

**JUDGMENT SHEET.**  
**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT.**

**Writ Petition No.3908/2015**

**Mst. Ayesha Shabbir & others**

**Versus**

**The Registrar Islamabad High Court, Islamabad & others**

Petitioners by : Mr. Ijaz Janjua, Advocate.  
Respondents No.1 & 2 by : Mian Abdul Rauf, AG, Islamabad.  
Respondent No.3 by : Mr. Wajid Hussain Mughal, Advocate.

**Writ Petition No.3909/2015**

**Muhammad Shoaib Akhtar & others**

**Versus**

**The Registrar Islamabad High Court, Islamabad & others**

Petitioners by : Mr. Muhammad Umair Baloch, Advocate.  
Respondents No.1 & 2 by : Mian Abdul Rauf, AG, Islamabad.  
Respondent No.3 by : Mr. Wajid Hussain Mughal, Advocate.

**Writ Petition No.4016/2015**

**Islamabad Bar Association through its President**

**Versus**

**The Registrar Islamabad High Court, Islamabad & others**

Petitioner by : Mr. Wajid Hussain Mughal, Advocate.  
Respondents by : Mian Abdul Rauf, AG, Islamabad.  
Date of hearing : 31.05.2017.

**JUDGMENT**

**MOHSIN AKHTAR KAYANI, J:-** Through this common judgment, I intend to decide all the captioned writ petitions as common questions of law and facts are involved in all these writ petitions.

2. Through W.P. No.3908/2015 the petitioners have prayed for the following relief:-

- (a) *The requirement to appear in examinations at this belated stage, after 2 years and nine months in service, be declared to be without lawful authority.*
- (b) *A declaration be issued that, the first examination held on 31 August till September 5, without prior training, is null and void.*
- (c) *A declaration that, the Examination Committee comprising of only two Hon'ble Judges was violative of the adopted Rules, which prescribed a minimum of three Judges, to form the Examination Committee.*
- (d) *A declaration that, the Petitioners are being discriminated against in service in complete disregard of Constitutional Guarantees / safe guards and therefore, the whole process and procedure is unconstitutional.*
- (e) *A declaration that, since the Petitioners were entitled to four attempts in 24 months, which is not possible through no fault of their own, they are absolved from appearing in the examination, which stand dispensed with in KPK, Balochistan and Sindh High Courts.*

Whereas, in W.P. No. 3909/2015 same relief has been claimed by the other set of petitioners, therefore, there is no need to reproduce the prayer of said writ petition, whereas in W.P. No. 4016/2015 petitioner (Islamabad Bar Association) has prayed for issuance of direction to respondent No.1 to initiate the process of Departmental Examination for Additional District & Sessions Judges appointed in September, 2012 as per Rule 20 (3) of Islamabad Judicial Service Rules, 2011.

3. Brief facts of the instant case(s) are that petitioners in W.P. No.3908 & 3909 of 2015 were appointed as Civil Judges-cum-Judicial Magistrates after due process of advertisement, written examination and interview conducted in all provinces as well as in FATA and finally the petitioners were appointed in Islamabad Judicial Service vide notification dated 22.09.2012. The petitioners are performing their duties since their date of appointment and presently conferred with powers of Civil Judge 1<sup>st</sup> Class vide notification dated 25.10.2012 and powers U/S 30 of Cr.P.C. vide notification dated 26.03.2015 by virtue of up-gradation of their post vide notification dated 19.03.2014. The petitioners were never offered to undergo the departmental training in terms of Rule 20(3) of the Islamabad Judicial Service Rules, 2011 whereafter, the petitioners have to appear in Departmental Examination for their confirmation in Islamabad Judicial Service vide letter dated 23.06.2015 whereby the Islamabad Judicial Service Rules have been amended on 02.05.2015 through notification and the Punjab Civil Judge Departmental

Examination Rules, 1991 have been adopted and the same were made applicable retrospectively to the extent of the petitioners who were appointed on 22.09.2012. Islamabad High Court vide notification dated 23.06.2015 directed the present petitioners to appear in Departmental Examination of Civil Judges-cum-Judicial Magistrates of Islamabad Judicial Service. The petitioners being aggrieved by the said notification challenged the same alongwith notification dated 16.11.2015 whereby the Islamabad High Court notified the results of first Departmental Examination held w.e.f. 31.08.2015 to 05.09.2015 whereby all the petitioners were declared fail in Departmental Examination and date of second Departmental Examination was notified, as w.e.f. 14.12.2015 to 19.12.2015. The petitioners have assailed both these notification through the instant writ petitions (W.Ps. No.3908 & 3909/2015).

4. Learned counsel for petitioners (in W.Ps. No.3908 & 3909/2015) argued that the impugned notifications dated 23.06.2015 and 16.11.2015 are void ab-initio, illegal, unlawful, arbitrary and against the rights of the petitioners; that there was no requirement of Departmental Examination existed in the appointment notification of the petitioners nor the same was prescribed in the Islamabad Judicial Service Rules, 2011 prior to the appointment of the petitioners; that Islamabad Judicial Service Rules do not provide Departmental Examination Rules whereas the Islamabad High Court has adopted the Punjab Civil Judges Departmental Examination Rules, 1991 which provides different mechanism and the same are not applicable in the case of petitioners; that petitioners have been discriminated as the Judicial Officers who were appointed in terms of Rule 2 (h) of the Islamabad Judicial Service Rules, 2011 have not been asked to undergo similar examination prior to confirmation of their services; that petitioners are being discriminated as similarly placed Civil Judges-cum-Judicial Magistrates by Islamabad High Court appointed on 20.01.2015 were sent for exclusive training for a period of 03 months prior to taking charge of their posts. Even the conditions of examination for confirmation of Civil Judges-cum-Judicial Magistrates has also been dispensed with by the Hon'ble Peshawar High Court, Hon'ble High Court of Sindh and Hon'ble High Court of Balochistan and the concerned Civil Judges were confirmed in service on completion of probation period; that as per Rule 4(1) of the Punjab Civil Judges Departmental

Examination Rules, 1991 the Chief Justice is required to constitute a committee comprising of three Judges of the Court for the purpose of conducting examination whereas in the case of petitioners the committee constituted by the Hon'ble Chief Justice of this Court was comprising of only 02 judges of the High Court; that as per Rule 4 (3) of the said Rules the committee is required to hold, conduct and supervise the examination, whereas in the present case, the committee appointed an external examiner for the conduct of examination and setting of question papers and the same external examiner was entrusted with the task to evaluate and check all the answer sheets despite the fact that he was only engaged to set the papers and not to check and evaluate the same; that schedule given for the examination is in violation of the Punjab Civil Judge Departmental Examination Rules, 1991 (adopted rules) as four examinations have been scheduled within a period of 10 months and not in two years as specified in Rule 5 of the said Rules; that there is no alternate efficacious and speedy remedy available except to invoke the writ jurisdiction as the issue relates to fundamental rights of the petitioners.

5. Conversely, learned counsel for Islamabad District Bar Association, argued that the instant writ petitions (W.Ps. No.3908 & 3909/2015) are not maintainable as the petitioners have no authority or right to challenge the departmental examination mainly on the ground that their terms and conditions of service were duly communicated to them in their notification of appointment dated 22.09.2012 and the same was accepted by the petitioners as a result whereof their notification for appointment was issued; that in terms of clause (i) of the notification of appointment the services of petitioners shall be governed by the terms and conditions given in the Islamabad Judicial Service Rules, 2011 and it has also been referred in clause (iii) that petitioners will be on probation for a period of two (02) years extendable for a further period of tow (02) years and the relevant Rules, Rule 20 (3) of the Islamabad Judicial Service Rules, 2011 imposes a condition that no person shall be confirmed in a post unless he has successfully completed such training and passed such departmental examination as may be prescribed from time to time; that the Departmental Examination has been prescribed by the Islamabad High Court, therefore, the petitioners cannot claim any discrimination on the basis of said law; that petitioners have not challenged vires of any rule and it is not their case rather they are

aggrieved by the second examination schedule as well as result of first Departmental Examination dated 16.11.2015 whereby all the petitioners have been declared failed.

6. Learned Advocate General, Islamabad has also represented the learned Registrar of Islamabad High Court, Islamabad whereby he argued that the instant writ petitions are not maintainable in terms of Article 199(5) of the Constitution of Islamic Republic of Pakistan, 1973; that the writ petitions have been filed against administrative order issued by Hon'ble Islamabad High Court and the same is not permissible in view of judgments reported as 2010 SCMR 632 "Muhammad Iqbal & others versus Lahore High Court through Registrar & others", PLD 1998 Supreme Court 103 "Muhammad Ikram Chaudhry & others versus Federation of Pakistan & others" and 1991 MLD 2546 [Lahore] "Nusrat Elahi & 41 others versus Registrar Lahore High Court and 68 others". Learned Advocate General further argued that petitions suffer from laches and the petitioners acquiesced the holding of Departmental examination by sitting in first departmental examination and now they cannot take u-turn by challenging the same; that petitioners have not availed the alternate remedy before approaching this Court.

7. Arguments heard, record perused.

8. From the perusal of record it has been observed that the petitioners (in W.Ps. No.3908 & 3909/2015) were appointed as Civil Judges-cum-Judicial Magistrates after due process of advertisement, written examination and interview by the Islamabad High Court vide notification dated 22.09.2012. The petitioners at the time of their appointment accepted the terms and conditions referred in notification dated 22.09.2012 which are as under:-

- (i) *Their services shall be governed by the terms and conditions given in the Islamabad Judicial Service Rules, 2011;*
- (ii) *They shall have to appear before a Medical Board for verification of good mental and physical state and being free from any physical defect likely to interfere with the efficient performance of their duties as a member of the Service;*
- (iii) *They will be on probation for a period of two (02) years extendable for a further period of two (02) years;*

- (iv) *They shall be subject to discipline as prescribed under rule 25 of the Islamabad Judicial Service Rules, 2011;*
- (v) *They shall be liable to be transferred and serve anywhere under the administrative control of this High Court or anywhere within or outside Pakistan on any equivalent or higher post under the Federal Government or any local authority or statutory body setup or established by Government and serve anywhere on deputation in Pakistan under the Provincial Governments;*
- (vi) *They shall be entitled to the scale of pay and other financial benefits including pensionary benefits as determined under rule 23 of the Islamabad Judicial Service Rules, 2011;*
- (vii) *Their services during period of probation or extended period of probation may be dispensed with at any time without giving any prior notice;*
- (viii) *If anyone of them wants to resign he may do so after giving one month prior notice to the authority, otherwise, one month pay shall be forfeited. The resignation shall, however, be subject to the acceptance by the Competent Authority;*
- (ix) *No TA/DA shall be admissible for joining the service.*

Whereas services of petitioners were governed by the terms and conditions given in the Islamabad Judicial Service Rules, 2011 and after acceptance of the above referred terms and conditions of appointment their names were notified as Judicial Officers. It has been observed from the record that the Hon'ble Chief of Islamabad High Court on the recommendation of Board (Judicial Selection Board) was pleased to appoint the petitioners as Civil Judge-cum-Judicial Magistrate (BPS-17) but their posts were upgraded from BPS-17 to BPS-18 vide notification dated 19.03.2014 however, in terms of Rule 20(3) of the Islamabad Judicial Service Rules, 2011 the Registrar of this Court issued the date sheet/ schedule, syllabus for the first Departmental Examination of Civil Judges-cum-Judicial Magistrates of Islamabad Judicial Service vide notification dated 23.06.2015. The Hon'ble Chief Justice, Islamabad High Court on the recommendations of Administration Committee has referred the amendment in the Islamabad Judicial

Service Rules, 2011 which was notified vide notification S.R.O. 395 (I)/2015 dated 05.05.2015 whereby following amendments have been made:-

*“In the Islamabad Judicial Service Rules, 2011, after sub-rule 3 of rule 20 following proviso shall be added:-*

*“Provided that until Islamabad High Court frames its own Rules regarding Departmental Examination of Civil Judges/Judicial Magistrates, the corresponding Rules of the Lahore High Court, Lahore with such modifications/ changes as may be prescribed by Hon’ble Chief Justice on the recommendation of the Hon’ble Administration Committee, shall apply.”*

In view of above amendment in the Rules, first Departmental Examination of Civil Judges-cum-Judicial Magistrates was notified and was held w.e.f. 31.08.2015 to 05.09.2015. All the petitioners participated in the Departmental Examination. However all the petitioners failed as per the notification dated 16.11.2015 whereas the petitioners had appeared in six different papers of Criminal Law, Civil Law-I, Civil Law-II, Revenue Law, Accounts & Shariah Law.

9. After the declaration of their results of 1<sup>st</sup> Departmental Examination the same notification contains second departmental examination date commencing w.e.f. 14.12.2015 to 19.12.2015 but all the petitioners assailed the same before this Court through W.P. No.3908 & 3909 of 2015.

10. The main grievance of the petitioners is relating to Rule 20(3) of the Islamabad Judicial Service Rules, 2011 however, in order to understand the analogy of the said Part-VIII of the Rules, Rule 20 is reproduced as under:-

*“20. **Probation.**—(1) The persons appointed to the Service at the first time appointment shall stand confirmed with effect from the date of their appointment:*

*Provided that they have been confirmed by their parent department otherwise they shall remain on probation for a period of one year.*

*(2) Save as provided in sub-rule (1), a person appointed to a post against a substantive vacancy shall remain on probation for a period of two years, if appointed by initial recruitment, and for a period of one year, if appointed otherwise:*

*Provided that the Appointing Authority may extend the period of probation by a similar term:*

*Provided further that a total period of probation shall not exceed four years in case of initial recruitment:*

*Provided also that the High Court may, in exceptional circumstances of any case, reduce the period of probation.*

***Explanation.***-*Officiating service and service spent on deputation to a corresponding or a higher post may be allowed to count towards the period of probation.*

*(3) No person shall be confirmed in a post unless he has successfully completed such training and passed such departmental examinations as may be prescribed from time to time.*

*(4) If no order to the contrary has been made by the day following the completion of the initial probationary period, the period of probation shall be deemed to have been extended:*

*Provided that the officers confirmed on the posts of Civil Judges-cum-Magistrates and on the posts of Additional District and Sessions Judges shall not be required to be confirmed on the posts of Senior Civil Judges-cum-Magistrates and District and Sessions Judges respectively.*

*(5) Subject to the provisions of sub-rule (3), if no order has been made by the day on which the maximum period of probation expires, the probationer shall be deemed to have been confirmed in his appointment from the date on which the period of probation was last extended or may be deemed to have been so extended.*

*(6) A probationer, who has satisfactorily completed his period of probation against a substantive vacancy, shall be confirmed with effect from the date of his continuous appointment against such a vacancy:*

*Provided that where the period of probation has been extended under the provisions of sub-rule (2), the date of confirmation shall, subject to the other provisions of this rule, be the date on which the period of probation was last extended.*

*(7) If it appears to the High Court at any time during or at the end of the period of probation, or extended period of probation, as the case may be, that a probationer has not made sufficient use of his opportunities or has otherwise failed to give satisfactory performance, it may revert the probationer to his original post, if any, or if he does not hold a lien on any post, his services may be dispensed with.*

*(8) A person whose services are dispensed with or who is reverted under sub-rule (7) shall not be entitled to any compensation."*

In view of Sub-rule 3 of Rule 20 it is mandatory to complete training and to pass departmental examination as may be prescribed from time to time before confirmation of any person under Islamabad Judicial Service Rules, 2011, whereas, admittedly petitioners have never been directed to join training nor any training has been prescribed under the



Rules till date however, the departmental examination has been prescribed vide notification dated 23.06.2015.

11. In view of above rules, term “*prescribed*” comes into play which requires a proper meaning. “*Prescribed*” means “*recommended with authority*”. According to Ballentine’s Law Dictionary, it means to lay down before hand as a rule, ordain, appoint, define authoritatively as a guide, direction, rule of action, defined in *PLD 1966 [Karachi] 483 “General Manager, North-Western Railway versus Sher Muhammad”, PLD 1982 Quetta 1 “Salooka Steels Ltd. versus Director General, Coast Guards, Pakistan”, 1991 CLC 1826 [Lahore] “Muhammad Hussain and 9 others versus Mst. Fatima and 2 others” and 1992 PLC (CS) 421 “Syed Sajid Hussain versus Ch. Muhammad Latif & others”*.

12. In view of above referred judgments and terminology provided in the legal dictionary, the meaning of word “*prescribed*” has to be seen as referred above especially when the said term has not been explained or defined in the Islamabad Judicial Service Rules, 2011. The simple meaning of word “*prescribed*” means things which were already ordained/ defined / recommended with authority prior to departmental examination in this case, however, I have gone through the notification dated 23.06.2015 wherein prescribed departmental examination has been notified to be taken from the present petitioners, hence, it can safely be concluded that Islamabad High Court being the competent authority has already prescribed / recommended the departmental examination whereas the training has not been prescribed so far, as a result whereof the petitioners have participated in the first departmental examination hence, they acquiesced the holding of departmental examination by sitting in the said examination and they could not wriggle out from the order of competent authority i.e. Islamabad High Court.

13. The other objection raised by the learned counsel for petitioners is that their maximum period of probation has already been expired and they are confirmed in terms of Sub Rule (5) of Rule 20 of the Islamabad Judicial Service Rules, 2011. I have gone through the wording of Sub-Rule (5) of Rule 20 which is “*subject to the provisions of sub-rule (3)*” the expression subject to means “*conditional on, contingent on, dependent on, depending on, controlled by, hingeing on, resting on, hanging on*”. Similarly, the said

term has also been reported and defined in **2011 PTD 1460 [Karachi High Court] “A.P. Moller through Agent versus Taxation Officer of Income Tax and another”**, wherein it has been held that:-

“18. The legislative device of subjecting a provision to other provisions of the statute (or even the whole of the statute) is of course well established. Its proper interpretation was explained as follows in *C&J Clark Ltd. v. Inland Revenue 71 Commissioners* (1973) 2 All ER 513 by Megarry, J. (in the High Court):--

*"In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision."* (p.520; emphasis supplied)

*In Harding v. Coburn* (1976) 2 NLR 577, the New Zealand Court of Appeal observed:--

*"The qualification, 'subject to' is a standard way of making clear which provision is to govern in the event of conflict. It throws no light, however, on whether there would in truth be a conflict without it."*(per Cooke, J., pg. 582; emphasis supplied)

*In Newcrest Mining (WA) Ltd. v. Commonwealth* (1997) HCA 38; (1997) 190 CLR 513, the High Court of Australia was concerned with the interpretation of sections 51 and 122 of the Australian Constitution. It was observed as follows (internal citations omitted):

*"In interpreting S.122 and its relationship with S.51 of the Constitution, the most striking feature of the relationship is that the powers conferred by S.51 are conferred 'subject to this Constitution' while S.122 is unqualified by that expression.... The use of the expression 'subject to this Constitution' does not itself mean that there is always conflict between S.51 and S.122. But it does mean that, where conflict exists, S.122 must prevail. As Megarry J pointed out in *C and J Clark Ltd. v IRC* (1973) 2 All ER 513, 520 '[w]here there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail.' In *S v Marwane* 1982 (3) SA 717(A), 747-8, the Appellate Division of the Supreme Court of South Africa had to construe the words '[s]ubject to the provisions of this Constitution'. Miller JA, giving judgment for the majority, said:*

*'The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one."* (emphasis supplied)

Finally, reference may be made to *The South India Corporation*

*(P) Ltd. v. The Secretary, Board of Revenue Trivandrum and another AIR 1964 SC 207, where the Indian Supreme Court observed:--*

*"The words 'subject to other provisions of the Constitution' mean that if there is an irreconcilable conflict between the pre-existing law and provision or provisions of the Constitution the latter shall prevail to the extent of that inconsistency." (para 23)*

*As these judicial observations indicate, the phrase "subject to" merely makes clear which provision is to prevail in case there is a conflict between two provisions. It does not however, in and of itself necessarily mean that there is or will be a clash or conflict between the dominant (or master) provisions on the one hand, and the subject provisions on the other. And it certainly does not mean that the provision being made "subject to" is to be applied as though every other provision of the statute is to be read into it."*

14. The above referred interpretation given in authoritative judgment of High Court clearly demonstrates that the term “**subject to**” donates a condition status and unless such condition has not been meted out the subsequent event do not apply whereas Sub-Rule 5 of Rule 20 clearly demonstrates that it is subject to the provision of Sub-Rule 3 which says “*no persons shall be confirmed in a post unless he has successfully completed such training and passed such departmental examinations as may be prescribed from time to time*”. Hence, it can safely be concluded that Sub-Rule 5 is dependent upon Sub-Rule 3 of Rule 20 of the Islamabad Judicial Service Rules, 2011 and it cannot be interpreted independently nor its wording gives independent meaning on the basis of deeming clause referred in the said provision. In terms of Rules of interpretation of statute, it is settled that the rules should be read in harmonious manner and meaning should be given in a very simple and straight concept unless any other intention has been expressed by the legislator, therefore Sub-Rule 3 of Rule 20 of Islamabad Judicial Service Rules, 2011 has to be applied with all its requirements at the first instance in a manner provided whereafter Sub-Rule 5 is applicable.

15. Admittedly the petitioners appeared in the first departmental examination conducted by the Islamabad High Court and they failed, however, the second date-sheet was announced but they have assailed the same before this Court on different grounds i.e. discrimination qua previous batches of Judicial Officers as well as the completion of four years of their probation period. As far as the above mentioned two grounds are concerned, firstly, the discrimination has not been observed in this case as concept of discrimination applies when similarly placed people have been discriminated in terms of

their same status however it can safely be concluded that petitioners fall under “*initial appointment*” and their appointment does not fall within the category of “*first time*” nor even fall under absorption category rather their cases falls within the terms referred in Rule 2(k) “*initial appointment*” which means appointment made otherwise than by promotion, transfer or first time appointment from another service, department, or organization, etc referred in the Islamabad Judicial Service Rules, 2011.

16. In view of above terms and conditions, petitioners can only be regulated under these rules and they have acknowledged the application of said rules by accepting the appointment letters issued to them. It has further been observed from the record that all the petitioners after acceptance of their terms and conditions referred above in notification gave their consent and as a result of said acceptance notification dated 22.09.2012 was issued by the order of Hon’ble Chief Justice of this Court, therefore, all the three batches referred by the petitioners have different appointment procedure and terms & conditions of their appointment have separately been notified under the Rules. It has further been observed from the record that petitioners who have filed their writ petitions before second departmental examination while assailing the second examination chance, voluntarily and un-intentionally deprived themselves from application of Sub-Rule 5 of Rule 20 of the Islamabad Judicial Service Rules, 2011 without considering the fact that Sub-Rule 5 is dependent upon Sub-Rule 3, in such case they are under obligation to complete such training and pass such departmental examination as may be prescribed from time to time however, the training has not been prescribed by the Islamabad High Court but departmental examination has been notified and prescribed, therefore, the petitioners have no right to say that they have been discriminated and they will not appear in any examination rather such kind of conduct amounts to serious misconduct and gives an impression that all the petitioners who themselves are Civil Judges-cum-Judicial Magistrates do not want to obey the Rules in letter & spirit. The petitioners have failed to establish any right for not taking departmental examination especially for the reason that they have not been subjected to any departmental training (if prescribed) whereas departmental examination is mandatory in terms of Sub-rule 3 of Rule 20 of Islamabad Judicial Service Rule, 2011.

17. Prior to conduct of departmental examination the petitioners were working as Judicial Officers for more than 03 years hence, their judicial experience is more than the training in respect of preparation for Departmental Examination and the petitioners cannot be allowed to avoid the departmental examination merely on the ground that they were not subjected to training as the training was not a pre-requisite for the appearance in the departmental examination. The use of word “*and*” in between the training and departmental examination alongwith term “*prescribed*” makes it clear that both the words have two separate conditions for confirmation. The word “*and*” has been defined in Oxford Thesaurus of English which gives the following meanings:-

*“Conjunction together with, alongwith, with, as well as, in addition to, including, also, too; besides, furthermore, moreover.”*

Therefore, both training and departmental examination are separate in their meaning unless any one has been prescribed or both have been prescribed by the Islamabad High Court. The requirements of departmental examination are clearly mentioned in Islamabad Judicial Service Rules, 2011 as Sub-Rule 3 of Rule 20 has been referred in the Islamabad Judicial Service Rules, 2011 which should be read as part of appointment notification dated 22.09.2012 at serial No.1 and petitioners terms and conditions have been governed under the said rules however, as far as the adoption of the departmental examination rules is concerned, same are procedural in nature and it is settled proposition of law that procedural law has retrospective effect even otherwise the training condition is not mandatory for the examination unless prescribed.

18. The above referred discussion has already fulfilled the requirements in explicit manner that unless anything has been prescribed the same shall not be applied whereas the training has not been prescribed till date by the Islamabad High Court however, there is no restriction or impediment upon the Islamabad High Court to prescribe departmental examination without any training and even petitioners could not demonstrate by any stretch of imagination that the notification for departmental examination is not within the purview and authority of Islamabad High Court. Moreover, the petitioners in any manner cannot challenge the holding of departmental examination by the High Court on the pretext that they have not been subjected to any training

because in any manner the training has no nexus with departmental examination because departmental examination relates to syllabus/ knowledge of petitioners whereas training is given for performing official duties assigned to the Judicial Officers as well as for practical work of Judicial Officers.

19. The amended proviso of Sub-rule 3 of Rule 20 of the Islamabad Judicial Service Rules further refers the application and adoption of the Punjab Civil Judges Departmental Examination Rules, 1991 wherein the relevant provisions are as follows:-

**“3. Confirmation of Probationers.**--- No Civil Judge shall be confirmed in the service unless he has passed the examination in all subjects specified in Schedule-I in accordance with these Rules.

**4. Committee to conduct examination.**---(1) For the purpose of conducting examination under these Rules, the Chief Justice shall constitute a Committee of three Judges of the Court.

(2) The Registrar of the Court or any office nominated by the Committee shall act as Secretary to the Committee.

(3) The committee shall hold, conduct and supervise the examination in accordance with the syllabus mentioned in Appendix-II and the instructions issued by the Chief Justice or the Administration Committee of the Court.

**5. Schedule of Examination.**--- Examination under these Rules shall be held twice in a year according to the programme to be announced by the Committee at least a month prior to the commencement of each examination.

**6. Number of attempts.**---(1) A Civil Judge shall be eligible to appear in four successive examinations only beginning from the commencement of the examination held immediately after his appointment.

(2) A Civil Judge who fails to qualify the examination in four attempts allowed under the sub-rule (1) shall not be allowed to appear in a subsequent examination except with the permission of the Chief Justice.

**Explanation.** The examination may be qualified by parts but appearance in a part of the examination shall be counted as one attempt for the purpose of reckoning the number of attempts allowed by sub-rule (1) above.”

20. In view of above rules, rule 4 declares a committee to conduct examination comprising of three judges of the Court whereby this relates to second objection of the petitioners that the initial notification of examination committee comprises of two judge of Islamabad High Court which was constituted vide notification dated 19.05.2015

however, the said notification was rectified through a corrigendum dated 28.05.2015 whereby three Hon'ble Judge have been notified as the Committee for conducting of Departmental Examination of Civil Judge-cum-Judicial Magistrates of Islamabad Judicial Service whereas the said newly constituted committee of the departmental examination has conducted the first examination under the notification dated 23.06.2015 and the petitioners appeared in six papers w.e.f. 31.08.2015 to 05.09.2015 hence, the objection raised by the petitioners has not been justified from the available record and stands rejected in view of corrigendum referred by the Islamabad High Court.

21. As far as the stance taken by the petitioners that after completion of maximum period of four years, their probation period has completed and their services have automatically been confirmed, the same is without any legal backing because the petitioners' confirmation as prescribed in the rules is subject to passing of departmental examination and as such the confirmation of their probation is not simply connected with the completion of maximum probation period of four years rather the same is tagged with the condition of passing of departmental examination as such, the prayer of the petitioners to that extent is baseless and unfounded.

22. In last I have gone through the prayer of the petitioners whereby they claimed that they are entitled for the departmental training before conducting of departmental examination and the first examination which was taken by the external examiner has no legal effect. In this regard I am of the clear view that departmental examination committee in terms of the Punjab Civil Judges Departmental Examination Rules, 1991 is competent for the purpose of conducting of examination under the rules as the committee has been constituted by the order of Hon'ble Chief Justice of the Court whereby Sub-rule 3 of Rule 4 referred above clearly explains the powers to hold, conduct and supervise the examination in accordance with syllabus mentioned in appendix under the instructions issued by the Hon'ble Chief Justice or the Administration Committee of the Court, thus powers left nothing to any explanation nor give rise to situation to challenge the powers of the examination committee as the powers have been drawn from the orders of Hon'ble Chief Justice who has passed the same in the Administration Committee of the High Court which means all the orders have been passed by the full Court.

23. In order to understand the analogy of High Court, it is necessary to go through provisions of Article 175 of the Constitution of Islamic Republic of Pakistan, 1973 whereby the establishment and jurisdiction of the Courts have been defined in Article 192, which provides the constitution of High Court whereby High Court shall consist of a Chief Justice and so many other Judges as may be determined by law, hence, I am of the clear view that the constitutional provisions are clear while establishing a High Court and in this regard whenever we are confronted with the situation regarding the definition of a High Court, it means the whole Court, the said analogy can safely be assumed in terms of section 3 of the Islamabad High Court Act, 2010 whereby it has been referred that Islamabad High Court shall consist of a Chief Justice and six others Judge to be appointed from provinces and others territories of Pakistan, in accordance with Constitution, therefore, it is clearly described in the law that High Court means the all judges of the High Court, hence, the order passed by the Administration Committee of the full Court including the Hon'ble Chief Justice of Islamabad High Court means the orders of the Islamabad High Court.

24. In order to deal with the maintainability of the instant writ petition, I am of the view that all the orders passed by the Islamabad High Court Administration Committee as well as by Examination Committee of High Court means the Islamabad High Court and the Registrar is just a conveying authority of the orders of the Islamabad High Court and against all the orders including the notifications issued by the Islamabad High Court no writ is competent.

25. In order to understand the reasoning of above mentioned question, it is necessary to firstly go through the Article 199 (5) of the Constitution of Islamic Republic of Pakistan, 1973 which is reproduced as under:-

***“199. Jurisdiction of High Court. –***

(1) .....

(2) .....

(3) .....

(4) .....

(5) *In this Article, unless the context otherwise requires, -*



*“Person” includes any body politic or corporate, any authority of or under the control of the Federal Government, or of a Provincial Government, and any Court or tribunal, other than the Supreme Court, a High Court or a Court or tribunal established under a law relating to the Armed Forces of Pakistan;”*

The above referred Article excludes the Supreme Court, a High Court or a Court or tribunal from the definition of term “person” which is the main subject of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. The above referred term clearly demonstrates that the framers of the Constitution are clear regarding the wisdom of the said definition whereas the judicial orders of the Supreme Court and High Court on jurisprudential plane were already protected from the exercise of writ. It is only the administrative/ executive or consultative functions / orders and acts which have been saved under this sub-Article. However, in order to give reasons between the judicial orders and actions or orders made by the High Court or the Supreme Court in exercise of powers and functions in the office or being Members of the Court would be interpreted in the light of principle of comity which has been discussed in **PLD 1966 Supreme Court 1 “Mian Jamal Shah versus The Member Election Commission, Government of Pakistan, Lahore & others”** wherein it has been held that:-

*“there was an express provision to the effect that a decision by the Tribunal will not be deemed to be a decision by the High Court, but for the interpretation of Article 98, in respect of this question that consideration is not of appreciable weight. The learned Judges were in all probability right in considering the Member to be persona designata, and not the High Court or a Judge of the High Court, when acting under section 53, but one may be pardoned for referring here to a small observation in one of the judgments cited by the Full Bench with reference to the idea of a Superior. Court issuing a writ to itself, viz.:-*

*"the process involves the rather ludicrous position that Judge, are called upon themselves to show cause to themselves"*

*why their orders should not be quashed. In the present case, the order in question is made by a Single Judge of the High Court acting as the relevant authority, but it is conceivable that a statute may appoint a Tribunal of say two or three High Court Judges to adjudicate matters arising thereunder, and then indeed the aspect of 'ludicrousness' might arise if a writ were sought from a Single Judge of the High*

*Court to avoid actions by such Tribunals. In a number of statutes in the United Kingdom express provisions are included which avoid the writ jurisdiction in relation to such adjudications, and it is a matter for consideration whether such provisions should not be made use of in Pakistan as well. Quite apart from the aspect of 'ludicrousness' there are other and more weighty considerations involved, such as the necessity of maintaining a high degree of comity among the Judges of the Superior Courts, which could be urged in support of such a provision."*

Similarly, in another judgment of four Hon'ble Judges of august Supreme Court in case reported as **PLD 1976 Supreme Court 315 "Abrar Hassan versus Government of Pakistan and others"**, the Apex Court after examining the provisions of Article 199 (5) of the Constitution of Islamic Republic of Pakistan, 1973 discussed the scope and extent thereof whereby the principles of coordinate jurisdiction and comity among the judges has been discussed and logic has been referred with the following words:-

*"The policy of law that no writ will issue to a High Court and Supreme Court is based on sound principles. If one Judge of a High Court were to issue a writ to another Judge under Article 199, the Judge to whom the writ is issued, may in exercise of the same jurisdiction nullify the writ This is the logical consequence of the fact that High Courts and them individual groups of Judges are invested with coordinate jurisdiction."*

It has further been declared by the apex Court that:-

*"Another reason why writs should not issue from one High Court to another High Court and from one Judge to another Judge of the same High Court is that such a course will destroy the traditional high degree of comity among the Judges of superior Courts which is essential for the smooth and harmonious working of the superior Courts."*

It is also held that bar under Article 199 (5) could be directed in case of challenging the qualification to hold the office of a Judge of a High Court or the Supreme Court by way of writ in the nature of quo warranto which is exception to general rule.

26. Similarly, in another celebrated judgment given by five member bench of the apex Court reported as **PLD 1998 Supreme Court 103 "Muhammad Ikram Chaudhry & others versus Federation of Pakistan & others"** wherein it has been held that:-

*“8. There seems to be unanimity of view among the superior Courts on the question that a High Court or the Supreme Court cannot in exercise of its Constitutional jurisdiction under Article 199 of the Constitution to interfere with an order passed by another Judge or another Bench of the same Court.*

*9. Then it was urged that the petitioners would have no remedy against a,, patently illegal order. The factum that an aggrieved party may have no other legal remedy simpliciter will not bring his case within the purview of Article 199 of the Constitution if otherwise it does not fall within its compass.”*

Similarly, another view of the apex Court rendered by 10 Hon’ble Judges of the Supreme Court reported in **PLD 1998 Supreme Court 161 “Malik Asad Ali and others versus Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs, Islamabad and others”** wherein it was held that:-

*“Maintenance of high degree of comity between the Judges of superior Courts is neither a rule-of law nor a Constitutional requirement. It is only a highly desirable tradition which has existed for long and should continue to be followed by the Judges to maintain harmony and smooth working of the Courts, and also to preserve their institutional image in the eyes of the public. However, this high tradition of maintaining comity between the Judges of superior Courts cannot come in the way of discharge of more important Constitutional duty imposed upon the Judges of the superior Courts to protect and defend the Constitution under the oath of their office. Therefore, if the violation of a provision of the Constitution is brought to the notice of a Judge of the superior Court in a properly filed proceeding which involved the person of another Judge of the same Court, the relief, in the absence of a Constitutional bar, cannot be declined relying on the principle of high tradition of maintaining comity between the Judges. of the superior Courts. The proceedings in the nature of quo warranto confer jurisdiction and authority on superior Courts to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. These proceedings provide a positive safeguard to citizens against usurpers of public offices, who, in some cases, may be allowed to continue to hold the office in connivance or with the help of the executive authority.*

*The actions of the Judge which relate to the performance of his duty and functions as a Judge of the Court or as a Member of the Court, cannot be brought under challenge under Article 199 of the Constitution before the High Court. Only such actions of a Judge of superior Court are amenable to the jurisdiction of High Court under Article 199 of the Constitution, which he performs in his personal capacity, having no nexus with his official functions as a Judge of the Court. The High Court, while*

*hearing a case against the Judge of a superior Court under Article 199 of the Constitution, seeking information in the nature of quo warranto, which is maintainable.”*  
(underlining is mine)

27. In view of above principles of law, rule of comity, the other aspect which has to be considered as to which view/ judgment is to be followed is that in such situation the view expressed by bench of greater numerical strength is to be followed even if the view was expressed prior in time to different view expressed by a bench of smaller numerical strength at some subsequent stage some of the principles have been referred below from different judgments of the Apex Court:-

(i) *“We therefore, hold that the earlier judgment of equal Bench in the High Court of the same point is binding upon the second Bench and if a contrary view had to be taken, then request for constitution of a larger Bench should have been made”. Reliance is placed upon PLD 1995 Supreme Court 423 “Multiline Associates versus ARDISHIR COWASJEE and 2 others”.*

(ii) *“It may be pointed out that a bench of the same number of judges of the same High Court, or of the Supreme Court, can not deviate from view of the earlier bench, as rightly has been held in case of Multiline Associates in relation to a High Court”. Reliance is placed upon 1999 SCMR 2518 “Babar Shahzad versus Said Akbar & another” and 1999 SCMR 2883 “ARDESHIR COWASJEE and 10 others versus Karachi Building Control Authority (KMC), KARACHI and 4 others”.*

(iii) *The above two principles have been taken into consideration in case reported as PLD 2004 Supreme Court 600 “All Pakistan Newspapers Society and others versus Federation of Pakistan & others.”*

(iv) *Principle laid down by any provision of law or Constitution by the larger bench has a binding effect over the smaller bench. Reliance is placed upon PLD 2009 Supreme Court 879 “Sindh High Court Bar Association through its Secretary and another versus Federation of*

Pakistan through Secretary, Ministry of Law Justice, Islamabad & others”.

(v) *“General rule as to which view/ judgment has to be followed. That in such situation usually the view expressed by greater numerical strength is to be followed even if the view was expressed prior in time to different view expressed by a bench of smaller numerical strength at some subsequent stage.” Reliance is placed upon PLD 2013 Supreme Court 793 “Hassan and others versus The State & others”.*

28. All the above referred principles laid down by the apex Court put emphasis that the view expressed by bench of greater numerical strength is to be followed. In view of above celebrated judgments of the apex Court, Constitution Petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is competent if the petitioner could establish that challenge was to be the act of a judge in his private capacity or a *persona designata* or the appointment was being challenged by way of writ in the nature of quo warranto, therefore, in my humble view the writ petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is not maintainable against the same Court or another bench of the same Court or against a judge of the same Court in terms of Article 199 (5) of the Constitution of Islamic Republic of Pakistan, 1973 as held by the larger bench of the Supreme Court in **PLD 1998 SC 161, “Malik Asad Ali versus Federation of Pakistan”.**

29. The petitioners could not demonstrate from record any malafide, any illegality in any manner and by filing the instant writ petitions, the petitioners are seeking a restraining order to conduct the departmental examination to be held w.e.f. 14.12.2015 to 19.12.2015 and subsequently in March 2016 and July 2016 but admittedly all these time lines have already been expired and not available to the petitioners even the time has been expired and petitioners have missed their valuable chances to appear in the departmental examination, therefore, their writ to that extent become infructuous and rest of the claims are not founded on the legal principles.

30. It is settled proposition of law that writ petition is not maintainable in presence of any alternate remedy whereas the petitioners have filed their representations

independently by raising certain issues including the objections on the syllabus of the examination, the said representations have been entertained and their grievances have been discussed by the competent authority and certain objections have validly been removed even during the pendency of these writ petitions a Tribunal has duly been constituted for redressal of all issues of the petitioners, therefore, in such eventuality when the alternate remedy is available the writ petitions are not competent.

31. From the perusal of record it has also been observed that objection was raised by the office at the time of filing of these writ petitions although, the objections were overruled at initial stage but I am of the considered view that the objections can be considered at later stage and it is prerogative of this Court to consider all these objections on the legal touch stone at the time of final hearing whereas it is settled proposition of law that writ is maintainable where no other alternate remedy is available and I am of the view that these writ petitions are not maintainable at the very inception and office had rightly raised the objection as all these orders which have been assailed in these petitions have not been passed by the Registrar of this Court rather the same are passed by the High Court. The petitioners have relied upon the recent judgment of Apex Court reported as *PLD 2016 SC 961 "Ch. Muhammad Akram, Advocate High Court versus Registrar, Islamabad High Court and others"* decided on 26.09.2016, whereby question of certain appointments in the Islamabad High Court have been discussed whereby the issue of appointments of the administrative staff of the High Court falls within the administrative actions of the Court as the entire matter before the Apex Court is regarding the contract employees, deputationists, initial appointments, promotions/up-gradations and absorptions of the employees. It is apparent from the judgment of the Apex Court that there are certain illegalities which have rightly been pointed out in the said case before the Apex Court while appointing different individuals in the High Court establishment even the Apex Court has discussed each and every individual's case in the said petition and declared the appointments of the individuals as illegal. It is apparent from the said judgment that the matter was directly entertained by the Apex Court in terms of Article 184(3) of the Constitution of Pakistan, 1973 and even otherwise the entire proceedings

before the Apex Court were in nature of quo warranto which falls under exception of General Rule as held in **PLD 1998 SC 161 “Malik Asad Ali versus Federation of Pakistan”**. The case of the petitioners is distinguishable from the said case as the petitioners have failed to point out any illegality and even they could not demonstrate from the record that how a discretion can be exercised in their favor when they themselves have not qualified the first departmental examination rather by way of instant writ petition they are claiming the rights to be confirmed as Civil Judges-cum-Judicial Magistrates without going through the examination which is mandatory requirement under the Rules and even notified by this Court.

32. In such eventuality, if the petitioners are allowed to get through with such situation without departmental examination it means this Court further perpetuates the illegality which is against the mandate of law. Even it is settled proposition of law that no writ petition can be allowed to perpetuate the illegality. The petitioners have been estopped by their own words and conduct by appearing in their first departmental examination and they could not challenge the same when the results are different from their expectations even otherwise there are hundreds of thousands law graduates eager to join the judicial service on the positions of the petitioners, therefore, I am of the considered view that by way of claiming the exemption from examination and by challenging the subsequent departmental examination, the claim of the petitioners is to be considered against the law and cannot be allowed in any manner rather such kind of claim will further earn a bad name for the institution. Even otherwise, Sub-Rule 7 of Rule 20 of the Islamabad Judicial Service Rules, 2011 clearly imposes a duty upon the petitioners to use sufficient opportunities for their successful completion of probation which is subject to Sub-Rule 3 of Rule 20 and if the petitioners being probationer have not made sufficient use of opportunities or have otherwise failed to give satisfactory performance, their services may be dispensed with as a last resort, however, I have constrained myself from declaring any such action especially in presence of the Hon’ble Chief Justice, Judges and Administration Committee of this Court as well as in presence of Examination Committee.

33. In view of above, both the W.Ps. No.3908 & 3909/2015 are not maintainable as well as devoid of merits and same are hereby dismissed.

34. In addition to above, W.P. No.4016/2015 is also not maintainable as the Islamabad High Court has not yet framed its rules regarding the departmental examination of the Judicial Officers inducted in the Islamabad Judicial Service through initial appointment and corresponding rules of the Lahore High Court have been made applicable. Departmental Examination Rules of the Lahore High Court do not provide departmental examination for the Additional District & Sessions Judges before their confirmation. Even otherwise there is no precedent for holding of any departmental examination for confirmation of Additional District & Sessions Judges in all the provincial High Courts, therefore, any direction to amend the corresponding rules of the provincial High Court i.e. Lahore High Court cannot legally be issued. Even otherwise when the departmental examination has not been prescribed for the Additional District & Sessions Judges, the Islamabad Bar Association cannot claim and enforce the amendment of the rules by way of writ petition and it is the prerogative of the Hon'ble Chief Justice to interpret the rules if any question arises as to interpretation of the rules in terms of Rule 27 of the said Rules.

35. In view of above W.P. No.4016/2015 also stands dismissed.

36. Before parting with this judgment, it is necessary to dilate upon the remaining issues raised in instant writ petitions and keeping in view the valuable suggestions of Islamabad Bar Association, it is decided that:-

- (i) Learned Registrar of this Court shall place this judgment before Hon'ble Chief Justice & Departmental Examination Committee of this Court and shall seek further directions regarding issuance of notification for Departmental Examination of Civil Judges-cum-Judicial Magistrates of Islamabad Judicial Service to be held within 03 months alongwith schedule of remaining chances.
- (ii) It is expected from Hon'ble Departmental Examination Committee to initiate process of examination of all other remaining batches of Civil Judges-cum-Judicial Magistrates in the same schedule.



(iii) It is further expected from the Hon'ble Departmental Examination Committee to review the syllabus of Departmental Examination and exclude those subjects which relate to Punjab jurisdiction i.e. (1) The Punjab Tenancy Act, 1887 (2) Punjab Alienation of Land Act, 1900 (3) The Colonization of Govt. Land (Punjab) Act, 1912 (4) The Punjab Pre-emption Act, 1991, etc and are not applicable in Islamabad and add those subjects which are applicable in Islamabad like, Islamabad Rent Restriction Ordinance, 2001 etc.

(iv) It is also expected from Hon'ble Chief Justice to issue necessary notification of one time extension in probation period of petitioners while considering the services rendered by them as their main time period of probation has already expired during the pendency of instant writ petition due to status quo order passed by this Court.

37. It has further been observed that petitioners (Civil Judges-cum-Judicial Magistrates) have decided thousands of cases during the tenure of four years from date of their appointment, therefore, they should be treated with fairness and according to the principle of natural justice, hence, all the petitioners shall continue to work/ act as Civil Judges-cum-Judicial Magistrates under their terms of appointment till passing of their remaining chances of departmental examinations within one time extended probation period.

**(MOHSIN AKHTAR KAYANI)**  
**JUDGE**

**Announced in open Court on 06.06.2017.**

**JUDGE**

**Approved for Reporting.**

**Irfan Ali**

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