IN THE HIGH COURT OF SINDH, KARACHI

Before:-
Mr. Justice Ahmed Ali M. Shaikh, C.J.
Mr. Justice Mohammed Karim Khan Agha, J.

Petition No. and name of petitioner along with counsel.

1. C.P. No.D-633 of 2016, C.P. Nos.D-584, D-585, D-586, D-813 and D-1170 of 2013 Intikhab A. Syed (petitioner) V Chairman, NAB & others through Mr. Mohammad Anwar Tariq and Muhammad Rehman Ghous, Advocate.

2. C.P. No. D-4394, 3149 of 2017 & D-786 of 2012 Syed Basit Rasool Qadri (petitioner) V. Chairman NAB & others through Mr. Ahmed Hasan Rana, Advocate.

3. C.P. No. D-5856 of 2016 Rana Munir Ahmed (petitioner) V Chairman NAB & others through through Mr. Mohammad Anwar Tariq, Advocate.

4. C.P. No. D-7058 of 2017 Adnan Hyder Khan (petitioner) V Chairman NAB & others through Nabeel Nazeer Ahmed, Advocate.

5. C.P. No.D-5148 of 2014, D-6538 of 2015 & D-8716 of 2017 of Syed Wajahat Hussain Zaidi (petitioner) V. Federation of Pakistan & others through Mr. Sami Ahsan, Advocate.

Counsel for the Respondents.

Mr. Mohammad Altaf and Yassir Siddiqui Special Prosecutors, NAB In all the above Constitutional Petitions.

Mr.Malik Khurshal Khan and Mr.Naveed Ul Haq, Advocates in CP.D.No 633/16
Mr.Khilji Bilal Arif, Advocate in CP.D.No.D-1349 and 4349/2017
Mr.Mansoor Ul Haq, Advocate in CP.D-No.7058 and 8716/17
Mr.Abdul Aziz Abro, Advocate in CP.D.No.5148/2016
Ms Naheed A Shahid, Advocate in CP.D 5856/2016
Mehmood Nazir Rana for State Bank of Pakistan CP.D 633/2016

On Court Notice: Salman Talibuddin Additional Attorney General for Pakistan along with Ms Maria Ahmed

Dates of Hearing: 08.03.2018,09.03.2018,28.03.2018
02.04.2018 and 16.04.2018

Date of Order: 07-05-2018

ORDER

Mohammed Karim Khan Agha, J. By this common order, we propose to dispose of the above petitions filed on behalf of the above mentioned petitioners. In short, inquiries/investigations

were initiated and later references filed against the petitioners by the National Accountability Bureau (NAB) under the National Accountability Ordinance 1999(NAO) for the offense of corruption and corrupt practices under the NAO and more particularly the offense of willful default under S. 9 (viii) of the NAO.

2. In some petitions some of the petitioners are on ad interim pre arrest bail whilst in other petitions the petitioners have applied for quashment of the inquiry/ investigation and later the quashment of the references filed against them.

3. Not withstanding the prayers in their petitions all the learned counsel for the petitioners (bar one) have argued that the inquiries/investigations and references filed against the petitioners by NAB should be quashed as NAB no longer has the jurisdiction to hear cases of willful default under the NAO. This is because following the promulgation of Act No.XXXVIII of 2016 (the Act) which further amended the Financial Institutions (Recovery of Finances) Ordinance 2001 (the Ordinance) amendments were made to bring the offense of willful default under the ambit of the Ordinance. Furthermore, as the Ordinance was a special law and the Act was promulgated later in time than the NAO, which was also a special law, the Ordinance as amended by the Act would take precedence over the NAO when the NAO and the Ordinance were in conflict as in the instant case of willful default. In support of their contentions in this regard learned counsel for the petitioners placed reliance on the case of **Syed Mushahid Shah V FIA** (2017 SCMR 1218) and an unreported Order of this court in CP.D No.3673/2017 **Azim Ahmed V State** dated 02-10-2017.

4. The Act at S.1 (2) specifically provided that the Act shall come into force at once i.e on 13-08-2016 the day when it was promulgated however learned counsel for the petitioners contended that the Act had retrospective effect largely on the basis that the amendment was in the procedural law as opposed to the substantive law. In this respect learned counsel for the petitioners placed reliance on the cases of **Adnan Afzal V Capt Sher Afzal** (PLD 1969 SC 187), **The State V Maulvi Muhammed Jamil** (PLD 1965 SC 681),**Rana Abdul Ghaffar V Abdul Shakoor** (PLD 2006 Lahore 64), **Malik Gul Hasan and Co V Allied Bank of Pakistan** (1996 SCMR 237), **Sajid Dadabhoy V NAB** (2015 P.CR.LJ 729) **The**

State V Nasim Amin Butt (2001 SCMR 1083), **Hafiz Muhammad Abdullah v. Imdad Ali Shah and another** (1972 SCMR 173), **Yusuf Ali Khan Barrister –at-law Lahore v. Messrs Hongkonk & Shanghai Banking Corporation Karachi and another** (1994 SCMR 1007), **Rai Naeem Shahadat v. Mst. Qamar Munir and others** (2004 SCMR 412) and **Air League of PIAC Employees through President v. Federation of Pakistan, M/O Labour and Manpower Division Islamabad and others** (2011 SCMR 1254),

5. One petitioner, Syed Wajahat Hussain Zaidi in CPD 8716/17 agreed with the other petitioners that the Act would take priority over the NAO in respect of the offense of willful default however he argued that it would only apply prospectively i.e. from the date when it was said to take effect in the Act and not retrospectively. In support of his contention he placed reliance on the case of **Muhammed Ashfaq V State** (PLD SC 1973 368).

6. Learned Additional Attorney General for Pakistan on court notice submitted that the Act would have retrospective effect if it solely concerned procedural issues however in his view the Act also made certain substantive legal amendments to the Ordinance. For example, in terms of the maximum sentence and the enlargement of the jurisdiction of the banking courts and as such the Act would not have retrospective effect. He submitted that all already initiated complaint verifications, inquiries, investigations and references under the NAO for the offense of willful default prior to the Act coming into effect i.e. before 13-08-2016 would continue with the NAB with the exception that in such cases the sentences which could be handed down on conviction would be governed by the Ordinance which sentences were lower than under the NAO as the accused was entitled to the rule of beneficial interpretation of legislation and in this way no one would be prejudiced. He was of the view that the Section in the NAO dealing with the offense of willful default starting from the date when the Act came into effect had been impliedly repealed. In this respect he placed reliance **Abdul Majid v. The State** (PLD 1974 Karachi 309), **Badshah Gul Wazir v. Government of Khyber Pakhtunkhwa** (2015 SCMR 43), **Sarwar Jan v. Mukhtar Ahmed** (PLD 2012 SC 217), **Saeed Ahmed v. The State** (PLD 1964 SC 266), **T. Barai Henry Ah Hoe** (AIR 1983 SC 150), **Taza Khan v. Ahmed Khan** (1992 SCMR 1371), **Kohinoor Mercantile Corporation v. Hazera Khatoon**

(PLD 1963 Dacca 238), **State of Orissa v. M.A. Tulloch** (AIR 1964 SC 1284), **Sona v. The State** (PLD 1970 SC 264) and **Waqar Azim v. The State** (2002 YLR 1811). He also placed reliance on S.6© of the General clauses Act to show that otherwise the NAO continued in force.

7. Learned special prosecutor NAB submitted that a later special law did not automatically take precedence over an earlier special law and based on the objects and purpose of the NAO its provisions regarding the offense of willful default would prevail over the Act. In this regard he placed reliance on **I.G HQ Frontier Corps V Ghulam Hussain** (2004 SCMR 1397). Even if this was not the case in the alternative he submitted that the Act was only prospective in effect and was not retrospective. According to him the rationale behind the Act which amended the Ordinance was to give effect to this courts decision in the case of **Amjad Hussain V NAB** (2017 YLR 1) concerning NAB's own SOP on pecuniary jurisdiction which was upheld by the Hon'ble Supreme Court whereby cases involving less that RS100M would not be taken up by NAB in all but a few exceptional cases with the permission of the Chairman NAB and the purpose of the Act in making the amendment was to allow the Ordinance to deal with willful default cases of less than 100M after its promulgation and allow NAB to deal with willful default cases of over RS100M as per its own SOP. He also submitted that as a general rule legislation was only retrospective if the legislature had expressly provided that it was to be the case in the concerned legislation and since this had not been done in the Act the Act took effect from the date specifically mentioned i.e 13-08-2016. In this respect he placed reliance on the case of **Muhammed Hussain V Muhammed and others** (2000 SCMR 367).

8. Other learned counsel for the respondents notably on behalf of the State Bank of Pakistan and Bank Islami adopted the arguments of special prosecutor NAB and in particular stressed that the Ordinance as amended by the Act could not override the NAO which would prevail over the Ordinance in cases of willful default; that in the alternative the Ordinance as amended by the Act was only prospective in nature and would come into effect on 13.08.2016 as expressly provided in the Act and not retrospectively as it contained substantive changes in the law and

not purely procedural ones, that rights of the parties would be adversely effected if the law was made retrospective which would be unjust, that Article 264 of the Constitution in cases of repeal did not effect the cases pending under that law prior to repeal; that S.6 of the General Clauses Act had a similar effect and that since an investigating agency had not even been appointed by the Federal Government under S.20(7) of the Ordinance despite it being in the field for over 18 months such retrospective effect would further delay the disposal of pending cases which would lead in effect to justice delayed being justice denied.

9. We have considered the submissions of the parties, perused the record, considered the relevant law and authorities cited at the bar.

10. At the outset we observe that we have found the Parliamentary debates surrounding the promulgation of the Act to be of little assistance in understanding why the Act was passed in the face of the similar provision dealing with willful default under the NAO which we assume the existence of which Parliament would have been aware of. We also do not find NAB's argument that the Act was passed following the case of **Amjad Hussain** (Supra) to be of much substance since if the Ordinance was to deal only with cases of willful default being less than RS100M and cases above that level being left to the NAB under the NAO then the Act would have expressly and specifically stated this to be the case which it did not.

11. When the National Accountability Bureau Ordinance 1999 (NABO) was promulgated and repealed the Ehtesab Act 1997 for the first time in Pakistan's history in its endeavor to thwart corruption and corrupt practices S.9 (viii) NABO made willful default as defined in S.5 ® NABO an act of corruption. Traditionally such an offense had been left to the recovery methods under the civil law. In the case of **Asfandyar Wali Khan V Federation of Pakistan** (PLD SC 2001 607) when the NABO was challenged and in particular the offense of willful default such offense was upheld by the Hon'ble Supreme Court as being in line with the constitution. The Preamble of the NAO also supported such an offense. For ease of reference the relevant parts of the preamble, S.9(viii) NAO and S.5 ® NAO and are set out below.

Preamble.

.....

"Whereas there is an emergent need for the **recovery of outstanding amounts from those persons who have committed default in the repayment of amounts to Banks, Financial Institutions,** [Government agencies and other Agencies].

"**S.9 (a) Corruption and Corrupt Practices** :--(a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices:--

(i) if he accepts.....

.....

(ii).....

(iii).....

(iv).....

(v).....

(vi).....

(vii).....

(viii)**If he commits an offence of willful default;**

"**S.5® Willful default"**; a person or a holder of public office is said to commit an offence of willful default under this Ordinance if he does not pay, or continues not to pay, or return or repay the amount due from him to any bank financial institution, cooperative society, Government department, statutory body or an authority established or controlled by Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations, instructions issued or notified by the State Bank of Pakistan or the bank, financial institution, cooperative society, Government of Pakistan statutory body or an authority established or controlled by a Government, as the case may be, and a thirty days notice has been given to such person or holder of public office.

Provided that it is not willful default under this Ordinance if such person or holder of public office was unable to pay return or repay the amount as aforesaid on account of any willful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution, cooperative society, Government department, statutory body or an authority established or controlled by a Government.

Provided further that in the case of default concerning a bank or a financial institution a seven days notice has also been given to such person or holder of public office by the Governor, State Bank of Pakistan:

> Provided further that the aforesaid thirty days or seven days notice shall not apply to cases pending trial at the time of promulgation of the National Accountability Bureau (Amendment Ordinance, 2001). (bold added)

12. Since the offense of "willful default" remains a part of the NAO today over 18 years since it was promulgated during which period a number of different governments have been in office it appears that successive Parliament's have been satisfied with this offense of "willful default" being a part of the NAO especially as no attempts have been made to **expressly** amend or delete the offense from the NAO to date.

13. In fact safeguards have been put in place under the NAO to ensure that S.9(viii) as defined by S.5 ® is not abused through S.31 © and (D) NAO which are set out below for ease of reference.

> "S.31 (C). **Court to take cognizance of offence with prior approval of the State Bank**. No Court established under this Ordinance shall take cognizance of an offence against an officer or an employee of a bank or financial institution for writing off, waiving, restructuring or refinancing any financial facility, interest or mark up **without prior approval of the State Bank of Pakistan.** (bold added)
>
> S.31 (D). Inquiry, investigation or proceedings in respect of imprudent bank loans, etc. Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or re-scheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution **without reference from the Governor, State Bank of Pakistan**:
> Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan".

14. Likewise under 25 A NAO where a person has been arrested or is in the custody of the NAB or apprehends such arrest or custody for the investigation of the charge against him of willful default he may at any such stage apply to the Governor of the State Bank of Pakistan (SBP) for reconciliation of his liability through the conciliation committee which the Governor if he deems fit may refer the matter. An elaborate mechanism as to how the

conciliation committee is to function and go about its task is then set out in the rest of S.25 A NAO.

15. On conviction under S.9 (viii) NAO S.10 NAO sets out the punishment whilst S.15 NAO also imposes certain other disqualifications on the convict. S.10 and 15 are set out below for ease of reference:

> **"S.10. Punishment for corruption and corrupt practices:**
>
> (a) A holder of public office or any other person who commits the offence of corruption and corrupt practices shall be punishable with **rigorous imprisonment for a term which may extend to 14 years and with fine** and such of the assets and pecuniary resources of such holder of public office or person, as are found to be disproportionate to the known sources of his income or which are acquired by money obtained through corruption and corrupt practices whether in his name or in the name of any of his dependents, or benamidars shall be [....] **forfeited** to the appropriate Government or the concerned bank or financial institution as the case may be.
>
> (b) The offences specified in the Schedule to this Ordinance shall be punishable in the manner specified therein.
>
> (c) The Federal Government may, by notification in the official Gazette, amend the Schedule so as to add any entry thereto or modify or omit any entry therein.
>
> (d) Notwithstanding anything to the contrary contained in any other law for the time being in force an accused, convicted by the Courts of an offence under this Ordinance, shall not be entitled to any remission in his sentence."
>
> "S.15. Disqualification to contest elections or to hold public office.—(a) Where an accused person is convicted of an offence under Section 9 of the Ordinance**, he shall forthwith cease to hold public office, if any, held by him and further he shall stand disqualified for a period of ten years,** to be reckoned from the date he is released after serving the sentence, or seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province:
>
> Provided that any accused person who has availed the benefit of sub-section (b) of Section 25 shall also be deemed to have been convicted for an offence under this Ordinance, and shall forthwith cease to hold public office, if any, held by him and further he shall stand disqualified for a period of ten years, to be reckoned from the date he has discharged his liabilities relating to the matter or transaction in issue, for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province.

(b) Any person convicted of an offence under Section 9 of the Ordinance **shall not be allowed to apply for or be granted or allowed any financial facilities in the form of any loan or advances or other financial accommodation by any Bank or Financial Institution owned or controlled by Government, for a period of 10 years** from the date of conviction." (bold added)

16. When the Ordinance was promulgated in 2001 (in order to repeal and with certain modifications re enact the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act 1997) **after** the NAO it did not mention the offense of willful default so it can be deemed that so far as Parliament was concerned right up to 13-08-2016 when the Act was passed the offense of Willful default was covered by the NAO and not the Ordinance.

17. When the Act was passed the following amendments which are relevant to the case in hand were made to the Ordinance whereby a new S.2 (g) was added and S.20 (6) was substituted and new subsections 20(b) (7), (8) and (9) were added which are set out below for ease of reference:

"S.2(g)"willful default" means

(i) deliberate or intentional failure to repay any finance, loan, advance or any financial assistance received **by any person from a financial institution** after such payment has become due under the terms of any law or an agreement, rules or regulations issued by the State Bank of Pakistan;

(ii) utilization of finance, loan, advance or financial assistance or a substantial part thereof, obtained **by any person from a financial institution** for a purpose other than that for which such finance, loan, advance or financial assistant had been obtained and payment in part or full not made to the financial institution; or

(iii) removal, transfer, misappropriation or sale of any assets collateralized to secure a finance, loan, advance or financial assistance **obtained from a financial institution without permission of such institution**.(bold added)

"S. 20(b) (6), (7), (8) and (9).

(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.

(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 thirty days notice upon the borrower demanding payment of the loan, advance or financial assistance.

(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) Any person convicted of the offence of willful default by a Banking Court shall not be eligible to receive any loan, advance or finance from any financial institution **for a period of ten years and shall not be permitted to contest any election as a member of the Majlis-e-Shoora (Parliament), any Provincial Assembly or a local body for a period of five years, after serving out a sentence after conviction.**

18. Thus, it would appear that for the first time Parliament with deliberate intent through the express language of the above referred sections intended that cases concerning willful default could **also** be tried under the Ordinance from 13-08-2016 which was the date when the Ordinance, as amended by the Act, came into effect

19. The first issue before us is therefore whether the offense of willful default can be applied under both the NAO and the Ordinance i.e. in essence have two similar cases running in parallel or only under either the NAO or the Ordinance especially as the offense of willful default has not been expressly repealed from the NAO and if so under which of the two laws. i.e the NAO or the Ordinance as amended by the Act.

20. In considering this issue we have been mindful of the fact that both the NAO and the Ordinance are both special laws with non obstante clauses, the intention of Parliament, the principle of law of redundancy whereby no part of a statute can be rendered redundant and if the Ordinance is found to prevail over the NAO from which date it would be applicable and how such existing cases should be treated.

21. As can be seen from a comparison of the definition and offense of willful default under the NAO and the Ordinance they are **similar in nature but NOT identical** especially bearing in

mind that since the case of **Abdul Aziz Memon V Federation of Pakistan** (PLD SC 2013 594) the NAO applies equally to individuals as to public office holders. To a certain extent it can be said that through the Act Parliament has simply added the offense of willful default from the NAO to the Ordinance which appears to be a logical step to take since it is the Ordinance which primarily deals with defaulted loan cases as opposed to the NAO which deals with all manner of other corruption cases under S.9 NAO.

22. **The significant differences** however between S.5® NAO and S.2 (g) of the amended Ordinance seem to be that whilst the Ordinance only applies to financial institutions and their customers the NAO is of wider application. Financial Institutions is defined in S.2 (a) of the Ordinance as under

> "(a) "financial institution" means and includes—
> (i) any company whether incorporated within or outside Pakistan **which transacts the business of banking** or any associated or ancillary business in Pakistan through its branches within or outside Pakistan and includes a Government savings bank, but excludes the State Bank of Pakistan;
> (ii) **a modaraba or modaraba management company, leasing company, investment bank, venture capital company, financing company, unit trust or mutual fund of any kind and credit or investment institution, corporation or company**,; and
> (iii) **any company** authorized by law to carry on any similar business, as the Federal Government may by notification in the official Gazette, specify; (bold added)

23. The scope of S.5 ® NAO therefore appears to be a little **wider** as a part from financial institutions it also applies to co-operative societies, government departments, statutory bodies, and authorities established or controlled by a Government which appear to be missing from the definition of "financial institution" under the Ordinance which in simplistic terms seems only to cover the relationship between banker and customer during the ordinary course of banking business.

24. Not withstanding this slight difference in definition in our view to a certain extent it could be said that some of the provisions of the NAO vis a vis willful default are more advantageous to the accused/defaulter as he has the safe guard of S.31 (D) and the

benefit of the conciliation committee and ability to make a plea bargain under S.25 NAO. However one of the key and most important differences in our view is the sentence and disqualification period entailed in each piece of legislation. In the NAO it is up to 14 years imprisonment whilst in the Ordinance it is up to 7 years imprisonment which is significantly lower whilst the disqualification period in the NAO is 10 years and the disqualification period in the Ordinance as amended by the Act is 5 years.

25. In the case of **Syed Mushahid Hussain** (Supra) a detailed, exhaustive and elaborate Judgment was passed by the Hon'ble Supreme court dealing with the consequences of special laws which provided similar, if not identical provisions, and which would prevail based on the fact that both laws contained non obstante clauses as in the case in hand.

26. The question of law in that case was 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).

27. The question, it appears, was whether a special law would trump a general law which was answered in the affirmative and if two special laws were in conflict which would prevail. Generally speaking it was found that the special law later in time on the same subject matter would prevail **however** other relevant factors would also need to be considered such as the object, purpose and policy of both statutes and the legislature's intention through the language used in the statutes before making a final determination

28. While dealing with the above proposition the Hon'ble Supreme Court seems to have reached the conclusion that where offences in ORBO were not covered in the Ordinance then the

cases would proceed under the ORBO **but where the offenses were similar or the same they would proceed under the Ordinance and not under the ORBO**. In reaching this conclusion the court took into consideration factors such as which special law was later in time, the severity of the relevant law on the accused, the question of the banks being able to pick and chose their forums, legislative intent, redundancy of law, parallel proceedings, discrimination, equality before the law, the requirement of certainty in the law for the accused and implied repeal. In this respect we rely on Para's 15-17 on P.1244 onwards of the aforesaid judgment which are set out below for ease of reference.

> 15. "On the other hand, the Ordinance, 2001 established Banking Courts which deal with dispute (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 the 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 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 immovable 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. The 'without prejudice' clause reproduced above can be divided into two parts:- (i) 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 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 fact, 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 these (sic) tribunals. Nor does it define the principle of 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 (I) that "All citizens are equal before law and are entitled to equal protection of law" and Article 4 (I) 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 lesser 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 requirement of Article 5(I) 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(I) 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. 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."

29. Thus, whilst relying on and being guided by the above case and keeping in view that (a) the Act which amended the Ordinance is later in time than the NAO (b) that the provisions on willful default are similar but NOT identical in both laws (c) that since parliament would have been aware of the existence of such a similar offense of willful default in the NAO it has deliberated and consciously intended to give preference to the offense of willful default as provided in the Act and as a general principle of statutory interpretation the offense of willful default under the Ordinance will prevail to the exclusion of the offense of willful default under the NAO **in so far as it relates to cases as defined under S. 2(a) of the Ordinance in respect of willful default which are covered by S.5 ® NAO but not to cases which are not covered by S.2 (a) of the Ordinance but are still covered under S.5® of the NAO (as discussed above).** As Such it appears that those parts of the definition of S.5® NAO relating to willful default which are covered by the definition of "financial institution" under S.2 (a) of the Ordinance are hit by the doctrine of implied repeal based on the principles laid down in the case of **State v Syed Mir Ahmed Shah and Another** (PLD 1970 Quetta 49) as it appears that the two laws on willful default cannot run concurrently and in parallel. With regard to the doctrine of implied repeal reference may be made to "Constitutional and Administrative law" 5th Ed. by O.Hood Phillips at P.55 which reads as follows, "The power of express repeal is so well established that it has not been contested in the courts. Lord Reid has said extra judicially: "It is good constitutional doctrine that Parliament cannot bind its successor."

There are two cases, however, in which it has been argued by counsel that a provision in an earlier Act precluded implied repeal in a later Act. The Acquisition of Land (Assessment of Compensation) Act 1919, s.7 (1), stated: "The provisions of the Act or order by which the land is authorized to be acquired....shall....have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect....." The marginal note (which is not binding) to section 7 reads: "Effect of Act on existing enactments." In *Vauxhall Estates Ltd. v. Liverpool Corporation* the plaintiffs claimed that compensation for land compulsorily acquired from them should be assessed on the basis of the Act of 1919 and not on the less favorable terms provided by the Housing Act 1925. The Divisional Court held that even if the Act of 1919 could be construed as intended to govern future as well as existing Acts assessing compensation, which construction was doubtful, **yet the relevant provisions must be regarded as impliedly overridden by the inconsistent provisions of the Act of 1925.** In *Ellen Street Estates Ltd. v. Minister of Health* a similar argument on the relation between the provisions for compensation contained in the Act of 1919 and the Housing Acts 1925 and 1930 was raised in the Court of Appeal. Here the decision that the Housing Acts impliedly repealed the Act of 1919 in so far as they were inconsistent with it was part of the ratio. **"The Legislature cannot, according to our constitution," said Maugham L.J., "bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature."** (bold added) (d) that as a general principle of law the law will be applied which is less severe on the accused in terms of sentence which in this case is the Ordinance (e) the requirement of equality before the law under Article 4 of the Constitution (f) the requirement that there be no discrimination under the law under Article 25 of the Constitution (g) that by adopting such an approach an accused will have certainty as to which law he will be proceeded with and before which forum (h) that the offense of willful default falls more neatly into the Ordinance which deals primarily with bank default and recovery cases (i) that it seems

more appropriate that cases of willful default not be proceeded with as corruption cases and (j) to put an end to the practice whereby financial institutions initiate recovery proceedings under the Ordinance and then refer the matter to the SBP as a case of willful default under S.31 (D) with a view to NAB taking up the case as a tactic by the banks to pressurize the accused into entering into a settlement. Thus for all the above reasons we find that cases of willful default will proceed exclusively under the Ordinance and exclusively before the Banking courts under the Ordinance and not under the NAO as discussed in this paragraph subject to the question of retrospectively which is dealt with in the later parts of this order.

30. Further reliance in this respect is placed on the case of **Alamdar Hussain** (2017 CLD 1101) which dealt with an almost identical issue, although related to a bail matter, as to whether the case fell under the Ordinance or the NAO and found that the case fell under the Ordinance a decision which the NAB initially appealed but which it later withdrew indicating that it accepted the legal reasoning behind the decision.

31. With regard to redundancy we do not consider that we have made the offense of willful default redundant under the NAO as there are still **some cases** where the definition of S.5® NAO is not covered by the definition set out in S.2 (q) of the Ordinance in respect of willful default and thus can proceed as willful default cases under the NAO. It is also pertinent to point out in terms of redundancy of any part of a statute that in the case of **Syed Mushahid Hussain** (Supra) when the Hon'ble Supreme court held that certain offenses which were also triable under ORBO and which were now exclusively to be tried under the Ordinance that those offenses under ORBO were not held to have become redundant. Thus, the same reasoning can be applied in this case where we have tried to achieve a harmonious interpretation of two special statues where some aspects may be in conflict.

Turning to the next issue which is the date when the Ordinance as amended by the Act shall take effect.

32. At the outset we do not consider the cases of **Muhammed Ashraf** (Supra) and **Sajid Dadabhoy** (Supra) to be of much assistance in deciding this issue.

33. In our view as a **general rule** of legal interpretation of statutes an Act will take effect from the date it is promulgated **unless** it is specifically stated in the Act that it will take effect from a given date. A good example is the NAO which at S.2 specifically provides that it will be deemed to come into force on 01-01-1985 despite being promulgated on 17-11-1999.

34. However there **may** be **some exceptions** to this general rule. For example, in the case **Adnan Afzal** (supra) which followed the 1965 case of **Maulvi Muhammed Jamil** (supra) it was held that an Act may be given retrospective effect if it related to procedural issues only such as change of forum **provided that in the process no existing rights were effected and the giving of retrospective effect would not cause inconvenience** in the following terms at P.191 to 192:

> "The general principle with regard to the interpretation of statutes as laid down in the well known case of the Colonial Sugar Refining Company Limited v. Irving (1) is that "if the matter in question be a matter of procedure only", the provisions would be retrospective. **"On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act", then "in accordance with a long line of authorities extending from the time of Lord Coke to the present day", the legislation would not operate retrospectively, unless the Legislature had either "by express enactment or by necessary intendment" given the legislation retroactive effect.**
>
> To the same effect are the observations of Jessel, Master of the Rolls, in the case of *In re : Jospeh Suche & Co. Limited* (2), where it was observed that as "a general rule when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. **It is said that there is one exception to that rule, namely, that, these enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights."**
>
> The question for consideration there was regarding the right of a secured creditor of a company to prove for the full amount of his debt without deducting the value of his Securities in the course of the winding up. That was held to be, in substance, a right of action for the recovery of a debt and, therefore, section 10 of the English Judicature Act was held not to apply retrospectively.

The principle has been admirably put by Crawford in his Book on Construction of Statutes, 1940 Edition, page 581, as follows:---

> **"As a general rule, legislation which relates solely to procedure or to legal remedies will not be subject to the rule that statutes should not be given retroactive operation. Similarly, the presumption against retrospective construction is inapplicable.** In other words, such statutes constitute an exception to the rule pertaining to statutes generally. Therefore, in the absence of a contrary legislative intention statutes pertaining solely to procedure or legal remedy may affect a right of action no matter whether it came into existence prior to, or after the enactment of the statute. Similarly, they may be held applicable to proceedings pending or subsequently commenced. In any event, they will, at least, presumptively apply to accrued and pending as well as to future action."

This principle has also been fully adopted by this Court in the cases of The State v. Muhammad Jamil (1) and Muhammad Alam v. The State (2).

> **The next question, therefore, that arises for consideration is as to what are matters of procedure. It is obvious that matters relating to the remedy, the mode of trial, the manner of taking evidence and forms of actions are all matters relating to procedure Crawford too takes the view that questions relating to jurisdiction over a cause of action, venue, parties pleadings and rules of evidence also pertain to procedure, provided the burden of proof is not shifted. Thus a statute purporting to transfer jurisdiction over certain causes of action may operate retroactively.** This is what is meant by saying that a change of forum by a law is retrospective being a matter of procedure only. **Nevertheless it must be pointed out that if in this process any existing rights are affected or the giving of retroactive operation cause inconvenience or injustice, then the Courts will not even in the case of procedural statute, favour an interpretation giving retrospective effect to the statute. On the other hand, if the new procedural statute is of such a character that its retroactive application will tend to promote justice without any consequential embarrassment or detriment to any of the parties concerned, the Courts would favourably incline towards giving effect to such procedural statutes retroactively."** (bold added)

35. The later 1996 case of **Malik Gul Hasan & Co V Allied Bank (1996 SCMR 237)** followed the above dicta and after a detailed review of the relevant law on this issue held as under at P.243.

> "From the principle enunciated in these Judgments it emerges that statute providing change of forum pecuniary **or otherwise** is procedural in nature and has retrospective effect **unless contrary is provided expressly or impliedly**

or it affects the existing right or causes injustice or prejudice.

8. The learned counsel for the respondent contended that the judgments pending in the High Court which had jurisdiction before the promulgation of the said Act and, therefore, although pecuniary jurisdiction had been enhanced, the High Court was competent to continue with the hearing of the case. This contention has no merits. **Any statute, which enhances or reduces the pecuniary jurisdiction of a Court provides a forum other than the one where the case is pending, falls within the category of procedural law and will be governed by the principles state above.**" (bold added)

36. Notwithstanding the above we are mindful however that retrospective effect can only be given to a statute **in exceptional cases** and we must look to the legislative intent. Reliance in this regard is placed on the case of **Muhammed Hussain** (Supra) where a larger bench of the Hon'ble Supreme Court held as under at P.377.

"From careful reading of section 1(2) of Act X of 1992 it is quite clear that though Act X of 1992 came into force on the date of its enactment namely 16-12-1992, but its provisions were given effect to from 31-12-1991. We are, therefore, of the view that Act X of 1992 is retrospective in its application and its provisions came into effect from 31-12-1991. It therefore, follows that the period of limitation which was originally prescribed under section 31 of the Act as one year, stood curtailed to 120 days and the amendment was made effective from 31-12-1991. **The question which, however, arises for consideration in these appeals, is whether the above retrospective effect given to Act X of 1992 through subsection (2) of section 1, destroyed the vested rights of the parties and if so to what extent?**

It is well-settled principle of interpretation that there is a strong presumption against the retrospectivity of a legislation which touches or destroys the vested rights of the parties. No doubt the Legislature is competent to give retrospective effect to an Act and can also take away the vested rights of the parties, but to provide for such consequences, the Legislature must use words which are clearly, unambiguous and are not capable of any other interpretation or such interpretation follows as a necessary implication from the words used in the enactment. Therefore, while construing a legislation which has been given retrospective effect and interfere with the vested rights of the parties, the words used therein **must be construed strictly** and no case should be allowed to fall within the letter and spirit of Act which is not covered by the plain language of the legislation." (bold added)

37. Bearing in mind that we have already found that in large part the offense of willful default under the NAO has been subject

to the doctrine of implied repeal it would be useful to consider how the Hon'ble Supreme Court has considered the effect on existing cases which are proceeding under one Statute which is then repealed and retrospectively of Statutes in general.

38. In the case of **Mst Sarwar Jan V Mukhtar Ahmed** (PLD 2012 SC 217) in terms of retrospectivity of statutes the Supreme Court held as under at P.221

> "7. In order to examine if as per its own force section 4 ibid has a retrospective effect, it is settled rule that any statute or a provision thereof forming part of substantive law, which creates or extinguish or affect the rights of the persons/citizen shall ordinarily have a prospective effect, except where by the clear command of the law, it is made applicable retrospectively."

39. In the case of **Muhammed Tariq Badr V NBP** (2013 SCMR 214) P.333 it was held as under

> "Before further proceeding with the matter it may be mentioned that according to the settled law a change in the substantive law which diverts and adversely affect the vested rights of the parties shall always have prospective application, unless by express word of the legislation and/or by necessary intendment/implication such law has been made application retrospectively. **In other words the vested and substantive rights of the parties are and should be decided according to the law which was prevalent when the action was initiated and the door of the Court was knocked, and/or the machinery (of the Court) was set in motion/**"(bold added)

40. In our view S.6 of the General Clauses Act 1897 is also not without significance, especially as there is no saving clause in the Act, in dealing with statues that are repealed (express or implied or even when specific parts of some sections of a statute as in this case are subject to the doctrine of implied repeal) as was held by the Supreme Court in the case of **MCB Bank Ltd V Abdul Waheed Abro** (2016 PLC 168) at P.175 as under;

> "As far as the contention of the learned counsel regarding the effect of repeal of Industrial Relations Ordinance, 2002 is concerned, we are of the opinion that the said argument is not well founded. **Section 6 of the General Clauses Act, 1897, operates in such a manner that it allows for the effect of an enactment repealed by any Central Act to continue even after such repeal.** A perusal of Section 6 of the Act ibid reflects the same:-
>
> > "6. Effect of repeal: Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made

or hereinafter to be made then, **unless a different intention appears**, the repeal shall not--

(a) revive anything not in force or existing at the time at which the repeal take effect; or

(b) **affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or**

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) **affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation liability, penalty forfeiture or punishment as aforesaid; and any such investigation; legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment maybe imposed as if the repealing Act or Regulation had not been passed."**

In the present case Section 6 of the Act ibid shall apply as the initial grievance application filed in the said Labor Court was made under the Industrial Relation Ordinance, 2002, which was repealed by a Central Act, i.e. Industrial Relation Act, 2008, thereby fulfilling the requirement of Section 6 of the General Clauses Act, 1897, and bringing it into operation." (bold added)

41. We also consider that Article 264 of the Constitution (which in large part replicates S.6 of the General Clauses Act as discussed above) is to a certain extent relevant to determining the issue at hand by way of analogy (although this Article refers to the repeal of a law by the Constitution as opposed to a part of a section of a statute by virtue of a later statute by way of implied repeal) which reads as under:

"264. **Effect of repeal of laws**. Where a law is repealed, **or is deemed to have been repealed**, by, under, or by virtue of the Constitution, the repeal shall not, except as otherwise provided in the Constitution,---

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) **affect the previous operation of the law or anything duly done or suffered under the law**;

(c) **affect any right, privilege, obligation or liability acquired, accrued or incurred under the law;**

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the law; or

(e) **affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;**

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed." (bold added)

42. From the above discussion and authorities the **key issues** on whether or not the Ordinance as amended by the Act is retrospective or prospective only appear to us to be whether the amendment is procedural only or whether it can be said to effect the substantive law, whether holding the Act to be of retrospective effect causes inconvenience or injustice or effects existing vested rights of any of the parties.

43. We make the following findings on these key issues based on the particular facts and circumstances surrounding this case and the above discussion:

(a) That the legislature has consciously and deliberately **not** made the Act retrospective **by express intention** by specifically stating that it will commence from 13-08-2016 and **not** from a retrospective date. It could have done so, as with the NAO, but it deliberately and intentionally did not do so.

(b) That if the intention of the legislature was to give retrospective effect to the Act apart from stating from which date it would take effect **additionally** in our view it would have made transitional arrangements for existing inquiries, investigations and references for the offense of willful default under the NAO. For example, when the Ehtesab Act 1997 was repealed and replaced by the NAO S.33 NAO specifically provided at **S.33 for the transfer of proceedings** in the following terms, "Any and all proceedings pending before a Court under the Ehtesab Act, 1997 shall stand transferred to a Court as soon as it is constituted under the Ordinance within the same Province and it shall not be necessary to recall any witness or again to record any evidence that may have been recorded." No such transitional arrangements have been made

(c) That we do not consider that the amendments made by the Act are wholly procedural in nature. For example, **some changes to the substantive law have been made**

especially in terms of potential sentences, the use of the conciliation committee will no longer be available, the ability to enter into a plea bargain will no longer be available etc. In this respect reliance is placed on **Abdul Majid V State** (PLD 1974 Kar 309) whereby a change in sentence was held to be a change in the substantive law.

(d) That some persons who are currently being proceeded against under the NAO for willful default by way of inquiry, investigation or reference have acquired some valuable vested beneficial rights under the NAO which should not be lightly taken away from them and to do so would be an injustice to them. For example, recourse to the conciliation committee, the ability to enter into a plea bargain, etc which if taken away from such accused may be regarded as an injustice to them and detrimental to their existing rights. In this respect even the cases cited by the petitioners in terms of procedural aspects all support this conclusion. For example, **Adnan Afzal** (supra) which followed the 1965 case of **Maulvi Muhammed Jamil** (supra) and **Malik Gul Hasan & Co** (Supra).

(e) That to transfer such existing inquiries, investigations and references would also **not** be convenient especially as to date despite a lapse of around 18 months no investigating agency has been nominated by the Federal Government under the Ordinance which failure would also further delay inquiries, investigations and references which were in full swing **which would lead to delayed justice especially in respect of references which have already been filed and the requirement under the NAO for expeditious trials**. Such wholesale transfer of cases may also over burden the banking courts and cause further delay in the proceedings.

44. Thus, taking into account the above factors we do **not** find the Ordinance as amended by the Act to be retrospective in nature. We find that the Ordinance as amended by the Act vis a vis the offense of willful default shall take effect from the date specifically mentioned in the Act i.e. 13-08-2016.

45. However in the light of the rule of beneficial interpretation of statutes vis a vis accused persons in criminal cases we find that any person convicted under the NAO for the offense of willful default after 13-08-2016 which would have been an offense of willful default under the Ordinance will be subject to the same sentence, punishment and disqualifications as set out in the Ordinance as amended by the Act and NOT those prescribed under the NAO. In respect of the rule of beneficial interpretation we place reliance on the case of **T. Barai Henry Ah Hoe** (AIR 1983 SC 150) which held at P.158 Para.26, "In the premises, the Central Amendment Act having dealt with the same offence as the one

punishable under Section 16(1) (a) and provided for a reduced punishment, **the accused must have the benefit of the reduced punishment. We wish to make it clear that anything that we have said shall not be construed as giving to the Central Amendment Act a retrospective operation insofar as it creates new offences or provides for an enhanced punishment.**" (bold added).Likewise the concept of beneficial interpretation of legislation in terms of a lesser sentence being imposed by a later statute and being applicable to an earlier statute is a well established concept under Pakistani law.

In summary and pursuant to this order.

1. The Ordinance as amended by the Act shall apply to and prevail over all cases of willful default under the NAO as per definition provided in S.2 (g) of the Ordinance **from 13-08-2016** when the Act is stated to take effect. Other matters relating to willful default, inquiries, investigations and other proceedings of willful default not covered by S.2 (g) of the Ordinance but covered by S.5 ® of the NAO will continue to be governed by the NAO

2. The Ordinance as amended by the Act shall **not** have retrospective effect and that all complaint verifications, cases pending before the Governor of the SBP in connection with the NAO, NAB inquiries, investigations and references in respect of the offense of willful default under the NAO in existence **prior to 13-08-2016** shall continue to be governed by the NAO but any convictions under the NAO for willful default will be subject to the same sentences, disqualifications etc as provided in the Ordinance and not under the NAO.

3. All persons already convicted of the offense of willful default under the NAO will remain convicted and their appeals, if any, shall be proceeded with under the mechanism provided in the NAO.

4. All the above petitions stand dismissed in the above terms **save that** the petitions in so far as they contain a prayer in respect of bail either pre arrest or post arrest (namely petitions CP.D.No. 633/16 584, 585, 586, 1170 all of 2013, and 3149/17) shall continue to be heard before this court in respect only of the

prayer for bail and shall be fixed by the office before this court on 21-05-2018 as per Roster
KB

During the course of their arguments we were informed by learned counsel for the petitioners that in terms of S. 20(7) of the Ordinance as amended by the Act whereby the Federal Government is required to nominate an investigating agency for taking action in respect of an offense of willful default under the Ordinance as amended by the Act that the Federal Government had not done so despite the lapse of about 18 months since the Act was passed. The learned AAGP could not controvert the above and as such we deem it appropriate to **direct** the Federal Government to nominate an investigating agency in terms of S.20 (7) of the Ordinance as amended by the Act in order to give effect to the aim of prosecuting offenses of willful default under the Ordinance within 15 days of the date of this order. A compliance report shall be sent to this court through MIT II within 28 days of the date of this order.

A copy of this order shall be transmitted by the office to the Secretary's of the Ministry of Interior and Ministry of Law Government of Pakistan, the Governor of the State Bank of Pakistan, the Chairman NAB, the DG NAB Karachi and Sukkur, all accountability court judges in Sindh and the Administrative Judge of the Banking Courts established under the Ordinance for Karachi for information and compliance.