiem involved from institution to final decision Approximately 5 years.

(iii) Causes of delay in decision - Although this case was compromised, it took about 5 years for the comprised decree to be passed from the date of the institution. This would amply demonstrate that in most cases delay is inbuilt into the legal system whereby due to rush of work in the courts even to obtain a compromise decree becomes time consuming. In this particular case, again frequent changes of counsel by the Defendants also caused delays as well as the fact that there were as many as 18 Defendants.

(iv) Causes of delay in securing decree - As in (iii) above.

(v) Causes of delay/problems in execution of decree - Although a compromise decree was passed in terms of which Defendents were to pay the decretal amount of Rs.23,572.726/- in instalments, the mortgaged property was sold as the payment of the said instalments was not adhered to by the Defendants. Finally the property wwas sold for Rs.2.4 million on 23rd May, 1988, after calling open bids. This procedure was also delayed because of unfair tactics employed by the Defendents.

(vi) a)	Amount of Loan -	Rs.23,572.700/-
b)	Value of mortgaged property approx.	Rs.2.6 million
c)	Cost incurred - approx.	Rs.200,000/-

Case Study No.5

Special Court Banking, Lahore

United Bank Ltd. vs M/s. Arshad and Co.

(i) No. of hearings and adjournments 67

(ii) Time involved from institution to final decision from 8.6.81 to 6.2.91.

(iii) Causes of delay in decision. Delay in service of notice

(iv) Causes of delay in securing decree
Non-availability of the whereabouts of borrower.

(v) Cause of delay/problems in execution of decree.
Non-availability of attachable property of the judgment-debtor.

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(v) a) Amount of Loan - Rs. 22,307/03

b) Value of mortgaged property, and Nil

c) Cost incurred - approx. Rs. 3,000/-

Case Study No.6

Special Court Banking, Lahore

National Bank of Pakistan V/s Mohammad Ajmal

(i) No. of hearings and adjournments 32

(ii) Time involved from institution to final decision from 18.9.85 to 26.1.92.

(iii) Causes of delay in decision.
Due to delay in service of notice and pendency of criminal proceedings against the judgment-debtor.

(iv) Causes of delay in securing decree as above

(v) Cause of delay/problems in execution of decree.
Execution proceedings are yet to commence.

(vi) a) Amount of Loan Rs. 48,194/-

b) Value of mortgaged property, and Nil

c) Cost incurred - approx. Rs. 10,000/-

Case Study No.7

Special Court Banking, Karachi

Suit No.107 of 1982 (Habib Bank Ltd. vs M/s. Raza Brothers and Another)

(i) No. of hearings and adjournments 50

(ii) Time involved from institution to final decision - May 1982 - todate

(iii) Causes of delay in decision - The main cause of delay is that due to backlog of cases the Special banking Court is not in a position to expedite the same. So also dialatory tactics caused further delays.

(iv) Causes of delay in securing decree - As above and also due to non production of Plaintiff's evidence.

(v) Cause of delay/problems in execution of decree - The suit is still at the evidence stage.

(v) a) Amount of Loan - Rs.491,123.20
b) Value of mortgaged property Rs.2.5 million
c) Cost incurred - approx. Rs. 50,000/-

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Case Study No.8

Special Court Banking, Karachi

Suit No.106 of 1982 (Execution No.4 of 1986) (Habib Bank Ltd. vs M/s. Raza Brothers & Another)

(i) No. of hearings and adjournments 25

(ii) Time involved from institution to final decision - May 1982 to 27th November, 1983.

(iii) Causes of delay in decision - In this case there was hardly any delay considering backlog of the cases with the Special Banking courts.

(iv) Causes of delay/problems in execution of decree - After the suit was decred the Bank only filed the executrion application on 8th February, 1986. Thereafter delays were caused in summoning the Defendants for the purpose of filing the objections to the execution application and finally the execution was granted and writ of attachment was issued on 30th January, 1992 and todate the Bailiff of the Court has been unable to attach the Defendent property since the same cannot be identified.

(v) a) Amount of Loan - Rs.2,08,937.62

b) Value of mortgaged property - There is no mortgaged property involved.

c) Cost incurred - approx. Rs. 50,000/-

Case Study No.9

Banking Tribunal, Punjab, Lahore

Bank of Credit & Commerce vs M/s. Wheels Pakistan Pvt. Ltd.

(i) No. of hearings and adjournments 20

(ii) Time involved from institution to final decision from 26.3.88 till date.

(iii) Causes of delay in decision.

Tribunal was not functioning for about 2.50 years ending January, 1992.

(iv) Causes of delay in securing decree

As above and also due to non-production of Plaintiff's edivdence .

(v) Cause of delay/problems in execution of decree.

The suit is yet at evidence stage.

(vi) a) Amount of Loan - Rs. 4,012,600/-

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b) Value of mortgaged property, and Rs.52,000,000/-

c) Cost incurred approx. Rs. 50,000/-

Case Study No.10

Banking Tribunal, Punjab, Lahore

Suit No.278/91 (United Bank Ltd. vs North-West O.B. Instrument (Pvt) Ltd.

(i) No. of hearings and adjournments 47

(ii) Time involved from institution to final decision from 15.1.91 till date.

(iii) Causes of delay in decision.

Tribunal was not working till January 1992

(iv) Causes of delay in securing decree

As above. Pending final disposal.

(v) Cause of delay/problems in execution of decree.
Suit has not yet been decided. Pending for arguments.

(v) a) Amount of Loan - Rs. 22,362/03

b) Value of mortgaged property, and Nil

c) Cost incurred - approx. Rs. 3,000/-

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Case Study No. 11

Banking Tribunal at Karachi

SUIT NO. 12 OF 1987

(HONGKONG BANK V/S AFTAB IQBAL)

(i) Number of hearing and adjournments Approximately 100.

ii) Time involved form institution to final decision - October 31, 1987 todate.

(iii) Causes of delay in decision The Defendants' Advocate took numerous adjournment on account of illness and business in Superior Courts. So also a number of miscellaneous applications were filed in the case by both the parties and finally after the evidence was led and arguments concluded the case was set down for judgement in May 1991 Unfortunately, the Tribunal stopped functioning from June 01, 1991 upto 31st July, 1991. Thereafter, the matter is still in the arguments stage as again the Defendants started dialatory tactics. However, he has been given a last chance to argue the matter this month whereafter the judgement could be given.

iv) Causes of delay in securing decree - as in (iii) above.

(v) Causes of delay/problems in execution of decree - the suit is still in the argument stage.

(vi) a) Amount of loan - Rs. 2,638,366/=

b) Value of mortgaged property - There is no mortgaged property involved.

c) Cost incurred - Approximately 100,000/= so far.

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