

**Judgment Sheet**  
**IN THE LAHORE HIGH COURT, LAHORE**  
**JUDICIAL DEPARTMENT**

WP No.57334/2017

**JUDGMENT**

**Mushtaq Ahmad** Vs. **Judge, Banking Offences Court No. 2, Lahore**

**Date of hearing:** 18.01.2019

**Petitioner**

**Represented by:** M/s. Israr Ahmad Qureshi and Sh. Aftab Umar, Advocates.

**Respondent No.2**

**Represented by:** Mr. Muhammad Nadeem, Advocate.

**State**

**Represented by:** Ms. Sadia Malik, Assistant Attorney General.  
Rai Shahid Saleem Khan, Assistant Advocate General.

**Assisted by:**

*Rana Shaher Yar, Research Officer/Civil Judge, Lahore High Court Research Centre.*

**JAWAD HASSAN, J:-** Through the instant constitutional petition, filed under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the “Constitution”), the Petitioner has called in question the legality of the order dated 15.07.2017 passed by the Judge Special Court (Offences In Banks)-II, Lahore (the “Special Court”), whereby the Petitioner’s application seeking dismissal of the complaint filed by the Respondent No.2, was dismissed.

**I. Background**

2. Succinctly, facts as stated in the petition are that the Petitioner and one Muhammad Nawaz (since dead) were allowed the

financial facility in the year 2004, by the Respondent No.2/bank, on the basis of pledge of paddy/rice and mortgage of certain immovable property. In the year 2006, the Respondent No.2 filed a complaint against the Petitioner & others, before the Special Court alleging therein that the Petitioner in connivance with others cheated the Respondent No.2/Bank by submitting the fake Fard Malkiyat for obtaining the said financial facility. The Petitioner while relying on judgment of the Hon'ble Supreme Court of Pakistan passed in Civil Appeal No.2561/16 (*Syed Mushahid Shah and others v. Federal Investment Agency etc.* (2017 SCMR 1218) moved an application before the Respondent No.1/Special Court for dismissal of the complaint asserting that it was not maintainable before the Special Court established under the Offences in Respect of Banks (Special Courts) Ordinance, 1984 (the "Ordinance of 1984"); rather it was triable by the Banking Court established under the Financial Institutions (Recovery of Finances) Ordinance, 2001 (the "Ordinance of 2001"). This application was dismissed by the Special Court, vide the impugned order dated 15.07.2017. Hence, this petition.

## **II. Submissions of the Petitioner.**

3. Learned counsel for the Petitioner *inter alia* contended that the Special Court has no jurisdiction to entertain the complaint filed by the Respondent No.2 against the Petitioner; that the matter falls within the purview of Section 20(b) of the Ordinance of 2001 and the Banking Court has the exclusive jurisdiction to adjudicate upon it; that the Special Court has passed the impugned order

wrongly and has assumed the jurisdiction not vested in it; that the Special Court has failed to understand the judgment of the Hon'ble Supreme Court of Pakistan passed in case of *Syed Mushahid Shah and others v. Federal Investment Agency* (2017 SCMR 1218); that the Hon'ble Supreme Court has clearly held the provisions of Ordinance of 2001 to have an overriding effect on anything inconsistent contained in any other law including the Ordinance of 1984.

### **III. Submissions of the Respondent No.2.**

4. On the other hand, counsel for the Respondent No.2 assisted by learned Law Officers have supported the impugned order by stating that the same was passed after due consideration of the provision of section 20 of the Ordinance of 2001 and section 4 of the Ordinance of 1984; that the Petitioner along with others prepared bogus and forged *Fard Malkiyat* and by using the same as genuine fraudulently secured loan from the bank after executing a mortgage deed on the basis of that forged document; that the offences with which the Petitioner & others have been charged do not fall exclusively within the domain of Section 20(b) of the Ordinance of 2001 rather the same attracts sections 4 & 5 and First Schedule of the Ordinance of 1984; that the case in hand does not fall within the category of cases mentioned by the august Supreme Court of Pakistan in its judgment reported at **2017 SCMR 1218** and the Special Court has the jurisdiction to adjudicate and decide the case.

5. I have heard the arguments of both sides and perused the record.

#### **IV. Moot Point**

6. After hearing the arguments advanced by both sides and perusing the material available on record, I find the following moot point necessary to be determined for decision of the instant petition:

*Whether the allegation of preparing a false and forged “Fard Malkiyat” and using the same as genuine for the purpose of cheating the bank, in order to secure a loan, falls within the ambit of section 20(b) of the Ordinance of 2001 or it attracts the provisions of sections 4 & 5 read with First Schedule to the Ordinance of 1984?*

#### **V. Determination**

7. For the proper determination of the question, the relevant provisions of law are reproduced herein below for ready reference:

##### **i. Relevant provisions of Section 20 of the Ordinance of 2001.**

*20. Provisions relating to certain offences.- (1) Whoever:--*

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*(b) makes fraudulent misrepresentation 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;*

##### **ii. Relevant provisions Sections 4 & 5 of the Ordinance of 1984.**

*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.*

##### **iii. FIRST SCHEDULE to the Ordinance of 1984.**

**FIRST SCHEDULE** [See Section 2 (d)]

*(a) Any offence punishable under any of the following sections of the Pakistan Penal Code (Act XLV of 1860), namely:--  
Sections 201, 204, 217, 218, 380,403, 406, 408, 409,419,420, 467, 468, 471, 472, 473, 475 and 477-A;*

*(aa)Any offence punishable under Section 27 of the Regional Development Finance Corporation Ordinance, 1985 (XXXVI of 1985);]*

(b) Any offence punishable under this Ordinance;

[(bb) Offences punishable under section 5 of the Prevention of Corruption Act, 1947 (II of 1947); and]

(c) Any attempt or conspiracy to commit, or any abetment of, any of the aforesaid offences.

8. It would also be advantageous to reproduce the relevant portion of the judgment of the Honorable Supreme Court passed in case of **Syed Mushahid Shah and others v. Federal Investment Agency etc. (2017 SCMR 1218)**, relied upon by the learned counsel for the Petitioner:

“15....

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*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 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.”*

[emphasis supplied]

9. The Respondent No.2/Bank has filed the complaint under section 5(1) of the Ordinance of 1984 for initiating criminal

proceedings u/s 406/420/468/471/409 PPC against the Petitioner, his partner Muhammad Nawaz (since dead), the then bank manager/Respondent No.4 and the Revenue Officials/Respondent No. 3 & 5. The complaint was filed by the Respondent Bank in the year 2006 and the Special Court on 21.12.2006 had held the view about the involvement of the Petitioner and Respondents No.3 to 5 as the accused under Sections 468, 471, 420 and 406/34 PPC and their bailable warrants were issued and the matter was pending with the Special Court and impugned order was passed on 15.07.2017. It has been alleged in the complaint that the Petitioner in connivance with other accused persons/Respondents No.3 to 5 prepared a false FARD MALKIAT of an immoveable property, used the said forged document dishonestly and cheated the Bank/Respondent No.2 in securing the loan of Rs.40 million. The allegations of making abetment and committing criminal breach of trust have also been made against the then Bank Manager/Respondent No.4. These allegations clearly constitute the commission of offences punishable under sections 406/409/420/ 468/471/34 PPC; and the Special Court, after examining the preliminary evidence/material produced by the complainant bank/Respondent No.2 in support of the complaint, has called the accused persons to face the trial in the said offences. The provisions of the Sections 20(b) of the Ordinance of 2001 and 5 of the Ordinance of 1984 are different in nature because the suit has been filed by the Respondent Bank against the Petitioner for the recovery of amount under Section 9 of the Ordinance of 2001 in which the issue is of default by the Petitioner and its recovery.

Whereas the Section 20(b) deals with the fraudulent misrepresentation, or breach of an obligation or representation made to a financial institution on the basis of which the financial institution has granted a finance to the Defendant. The criminal complaint was filed before the Special Court under Section 5 of the Ordinance of 1984 against the Petitioner and Respondents No.3 to 5 who are Patwari, OG-I and Gardawar which are not the party in the Banking suit and the Respondent Bank has alleged in the complaint that the Petitioner in connivance with other accused persons/Respondents No.3 to 5 prepared a false FARD MALKIAT of an immoveable property, used the said forged document dishonestly and cheated the Bank/Respondent No.2 in securing the loan of Rs.40 million. Since the nature of the complaint is; against the different parties, different cause of action and on different grounds which cannot be tried by the Banking Court because it can only try the matters covered under Section 9 of the Ordinance of 2001. As such, the Special Court has rightly passed the impugned order by following the dictum laid down by the Hon'ble Supreme Court of Pakistan in the Syed Mushahid Shah's case *supra*. It is to be noted that the matter is pending since 2006 and examination in chief of two witnesses of the Respondent Bank was recorded, therefore, at this belated stage the application was rightly dismissed by the Special Court in the year 2017 regarding the matter filed in the year 2006.

10. The Hon'ble apex Court, in Syed Mushahid Shah's case, has held that the offences which fall squarely within the purview of the

Ordinance, 2001 are to be tried by the Banking Court under the said Ordinance, while the offences not covered by the Ordinance of 2001 would be triable under the Ordinance of 1984. Section 20(b) of the Ordinance of 2001 relied upon by learned counsel for the Petitioner (afore-quoted) has carefully been read; it relates to the fraudulent misrepresentation, or breach of an obligation or representation made to a financial institution on the basis of which the financial institution has granted a finance; but it does not cover the allegations made in the complaint by the Bank/Respondent No.2, of preparing a false/forged document, using fraudulently that document as genuine and committing the criminal breach of trust. All these offences punishable u/s 406/420/468/471 PPC are mentioned in the FIRST SCHEDULE to the Ordinance of 1984, and triable exclusively by the Special Court as per section 4 of the Ordinance of 1984. The Special Court has thus correctly held in the impugned order that the offences with which the Petitioner/accused has been charged do not fall exclusively within the domain of section 20 of the Ordinance of 2001 rather the same attracts section 4 and first schedule of the Ordinance of 1984. In coming to this conclusion, I am also fortified by the following observations of the Honorable Sindh High Court made in case of *Naseem A. Sattar and 6 others V. Federation Of Pakistan through Federal Secretary, Ministry of Interior, Islamabad and 3 others* (P L D 2016 Sindh 311):

“8. The impugned FIR has been lodged under section 406/420/468/471/109, P.P.C. The offences are cognizable in nature, and are scheduled offences according to provisions of the Ordinance, 1984. A perusal of the First Schedule contained in section 2(d) read with subsection (2) to section 6 of the Ordinance, 1984, provides that all (ibid) offences if are alleged to

*have been committed in respect, or in connection with the business of a Bank are cognizable and non-bailable. Section 6(2) lays down that for the purpose of this Ordinance, the provisions of P.P.C., 1860 specified in the Second Schedule, subject to modifications therein whereby these penal provisions have been made more stringent, shall have effect, meaning thereby that if the offences are cognizable and non-bailable under P.P.C., 1860, they shall be treated so for the purpose of this Ordinance. Under section 3, the Special Court is established and in terms of section 4 of the Ordinance, 1984, the scheduled offences shall be triable exclusively by a Special Court, notwithstanding anything contained in the Code. The impugned FIR and the subsequent cognizance taken by the Special Court, seen in above context, do not appear to be illegal or coram non iudice.....”*

[emphasis supplied]

Moreover, in Asif Mahmood’s case reported at **1987 PCr.LJ 896** the trial of similar offences u/s 420/468/471 PPC was conducted by a Special Court (Offences in Banks) and the Honorable Supreme Court has approvingly referred the said case in in Syed Mushahid Shah’s case (**2017 SCMR 1218**).

11. In view of what has been discussed above, I feel no hesitation to hold that the impugned order has rightly been passed by the Special Court while observing that it has the jurisdiction to adjudicate and decide the case, and see no ground to interfere with it, under the constitutional jurisdiction of this Court. Consequently, the petition, being devoid of any merit, is hereby dismissed.

**(JAWAD HASSAN)  
JUDGE**

**Approved for reporting**

**JUDGE**