



RESEARCH PAPER

Lucrative Role of Financial Institutions on Willful Default - Financial Risk, and Fiscal Recovery: Evidence from Judgements of Apex Courts in Pakistan

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ABSTRACT

The study theoretically supports financial institutions regarding financial risk which can criminally proceed against customers, expose willfully default-financial risk or not? The FIO, 2001 and judgments of Apex Courts have privileges i.e. fiscal recovery of suits under FIO, 2001, Code of Civil Procedure (1908-Act, V), Code of Criminal Procedure (1898-Act, V) and judgments of Apex Courts. These are the domains on Willful Default financial risk. Overall results explored that FIO, 2001, Order 37 of CPC and judgments of Apex Courts support to protect rights and interests of financial institutions through Banking Courts but initiation of criminal proceedings shall be through investigation agencies (FIA and NAB), appointed by Federal Government section 20 (7) of FIO, 2001 and action accordingly. The theoretical view has important implications for financial institutions that they may consider FIO, 2001 as a safer flight during criminal proceedings through investigation agencies against customers with respect to Willful Default (WD) financial risk, and fiscal recovery. Moreover, the regulators may decide to control the financial position of banks due to willful default financial risk.

KEYWORDS Apex Courts, Federal Investigation Agency, Financial Institutions Ordinance, State Bank of Pakistan, Willful Default

Introduction

Financial Institution Ordinance (FIO), 2001 originated in 2001, through which banking courts enabled to proceed all matters regarding banking recoveries or customers with respect to willful defaults (WD), and financial risk. The duty of customers is to perform or repay the obligations to financial institutions under law if defaults risk then liable to pay within default date and realization of cost of assets of financial institutions. The FIO, 2001 ordinance provide privileges that the default of customers under sub-section (1). The banking courts exercise jurisdictions under FIO, 2001 and appoint a judge for this purpose and if there will be more than one banking courts then Federal Government have a right to define the territory of banking courts.

The banking courts have been increased with the passage of time with the aim to accelerate the process of loan recovery through financial institutions. It is important to note that growth of credit culture, reduction of default risks, creation of additional funds for new lending to borrowers and enlarge cash flow in market become possible upon smooth recovery process. There are two stages of suits being filed in banking courts. Firstly, the determination of rights of parties and secondly, includes decree execution as per laws in Pakistan. The courts in Pakistan need to create attention over many special laws. But it is fact that few laws in Pakistan are old which need to amend and implement properly. The implementation of these laws is more important than its amendments in FIO, 2001.

The FIO, 2001 provides provisions to criminal proceeding against customers involve in willful default. Willful default (WD) financial risk is failure to repayment of finance, any financial assistance, loan or advance obtained by a person from financial institution intentionally after that the payment has observed due under law, rules/regulation floated by State Bank of Pakistan (SBP). According to stated clause 20 (6) in FIO, 2001 all offences are expressed as bailable except willful default, compoundable/cognizable. The punishment for willful default (WD), and financial risk comparatively severe to other offences cited in FIO, 2001. The category of falling cases in Willful Default particularly analyzed by banks would be settled in accordance with FIO, 2001 as well as judgements (WD) of Superior Courts. The facts of each case dynamics and circumstances would be accordingly dealt with its own evidences. The rights and interests of financial institutions regarding cases of Willful Default (WD) of customers are protected through FIO, 2001 and Banking Courts play a role in this regard.

The banking courts have relevant provisions of law in accordance with FIO 2001 i.e., section 5(8) of it permits judges working in banking courts to appoint an assistant (*amicus curiae*) for technical aspects of banking transactions regarding any case. The technical expert would have at least 10-year experience of banking or reputable financial institution at level of higher management in Pakistan and qualifications (degree of Commerce, Accounting, Economics, Business Administration or any course completed in banking institute of Pakistan). Banking courts have powers under section 7 of FIO to proceed the matters of civil and criminal courts. Section 7, explored the banking courts as. (a) exercise all powers of civil jurisdiction vested under Code of Civil Procedure in civil Courts, 1908 (Act-V, 1908), (b) exercise all powers of criminal jurisdiction vested under Code of Criminal Procedure, 1898 (Act-V, 1898), punishable in Session Courts. Moreover, all matters for banking courts shall not provide in Ordinance, procedure is to be followed in Code of Civil Procedure, 1908 (Act-V, 1908) as well as in Code of Criminal Procedure, 1898 (Act-V, 1898). However, as the civil laws are concerned, Order XXVI, Rule 9, permit to appoint local commissions. In light of above discussion, it is clear that FIO, 2001 provides safeguard to financial institutions in case of a customer willfully default (WD). The Banking Courts with the help of procedures in ordinance, Code of Civil Procedure, 1908 (Act-V, 1908) as well as in Code of Criminal Procedure, 1898 (Act-V, 1898) can criminally proceed against customers willfully default (WD)-financial risk, and investment opportunities performance is enhanced diversification (Khan et. al., 2011).

The remainder of this study would explain as follow. Section (II), will be on literature review. Section (III) on contribution of judgments on Willful Default (WD) -financial risk by Apex Courts (AC) and final section (IV) on concluding remarks and implication of study. The review of literature is as under.

A willful defaulter expressed as an individual or entity engaged in not to pay back loan despite able to repay it. Moreover, funds used for the purpose to somebody willfully declared defaulter on borrowed amount or when it was not repaid.

Literature Review

Fiscal recovery under financial risk, the banking sector faces credit risk management problem due to non-performance of assets. Particularly, financial products are complex and risks can be understood even difficult (Lukonga, 2015). Recovery of loan stable bank's liquidity risk and bank run become more vulnerable (Schiantarelli et. al., 2016). The debate on risk is as old as the banking finance industry. The theoretical overview on willful default (WD) in Pakistan has very limited attention in literature. The literature review would explore about the contribution of other countries in the world and Pakistan on subject matter of Willful Default (WD).

The concept of Willful Default (WD) financial risk in Pakistan is unique one. The rise in Willful Default (WD) corroborate parallel to rise in non-performance of bank's assets (Aghian, 1999). He further argued that success of rates of high repayments could be determined through few factors. Among the various factor Willful Defaults (WD)-financial risk is perceived as critical factor which rise bad loans in banking sector (Sanjeev, 2007). The incidence of Willful Default (WD)-financial risk is sequential game and highlighted at that stage where borrowing platform doesn't show true picture of financial position and become willfully default (WD)-financial risk (Bardhan and Mukherjee, 2013). The study is evident that factors have affected the performance of repayment and willful defaulters mostly belonging to high income group (Mishra, 2014). Strategic default is another factor which have explored that credit market based on such a default (Karlan & Zinman, 2009; Morse & Tsoutsoura, 2013; Guiso et. al., 2013 and Edelberg et. al., 2014).

Scenario of Willful Default Financial Risk in Pakistan

The banks in public sector in Pakistan facilitate bulk of credit to Pakistani economy. The lending decisions in banks of public sector are dependent to time-to-time guidelines issued by State Bank of Pakistan (SBP). Bulk of literature exist behind incidence of default risk growing and it is common practice in Pakistan due to loan given politically. The politically pressure should be reduced in Pakistan only through legislations (Awan, 2010). The loans have been given in Pakistan on personal relations that cause default (Awan & Maliha, 2014). The two important categories have been analyzed i.e., liquidity risk and credit risk in Pakistan by (Shafiq & Nasr, 2010; Akhtar, Ali & Sadaqat, 2011; Iqbal, 2012; Hanif et. al., 2012; Abdullah & Khan, 2012 and Ramzan & Zafar, 2014). The awareness campaign should be effective to reduce such credit risk in Pakistan. The banks should be conscious about the recoveries of loans in past and criteria to disclose previous history of customer when loan granted If otherwise financial risk targets the investors behavior, and performance of financial institutions badly exploited (Khan, Akhter, and Bhutta, 2020).

The loan recoveries stringently and foreclosure laws play a vital role in banking system. The faster the recoveries have become the sector healthier, increase in working capital, and financial performance of firms efficiently (Khan, Akash, Hamid, and Hussain, 2011) and reduce willful defaults (WD) financial risk. If otherwise, resultantly decline in firm's value in market with upswing risk that be contingent on information asymmetry, and become a financial hazard for firms (Khan, Akhter, and Bhutta, 2020). The economy regarding financial institutions recovery risk and its performance plays a vital role in capital markets (Hussain, Hamid, Akash, and Khan, 2011). However, the recent data in percentage disclosed by State Bank of Pakistan (SBP), the financial sector of Pakistan swelled towards alarming situation of Rs. 783 billion as reported in June 30, 2019. Section (15) of FIO, 2001 enforced the banks to sell mortgaged properties without availing remedy to banking courts. The lack of reserve price mechanism, acting of bank being seller, auctioneer, purchaser and beneficiaries all at one stage declared as ultra vires by Supreme Court of Pakistan in 2013. The recoveries of loans have been made by bank on ground of unproductive legal proceedings in Courts, the Willful Default (WD)-financial risk introduced provisions of an offence in FIO, 2001 as amended in Act, 2016. This FIO Amendment Act, 2016 now become a hope for financial institutions to realize the light at the end of tunnel (Hamad, 2020). The Apex Courts (AC) also have contribution through judgmental view on Willful Defaults (WD)-financial risk in Pakistan which further theoretical explored as follows.

Willful Default Financial Risk with reference to Judgements of Apex Courts in Pakistan.

This study further focuses on either the judgements of Apex Courts (AC) are helpful for criminally proceeding against customers willfully default or not? The theoretical views on judgments of Apex Courts (AC) are as follow.

1. A Judgement has been passed by Bench of Supreme Court of Pakistan, comprising of three members namely, Mr. Justice Mian Saqib Nisar, CJ, Mr. Justice Faisal Arab and Mr. Justice Umar Ata Bandial titled "Syed Murshad Shah & others Vs. FIA & others" on 15-05-2017. The Judgement explored that either the Banking Courts are constituted under FIO, 2001, the offences have been mentioned in Section (20), exclusively jurisdiction and ordinance to exclusion of (I) Special Courts have been constituted in respect of Banks ordinance, 1984 to deal with offences (II) Ordinary Courts for criminal jurisdiction and execution of Cr.P.C, 1898 and (III). Investigation conducted by Federal Investigation Agency (FIA) Act, 1974. The reference of this judgment has permitted to different forums i.e., FIA, Police authorities, Banking Courts, Session Courts to dismiss/return the pending cases and directed to use appropriate forum. The change of mode for recovery prospects from fresh criminal complaints by banks to Banking Courts have been dealt severely. The FIO, 2001 clause 20 (6) Financial Institutions Ordinance referred those offences are bailable, cognizable and compoundable except Willful Default (WD) financial risk. This explored that the punishment of Willful Default (WD)-financial risk has severe comparative to other offences includes in FIO, 2001 and judgements of Apex Courts (AC).

The above said judgement states that the amendment in 2016 in FIO, 2001 has made on Willful Default (WD) -financial risk as an offence. Willful Default (WD) -financial risk term used in FIO, 2001, provided a safe flight to financial institutions (banks) to protect their rights and interests. On the other side defaulters are using loopholes successfully in judicial system by approaching good law firm, paying heavy amount and law firms using delay in legal initiative against culprits and in order to fiscal recovery pending loans amount from customers of financial institutions. The assets of customers (defaulters) are growing with the support of legal system and they are delaying repayments to financial institutions (banks). The pressure on customers (defaulters) is apparently very low. A study has been conducted by judicial academy in Sindh in which the causes of delay in cases of Banking Courts are evaluated. The findings suggested that the conviction rate was 1% because of accused were acquitted from 99% criminal cases. This scenario highly impacting economy of Pakistan as the banking industry is perceived a heart of country because of contributive role of funds towards GDP of country. The results predicted that banks are now reluctant to lend further loans even to good reputable corporates.

The legislature is fully cognizant and responsible for prevalent situation in country because of repayments to financial institutions (banks) are continuously avoiding by Willful Defaulters (WD). In this scenario, FIA has been introduced stringent law and empowered to solve or investigate the pending/referred cases. The law has permitted to FIA if an accused found guilty in categories i.e. as per section 2 (g) (I) (II) or (III) the investigating agency (FIA) would submit report along with challan to banking courts for further trial against accused that will be sentenced.

In view of above-mentioned judgement, it is declared that Apex Courts (AC) consistent in their view in order to create Willful Default (WD)- financial risk, intentionally failure to recover obligations under law, subject to decree is necessarily required. The circumstances have been proved the facts that how FIA and banking courts determine liability of customers (Willful Defaulters) when same matter is at non-decreed stage in Banking Courts? The facts explored that those cases would be referred to FIA and banking courts for investigation on which decree or judgement in favor of bank has been passed. While, in view of myself, it is stated that issue of Willful Default (WD)-financial risk explored that the fiscal recovery suit has been made under section 9 of FIO, 2001 if customer of financial institution (bank) defaults risk in discharge of his liability. It is called a civil liability or if intentional defaults then it will be criminal liability. The facts of criminal liability would be further investigated by FIA under section 20 (7) of FIO, 2001. The appointment of investigation agency shall be made through Federal Government and action accordingly. The discretion of court is important to settle principles in accordance with facts and circumstances of case proceeding.

Finally, it is concluded that establishment of FIO, 2001 has been provided a safer flight to financial institutions as the fiscal recovery against defaulted loans has become speed up. The courts are interpreting this clause as per facts and circumstances of case. It is further explored that litigation related recoveries which have not been yet decreed, financial institutions would wait till decree in his favor and as per section 2 (g) (i) invoked of FIO, 2001. The settled offence of Willful Default (WD) financial risk has been declared as continuing offence under section 23 of Law of Limitation Act, IX-1908 which comes into play wrongly and breach continuously.

2. A Judgement (PLD 2016 Supreme Court 620) has been passed by Bench of Supreme Court of Pakistan, comprising of three members namely, Qazi Faez Isa, JJ, Gulzar Ahmed and Dost Muhammad Khan titled "The State through Chairman NAB & others Vs. Muhammad Asif Saigol and others-Respondents.

The decision was made on criminal Appeals (Nos. 274-279 of 2006) along with criminal petitions (Nos. 78. L-79. L of 2004) dated 04-05-2016. The judgment of High Court, Lahore, Appeals Nos. 1092-2001, 29-2002 & 1075-2002 has been taken into consideration being an appeal dated 08-07-2003. NAB ordinance (XVIII-1999), S. 5 (r) used for willful default (WD) financial risk amended as ordinance (IV of 2000). Willful Default (WD) financial risk has been used first time on 03-02-2000 through NAB. Willful Default (WD) defined as it is committed offence on not repaying the obligations by a customer of bank as per law until the default has been proved that it was willful, investigated under NAB ordinance, clause (r), S (5). The arguments explored that in light of law, willful default (WD) has been considered in present case if it must be deliberately refusal to pay and intentional act. The prosecution didn't play a role to set this case in light of Willful Default (WD) and declared a simple default on part of accused cases. The remedy of willful was found absent and accused could not be declared guilty for offence (Willful Default) and charges of acquitted were set aside (Muhammad Akbar Tarrar, Additional Prosecutor General (NAB) and M.S. Khattak, Advocate on Record for the State (NAB); Aitzaz Ahsan, Senior Advocate Supreme Court for Muhammad Asif Saigol (in person) and Companies, 2016).

It is concluded that these cases were borderline with regard to willful default (WD) financial risk. The default committed at that time when law was absent or in general atmosphere and considered a civil liability which couldn't be converted into criminal liability. The prosecution found unable to identify Muhammad Asif Saigol, convicted in offence of willful default (WD) financial risk and case set aside. Moreover, appeals by NAB has been filed to seek sentences have been dismissed or alternative appeal by Muhammad Asif Saigol has been allowed. Overall results suggested that the conviction of willful default (WD) financial risk would stand only when the offence will be committed proved.

3. Another judgement (PLD 2018 Supreme Court 2018) has been passed by Bench of Supreme Court of Pakistan, comprising of three members namely, Mian Saqib Nisar CJ., Ijaz Ul Ahsan, JJ and Umar Ata Bandial titled "Habib Bank Ltd. (HBL) Vs. WRSB Trading Company, LLC & others-Respondents.

The decision was made on civil appeal No. 522 of 2015 dated 2018. The judgement of Lahore High Court, R.F.A No. 395 of 2005 has been taken into consideration. The FIO, 2001 ordinance S. 2 (a) of financial institutions is also considered to define the scope of Banking Courts in country or foreign. The facts state that there was no valid reason to ignore the jurisdiction of Banking Courts in Pakistan if courts have jurisdiction over parties in foreign. Supreme Court explored about that there should be no situation to create availed finance by citizen in country or abroad. There would be no redress against them in this case and treated as country safe and to ensure effective recovery of finance from defaulters of loans of financial institutions.

The brief facts of the case were that the appellant No. 01 availed loan from bank branch in Dubai and filed a suit No. 105-2002 through banking courts, Lahore for recovery of loan amounting to Rs. 33,285,565.28 on 22-01-2001. The banking courts have returned the case to court of appropriate jurisdiction. The orders of banking courts No. R.F.A 395/2005 which challenged by appellant was dismissed in light of order of High Court, Lahore on 10-03-2015. The order states that the appellant was not financial institution under section 2 (a) of FIO, 2001 for recovery of suits of financial institutions. He further state that appellant was not entitled for filing recovery of suit due to transaction in Pakistan and permitted to follow section 9 of FIO, 2001 as transaction would be within Pakistan. It explored that section 20 of CPC, 1908 is naturally procedural and inapplicable to FIO, 2001. The facts state that suit filed by appellant (financial institution) before the banking court No. 1, Lahore was beyond the threshold of events which would be held within the jurisdiction of banking court particularly, invoked. Moreover, the courts in Dubai, jurisdiction of parties is invalid reason to ignore jurisdiction of banking courts in Lahore.

The aforementioned arguments explored that order of Lahore High Court set aside and appeal has been allowed. The matter was fixed before the banking courts for afresh decision on plaint already filed by respondent within a month and same would be intimated to registrar office for compliance timely. It is further concluded that the direction was passed to decide matter within a month by banking court without delay. The jurisdiction has been decided and elaborated in judgement that the legal rights of respondents shall have objections before the court.

Conclusion

It is concluded that bank loans have been monitored and supervised weakly and poor enforcement mechanism in Pakistan. The rate of loan defaulters would be increased in such a case. The encouragement of banks and pursuance of procedure for fiscal recovery of loan efficiently base on effective laws of bankruptcy in Pakistan. Pakistan is a developing country where the strategies regarding fiscal recovery suits are week implemented (Khan, Hussain, and Akash, 2023). The implementation of laws is important that formulation. These are the reasons upon which borrowers become willfully default (WD) financial risk that indicate the burden of loan in balance sheet of bank and continuous failure in the system. The Willful Default financial risk is the reason of carefulness in sanctioning of loan, poor recovery criteria in banks. As my personal opinion, the private banks are more efficient to recover their loan as compare to public banks due to effective control over rules and laws. The system of banks needs to be improved and should become an iterative process. The FIO, 2001 ordinance provide privilege for recovery of suit on loan amount but criminal proceeding against customer on grounds of Willful Default financial risk would be through investigation agencies i.e., FIA, NAB etc. The judgmental view on Willful Default financial risk was remained supportive in a case which explored that there may be suit for recovery of loan under FIO, 2001 through banking courts but criminal proceedings under section 20 (7) of FIO, 2001 initiated through investigation agencies on proof and action accordingly.

Recommendations

It is recommended that the regulators may decide to control the financial position of banks due to willful default or could further increase in loan amount to earn maximum profit in light of effective implementation of stated laws for recovery of suits and willful defaults (WD) financial risk. There would be criteria to define controls of banks, smooth conduct of trials in banking courts and support of investigation agencies through which the risk of willful default (WD) financial risk could be minimized and mitigated effectively. The deeper analysis with regard to willful default (WD) financial risk may be extended on academic side and severe need to understand behavioral aspect, social, political engagements, regulatory compliance failure and geographical factors paying attention to willful default (WD) financial risk.

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