

**ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI**

C.P. No.D-4679 of 2016

Date	Order with signature of Judge
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Present:

Mr. Justice Muhammad Ali Mazhar

Mr. Justice Abdul Maalik Gaddi

Sohail Ahmed & others.....Petitioners

Vs.

Province of Sindh & others.....Respondents

**Dates of hearing: 17.10.2016, 24.10.2016, 10.11.2016
& 25.11.2016.**

M/s. Abid S. Zuberi, Ayan Mustafa Memon, Muhammad Saad Siddiqui, & Atta H. Khoso, Advocates for the Petitioners.

M/s. Abdul Jalil Zubedi and Abdul Jabbar Qureshi, A.A.G.

Mr. Ghulam Mustafa Memon, Registrar of this court along with Mr. Asif Majeed, Additional Registrar (Research) and Mr. Ashraf Memon, Addl. MIT-I.

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Muhammad Ali Mazhar-J: This petition has been brought to encounter the rejection of candidature of petitioners to take part in the competitive selection process for the appointment to the post of “Additional District and Sessions Judge”.

2. The evanescent facts of this legal action are that the Sindh High Court Establishment invited applications for the appointment of “Additional District & Sessions Judge” on 10.6.2016 through publication in the newspapers and High Court Website. The petitioners being judicial officers governed under the provisions of Sindh Judicial Service Rules, 1994 after satisfying formal procedure applied for the post before the cutoff date i.e. 15.7.2016. The respondent No.2 issued provisional list of

candidates in which the petitioners were declared not eligible being judicial officers in view of amendment made in Rule 8, sub-rule (1); clause (d) of Rules, 1994.

3. The learned counsel for the petitioner argued that the Sindh Judicial Service Rules, 1994 have been enacted taking into account Section 26 of the Sindh Civil Servants Act, 1973. The competent authority to ordain the rules is Government of Sindh. At the time when the advertisement was published, the said Rules were not amended and they expressly allowed serving judicial officers to apply for the post of ADJ through initial recruitment. It was further contended that the Notification of amendment in Rule 8 was issued by the Government of Sindh on 26.7.2016 **[Notification No.SOR (SGA&CD) 2-3/93 (P-III)]**. The advertisement was published on 10.6.2016 prior to the issuance of the notification of the amendment therefore the amendment cannot apply with retrospective effect. It was further accentuated that the petitioners who applied for the post of ADJ before the cut-off date i.e. 15.7.2016 had legitimate expectation to apply and join the process. The amendment brought to Rule 8 of the Rules, 1994 vide Notification dated 26.7.2016 but it was published in the official gazette on 22.9.2016.

4. To meet up the disquiet of maintainability, the learned counsel referred to the most recent unreported judgment of the apex court rendered on 26.9.2016 in the case of **Muhammad Akram v. Registrar, Islamabad High Court and others in C.P. No.3/2014 and CMA No.8540 of 2015**. The honorable Supreme Court has settled the law with regard to the complexities of Article 199 (5) of the Constitution of Pakistan. In the enlightened guidance and

dictum, the apex court held that the judgment rendered in the case of Muhammad Iqbal Jan approving the case of Asif Saeed being against the provisions of the Constitution is per incuriam and is not a good law. The apex court also concluded that the provisions of Article 199 (5) would bar a writ against a High Court if the issue is relatable to judicial order or judgment whereas a writ may lie against an administrative/consultative/executive order passed by the Chief Justice or the Administration committee involving any violation of the Rules framed under Article 208 causing infringement of the fundamental rights of a citizen.

5. The learned Registrar of Sindh High Court Establishment filed his comments. He maintained that in the advertisement published for inviting applications, the judicial officers were precluded from applying to the posts of Additional District & Sessions Judges. The word “otherwise qualified in accordance with law” mentioned in the advertisement referring to the candidates from the Bar or Sindh Prosecution Service possessing the requisite qualifications. The petitioners had knowledge of the amendment made in Rule 8(1) (d) of the Sindh Judicial Service Rules, 1994. The amendment in Rule 8(1) (d) of the Sindh Judicial Service Rules, 1994 was unanimously approved by the Full Court Judges Meeting convened six (06) months prior to the advertisement published in daily newspapers. The above amendment stood promulgated on the very day i.e. 19th December, 2015 when it was approved by the Full Court Judges Meeting. The criteria laid down in Rule 5 (3) of Sindh Judicial Service Rules has been followed by filling two third posts of existing vacancies of the Additional District & Sessions Judges firstly by promoting Senior Civil Judges and the remaining one third

posts were advertised on 10.06.2016 to fill by initial appointment. The amendment in question has not been made retrospectively but it stands promulgated with effect from 19.12.2015. The hon'ble Full Court decision cannot be called in question under Article 199 of the Constitution. He further argued that the petition is not maintainable. It is bad in law for non-joinder of proper parties inasmuch as the Registrar of this Court has not been impleaded. The eligibility of judicial officers to be aspirant for the post of Additional District & Sessions Judge by way of initial appointment ceased to have effect immediately after the hon'ble Full Court Judges meeting. It was further contended that even in view of the previous posture of Rule 8(1)(d) of Sindh Judicial Service Rules, 1994 the petitioners cannot be admitted as eligible candidates for initial appointment as none of the petitioners have applied to the competent authority for grant of NOC to contest for the advertised posts.

6. The learned A.A.G argued that mere submission of application in respect of recruitment for the post of Additional District & Sessions Judge does not create any vested right. The petitioners are in judicial service and by way of promotion, they are entitled to become Additional Sessions Judge. The impugned amendment made by the Government of Sindh is based on the recommendation of Full Court. The Government of Sindh made the amendment in the Sindh Judicial Service Rules, 1994 by which only practicing advocate of High Court and the Sub-Ordinate Courts with the minimum practice of 06 years is entitled to participate in the Recruitment process for Additional District & Sessions Judge. The impugned action is neither suffer from any illegality nor lack of jurisdiction or the

excess of jurisdiction nor in disregard of any law. Being judicial officers, the petitioners are not eligible to apply and participate in the Recruitment Process for the post of ADJ.

Judicial Precedents

(1) 1992 SCMR 1652 (Messrs Army Welfare Sugar Mills Ltd. & others vs. Federation of Pakistan & others). It seems to be well-settled proposition of law that a notification which purports to impair an existing or vested right or imposes a new liability or obligation, cannot operate retrospectively in the absence of legal sanction, but, the converse i.e. a notification which confers benefit cannot operate retrospectively, does not seem to be correct proposition of law.

(2) 2008 SCMR 1717 (Chief Administrator Auqaf vs. Mst. Amna Bibi). It has been laid down by the superior Courts that a notification which curtails or extends rights of citizens will take effect from date of its publication in Gazette and not from any prior date. Reference in this context can be made to the cases of Abdul Wajid and others v. Aftab Ahmad Khan, Deputy Registrar and others NLR 1992 CLJ 247 and Muhammad Suleman and others v. Abdul Ghani PLD 1978 SC 190 wherein it has been observed that word "notification" according to section 2(41) of the West Pakistan General Clauses Act (VI of 1956), shall mean a notification published under proper Authority in the official Gazette. Further reliance can be placed on case of Sh. Rahmatullah v. The Deputy Settlement Commissioner PLD 1963 SC 633 and Muhammad Ishaq v. Chief Administrator of Auqaf, Punjab PLD 1977 SC 639 wherein the Honourable Judges of the Supreme Court have laid down that the clause "within 30 days of such notification under section 7 of West Pakistan Waqf Properties Ordinance, 1961", would mean within 30 days time when notification was brought to the notice of general public by normal mode.

(3) 2008 SCMR 1148 (Government Of The Punjab, Food Department through Secretary Food and another Vs. Messrs United Sugar Mills Ltd. and another). West Pakistan Foodstuffs (Control) Act (XX of 1958).S.3(1). West Pakistan General Clauses Act (VI of 1956), S.2(41). Control, Notified order would mean notification through publication in official Gazette and not by passing an order and keeping same in office of department concerned. Notification not published in official Gazette would be invalid. Notified declaration could take effect from date of publication in Gazette and not from any prior date.

(4) PLD 1978 Supreme Court 190 (Muhammad Suleman etc. vs. Abdul Ghani). Notifications which curtail or extend rights of the citizens, cannot be retrospective and this is all the more so in such cases when a state of things is to take place by publication of a notification which means from the date of its publication in the Gazette and not from any prior date or to be more precise, not from the date of the notification itself if it is prior to the actual date of the publication in the Gazette, because then it will tantamount to giving that notification a retrospective effect not from its publication but from a date prior thereto which as explained above is not permissible according to the relevant law.

(5) PLD 2011 Supreme Court 347 (Government of Sindh & others vs. Messrs Khan Ginners (Private) Limited & 57 others). The case of Muhammad Suleman and others v. Abdul Ghani PLD 1978 SC 190 throws sufficient light on the legal position that issuance of a Notification is not of any significance or legal importance till it is published in an official Gazette. According to section 2(41) of the General Clauses Act, 1956 a 'Notification' means a Notification published under proper authority in an official Gazette. In this view of the matter before its publication in the official Gazette the Notification relevant to the present appeals could not even be lawfully termed as a Notification. In these peculiar circumstances of this case we have not been able to take any legitimate exception to the declaration made by the learned Division Bench of the High Court of Sindh, Karachi that notices of demand issued against the respondents on 2-10-1998 were without lawful authority and of no legal effect.

(6) 1983 SCMR 785 (Muhammad Siddque vs. The Market Committee, Thandlianwala). Punjab Agricultural Produce Markets Act (V of 1939), S.27. Notification: On the 30th July, 1975 a notification No.SO(S&M)-X-53/72 was issued by the Provincial Government prohibiting the establishment of any market within the market area of any Market Committee unless the site for the same had been approved by the Provincial Government. This notification was published in the official Gazette on the 20th November, 1975. A plain reading of the section will make it clear that the condition of previous publication in the official Gazette is confined to bye-laws only and not to the rules or any notification issued thereunder. In the instant case the mere fact that the publication of notification was delayed until the 20th November, 1975 will not invalidate or otherwise make its operation retrospective from any date prior to the 30th July, 1975 when it was actually signed though not published in the official Gazette.

(7) 2012 SCMR 455 (Dr. Akhtar Hassan Khan & others vs. Federation of Pakistan & others). Art. 184(3). Judicial review of Executive's authority. Scope and limitations. Once the competent authority in the government has taken a decision backed by law, it would not be in consonance with the well-established norms of judicial review to interfere in policy making domain of the executive authority. Grounds upon which an administrative action is subject to control by judicial review, includes, illegality, which means the decision-maker must understand the law correctly that regulates his decision-making power and must give effect to it. Not every wandering from the precise paths of best practice, lend fuel to a claim for judicial review.

(8) 1996 SCMR 1185 (Hameed Akhtar Niazi vs. The Secretary, Establishment Division, Government of Pakistan & others). Sections 8 and 23 of Civil Servants Act, 1973. Seniority---Merger of C.S.P and P.S.P cadres and creation of APUG. In this case the apex court remanded the case to the Tribunal with the direction to re-examine the above case after notice to the affected persons and to decide the same afresh in the light of above observations. We may observe that if the Tribunal or this Court decides a point of law relating to the terms of service of a civil servant which covers not only the case of the civil servant who litigated, but also of other civil servants, who may have not taken any legal proceedings; in such a case, the dictates of justice and rule of good governance demand that the benefit of the above judgment be extended to other civil servants, who may not be parties to the above litigation instead of compelling them to approach the Tribunal or any other legal forum.

7. Heard the arguments. In the beginning, let us first converge that the learned counsel for the petitioner remained self-confined to the solitary vantage point that petitioners applied before the cutoff date so their applications could not be rejected due to the amendment notified on 26th July 2016 and published in the official gazette on 22.9.2016. However, he renounced and part with all other grounds raised in the memo of petition to challenge and or contest the legitimacy or lawfulness of the amendment made in the rules. So in all fairness, at this moment in time the amendment made by the Full Court is

not under challenge otherwise we could have recused to entertain this petition being privy to the full court judges meeting and decision. We are also sanguine that the Full Court has absolute powers and prerogative to suggest and proposed any amendment in the Sindh Judicial Service Rules 1994 on all-encompassing legal principles and philosophy sagacious to meet any state of affairs and exigency but virtually amendment in the rules is to be notified by the Government of Sindh. At this juncture, the decisive and pivotal facet is only the effective date of amendment brought in the statute and not the decision of full court.

8. With the aim and object of regulating the recruitment to the Sindh Judicial Service and prescribing conditions of service for the persons appointed, the Government of Sindh in exercise of powers conferred by Section 26 of the Sindh Civil Servants Act, 1973 enacted Sindh Judicial Service Rules, 1994. Under Rule 8, Sub-Rule- (1) Clause (d), the appointment of Additional District & Sessions Judge has been dealt with. For the ease of reference, the text of relevant Clause (d) is replicated as under:-

“(d) In case of appointment to a post of Additional District and Sessions Judge, he, apart from possessing the qualifications in clause (a), is also a practicing Advocate of High Court and the Courts subordinate thereto with minimum practice of six years for he has for a period of not less than six years, held a Judicial office with clean record of service”. [Emphasis applied].

9. A Full Court Judges Meeting of this court was convened on 19.12.2015 to discuss the following agenda:

“05/2015 (FC). To consider the question for approval of prescribed criteria and mode of appointment of Additional District & Sessions Judges.”

After due contemplation and rumination, the Full Court resolved as under:-

“It was unanimously resolved that in Rule-8 (d) of Sindh Judicial Service Rules 1994, after the words six years, the phrase [or he has for a period of not less than six years, held a Judicial Office with clean record of service.] be deleted. And the Government of Sindh may be moved for such amendment in the rules”. [Emphasis applied].

10. The Sindh High Court Establishment invited applications on 10.06.2016 for the appointment of Additional District & Sessions Judge (BS-20) through newspapers and High Court official website against some vacant posts with the following eligibility criteria:

- “i) He/She shall have a Degree in Law from a recognized University or a Barrister of Law from England or Ireland or is a Member of the Faculty of Advocates of Scotland.**
- ii) Six (6) years’ experience as practicing Advocate of High Court and the Courts subordinate thereto.**
- iii) He is otherwise also qualified in accordance with the law”. [Emphasis applied]**

11. The bone of contention between the parties is whether the amendment get done in pursuance of recommendation of Full Court Judges meeting will be effective or operative as of the moment it was proposed/recommended or this will take effect from the date of its publication in the official gazette?. Quite the reverse, the learned Registrar and the learned A.A.G. articulated that the amendment was made effective the moment it was passed by the Full Court. However it is an admitted position that the cutoff date for filing applications to join this competitive process was 15.07.2016 and the petitioners submitted that applications but their applications were rejected on the sole ground i.e. **“Not Eligible Being Judicial Officer”** while the

Notification of amendment was issued by the Sindh Government on 26.7.2016 which is reproduced as under:-

**“GOVERNMENT OF SINDH
SERVICES, GENERAL ADMINISTRATION &
COORDINATION DEPARTMENT
(REGULATION WING)**

Karachi, dated the 26th July, 2016

NOTIFICATION

No.SORI(SGA&CD)2-3/93^(P-III):- In exercise of the powers conferred by section 26 of the Sindh Civil Servants Act, 1973, the Government of Sindh are pleased to make the following amendment in the Sindh Judicial Service Rules, 1994:-

AMENDMENT

In rule 8, in sub rule (1), for clause (d) the following shall be substituted:-

“(d) in case of appointment to a post of Additional District and Sessions Judge, he, apart from possessing qualifications in clause (a), is also a practicing Advocate of High Court and the courts subordinate thereto with minimum practice of six years.”

**MUHAMMAD SIDDIQUE MEMON
CHIEF SECRETARY SINDH**

No.SORI(SGA&CD)2-3/93^(P-III)-Karachi, dated the 26th July, 2016

A copy is forwarded to the Superintendent, Sindh Government Printing Press, Karachi with a request to publish the same in the next issue of the Sindh Government Gazette and supply 300 copies thereof to this Department.

**(MUSADDIQUE MEMON)
SECTION OFFICER (REGULATION-I)”**

12. It is a matter of record that Sindh Government issued Notification of Amendment on 26th July 2016 which was published in the Official Gazette on 22.9.2016 while the cutoff date to join the competitive process in the advertisement was 15.7.2016. The Full Court Meeting was convened on 19.12.2015 but till the cutoff/closing date, no amendment was notified. With regard to the condition No-iii published in the advertisement **“He is otherwise**

also qualified in accordance with the law”, we are not persuaded to subscribe the solicitation of the learned Registrar that the word “*otherwise qualified in accordance with law*” mentioned in the advertisement referring to the candidates from the Bar or Sindh Prosecution Service possessing the requisite qualifications only. On the contrary the aforesaid expression has widespread and broad spectrum which cannot be restricted or circumscribed to a particular mannerism or characteristic. The acid test is to get the drift of original conditions to apply embedded under the Rule 8, sub-rule (1); clause (d) of Sindh Judicial Service Rules, 1994. Before amendment, the petitioners were entitled to apply under the original rules so they could not be excluded from the process rather than to be more precise they were abundantly shielded and covered within the phrase “***otherwise qualified in accordance with law***”, provided they fulfill other canons. The learned Registrar also referred to the advertisements of previous process to draw some comparison that in the advertisement of present competitive process, he deleted the condition “**or he has for a period of not less than six years, held a Judicial office with clean record of service**”. Mere deletion of this condition without amendment in rules has no significant effect when the petitioners were otherwise qualified in accordance with law and their right to apply continued up to the date of amendment notified by the Government of Sindh. To meet up the merger of past experience of advocacy for considering the proficiency and excellence, the learned counsel for the petitioners argued that the Administration Committee of this Court in its meeting held on 14.2.2009 had already resolved that those judicial officers who have some period of practice as advocates prior to their joining

as judicial officers their such period of practice should be counted towards the period of service. He placed on record a copy of counter affidavit filed by learned Registrar of this court in **C.P.No.D-4066/2013 (Tariq Ali Jakhrani vs. Province of Sindh & others)**. The learned Registrar of this court did not controvert or deny this document. The relevant portion is reproduced as under:-

“As regard the contents of Ground No.2, it is submitted that the requirement for appointment to the post of Additional District & Sessions Judge is that the candidate should either be an advocate having not less than six (6) years of practice as advocate of subordinate Courts and High Court, or he should be a judicial officer having six (6) years service as such judicial officer. The respondents No.4 and 5 were working as judicial officers since 2006 and 2007 respectively and they had also period of practice as advocates prior to their appointment as Civil Judges. It is submitted that the Administration Committee of this Court in its meeting held on 14.2.2009 had resolved that those judicial officers who have some period of practice as advocates prior to their joining as judicial officers their such period of practice should be counted towards the period of service. [Emphasis applied]. It is further submitted that the Hon’ble Supreme Court of Pakistan in its judgment dated 21.12.2010, passed in CPLA No.394-K and 395-K of 2010 (The Administrative Committee Vs. Mohammad Wasim Abid & others) has been pleased to hold that the Administration Committee of the Sindh High Court had absolute discretion and vast powers to follow any equitable procedure....”

13. According to Sind General Clauses Act, 1956, notification means a notification published under proper authority in the official Gazette and rules. The notification, orders, regulations and circulars having the effect of law made or issued under any enactment are required to be published in the official Gazette. The relatable excerpt of law is copied as under:-

Sindh General Clauses Act, 1956

2(41). Notification. “notification” shall mean a notification published under proper authority in the official Gazette.

19-A. Rules and orders, etc. to be published.---All rules, notification, orders, regulations and circulars having the effect of law made or issued under any enactment shall be published in the official Gazette.

General Clauses Act, 1897

20A. Rules and Order, etc., to be published.---All rules, Orders, regulations and circulars having the effect of law made or issued under any enactment shall be published in the official Gazette.

14. The learned Registrar referred to the order dated 01.11.2012 passed by hon'ble Supreme Court in **C.P.No.258-K and 259-K of 2012**. The Sindh High Court advertised the post of Additional & District Sessions Judge (BS-20). The petitioners before the Apex Court had also applied but they were not found eligible. They had filed Constitution Petition in this court but the same was dismissed vide judgment dated 16.08.2012. The petitioner Faisal Noor Junejo claimed that he is employed as Junior Assistant (BS-17) in the Supreme Court while petitioner Nasir Ali Noor Qureshi as Senior Translator (BS17) in the High Court of Sindh so according to them they had more than six years' service which make them eligible to participate in the selection process. The Apex Court while dilating upon qualification/eligibility for the appointment of Additional District & Sessions Judge contained in the Sindh Judicial Service Rules, 1994 held that the office of Judicial Assistant and Senior Translator do not come at par with Judicial Office consequently both the petitions were dismissed. The facts and circumstances of this case are distinguishable where no issue of amendment in the rules or issue of notification and its effect was involved.

15. He further referred to the judgment of hon'ble Supreme Court rendered in the **Constitution Petitions No.37 and 40 of 2015 and Civil Petition No.2197/2015** on 08.10.2015 in the case of **“Muhammad Afzal Majoka & others versus Registrar Lahore High Court”**. In this judgment the Apex Court alluded to Punjab Judicial Service Rules, 1994. In the original rules of 1994 notified on 31.03.1994, 60% quota was reserved for filling up the vacancies of Additional District & Sessions Judge through promotion amongst the serving Civil Judges/Senior Civil Judges on seniority-cum-fitness basis and remaining 40% quota was reserved for direct recruitment from the members of Bar as per eligibility criteria specified under the rules. However, vide Notification dated 09.05.2014, a path was created through which Senior Civil Judges and Civil Judges-cum-Magistrates having ten years' service experience could have applied. However, another notification was issued on 13.05.2015 whereby the Judicial Officers in the Province of Punjab those were earlier qualified to participate against the 40% reserved quota for the members of Bar for the vacancies of Additional District & Sessions Judge were excluded and relegated to their position prior to the notification dated 09.05.2014. Before the apex court, the petitioners took the plea that in view of the amendment, vacancies were advertised and as per requirement of Rules some of them also obtained requisite permission from Lahore High Court for their eligibility to participate in such examination but due to the impugned notification dated 13.05.2015 the process was scrapped and the subsequent advertisement dated 22.05.2015 debarred them from their participation in their selection

process. The apex court in paragraph 11 of the judgment held as under:

“11. The bare reading of the original text of the Rules of 1994 dated 31.3.1994 shows the scheme of Policy Makers about the equitable distribution of such vacancies amongst the serving Senior Civil Judges and Civil Judges-cum-Magistrates in the Province of Punjab and the members of the Bar on basis of seniority-cum-fitness and direct recruitment respectively in the ratio already discussed above i.e. sixty percent and 40 percent. These rules before any amendment remained effectively in force for a period of more than 20 years to cater the need of District Judiciary for the purpose of appointment of Additional District & Sessions Judges. However, the competent authority having power to amend the rules vide notification dated 09.5.2014 amended it in the manner that the 60 percent reserved quota meant for promotion of serving Civil and Senior Civil Judges to the post of Additional District and Sessions Judges, on the criteria of seniority-cum-fitness remained intact, but the remaining 40 percent quota reserved for direct recruitment from the members of the Bar was disturbed in the manner that as per the qualification criteria provided under the amended rules, the serving Senior Civil Judges and Civil Judges-cum-Magistrates were also made eligible to apply for the post of Additional District & Sessions Judges through the process of direct recruitment, thereby encroaching upon the exclusive 40 percent share of members of the Bar in the process of filling up the vacancies of Additional District & Sessions Judge. Without commenting upon such amendment, we may say that probably the policy laid down by the competent authority for appointment of Additional District & Sessions Judges *prima facie* did not work effectively; failed to achieve the desired results and consequently through impugned notification dated 13.5.2015 the rules were again amended in order to dilute the effect of earlier notification dated 09.5.2014. With the result, the original position as provided under the Rules of 1994 was restored. None of the learned ASCs for the Petitioners has questioned the jurisdiction or competence of the authority which had issued the notification dated 13.5.2015, and rightly so as this notification was issued by the competent authority under the same statutory power, which had issued the earlier

notification dated 09.05.2014, therefore, any challenge to the jurisdiction or competence of the authority to issue such notification would have entirely displaced the claim of the Petitioners based on the notification dated 09.5.2014....The other important feature of the case which cannot be lost sight of is the fact that if any Senior Civil Judge and Civil Judge-cum-Magistrate is confident enough about his skills and qualification to hold the post of Additional District & Sessions Judge, but not willing to wait for his turn of promotion against the reserved quota of 60 percent meant for him on the principle of seniority-cum-fitness, then there is no hurdle in his way to avail the chance of direct appointment as Additional District & Sessions Judge against the 40 percent reserved quota for the members of the Bar, by tendering his resignation from the judicial post and getting himself again enrolled with the concerned Bar Council. All these facts go a long way to show that in fact the impugned notification is based on reasonable and rational classification and in no manner it is violative of any fundamental right or any other statutory provision.”

Note: The aforesaid judgment of honourable Supreme Court explicitly demonstrates that the controversy moved around was altogether different. No issue relating to the date of amendment or signing of notification or its publication in the official gazette and or its effective date was involved so in our humble view it is distinguishable on all fours.

16. An exhaustive and all-embracing survey of judicial precedents quoted by the parties ensuing to the ratio and legal values as under:-

- i. Notification which purports to impair an existing or vested right or imposes a new liability cannot operate retrospectively.
- ii. Notification which curtails or extends rights will take effect from date of its publication in the Gazette and not from any prior date.
- iii. A notification which confers benefit cannot operate retrospectively does not seem to be correct proposition of law.

- iv. The word notification shall mean a notification published under proper Authority in the official Gazette.
- v. Notified order would mean notification through publication in official Gazette and not by passing an order and keeping same in office of department concerned.
- vi. When a state of things is to take place by publication of a notification which means from the date of its publication in the Gazette and not from any prior date. If it is prior to the date of the publication in the Gazette, it will tantamount to give a retrospective effect.
- vii. Issuance of a Notification is not of any significance or legal importance till it is published in an official Gazette.
- viii. Once the competent authority in the government has taken a decision backed by law, it would not be in consonance with the well-established norms of judicial review to interfere in policy making domain of the executive authority.
- ix. Grounds upon which an administrative action is subject to control by judicial review, includes, illegality, which means the decision-maker must understand the law correctly that regulates his decision-making power and must give effect to it.
- x. If the court decides a point of law which covers not only the case of the civil servant who litigated, but also of other civil servants, the dictates of justice demand that the benefit of the judgment be extended to other civil servants also who may not be parties to the litigation.
- xi. Even the plain reading of Article 199 (5) leads to the conclusion that by excluding a High Court and Supreme Court from the definition of person, the framers of the Constitution envisaged judicial jurisdiction and not

the extraneous administrative/executive/consultative matters pertaining to the Establishment of Courts. **[Ref. latest judgment of Apex Court in C.P.No.03/2014].**

- xii. The apex court concluded that provisions of Article 199 (5) would bar a writ against High Court if the issue is relatable to judicial order or judgment; whereas a writ may lie against an administrative/consultative/executive order passed by the Chief Justice or the Administration Committee, involving any violation of the Rules framed under Article 208, causing infringement of the fundamental rights of the citizen. **[Ref. latest judgment of Apex Court in C.P.No.03/2014].**

17. We would like to discuss the case of **Muhammad Siddque [1983 SCMR 785]** separately for the reason that in this case on 30th July, 1975 a notification was issued by the Provincial Government prohibiting the establishment of any market within the market area. This notification was published in the official Gazette on 20th November, 1975. Apex court held that under the relevant Section of Punjab Agricultural Produce Markets Act (V of 1939), it is clear that the condition of previous publication in the official Gazette was confined to bye-laws only and not to the rules or any notification issued thereunder. So it was held that the publication of notification was delayed until the 20th November, 1975 will not invalidate or otherwise make its operation retrospective from any date prior to the 30th July, 1975 when it was actually signed though not published in the official Gazette. If we apply this dictum in the case in hand and amendment is reckoned from the date of Notification i.e. 26.7.2016 and not from the date its publication in the Official Gazette, **(i.e. 22.9.2016)** even then, the petitioners

were not debarred from participating in the competitive process in which last date to apply was 15.7.2016.

18. The Apex court recently concluded that provisions of Article 199 (5) would bar a writ against High Court if the issue is relatable to judicial order or judgment; whereas a writ may lie against an administrative, consultative and executive order involving any violation of the Rules framed under Article 208, causing infringement of the fundamental rights of a citizen. However, the issue in hand has already been dealt with in detail and the controversy involved here has otherwise nothing to do with the rigors and exactitudes of Article 199 (5) of the Constitution as the matter is confined to the effective date of amendment and not to the powers of full court to suggest or proposed the amendment in the rules.

19. Though only eight petitioners have filed this petition but it was brought in our knowledge that some more similarly placed persons had also applied and their applications were rejected on the same ground therefore being fortified by the dictum laid down in case of Hameed Akhtar Niazi case (supra) in which apex court held that if the court decides a point of law which covers not only the case of the civil servant who litigated, but also of other civil servants, who may have not taken any legal proceedings; the dictates of justice and rule of good governance demand that the benefit of the above judgment be extended to other civil servants, who may not be parties to the above litigation instead of compelling them to approach the legal forum, therefore, in our short order we allowed all such candidates who applied to take part in the process before the cutoff date.

20. The learned Registrar alluded to a judicial precedent vis-à-vis well-established norms of judicial review to interfere in the policy making domain of the executive authority and grounds upon which an administrative action is subject to control by judicial review. Here no matter of any judicial review is involved nor are we going to disturb any policy decision.

21. The whys and wherefores lead us to a firm conclusion that the Notification dated 26th July 2016 published in the Official Gazette on 22.9.2016 cannot be given retrospective effect. This petition was disposed of vide our short order dated 25.11.2016 in the following terms:

- (i) **“Since the petitioners had applied before the cutoff date mentioned in the advertisement and till such time no amendment was notified creating any embargo against them being judicial officers hence they were eligible and qualified to join the competitive process and their applications were wrongly rejected.**
- (ii) **The learned Registrar informed us that the selection process in response to the same advertisement in which the petitioners had applied is likely to be completed soon. The interviews of successful candidates appeared in the NTS and subsequent written test are being conducted to complete the selection process. In our considerate outlook at this stage there is no rational to scrap the entire process. However, with the concurrence of the honourable Chief Justice and honourable Members of Administration Committee (SHC), the learned Registrar shall arrange the prequalification test (NTS) and then written test of the petitioners and other applicants who had submitted their applications in the same competitive process before the cutoff date but their applications were also rejected for the reason of being judicial officers. (Ref: *Hameed Akhtar Niazi vs. Secretary Establishment Division Pakistan, reported in 1996 SCMR 1185*).**
- (iii) **The learned Registrar will also make a request to the honourable Chief Justice and honourable members of Administration Committee to withhold the result of interview for ongoing selection process till such time the competitive selection process of the petitioners and**

similarly placed candidates is completed so that the consolidated merit list of entire selection process may be issued by the learned competent Authority for the appointment of Additional District & Sessions Judges.

- (iv) At this juncture, the learned Registrar submits that only those applications will be considered which were submitted through proper channel which means forwarded by the learned District and Sessions Judge of concerned candidate. Obviously this is the lookout of the learned Registrar to scrutinize the applications whether submitted through proper channel or not”.

Above are the reasons of our short order.

Karachi:
Dated.1.12.2016

Judge

Judge