IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR, CJ
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE FAISAL ARAB

CIVIL APPEALS NO. 2561 TO 2568 OF 2016 AND CIVIL PETITION NOS. 2779-L TO 2785-L, 2793-L, 3182-L, 3183-L, 3224-L, 3225-L, 3328-L, 3253-L, 3299-L, 3300-L, 3345-L, 3553-L TO 3557-L OF 2016 AND CRIMINAL PETITION NO. 1050-L OF 2016

(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.P. No.31284, 35792, 36199, 36555 & 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)

Syed Mushahid Shah etc. (in CA 2561/16)
Mian Naseer Ahmed, etc. (in CA 2562/16)
Tahir Naseem, etc. (in CA 2563/16)
Umar Hayat, etc. (in CA 2564/16)
Muhammad Shafique (in CA 2565/16)
Naseer Ahmed (in CA 2566/16)
Pervaiz Sadiq, etc. (in CA 2567/16)
Jahangir Ahmed & others (in CA 2568/16)
...Appellant(s)

Gulshan Spinning Mills Ltd, etc. (in CP 2779-L/16)
Gulistan Textile Mills Ltd, etc. (CPs 2780-L to 2782-L/16)
Haji Iftikhar-ud-Din, etc. (in CP 2783-L/16)
Noureen Imran, etc. (in CP 2784-L/16)
Muhammad Ahsan, etc. (in CP 2785-L/16)
Hassan Aftab (in CP 3182-L/16)
Hamid Waheed Khawaja (in CP 3183-L/16)
Dr. Hassan Sohaib Murad (CPs 3224-L to 3225-L,3299-L/16)
Sheikh Niaz Anjum, etc. (in CP 3328-L/16)
Shamsher Ali (in CP 3253-L/16)
Gulraiz Akbar (in CP 3300-L/16)
Irfan Ahmed Ayub (in CP 3345-L/16)
Amir Saleem Anwar Khan, etc. (in CP 3553-L/16)
Naeem Omer (CPs 3554-3556-L/16)
Farrukh Mehmood Butt, etc. (in Cr.P.1050-L/16)
...Petitioner(s)

VERSUS

Federal Investment Agency, etc. (CAs 2561-2563/16)
Government of Pakistan, etc. (in CAs 2564,2565/16)
S.H.O. PS Bhikki District Sheikhupura, etc. (in CA 2566/16)
The Bank of Punjab, etc. (CA 2567/16, CPs 2783-L to 2785-L)
Government of Pakistan thr. Secretary M/o
Law Justice Human Rights and Parliamentary
Affairs Islamabad & others (in CA 2568/16)
Burj Bank Ltd, etc. (CPs 2779 to 2782-L, 2793-L/16)
The State through Advocate General Punjab etc. (in CP 3182-L/16)

S.H.O. PS Sarwar Road, Lahore, etc.	(in CP 3183-L/16)
S.H.O. PS Qila Gujjar Singh, Lahore, etc.	(CPs 3224-L, 3299-L & 3300-L/16)
S.H.O. PS Civil Lines, Lahore, etc.	(in CP 3225-L/16)
S.H.O. Police Station, B-Division, Okara, etc.	(in CP 3328-L/16)
S.H.O. PS Purani Anarkali, Lahore, etc.	(in CP 3253-L/16)
S.H.O. Civil Line, Gujrat, etc.	(in CP 3345-L/16)
The State, etc.	(in CP 3553-L/16)
Additional Sessions Judge, Lahore, etc.	(CPs 3554-3557-L/16)
Askari Bank Ltd, etc.	(in Cr.P. 1050-L/16)

...Respondent(s)

For the Appellant(s):	
(in CA 2561/16)	Mr. Shahid Ikram Siddiqi, ASC. **(also for petitioners in CPs 3182, 3183, 3224, 3225, 3228, 3299, 3300-L/16)** *(did not appear on 01.03.2017)*
(in CAs 2562-2568/16)	Mr. Salman Aslam Butt, Sr. ASC. **(also for petitioners in CPs 2779-2785, 2793-L/16)**
For the Petitioners(s):	
(in CP 3253-L/16)	Nemo.
(in CP 3345-L/16)	Mr. Haq Nawaz Chatha, ASC.
(CPs 3553-3557-L/16)	Mr. Shazaib Masud, ASC.
(in Crl.P 1050-L/16)	*(did not appear on 01.3.2017)* Mian Asghar Ali, ASC.
For the Respondent(s):	
For Bank of Punjab	Mr. Rashdeen Nawaz Qasuri, ASC. Sardar Qasim Farooq Ali, ASC. Mr. Amir Wakeel Butt, ASC.
For First Women Bank & UBL	Mr. Abdul Hameed Chohan, ASC.
For Burj Bank	Raja Nadeem Haider, ASC.
For MCB	Nemo.
For FIA	Mr. Sajid Ilyas Bhatti, DAG. Raja Abdul Ghafoor, AOR.
For the State:	Mr. Razzak A. Mirza, Addl. AG, Pb. Rana Abdul Majeed, Addl. PG.
Dates of Hearing:	21, 22, 28.02.2017 and 01.03.2017

...

JUDGMENT

MIAN SAQIB NISAR, CJ.— 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 PPC)* 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 PPC. 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 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 PPC 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 PPC for every act or omission contrary to its provisions *(Section 2)*. Accordingly, the PPC 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 PPC *[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 PPC, 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)* of 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, [illegible]

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. 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. 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 deal 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 Sessions 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 sub-section (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 sub-section (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 re-payment 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 re-payment 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.

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

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[1] Subs. and added by Act XXXVIII of 2016, Section 9.
[2] *Ibid.*

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 PPC 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 PPC were

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

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 PPC 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 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 PPC, 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 sub-section (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 Vs. Muhammad Maqbool and others (PLD 1991 SC 258)** this Court observed:-

> *"In our opinion a 'non-abstante' (sic) clause operates as an ouster of the earlier provisions only where there is a conflict and 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 Vs. 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:-

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[5] Black's Law Dictionary (9th Ed.)
[6] Principles of Statutory Interpretation (13th Ed.)

> *"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 PPC? 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 PPC. 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 PPC. 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 PPC "*shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained",* whereas sub-section (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 PPC stipulates that "*Nothing in this Act [PPC] 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 PPC 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 Vs. (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 PPC is brought out by the following comparison:-

Inconsistency	***Ordinance, 2001***	***PPC***
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 PPC 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 PPC 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 PPC as the former law was promulgated on 30.08.2001 whereas the latter was inserted into the PPC 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 Vs. 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 Vs. 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 Vs. 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 Vs. 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. Vs. 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 & 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 & 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 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. Vs. 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 Vs. 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. Vs. 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 Vs. 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 Vs. 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.

(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 Vs. 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)]*	***Initiation of proceedings*** *Upon a complaint by any person; or* *A report in writing made by any police officer [Section 5(1)]*

	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)]*	***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 PPC offences in the Second Schedule, not less than seven years, and/or fine, while the other PPC 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 Vs. 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 Vs. The State (PLD 1985 Lah 48)**;

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

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

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

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

vi. Embezzlement of money from bank account maintained with a bank – **Allied Bank of Pakistan Ltd. Vs. 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 Vs. 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 Vs. Presiding Officer,**

Special Court (Offences in Banks), Singh at Karachi and 3 others (2011 PCrLJ 1488); and

x. Fraudulent misappropriation from bank account by a bank employee and embezzlement – **Hamad Raza through Special Attorney Vs. 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**

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

more onerous law, in this case the ORBO. 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 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 PPC, 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 Vs. (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 fair 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

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

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, 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. 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 Vs. Lahore Development Authority and others (2016 SCMR 931)** and **Province of Sindh through Chief**

Secretary and others Vs. 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. Vs. Commissioner Income Tax, Zone Companies, Circle-5, Peshawar (2015 SCMR 1494)** and **Aftab Shahban Mirani and others Vs. 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 PPC)*. When an act/omission that falls within Section 83A *supra (or other provisions of the PPC)* 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 PPC)* 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.

CHIEF JUSTICE

JUDGE

JUDGE

Announced in open Court

on **15.5.2017** at **Islamabad**
Approved for reporting
Mudassar/*