IN THE SUPREME COURT OF PAKISTAN
(CIVIL APPELLATE JURISDICTION)

C.M.A.NO. K/2025 Nature
Factual Summary on behalf of the Appellant in Civil Appeal No.57-K of 2019
Filed on - 9-2025

Muslim Commercial Bank Ltd.....Petitioner

Versus.

Federation of Pakistan & Others.....Respondents

Counsel for Petitioner *Mr.Raashid Anwer.ASC*
Enrolled No.3075
Mr.K.A.Wahab AOR

INDEX

The above noted index has been prepared by me and is correct.

Filed by

(K.A.Wahab)
AOR FOR PETITIONER

Karachi
Dated 09-2025

IN THE SUPREME COURT OF PAKISTAN

Civil Appeal No. 57-K/2019

MCB Bank . . . Appellant

v.s

Federation & others . . . Respondents

FACTUAL SUMMARY

It is respectfully submitted on behalf of the Appellant as under:

1. The Respondent No. 4, Mr Hai opened trading account No. 1484 with a stock broker, M/s ZHV Securities (Pvt.) Ltd in 2006.
2. Under the terms of the Account, Mr Hai appointed his wife, Rubina Hai/ Rubina Dosso as firstly, his nominee/successor and secondly as his Authorized Agent for purposes of operating his account.
3. Mr Hai and his wife continued to operate the Account without any complaints up till 2009.
4. Mr Hai and his wife undertook *badla* transactions (i.e. they would trade securities with borrowed fonds from ZHV Securities).
5. In 2009, due to losses while trading, Mr Hai suffered a loss of Rs 1,484,012/-. This loss was paid initially by ZHV Securities and it sought reimbursement from Mr Hai.
6. An analysis of Mr Hai's account statement for the year 2008 - 2009 reveals that a sum of PKR 1,484,012/- was payable by Mr Hai to ZHV Securities due to the trading losses suffered by the former.
7. After the loss was not set off by Mr Hai and remained payable towards ZHV Securities, the latter under the authority of Clause 12 of the account terms and conditions, pledged the securities with MCB Bank.
9. MCB sought confirmation and verification that ZHV Securities had the proper authorisation to pledge their Client's securities. As such, ZHV Securities shared a copy of the Account Opening Form and accompanying documentation with MCB.

10. That, thereafter, MCB acting on the instructions of its own client, namely, ZHV Securities sold 61,000 shares on 04.04.2009. These shares were sold to pay the amount owed by Mr Hai to ZHV Securities.

11. The sale proceeds of the 61000/- shares amounted to. Rs. 1,550,884.64/-. This amount was utilised to settle the debit loss of 1,484,012/- as was being reflected in Mr Hai's Account. An amount of PKR 66,872/- was left over after the settlement of dues and the same was reflected in Mr Hai's Account.

12. Mr Hai subsequently had a change of heart and began to dispute these transactions whereby he suffered a loss of Rs 1.48 Million on the basis that he had never authorized his wife to trade in his account. However, he continued to operate the trading account under the same terms as agreed upon in 2006.

13. Mr Hai also claimed that he had not given any authorization to ZHV Securities to pledge any shares with MCB. It should be noted here that this stance was in contradiction to the previous paper work shared with MCB.

14. It should also be noted here that despite casting doubts over the Account terms and conditions, Mr Hai continued to operate his trading account up until 2012.

15. That Mr Hai then filed a complaint against ZHV Securities with the SECP and the KSE. However, the complaint bore no fruit since the same was frivolous.

16. Thereafter Mr Hai filed a complaint with the Federal Investigation Agency (i.e. FIA). Pursuant to this an Inquiry No. 29/2011 was initiated under the provisions of the FIA Act 1974.

17. It should also be noted that Mr Hai filed Suit No. 173 of 2015 before the Civil Court for damages and recovery. In this Suit, evidence was recorded in which Mr Hai admitted that he had no evidence of any wrongdoing on the part of MCB Bank. This suit was ultimately

dismissed for non-prosecution on 5.4.2021.

18. In the meantime, FIA issued a Notice under section 160 of the CrPC dated 27.06.2012 seeking information in relation to credit facilities being extended to ZHV Securities by MCB.

19. MCB and its employees facing constant harassment by FIA filed C.P No. 2822 of 2012 for the quashment of the inquiry and the Notice issued in relation thereto. Restraining Orders were duly granted by the Hon'ble High Court.

20. That in the meanwhile the relevant FIA officer (IO/Respondent No.3) continued to file various Criminal Miscellaneous Applications before the District and Sessions Judge (Karachi, South). These matters were heard ex-parte and orders based on misrepresentations were solicited.

21. However, despite this MCB was able to file a reply under Section 6 (3) of the Bankers Book Evidence Act 1891 and thereafter the Sessions Court was pleased to restrain FIA and its IO from harassing MCB and its employees.

22. Thereafter, despite the management of MCB co-operating with FIA, the same filed an FIR No. 22/13 on 01.10.2013. The FIR

23. The pith and substance of the FIR is that the accused persons of MCB and the directors of ZHV Securities, fraudulently pledged securities belonging to Mr Hai without any approval or authorisation. Thus there was no allegation of any wrongdoing against MCB Bank in the FIR.

24. That in light of the fore-going the following litigation was initiated:

    A. MCB filed C.P. No. 2822 of 2012 to impugn Enquiry No. 29/2011 and thereafter C.P. No. 3990 of 2013 seeking the quashment of FIR No. 22/2013;

    B. MCB's serving officers who were constantly being harassed filed CP. No. 4131 of 2013;

    C. MCB's (2) former employees who worked at the Stock Exchange branch and whose names were entered in the FIR filed C.P No. 4047 of 2013.

25. ZHV Securities also filed (2) separate Petitions, which were then all tagged together and decided.

26. That vide Judgment dated 30.05.2018, all six Petitions were dismissed by the Hon'ble High Court.

27. The Judgment is entirely based upon (2) findings:

    a. That ZHV Securities pledged the shares with MCB to raise funds for ZHVS's own use and as such the was unwarranted;

    b. That secondly that the CDC Act 1997 being a special law does not oust the applicability of the Pakistan Penal Code in the facts and circumstances in the case, because the CDC Act does not provide for the proper punishment of the persons involved in the matter.

Karachi.

Dated: 30.8.2025

Search Cases

Karachi (

Advance Sear

Pending

Previous Search

Defamation Sui

Suit (Received

Suit (Rec

Search Result

S.No	Case No
1	Hudood T STATE V/ JAMEEL
2	Criminal B 173/2015 the state
3	Ist Class C 173/2015 Hai V/S A Zakaria
4	First Rent 173/2015 Muhamma
5	Family Su Mst.Tania V/S Kamr Suhrward
6	S.M.A 173 Bano V/S
7	Criminal F 173/2015 SHO MEH
8	Misc. Rent 173/2015 Nasir

Case Profile

5

Case Detail

Case No	Ist Class Civil Suits 173/2015, Khawaja Saeed Hai V/S Abdul Majeed Zakaria 1736201500500058O	**Court**	Senior Civil Judge / Assistant Sessions Judge VI, Karachi (South)
Advocate 1	S. Faiq Hussain Rizvi(ADVO-2514-SBC-KHS)	**Advocate 2**	Jam Asif Mehmood Lar(ADVO-10595-SBC-KHS)
Under Section	C.P.C.-Suit for damages		

S.No	Diary	Date
1	Case called. None is present from plaintiff side. Advocate for 2 is present. None is present advocate for defendant No.1. Order passed on order sheet. In view of above circumstances, the civil suit in hand is hereby dismissed in non-prosecution with no order as to cost. Resultantly all listed applications, if any, are also disposed of accordingly. Order sheet placed on record.	05/Apr/2021
2	Case called. None is present from plaintiff side. Advocate for 2 is present. None is present advocate for defendant No.1. Put off to 05/04/2021 for cross to defendant and hearing on application for change of attorney U/S 151CPC article 540 Qnoon-e-shahdat 1984 as last & final chance.	02/Apr/2021
3	Case called. None is present from plaintiff side. Advocate for 2 is present. None is present advocate for defendant No.1. Put off to 02/04/2021 for cross to defendant and hearing on application for change of attorney U/S 151CPC article 540 Qnoon-e-shahdat 1984 as last & final chance.	11/Mar/2021
4	Case called. None is present from plaintiff side. Advocate for 2 is present. None is present advocate for defendant No.1. Put off to	13/Feb/2021

CURITIES &

ng

Action

IN THE HIGH COURT OF SINDH, KARACHI

C. Ps. Nos. D- 2641, 2668, 2688 and of 2012 & 4207/2011

Present: Sajjad Ali Shah, J.
Naimatullah Phulpoto, J.

Date of hearing: 12.04.2013 & 17.04.2013.

Petitioners: MCB Bank Limited & others through Mr. Haider Waheed, Advocate.

Respondents 4&5: Razzak Latif & Raheel Latif through Mr. Manzoor Hameed Arain, Advocates.

Respondents 1&2: Federation of Pakistan & Federal Investigation Agency through Mr. Jawaid Farooqui, D.A.G. alongwith Mirza Tanveer Ahmed of FIA

ORDER

Naimatullah Phulpoto, J.:-- By this single order we would dispose of aforesaid constitutional petitions as in all petitions quashment of FIR No.33/2012 dated 05.07.2012 under sections 406/409/468/471/109/34 PPC lodged at P.S. FIA, CBC, Karachi and enquiry in C.P. No.4207/2011 have been sought.

2. Brief facts leading to filing of instant Petitions are that the Petitioner No.1 is a private brokerage firm registered with Karachi Stock Exchange and Securities Exchange Commission of Pakistan (SECP). The Petitioners are engaged in the business of trading and brokerage of equities and securities/shares on various Stock Exchanges of the country and maintain account with CDC in terms of the provisions of the Central Depository Act 1997. The Respondent No.2 is F.I.A, which is created for conducting inquiry and investigation in the offences specified in the Schedule thereto, including an attempt or conspiracy to commit and abetment of any such offence, but limited to the offences committed in connection with matters only concerning Federal Government and matters therewith. Respondent No.3 is Inspector of Commercial Banking Circle working under the Economic Crime Wing of the Respondent No.2, responsible for investigation of cases pertaining to pilferage of

Government revenue occurring through evasion of taxes/duties levied by the Federal Government. Respondents Nos.4 and 5 jointly held an Account No.012-036 with Petitioner No.1 to trade in shares and securities listed on the Stock Exchange(s) and Central Depository Company. Furthermore, Respondent No.4 was also a part of the Management and Board of Directors of the Petitioner No.1 and had provided personal Bank guarantees for obtaining credit facilities for Petitioner No.1 from Financial Institutions being Director of the Company. It is alleged that the Petitioner No.1 availed certain finance facilities from the MCB Bank Limited and Bank Al-Falah Limited to adjust the debit balance of the Respondents Nos. 4 - 5 and as security for the finance facilities being availed by the petitioner No.1, the same created pledge over various book entry securities, from time to time in accordance with the law. The pledge created over the book entry securities of the Respondents No.4 and 5 was released by MCB and Bank Al-Falah Limited way back in the year 2008 and the entire liabilities owed by the Petitioner No.1 to the said Banks have been repaid since 2010. It is stated that civil disputes arose between the Respondents Nos. 4 and 5 with the Petitioner No.1 and its management. On the basis of such disputes, civil suits as well as constitutional petitions have been filed by the Petitioner No.1 as well as the Respondents Nos. 4 and 5 against each other, which are pending adjudication. It is alleged that the Respondent No.4 also filed several frivolous complaints with the Respondent No.2 whereupon an inquiry No.139/2011 was initiated by the Respondents Nos. 2 and 3 under the provisions of the FIA Act 1974. The Respondent No.2 prior to Inquiry No.139/2011 has conducted inquiry pertaining to the same matter, firstly initiated by Mr. Rashid Qureshi, I.O, in May 2009 and closed thereafter in November 2009. Thereafter, an inquiry was again re-opened by Mr. Ali Murad I.O pertaining to the said matter in February 2010 and closed subsequently in May 2011. The said inquiry culminated into registering of FIR No.33/2012 dated 05.07.2012 by the Respondent No.3, it has been alleged by the Respondent No.3 in the impugned FIR that the Petitioners Nos. 2–4 and the official/Directors of the Petitioner No.1 were involved in the commission of the offences. The alleged rationale behind the FIR is that the Petitioners pledged the book entry securities owned by the Respondent no.4 and 5 available in their Account and also violated Circular No.15/2008 dated 24th June 2008 issued by the State Bank of Pakistan. It is alleged that conducting of inquiry and

lodging of FIR against the Petitioners are without jurisdiction and illegal and are therefore liable to be quashed.

3. Notices were issued to the respondents as well as D.A.G.

4. Comments have been filed by respondents No.1 to 3, in which allegations of the Petitioners have been denied. It is stated that F.I.A is conducting investigation in Crime No.33/2012 u/s 406/409/468 PPC regarding illegal pledge of shares of Rs.47168594/- owned by Abdul Razak and Raheel Latif in favour of MCB and Bank Al-Falah Karachi and fraudulently obtained financial facilities, without knowledge of owners. Interim challan has already been submitted and Special Court (Offence in respect of Banks) Sindh at Karachi has exclusive jurisdiction in the matter. It is prayed for dismissal of the instant petition.

5. Mr. Haider Waheed, learned counsel for the petitioners contended that dispute between the parties is of civil nature and civil dispute has been converted to the criminal case against the petitioners by lodging F.I.R. No.33/2012, under Sections 406/409/468/471/109/34 P.P.C. at P.S. FIA CBC Karachi. It is further contended that Respondents No.2 and 3 have no jurisdiction to entertain a complaint filed by Respondents Nos. 4 and 5 in respect of private dispute with company against Petitioners. It is further submitted that proceedings would be nothing but abuse of process of law and the case would not end to conviction. He has placed reliance on the case reported as ***Waqar Ali and others v. The State (P L D 2011 Supreme Court 181).***

6. Mr. Jawaid Farooqi, D.A.G. argued that civil and criminal proceedings can proceed simultaneously and FIA has jurisdiction in the matter to investigate crime in respect of money involved in the commercial banks. Lastly, it is contended that petition is not maintainable under the law.

7. We have carefully perused the contents of the F.I.R. No.33/2012 registered at P.S. FIA CBC Karachi on 05.07.2012, under Sections 406/409/468/471/109/34 P.P.C. and documents available on record.

8. It appears that dispute arose between the respondents No.4 & 5 with the Company and its management, on the basis of such dispute

various civil as well as constitutional petitions have been filed which are pending adjudication. It is admitted by learned D.A.G. that dispute between the parties is of civil nature. In the case of ***Waqar Ali and others (supra)*** Honourable Supreme Court of Pakistan has held as under:

> *"8. It is clear from section 3 ibid that in order to constitute an offence thereunder the complaint must disclose the existence of both, an unlawful act (actus reas) and criminal intent (mens rea). In view of the allegations and circumstances considered above, it is apparent that even if it is ultimately established that the appellants are in occupation of an area owned by the respondent-complainant, there is no indication that they also had the necessary criminal intent. On the contrary, the averments in the complaint point in the opposite direction and show at best, that there is a dispute of a purely civil nature between the parties as to the exact location of their respective parcels of land. It is in these circumstances, and with the aforesaid background in mind that learned counsel for the respondent-complainant was asked to state if an inadvertent encroachment would constitute an offence under section 3 of the Act. He replied in the affirmative. We are afraid his response is against the express wording of the statute which requires the existence of a guilty intention for the purpose of assuming jurisdiction. For reasons considered above, guilty intent, does not exist in the present case. Learned counsel for the respondent did advert to some precedents in support of his submission to the contrary. However, the ratio of the cited precedents is not attracted in the presence case as will be shown shortly."*

9. From the facts and circumstances of the case, we have come to the conclusion that the civil dispute has been converted to the criminal litigation. In fact dispute is between the two private persons, which is pending before competent Court. F.I.A has no jurisdiction to entertain complaint lodged by Respondents Nos. 4 and 5 in respect of private dispute with company against Petitioners. Moreover, violation of circular issued by State Bank of Pakistan constitutes no criminal offence. Therefore, proceedings would be nothing but abuse of process of Court. Consequently proceedings emanating from Crime No.33/2012, under Sections 406/409/468/471/ 109/34 P.P.C. registered at P.S. F.I.A. CBC Karachi and enquiry are hereby quashed.

10. Needless to mention that concerned respondents would be at liberty to adopt legal course available to them under the law if advised so.

Petitions are accordingly disposed of.

JUDGE

19

JUDGE

Gulsher/PA

9. Foregoing are the reasons for our short order, which reads thus:-

"We have heard arguments of the learned ASCs for both parties. For reasons to be recorded separately, this appeal is allowed. The impugned judgment dated 17.09.2013, passed by the learned Division Bench of the Islamabad High Court in Intra Court Appeal No.872 of 2013 and judgment dated 20.05.2013, passed by the learned single Judge in Chambers of the Islamabad High Court in Writ Petition No.975 of 2011, are set aside, and the Writ Petition filed by Respondents Nos.1 to 20 is accordingly dismissed.

(2) At this stage, learned ASC for appellant has clarified that Respondents Nos. 1 to 20 have been earlier upgraded to Scale-13, therefore, he will ensure payment of their salaries along with arrears, if any, from the date of their upgradation in Scale-13. Moreover, if need be, their cases for further upgradation will also be considered. Order accordingly."

MWA/G-9/SC

Appeal allowed.

2016 S C M R 447

[Supreme Court of Pakistan]

Present: Ijaz Ahmed Chaudhry, Umar Ata Bandial and Maqbool Baqar, JJ

DIRECTOR GENERAL, FIA and others---Appellants

versus

KAMRAN IQBAL and others---Respondents

Civil Appeal No. 350-L of 2009, decided on 25th November, 2015.

(Against Order dated 13-11-2008 of the Lahore High Court, Lahore passed in Writ Petition No. 11056 of 2008)

(a) Federal Investigation Agency Act (VIII of 1975)---

----Preamble & Sched.---Penal Code (XLV of 1860), S. 489-F---S.R.O. No.977(I)/2003 dated 08-10-2003---Federal Investigation Agency, jurisdiction of---Offences under the Pakistan Penal Code, 1860---Registration of FIR---Dispute between private individuals---Federal Investigation Agency was not competent and did not have the

jurisdiction to register an FIR under S. 489-F, P.P.C. for a dispute between two private individuals in respect of a purely business transaction---Schedule to the Federal Investigation Agency Act, 1975 granted jurisdiction to the Federal Investigation Agency to act in respect of several offences, however for exercising jurisdiction in such offences there had to be some nexus between the offences complained of and the Federal Government---Present case did not even remotely involve the Federal Government or for that matter any governmental entity, thus Federal Investigation Agency had no jurisdiction to record the FIR in question---High Court was correct in ordering quashment of such FIR---Appeal was dismissed accordingly. [pp. 449, 450] A & D

Waris Meah's case PLD 1957 SC (Pak) 157 ref.

(b) Interpretation of statutes---

----Preamble to an enactment---Preamble to a statute was not an operative part thereof, however the same provided a useful guide for discovering the purpose and intention of the legislature. [p. 449] B

Murree Brewery Company Limited v. Pakistan through the Secretary of Government of Pakistan and others PLD 1972 SC 279 ref.

(c) Interpretation of statutes---

----Object of statute---'Purposive approach'---While interpreting a statute a purposive approach should be adopted in accord with the objective of the statute and not in derogation to the same. [p. 449] C

(d) Federal Investigation Agency Act (VIII of 1975)---

----S. 5(1)---Investigation launched without jurisdiction or lawful authority--- Effect--- Such investigation was liable to be struck down. [p. 450] F

Zakriya Sh., DAG and Ahmed Rizwan, AD FIA for Appellants.

Ch. Naseer Ahmed Sandhu, Advocate Supreme Court for Respondent No.1.

Date of hearing: 24th August, 2015.

JUDGMENT

MAQBOOL BAQAR, J.---The order assailed through this appeal has been passed by a learned Single Judge of the Lahore High Court ordering quashment of an FIR in the Constitutional Jurisdiction.

2. The respondent through the aforesaid proceedings sought quashment of an FIR recorded by the Federal Investigation Agency (FIA) on the complaint of a private person against the respondent for an offence under section 489-F, P.P.C. The complainant alleged that he started business in the field of Iron Ore and Gypsum with the Respondent. In terms of the agreement executed between them, the business financed by the complainant, was to be carried out/conducted by the respondent as an operational/working partner. In this regard, the respondent drew a cheque in favour of the complainant and delivered it to him. Though the respondent was obliged to furnish accounts for the money he spent in the business, however, he failed to comply. The aforesaid cheque when presented to the bank was dishonoured for lack of funds. The complainant thus, lodged the above FIR.

3. The question raised before the learned High Court was of competence and jurisdiction of the FIA to record the subject FIR and conduct investigation thereunder. The learned High Court found that though in terms of SRO 977(1)/2003 Section 489-F, P.P.C. has been incorporated in the schedule of offences under the FIA Act, 1974, however, since the FIA has been established for the investigation of offences committed in connection with matters concerning the Federal Government, and for matters connected therewith and thus does not enjoy any power or jurisdiction in relation to a purely private business dispute between the two individuals, allowed the petition, and quashed the proceedings emanating from the said FIR.

4. There is no cavil to the proposition that the FIA has been established/constituted for investigation of certain offences committed in connection with matters concerning the Federal Government and in connection therewith. Such is discernable from the preamble of The Federal Investigation Agency Act ("The Act"), which reads as follows:- A

> *"Whereas it is expedient to provide for the constitution of a Federal Investigation Agency for the investigation of certain offences committed in connection with matters concerning the Federal Government, and for matters connected therewith".*

5. Indeed, preamble to a Statute is not an operative part thereof, however, as is now well laid down that the same provides a useful guide for discovering the purpose and intention of the legislature. Reliance in this regard may be placed on, the case of *Murree Brewery Company Limited v. Pakistan through the Secretary of Government of Pakistan and others (PLD 1972 SC 279)*. It is equally well established principle that while interpreting a, Statute a purposive approach should be B C

adopted in accord with the objective of the Statute and not in derogation to the same.

6. Keeping in view the intent of the Act as spelt out from the preamble and the fact that through the Act the FIA, in terms of the schedule to the Act has been granted jurisdiction and power to act in respect of several offences under the P.P.C. which are cognizable by the local police also, and also in order to avoid a conflict of jurisdiction, the only conclusion that the Court may draw is that for exercising jurisdiction in the matter of the offences enumerated in the schedule to the Act there has to be some nexus between the offences complained of and the Federal Government or else there shall be overlapping of the jurisdiction of the local police and the FIA creating an anomalous situation which certainly is not the intent of the legislature. Another aspect of concern is that though in terms of notification, bearing SRO 977(1)/2003, Section 489-F, P.P.C. has been made a scheduled offence under the FIA Act, but no reasonable classification has been provided for exercising such power and it is left to the discretion of the concerned officer of the FIA to exercise his authority and jurisdiction under the Act in respect of the said offence, which militates against the protection enshrined by Article 25 of the Constitution of Islamic Republic of Pakistan. If a citizen is exposed to the proceedings in respect of an offence lodged against him which could be initiated before more than one forums, a reasonable classification is the requirement of the Constitution.

7. Under somewhat similar circumstances where validity of certain provisions of the Foreign Exchange Regulations Act, providing three modes of trial and punishment for offences under the Act, were called in question before this Court in *Waris Meah's Case (PLD 1957 SC (Pak) 157)*, and it was found that under the said legislation, State Bank was authorized to proceed in respect of the offences under the Act before more than one forum. The Court whilst observing that the Statute does not provide a guideline for classification of persons required to be tried before a certain forum, held that the provision which conferred such arbitrary discretion to choose any of the three different forums prescribed by the Act without classification was *ex facie* discretionary, and violative of Article 5(i) of the 1956 Constitution (which is akin to Article 25 of the Constitution 1973), although the question then before the Court was of the discretion in the choice of forum for trial, however, the ratio of the case and the principle enunciated therein is equally applicable at the investigation stage as well as the discretion of choice of forum of trial in the matter also lies with FIA.

8. In the present case, as noted earlier, the dispute is between two

private individuals. It is in respect purely of a business transaction, and there is not the remotest involvement of the Federal or for that matter any Government or any governmental entity and thus in view of the foregoing circumstances, the FIA has had no jurisdiction in the matter. It is now well settled that an investigation launched beyond jurisdiction is *mala fide* and without lawful authority and is liable to be struck down.

9. In the circumstances, we are of the view, that the FIA has had no jurisdiction in the matter and the learned Judge has rightly allowed the respondent's petition. The appeal is, therefore, dismissed but with no orders as to cost.

MWA/D-9/SC Appeal dismissed.

2016 S C M R 451

[Supreme Court of Pakistan]

Present Sarmad Jalal Osmany, Muhammad Athar Saeed and Mushir Alam, JJ

INDUSTRIAL DEVELOPMENT BANK OF PAKISTAN---Appellant

versus

HYDERABAD BEVERAGE COMPANY PRIVATE LIMITED and others---Respondents

Civil Appeal No. 42-K of 2010, decided on 26th September, 2014.

(Against judgment dated 20-2-2009 of High Court of Sindh at Karachi, passed in High Court Appeal No.287 of 2007)

(a) Contract Act (IX of 1872)---

----S. 133---Discharge of surety/guarantor by variance in terms of contract---Continuous guarantee---Scope---Finance agreement between bank and borrower with respondent standing as guarantor/surety---Default by borrower---Concession/settlement agreement between bank, borrower and guarantor for rescheduling the loan arising out of the original finance agreement---Liability of guarantor/surety would continue in such circumstances as liability of guarantor/surety was co-extensive with the principal borrower, and more so since guarantor had waived his right and or defence in the present case against any variation of loan agreement.

appeal before the High Court against the respondent's acquittal. The legal position which emerges is that the State/Federal Government could competently file an appeal before the High Court; the Director-General Anti-Narcotics Force could act in the matter as a delegatee of the Federal Government; and the function of the Anti-Narcotics Force regarding filing of an appeal could competently be performed by any official of the Force, including a Special Prosecutor, as directed by the Director-General, Anti-Narcotics Force. In this view of the matter the whole controversy over the State and the Director-General having acted in the case before the High Court through a Special Prosecutor has appeared to us to be making a fetish of technicalities which cannot be allowed to defeat the ends of justice if the jurisdictional competence is not doubted in the matter of filing of the appeal by the State/Federal Government/ the Director-General, Anti-Narcotics Force. These observations made to us also take care of the argument addressed before us regarding the State acting in this case before the High Court through a Force Commander because it is not doubted that it was the State which had filed the appeal before the High Court and even before this Court it is the Special Prosecutor who is prosecuting the matter.

7. For what has been discussed above this appeal is allowed. The impugned judgment passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi on 16.06.2010 is set aside and the matter is remanded to the said Court to decide Criminal Appeal No. 424 of.2003 afresh on its merits.

MWA/S-15/SC Case remanded

2017 S C M R 1218

[Supreme Court of Pakistan]

Present: Mian Saqib Nisar, C.J., Umar Ata Bandial and Faisal Arab, JJ

Syed MUSHAHID SHAH
and others---Appellants/Petitioners

versus

FEDERAL INVESTMENT AGENCY
and others---Respondents

Civil Appeals Nos. 2561 to 2568 of 2016 and Civil Petitions Nos. 2779-L to 2785-L, 2793-L, 3182-L, 3183-L, 3224-L, 3328-L, 3253-L, 3299-L, 3300-L, 3345-L, 3553-L to 3557-L and Criminal Petition No. 1050-L of 2016, decided on 15th May

(On appeal against the judgment dated 26.05.2016, 27.09.2011, 17.11.2016 and 23.06.2016 of the Lahore High Court, Lahore passed in W.Ps. Nos.31284, 35792, 36199, 36555 and 36556 of 2015, 6720/2016, 3932/2011, 36331/2015, 22010/2013, 22011/13, 22013/13, 22015/13, 13821/16, 13845/16, 13855/16, 22012/2013, 9712/2009, 14030/2011, 1379/2011, 4428/2011, 23901/2009, 1456-Q/2012, 15460/2011, 15461/2011, 19532/2014, 14898/2011, 19731/2012, 19732/2012, 19733/2012, 19734/2012 and Crl. Rev.487/2016 respectively)

(a) Law---

----'General' and 'Special' law---Scope and distinction---General law was one that was unrestricted in terms of its applicability to all issues covered by its subject matter, whereas special law may be restricted to certain localities, persons or types of cases---Whether a law was general or special depended on the particular features of the statute in issue and was ultimately a question of relativity between two or more statutes on the common subject matter. [p. 1224] A

(b) Penal Code (XLV of 1860)---

----Ss. 1(2) & 5---Criminal Procedure Code (V of 1898), Ss. 1(2), 5(1), 5(2) & 29(1)---General law---Scope---Pakistan Penal Code, 1860 and Criminal Procedure Code, 1898 were both general law and would cede to any special law. [pp. 1224, 1232] B & F

(c) Interpretation of statutes---

----Non obstante clause---Scope and definition---Non obstante clause was a phrase used in documents to preclude any interpretation contrary to the stated object or purpose. [p. 1230] C

Principles of Statutory Interpretation (13th Ed.); Packages Limited through General Manager and others v. Muhammad Maqbool and others PLD 1991 SC 258 and Muhammad Mohsin Ghuman and others v. Government of Punjab through Home Secretary, Lahore and others 2013 SCMR 85 ref.

(d) Interpretation of statutes---

----'General' and 'Special' law---Where there was a conflict between a special law and a general law, the former would prevail over the latter. [p. 1232] E

Muhammad Mohsin Ghuman and others v. Government of Punjab through Home Secretary, Lahore and others 2013 SCMR 85 ref.

18

(e) Interpretation of statutes---

----Conflict between two laws providing different punishments for the same offence---Law providing greater punishment must relent in favour of the law ordaining the lesser punishment. [p. 1233] G

(f) Interpretation of statutes---

----'Special law'---Conflict between two special laws containing overriding clauses---When there were two special laws both of which contained overriding clauses, and there was a conflict between them, generally the statute later in time would prevail over the statute prior in time---Said presumption, however, was not automatic, instead a host of other factors including the object, purpose and policy of both statutes and the legislature's intention, as expressed by the language employed therein, needed to be considered in order to determine which of the two special laws was to prevail. [p. 1239] I

Shri Ramah-Narain v. The Simla Banking and Industrial Co Ltd. 1956 SCR 603; Kumaon Motor Owners' Union Ltd. and another v. The State of Uttar Pradesh AIR 1966 SC 785 = [1966] 2 SCR 122; Sarwan Singh v. Kasturi Lal AIR 1977 SC 265; Ashok Marketing Ltd. and another v. Punjab National Bank and others (1990) 4 SCC 406; Slidaire India Ltd. v. Fairgrowth Financial Services Ltd. and others (2001) 3 SCC 71; Bhoruka Steel Ltd. v. Fairgrowth Financial Services Ltd. 5 (1997) 89 Comp Cas 547; Messrs Maruti Udyog Ltd. v. Ram Lal and others (2005) 2 SCC 638; State of Bihar and others v. Bihar M.S.E.S.K.K. Mahasangh and others AIR 2005 SC 1605; Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd. AIR 2007 SC 65; Employees Provident Fund Commissioner v. O. L. of Essem Pharmaceuticals Limited AIR 2012 SC 11; State v. Syed Mir Ahmad Shah and another PLD 1970 Quetta 49 and I.G. HQ Frontier Corps and others v. Ghulam Hussain and others 2004 SCMR 1397 ref.

(g) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 4, 7(4), 7(5)(a) & 20---Offences in Respect of Banks (Special Courts) Ordinance (IX of 1984), Ss. 4 & 12---Constitution of Pakistan, Arts. 4 & 25---Offence falling under the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 and also under the provisions of Offences in Respect of Banks (Special Courts) Ordinance, 1984---Forum competent to try such offence---Financial Institutions (Recovery of Finances) Ordinance, 2001, shall have an overriding effect in case of such offences---Were both laws to apply concurrently and permit of parallel platforms for the adjudication of offences under

both laws then banks/financial institutions would always choose to initiate proceedings under the more onerous law, i.e. Offences in Respect of Banks (Special Courts) Ordinance, 1984---Such an interpretation would give banks/financial institutions unbridled power to choose the forum before which trial of offences should take place, and they would obviously choose the Special Courts under the Offences in Respect of Banks (Special Courts) Ordinance, 1984 being more burdensome and prejudicial to the accused---Natural corollary was that in such circumstances the Financial Institutions (Recovery of Finances) Ordinance, 2001 would, in effect, be rendered redundant, which was not permissible under any principle of interpretation of law, when the courts were trying to reconcile two potentially conflicting laws---To allow forums under both the laws to operate concurrently would offend the provisions of Art. 25 of the Constitution, which provided that all citizens were equal before the law and were entitled to equal protection of the law---In the absence of any defined guidelines on the basis of which cases may be tried under either law, it would tantamount to conferring unfettered discretion on financial institutions to pick and choose the forum as per their free will, which would be violative of the rule against discrimination---Furthermore if both the Financial Institutions (Recovery of Finances) Ordinance, 2001 and Offences in Respect of Banks (Special Courts) Ordinance, 1984 were to enjoy concurrent jurisdiction, citizens alleged to have committed an offence in respect of finances would be left wondering which offence they would be charged with, which court they would be tried in and under what procedure---Such a situation would be an affront to the provisions of Art. 4 of the Constitution.

[pp. 1243, 1244, 1247, 1248] J, K, L, M & N

Waris Meah v. (1) The State (2) The State Bank of Pakistan PLD 1957 SC 157 **ref.**

(h) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 4, 7(4), 7(5)(a) & 20---Offences in Respect of Banks (Special Courts) Ordinance (IX of 1984), Ss. 4 & 12---Criminal Procedure Code (V of 1898), Ss. 1(2), 5(1), 5(2) & 29(1)---Federal Investigation Agency, Act, 1974 (VIII of 1975), S. 3(1)---Banking Companies Ordinance (LVII of 1962), S. 83A---Offence falling within the provision of the Financial Institutions (Recovery of Finances) Ordinance, 2001---Forum competent to try such offence---Whenever an offence was committed by a customer of a financial institution within the contemplation of the Financial Institutions (Recovery of Finances) Ordinance, 2001, it could only be tried by the Banking Court constituted thereunder and no other forum---Special Courts under the

both laws then banks/financial institutions would always choose to initiate proceedings under the more onerous law, i.e. Offences in Respect of Banks (Special Courts) Ordinance, 1984---Such an interpretation would give banks/financial institutions unbridled power to choose the forum before which trial of offences should take place, and they would obviously choose the Special Courts under the Offences in Respect of Banks (Special Courts) Ordinance, 1984 being more burdensome and prejudicial to the accused---Natural corollary was that in such circumstances the Financial Institutions (Recovery of Finances) Ordinance, 2001 would, in effect, be rendered redundant, which was not permissible under any principle of interpretation of law, when the courts were trying to reconcile two potentially conflicting laws---To allow forums under both the laws to operate concurrently would offend the provisions of Art. 25 of the Constitution, which provided that all citizens were equal before the law and were entitled to equal protection of the law---In the absence of any defined guidelines on the basis of which cases may be tried under either law, it would tantamount to conferring unfettered discretion on financial institutions to pick and choose the forum as per their free will, which would be violative of the rule against discrimination---Furthermore if both the Financial Institutions (Recovery of Finances) Ordinance, 2001 and Offences in Respect of Banks (Special Courts) Ordinance, 1984 were to enjoy concurrent jurisdiction, citizens alleged to have committed an offence in respect of finances would be left wondering which offence they would be charged with, which court they would be tried in and under what procedure---Such a situation would be an affront to the provisions of Art. 4 of the Constitution.

[pp. 1243, 1244, 1247, 1248] J, K, L, M & N

Waris Meah v. (1) The State (2) The State Bank of Pakistan PLD 1957 SC 157 ref.

(h) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---

----Ss. 4, 7(4), 7(5)(a) & 20---Offences in Respect of Banks (Special Courts) Ordinance (IX of 1984), Ss. 4 & 12---Criminal Procedure Code (V of 1898), Ss. 1(2), 5(1), 5(2) & 29(1)---Federal Investigation Agency, Act, 1974 (VIII of 1975), S. 3(1)---Banking Companies Ordinance (LVII of 1962), S. 83A---Offence falling within the provision of the Financial Institutions (Recovery of Finances) Ordinance, 2001---Forum competent to try such offence---Whenever an offence was committed by a customer of a financial institution within the contemplation of the Financial Institutions (Recovery of Finances) Ordinance, 2001, it could only be tried by the Banking Court constituted thereunder and no other forum---Special Courts under the

21

Offences in Respect of Banks (Special Court) Ordinance, 1984, the ordinary criminal Courts under the Criminal Procedure Code, 1898, and the Federal Investigation Agency under the Federal Investigation Agency, Act, 1974 read with the Banking Companies Ordinance, 1962 would have no jurisdiction in the matter---Provisions of the Financial Institutions (Recovery of Finances) Ordinance, 2001 were to have an overriding effect on anything inconsistent contained in any other law for the time being in force. [pp. 1231, 1233, 1249] D, H & O

Shahid Ikram Siddiqi, Advocate Supreme Court for Appellants (in C.A. 2561 of 2016).

Shahid Ikram Siddiqi, Advocate Supreme Court for Petitioners (in C.Ps. 3182, 3183, 3224, 3225, 3228, 3299, 3300-L/16) (did not appear on 01.03.2017)

Salman Aslam Butt, Senior Advocate Supreme Court for Appellants (in C.As. 2562-2568 of 2016).

Salman Aslam Butt, Senior Advocate Supreme Court for Petitioners (in C.Ps. 2779-2785, 2793-L of 2016).

Nemo for Petitioners (in C.P. No. 3253-L of 2016).

Haq Nawaz Chatha, Advocate Supreme Court for Petitioners (in C.P. 3345-L of 2016).

Shazaib Masood, Advocate Supreme Court for Petitioners (in C.Ps. 3553-3557-L of 2016) (did not appear on 01.3.2017)

Mian Asghar Ali, Advocate Supreme Court for Petitioners (in Crl. Petition 1050-L of 2016).

Rashdeen Nawaz Qasuri, Advocate Supreme Court, Senior Qasim Farooq Ali, Advocate Supreme Court and Amir Wakeel Bhatti, Advocate Supreme Court for the Respondents for Bank of Punjab.

Abdul Hameed Chohan, Advocate Supreme Court for First Women Bank and UBL.

Raja Nadeem Haider, Advocate Supreme Court for Burj Bank.

Nemo for MCB.

Sajid Ilyas Bhatti, DAG and Raja Abdul Ghafoor, Advocate-on-Record for FIA.

Razzak A. Mirza, Additional A.-G., Punjab and Rana Abdul Majeed, Additional P.-G. for the State.

Dates of hearing: 21st, 22nd, 28th February and 1st March, 2017.

JUDGMENT

MIAN SAQIB NISAR, C.J.---These appeals with the leave of the Court and petitions for leave to appeal *(civil and criminal)* are being disposed of together as they involve a common question of law: whether the Banking Courts constituted under the Financial Institutions (Recovery of Finances) Ordinance, 2001 *(the Ordinance, 2001)* have exclusive jurisdiction to try the offences mentioned therein to the exclusion of the Special Courts constituted under the Offences in Respect of Banks (Special Courts) Ordinance, 1984 *(the ORBO)*, the courts of ordinary criminal jurisdiction under the Code of Criminal Procedure, 1898 *(the Code)* read with the Pakistan Penal Code, 1860 *(the P.P.C.)* and from inquiry and investigation by the Federal Investigation Agency *(the Agency)* under the Federal Investigation Agency Act, 1974 *(the Act, 1974)*.

2. The appellants/petitioners are customers of the respondents *(financial institutions)* who may be divided into two categories. In the first category, the customers are alleged to have committed offence(s) of either removing the hypothecated or pledged goods, disposing of the mortgaged properties and/or of breaching the terms of the finance agreement, instrument, etc. The financial institutions filed complaints against them before the Special Courts constituted under the ORBO and the Agency under the Act, 1974. In the second category, cheques issued by the customers to the financial institutions were dishonoured and cases *(FIRs)* were registered against the former under the provisions of section 489-F of the P.P.C. Aggrieved, the customers approached the learned High Court directly by filing either constitution or revision petitions, or under section 561-A of the Code, claiming that action could only be taken against them under the Ordinance, 2001 *(in particular section 20 thereof)* and no other law, and exclusive jurisdiction vests with the Banking Courts constituted under the said Ordinance. Through the impugned judgments, the learned High Court dismissed the matters holding that concurrent jurisdiction vests in the Banking Courts constituted under the Ordinance, 2001, the Special Courts constituted under the ORBO, the ordinary criminal courts and the Agency, and the jurisdiction of the latter two courts and the Agency would not be ousted on account of sections 4 and 20 of the Ordinance, 2001. Thereafter, the customers approached this Court and leave in the appeals was granted in the following terms:-

> *"It is contended by the learned counsel for the Petitioners that by way of the impugned judgment dated 26.05.2016 passed in Writ Petition No.33423 of 2013, titled Faisal Farooq and 3 others v. SHO and another, the learned Lahore High Court has misinterpreted sections 7(4) and 20 of the Financial*

23

Institutions (Recovery of Finances) Ordinance, 2001, to hold that the Banking Court did not have exclusive jurisdiction to try offences mentioned in the Ordinance of 2001 and that criminal proceedings can be launched independently in a forum, which is mentioned in the said Ordinance, 2001. It is further contended that the learned Lahore High Court has failed to take into consideration the dictum laid down by this Court in the judgment, reported as Waris Meah v. The State and another (PLD 1957 Supreme Court (Pak.) 157) and the Articles 4, 10-A and 25 of the Constitution of Islamic Republic of Pakistan, 1973.

2. Leave is granted, inter alia, to consider the aforesaid contentions of the learned counsel for the petitioners."

The extensive arguments of the learned counsel for the parties are not recorded separately, but shall be reflected during the course of this opinion.

3. We begin with the concept of general and special law. General law is one that is unrestricted in terms of its applicability to all issues covered by its subject matter. In juxtaposition special law may be restricted to certain localities, persons or types of cases. Whether a law is general or special depends on the particular features of the statute in issue and is ultimately a question of relativity between two or more statutes on the common subject matter. The P.P.C. is a comprehensive code for creating all criminal offences in Pakistan and applies throughout the country *(Section 1)*. Every person is liable to punishment under the P.P.C. for every act or omission contrary to its provisions *(Section 2)*. Accordingly, the P.P.C. is undoubtedly a general law. Similarly, the Code is also a general law as it applies to the whole of Pakistan *[Section 1(2)]* and deals with investigation, inquiry and trial etc. of all offences under the P.P.C. *[Section 5(1)]*.

4. Initially, all criminal offences *(barring a few)* in Pakistan were tried by the courts of ordinary criminal jurisdiction under the Code and the P.P.C., i.e. the general law, and this included offences committed with respect to banks. Subsequently, the Banking Companies (Recovery of Loans) Ordinance, 1978 *(the Ordinance, 1978)* was promulgated to provide for a summary procedure for recovery of loans of banking companies and connected matters. Section 3 of the Ordinance, 1978 provided that *"The provisions of this Ordinance shall be in addition to and, save as hereinafter expressly provided, not in derogation of any other law for the time being in force."* According to this law, banking disputes pertaining to the recovery of loans by a banking company from a borrower were made subject to the jurisdiction *(civil and criminal)*

the Special Courts constituted thereunder, and no Court other than a Special Court was to possess or exercise any jurisdiction with respect to any matter to which the jurisdiction of such Court extended under the Ordinance, 1978 *[Section 8(4)]*. Banking offences *(and their punishments)* were prescribed, all of which were bailable, non-cognizable and compoundable *(Section 11)*. As is evident from its salient features, the Ordinance, 1978 was a special law. The Ordinance, 1978 was repealed and replaced with the Banking Companies (Recovery of Loans) Ordinance, 1979 *(the Ordinance, 1979)* which re-enacted the former with some modifications.

4(sic.) On 31.12.1984, the Banking Tribunals Ordinance, 1984 *(the Ordinance, 1984)* was promulgated to provide a machinery for the recovery of finance provided by banking companies under a system of financing which is not based on interest *(Preamble)*. This law closely followed the Ordinance, 1979 to quite an extent. One major difference was the phrase *"without prejudice to any other action which may be taken against him under this Ordinance or any other law for the time being in force"* which appeared in the provisions relating to offences *(Section 7)*. In 1997, both the Ordinances of 1979 and 1984 were repealed and replaced by the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Ordinance, 1997 *(the Ordinance, 1997)* which eventually culminated into the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 *(the Act, 1997)*. The Act, 1997 essentially amalgamated the Ordinances of 1979 and 1984 creating one single statute for banking companies to recover loans or finances *(interest based and interest-free)* from borrowers or customers respectively. Like its predecessors, the Act, 1997 contained a non-derogation clause, and the 'without prejudice' clause in the provisions relating to offences *(Section 19)*, akin to the one in the Ordinance, 1984. The Ordinances of 1984 and 1997 and the Act, 1997 were indubitably special laws, containing features similar to those of the Ordinances of 1978 and 1979.

6(sic.) The final link in the chain is the Ordinance, 2001. It repealed and re-enacted the Act, 1997, albeit with certain modifications. The Ordinance, 2001 established Banking Courts which deals with disputes *(civil and criminal)* between financial institutions and customers in respect of finances availed by the latter. Sections 4, 7 and 20 of the Ordinance, 2001 are important and read as follows:-

> *4. 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.*

7. Powers of Banking Courts.–(1) Subject to the provisions of this Ordinance, a Banking Court shall–

(a) .....

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

Provided that a Banking Court shall not take cognizance of any offence punishable under this Ordinance except upon a complaint in writing made by a person authorised in this behalf by the financial institution in respect of which the offence was committed.

...

(4) Subject to subsection (5) no Court other than a Banking Court shall have or exercise any jurisdiction with respect to any matter to which the jurisdiction of a Banking Court extends under this Ordinance, including a decision as to the existence or otherwise of a finance and the execution of a decree passed by a Banking Court.

(5) Nothing in subsection (4) shall be deemed to affect–

(a) the right of a financial institution to seek any remedy before any court or otherwise that may be available to it under the law by which the financial institution may have been established; or

(b) the powers of the financial institution, or jurisdiction of any Court such as is referred to in clause (a);

or require the transfer to a Banking Court of any proceedings pending before any financial institution or such Court immediately before coming into force of this Ordinance.

20. Provisions relating to certain offences.– (1) Whoever–

(a) dishonestly commits a breach of the terms of a letter of hypothecation, trust receipt or any other instrument or document executed by him whereby possession of the assets or properties offered as security for the repayment of finance or fulfillment of any obligation are not with the financial institution but are retained by or entrusted to him for the purposes of dealing with the same in the ordinary course of business subject to the terms

of the letter of hypothecation or trust receipt or other instrument or document or for the purpose of effecting their sale and depositing the sale proceeds with the financial institution; or

(b) makes fraudulent mis-representation or commits a breach of an obligation or representation made to a financial institution on the basis of which the financial institution has granted a finance; or

(c) subsequent to the creation of a mortgage in favour of a financial institution, dishonestly alienates or parts with the possession of the mortgaged property whether by creation of a lease or otherwise contrary to the terms thereof, without the written permission of the financial institution; or

(d) subsequent to the passing of a decree under section 10 or 11, sells, transfers or otherwise alienates, or parts with possession of his assets of properties acquired after the grant of finance by the financial institution, including assets or properties acquired benami in the name of an ostensible owner

shall, without prejudice to any other action which may be taken against him under this Ordinance or any other law for the time being in force, be punishable with imprisonment of either description for a term which may extend to three years and shall also be liable to a fine which may extend to the value of the property or security as decreed or the market value whichever is higher and shall be ordered by the Banking Court trying the offence to deliver up or refund to the financial institution, within a time to be fixed by the Banking Court, the property or the value of the property or security.

Explanation.– Dishonesty may be presumed where a customer has not deposited the sale proceeds of the property with the banking company in violation of the terms of the agreement between the financial institution and the customer.

(2) Whoever knowingly makes a statement which is false in material respects in an application for finance and obtains a finance on the basis thereof, or applies the amount of the finance towards a purpose other than that for which the finance was obtained by him, or furnishes a false statement of stocks in violation of the terms of the agreement with the financial institution or falsely denies his signatures on any banking document before the Banking Court, shall be guilty of an offence punishable with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

(3) Whoever resists or obstructs, either by himself or on behalf of the judgment debtor, through the use of force, the execution of a decree, shall be punishable with imprisonment, which may extend to one year, or with fine, or with both.

(4) Whoever dishonestly issues a cheque towards repayment of a finance or fulfillment of an obligation which is dishonoured on presentation, shall be punishable with imprisonment which may extend to one year, or with fine or with both, unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque.

(5) .....

[(6) All offences under this Ordinance shall be triable by a Banking Court in accordance with section 7. All offences, except for the offence of willful default, shall be bailable, non-cognizable and compoundable.][1]

[(7) Notwithstanding anything to the contrary provided in any other law for the time being in force, action in respect of an offence of willful default shall be taken by an investigating agency, to be nominated in this behalf by the Federal Government, on a complaint in writing filed by an authorized officer of a financial institution after it has served a thirty days (sic) notice upon the borrower demanding payment of the loan, advance or financial assistance.][2]

(8) An offence of willful default shall be cognizable, non-bailable and non-compoundable and punishable with imprisonment which may extend to seven years or fine not exceeding the amount of default or with both.

(9) .....

[Emphasis supplied]

Like its predecessor statutes, the Ordinance, 2001 is also a special law as it created a special forum, i.e. Banking Courts, to deal with the recovery of finance by financial institutions from customers, and created certain offences in respect thereof which were also to be tried by such Courts. The Ordinance, 2001 basically carved out a portion of the jurisdiction of the ordinary courts, both civil and criminal.

---

1 Subs. and added by Act XXXVIII of 2016, section 9.

2 Subs. and added by Act XXXVIII of 2016, section 9.

7. A few months before the Ordinance, 1984 was enacted the ORBO was promulgated on 23.02.1984. It provides for the speedy trial of certain offences committed in respect of banks and for matters connected therewith or incidental thereto *(Preamble)*. Special Courts were created *(Section 3)* to try 'scheduled offences' defined in section 2(d) to mean *"an offence specified in the First Schedule and alleged to have been committed in respect, or in connection with the business, of a bank;"* Clause (a) of the First Schedule provides *"Any offence punishable under any of the following sections of the Pakistan Penal Code (Act XLV of 1860), namely:- Sections [201, 204, 217, 218, 380][3], 403, 406, 408, 409, [419, 420][4], 467, 468, 471, 472, 473, 475 and 477-A" (some of which are subject to certain modifications as set out in the Second Schedule of ORBO read with Section 6(2) thereof)*. Sections 4, 5 and 12 (relevant parts) of the ORBO read as under:-

> *4. Scheduled offence to be tried by Special Court.--- (1) Notwithstanding anything contained in the Code, the scheduled offences shall be triable exclusively by a Special Court.*
>
> *5. Procedure of a Special Court.---(1) A Special Court may take cognizance of any scheduled offence upon receiving a complaint of the facts which constitute such offence or upon a report in writing of such facts made by any police officer.*
>
> *12. Ordinance to override other laws. The provisions of this Ordinance shall have effect notwithstanding anything contained in the Code or in any other law for the time being in force.*

The ORBO created Special Courts which were given exclusive jurisdiction to try various offences *(Section 4)* stipulated in the P.P.C. but incorporated into the ORBO by way of legislative reference *(scheduled offences)* which were/are committed in respect of or in connection with the 'business of a bank'. Furthermore, no new offences specific to the ORBO were created by it: instead the existing offences in the P.P.C. were incorporated through legislation by reference *(note:- punishment was increased)*. It is patently clear that the ORBO is a special law in light of its aforementioned features, as it wrests some of the jurisdiction of the ordinary criminal courts.

8. As established, the Code and P.P.C. are general laws whilst the ORBO and the Ordinance, 2001 are special laws. The appellants' case is that an offence committed in relation to a finance agreement inter se the

---

[3] Inserted by SRO No.396(I)/85 dated 24.8.1985.

[4] Inserted by SRO ibid.

29

financial institution and the customer, that falls within the orbit of the Ordinance, 2001 can only be tried by the Banking Courts constituted thereunder and that the Special Courts constituted under the ORBO or the ordinary criminal courts under the Code would have no jurisdiction. Equally the jurisdiction of the Agency under the Act, 1974 would also stand excluded by the criminal complaint procedure provided in section 20 of the Ordinance, 2001. In the above configuration of laws, does the Ordinance, 2001 have an overriding effect over the Code and the P.P.C., the ORBO and the Act, 1974?

9. Section 7(4) of the Ordinance, 2001 confers exclusive jurisdiction on the Banking Courts with respect to certain matters albeit subsection (5) creates an exception to the exclusive jurisdiction of the Banking Courts. This confers a right on the financial institution to seek any remedy before any court or otherwise which may be available to it under the law by which the financial institution may have been established *[Section 7(5)(a)]*. According to section 4 of the Ordinance, 2001 reproduced above, its provisions *"shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."* This is essentially a non obstante clause which is defined as *"A phrase used in documents to preclude any interpretation contrary to the stated object or purpose."*[5] 'Notwithstanding' means despite, in spite of or regardless of something. In this respect Justice G. P. Singh[6] has aptly explained:-

> *"A clause beginning with 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force', is sometimes appended to a section in the beginning, with a view to give the enacting part of the section in case of conflict an overriding effect over the provision or Act mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment."*

In the judgment reported as *Packages Limited through its General Manager and others v. Muhammad Maqbool and others (PLD 1991 SC 258)* this Court observed:-

> *"In our opinion a 'non obstante' clause operates as an ouster of the earlier provisions only where there is a conflict and*

---

5 Black's Law Dictionary (9th Ed.)

6 Principles of Statutory Interpretation (13th Ed.)

inconsistency between the earlier provisions and those contained in the later provision and, therefore, must be read in the context in which it is operating. Accordingly, a non obstante clause will operate as ouster only if an inconsistency between the two is found to exist."

In the judgment reported as *Muhammad Mohsin Ghuman and others v. Government of Punjab through Home Secretary, Lahore and others (2013 SCMR 85)*, this Court cited with approval a passage from Interpretation of Statutes by N. S. Bindra which reads as under:-

"It has to be read in the context of what the legislature conveys in the enacting part of the provision. It should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing law which is inconsistent with the new enactment. The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously, for even apart from such clause a later law abrogates earlier laws clearly inconsistent with it.

The proper way to construe a non obstante clause is first to ascertain the meaning of the enacting part on a fair construction of its words. The meaning of the enacting part which is so ascertained is then to be taken as overriding anything inconsistent to that meaning in the provisions mentioned in the non obstante clause. A non obstante clause is usually used in a provision to indicate that that provision should prevail despite anything to the contrary in the provision mentioned in such non obstante clause. In case there is any inconsistency between the non obstante clause and another provision one of the objects of such a clause is to indicate that it is the non obstante clause which would prevail over the other clauses. It does not, however, necessarily mean that there must be repugnancy between the two provisions in all such cases. The principle underlying non obstante clause may be invoked only in the case of 'irreconcilable conflict'."

From the above it is clear that the non obstante clause of section 4 of the Ordinance, 2001 has been used by the legislature to give the provisions of the said Ordinance an overriding effect over any other law for the time being in force which may be contrary thereto. The use of the word

'notwithstanding' in section 4 ibid indicates the legislative intent to avoid the operation of conflicting provisions, by providing that in the event of such conflict, the provisions of the Ordinance, 2001 would take precedence over any such inconsistent law.

10. So, does the Ordinance, 2001 override the provisions of the Code and the P.P.C.? This question pertains to the second category of cases *(identified in the second paragraph of this opinion)* in which cheques issued by the customers to the financial institutions were dishonoured and FIRs were registered against the former under the provisions of section 489-F of the P.P.C. It is a settled canon of interpretation that where there is a conflict between a special law and a general law, the former will prevail over the latter. In *Muhammad Mohsin Ghuman's case (supra)* this Court observed that *"special statute overtakes the operation of general statute"*. At this juncture, it is useful to point out certain relevant provisions of the Code and the P.P.C. Section 1(2) of the Code provides that *"...in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."* According to section 5(1) of the Code, all offences under the P.P.C. *"shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained"*, whereas subsection (2) thereof states that *"All offences, under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."* Section 29(1) of the Code provides *"Subject to the other provisions of this Code, any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court."* While section 5 of the P.P.C. stipulates that *"Nothing in this Act [P.P.C.] is intended to repeal, vary, suspend or affect any of the provisions...of any special or local law."* These provisions make it clear that not only do the Code and the P.P.C. recognize special laws, but they indicate that such general laws would cede to the special laws. The phrase 'for the time being in force' *[in Section 1(2) of the Code]* has been interpreted by a five member bench of this Court in the judgment reported as *(1) Mian Iftikhar-ud-Din, and (2) Arif Iftikhar v. (1) Muhammad Sarfraz Administrator, Progressive Papers Ltd. (2) The Government of Pakistan (PLD 1961 SC 585)* to mean that it will apply not only to those existing statutes enacted in the past, but also to those which may be enacted in the future. Thus the Code does not affect any special laws including the Ordinance, 2001.

11. This overriding effect of section 20(4) of the Ordinance on section 489-F of the P.P.C. is brought out by the following comparison:-

Inconsistency	Ordinance, 2001	P.P.C.
Elements of the offence	20(4). Whoever dishonestly issues a cheque towards re-payment of a finance or fulfillment of an obligation which is dishonoured on presentation,	489-F. Dishonestly issuing a cheque. Whoever dishonestly issues a cheque towards repayment of a loan or fulfilment of an obligation which is dishonoured on presentation,
Punishment	shall be punishable with imprisonment which may extend to one year, or with fine or with both,	shall be punished with imprisonment which may extend to three years or with fine, or with both,
Burden of proof	unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque.	unless he can establish, for which the burden of proof shall rest on him, that he had made arrangements with his bank to ensure that the cheque would be honoured and that the bank was at fault in not honouring the cheque.

The above comparison of sections 20(4) of the Ordinance, 2001 and 489-F of the P.P.C. suggests that there is a clear conflict between them – they are worded in identical terms *[save for the word 'finance' in section 20(4) as opposed to 'loan']* but the former provides for a lesser punishment of imprisonment which may extend to one year, or with fine or with both, whereas the latter stipulates a punishment of imprisonment which may extend to three years or with fine, or with both. Therefore section 489-F cannot simultaneously apply to a situation where an offence under section 20(4) of the Ordinance, 2001 is made out on account of the disparity in punishment. The law providing greater punishment must relent in favour of the law ordaining the lesser punishment. The ineluctable conclusion is that the Ordinance, 2001 overrides the Code and the P.P.C. where an offence has been committed which falls within the purview of the former; and exclusive jurisdiction would vest in the Banking Courts constituted thereunder *(the Ordinance, 2001)* to the exclusion of the ordinary criminal courts.

We are not convinced by the argument of the learned counsel for the respondents that the Ordinance, 2001 could not override section 489-F of the P.P.C. as the former law was promulgated on 30.08.2001 whereas the latter was inserted into the P.P.C. by way of amendment on 25.02.2002, because as mentioned above, the phrase *"for the time being in force"* applies to future enactments as well, thus mere insertion of a provision in a general law after the special law comes into

force would not make the general law override the special law. In fact, this insertion after the promulgation of the Ordinance, 2001 negates the respondents' argument for the reason that it shows that the object was to also make the dishonouring of cheques to be an offence in ordinary cases apart from those cases involving a customer and a bank which are dealt with by the Ordinance, 2001.

12. The other question which arises is, does the Ordinance, 2001 override the provisions of the ORBO? This relates to the first category of cases *(identified in the second paragraph of this opinion)*. As established above, both the Ordinance, 2001 and the ORBO are special laws, therefore their respective scope and sphere of application needs to be examined in order to determine the relationship between the two. In other words, which law is the more special? To answer this question, it is necessary to elucidate the law on this subject.

Case law from the Indian jurisdiction on this subject is quite extensive. In the case of *Shri Ramah Narain v. The Simla Banking and Industrial Co. Ltd. (1956 SCR 603)*, the Indian Supreme Court, while considering the effect of the overriding effect of two special laws, held as follows:-

> *"On the other hand, if the rule as to the later Act overriding an earlier Act is to be applied to the present case, it is the Banking Companies (Amendment) Act, 1953, that must be treated as the later Act and held to override the provisions of the earlier Displaced Persons (Debts Adjustment) Act, 1951. It has been pointed out, however, that section 13 of the Displaced Persons (Debts Adjustment) Act, uses the phrase "notwithstanding anything inconsistent therewith in any other law for the time being in force" and it was suggested that this phrase is wide enough to relate even to a future Act if in operation when the overriding effect has to be determined. But it is to be noticed that section 45-A of the Banking Companies Act has also exactly the same phrase.. What the connotation of the phrase "for the time being" is and which is to prevail when there are two provisions like the above each containing the same phrase, are questions which are not free from difficulty. It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein."*

In *Kumaon Motor Owners' Union Ltd. and another v. The State of Uttar Pradesh (AIR 1966 SC 785 = [1966] 2 SCR 122)* the Indian Supreme

Court compared the provisions of the Motor Vehicles Act, 1939 and the Defence of India Act, 1962, particularly Sections 68-B and 43 thereof respectively, and held that the latter would prevail over the former. In the judgment of *Sarwan Singh v. Kasturi Lal (AIR 1977 SC 265)*, the Indian Supreme Court relied upon *Shri Ram Narain's case (supra)* and observed as under:-

> *"When two or more laws operate in the same field and each contains a non obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration."*
>
> *[Emphasis supplied]*

In *Ashok Marketing Ltd. and another v. Punjab National Bank and others [(1990) 4 SCC 406]*, the Supreme Court of India referred to the cases of *Shri Ram Narain, Kumaon Motor Owners' Union* and *Sarwan Singh (supra)* and held as under:-

> *"The principle which emerges from these decisions is that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein. We propose to consider this matter in the light of this principle."*

In *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. and others [(2001) 3 SCC 71]*, it was observed:-

> *"It is clear that both these Acts are special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail. The decisions cited in the above context are as follows: Maharashtra Tubes Ltd. v. State Industrial and Investment Corpn. of Maharashtra Ltd; [1993] 2 SCC 144]; Sarwan Singh v. Kasturi Lal [1977] 2 SCR 421]: Allahabad Bank v. Canara Bank [(2000) 4 SCC 406] and Ram Narain v. Simla Banking and Industrial Co., Ltd. [1956] 1 SCR 603]."*

The Court went on to quote, with approval, the ratio of the decision in *Bhoruka Steel Ltd v. Fairgrowth Financial Services Ltd. [5 (1997) 89 Comp Cas 547 (Special Court)]*, the relevant extract of which reads as under:-

> *"It is a settled rule of interpretation that if one construction*

35

leads to a conflict, whereas on another construction, two Acts can be harmoniously constructed then the latter must be adopted."

In *Messrs Maruti Udyog Ltd. v. Ram Lal and others [(2005) 2 SCC 638]* the Indian Supreme Court relied on *Solidaire India's case (supra)* and held that:-

"The said Act contains a non obstante clause. It is well-settled that when both statutes containing non obstante clauses are special statutes, an endeavour should be made to give effect to both of them. In case of conflict, the latter shall prevail."

The Indian Supreme Court in *State of Bihar and others v. Bihar M.S.E.S.K.K. Mahasangh and others (AIR 2005 SC 1605)* reiterated the principles in *Swaran Singh's case (supra)* and the Principles of Statutory Interpretation by Justice G. P. Singh (9th Ed.). In *Morgan Securities and Credit Pvt. Ltd. v. Modi Rubber Ltd. (AIR 2007 SC 683)*, it was held that:-

"Both the Acts contain non obstante clauses. Ordinary rule of construction is that where there are two non obstante clauses, the latter shall prevail. But it is equally well-settled that ultimate conclusion would depend upon the limited context of the statute."

In the judgment reported as *Employees Provident Fund Commissioner v. O. L. of Esskay Pharmaceuticals Limited (AIR 2012 SC 11)* the Court reiterated the principles enunciated in the cases of *Shri Ram Narain, Kumaon Motor Owners' Union* and *Ashok Marketing (supra)* and held that:-

"Another rule of interpretation of Statutes is that if two special enactments contain provisions which give overriding effect to the provisions contained therein, then the Court is required to consider the purpose and the policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions."

13. As regards the case law from the Pakistani jurisdiction, in the judgment reported as *State v. Syed Mir Ahmed Shah and another (PLD 1970 Quetta 49)* Justice Muhammad Afzal Zullah comprehensively dealt with the issue of implied repeal. He discussed and compared the various features of the Pakistan Criminal Law Amendment Act (XL of 1958) and the Criminal Law (Special Provisions) Ordinance (II of 1968) and concluded that for an accused person the mode of trial under the Act is far more beneficial than that under the Ordinance, that both the statutes

are inconsistent with each other and clearly exclude the application of the other. He enunciated the accepted general principles for the avoidance of conflict between different statutes as under:-

> *"(i) If the provisions of a later Act are so inconsistent with those of an earlier Act that both cannot stand together, the earlier stands impliedly repealed by the later. This principle is based on the maxim leges posteriores priores contrarias abrogant. In other words, it means that the latest expression of the will of the Legislature must prevail. This, of course, is subject to the condition contained in the next principle. That is: if the prior enactment is special and the subsequent enactment is general, the earlier special Legislation will not be, indirectly, repealed, altered or derogated from merely by force of the general words of the later statute, without any indication of a particular strong intention to do so.*
>
> *(ii) A general later law does not abrogate, by mere implication, an earlier particular or special law which deals with a special object or a special class of objects. This principle is based on the maxim generalia specialibus non derogant. But when a general Act is incorporated into a special one, the provisions of the latter would prevail over any of the former with which they are inconsistent. If one statute enacts something in general terms, and afterwards another statute is passed on the same subject, which, although expressed in affirmative language, introduces special conditions and restrictions, the subsequent statute will usually be considered as repealing by implication the former, for "affirmative statutes introductive of a new law do imply a negative". However, if a subsequent statute merely creates an exception from the operation of a previous statute, the previous statute is not necessarily repealed.*
>
> *(iii) When the later of two general enactments is couched in negative terms or in such affirmative terms which unequivocally involve negative which proves fatal to the earlier enactment, the earlier one is impliedly repealed.*
>
> *(iv) When the two statutes are expressed in negative terms, they may be affirmative inter se and may not be contradictory to each other; though the effect of both may be that they are negative as regards a third statute 'at which both of them may have made some inroads'. When seen in this light, an apparent conflict of two statutes is found as without any reality. Because they (sic) objects may be different and both may be parallel; and each may be restricted to its own particular subject or locality.*

37

(v) If the co-existence of the two inconsistent statutes would be destructive of the object for which the later was passed, the earlier would be deemed to have been repealed.

(vi) In so far as the Penal Acts are concerned, if a later statute again describes an offence created by a former one, and provides a different punishment, creates a new jurisdiction and remedy and varies the procedure-modifying the manner or changing the forum of trial or appeal, the earlier statute is impliedly repealed by the later unless, of course, both of them can exist in parallel application to different localities, subjects or objects.

(vii) When the words are clear and capable of proper operation, the revocation or alteration of a statute by construction is not permissible. The Legislature is normally not presumed to have intended to keep two contradictory enactments on the statute-book with the intention of repealing the one with the other, without expressing an intention to do so. Such an intention cannot be imputed to the Legislature without some strong reasons and unless it is inevitable. Before adopting the last-mentioned course, it is necessary for the Courts to exhaust all possible and reasonable constructions which offer an escape from repeal by implication.

(viii) All other consideration being equal, if the inconsistency, in spite of applying all general principles of interpretation of statutes, cannot be resolved, a statute more beneficial in remedy or method of taking action will override the statute which is not so beneficial.

The list of the principles on the subject is, by no means, exhaustive. Departures from the above principles have been made in individual cases on the basis of the language used in, and the intention found in respect of, particular statute. The approach in Pakistan on various questions of interpretation of statutes, as compared to India, has usually been pragmatic rather than technical. It was observed in the case of Badrul Haque (PLD 1963 SC 704), that "the fundamental rule of interpretation to which all others are subordinate is that a statute is to be expounded according to the intent of them that made it". Therefore, it has to be laid down as a governing rule that whenever there are two possible interpretations, the one destroying the intention of the Legislature in passing the Act should not be adopted. But once the intention having been

discovered and words having been given correct meaning and interpretation, the Courts will not refuse to give effect to the Legislation merely because it appears to be harsh, unreasonable or even vindictive; because these attributes of a statute fall within the field of policy of the Legislature and go beyond the ambit of the jurisdiction of the Courts. This, of course, is subject to the question of mala fides of the Legislature in enacting a law and the further question whether or not on that basis the Courts can go into validity of a particular law. That subject is not relevant to the discussion of the present case. Therefore, no comments are made thereon.

The principles laid down in *Mir Ahmed Shah's case (supra)* were cited with approval in the judgment of this Court reported as *I. G. HQ Frontier Corps and others v. Ghulam Hussain and others (2004 SCMR 1397)*. Thus, when there are two special laws both of which contain overriding clauses, in the case of conflict between the two laws generally the statute later in time will prevail over the statute prior in time. However, we are of the opinion that this presumption is not automatic: instead a host of other factors including the object, purpose and policy of both statutes and the legislature's intention, as expressed by the language employed therein, need to be considered in order to determine which of the two special laws is to prevail.

14. In the light of the above, a comparison of the salient features of both the laws is necessary:-

Inconsistency	*Ordinance, 2001*	*ORBO*
Object	*Providing a special forum and procedure for redressal of grievances, both civil and criminal, between a "financial institution" [Section 2(a)] and a "customer" [Section 2(c)] arising out of or in relation to "finance" [Section 2(d)] [proviso to Section 7(1)(b)]*	*Providing a forum and procedure for trial of offences committed in respect of or in connection with the "business of a bank" [Sections 2(d) and 4]*
Subject	***Civil*** *Customer and financial institution (Section 9)* ***Criminal*** *Whoever commits an offence in relation to obligations arising out of the finance in respect of a financial institution (Section 20)*	*No civil jurisdiction* ***Criminal*** *Any person committing a scheduled offence in relation to the business of a bank [Sections 2(d) and 4]*

Procedure	***Initiation of proceedings*** *Only upon a complaint in writing made by a person authorised by the financial institution in respect of which the offence was committed* *No First Information Report as the offences are non-cognizable other than willful default [Section 20(6)]* ***Bail*** *All offences, other than willful default, are bailable [Section 20(6)]* ***Compounding*** *All offences, other than willful default, are compoundable [Section 20(6)]* ***Forum*** *To be exclusively tried by a Banking Court [Section 7(4)]*	***Initiation of proceedings*** *Upon a complaint by any person; or* *A report in writing made by any police officer [Section 5(1)]* ***Bail*** *Not to be released on bail if there appear reasonable grounds of guilt [Section 5(6)]* *In case of bail, the amount of bail bond to be fixed in relation to the amount involved and cannot be less than such amount [Section 5(7)]* ***Compounding*** *Most of the scheduled offences are non-compoundable* ***Forum*** *To be exclusively tried by a Special Court [Section 4(1)]*
Punishment	*For offences falling in Section 20(1) and (2), three years imprisonment and fine* *For offences falling in Section 20(3) and (4), one year imprisonment and fine*	*For the P.P.C. offences in the Second Schedule, not less than seven years, and/or fine, while the other P.P.C. offences in the First Schedule, which may extend to seven/three/two/one-fourth part of the longest term of the imprisonment provided for the offence, and/or fine (First and Second Schedule)* *Amount of fine to be fixed having regard to the gravity of the offence, and where the offence is committed with respect to a specific amount, not less than twice the said amount [Section 6(3)]*
Impediments and burden of proof		***Dealing with property*** *After taking cognizance, an accused, relatives of the accused and persons acting on his behalf are barred from dealing with moveable and immoveable properties without permission of the Special Court (Section 7)*

		Bar against leaving Pakistan *After taking cognizance, an accused cannot travel abroad without permission of the Special Court [Section 8(1)]* ***Bar against employment*** *After taking cognizance, an accused cannot be employed for any service without permission of the Special Court [Section 8(2)]* ***Burden of proof*** *Presumption of guilt against an accused and burden of proof on accused in respect of his assets as well as those of his relatives (Section 9)*

15. As mentioned earlier, section 4(1) of the Ordinance, 2001 is an overriding clause. However, an almost identical overriding clause can be found in section 12 of the ORBO, save for the fact that it does not contain the words 'inconsistent therewith' after 'notwithstanding anything'. We find this omission to be insignificant, as the legislature's intent is clear; that the provisions of the ORBO be given effect in spite of anything contained in the Code or any other law for the time being in force. Thus both laws are special and contain competing overriding clauses. As stated earlier in this opinion, the object and purpose of the ORBO was to create Special Courts to provide for the speedy trial of 'scheduled offences' which are offences committed in respect, or in connection with the business of a bank. 'Business of a bank' has been elaborately explained in the judgment reported as *A. Habib Ahmed v. M. K. G. Scott Christian and 5 others (PLD 1992 SC 353)* to mean:-

> *The definition of scheduled offence as contained in section 2(d) of the Ordinance does include a rider to be to the offences which are mentioned in the schedule and which undoubtedly are alleged in this case. The rider is that those offences should have been alleged to have been committed "in respect of or in connection with the business of bank". It needs to be emphasized that the expression "business of a bank" used in the definition would have to be given extended meaning on account of the use of two such further open ended expressions which connote very wide meaning for the words "business" and the "Bank". These are "in respect of" or "in connection with". The scrutiny of the meanings of these words and expressions in the classical sources together with the modern usages and scope of Banking business, leave absolutely no doubt that there will be*

left out of their ambit only extremely rare cases. They somehow or the other, are linked with the modern extended banking practices in trade business, industry and finance, domestic and other; besides the earlier known scope of their operation. Take, for example, the word "Business" as separate from the word "Bank". Again take all that goes with the modern banking business and all that is included in the banking procedures. Not only this, banking activities both with regard to the depositors dealings as well as dealings in trading and other enterprises are their business. There is no need to dilate upon the scope of the expressions "in respect of" and "in connection with" any further.

...The intention being that all conceivable situations, linked with the business of the bank, would make the offences mentioned in the schedule as scheduled offences. Thus to take away all such cases from the ordinary Courts, for purpose of their trial before the Special Courts (Banks).

[Emphasis supplied]

Thus the conceptual construct of 'business of the bank' and the scope of the ORBO are interlinked. Furthermore, the number as well as the ambit of the offences specified in the First Schedule to the ORBO is relatively wide. The following cases illustrate the variety of offences that fall within the purview of the ORBO:-

i. Misappropriation of funds by bank employee – *Muhammad Yaqub Ali v. The State (PLD 1985 Lah. 48);*

ii. Forgery of title deeds by mortgagee and non-verification of documents by bank employee *Asif Mahmood v. The State (1987 PCr.LJ 896);*

iii. Bank guarantee forged by a bank employee – *The State v. Muhammad Iqbal (1987 PCr.LJ 1096);*

iv. Cashier running away with the cash of a bank – *Manzoor Ahmed v. The State (1989 MLD 4890);*

v. Forgery of banking instrument by an account holder to claim a higher sum– *Asmat Qadri v. The State (PLD 1989 Kar. 276);*

vi. Embezzlement of money from bank account maintained with a bank – *Allied Bank of Pakistan Ltd. v. Khalid Farooq (1991 SCMR 599);*

vii. Fraudulent sale of shares by a bank employee, which were held as security by the bank – *A. Habib Ahmed's case (supra);*

viii. Forgery of cheques for withdrawal of amount by an account holder – *Ghulam Mustafa v. Presiding Officer, Special Court (Offences Against Banks), Rawalpindi and 2 others (2003 MLD 841);*

ix. Manipulation of pay order by an account holder – *Muhammad Moinuddin v. Presiding Officer, Special Court (Offences in Banks), Sindh at Karachi and 3 others (2011 PCr.LJ 1488)*; and

x. Fraudulent misappropriation from bank account by a bank employee and embezzlement – *Hamad Raza through Special Attorney v. The State and 2 others (2014 CLD 1493).*

On the other hand, the Ordinance, 2001 established Banking Courts which deal with disputes *(civil and criminal)* between financial institutions and customers in respect of finances availed by the latter and investigate and try offences stipulated therein. Section 20 of the Ordinance, 2001 indicates that there are numerous elements of each offence, making such offences far more specific than those triable by the Special Courts under the ORBO. Thus, perchance if a customer commits an act which constitutes an offence under any of the provisions of section 20(1) of the Ordinance, 2001 and the same act also constitutes an offence under the ORBO, and but for the Ordinance, 2001 being in force, such customer would have been tried under the ORBO, then it could be said that there was/is a definite overlap between the two laws and the Courts established under the ORBO may not exercise concurrent jurisdiction with respect to those acts/omissions which constitute offences under the Ordinance, 2001. The examples of cases listed above, falling within the purview of the ORBO, demonstrate that they do not extend to customers who are alleged to have committed offences which fall squarely within the purview of the Ordinance, 2001; rather they are restricted to the employees of banks, any third parties *(vis-à-vis customer and financial institution)* or in some instances customers but only when the act/omission does not fall within the ambit of the offences in the Ordinance, 2001. Therefore it is categorically held that the Ordinance, 2001 shall have an overriding effect on all those cases which are covered by it. Concomitantly, offences not covered by the Ordinance, 2001 would be triable under the ORBO. A comparative analysis shows that generally, proceedings before the Special Courts under the ORBO are more onerous and relatively disadvantageous to the accused. Under the ORBO, proceedings can be initiated on the basis of a complaint by any person or a report by a police officer *(as opposed to only a complaint by a financial institution under the Ordinance, 2001)*, the accused is not to be released on bail if there appear reasonable grounds of guilt *(whereas all offences apart from willful default are bailable under the Ordinance, 2001)*, most offences are non-compoundable, punishment of the offences

is generally of greater severity, the accused and persons acting on his behalf are barred from dealing with moveable and immoveable property without permission of the Special Court, the accused can neither leave Pakistan nor be employed for any service without the permission of the Special Court, and there is presumption of guilt and the burden of proof is on the accused.

16. The learned counsel for the respondents have argued that the Banking and Special Courts under the Ordinance, 2001 and the ORBO respectively enjoy concurrent jurisdiction, giving the financial institutions/banks a choice of forum before which the trial should take place: in this behalf they have relied upon section 20(1) of the Ordinance, 2001, according to which whoever commits any of the offences made out in parts (a) to (d) would be punishable to the extent mentioned therein, ***"without prejudice to any other action which may be taken against him under this Ordinance or any other law for the time being in force" [Emphasis supplied]***. Provisions enacted 'without prejudice' to other provisions means that the former would not affect the operation of the latter.[7] The 'without prejudice' clause reproduced above can be divided into two parts:- (i) any other action which may be taken against him under the Ordinance, 2001; and (ii) any other action which may be taken against him under any other law for the time being in force. As regards the first part, it means that if a person commits an offence which falls within the purview of Section 20 of the Ordinance, 2001, action can be taken against him under the said Ordinance, including, inter alia, a civil suit filed by a banking company before the Banking Court under section 9 thereof quite apart from action for committing another offence. As far as the second part is concerned, when the Ordinance, 2001 came into force, the ORBO was already in existence. Would this mean that if a person committed an offence which fell within the purview of section 20 of the Ordinance, 2001, parallel action could be taken against him under the ORBO? The answer depends on the scope of the phrase 'without prejudice'. In isolation this expression would speak to the legislature's intention that a financial institution be not confined to having recourse to only one specific remedy against a customer for offences committed by him in relation to the obligations of the finance availed, but to allow the banking company to choose its remedy. **However, we cannot subscribe to this point of view. Were both laws to apply concurrently and permit of parallel platforms for the adjudication of offences under both laws then banks/financial institutions would always choose to initiate proceedings under the more onerous law, in this case the ORBO. Such an interpretation would give banks/financial institutions**

[7] Justice G. P. Singh in Principles of Statutory Interpretation (13th Ed.)

unbridled power to choose the forum before which trial of offences should take place, and they would obviously choose the Special Courts under the ORBO being more burdensome and prejudicial to the accused *(as demonstrated above)*. A natural corollary is that in such circumstances the Ordinance, 2001 would, in effect, be rendered redundant. This is not permissible under any principle of interpretation of law when the Courts are trying to reconcile two potentially conflicting laws: our duty is to bridge the gap between what is and what was intended to be. We are not willing to attribute redundancy to the legislature. We do not wish to give financial institutions the unrestricted power to choose, when there has been an alleged dishonour of a cheque, between section 20(4) of the Ordinance, 2001 and section 489-F of the P.P.C., as they would of a certainty opt to initiate proceedings under the latter which offence carries a greater punishment than the former. In this context, the judgment reported as *Waris Meah v. (1) The State (2) The State Bank of Pakistan (PLD 1957 SC 157)* is relevant in which a five member bench of this Court held as under:-

> *In the present case, the question to be determined is whether the impugned Act is ex facie discriminatory, and we have no hesitation in saying that it is. Three tribunals with different powers and procedures have been set up. The Act creating them contains no indication as to which class or classes of cases are to go before a Court and which before the Tribunal and the Adjudication Officer and it does not impose upon the Central Government, the obligation, or expressly confer on it the power, of making rules with a view to classifying the cases to be tried by each of thesee (sic) tribunals. Nor does it define the principle or policy on which such classification may be made by the Central Government or the State Bank. The Central Government has not exercised its power of issuing any directions to the State Bank or of making any rules under section 27 for carrying into effect the provisions of the Act. The result, therefore, is that in the present state of the law no person who is alleged to have contravened any provision of the Act can know by which Court he is to be tried, and the question whether on conviction he shall be punished with imprisonment or should be punished with imprisonment and fine which may extend to any amount, or whether he should be let off with a mere penalty of three times the value of the amount involved rests entirely on the action that the Central Government or the State Bank may choose to take.*
>
> *It was contended on behalf of the State that in the present cases, it could not be said that discretion had not been exercised in a*

45

air and reasonable manner by the State Bank, in electing to send the cases to a Tribunal. On the allegations, the cases were of a serious character, and merited severe punishment. The mischief of the Act is, however, not susceptible of so simple a cure. It confers discretion of a very wide character upon stated authorities, to act in relation to subjects falling within the same class in three different modes varying greatly in severity. By furnishing no guidance whatsoever in regard to the exercise of this discretion, the Act, on the one hand, leaves the subject, falling within its provisions, at the mercy of the arbitrary will of such authority, and, on the other, prevents him from invoking his fundamental right to equality of treatment under the Constitution.

The Constitution declares in Article 5 (1) that "All citizens are equal before law and are entitled to equal protection of law" and Article 4 (1) provides that "Any existing law . . . . . in so far as it is inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void." That duty of declaring that a law is void, for violating a Fundamental Right defined in Part II rests on the Courts. That duty cannot be performed, so as to ensure that a law operates equally in relation to all persons within its mischief, if the law itself provides for differential operation in relation to such persons, not in accordance with any principle expressed or implicit in the law, not on the basis of any classification made by or under the law, but according to the unfettered discretion of one or more statutory authorities.

Here, not only is there discretion in the specified authorities whether they will proceed at all against any member of the class concerned, viz. offenders against the Act, but there is also an unfettered choice to pursue the offence in any one of three different modes which vary greatly in relation to the opportunity allowed to the alleged offender to clear himself, as well as to the quantum and nature of the penalty which he may incur. The scope of the unguided discretion so allowed is too great to permit of application of the principle that equality is not infringed by the mere conferment of unguided power, but only by its arbitrary exercise. For, in the absence of any discernible principle guiding the choice of forum, among the three provided by the law, the choice must always be, in the judicial viewpoint, arbitrary to a greater or less degree. The Act, as it is framed, makes provision for discrimination between persons falling, qua its terms, in the same class, and it does so in such manner as to render it impossible for the Courts to determine, in a particular

case, whether it is being applied with strict regard to the requirements of Article 5(1) of the Constitution.

In our view such a law has the effect of doing indirectly i.e., by leaving the discrimination within the unguided and unfettered discretion of statutory authorities, what it could not do directly i.e., to treat unequally persons falling within the same class, upon a basis which bears no reasonable relation to the purposes of the law. The Act is, therefore, in our opinion, in relation to its discriminatory provisions, inconsistent with the declaration of equality in Article 5(1) of the Constitution.

17. In addition to our opinion expressed above about the redundancy of the Ordinance, 2001 *(see paragraph No.16)*, to allow forums under the Ordinance, 2001 and the ORBO to operate concurrently would offend the provisions of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution) which provides that all citizens are equal before the law and are entitled to equal protection of the law; there being no defined guidelines on the basis of which cases may be tried under either law, it would tantamount to conferring unfettered discretion on financial institutions to pick and choose the forum as per their free will. Allowing them to do so would be violative of the rule against discrimination therefore we deem it best to restrict the applicability of the ORBO and hold that the Ordinance, 2001 is to have an overriding effect on the former. Furthermore, Article 4 of the Constitution confers upon the citizens the inalienable right to enjoy the protection of law and to be treated in accordance with law. This provision is reflective of the seminal concept of the rule of law, one of the elements of which is, as identified by Tom Bingham, that the law must be accessible and so far as possible intelligible, clear and predictable.[8] If both the Ordinance, 2001 and the ORBO were to enjoy concurrent jurisdiction, citizens alleged to have committed an offence in respect of finance would be left wondering which offence they would be charged with, which Court they would be tried in and under what procedure. Thus, to our minds, such a situation would also be an affront to the provisions of Article 4 of the Constitution.

18. There is another aspect to this matter. The 'without prejudice' clause was first introduced in the Ordinance, 1984. As mentioned in the beginning of this opinion, the Ordinance, 1984 was enacted to deal with the recovery of interest-free finance(s) as there already existed the Ordinance, 1979 to deal with regular loans. Both the laws were meant to operate side by side as they catered to two different types of finance/loan – interest free and otherwise. This is why the Ordinance,

[8] The Rule of Law (2010) by Tom Bingham.

1984 did not repeal the Ordinance, 1979, instead section 7 *(of the Ordinance, 1984)* included the phrase *"without prejudice to any other action which may be taken against him under this Ordinance or any other law for the time being in force"* This was to cater for situations where a customer/borrower had, for instance, taken a loan and an interest-free finance, and he had breached his obligations with respect to both: if action were to be taken against him under the Ordinance, 1984 for breach of his obligations with respect to the interest-free finance, it would not preclude any action that may be taken against him in respect of breach of his obligations with regard to the regular loan. Unfortunately this 'without prejudice' clause was retained in the Ordinance, 1997, the Act, 1997 and the Ordinance, 2001 when there was absolutely no need to do so since these enactments dealt with both regular and interest-free loans. It is a mere remnant and representative of thoughtless drafting.

18(sic.) It is for the aforesaid reasons that the phrase *"without prejudice to any other action which may be taken against him under... any other law for the time being in force"* appearing in section 20(1) of the Ordinance, 2001 has to be read down in order to arrive at a harmonious interpretation to the laws in question, without which the said Ordinance would be rendered superfluous *(at least to the extent of the offences)*. The principle of 'reading down' has been employed by this Court in numerous cases such as *Haroon-ur-Rashid v. Lahore Development Authority and others (2016 SCMR 931)* and *Province of Sindh through Chief Secretary and others v. M.Q.M. through Deputy Convener and others (PLD 2014 SC 531)* in order to save a statute and this is precisely what we are doing today. By reading down the aforementioned phrase in section 20(1) supra, we are adopting a harmonious interpretation in order to save the Ordinance, 2001, particularly the provisions of section 20 thereof from being rendered nugatory. The principle of harmonious interpretation has often been endorsed by this Court in cases such as *Lucky Cement Ltd. v. Commissioner Income Tax, Zone Companies, Circle-5, Peshawar (2015 SCMR 1494)* and *Aftab Shahban Mirani and others v. Muhammad Ibrahim and others (PLD 2008 SC 779)*. Thus, it is held that the scope of the offences in the ORBO is wider than those set out in the Ordinance, 2001, leading us to the conclusion that the ORBO would not apply to any acts or omissions which constitute an offence under the Ordinance, 2001. The same applies to the argument of the learned counsel for the respondents that the Agency had the jurisdiction under the Act, 1974 *(Section 3 and the Schedule)* with regard to the offence committed under section 83A of the Ordinance, 1962 *(and other provisions of the P.P.C.)*. When an act/omission that falls within section 83A supra *(or other provisions of the P.P.C.)* also constitutes an offence under section 20 of

the Ordinance, 2001, then the latter will prevail over the former and only the Banking Courts constituted under the Ordinance, 2001 would have the jurisdiction in the matter, to the exclusion of the Agency.

19. In conclusion, we find that the provisions of the Ordinance, 2001 are to have an overriding effect on anything inconsistent contained in any other law for the time being in force, including the ORBO, the Code *(read with the P.P.C.)* and the Act, 1974 *(read with the Ordinance, 1962)*. In essence, whenever an offence is committed by a customer of a financial institution within the contemplation of the Ordinance, 2001, it could only be tried by the Banking Courts constituted thereunder and no other forum. The Special Courts under the ORBO, the ordinary criminal Courts under the Code and the Agency under the Act, 1974 read with the Ordinance, 1962 would have no jurisdiction in the matter. In the light whereof, all these appeals are allowed, the petitions are converted into appeals and allowed and all the impugned judgments are set aside.

MWA/M-24/SC

Appeal allowed.

2017 S C M R 1249

[Supreme Court of Pakistan]

Present: Anwar Zaheer Jamali, C.J., Amir Hani Muslim, Sh. Azmat Saeed, Manzoor Ahmed Malik and Faisal Arab, JJ

SAID ZAMAN KHAN and others---Petitioners

versus

FEDERATION OF PAKISTAN through Secretary Ministry of Defence and others---Respondents

Civil Petitions Nos. 842 of 2016, 3331, 3332, 3674 and 3777 of 2015, 06, 32, 211, 278, 417, 1263, 1306, 1335, 1353, 1503 and 1541 of 2016, decided on 29th August, 2016.

(On appeal from the judgment dated 26.01.2016 Lahore High Court, Rawalpindi Bench in W.P. No. 05/2016, judgment dated 14.10.2015 of the Peshawar High Court, Peshawar passed in W.P. No.2915/2015, judgment dated 14.10.2015 of the Peshawar High Court, Peshawar passed in W.P. No.2979 of 2015, order dated 09.12.2015 of the Peshawar High Court, Peshawar passed in W.P. No.3219-P/2015,

VOLUME LXX بسم الله الرحمن الرحيم 2018

THE

ALL PAKISTAN LEGAL DECISIONS

PESHAWAR HIGH COURT

P L D 2018 Peshawar 1

Before Yahya Afridi, C.J. and Ikramullah Khan, J

MUHAMMAD AYAZ---Petitioner

versus

SUPERINTENDENT DISTRICT JAIL, TIMERGARA, DISTRICT LOWER DIR and 3 others---Respondents

Writ Petition No. 1706-P of 2016, decided on 25th May, 2017.

(a) ***Constitution of Pakistan---***

---Art. 199---Constitutional jurisdiction of High Court---Scope---Factual controversy---Controversy, which was based on contentious disputed facts, could not be entertained and adjudicated in constitutional jurisdiction of the High Court. [p. 8] A

Ghulam Nabi's case PLD 2001 SC 415; Shamim Khan's case PLD 2005 SC 792; Muhammad Sadiq v. Ilahi Bukhsh 2006 SCMR 12 and Milan Party's case PLD 2012 SC 292 ref.

(b) ***Constitution of Pakistan---***

---Art. 199---Pakistan Army Act (XXXIX of 1952), S. 97---Conviction and sentence passed by Field General Court Martial---Judicial review by High Court---Scope---Powers of judicial review under Art. 199 of the Constitution, against the sentences and convictions passed by the Field General Court Martial was not legally identical to the powers of an Appellate Court---Evidence produced could not be analyzed in detail to displace any reasonable or probable conclusion drawn by the Field

General Court Martial nor could the High Court venture into the realm of the "merits" of the case---Evidentiary value of the prosecution evidence could not be adjudged by the High Court as a Court of Appeal and that too on the legal threshold required for conviction of a person on a capital charge under the ordinary criminal law---High Court, in its constitutional jurisdiction only had the legal mandate to positively interfere with the decision of the Military Courts on three fundamental grounds; if the case of the prosecution was based, firstly, on no evidence, secondly, insufficient evidence and thirdly, absence of jurisdiction. [p. 10] B

Said Zaman Khan v. Federation of Pakistan and others 2017 SCMR 1249 ref.

(c) Pakistan Army Act (XXXIX of 1952)---

----S. 59---Criminal Procedure Code (V of 1898), S. 164---Actions (in Aid of Civil Power) Regulation, 2011, Regln. 13---Pakistan Army Act Rules, 1954, R. 13---Designing vehicle for a terrorist act, attacking law enforcement agencies, possessing firearm and explosives---Admission of guilt by the accused---Effect---Confessional statement of the accused before the Judicial Magistrate and Military Court clearly spoke of his admission of guilt of the charges framed against him---Prior to making his admission of guilt before the Military Court, the accused had on three previous occasions admitted his guilt; firstly, before the Judicial Magistrate, while recording his statement under S. 164, Cr.P.C.; secondly, during his period of internment under S. 13 of the Actions (in Aid of Civil Power) Regulation, 2011 and thirdly, during the proceedings of taking summary of evidence under R. 13 of the Pakistan Army Act Rules, 1954---Challenge made to the mode, manner and the time of the confessions made by the accused, under the ordinary criminal jurisprudence would have seriously diminished the evidentiary value thereof, but in view of the limited scope available to the High Court in its Constitutional jurisdiction in evaluating the evidence and the repeated admission of guilt by the accused did not warrant interference in the impugned conviction awarded by the Military Court---Constitutional petition was disposed of accordingly. [pp. 11, 17] C & J

(d) Pakistan Army Act (XXXIX of 1952)---

----S. 59(1)(a)---Explosive Substances Act (VI of 1908), Ss. 4 & 5---Anti-Terrorism Act (XXVII of 1997), Ss. 6(2)(ee) & 7(1)(ff)---Designing vehicle for a terrorist act, attacking law enforcement agencies, possessing firearm and explosives---Quantum of sentence awarded by Field General Court Martial---Scope---Bare reading of

59(1)(a) of the Pakistan Army Act, 1952 clearly revealed that the quantum of sentence that could be awarded by a Military Court could not go beyond that prescribed for the said offence under the ordinary penal laws enforced in Pakistan---Accused (a civilian) was awarded the death sentence by Field General Court Martial---Two striking features of the present case were that; firstly, the accused was not charged for the death of any person; and secondly he was not charged for actually causing an explosion---Charge against the accused was not for the act of causing an explosion---In fact, accused was charged for planting an explosive device, which act could fall under the offences provided under Ss. 4 & 5 of the Explosive Substances Act, 1908, which at best carried maximum punishment for life and not death---Punishment for offence involving use of explosive by any device given under S.7(1)(ff) of the Anti-Terrorism Act, 1997 also provided a maximum sentence of imprisonment for life but not death---Death sentence awarded to the accused by the Military Court warranted interference by the High Court in its Constitutional jurisdiction, as the Military Court lacked legal jurisdiction to award death penalty for the charges framed upon the accused---Sentence of death awarded to accused and the confirmation thereof passed by the Chief of Army Staff was set aside and the case was remanded back to the Military Court either to revisit the quantum of punishment awarded or to alter the charge framed against the accused and thereafter proceed against him under the law---Constitutional petition was disposed of accordingly. [pp. 12, 13, 15, 16, 17] D, E, F, G & K

Brig. (Retd.) F.B. Ali's case PLD 1975 SC 506 ref.

(c) Administration of justice---

---Principles---Criminal law---Two penal provisions prescribing two distinct punishments for the same offence---Principle of safe administration of criminal justice provided that in such a situation the accused was to be charged for the offence carrying the lesser punishment. [p. 16] H

(d) Pakistan Army Act (XXXIX of 1952)---

---S. 97---Field General Court Martial---Safe administration of justice, principle of---Scope---Accused could not be punished for an offence he was not charged for---Said principle of safe administration of justice could not be lost sight of even in cases tried by the Military Court under the Pakistan Army Act, 1952. [p. 16] I

Abdul Latif Afridi and Khalid Anwar for Petitioner.

Manzoor Khan Khalil, DAG and Waqar Ahmad Khan, AAG

along with Major Muhammad Tahir and Lt. Col. Kashif, 11 Corps. for Respondents.

Date of hearing: 2nd March, 2017.

JUDGMENT

YAHYA AFRIDI, C.J.---Muhammad Ayaz, petitioner, seeks the Constitutional jurisdiction of this Court in challenging the conviction awarded to convict Muhammad Imran, by the Court Martial, whereby, he was sentenced to death vide order dated 28.6.2015.

2. The brief and essential facts leading to the present petition are that convict Muhammad Imran, being involved in terrorist activities, was charged and tried by a Court Martial ("Military Court") under The Pakistan Army Act, 1952 as amended vide Pakistan Army (Amendment) Act, 2015 ("The Army Act"), for the following charges;

"First Charge.

PAA section 59

Committing a civil offence, that is to say, designing vehicle for terrorists act, in that he, at Nahaqi (Mohmand Agency) during 2008, along with Civilians Musafir and Farhan designed a Shahzore vehicle by fixing improvised explosive device for terrorist attack on Nahaqi Check Post, Mohmand Rifles, Frontier Corps; and thereby committed an offence punishable under Pakistan Army (Amendment) Act, 2015.

Second Charge

PAA section 59

Committihg a civil offence, that is to say, attacking the law enforcement agency, in that he, at DG-II Check Post (Mohmand Agency), on 29 October 2008, along with Civilian Sheraz attacked on the troops of 3 Wing Mohmand Rifles, Frontier Corps, deployed at DG-II Check Post, by firing with Sub Machine Gun; and thereby committed an offence punishable under the Pakistan Army (Amendment) Act, 2015.

Third Charge

PAA section 59

Committing a civil offence, that is to say, possessing firearm, in that he, at DG-II Check Post (Mohmand Agency), on 29 October 2008, was found in possession of 1x Sub Machine Gun along with 4x Magazines; and thereby committed an offence punishable under the Pakistan Army (Amendment) Act, 2015;

Fourth Charge

PAA section 59

Committing a civil offence, that is to say, possessing explosives, in that he, at DG-II Check Post (Mohmand Agency), on 29 October 2008, was found in possession of 2x grenades; and thereby committed an offence punishable under the Pakistan Army (Amendment) Act, 2015;

3. To the above charges, the accused pleaded *guilty*. However, Military Court did not convict the accused on his said plea of guilt, and directed the prosecution to lead its evidence, as provided under Sub-Rule (4) of Rule 42 of The Pakistan Army Act Rules, 1954 ("The Rules"), which reads;-

"A plea of "Guilty" shall not be accepted in cases where the accused is liable, if convicted, to be sentenced to death, and where such plea is made, the trial shall proceed and the charge shall be dealt with as if the plea made was "Not guilty".

4. Accordingly, the prosecution in support of its case produced as many as seven witnesses, which included Interrogation Officer **(PW-1)**; Internment Officer **(PW-2)** who produced internment report; Judicial Magistrate **(PW-5)** who recorded the confessional statement of the convict; an officer **(PW-7)** before whom the accused recorded his exculpatory voluntary statement at the time of recording summary of evidence; and **(PWs-3, 4 and 6)** supported the prosecution's case in their testimony before the Military Court.

5. The Military Court also examined the convict, Muhammad Imran, who once again confessed his guilt, by narrating the entire events and his involvement in the terrorist activities, in terms that:

"I Mohammad Imran son of Abdul Manan joined Harkat-ul-Mujahideen in year 2004. I went to Karachi in year 2005 where I got affiliated with Haqqani Network and got training from its commander Khalifa at Miran Shah in year 2006. In year 2007, I moved to Kurram agency and established a camp at Ghauz Ghari Makbal near Afghanistan border in Upper Kurram. I took part in various attacks across the border in Afghanistan on NATO/Allied troop convoys. In year 2008, I got appointed as commander of Khalifa group in Mohmand Agency. I established my markaz at Lakaro Walikore Qandharo and made a pact with Commander Abdul Wali of Tehreek-e-Taliban Mohammad. I got training of preparation of improvised explosive devices/suicide jackets at markaz of Taliban Commander Abdul Wali. I confess to having prepared a Shahzore vehicle borne improvised

explosive that was used on 26 October 2008 at Nahaqi check post suicide attack. I used to roam around in Mohmand agency along with my companions brandishing weapons and regularly coordinated my activities along with Taliban commander Abdul Wali at Mohmand agency. On 29 October 2008, upon reaching DG-II check post, one of the sentries deployed on duty gave signal to our car for stopping. As I and my driver companion were armed with SMG and grenades so I told my companion to speed up the car, while I started firing upon the troops deployed at check post. Upon retaliatory firing by the troops, I got injured at my shoulder while other person alongside me died on spot. During the fire fight, I abandoned the car and ran towards nearby built up area. I tried to avoid capture by taking shelter behind hostage children, but after a prolonged fight my ammunition ran out and I surrendered to the troops."

(emphasis provided)

6. Valuable arguments of the worthy counsel for the parties heard and the available record of the case thoroughly considered.

7. The worthy counsel for the petitioner raised a *preliminary objection* that with the flux of time, the impugned conviction by the Military Court had lost its legal force, and thus was a nullity in the eyes of law. The legal contention of the worthy counsel for the petitioner was that the Military Court had sentenced the convict to death under the provisions introduced in the Army Act through the Sun Set legislation, which expired on 7th January, 2017, and thereafter, the sentence of death could not be executed. The worthy counsel placed reliance on *Air League's case (2011 SCMR 1254)*. It was further contended that as the matter was still before this Court and the death sentence had not been executed, it was not a closed and past transaction, so as to rescue the prosecution under section 6 of the General Clauses Act, 1897. In this regard, reliance was placed on *Sheikh Liaqat Hussain's case (PLD 1999 SC 504), Miran's case (PLD 1996 Lahore 542) and Mehram Ali's case (PLD 1998 SC 1445)*.

8. In response, the worthy Deputy Attorney General vehemently opposed the contention of the worthy counsel for the petitioner by stating that all actions taken, decision passed by the Military Court under the Army Act were protected under section 6 of the General Clauses Act, 1897. In this regard, reliance was placed on *Asad Ali's case (PLD 1998 SC 161), Mehram Ali's case* and *Air Leavie's case supra*.

9. This contested legal issue does not require a definite finding of this Court in the instant petition, as during the present proceedings, the Parliament introduced the **Constitutional (Twenty Third Amendment)**

2017 ("Act of 2017") and the Pakistan Army (Amendment) Act, 2017, whereby the *life* of the Military Courts was extended for a further period of two years from 07.01.2017. The relevant provision of the Act 2017 so introduced, reads;

> *"1. Short title and commence.—*
>
> *1) This Act may be called the Pakistan Army (Amendment) Act, 2017.*
>
> *2) It shall come into force at once and shall be deemed to have taken effect on and from 7th January, 2017.*
>
> *3) The provisions of this Act shall remain in force for a period of two years from the date of its commencement and shall cease to form part of the Constitution and shall stand repealed on the expiry of the said period."*

10. Accordingly, the preliminary objection of the worthy counsel for the petitioner regarding the conviction being without any lawful authority based on the legal premise that the *Sun Set Legislation* had lapsed would be of no legal avail to the convict.

11. During the proceeding of the instant case, the worthy counsel for the petitioner moved an application (C.M. No.1752-P/2016), raising a specific plea that Major Faisal Riaz Kiyani purporting to be a member of the Military Court had raised serious objections to the death sentence awarded to the three specific cases mentioned therein. In response to the said application, the Assistant Judge Advocate General expressly denied the veracity of the said letter and in support thereof filed a personal affidavit.

12. There being contesting assertions of the parties duly supported by affidavits, this Constitutional Court would not enter into resolving the said issue in the instant constitutional petition. In this regard, we seek guidance from the judgment of the august Supreme Court of Pakistan in *Ghulam Nabi's case (PLD 2001 SC 415)*, wherein it was held that;

> *"It hardly needs any elaboration that the superior Courts should not involve themselves into evidence. This can more appropriately be done in the ordinary Civil Procedure for litigation by a suit. This extraordinary jurisdiction is intended primarily, for providing an expeditious remedy in a case where the illegality of the impugned action of an executive or other authority can be established without any elaborate enquiry into complicated or disputed facts."*

Similarly, in *Shamim Khan's case* (PLD 2005 SC 792), the Full Bench of the apex Court has observed that;

> *"Controversial question of facts requiring adjudication on the basis of evidence could not be undertaken by the High Court under its Constitutional jurisdiction where the material facts were admitted by the respondent, High Court could interfere."*

This was followed by the apex Court in *Muhammad Sadiq v. Ilahi Bukhsh* (2006 SCMR 12) and has held that;

> *"High Court in exercise of its constitutional jurisdiction is not supposed to dilate upon the controversial questions of facts and interfere in the concurrent findings on such question in the writ jurisdiction but it is settled law that if findings of facts are based on misreading or non-reading of evidence or not supported by any evidence, the High Court without any hesitation can interfere in the matter in its constitutional jurisdiction."*

And finally, the Supreme Court has reiterated the above principles in *Watan Party's case* (PLD 2012 SC 292).

13. In view of the *'ratio decidendi'* laid down in the above judgments of the apex Court, it is clear that controversies, which are based on contentious disputed fact, should not be entertained and adjudicated in constitutional jurisdiction. Accordingly, the contention of the worthy counsel for the petitioner will not be considered while deciding the instant petition.

14. Now, moving on to the next contention of the worthy counsel for the petitioner *qua* the access to the record of the Military Court leading to the impugned conviction. When confronted, the worthy Deputy Attorney General vehemently contested the same and submitted that by allowing free access of the record and that too in an open Court would be against the law and put the *life* of the Presiding Officer, witnesses and counsel representing the parties at peril.

15. In this regard, the attention of this Court was drawn to the procedure endorsed, and adopted by the apex Court, in case titled, *"Said Zaman Khan v. Federation of Pakistan and others"* (C.P. No.842 of 2016) wherein, it was held that;-

> *97. The learned counsel for the petitioners complained of limited access to the record of the proceedings conducted by the FGCM. We cannot ignore the fact that in view of the peculiar nature of the offences for the commission whereof the Convicts have been accused, it was imperative that efforts should be made to ensure the security and safety of the Members of the FGCM, witnesses*

produced, the Prosecuting and the Defending Officers and the interpreters. Such sensitivity necessitated by the existing extra-ordinary circumstances has been reflected in section 2-C of the Pakistan Army Act, incorporated through a subsequent Amending Act dated 19.11.2015. In the instant cases through specific Order passed by this Court, all the learned counsel were permitted to examine the record of the proceedings of the FGCM, which has been made available to this Court. It has also been noticed that at no point of time after the confirmation of the sentence by the FGCM, any application was filed to the Competent Authority for the supply of the copies of the proceedings, if so required, in terms of Rule 130 of the Pakistan Army Act Rules, 1954. Such applications were not even moved during the pendency of the proceedings before the High Courts or even before this Court.

In the circumstances, we are not persuaded that any prejudice has been caused to the petitioners, in this behalf.

(emphasis provided)

16. In view of the definite direction rendered by the apex Court, this Court decided that the record and the proceedings should not be made open to public, and that the recorded proceedings leading to the impugned conviction should only be provided to the worthy counsel for the petitioner, and that too after due precautions are taken to ensure that the identity of the witnesses, Presiding Officers and the worthy counsel for the parties in the proceedings challenged before this Court, are not divulged or revealed. As a further precautionary measure, the worthy Deputy Attorney General insisted that the copies of the written notes taken by the worthy counsel for the petitioner during the inspection of the record allowed by this Court be also provided to the prosecuting team. The same being not prejudicial to the defense of the convict was allowed.

17. Accordingly, the worthy Deputy Attorney General along with the official custodian of the record were directed to provide to the worthy counsel for petitioner, the recorded trial proceedings at the Judges' Library, Peshawar High Court, Peshawar. And this Court, ensured that the entire record of the Military Court leading to the impugned conviction had been inspected and examined by the worthy counsel for the convict prior to his addressing legal submissions before this Court.

18. Before this Court considers the merits of the valuable submissions of the worthy counsel for the parties, would be crucial to first determine the scope of judicial review mandated to this

constitutional Court in adjudicating the challenge made to the conviction and sentence awarded to a civilian by a Military Court under the Army Act. This jurisdictional issue has been a matter of great deliberation by the superior Courts of our jurisdiction, which culminated in the decision of the apex Court in *Said Zaman Khan's case supra*, wherein the worthy Supreme Court held that;

> *"93. It may be noted that the actions complained of can even otherwise be without jurisdiction, a separate and independent ground available to challenge the sentences and convictions of the FGCM, therefore, it must necessarily be examined whether the FGCM had the jurisdiction over the person tried and the offence for which such trial has taken place and to ascertain existence or otherwise of any other defect or a gross illegality in the exercise of jurisdiction denuding the same of validity.*
>
> *However, we cannot lose sight of the non-obstantive provision {in the Constitution i.e. Article 199(3)) impeding the exercise the powers of Judicial Review by the High Court under Article 199 of the Constitution. Consequently, the boundaries of the available jurisdiction cannot be pushed so as to negate and frustrate the said provision of the Constitution. An exception to the rule barring exercise of jurisdiction cannot be extended so as to defeat and destroy the rule itself. It is by now a well settled proposition of law, as is obvious from the judgments of this Court, referred to and reproduced hereinabove, that the powers of Judicial Review under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, against the sentences and convictions of the FGCM is not legally identical to the powers of an Appellate Court. The evidence produced cannot be analyzed in detail to displace any reasonable or probable conclusion drawn by the FGCM nor can the High Court venture into the realm of the "merits" of the case. However, the learned High Court can always satisfy itself that it is not a case of no evidence or insufficient evidence or the absence of jurisdiction."*
>
> *(emphasis provided)*

19. Keeping the *ratio decidendi* of the aforementioned judgment as our guiding principle, it would be safe to state that this Court in its constitutional jurisdiction has the legal mandate to positively interfere with the decision of the Military Courts on three fundamental grounds; if the case of the prosecution is based, **Firstly**, on no evidence, **Secondly**, insufficient evidence and **Thirdly**, absence of jurisdiction.

20. Thus, the evidentiary value of the prosecution *evidence* cannot be adjudged by this Court as a *Court of Appeal* and that too on the legal

threshold required for conviction of a person on a capital charge under the ordinary criminal law. What this Court has to see is whether the conviction recorded by the Military Court is based on *no* or *insufficient* evidence or *absence of jurisdiction.*

21. Even if this Court discards the entire evidence of the prosecution witnesses, the statement of the accused before the Judicial Magistrate and Military Court, duly narrated hereinabove, clearly speaks of his admission of guilt of the charges framed against him. Needless to mention, that prior to making his admission of guilt before the Military Court, the convict had on three previous occasions admitted his guilt; Firstly, before the Judicial Magistrate, while recording his statement under section 164 of Criminal Procedure Code, 1898 ("Cr.P.C."), Secondly, during his period of Internment under section 13 of the Actions (In Aid of Civil Power) Regulation, 2011 and Thirdly, during the proceedings of taking summary of evidence under Rule 13 of the Rules.

22. No doubt, the challenge made to the mode, manner and the time of the confessions made by the accused, under the ordinary criminal jurisprudence would seriously diminish the evidentiary value thereof. But in view of the limited scope available to this constitutional Court in evaluating the evidence and the repeated admission of guilt by the accused convict does not warrant interference in the impugned conviction and sentence awarded by the Military Court.

23. As far as the contention of the worthy counsel for the petitioner that the convict was not provided legal representation of his free choice, as was his Fundamental Right under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 ("**Constitution**") and Rules 23, 82, 83 and 87 of the Rules, it is noted that this issue was resolved in *Said Zaman Khan's case supra*, by Mr. Justice Faisal Arab in his separate note. It was opined;-

> *"The Court in its anxiety to ensure that a crime may not go unpunished must not lose sight of the fact that the family members of the accused must be given information of his arrest or detention. If in the present case had there been no categorical admission of guilt by the convicted persons before the Magistrate. retrial would have been the right course to adopt." (emphasis provided)*

24. Thus, in the face of the bold repeated admission of guilt made by the accused, the impugned conviction and sentence does not warrant to be set aside on this ground alone. Moreover, in this regard, it is on record that when confronted, the convict did not oppose or protest the defending officer appointed to represent him before the Military Court under Rule 23 of the Rules.

FLD

25. Similarly, it was also argued by the worthy counsel for the petitioner that the prosecution had not obtained the requisite sanction of the Federal Government and that the appeal of the convict has not been considered and decided by the competent authority. In response, the worthy Attorney General produced copies of sanction of the Federal Government for trial of accused by Military Court. order of Court of Appeal whereby appeal filed by the convict was rejected and orders of confirmation of sentence and rejection of Mercy Petition by the Chief of Army Staff.

26. The worthy counsel for the petitioner further urged the Court that the charges for which the convict was sentenced to death by the Military Court is not an offence punishable to death under the ordinary penal laws of Pakistan. Hence, it was vehemently argued that the sentence of death could not be maintained in the instant case.

27. It is an admitted position that Muhammad Imran *alias* Mansoor son of Abdul Manan is a civilian, who has been charged for four distinct *civil offences*; firstly for designing a vehicle for terrorist act and affixing thereon improvised explosive for a terrorist attack, secondly for attacking the law enforcing personnel by firing with sub-machine gun, thirdly for possessing fire arm and ammunition, and finally for possessing grenades (explosive).

28. The two striking features in the above charges are that firstly Muhammad Imran is not charged for the death of any person, secondly he was not charged for actually causing an explosion. Keeping in view these two striking features of the charges against Muhammad Imran, let us review the jurisdictional mandate of a Military Court to try a civilian for a civil offence, as provided under section 59 of the Army Act. The said provision reads:-

> *"59. Civil Offences.- (1) Subject to the provisions of sub-section (2), any person subject to this Act who at any place in or beyond Pakistan commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be dealt with under this Act, and on conviction, to be punished as follows, that is to say,-*
>
> *(a) if the offence is one which would be punishable under any law in force in Pakistan with death or with imprisonment for life, he shall be liable to suffer any punishment assigned for the offence by the aforesaid law or such less punishment as is in this Act mentioned; and*
>
> *(b) in any other case, he shall be liable to suffer any punishment assigned for the offence by the law in force in Pakistan, or*

rigorous imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned:

Provided that, where the offence of which any such person is found guilty is an offence liable to Hadd under any Islamic law, the sentence awarded to him shall be that provided for the offence in that law.

(3) The powers of a Court martial or an officer exercising authority under section 23 to charge and punish any person under this section shall not be affected by reason of the fact that the civil offence with which such person is charged is also an offence against this Act.

(4) Notwithstanding anything contained in this Act or in any other law for the time being in force a person who becomes subject to this Act by reason of his being accused of an offence mentioned in clause (d) of subsection (1) of section 2 shall be liable to be tried or otherwise dealt with under this Act for such offence as if the offence were an offence against this Act and were committed at a time when such person was subject to this Act; and the provisions of this section shall have effect accordingly."

(emphasis provided)

29. The bare reading of clause (a) of subsection (1) of section 59 ibid clearly reveals that the quantum of sentence that can be awarded by the Military Court cannot go beyond that prescribed for the said offence under the ordinary penal laws enforced in Pakistan. This crucial issue came up before the apex Court in *Brig. (Retd.) F.B. Ali's case (PLD 1975 SC 506)*, wherein the Hon'ble Court explained the limited scope of awarding punishments being restricted to clauses (a) and (b) of section 59 of the Army Act. The apex Court opined that;

"It is limited to an offence mentioned in clause (d) of subsection (1) of section 2 of the said Act and its purpose is to make that offence triable under the Army Act as if it was an offence under the said Act and was committed at the time when such person was subject to the said Act. In the case of other civil offences, the provisions of subsection (1) of section 59 are attracted. This subsection reads as follows;-

(1) Subject to the provisions of subsection (2), any person subject to this Act who at any place in or beyond Pakistan commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged therewith under this

section, shall be liable to be dealt with under this Act, and on conviction, to be punished as follows, that is to say,-

(a) if the offence is one which would be punishable under any law in force in Pakistan with death or with imprisonment for life, he shall be liable to suffer any punishment assigned for the offence by the aforesaid law or such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment assigned for the offence by the law in force in Pakistan, or rigorous imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned.

This section seems to provide that if any person who is or has become subject to the Army Act, commits any civil offence, he shall be seemed to be guilty of an offence against the said Act and, if charged therewith, shall be liable to be tried by a Court Martial subject to the limitations mentioned in subsection (2) and will be punishable as prescribed in clauses (a) and (b)."

30. This Court has to now consider whether under the ordinary penal laws of Pakistan the offences for which Muhammad Imran has been convicted and sentenced to death carry the capital punishment of death or otherwise.

31. There was no contest except the first charge, which the worthy Deputy Attorney General insisted was punishable with death under the ordinary penal laws. For ease of reference, the said charge is reiterated and it reads;-

"First Charge.

PAA section 59

Committing a civil offence, that is to say, designing vehicle for terrorists act, in that he, at Nahaqi (Mohmand Agency) during 2008, along with Civilians Musafir and Farhan designed a Shahzore vehicle by fixing improvised explosive device for terrorist attack on Nahaqi Check Post, Mohmand Rifles, Frontier Corps; and thereby committed an offence punishable under Pakistan Army (Amendment) Act, 2015."

32. Now, when we canvas through the ordinary penal laws relating to explosive and in particular the offence for which the convict was charged in the instant case, our attention is drawn to the provisions of the **Explosive Substances Act, 1908** **("Act of 1908")**, and the more recent legislation relating to terrorism, **The Anti-Terrorism Act, 1997**

Act of 1997"). In this regard, let us first review section 3 of the Act of 1908, which was so rigorously relied upon by the worthy Deputy Attorney General, contending that the same to carry the death sentence. The said provision provides;-

> ***"3. Punishment for causing explosion likely to endanger life or property.*** *Any person who unlawfully and maliciously causes by any explosive substance and explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not be punished with death or imprisonment for life."*
> *(emphasis provided)*

33. When we read the above provision of law, it is but clear that the condition precedent for saddling the said charge on any person is the very act of explosion, which in the present case is wanting. The charge against Muhammad Imran was not for the act of causing an explosion. In fact, he was charged for planting an explosive device. This act could fall under the offences provided under sections 4 and 5 of the Act of 1908, which at best carry the maximum punishment for life and not death.

34. More importantly, the Act of 1997, a more recent legislation aimed to curb terrorism, specifically provided in section 6 for offences relating to explosives. The said provision reads;-

> ***"Section 6 Terrorism.-***
>
> *(1) In this Act, terrorism means the use or threat of action where;*
>
> *(a) the action falls within the meaning of subsection (2), and*
>
> *(b) .....*
>
> *(c) .....*
>
> *(2) An action shall fall within the meaning of subsection (1), if it;*
>
> *(a) .....*
>
> *(b) .....*
>
> *(c) .....*
>
> *(d) .....*
>
> *(e) .....*

(ee) Involves use of explosives by any device including bomb blast or having any explosive substance without any lawful justification or having been unlawfully concerned with such explosive.

35. The punishment prescribed for the above act of *terrorism* relating to explosives under section 6(2)(ee) is provided in section 7(1)(ff) in terms that;-

"the act of terrorism committed falls under section 6(2)(ee), shall be punishable with imprisonment which shall not be less than fourteen years but may extend to imprisonment for life."

(Emphasis provided)

36. Thus, what we have are two penal provisions prescribing two distinct punishments for the same offence. Faced with such circumstances, it is by now settled principle of safe administration of criminal justice that the accused is to be charged for an offence carrying a lesser punishment. Moreover, this Court cannot lose sight of the wisdom of the legislature, whereby it, while enacting a law to curb terrorism has expressly provided a lesser punishment for the offence relating to explosive. When faced with these two penal legislations regarding the same offence, the one more recent has to be given precedent and applied.

37. When confronted with the above legal position, the worthy Deputy Attorney General vehemently contended that Muhammad Imran though not charged for the actual act of explosion, had admitted in his statement that the *Shahzore* he had laden with explosives was used in a terrorist attack causing death to security personnel and hence is criminally liable for the same. This Court is not in consonance with the above contention of the worthy Deputy Attorney General for the simple reason that Muhammad Imran was not charged for causing death to the security personnel, as a result of the explosion. To saddle him with the punishment of death would surely prejudice his defence; an accused cannot be punished for an offence he was not charged for. This cardinal principle of safe administration of justice cannot be lost sight of even in cases tried by the Military Court under the Army Act.

38. In conclusion, keeping in view the limited scope of judicial review mandated to this Court and in the face of the repeated admission of guilt made by the convict, culminating in punishment awarded by the Court Martial, it would not be appropriate for this Court to interfere in the impugned conviction. However, as far as the quantum of sentence is concerned. this Court has serious reservations for awarding death

fence to the convict for the charges he faced before the Military Court.

18. In view of the above deliberation, this Constitutional Court finds that:-

(1) The awarded of conviction by the Military Court to Muhammad Imran does not warrant interference by this Constitutional Court, as it is not a case of no or insufficient evidence.

(2) The sentence awarded to Muhammad Imran *alias* Mansoor son of Abdul Manan, however, warrants interference by this Constitutional Court, as the Military Court lacked legal jurisdiction to award death penalty for the charges like the ones framed upon him.

(3) The sentence of death awarded to Muhammad Imran *alias* Mansoor son of Abdul Manan and the confirmation thereof passed by the Chief of Army Staff is set aside and the case is remanded back to the Military Court either to revisit the quantum of punishment awarded or to alter the charge framed against Muhammad Imran and thereafter proceed against him under the law.

Accordingly, for the reasons stated hereinabove, this writ petition is disposed of, in the above terms.

FWA/281/P

Order accordingly.

P L D 2018 Peshawar 17

Before Muhammad Ayub Khan and Shakeel Ahmad, JJ

REHMATULLAH alias REMATOLI---Petitioner

versus

GOVERNMENT OF KHYBER PAKHTUNKHWA through Secretary Home and Tribal Affairs Peshawar and others---Respondents

W.P. No. 833-D of 2017, decided on 26th September, 2017.

(a) ***Khyber Pakhtunkhwa Maintenance of Public Order Ordinance (XXXI of 1960)---***

---S. 3---Power to arrest and detain suspected persons---Pre-requisites---Pre-requisite condition for issuance of an order under S. 3 of the Maintenance of Public Order Ordinance, 1960 was that the Government had to satisfy itself that a person was likely to act in a

PLD