ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C.P No.D-6737 of 2015

Present
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Anwar Hussain

Sohail Baig Noori ..... Petitioner

Versus

The High Court of Sindh
through Registrar & others ..... Respondents

Dates of hearing: 19.02.2016, 26.02.2016, 04.03.2016, 21.03.2016 & 28.03.2016.

Mr. Abdul Abid Advocate for the Petitioner.

Mr.Sohail Baig Noorie, Petitioner is also present.

Mr. Salahuddin Ahmed, Amicus Curiae.

Mr.Ghulam Mustufa Memon, Registrar, Sindh High Court.

Mr.Sibtain Mehmood, A.A.G.

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Muhammad Ali Mazhar J. This petition of quo warranto has been brought to challenge the appointment of respondent No.2 as Chairman Inspection Team (C.I.T), Sindh High Court Establishment.

2. The petitioner is by profession an advocate. He is also convener of Justice Lawyers Front (J.L.F), Karachi. He argued in person that the respondent No.2 was elevated as judge of this court on the advice of then Chief Justice of Pakistan Mr. Justice Abdul Hameed Dogar. He referred to the judgment reported in PLD 2009 S.C 789 and further argued that in view of the dictum laid down in the

aforesaid judgment by the apex court, the respondent No.2 is not a retired Judge of this court. He was initially appointed on contract basis as Chairman Inspection Team vide Notification dated 30.07.2015 on up-gradation of the post of M.I.T-I but subsequently, he was also allowed to officiate as Registrar of this court as a former Judge of the High Court which amounts to contempt of the hon'ble Supreme Court. So far as the merits of the case are concerned, he argued that the appointment of the respondent No.2 on contract basis is sheer violation of the judgment of the hon'ble Supreme Court passed in Criminal Original Petition No.89 of 2011. The appointment of respondent No.2 on contract basis is also clear-cut violation of the Sindh High Court Establishment (Appointment and Condition of Service) Rules, 2006 which clearly provides that the post of M.I.T should be filled by transfer/promotion amongst senior most District & Sessions Judges. The respondent No.2 was retired from the post of District & Sessions Judge so he cannot be appointed on contract basis. He further argued that the Notification for the appointment of respondent No.2 clearly indicates that in order to accommodate him, the post of Chairman Inspect Team was created which could not be done under Rule 4 of the Sindh High Court Establishment (Appointment and Condition of Service) Rules, 2006 without the concurrence of the Administration Committee. He moved an application to the hon'ble Chief Justice of this court against the appointment of the respondent No.2 but no action was taken. The up-gradation and creation of new post under the guise of change of nomenclature was a person specific to accommodate the Respondent No.2 alone which is not permissible. The appointment on contract basis creates frustration amongst the existing employees for the simple reason that their venue of promotion or progression may be blocked. The petitioner

argued that in the writ of quo warranto, the bar contained under Article 199 (5) of Constitution does not apply. The petitioner also referred to Suo Moto case No.24 of 2010 decided by the hon'ble Supreme Court and along with statement, he produced at least three orders issued by the Registrar of this court on 01.02.2011, whereby, the contracts of three employees were terminated in pursuance of the order passed by the hon'ble Supreme Court in Suo Moto case No. 24 of 2010. He robustly argued that on one hand, the engagement of contractual employees were terminated in the year 2011 on the basis of dictum laid down by hon'ble Supreme Court but again in 2015, the Chairman Inspection Team has been appointed on contract basis which is sheer violation of the Apex Court's judgment. In order to meet the office objection, learned counsel referred to **2010 S.C.M.R 632 and an unreported order passed by the hon'ble Supreme court on 06.01.2016 in Civil Appeal No.169-K to 177-K of 2011.**

3. Mr. Salahuddin Ahmed, learned Amicus Curiae argued that the post of Member Inspection Team is a public office. The note of the then Registrar dated 27.07.2015 attached with the counter affidavit of the respondent No.2 clearly indicates that in order to improve the working of district judiciary, a proposal was given to the hon'ble Chief Justice of this court to upgrade the post of Member Inspect Team to B.P.S-22 with change of its nomenclature as Chairman Inspect Team with direct reporting line to the Chief Justice and Senior Pusine Judge. In the same note further proposal was given that offer of appointment may be given to respondent No.2 to assume the charge of this post in order to improve the working of district judiciary. It is further stated in the same note that the functions and assignments be undertaken by Inspection Team will be

decided after discussion with respondent No.2 once he assumes the charge of the post. He further argued that the proposal floated for the up-gradation and changing the nomenclature clearly indicates that it is not merely a change of nomenclature or up-gradation but it amounts to creation of new post on account of reorganization and restructuring the Inspection Team Department of this court. He referred to Rule 4 of Sindh High Court Establishment (Appointment and Condition of Service) Rules, 2006 and argued that though in this Rule, the Chief Justice may create or abolish, upgrade and downgrade the post temporary or permanent but the post in pay scale 16 or above may be created or abolished with the concurrence of the Administration Committee. He also referred to methods of appointment provided under Rule 5 which includes direct recruitment, by promotion, by posting the judicial officer and in case of no suitable person available for appointment in clause (a) to (c), then a person may be appointed on contract for a period not exceeding three years on such terms and conditions as may be laid down in contract of appointment. He argued that before appointing any person on contract, it was to be judged first whether any other suitable person is available for appointment to the post or not. The note placed before the Chief Justice by the then Registrar does not show any exigency that offer was made to the respondent No.2 due to non-availability of any suitable person for the appointment. Another limb of the argument was that the creation of post of Chairman Inspect Team after its up-gradation in B.P.S-22 could not be done without concurrence of the Administration Committee. Keeping in view the available record including the comments of respondent No.2 & 3 nothing has been brought forwarded for the consumption of this court to see whether any concurrence was obtained from the Administration

Committee or not on the appointment in issue. He also shown us office order dated 12.02.2007 issued under Rule 4 of the Sindh High Court Establishment (Appointment and Condition of Service) Rules, 2006, whereby, with the concurrence of the member of Administration Committee of this court, the Chief Justice was pleased to create post of M.I.T-II in B.S-20 earlier. He also referred to Rule 3 of the Rules, 2006 and argued that the strength of persons/employees holding post in this court are specifically mentioned in part-I and part-II of the Schedule appended to the Rules. The post of Registrar is provided at Serial No.1 of the Rules while the second entry is for M.I.T. First of all no amendment was made in the Schedule of the Rules which is an integral part of the Rules and if it is assumed that the post of M.I.T-I has been upgraded in B.P.S-22 with the change of nomenclature of Chairman Inspection Team even then no direct appointment on contract basis could have been made but the post could be filled only by transfer of one of the senior District Judges serving under the High Court or by promotion the officer of the High Court serving in BPS-19 on regular basis provided he is a law graduate. It was further contended that time and again the Apex Court deprecated the appointments of the retired persons on contract basis, he referred to an order passed by the Apex Court in Suo Moto case No.24 of 2010 due to which at least the contract of three employees of this court were terminated. So far as the niceties of Article 199 (5) of the Constitution is concerned, learned amicus curiae also relied upon the case reported in 2000 S.C.M.R 632 and an unreported order passed by the Apex Court in Civil Appeal No.169-K to 177-K of 2011. He further argued that the terms of engagement unequivocally show that the respondent No.2 is holding a public office. Under Article 203 of the Constitution, 1973, this court has to supervise and control

all courts subordinate to it and to ensure that the subordinate courts are functioning honestly, efficiently and in the public interest. The purpose of establishing M.I.T department is to facilitate the general public so that their complaints may be attended and resolved. This is the reason that is why, vide order dated 06.09.2007, the Registrar of this court issued the office order showing the reason of creating post of MIT-II and posts of two additional MITs with their functions. He further argued that despite bar contained under Article 199(5) of the Constitution, the writ of quo warranto is maintainable against the respondent No.2. In support of his argument, he referred to **PLD 1998 S.C 161, 2010 S.C.M.R 632, unreported order of the Apex Court in Civil Appeal No.169-K to 177-K of 2011, PLD 1975 S.C 244, PLD 2012 Sindh 232, A.I.R 1952 Nagpur 330, PLD 1966 (W.P) Lahore 770, 2015 S.C.M.R 456, PLD 2011 S.C 277, PLD 2013 S.C 443, 2013 S.C.M.R 1752, Principles of Statutory Interpretation By Guru Prasanna Singh, page 149, Maxwell on the Interpretation of Statutes, Twelfth Edition, by P. ST. J. Langan of Lincoln's Inn, and of King's Inns, Dublin, page-12 and N S Bindra's Interpretation of Statutes, Eleventh Edition by Amita Dhanda, page 253**

4. Notice was issued to the respondent Nos.2 and 3. They filed their comments but did not prefer to engage any counsel for representing them in the court nor did they appear in person to argue their case. The respondent No.2, Dr.Zafar Ahmed Khan Sherwani, challenged the maintainability of this petition of quo warranto bearing in mind the niceties of Article 199 (5) of the Constitution. However, he failed to repudiate the defects deciphered by the petitioner in his appointment nor did he controvert the main plea that his appointment is made without the

concurrence of the Administration Committee of this High Court Establishment. Mostly he remained confined to his appointment as Additional Judge of this court for which he referred to the judgment reported **PLD 2009 S.C. 789 (Sindh High Court Bar Association v. Federation of Pakistan).** He further insisted that he can write the words "Retired Justice" as prefix to his name as according to his understanding, the above judgment does not create any bar against this ascription or provenance. Finally he stated that he was retired as District and Sessions Judge on 14.3.2010 but his status of a former judge of this court did not cease, therefore the Registrar of this court rightly recommended his name for the appointment of Chairman, Inspection Team, Sindh High Court on contract basis. Along with the comments he has also attached a copy of note of the Registrar placed before the former Chief Justice of this court for up-gradation of Member Inspection Team-I post to BPS-22 and change of its nomenclature as Chairman, Inspection Team.

5. The respondent No.3, Mr.Abdullah Channa, Member Inspection Team-II has also filed his comments and taken the same plea that the petition is not maintainable under Article 199 (5) of the Constitution. He further stated that he is bound to issue notification under the direction of the hon'ble Chief Justice, however, he further submitted that since this petition of quo warranto has not been moved against his office therefore, no further comments are required to be filed by him.

6. The Registrar of this court in his comments and oral submission took the plea that the post was upgraded with the change of nomenclature which is not creation of a new post. He further stated that vide office note dated 4.1.2006 the function of the Registrar and Member Inspection

Team-I were prescribed. The Registrar is required to deal with all matters relating to the Administration and other affairs of the High Court Establishment while the Member Inspection Team-I was required to assist the Chief Justice and Senior Pusine Judge in the matters pertaining to the conduct and discipline of judicial officers. The Deputy Registrar (Confidential) and other officers dealing with such matters are required to report to Member Inspection Team-I. So far as the job description of the Chairman, Inspection Team is concerned the learned Registrar responded in paragraph 3 of his comments as under:-

> **"3. That vide office note dated 27.7.2015 (Annexure-"E") the post of MIT-I was upgraded from BPS-21 to BPS-22 and its nomenclature was changed from Member Inspection Team-I to Chairman Inspection Team. However, it was ordered that the functions and assignments of the Chairman Inspection Team will be decided after discussion with Dr.Zafar Ahmed Khan Sherwani, once he assumes the charge of the post, in order to improve the working of the District Judiciary. After approval by the Hon'ble Chief Justice, the notification dated 30.7.2015 (Annexure-"F") was issued. The functions and assignments of the post of Chairman Inspection Team are yet to be decided. Nevertheless, Dr.Zafar Ahmed Khan Sherwani has orally informed that draft regarding functions and assignments of the Chairman Inspection Team has been submitted to the Hon'ble Chief Justice by him for approval and hitherto same is not approved."**

7. The learned A.A.G argued that under Rule 4 of the Sindh High Court Establishment (Appointment and Conditions of Service) Rules, 2006, the Chief Justice may create or abolish, upgrade and downgrade a post temporary or permanently. However, the post in pay scale 16 or above may be created or abolish with the concurrence of the Administration Committee. Though the note of the Registrar made for up-gradation and change of nomenclature but from the order it is clearly transpiring that it was not mere up-gradation or change of nomenclature but it was a creation of new post which

could have been done only with the concurrence of Administration Committee according to the rules framed under Article 208 of the Constitution. While creating post, the corresponding changes have also not been made in the Schedule appended to the Rules 2006. He further argued that the public office has not been defined in the present Constitution but this definition was mentioned in our 1962 Constitution. However, definition of the holder of public office is provided under Section 5 (m) of National Accountability Bureau Ordinance, 1999. He further referred to Section 2 (17) of CPC which provides the definition of public officer. He also referred to the definition of "office", "officer", "public office" and "public officer" as enunciated in the **American Jurisprudence Volume 42, page 879, Corpus Juris Secundum, Volume LXVII, page 97-98 and Stroud's Judicial Dictionary, Fifth Edition, Volume 4, page 2092-2093.**

Note: All learned counsel jointly made a request that this matter may be heard and decided at Katcha Peshi stage and they argued their case extensively.

8. Heard the arguments. The writ of quo warranto is in the nature of writ of right for the king against any subject who claim or usurp any office, to enquire by what authority he supported his claim in order to determine the right. Quo warranto proceeding affords a judicial remedy by which any person who holds an independent substantive public office or franchise or liberty is called upon to show by what right he holds the said office. In other words this specie of writ gives judiciary a weapon to control executive action from making appointment to public office against the law. This also protects the public from usurper of public office. The purpose of writ is to pose a question to the holder of a public office where is your warrant of appointment by which you are holding this office? In the writ of quo

warranto no special kind of interest in the relator is needed nor is it necessary to explain what of his specific legal right is infringed. It is enough for its issue that the relator is a member of the public and acts bona fide. This writ is more in the nature of public interest litigation where undoing of a wrong or vindication of a right is sought by an individual for himself but for the good of the society or as a matter of principle. For the purpose of maintaining writ of quo warranto there is no requirement of an aggrieved person, but a whistle blower need not to be personally aggrieved in the strict sense may lay the information to the court to enquire from the person holding public office. The conditions necessary for issuance of writ of quo warranto are that the office must be public and created by a statute or constitution itself; the office must be substantive one not merely the function of an employment of a servant at the will during the pleasure of others; there has been contravention of the constitution or a statute or statutory instrument and appointing such person to that office, while essential grounds for issuing writ of quo warranto are that a holder of the post does not possess the prescribed qualification; the appointing authority is not competent authority to make appointment and that the procedure prescribed by law has not been followed and the burden of proof is upon the appointee who has to demonstrate that his appointment is in accordance with law and rules.

9. The **Halsbury's Laws of England, 3rd Edition Vol. II,** dealt with writ of quo warranto in the following terms. **(Also See AIR 1965 S.C. 491).**

> **"An information in the nature of a quo warranto took the place of the obsolete writ of quo warranto which lay against a person who claimed or usurped an office, franchise, or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined." Broadly stated, the quo warranto proceeding affords a judicial enquiry in**

which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty, if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognized in that behalf, they tend to protect the public from usurpers of public office in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not.

10. The **Halsbury's Laws of India, Volume 35. Page 145** delineates that the writ of Quo warranto is a discretionary remedy which the court may grant or refuse according to the facts and circumstances of each case. The writ lies only in respect of a public office of a substantive character. The writ calls upon the holder of a public office to show to the court under what authority he is holding that office. The court may oust a person from an office to which he is not entitled. It is issued against the usurper of an office and the appointment authority is not a party. The quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order in other words, the

procedure of quo warranto gives the judiciary a weapon to control the executive from making appointments to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office, who might be allowed to continue either with the connivance of the executive or by reason of its apathy. It will, thus, be seen that before a person may effectively claim a writ of quo warranto, he has to satisfy the court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to the enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not.

11. The respondent No.2 and 3 in their comments have taken specific plea that this writ is not maintainable keeping in the bar contained under Article 199 (5) of the Constitution of Islamic Republic of Pakistan. In this regard let us first refer to **2010 SCMR 632 (Muhammad Iqbal and others v. Lahore High Court through Registrar and others).** In this case the apex court has discussed in detail the case of Asif Saeed, decided by the learned Full Bench of Lahore High Court **(PLD 1999 Lahore 350)** and held as under:-

> **"7. The view held by Lahore High Court is challenged in the light of Mahesh Prakash's case (supra), which is very well distinguished by Mr. Justice Mian Saqib Nisar speaking on behalf of the full Bench in Asif Saeed's case (supra). The learned Judge distinguished the Indian ruling on the ground that there are no provisions in the Indian Constitution analogous or parallel to Article 199(5) of our Constitution. Secondly, it was reasoned that the Indian Supreme Court was of the view, despite no analogous provision in their Constitution, that no writ would lie against the judicial order of a High Court. Meaning thereby "that the true purpose of this sub-Article is more pointed towards protecting the non-judicial actions/orders/steps of**

this Court rather than its judicial orders". We perfectly agree with the view taken by Lahore High Court that all judicial orders passed by a High Court can be challenged in accordance with the Constitution or the law and are individually and specifically protected. For such purpose of protecting judicial orders, there was no need absolutely to enact the provisions of sub-Article (5) of Article 199 and that such provisions were given in the Constitution to protect, rather, the non-judicial orders of the High Court. We are further of the view that if such orders are allowed to be challenged before the same High Court, it would lead to creating ludicrous situations and hazardous consequences.

9. While discussing the implications involved, the learned author Judge of Asif Saeed's case (supra) has gone further to reinforce his reasoning, saying:-

"It is clear that the Supreme Court of Pakistan has also been excluded from the definition of the word "person" clubbed, together with the High Court. Undoubtedly, it is inconceivable that the order of the Supreme Court on its judicial side can be challenged before the High Court in writ, irrespective of sub-Article (5). Now if the interpretation of the petitioners that administrative order of the High Court can in writ be challenged is accepted, the same rule would also apply to the Supreme Court, situation may arise where a full Court of the apex forum takes a non-judicial decision then on the basis of above reasoning a Single Judge of this Court may issue writ to quash the same which would he just preposterous. This also applies to the administrative decision taken by the Full Court of a High Court, particularly, when the same Judge/Judges are party to such a decision. There can be numerous examples cited to show fallacy of such an interpretation. If the same rule is allowed to prevail, rules made by the Supreme Court, under Article 191 and by the High Courts, under Articles 203, and 208 are not safe from attack and may become subject of every day's litigation leading to a hazardous situation.

16. To our mind the judicial orders of the Supreme Court and the 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 in fact have been saved under the sub-Article. By plain reading of sub-Article (5) and by applying settled rules of interpretation, High Court cannot be decided to be conferred with two distinct characters i.e. one judicial, which is immune from writ, and the other administrative which is amenable to the writ.

In Asif Saeed's case (supra) almost every aspect of the case has very elaborately been discussed, answered and distinguished wherever necessary. In the instant

case the scenario would have been altogether different if the appointments had been challenged by someone seeking a writ of quo warranto." (Emphasis applied).

12. In the **Civil Appeals Nos.169-K to 177-K/2011. (Arbab Imtiaz Khan vs. Mudasar Zawar & others),** the appellant, an employee of this court was aggrieved against some promotions and appointments which he challenged in the Sindh High Court but his petition was dismissed on the ground that a writ cannot be issued against the High Court in terms of the law laid down in Asif Saeed Vs. Registrar, Lahore High (supra). On his appeal, the apex court held as under:-

"The appellant who is an employee of Sindh High Court (the court) primarily being aggrieved of certain promotions and/or appointment orders of the private respondents who are also in the employment of the court alleging those to be detrimental to his rights filed constitution petitions which have been dismissed basically on the ground that a writ cannot be issued against the High Court in terms of the law laid down in Asif Saeed Vs. Registrar, Lahore High Court and others (PLD 1999 Lahore 350) as upheld by this court by virtue of the law declared in Muhammad Iqbal and others Vs. Lahore High Court through Registrar and others (2010 SCMR 632). The appellant, who appears in person by relying upon paragraph No.10 of this court's judgment (supra) i.e. "In the instant case the scenario would have been altogether different if the appointment had been challenged by someone seeking a writ of quo warranto.", submitted that his petition was a composite case seeking the enforcement of his service rights and also a quo warranto writ against the private respondents by challenging their appointment as having been made otherwise then in accordance with law, and the said respondents were very much a party to the petition and this aspect of the matter has not been taken into consideration by the learned High Court, as the court was overwhelmed only by the law laid down in the two judgments (supra) that a writ cannot at all be issued against a High Court, whereas in the facts and circumstances of the case the learned High Court was a pro-forma/proper party whereas the necessary relief in fact has been claimed against the private respondents. Having considered the contention, we by making a clear declaration that a writ with regard to the enforcement and implementation of the terms and conditions of service by the appellant against the

court was absolutely incompetent in view of the law laid down in Muhammad Iqbal (supra) therefore, to this effect the writ has been rightly dismissed, however, as regards the quo warranto part of the petition that aspect fell within the exception of the quoted judgment and therefore, the writ petitions should have been considered to be quo warranto petitions simpliciter and decided accordingly.

2. In view of the above, we partly allow these appeals and by holding that the writ petitions filed by the appellant to the effect of being quo warranto in nature shall be deemed to be pending before the learned High Court and matter be decided as to whether the private respondents are holding public office under valid authority of law in terms of Article 199(1) (b)(ii) of the Constitution of Islamic Republic of Pakistan 1973". (Emphasis applied).

13. In the aforesaid appeals, the apex court while considering the law declared in Muhammad Iqbal and others Vs. Lahore High Court through Registrar and others (2010 SCMR 632), held that a writ with regard to the enforcement and implementation of the terms and conditions of service by the appellant against the court was absolutely incompetent in view of the law laid down in Muhammad Iqbal (supra) therefore, to this effect the writ has been rightly dismissed, however, as regards the quo warranto part of the petition that aspect fell within the exception of the quoted judgment and therefore, the writ petitions should have been considered to be quo warranto petitions simpliciter and decided accordingly. So for all intent and practical purposes it is clear beyond any shadow of doubts that in view of the aforesaid dictums laid down by the apex court, this court under Article 199 of the Constitution can entertain and decide the petition of quo warranto against its own employees also and the rigors and or bar contained under Sub-Article (5) of Article 199 does not apply to make inquiry and investigation for issuing writ of quo warranto against a person whose appointment is under challenge on the ground that he does not possess the prescribed qualification; the

appointing authority was not competent authority to make appointment and that the procedure prescribed by law was not followed. However the burden of proof is upon the appointee who has to demonstrate that his appointment is in accordance with law and rules. At this juncture, we would like to record our observation that the self regulatory powers are conferred to allow independence and to immune the actions from external intrusion, impediment or obstruction but such self regulatory powers are subject to self restraint. In the case of **Independent Newspapers Corporation (Pvt) Ltd. versus Chairman Fourth Wage Board & others, reported in 1993 PLC 673,** the apex court held that "the principle is well settled that when express statutory power is conferred on a public functionary, it should not be pushed too far, such conferment implies a restraint in operating that power, so as to exercise it justly and reasonably. In the words of Scarman L.J. excessive use of lawful power is itself unlawful. (The Development of Administrative Law, published in Public Law 1990". (Emphasis applied).

14. The record reveals that the post of Member Inspection Team-II was created by the honorable Chief Justice of this court with the concurrence of Administration Committee under Rule 4 of the Sindh High Court Establishment (Appointment and Conditions of Service) Rules 2006 vide order dated 12th February 2007 in BS.20. The order is reproduced as under:-

"THE HIGH COURT OF SINDH, KARACHI

No.GAZ/V.D.32 Karachi dated the 12th February, 2007

O R D E R

In exercise of powers vested in him under Rule-4, of Sindh High Court Establishment (Appointment & Conditions of Service) Rules-2006 and with the

concurrence of the members of Administration Committee of this Court, the Hon'ble Chief Justice has been pleased to create the post of Member Inspection Team-II (B-20) with immediate effect.

The expenditure involved will be met from within the Budget Provisions, lump-sum or otherwise, for "Pay of Officers" and "Pay of Establishment" or by utilization of savings which are to accrue under the Heads "Pay of Officers" and "Pay of Establishment" during the Financial year 2006-2007.

Sd/-
(IMAM BUX SOOMRO)
INCHARGE REGISTRAR"

However on 6th September 2007, another office order was issued to the effect that the post of MIT-II has already been created and to assist this court in various aspects, posts of two Additional MITs are also being created. This office order articulates as under:

"THE HIGH COURT OF SINDH AT KARACHI

GAZ/H.C.ESTB. (Assignment) Karachi dated the 6th September, 2007

O R D E R

Article 203 of the Constitution mandates every High Court to supervise and control all courts subordinate to it and it is the solemn duty of this court to ensure that all courts under its administrative control function honestly, efficiently and in the public interests. Though Performance Evaluation of all Judicial Officers is undertaken annually, it is felt that sufficient information is not often available to undertake an objective evaluation of a quality of work output. To assist this court in doing so, post of MIT-II has been created and posts of two Additional MITs are being created, whose main functions would be as follows:

1. **Honourable Judges of this Court have already been designated as Monitoring Judges for different districts in the province who are expected to inspect courts in that district at least once a year and keep themselves abreast about the performance of Judicial Officers within their allocated district so as to be able to assist the Chief Justice in writing/counter-signing their PERs. MIT-II or Additional MIT is expected to accompany the monitoring Judge on inspection and to generally assist him in performance of his monitoring duties.**

2. **All Judicial Officers are required to send at least three Judgments authored by them every month, which are to be examined by Monitoring Judges. Unfortunately, at**

time Hon'ble Judges on account of their pre-occupation with judicial work are unable to analyze those judgments carefully and record their opinion as to the quality of adjudication. MIT-II/Addl. MITs are expected to read those judgments carefully, identify their salient aspects and point them out to the Honourable Judges to elicit their lordship's comments. The comments so recorded must carefully be fed into the computer and the judgment may also be retained.

3. **At times it may be difficult to appreciate the true quality of an adjudication through a mere consideration of the judgment. In such cases, the MIT-II would be free to call for the record and proceedings of a decided case unless required by a court of appellate or revisional jurisdiction. However, when a record is called by any other judicial forum it must be instantly dispatched.**

4. **In addition to the above, the MIT-II may with the approval of the Monitoring Judge, at random call for the record and proceedings of any other decided case by a particular Judicial officer and a list of such cases which is received from Districts and will now be handled in the office of MIT-II periodically. Moreover, in districts, where automation has been fully effected, all orders passed by Judicial officers as well as court diaries can be viewed on the computer screen and the MIT-II/Additional MITs would bring any order/judgment requiring conformity to the notice of the concerned Monitoring Judge/Administrative Judge/Chief Justice.**

5. **Whenever the decision of a Judicial officer is called in question before this court the bench hearing the matter is expected to record its opinion about the quality of the judgment rendered which it has the occasion to consider and scrutinize. The Reader to the Honourable Judges have been directed to obtain comments of their lordships and the respective branches have been directed to furnish such comments to the MIT-II. These comments need to be faithfully fed into the computer and the file of Judicial Officer by MIT-I. In case an Honourable Judge omits to do so on account of rush of work the MIT-II may approach him and elicit his comments.**

6. **Whenever an order or judgment is such which might call for disciplinary action, the MIT-II/Addl. MITs may promptly refer the matter to the authorized officer through MIT-I for taking appropriate action.**

7. **Whenever it is felt that any order passed by a criminal court may call for exercise of High Court revisional jurisdiction under Section 439, Cr.P.C. appropriate proposal may be submitted to the Hon'ble Senior Judge exercising criminal revisional jurisdiction at the principal seat.**

8. **Whenever the performance of a subordinate Judicial officer does not appear to be entirely satisfactory MIT-II is expected to establish contact with the concerned District Judge and require him to closely monitor the**

performance of such officer and whenever necessary such officer should be counseled and record be kept in custody.

9. If it is found that some mistakes are frequently committed by Judicial officers or if knowledge and understanding of law in some areas is commonly found inadequate, appropriate recommendations may be made for arrangement of appropriate course in the Judicial Academy.

10. The MIT-II/Addl. MITs are expected to commence preparation of comprehensive reports with respect to each Judicial officer in April ever year so that they are completed by the 15th of May and Performance Evaluation Reports are finalized during summer vacations.

11. Special emphasis should be attached to officers appointed on probation, i.e. during first two years on those initially appointed and first year on those appointed on probation. It must be ensured that their performance is satisfactory in all respects before they are confirmed.

Sd/-
(ZAHEERUDDIN S. LEGHARI)
REGISTRAR"

15. The object and idea discernable from the reading of Article 203 of the Constitution of Pakistan appears to secure judicial independence by making subordinate court completely free from executive and extraneous control. The power is meant to enable the High Court to discharge its duties as a superior court towards fair and proper administration of justice. These powers have been conferred without any limit, fetters or restriction to supervise and control the subordinate courts in all administrative as well as judicial matters and has made the High Court custodian of justice within territorial limits of its jurisdiction. It is evident from the language of Article 203 of the Constitution that it is meant to give administrative control to High Court of each province to supervise all courts within the respective province which links administrative relationship between the High Court and subordinate courts within the provinces. The fundamental objective of supervision is to keep the

administration of justice pure and to correct and cure faults or dereliction of duty, defects of jurisdiction, denial of justice and abuse of process of court or law. High Court is obligated to control and supervise working of subordinate courts with active vigilance and issue instructions to improve its working for administration of justice. In order to achieve desired result and to properly handle complaints and other matters relating to subordinate judiciary the department of Inspection team has been established which fact is clearly visible that the post of MIT-II was created with two Additional Members Inspection Team. In the case of **M/s.Shaheen Air International Limited vs. M/s.Voyage of DE Air (2006 SCMR 1684),** the hon'ble Supreme Court dilated upon Article 203 of the Constitution in detail and held that duty under Article 203 can be performed irrespective of whether anybody may be harmed or not and irrespective of whether anybody will be benefited by it or not. The object of this provision is to enable the High Court to establish orderly, honourable, upright and impartial and legally correct administration of justice. The superintendence of the High Court includes the authority to direct enquiry with a view to take disciplinary action in case of flagrant maladministration of justice.

16. Under Article 208 of the Constitution of Islamic Republic of Pakistan, the Supreme Court and the Federal Shariat Court with the approval of the President and High Court with the approval of Governor concerned, may make Rules providing for the appointment by the Court of Officers and Servants of the Court and for their terms and conditions of their employment. In view of the powers conferred by this Article, High Court of Sindh framed Sindh High Court Establishment (Appointment and Conditions of Service) Rules 2006. In the definition clause, (Rule-2) the

'Administration Committee' means the Administration Committee of High Court of Sindh while the 'post' means the posts mentioned in the first and second part of the Schedule. In the same definition clause 'officer' means an employee of the High Court in BPS-16 or above mentioned in the Schedule and 'servant' means an employee of the High Court in BS-1 to BS-15 mentioned in the Schedule.

17. Under Rule 3 it is provided that the strength shall comprise of persons holding posts specified in Part-I and Part-II of the Schedule and such other posts that may be created under Rule 4 other than Judicial Officer. A proviso is also attached with this Rule which clarifies that persons holding post not specified in the Schedule will continue to hold their offices till they are absorbed against the scheduled post or their services are otherwise terminated according to these Rules. It is further provided in sub-rule (2) that when a post is created or abolished, consequential amendment shall be made in the Schedule.

18. Under Rule 4 of the same Rules the Chief Justice has vested in the powers to create or abolish, upgrade and downgrade a post temporary or permanent. Here also a proviso is attached according to which a post in pay scale 16 or above may be created or abolished with the concurrence of the Administration Committee.

19. Rule 5 pertains to the method of appointment which is in fact provides four different methods i.e. (a) by direct recruitment, (b) by promotion of officer or other persons employed in the High Court, (c) by posting a Judicial Officer and (d) in case no suitable person is available for appointment under clauses (a) to (c) then a person may be appointed on contract basis for a period not exceeding three years upon such terms and conditions as may be laid down in the contract of appointment.

20. In the Schedule appended to these Rules as Annexure-1, the post of Registrar and MIT are postulated in Part-I at Serial No.1 and 2. The mode of appointment, qualification and other conditions are provided in Column-3 of the Schedule according to which the Registrar may be appointed by transfer of one of the Senior District Judge serving under the High Court preferably of selection grade or by promotion an officer of High Court serving in BPS-19 or regular basis provided that the length of service for promotion to this post shall be seven years or through direct recruitment on contract basis of a suitable person having reasonable experience of administration and financial matters or by way of transfer on deputation of a civil servant of equivalent rank from Federal Government or Provincial Government. So far as the post of MIT is concerned it is clearly provided in the Schedule that appointment of MIT may be made by transfer of one of the Senior District Judge serving under the High Court in selection grade and by promotion of an officer of the High Court serving under BPS-19 on regular basis provided he is law graduate with length of seven years service. The bare reading of mode of appointment of MIT makes amply clear that against this post no pathway or conduit of hiring is accessible all the way through contractual engagement but this post may be filled by transfer or promotion according to its pre-requisites.

21. In order to decide whether the appointment of the Respondent No.2 was made through creation of post or it is a case of mere change of nomenclature with upgradation, the note generated by the then Registrar is somewhat worth mentioning through which a proposal was made for the appointment of Respondent No.2 which reads as under:-

"THE HIGH COURT OF SINDH AT KARACHI

Submitted: As directed.

It is respectfully submitted that the post of Member Inspection Team-I (BPS-21) is presently lying vacant. In order to improve the working of District Judiciary, it is necessary to reorganize the Inspection Team of the High Court. (Emphasis Applied)

In such circumstances, it is proposed that the post of Member Inspection Team-I may be upgraded to BPS-22 with change of its nomenclature as Chairman Inspection Team, High Court of Sindh, who will directly report as regards his functions and assignments to the Honourable Chief Justice and Honourable Senior Pusine Judge. [Emphasis applied].

It is further respectfully submitted that in order to fill up the said post, it is proposed that offer of appointment may be made to Dr.Zafar Ahmed Khan Sherwani (Former Judge of High Court of Sindh) as Chairman Inspection Team, High Court of Sindh, who is Ph.D in Law. He is author of several research papers published in PLD. and was worked as Registrar of this Court as well as Member Inspection Team before elevation as Judge of this Court. He has also worked as Election Tribunal in maxim of B-22 for 20 months w.e.f. June 2013 to February 2015. He has been commended on his work and case flow management and use of Information Technology in Court System. (Copy of annual report 2004 is attached)

It is further respectfully submitted that the functions and assignments to be undertaken by Inspection Team will be decided after discussion with Dr.Zafar Ahmed Khan Sherwani, once he assumes the charge of the said post, in order to improve the working of District Judiciary. [Emphasis applied].

In view of the above, following orders are solicited:

A. The post of Member Inspection Team-I may be upgraded from BPS-21 to BPS-22 and its nomenclature may be changed as Chairman Inspection Team, High Court of Sindh.

AND

B. Offer of appointment may be made to Dr.Zafar Ahmed Khan Sherwani as Chairman Inspection Team, High Court of Sindh in maximum of (BPS-22), on usual terms and conditions, initially for a period of two years, on contract basis.

AND/OR

C. Any order as deemed fit and proper.

(sd/-)
Registrar

Honourable Chief Justice.
(Sd/-)"

22. At this stage it is pertinent to point out that vide Notification dated 13th November 2007, Government of Sindh, Law Department upgraded the post of District & Sessions Judge from BS-20 to BS-21. In the same analogy, the Registrar of this Court put up a Note to the honourable Chief Justice to upgrade the post of Registrar from BS-20 to BS-21 then BS.21 to BS.22. This proposal was approved by honourable Chief Justice on 14.11.2007 but the post of MIT-I was intact in BPS-21. However in order to provide an opportunity of lateral appointment to the Respondent No.2, the Registrar put up a person specific Note/proposal with the request that the post of MIT-I may be upgraded to BPS-22. It was further stated by him that in order to improve the working of District Judiciary, it is necessary to reorganize the Inspection Team of the High Court. He also proposed to change the nomenclature of the MIT-I to Chairman Inspection Team who will directly report to the Chief Justice and Senior Pusine Judge. In the same letter the name of Respondent No.2 was also recommended to offer him appointment. However, it was further stated in the same proposal **that functions and assignments to be undertaken by Inspection Team will be decided after discussion with Dr. Zafar Ahmed Khan Sherwani once he assumes the charge of said post in order to improve the working of District Judiciary. (Emphasis applied).** Though the Registrar proposed for the upgradation and change of nomenclature but it is obvious and noticeable from his Note that he requested for reorganization which always need restructuring of department. However, on this proposal a Notification was issued on 30th July 2015, for the appointment of Respondent No.2 as

Chairman Inspection Team High Court in BPS-22, which reads as under:-

"THE HIGH COURT OF SINDH AT KARACHI

No.GAZ/V.A.4(1) Karachi dated the 30th July, 2015

N O T I F I C A T I O N

In exercise of powers conferred under Rule-4 of Sindh High Court Establishment (Appointment and Conditions of Service) Rules, 2006, the Hon'ble Chief Justice has been pleased to upgrade the post of Member Inspection Team-I from BPS-21 to BPS-22 and change the nomenclature of the said post as Chairman Inspection Team, High Court of Sindh, with immediate effect.

AND

The Hon'ble Chief Justice has further been pleased to appoint Dr. Zafar Ahmed Khan Sherwani (former Judge of this Court) as Chairman Inspection Team, High Court of Sindh, BPS-22, on usual terms and conditions, on contract basis, initially for a period of two (02) years from the date he assumes the charge of the said post.

Sd.
(Fahim Ahmed Siddiqui)
R E G I S T R A R"

23. On 2nd September 2015, one more Notification was issued signed by MIT-II communicating that the honourable Chief Justice of Sindh High Court has been pleased to direct Dr. Zafar Ahmed Khan Sherwani to officiate as Registrar till further orders. It was further mentioned in the notification that Mr. Sherwani in addition to his own duties will also officiate as Director General Sindh Judicial Academy and will also sign cheques pertaining to the Bank Account to the Academy. This notification is also reproduced as under:-

"THE HIGH COURT OF SINDH AT KARACHI

No. GAZ/VI-Z-7(3)(C) Karachi dated:2nd September, 2015

N O T I F I C A T I O N

The Hon'ble Chief Justice has been pleased to direct Dr. Zafar Ahmed Khan Sherwani (former Judge of this Court), Chairman Inspection Team of this Court to officiate as Registrar till further orders.

He will also officiate as the Director General Sindh Judicial Academy, Karachi in addition to his own duties and sign cheques pertaining to the bank account to the Academy, till return of the Hon'ble Director General from Ex-Pakistan leave.

(ABDULLAH CHANNA)
Member Inspection Team-II"

24. Now we would like to revert back to Rule 4 of the **Sindh High Court Establishment (Appointment and Conditions of Service) Rules, 2006.** Since this Rule is of the essence and imperative for the outcome and finale of this petition therefore for the ease of reference, it is reproduced as under:

Rule 4. Power to create Posts:

The power to create or abolish, upgrade and down grade a post, temporary or permanent, vests in the Chief Justice.

Provided that a post in Pay Scale-16 or above may be created or abolished with the concurrence of the Administration Committee".

25. In the attached Schedule made under Rule 3 of Sindh High Court Establishment (Appointment and Conditions of Service) Rules 2006, the mode of appointment of each and every post is dealt with separately whether it is to be made through direct induction, transfer, promotion and or contract. It is well settled scheme of law that Schedules appended to statutes form part of the statute. It contains details and forms for working out the policy underlying the sections of the statute. The division of a statute into

Sections and Schedules is a mere matter of convenience and a Schedule therefore may contain substantive enactment. Provisions in a schedule required to be construed in the light of what is enacted in the Sections. An explanation to the Schedule amounts to an explanation in the Act itself. Reference can be made to following principles of Statutory Interpretation:

Principles of Statutory Interpretation By Guru Prasanna Singh. Page 149.

"Schedules appended to statutes form part of the statute. They are added towards the end and their use is made to avoid encumbering the sections in the statute with matter of excessive detail. They often contain details and forms for working out the policy underlying the sections of the statute, and at times they contain transitory provisions which remain in force till the main provisions of the statute are brought into operation. Occasionally they contain such rules and forms which can be suitably amended according to local or changing conditions by process simpler than the normal one required for amending other parts of the statute. The division of a statute into sections and Schedules is a mere matter of convenience and a Schedule therefore may contain substantive enactment which may even go beyond the scope of a section to which the Schedule may appear to be connected by its heading. In such a case a clear positive provision in a Schedule may be held to prevail over the *prima facie* indication furnished by its heading and the purpose of the Schedule contained in the Act. However, if the language is not so clear, the provision in the Schedule may be construed as confined to the purpose indicated by its heading and the section in the statute to which it appears connected. In case of conflict between the body of the Act and the schedule the former prevails"

Maxwell on the Interpretation of Statutes, Twelfth Edition. Page 12.

"Schedules to statutes are as much part of an Act as any other, and may be used in construing provisions in the body of the Act. Similarly, provisions in a schedule will be construed in the light of what is enacted in the sections".

N. S. Bindra's Interpretation of Statutes, Eleventh Edition. Page 253

"The schedule is as much a part of the statute, and is as much an enactment as any other part, and may be used in construing provisions in the body of the Act. A

schedule in an Act of Parliament is a mere question of drafting a mere question of words. The liability imposed in the schedule is equally binding. It must be read together with the Act for all purposes of construction. The purpose and usefulness of a schedule is succinctly set out by the Supreme Court as: 'A schedule in an Act of parliament is a mere question of drafting. It is the legislative intent that is material'. An explanation to the schedule amounts to an explanation in the Act itself. The schedule may be used in construing a provision in the body of the Act. It is as such an Act of legislature as the Act itself and it must be read together with the Act for all purposes of construction. Expressions in the schedule cannot control or prevail against the express enactment in case of any inconsistency between the schedule and the enactment".

26. The entry No.1 and 2 in the appended Schedule (Annexure-1) are relevant to the mode of appointment, qualification and other conditions of the post of the Registrar and MIT therefore it would also be advantageous to replicate the literal portion of Schedule as under:

Annexure - I
S C H E D U L E
(Under Rule 3)
Part- I

Name of Post	Status & Scale of Pay	Mode of Appointment, Qualification and Other conditions
1.	2.	3.
1. Registrar	*BS-20& BS-21	(1) By transfer of one of Senior District Judge serving under the High Court preferably of Selection Grade. (2) By promotion of an officer of the High Court serving in BPS-19 on regular basis provided he is law graduate. Provided that length of service for promotion to this post shall be seven years in BPS-19. (3) By direct recruitment on contract basis, of a suitable person having reasonable experience of administration and financial matters or by way of transfer on deputation of a civil servant of equivalent of a civil servant of

		equivalent rank, from the Federal Government or Provincial Government.
2. M.I.T	*BS-20 & BS-21	(1) By transfer of one of Senior District Judge serving under the High Court preferably of Selection Grade. (2) By promotion of an officer of the High Court serving in BPS-19 on regular basis provided he is law graduate. Provided that length of service for promotion to this post shall be seven years in BPS-19.

27. It is quite obvious that under Rule 4, no powers are vested in to change the nomenclature of any post however the Chief Justice may create or abolish or upgrade and downgrade a post but no post in pay scale 16 or above may be created or abolished without the concurrence of Administration Committee. The plea has been taken by the Respondents that the nomenclature of MIT-I has been changed to Chairman Inspection Team High Court of Sindh which is not synonymous or equivalent to a creation of new post but in our humble view this plea is deceptive and misconceived. Had it been a case of mere change of nomenclature, then other way round, the induction from outside was not possible as it is clearly mentioned in the Schedule itself that the post of MIT may be filled by transfer of Senior District Judge serving under the High Court or by promotion of an officer of High Court and no venue of appointment through contract was available for this post. Not only in the note placed before the Chief Justice for approval of Respondent No.2 appointment but the present Registrar in his comments also stated that **"However, it was ordered that the functions and assignments of Chairman will be decided after discussion with Dr. Zafar Ahmed Khan Sherwani once**

he assumed the charge of the post in order to improve the working of District Judiciary.... The functions and assignments of the Chairman Inspection Team are yet to be decided. Nevertheless Dr.Zafar Ahmed Sherewani has orally informed that draft regarding functions and assignments of Chairman Inspection Team has been submitted to the Honourable Chief Justice by him for approval and hitherto same is not approved".(Emphasis applied). The gist of note and facts and circumstances of the case in conjunction with the comments filed by the Registrar unequivocally put on view that it is a creation of new post and not simply takeover the assignments or job description of MIT-I.

28. It is also worth mentioning that the post of Registrar was upgraded from BPS-21 to 22 in the year 2007 while the post of MIT-I was in BPS-21 until the appointment of Dr. Zafar Ahmed Khan Sherwani as Chairman. To commensurate the post of MIT-I to the pay scale of Registrar, the up-gradation was made in BPS-22 with direct reporting line to the Chief Justice and the Notification of appointment was signed by the Registrar for the appointment of Chairman Inspection Team having the same grade. No document has been produced by the Respondents including the Registrar of this court to show any concurrence of Administration Committee. If it is assumed that it is only a case of change of nomenclature from MIT-I to Chairman Inspection Team then virtually the post of MIT-I has been abolished so in that case also the concurrence of Administration Committee was mandatory which is missing in this case. It is also clearly manifesting from the record that a new post has been created without making amendments in the Schedule under Rule 19 which could be done only by Full Court by a Majority Vote, therefore we feel no reluctance to hold that the

appointment of the respondent No.2 is defective and not in consonance with 2006 Rules.

29. So far as the upgradation is concerned, this too could not be done to benefit a particular individual for providing him avenues of lateral appointment or posting. In this regard, the judgment of honourable Supreme Court in the case of **Ali Azhar Khan Baloch and others v. Province of Sindh and others, reported in 2015 SCMR 456** is much translucent and lucid to deal with the Mechanism of upgradation of posts. The binding effect of the judgment of honourable Supreme Court is well known. Under Article 189 of the Constitution, any decision of the Supreme Court to the extent that it decides question of law or enunciates a principle of law is binding on all other courts in Pakistan. In the case of **Justice Khurshid Anwar Bhinder** versus Federation of Pakistan, reported in **PLD 2010 SC. 483**, it was held that **"where the Supreme Court deliberately and with the intention of settling the law, pronounces upon a question, such pronouncement is the law declared by the Supreme Court within the meaning of this Article and is binding on all courts in Pakistan. It cannot be treated as mere obiter dictum. Even obiter dictum of the Supreme Court, due to high place which the court holds in the hierarchy of courts in the country, enjoy a highly respected position as if it contains a definite expression of the Court's view on a legal principle or the meaning of law"**. The courts are custodian and guardian of law and it does not seem to be correct exposition of law that while making any appointment or upgradation to any posts by High Court Establishment, the principle of law enunciated by the apex court may not apply which elocution of law is quit apt and germane to the issue in hand. It is irrational to grasp or comprehend the feelings that the Supreme Court has decided the issue in the above matter against Sindh

Government in relation to the civil servants therefore it does not apply to the High Court Establishment. On the contrary we are of the firm view that the Supreme Court through the above dictum laid down the principle for upgradation and its mechanism with ultimate guidance therefore the aforesaid judgment is applicable even for making any upgradation of the post in the High Court Establishment which term is not defined under the 2006 Rules. The apex court passed the judgment on 5th January 2015 while the respondent No.2 was appointed vide Notification dated 30.7.2015 when the judgment of apex court was already in field. The relevant portion of judgment of apex court (supra) is reproduced as under:-

> **"MECHANISM FOR UPGRADATION OF POSTS**
>
> **138. During the hearing of the review petitions, we have noticed that the Sindh Government has upgraded certain posts of individuals without any mechanism of upgradation to benefit them. The expression 'upgradation' is distinct from the expression 'promotion' which has not been defined either in the Act or the Rules framed thereunder, and is restricted to the post and not with the person occupying it. The upgradation cannot be made to benefit a particular individual in terms of promoting him to a higher post or further providing him with the avenues of lateral appointment or transfer or posting. In order to justify the upgradation, the Government is required to establish that the department needs restructuring, reform or to meet the exigency of service in public interest. In the absence of these pre-conditions, upgradation is not permissible. (Emphasis applied) We have noticed that some of the civil servants have been promoted to higher posts against the tenural limitations, without qualifying the requisite departmental examinations/trainings under the garb of upgradation. Such civil servants having not been promoted in accordance with law need to be reverted to their substantive ranks/posts which they were holding immediately before their upgradation and their seniority shall be determined along with their batchmates. The Sindh Government shall undertake this exercise and report compliance within 4 weeks through the Chief Secretary, Sindh."**

30. The next question that requires consideration of this court is the true import and connotation of the phrase "Public Office" which is quite relevant to deal and decide

the writ of quo warranto in terms of sub-clause (ii) of Clause (b) of Article 199 of the Constitution. To explore and survey this derivation we have come across the definition of "Public Office" in the Constitution of Pakistan 1962 and Interim Constitution 1972 as under:

1. <u>Constitution of Pakistan 1962</u>.

Article 242. Interpretation. "public office" includes any office in the service of Pakistan and membership of an Assembly."

2. <u>Interim Constitution of Pakistan 1972.</u>

Article 290. Interpretation. "public office" includes any office in service of Pakistan and membership of an Assembly."

31. However no definition of public office is provided under the Constitution of Islamic Republic of Pakistan 1973 but definition of "Service of Pakistan" is endow with not only in 1962 and 1972 Constitution but also provided in 1973 Constitution of Pakistan. At this juncture we would like to quote **"The Law of Extraordinary Legal Remedies by Forrest G. Ferris and Forrest G. Perris. JR. of the St. Louis Bar** in which the scope and compass of public office has been thrashed out in detail as under:-.

"145-154. A Public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public, for the terms and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration, emolument and duties. A public officer is thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached. The common law rule is that in order for the writ to lie, the office must be one of a public nature. The determining factor, the test, is whether the office involves a delegation of some of the solemn functions of government, either executive, legislative or judicial, to be exercised by the holder for the public benefit. Unless his powers are of this nature, he is not a public officer.

As one authority puts it, the tests to be applied in determining whether an information will lie, are the source of the office, which should be from the sovereign authority; the tenure, which should be fixed and public; and the duties, which should be of a public nature. The proceeding is brought in the name and on behalf of the people and is not, primarily, in the interest of any individual, but to protect the public generally against the unlawful usurpation of offices and franchises".

32. The **Halsbury's Laws of England, Fourth Edition, 2001, Reissue, Volume 1(1). Page 14 and 404,** discussed the magnitude and connotation of public office as under:-

"9. Public office. The meanings of 'public office' and 'public officer' vary according to the context in which the terms are used. In general, a public officer may be said to be one who discharges a duty in the performance of which the public is interested; a person is more likely to be such an officer if he is paid out of a fund provided by the public, but it does not necessarily follow that the fund must belong to the central government. Tenure of a public office is not inconsistent with having the status of employee under a contract of employment; but the occupants of certain public offices, such as that of a police officer, are not regarded as having the status of servants.

253. Public nature of office. An information in the nature of a quo warranto lay, and an injunction in lieu of an information would have been granted only if the duties of the office were of a public nature. Thus, an information lay against a privy counsellor, because membership of the Privy Council constitutes the holding of an office of a public nature. An information in the nature of a quo warranto was held to lie in respect of an elected vestryman; a country treasurer in Ireland and, apparently, a superintendent registrar of births, deaths and marriages. The following, inter alia, are offices in respect of which there have been quo warranto proceedings, although the question whether or not an information in the nature of a quo warranto would lie was not discussed in some of them: recorder of a borough; freeman of a borough; burgess; bailiff of a borough; constable; mayor; alderman; town councilor; coroner of a borough; coroner of a country; justice of the peace; sheriff; chief constable; clerk of the peach; judge of a country court; high bailiff of a country court; master of a city company; and member of the General Medical Council. However, an information did not lie in respect of the post of treasurer to a district council which acted as rural sanitary authority pursuant to the Local Government Act 1894 as the duties of such an office were not of that public and substantive nature required to support a quo warranto. Similarly, an information was refused in respect of the office of master of a hospital and free school, which institution

was a private charitable foundation, the right of appointment to offices in which was in governors who were private and not public functionaries; it was immaterial that a charter of incorporation for the institution had been obtained from the Crown".

33. In the case of **Allah Ditta v. Muhammad Munir & others reported in PLD 1966 (W.P.) Lahore 770,** the learned court while exploring and analysing true description and features of public office referred to an article published in Law Quarterly Review as under:-

"Winfield in Law Quarterly Review, Volume 61 at page 464 has in an interesting article discussed what a public office is. He mentions two judicial definitions: In 1914, Lawrence, J. said that a public officer is an officer who discharges any duties, in the discharge of which the public are interested, more clearly so, if he is paid out of a fund provided by the public. Best, C. J. in 1828 described a public officer as everyone who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise. The C. J. lays too much emphasis on remuneration of some sort, for some public officers discharge their duties gratuitously for example, the Lord Lieutenant of a country or Justice of the Peace, and both definitions use the very word which they purport to explain. He concludes that the chief characteristics of a public officer seem to be that is a post, the occupation of which involves the discharge of duties towards the community, or some section of it, and that usually those duties are connected with Government, whether central or local. Winfield repeats these views in his text-book of the Law of Tort, Third Edition at page 614. Burrows in Volume IV says that to make the office a public office the pay must come out of national and not out of local funds and the office must be public in the strict sense of that term. It is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary and remote sense. In Hulsbury's Laws of England at pages 146 and 147 (Simonds Edition) it is stated:

"The duties of the office must be of a public nature. Thus, an information lay against a privy councillor, because membership of the Privy Council constitutes the holding of an office of a public nature.

An information in the nature of quo warranto was held to lie in respect of a vestryman elected under the Metropolis Management Act on: the ground that it was an office created by the status Rex v. Soutter (1891) 1 Q B 57."

Similarly, recorder of a borough, freeman of a borough, burgess, bailiff of a borough, constable, mayor,

alderman, town councillor, coroner of a borough, coroner of a county, justice of the peace, sheriff, chief constable, clerk of the peace, Judge of a county Court, high bailiff of a county Court, master of a city company and member of the General Medical Council were held to hold a public office."

34. In the case of **Salahuddin & others v. Frontier Sugar Mills & Distillery Ltd, reported in PLD 1975 Supreme Court 244,** the apex court has also discussed the concept of public office in the following terms:

"The term 'public office' is defined in Article 290 of the Interim Constitution as including any office in the Service of Pakistan and membership of an Assembly. The phrase 'Service of Pakistan' is defined, in the same Article, as meaning any service, post or office in connection with the affair of the Federation or of a Province and includes an All-Pakistan Service, any defence service and any other service declared to be a Service of Pakistan by or under Act of the Federal Legislature or of a Provincial Legislature but does not include service as a Speaker, Deputy Speaker or other member of an Assembly. Reading the two definitions together, it becomes clear that the term 'public office', as used in the Interim Constitution, is much wider than the phrase 'Service of Pakistan', and although it includes any office in the Service of Pakistan, it could not really refer to the large number of posts or appointments held by State functionaries at various levels in the hierarchy of Government. As early as 1846, the House of Lords in Henry Farran Darley v. Reg. (6), expressed the view that "a proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by Charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office be of a public nature and a substantive office, and not merely the function or employment of a deputy or servant held at the will and pleasure of others". Their Lordships held the office of Treasurer of the public money of the county of the city of Dublin to be an office for which an information in the nature of a quo warranto would lie. In other words, their Lordships excluded, from the purview of the term 'public office', the large number of servant of the Crown who were not holding any statutory, representative or elective office.

In the light of the foregoing discussion, the position of a public limited company, in relation to the applicability of the various clauses of Article 201 of the Interim Constitution, or Article 199 of the permanent Constitution of 1973, may be summed up by saying that while it cannot ordinarily be regarded as a person performing functions in connection with the affairs of the Federation, a Province or a local authority simply for the reason that its functioning is regulated by a

statute; yet nevertheless the offices held by its Directors and its Chief Executive, which term would include a Managing Director, must be regarded as public offices inasmuch as they involve the performance of public duties which are of the greatest importance to the public interest in the field of the operation of public joint stock companies under the Company Law. As a consequence, although a joint-stock company may not be amenable to the issuance of a writ under clauses (2)(a)(i) and (2)(a)(ii) of Article 201 of the Interim Constitution, but its Directors and the Chief Executive are within the purview of clause (2)(b)(ii) of the said Article which permits the High Court to issue a writ in the nature of quo warranto, requiring a person within its territorial jurisdiction holding or purporting to hold a public office to show under what authority of law he claims to hold that office".

35. In the case of **Kumari Shrilekha Vidyarthi vs. State of U.P. and others, reported in AIR 1991 Supreme Court 537,** the court held as under:-

"Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good."

36. In another case reported in **A.I.R. 1952 Nagpur 330 (G.D. Karkare. v. T. L. Shevde and others),** issue of public office has been dealt with in the following manner:-

"(8). In 'Darley v. The Queen', (1846) 12 Cl & F 520 at p. 537: 8 ER 1513, the Judges were summoned to the House of Lords to give their opinion. The House of Lords accepted the opinion given by Tindall C.J. The conclusion of Tindall C. J. is expressed in the following words:

"After the consideration of all the cases and dicta on this subject, the result appears to be that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the

function or employment of a deputy or servant held at the will and pleasure of others."

"So what the court has to consider in an application for a writ of 'quo warranto' is whether there has been usurpation of an office of a public nature and an office substantive in character i.e. an office independent of title. If the office be of a very small nature like that of petit-constable, as in Anonymous' 94 E R 190, the Court may refuse to grant the information."

37. In order to explore and delve into exhaustively the definition and exactitude of public office up to a broad spectrum and assortment, we have also visited the precision of this phrase alluded to in American Jurisprudence, Stroud's Judicial Dictionary of Words & Phrases and Corpus Juris Secundum, Volume LXVII.

American Jurisprudence, Volume 42 Page.879.

2. Definitions. There are numerous and varied definitions of the terms "office," "officer," "public office", and "public officer", as used in statutes and Constitutions. They are terms of vague and variant import, the meaning of which necessarily varies with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the subject matter in reference to which the terms are used. It is easier to conceive the general requirements of public office as hereinafter set forth and the things necessary to constitute one a public officer than to express them in terms that would be entirely faultless.

The term "officer' is one inseparably connected with an office, and so it may be said that one who holds a public office, as that term is hereinafter defined, is a public officer, and that where there is no office, there can be no public officer. A public officer is such an officer as is required by law to be elected or appointed, who has a designation or title given him by law, and who exercises functions concerning the public, assigned to him by law. The duties of such officer do not arise out of contract or depend for their duration or extent upon the terms of a contract.

Stroud's Judicial Dictionary of Words and Phrases, Fifth Edition Page. 2092-2093.

PUBLIC OFFICE. (1) An employ in an incorporated company, such as the Bank of Scotland, was a "public office, or employment of profit," within Sched. E to the Income Tax Acts 1842 (c. 35) and 1853 (c. 91) (Tennant v. Smith [1892] A.C. 150); so, of a national

schoolmaster, "because the salary is paid by persons whose position as managers of the school is recognized by Act of Parliament, and is paid out of sums of money principally contributed from the taxes of the country in order that the persons to whom it is paid may discharge a duty which is recognized as part of the PUBLIC SERVICE" (PER Pollock B., Bowers v. Harding [1891] 1 Q.B. 560.)

(2) A bursar of an Oxford college, who was not on the foundation and received a salary, held such a "public office" (Langston v. Glasson [1891] 1 Q.B. 567). A person assessable on a "public office, or employment," had to be assessed under Sched. E, and could not be assessed under Case 2, Sched. D. as on an "employment or VOCATION" (per Lord Watson, Tennant v. Smith, supra).

(3) In Pickles v. Foster [1913] 1 K.B. 174, it was held that under r. 3, s. 146 of the Income Tax Act 1842 (c. 35), the office or employment of the profit had to be exercised within the United Kingdom, and did not include the case of a person employed by an English company who exercised his functions entirely abroad.

(4) (a) As regards the Income Tax Act 1918 (c. 40), Sched. E, see Ricketts v. Colquhoun, 95 L.J.K.B. 82. See also Great Western Railway v. Bater [1992] 2 A.C. 1, cited OFFICE, in which case the question was fully discussed, and it was held that a clerk employed by a railway company did not hold a "public office."

(b) The office of director of an English private company was a "public office in the United Kingdom" within the meaning of Sched. E., r. 6, whether the director resided in England or not. The office of director was situate where the company was, and in the above-mentioned rule the expression "public office" included the office of a director of any company incorporated under the Companies Act 1929 (c.23) (MacMillan v. Guest [1942] A.C. 561).

(c) A foreign journalist in England whose salary was payable abroad was not within the rule (Bray v. Colenbrander [1952] 2T.L.R. 499).

(d) "Payable . . . by any public office "(Income Tax Act 1918 (c. 40), Sched. 3, r. 4(1)): on the true construction of the War Damage Act 1943 (c.21) the War Damage Commission is a "public office" within the meaning of the rule (I.R.C. v. Bew Estates; I.R.C v. Westbury [1956] Ch. 407).

(5) A commission in the Territorial Forces was held to be a "public office" for the purposes of a condition in a will providing for forfeiture on under taking any "public office." The condition was held to be contrary to public policy (Re Edgar, 83 S.J. 154).

(6) "Public annual office" (Public Accounts Act 1692 (c. 11), s.6), included the office of assessor and collector of

land or assessed taxes, or of a churchwarden (R. v. Anderson, 9 Q.B. 663, cited SERVED); so, semble, of a clerk to Land Tax Commissioners (R. v. St. Martin-in-the-Fields Commissioners, 1 T.R.146).

(7) Semble the mastership of a city company is a public office of trust (R. v. Neal, Cunn. 267).

Corpus Juris Secundum, Volume LXVII. Page. 97-98.

a. Public office.

In general, the term "public office" embraces the ideas of tenure, duration, emolument, powers, and duties; and it has been defined as a public station or employment conferred by the appointment of government, or the right, authority, and duty created and conferred by law, by which for a given period an individual is invested with part of the sovereign functions of the government.

It has been observed that, although many definitions of "public office" have been suggested, the courts have questioned the possibility of framing a definition which will meet the requirements of all cases which may be presented. In general, "office," in the sense of public office, embraces the ideas of tenure, duration, emolument, powers, and duties, and certain of these ideas are more or less emphasized in the many definitions of the terms given by the courts and test-writers. The term has been defined as a public station or employment conferred by the appointment of government; the right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some part of the sovereign functions of the government to be exercised by him for the benefit of the public.

It has also been defined as the right and duty conferred on an individual to perform any part of the function of government, and receive such compensation, if any, as the law has affixed to the service; a special or particular duty, charge, or trust, conferred by public authority and for a public purpose; an employment on behalf of the government in any station or public trust not merely transient, occasional, or incidental; a place in a governmental system created or recognized by the law of the state which, either directly or by delegated authority, assigns to the incumbent the continuous performance of certain permanent public duties.

38. At this point of time before moving ahead, we ruminate to reproduce the definition of "Service of Pakistan" as

provided under Article 260 of the Constitution of Pakistan which is most significant in our perspective:

> **"Service of Pakistan" means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of [Majlis-e-Shoora (Parliament)] or of a Provincial Assembly, but does not include service as Speaker, Deputy Speaker, Chairman, Deputy Chairman, Prime Minister, Federal Minister, Minister of State, Chief Minister, Provincial Minister, [Attorney-General], [Advocate-General], [Parliament Secretary] or [Chairman or member of a Law Commission, Chairman or member of the Council of Islamic Ideology, Special Assistant to the prime Minister, Adviser to the Prime Minister, Special Assistant to a Chief Minister, Adviser to a Chief Minister] or member of a House or a Provincial Assembly.**

39. The status of employees of High Court Establishment that they would fall within the definition of service of Pakistan has already been discussed and decided by the apex court in the case of **Government of the Punjab through Secretary, Finance Department, Lahore v. Mubarik Ali Khan,** reported in **PLD 1993 Supreme Court 375** in the following terms "Employees of the High Court establishment would fall within the definition of service of Pakistan and have been taken to be employed in connection with the affairs of a Province. Definition of "service of Pakistan" itself divides those included into it into two broad categories i.e. one of those employed in connection with the affairs of the Federation and the other of those employed in connection with the affairs of a Province. Applying this definition, the employees of the High Court establishment would fall within the definition of service of Pakistan and have been taken to be employed in connection with affairs of a Province". In the case of **Registrar, Supreme Court of Pakistan, Islamabad v. Qazi Wali Muhammad,** reported in **1997 SCMR 141,** the apex court held that "On a careful examination of the definitions of 'Service of Pakistan' as given in Article 260 of

the Constitution and the 'civil servant' as mentioned in the Civil Servants Act, 1973, it would appear that the two expressions are not synonymous. The expression 'Service of Pakistan' used in Article 260 of the Constitution has a much wider connotation than the term 'civil servant' employed in the Civil Servants Act. While a 'Civil servant' is included in the expression 'service of Pakistan', the vice versa is not true. 'Civil servant' as defined in the Civil Servants Act, 1973 is just a category of service of Pakistan mentioned in Article 260 of the Constitution." While in the case of **Muhammad Mubeen-US-Salam and others v. Federation of Pakistan through Secretary, Ministry of Defence and others,** reported in **PLD 2006 Supreme Court 602,** it was held by the apex court that "Civil Servant" as defined in the Civil Servants Act, 1973 is just a category of "Service of Pakistan" mentioned in Article 260 of the Constitution. To illustrate the point it can be said that Members of the Armed Forces, though fall in the category of "Service of Pakistan", but they are not civil servants within the meaning of Civil Servants Act, 1973, and the Service Tribunals Act, 1973. Under Article 260 of the Constitution, a person can be declared to be in service of Pakistan if his duties have a nexus with the affairs of the Federation, meaning thereby that a person who is playing an active role in the performance of sovereign functions of the State and exercises public powers can legitimately claim to be in the service of Pakistan."

40. It is readily understood that employees of High Court Establishment comes within the realm and ambit of service of Pakistan and have been taken into employment in connection with the affairs of a Province. It is also a ground reality that no definition of public office is provided under 1973 Constitution but it was provided under 1962 and Interim Constitution 1972 so it is open to decide as to whether any person holding any office in the service of

Pakistan in any circumstances can be regarded to have been holding a public office or not? Naturally to give credence and weightage to an office as public office, the status and eminence of office and nature of duties or job description are to be looked into for deciding the writ of quo warranto and each and every petit, miniature and or diminutive post or office cannot be made the subject matter of writ of quo warranto. In the High Court Establishment Rules 2006, two distinct categories of employees are mentioned i.e. the officer which means an employee in BS-16 or above while the servant means employee in BS-1 to BS-15. The minutiae of precedents both local as well as foreign jurisdiction and the ratio of precedents deducible there from, it is discernible and obvious that a Public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public for the terms and by the tenure prescribed by law. The meanings of 'public office' and 'public officer' vary according to the context in which the terms are used. In general, a public officer may be said to be one who discharges a duty in the performance of which the public is interested; a person is more likely to be such an officer if he is paid out of a fund provided by the public, but it does not necessarily follow that the fund must belong to the central government. The public officer is an officer who discharges any duties, in the discharge of which the public are interested, more clearly so, if he is paid out of a fund provided by the public. The chief characteristics of a public officer seem to be that is a post, the occupation of which involves the discharge of duties towards the community, or some section of it, and that usually those duties are connected with Government, whether central or local. A public office is the right, authority and duty created and conferred by law, by which

an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. In the foreign jurisdiction, the following, inter alia, are offices in respect of which there have been quo warranto proceedings; recorder of a borough; freeman of a borough; burgess; bailiff of a borough; constable; mayor; alderman; town councilor; coroner of a borough; coroner of a country; justice of the peace; sheriff; chief constable; clerk of the peach; judge of a country court; high bailiff of a country court; master of a city company; and member of the General Medical Council. Even in the case **Salahuddin (supra),** our apex court held that a public limited company cannot ordinarily be regarded as a person performing functions in connection with the affairs of the Federation, a Province or a local authority simply for the reason that its functioning is regulated by a statute; yet nevertheless the offices held by its Directors and its Chief Executive, which term would include a Managing Director, must be regarded as public offices inasmuch as they involve the performance of public duties which are of the greatest importance to the public interest in the field of the operation of public joint stock companies under the Company Law.

41. In fact the Inspection Team has been created under the mandate of Article 203 of the Constitution. Under the job description, the MIT-II or Additional MIT is expected to accompany the monitoring Judge on inspection and to generally assist him in performance of his monitoring duties. The MIT-II/Addl. MITs are expected to read judgments of subordinate courts carefully and identify their salient aspects and point them out to the monitoring Judges. The MIT-II would be free to call for the record and proceedings of a decided case unless required by a court of

appellate or revisional jurisdiction. He may with the approval of the Monitoring Judge, at random call for the record and proceedings of any other decided case by a particular Judicial officer and a list of such cases which is received from Districts and will now be handled in the office of MIT-II periodically. Whenever an order or judgment is such which might call for disciplinary action, the MIT-II/Addl. MITs may promptly refer the matter to the authorized officer through MIT-I for taking appropriate action. Whenever the performance of a subordinate Judicial officer does not appear to be entirely satisfactory MIT-II is expected to establish contact with the concerned District Judge and require him to closely monitor the performance of such officer and whenever necessary such officer should be counseled and record be kept in custody. If it is found that some mistakes are frequently committed by Judicial officers or if knowledge and understanding of law in some areas is commonly found inadequate, appropriate recommendations may be made for arrangement of appropriate course in the Judicial Academy. The MIT-II/Addl. MITs are expected to commence preparation of comprehensive reports with respect to each Judicial officer in April every year so that they are completed by the 15th of May and Performance Evaluation Reports are finalized during summer vacations. According to Annexure-D, attached with the comments of Registrar, a note was put up to the honourable Chief Justice of this Court on 4.1.2006 for identifying the job description of the Registrar and MIT-I. In view of the proposal approved by the Chief Justice in 2006, the Registrar has to deal all matters relating to the administration and other affairs of the High Court Establishment while function of MIT-I is to deal all matters concerning the subordinate courts and he is also responsible for assisting the Chief Justice and Senior Pusine Judge in matters pertaining to conduct and

discipline of judges of sub-ordinate courts and the Deputy Registrar (Confidential) and other officers dealing with such matters will report him. At this moment in time, it is noteworthy to draw attention to Sindh High Court Official Website **"http://www.sindhhighcourt.gov.pk/complains.php"** which put on display the procedure for filing complaints by the general public in the following categories:-

1. **For any complaint against Judicial Officers of District Courts of Sindh for any grievance, please contact the Member Inspection Team-I on the Email: mit1shc@sindhhighcourt.gov.pk.**

2. **For any complaint against any Government Officer/Department for any grievance, please contact the Member Inspection Team-II on the Email: mit2shc@sindhhighcourt.gov.pk**

3. **For any complaint against any Government Officer/Department for any grievance, please contact the Additional Member Inspection Team-II on the Email addlmit2@shc.gov.pk**

42. It is stated that the approval of job description is pending with the honorable Chief Justice which is clear evidence that it is case of creation of new post and not simple transfer of duties of MIT-I. Had it been so then there was no need to put forward document containing or proposing fresh or revise job description of the Chairman Member Inspection Team. Fact remains that the nomenclature of Chairman Inspection Team means an independent office. The ordinary dictionary meaning of "Chairman" is a person chosen to preside over a meeting, presiding officer of assembly, meeting or committee and or administrative head of a department or other organization. It is wrong to assert that he has assumed the charge of MIT-I. On High Court web site two types of complaints may be filed by general public with different classification to MIT-1, MIT-II and Additional MIT. At least to our knowledge nothing has been placed before us to demonstrate the

reporting line of MIT-II to MIT-I but apparently both have different job descriptions, however after creation of new post of Chairman, he is virtually heading and supervising the entire Inspection Team Department of Sindh High Court Establishment with direct reporting line to the honorable Chief Justice. In our considerate view, the functions and assignments of this department are directly correlated and linked to the public duties for redress of their grievances and to hear their complaints in relation to the subordinate judiciary and government officials or government departments with publically notified procedure to receive the public complaints for redress and ameliorate and alleviate their miseries and anguishes, therefore it can be safely concluded taking into consideration the performance of public duties and responsibilities involved and the sanctity and enormity of great importance attached to this office, the Chairman Member Inspection Department is a public office.

43. One more outlook of this case is the appointment on contract basis. The creation of post, upgradation even change of nomenclature are distinct features that have already been dealt with and discussed by us but to all intents and purposes it is equally significant to call our attention that creation of new post or its upgradation does not mean that induction may be made on contract basis but it is linked with non availability of suitable person in terms of Clause (d) of Rule 5. After creation or upgradation, neither any advertisement was published for inviting applications for this post nor equal opportunity was provided to other persons through competitive process but in one go a proposal was placed and in the same proposal the name of respondent No.2 was mentioned to offer the post without mentioning anything in this regard that no other suitable person is available to hold the post which

was the foremost requirement envisioned under Clause (d) of Rule 5. The apex court time and again deprecated and denounced the appointment of retired employees on contract basis. Reference can be made to following dictums laid down by the apex court on the subject matter:

PLD 2011 Supreme Court 277 (Suo Motu Case NO.24 of 2010 & Human Rights Cases Nos. 57701-P, 57719-G, 57754-P, 58152-P, 59036-S, 59060-P, 54187-P & 58118-K of 2010)

> **"5. Learned Attorney General has also placed on record summary of some of the Police Officers who are re-employed on contract basis. A perusal whereof indicates that prima facie while they were re-employed, the provisions of law i.e. section 14 of the Civil Servants Act, 1973 as well as instructions contained in Esta Code in Volume-I, Edition 2007 under the heading "Re-Employment" and the judgments of the superior courts on the subject were not considered/adhered to. It is to be noted that for establishing rule of law and Constitutionalism, it is necessary that the relevant provisions should be followed strictly in letter and spirit otherwise it would not be possible to provide an effective machinery in law particularly in Police Department to ensure law and order, so the peace in the country, at the same time to avoid violation of the relevant provisions of law noted hereinbefore, which is tantamount to blocking the promotion of the Officers who have also served in the Forces and are waiting for their promotion but they are not getting chance because of the re-employment/contract awarded to the retired Officers. This is not only in the Police Department but for the purpose of achieving good governance; the same principle should be followed and strictly applied in other Departments as well. Be that as it may, we are adjourning this case and in the meanwhile learned Attorney-General shall take up the matter with the Government/Competent Authority so it may take necessary steps to rectify if any omission has been committed, before the next date of hearing. Similarly, the learned Attorney-General shall convey this order to the Secretary, Establishment Division and the Chief Secretaries of the Provinces to ensure that if any Civil Servant or other person who has been re-employed, his case be also examined in terms of the provisions of law and both Federal and Provincial Governments should take necessary steps to ensure that re-employment or employment on contract basis are not made in violation of the relevant law."**

PLD 2013 Supreme Court 443 (Suo Motu Case NO.16 of 2011 along with CMAs)

> **"15. This Court in Suo Motu Case No.24 of 2010 (PLD 2011 SC 277), has held that re-employment of such**

persons in services on their retirement must be made in public interest because re-employment against a sanctioned post is likely to affect the junior officers, who are waiting for promotion to the next higher rank as their right of promotion is blocked. And they have to wait till such re-employed officer completes his contract. In the meanwhile, they have to face difficulties in maintaining their seniority etc. It is a settled principle of law that the promotion of an employee is not to be blocked to accommodate a retired officer, however, if the right of promotion is not blocked by re-employment, then such powers can be exercised, that too in an exceptional case……."

2013 SCMR 1752 (Contempt Proceedings against Chief Secretary, Sindh & others)

"138….. The post retirement re-employment is major problem in the smooth service of career officers in terms of promotions and postings instilling a sense of injustice. This Court has time and again recorded its displeasure and reservations to re-employment……."

2015 P L C (C.S.) 73 (Suo Motu Case NO.24 of 2010: In the matter of (Regarding Corruption in Hajj Arrangements in 2010.)

"36. ……. re-employment against a sanctioned post is likely to affect the junior officers, who are waiting for promotion to the next higher rank as their right of promotion is blocked. They have to wait till such re-employed officer completes his contract. In the meanwhile, they have to face difficulties in maintaining their seniority, etc. The promotion of an employee is not to be blocked to accommodate a retired officer, however, if the right of promotion is not blocked by re-employment, then such powers can be exercised, that too in an exceptional case…."

44. It is momentous and notable incidence that in view of order passed by the Supreme Court in Suo-Moto Case No.24 of 2010, (supra), this High Court Establishment, had terminated the contractual engagement of three employees such as Syed Muhammad Masroor Zaidi, Secretary Protocol-I, Mr.Naimuddin Siddiqui, Director Library & Research and Mr.Safdar Jang, Additional Registrar (O.S), High court of Sindh. Since all termination orders were identical, therefore, one letter as sample is reproduced as under:-

"THE HIGH COURT OF SINDH KARACHI

No.GAZ/VI.Z.7(3)(c)
Karachi dated:01-02-2011

From:

The Registrar, High Court of Sindh,
KARACHI

To

Syed Muhammad Masroor Zaidi,
Secretary Protocol-I,
High Court of Sindh,
KARACHI

Subject: ONE MONTH ADVANCE NOTICE FOR TERMINATION OF CONTRACTUAL APPOINTMENT/RE-APPOINTMENT

WHEREAS you have been appointed on contract basis which will expire on 30-01-2012 vide this Court's notification of even number dated 06-01-2011.

THEREFORE, In pursuance of the order passed by the Hon'ble Supreme Court in Suo-Moto Case No.24 of 2010, you are hereby served one month's advance notice with immediate effect, that your contract will be terminated on 28-02-2011 (Afternoon).

Sd/-
(ABDUL RASOOL MEMON)
R E G I S T R A R"

45. It is difficult to grasp that contractual employment of three employees were terminated at one fell swoop following the dictum laid by the apex court in Suo-Moto Case No.24 of 2010 and obviously this action was taken keeping in view the binding effect of the judgment of apex court but again regardless of the judgment holding the field with further addition of judgments on alike proposition, the respondent No.2 has been engaged on contract basis who is a retired District and Session Judge.

46. Whether the respondent No.2 may claim to be a retired or former judge of this court or not? We do not want to indulge in this unseemly and indecorous discussion and avoid to pass any such declaration as the case in hand is

precisely confined to the issue of quo warranto alone, therefore we leave it at the wisdom and prudence of learned Respondent No.2 who may seek ultimate guidance from the judgment passed by the apex court in the case of **Sindh High Court Bar Association vs. Federation of Pakistan (PLD 2009 SC 789).**

47. At the end, we also appreciate the invaluable assistance rendered by Mr. Salahuddin Ahmed, learned Amicus Curiae.

48. As a result of above discussion we have reached to the firm conclusion that the Respondent No.2 is holding the Office of Chairman Inspection Team, Sindh High Court Establishment without lawful authority. His Notification of appointment is set aside and he is directed to relieve the charge with immediate effect. Petition is disposed of in the above terms.

Karachi:- **Judge**
Dated.30.6.2016

Judge