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ORDINANCE NO.IX OF 2019

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ORDINANCE

*to provide for the efficient recovery of mortgage-backed
securities by financial institutions*

WHEREAS it is expedient to provide for the efficient recovery of mortgage-backed securities by financial institutions for the purposes of facilitating financial institutions in granting those securities, thus the same ultimately acts as a catalyst for satisfying the housing needs of the people of Pakistan;

AND WHEREAS the Senate and National Assembly are not in session and circumstances exist which render it necessary to take immediate action;

NOW, THEREFORE, in exercise of the powers conferred by clause (1) of Article 89 of the Constitution of the Islamic Republic of Pakistan the President is pleased to make and promulgate the following Ordinance:-

1. **Short title, extent and commencement.**—(1) This Ordinance shall be called the Recovery of Mortgage-backed Security Ordinance, 2019.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

2. **Definitions.**—(1) In this Ordinance, unless the context otherwise requires,—

(a) “bank” means—

(i) a banking company; or

(ii) a corresponding new bank; or

(iii) the State Bank of Pakistan; or

(iv) a subsidiary bank; or

(v) the House Building Finance Company Limited; or

(vi) such other bank which the Federal Government may, by notification in the official Gazette, specify for the purposes of this Ordinance.

(b) “banking company” shall have the same meaning as assigned to it in the Banking Companies Ordinance, 1962 (LVII of 1962);

(c) “banking court” means:

(i) in respect of a case in which the claim does not exceed fifty million rupees or for the trial of offences under the Financial Institutions (Recovery of Finances) Ordinances 2001 (XLVI of 2001), the court established under section 5 of that Ordinance; and

(ii) in respect of any other case, the High Court.

(d) “borrower” means any person or corporation who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution;

- (e) "Central Depository Company" means the Central Depository Company of Pakistan formed under the Central Depositories Act, 1997 (XIX of 1997);
- (f) "default" means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor in accordance with the directions or guidelines issued by the State Bank of Pakistan;
- (g) "financial assistance" means any loan or advance granted or any other credit facility extended by any bank or financial institution;
- (h) "financial asset" means debt or receivables and includes —
 - (i) any debt or receivables secured by mortgage of, or charge on, immovable property; or
 - (ii) any right or interest in the security, whether full or part underlying such debt or receivables.
- (i) "financial institution" means —
 - (i) a financial institution as defined under the Companies Act, 2017 (XIX of 2017); or
 - (ii) any other institution or non-banking financial company as defined in the Banking Companies Ordinance, 1962 (LVII of 1962), or which the Federal Government may, by notification in the official Gazette, specify as financial institution for the purposes of this Ordinance.
- (j) "mortgage" means the transfer of an interest in property for the purpose of securing the payment of the mortgage money or the performance of an obligation which may give rise to a pecuniary liability;
- (k) "mortgage money" means any finance or other amounts relating to a finance, penalties, damages, charges or pecuniary liabilities, payment of which is secured for the time being by the security agreement, including any mortgage deed or memorandum of deposit of title deeds;

- (l) "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset, in accordance with the directions or under guidelines relating to asset classifications issued by the State Bank of Pakistan;
- (m) "prescribed" means prescribed by rules made under this Ordinance;
- (n) "property" means immovable property;
- (o) "State Bank" means the State Bank of Pakistan;
- (p) "security agreement" means an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor including the creation of mortgage by deposit of title deeds with the secured creditor;
- (q) "secured asset" means the property on which security interest is created;
- (r) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions;
- (s) "secured debt" means a debt which is secured by any security interest; and
- (t) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation or assignment.

(2) Words and expressions used and not defined in this Ordinance shall have the same meaning assigned thereto in the Contract Act, 1872 (IX of 1872) or the Transfer of Property Act, 1882 (IV of 1882) or the Companies Act, 2017 (XIX of 2017).

3. **Enforcement of security interest.**—(1) Any security interest created in favour of any secured creditor may be enforced, without the intervention of any court or tribunal, by such creditor in accordance with the provisions of this Ordinance.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof and his account in respect of such debt is classified by the secured creditor as a non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured

creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower and shall be given in the manner and form as may be prescribed.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2) and in the prescribed manner, the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—

- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;
- (b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;
- (c) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (c) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or takeover of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditor or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors. For the purposes of this sub-section amount outstanding shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the prescribed form and manner to the banking court having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) The rights of a secured creditor under this Ordinance may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(12) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise, other than in the ordinary course of his business, any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

4. **Valuation of security interest.**—(1) The security agreement shall be registered with the Central Depository Company and shall become valid only once such registration has been completed.

(2) No disbursement shall be made unless the security agreement has been registered under sub-section (1).

(3) The particulars of the security agreement shall be filed with the Central Depository Company in the manner and on payment of such fee as may be prescribed, within fourteen days after the date of such transaction or creation of security, by the secured creditor:

Provided that the Central Depository Company may allow the filing of the particulars of such transaction or creation of security within fourteen days next following the expiry of the said period of fourteen days on payment of such additional fees not exceeding ten times the amount of such fee.

(4) The registration under sub-section (1) shall include the registration of the validity, value and all material details of the security agreement as may be prescribed.

(5) The registration under sub-section (1) shall be done by the secured creditor. The Central Depository Company shall explicitly communicate the details of the security interest as to be registered through a notice to the borrower within one week of an application of registration by the secured interest.

(6) The borrower shall file objections with respect to registration under this section, if any, within one week of the receipt of the notice under sub-section (2) of section 3, after which, the borrower shall be deemed to have no objections to the details of such registration.

(7) The secured property registered under sub-section (1) shall have a reserve price which shall be equal to the secured interest as per the security agreement as registered by the Central Depository Company plus costs reasonably incurred by the secured creditor through enforcement under section 3.

5. **Recovery of asset.**—(1) In case of default in payment by a borrower, the financial institution may send a notice upon the borrower demanding payment of the mortgage money outstanding within fourteen days from service of the notice and failing payment of the amount within due date, it shall send a second notice of demand for payment of the amount within fourteen days. In case the borrower on the due date given in the second notice sent, continues to default in payment, financial institution shall serve a final notice upon the borrower demanding the payment of the mortgage money outstanding within thirty days from service of the final notice on the borrower.

(2) Before exercise of its powers under section 3, the secured creditor shall cause to be published a notice in one reputable English daily newspaper with wide circulation and one Urdu daily newspaper in the Province in which the mortgaged property is situated, specifying particulars of the mortgaged property, including name and address of the mortgagor, details of the mortgaged property, amount of outstanding mortgage as registered under section 4 and indicating the intention of the secured creditor to sell the mortgaged property. The financial institution shall also send such notices to all persons who, to the knowledge of the secured creditor, have an interest in the mortgaged property as mortgagees.

(3) The sale of the secured property shall be done through a public auction where the property may be sold at the highest price obtained through such auction provided that such price is not below the reserve price.

(4) The secured creditor and the borrower shall be entitled, in their discretion, to participate in the public auction and to purchase the mortgaged property at the highest bid obtained in the public auction, provided that such price is not below the reserve price.

6. State authority to assist secured creditor in taking possession of secured asset.—(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Ordinance, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request in writing any state authority designated in the prescribed manner by the Federal Government, within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof and such state authority, on such request being made to it, shall—

- (a) take possession of such asset and documents relating thereto, and
- (b) forward such asset and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the designated state authority may take or cause to be taken such steps and use or cause to be used such force as may in its opinion be necessary.

(3) No act of the designated state authority done in pursuance of this section shall be called in question in any court or before any authority.

7. Right to appeal.—(1) Any person including borrower, aggrieved by any of the measures referred to in sub-section (4) of section 3 taken by the secured creditor or his authorised officer under this Ordinance, may prefer an appeal to the banking court, having jurisdiction in the matter, within forty-five days from the date on which such measure had been taken.

(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the banking court unless the borrower has deposited with the court seventy-five percent of the amount claimed in the notice referred to in sub-section (2) of section 3.

8. Appeal to High Court.—Any person aggrieved, by any order made by the banking court under section 7, may prefer an appeal to the High Court within thirty days from the date of receipt of the order of the banking court.

9. **Scope of appeal.**—(1) Neither the banking court under section 7 nor the High Court under section 8 shall grant an injunction restraining the sale or proposed sale of mortgaged property unless —

- (a) it is satisfied that no mortgage in respect of the immovable property has been created; or
- (b) all moneys secured by mortgage of the mortgaged property have been paid; or
- (c) the mortgagor or objector deposits in the banking court in cash the outstanding mortgaged money.

10. **Right of borrower to receive compensation and costs in certain cases.**—If the banking court or the High Court, as the case may be, on an appeal filed under section 7 or section 8 holds the possession of secured assets by the secured creditor as wrongful and directs the secured creditor to return such secured assets to the concerned borrower, such borrower shall be entitled to payment of such compensation and costs as may be determined by such banking court or High Court.

11. **Secured creditors to report satisfaction of security interest.**—(1) The secured creditors shall give intimation to the Central Depository Company of the payment or satisfaction in full of any security interest relating to the secured creditors and requiring registration under this Ordinance within thirty days from the date of such payment or satisfaction.

(2) The Central Depository Company shall, on receipt of such intimation, cause a notice to be sent to the secured creditors calling upon it to show cause within a time not exceeding fourteen days specified in such notice, as to why payment or satisfaction should not be recorded as intimated to the Central Depository Company.

(3) If no cause is shown, the Central Depository Company shall order that a memorandum of satisfaction shall be entered in the Central Depository Company.

(4) If cause is shown, the Central Depository Company shall record a note to that effect and shall inform the borrower that he has done so.

12. **Right to inspect particulars of security interest transactions.**—(1) The particulars of security interest entered in the register of such transactions kept under section 11 shall be open during the business hours for inspection by any person on payment of such fee as may be prescribed.

(2) The register referred to in sub-section (1) maintained in electronic form shall also be open during business hours for the inspection of any person through electronic media on payment of such fee as may be prescribed.

13. **Protection of action taken by good faith.**— No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or to be done in good faith under this Ordinance.

14. **Civil court not to have jurisdiction.**— Notwithstanding anything contained in any other law for the time (being in force) civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a banking court or the High Court is empowered by or under this Ordinance to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Ordinance.

15. **Ordinance to override other laws.**— The provisions of this Ordinance shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

16. **Power to make rules.**— The Federal Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Ordinance.

17. **Power to remove difficulties.**— If any difficulty arises in giving effect to the provisions of this Ordinance, the Federal Government may, by order published in the official Gazette, make such provisions not inconsistent with the provisions of this Ordinance as may appear to be necessary for removing the difficulty:

Provided that no order shall be made under this section after the expiry of a period of two years from the commencement of this Ordinance.

STATEMENT OF OBJECTS AND REASONS

1. Introduction:

Mortgage facility is the backbone of the Housing Sector which supports financial aspect of construction of houses. In Pakistan mortgage debt has deteriorated to an acute level. Banks/ Investors are ill-equipped to protect their own interests. Foreclosure laws empower the bank/ investors to take possession of the asset upon borrower's default. Therefore, to increase the trend of housing mortgage, banks desperately needed the updated foreclosure laws. Without these laws commercial banks as well as foreign investors are reluctant to invest and finance in this sector.

Prime Minister approved the establishment of an apex body by the name of "Naya Pakistan Housing & Development Authority" to regulate the private sector through an enabling environment which will regulate mortgage debt to GDP ratio by adopting better legal frameworks and minimize housing lag on supply side.

2. Justification to Establish Legal Framework of foreclosures:

- The jurisdiction of legal framework may extend to whole of Pakistan.
- An efficient development program that balances risk, cost, schedule and performance.
- Promptly identifies loans with well-defined weaknesses.
- Provides essential information to assess the adequacy.
- Ensures that appraisals on troubled real estate and other secured loans are maintained on a regular and timely basis.
- It is better to recover a portion of a mortgage loan than to absorb a total loss. Therefore, in lieu of a better foreclosure framework, banks will often settle for low risks.
- To establish a transparent criteria and procedure for regularizing mortgage debt.
- To establish and specify Key performance indicators, monitoring and evaluation, audit and achievement mechanisms.
- Public can use regular mortgage financing.
- Banking regulation will improve.
- Regulating the mortgage debt ratio will bring positive tax benefits to the economy.
- Facilitating peoples to relish capital appreciation over their land.

- Improving confidence of foreign investors by taking measures to regulate the mortgage debt to GDP ratio.
 - Economy will become more documented inevitably minimizing risks and increasing investing opportunities.
 - Better foreclosure laws that would develop Protection of credit and prevention of a foreclosure.
 - Provision of Mortgage facility will benefit peoples to pay their debt through affordable monthly/ quarterly installments.
3. Therefore, there is an urgent need of a legal framework to expedite the better mortgage facilities on fast track basis so as to address the above narrated issues.

**CHAUDHARY TARIQ BASHIR CHEEMA,
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