JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A. No.323 of 2022
The Federation of Pakistan
Versus
Imtiaz Ali Qureshi and others

Dates of Hearing:	14.02.2023 & 16.02.2023.
Appellants by:	Malik Shaukat Nawaz Awan, learned Assistant Attorney General in I.C.A. No.323/2022. M/s Zulfikar Khalid Maluka and Shafqat Ghafar Khan Joyia, Advocates for the appellant in I.C.A. No.325/2022
Respondents by:	Mr. Imtiaz Ali Qureshi / respondent No.1 in person.

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, we propose to decide intra Court appeals No.323/2022 and 325/2022 since they both are against the same judgment.

2. Through Intra Court Appeals No.323/2022 and 325/2022 the appellants, the Federation of Pakistan and the Islamabad Capital Territory - Private Educational Institutions Regulatory Authority (**"ICT-PEIRA"**), respectively, assail the judgment dated 22.07.2022 passed by the learned Judge-in-Chambers whereby writ petition No.4517/2021 filed by respondent No.1, Imtiaz Ali Qureshi (**"Mr. Qureshi"**), was allowed and the decision of the Federal Cabinet (**"Cabinet"**) dated 23.11.2021 to terminate respondent No.1's services as Member (Academics), ICT-PEIRA as well as the notification dated 03.12.2021 issued by the Ministry of Federal Education and Professional Training (**"Ministry of FE&PT"**) pursuant to the said decision, were set-aside.

FACTUAL BACKGROUND:-

3. The record shows that on 13.07.2009, the erstwhile Ministry of Education (succeeded by the Ministry of FE&PT as a consequence of the Constitution (Eighteenth Amendment) Act, 2010) published an advertisement inviting applications for appointment against different posts in ICT-PEIRA on permanent

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basis, including the post of Member (Academics). Mr. Qureshi was one of the candidates who participated in the competitive process for appointment to the post of Member (Academics). A four-member Selection Board had been constituted to scrutinize the candidature of respondent No.1. The minutes of the Selection Board's meeting dated 01.10.2009 show that Mr. Qureshi was unanimously recommended for appointment as Member (Academics) on permanent basis. Thereafter, vide letter dated 05.10.2009 from ICT-PEIRA, Mr. Qureshi was appointed to the said post on permanent basis.

4. During 2019, ICT-PEIRA had taken decisions which resulted in the reduction of the fees charged by private educational institutions from students. Mr. Qureshi as Member (Academics) was also responsible for such decisions. During that period, writ petition No.403/2019 was filed before this Court by Abdul Waheed seeking the issuance of a writ of *quo warranto qua* the appointment of Mr. Qureshi as Member (Academics). Order dated 13.01.2020 passed in the said petition shows that Mr. Qureshi's appointment was challenged on the ground that under the Islamabad Capital Territory Private Educational Institutions Chairman and Member (Academic) and Member (Registration) (Appointment and Qualifications) Rules, 2015 (**"the 2015 Rules"**), the appointment to the said post was to be made for a fixed tenure of three years whereas Mr. Qureshi had been appointed on permanent basis. The position taken by ICT-PEIRA in the said proceedings was that Mr. Qureshi had been appointed on permanent basis in terms of Section 7 of the Islamabad Capital Territory Private Educational Institutions (Regulation and Promotion) Ordinance, 2006 (**"ICT-PEIRA Ordinance 2006"**) which provided that the Chairman and Members shall be appointed by the Government on such terms and conditions as it may determine. This Court, vide order dated 13.01.2020, deemed it appropriate to place the matter regarding Mr. Qureshi's appointment as Member (Academics) before the Cabinet.

5. On 01.04.2020, the Ministry of FE&PT submitted a summary seeking a declaration from the Federal Cabinet that the

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appointment of Mr. Qureshi as Member (Academics) in ICT-PEIRA *"can be regulated on the basis of tenure on the same principle laid down in Rule 7 of the ICT-Private Educational Institutions Chairman and Member (Appointment and Qualification) Rules, 2015."*

6. No decision was taken by the Cabinet on the said summary. But the order dated 02.10.2020 passed by this Court in writ petition No.403/2019 and the Cabinet Division's Office Memorandum (**"O.M."**) dated 10.06.2020 shows that the Ministry of FE&PT had been asked to seek the comments of the Law and Justice Division and incorporate the same in the summary for the Cabinet.

7. On 13.04.2020, the Establishment Division issued an O.M. in which reference was made to its earlier views expressed vide O.M. dated 18.11.2015. In the latter O.M., the Establishment Division had taken the view that the 2015 Rules would have prospective effect and that the permanent appointment of Member (Academics) could not be converted into a tenured appointment due to such Rules. It ought to be borne in mind that by the time the Establishment Division's O.M. dated 13.04.2020 was issued, the Law and Justice Division had not given its opinion.

8. The Law and Justice Division gave its opinion to the Ministry of FE&PT through O.M. dated 13.07.2021. While concurring with the views of the Establishment Division contained in the O.M. dated 18.11.2015, the Law and Justice Division opined that the 2015 Rules are to have prospective effect and cannot in any manner adversely affect the terms and conditions of service of the existing Members.

9. On 16.11.2021, the Ministry of FE&PT submitted another summary to the Cabinet in which it took the position that Mr. Qureshi's appointment as Member (Academics) was illegal as it had been made in the absence of Rules and as such his services needed to be terminated with immediate effect. It was also mentioned that after the termination of his services, the process for the appointment of Member (Academics) shall be initiated in

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accordance with the 2015 Rules. Approval of the Cabinet had been sought to terminate Mr. Qureshi's services and to re-initiate the process for the appointment of Member (Academics) in accordance with the 2015 Rules. It is most pertinent to mention that the said summary does not make any mention of either the Law and Justice Division's opinion dated 13.07.2021 or the Establishment Division's views contained in its O.M. dated 18.11.2015.

10. On 23.11.2021, the Cabinet decided to approve the proposal made by the Ministry of FE&PT in its summary dated 16.11.2021. Consequently, vide notification dated 03.12.2021 issued by the Ministry of FE&PT, Mr. Qureshi's services were terminated with effect from 23.11.2021. After Mr. Qureshi's services were terminated, writ petition No. 403/2019 filed by Abdul Waheed was dismissed as having been rendered infructuous.

11. Mr. Qureshi assailed the said notification dated 03.12.2021 whereby his services were terminated through writ petition No.4517/2021 which was allowed by the learned Judge-in-Chambers vide the impugned judgment dated 22.07.2022 and it was directed that Mr. Qureshi be reinstated in service with all back benefits. The said judgment has been assailed by the Federation of Pakistan through the Secretary, Ministry of FE&PT as well as by ICT-PEIRA through Intra Court appeals No. 323/2022 and 325/2022, respectively.

CONTENTIONS OF LEARNED COUNSEL FOR ICT-PEIRA:-

12. Learned counsel for ICT-PEIRA submitted that in December 2006, Mr. Qureshi had been appointed as Member (Academics) on contract basis for a period of two years; that the period of his contract appointment was extended for one year; that in the year 2009, it was Mr. Qureshi who had initiated the process for his own appointment as Member (Academics) on permanent basis in the absence of any service rules; that Mr. Qureshi had devised the publication of a self-serving advertisement dated 13.07.2009 to facilitate his own appointment as Member (Academics); that Mr. Qureshi had maneuvered the entire process for his own

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appointment of Member (Academics) on permanent basis, whereas the Islamabad Capital Territory Private Educational Institutions (Regulation and Promotion) Regulatory Authority Employees (Service) Rules, 2006 (**"the 2006 Rules"**) envisaged the appointment not to be on permanent basis; that the 2015 Rules governing the appointment of Chairman and Members of ICT-PEIRA were issued on 18.11.2015; that Rule 7 of the 2015 Rules provides for the appointment of Member (Academics) to be made for a fixed tenure of three years; that appointment to the post of Member (Academics) in terms of Section 7 of ICT-PEIRA Act, 2013, could not have been made on permanent basis in the absence of service rules; that Mr. Qureshi's appointment letter dated 05.10.2009 was signed by Chairman, ICT-PEIRA whereas the applicable statute provided that the members of ICT-PEIRA are to be appointed by the Federal Government; that Mr. Qureshi was appointed as Member (Academics) during the 120-day period after the judgment dated 31.07.2009 of the Hon'ble Supreme Court in the case of Sindh High Court Bar Association Vs. Federation of Pakistan (PLD 2009 SC 879); that with the lapse of the said period, Mr. Qureshi's appointment as Member (Academics), ICT-PEIRA was rendered unlawful; and that it was not until 19.03.2013 that the ICT-PEIRA Act, 2013 was enacted which did not save any of the appointments made during the currency of any of the Ordinances promulgated for the establishment of ICT-PEIRA

13. The learned Assistant Attorney-General adopted the arguments of the learned counsel for ICT-PEIRA.

CONTENTIONS OF MR. QURESHI:-

14. Mr. Qureshi appeared in person and took us through the documents showing that he had been appointed as Member (Academics) ICT-PEIRA on permanent basis after emerging successful in a competitive process initiated through advertisement dated 13.07.2009. Mr. Qureshi submitted that he served as Member (Academics) for 12 years before he was suspended and subsequently his services were terminated on the basis of the decision dated 23.11.2021 taken by the Cabinet;

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that the Cabinet's said decision was on the basis of a *mala fide* summary submitted by the Ministry of FE&PT which made no mention of the Law and Justice Division's opinion dated 13.07.2021; that the said opinion was deliberately concealed so that the Cabinet was kept in the dark and a decision against his interests was obtained; that strong vested rights had been created in his favour on 05.10.2009 when he was appointed as Member (Academics) on permanent basis and such rights could not be destroyed by giving retrospective operation to the 2015 Rules; that the Establishment Division, in its O.M. dated 18.11.2015 and the Law and Justice Division, in its opinion dated 13.07.2021, had clearly stated that the 2015 Rules could not be given retrospective effect and did not apply to his appointment made years before the said Rules were made. He prayed for the appeal to be dismissed.

15. We have heard the contentions of the learned counsel for the appellants as well as Mr. Qureshi and have perused the record with their able assistance. The facts leading to the filing of the instant appeals have been set out in sufficient detail in paragraphs 3 to 11 above and need not be recapitulated.

16. ICT-PEIRA was established under the provisions of the ICT-PEIRA Ordinance 2006 which was promulgated on 21.09.2006. Section 6 of the said Ordinance provided that ICT-PEIRA shall consist of a Chairman and two Members possessing qualifications and experience as may be prescribed whereas Section 7 provided that the Chairman and Members shall be appointed by the Government on such terms and conditions as it may determine. The word "prescribed" was defined by Section 2(g) of the said Ordinance to mean prescribed by rules made under the said Ordinance. Section 22 of the said Ordinance provided that subject to the approval of the Government, ICT-PEIRA may make rules to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of the said Ordinance.

17. In exercise of the powers conferred by Section 22 of the ICT-PEIRA Ordinance, 2006 the Federal Government made the

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2006 Rules. Rule 2(i) of the said Rules provided that the said Rules shall apply to all employees in the full-time employment of ICT-PEIRA other than the Chairman and Members. Since the 2006 Rules did not apply to the Chairman and Members, the qualification and experience required for appointing a Chairman and Members of ICT-PEIRA needed to be prescribed in the rules to be made in exercise of powers under Section 22 of said Ordinance.

18. It was not until 18.11.2015 that the Federal Government made the 2015 Rules through Notification (SRO 107(KE)/2015) issued by the Capital Administration and Development Division. The said Rules prescribed the qualification and experience required for appointment to the position of Chairman and Member(s), ICT-PEIRA, the method of appointment, salaries and privileges, etc. Rule 7 of the said Rules provides *inter alia* for the appointment of Chairman, Member (Academics) and Member (Registration) to be made on tenure basis for an initial period of three years. Rule 1(3) of the said Rules provides that the said Rules shall come into force at once. This implies that the said Rules do not have retrospective effect.

19. Six years prior to the making of the 2015 Rules, the Ministry of Education (the predecessor Ministry of the Ministry of FE&PT), which had administrative control over ICT-PEIRA, had initiated the process of the appointment of Member (Academics) on permanent basis. On 13.07.2009, the erstwhile Ministry of Education published an advertisement explicitly providing that the appointment of Member (Academics) in ICT-PEIRA is to be made on permanent basis. The Selection Board that scrutinized the credentials of the applicants comprised of (i) Secretary, Ministry of Education, (ii) Senior Joint Secretary (Administration), Ministry of Education, (iii) Deputy Educational Advisor (Training Wing), Ministry of Education, and (iv) the Chairman, ICT-PEIRA. The Selection Board had unanimously recommended Mr. Qureshi's appointment to the said post to be made on permanent basis.

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20. As mentioned above, Section 7 of ICT-PEIRA Ordinance 2006 provided that the Chairman and Members shall be appointed by the Government *"on such terms and conditions as it may determine."* The terms and conditions of Mr. Qureshi's appointment as Member (Academics) were set out in his appointment letter dated 05.10.2009. According to the said letter, the nature of Mr. Qureshi's employment was on permanent basis. Although the said letter was signed by the Chairman, ICT-PEIRA, the Ministry of FE&PT cannot claim to be oblivious of the fact that the entire competitive process culminating in the issuance of the said appointment letter was for the appointment of Member (Academics) ICT-PEIRA to be on permanent basis. The Federal Government has not taken a position that the said appointment letter dated 05.10.2009 had been issued without its knowledge or concurrence. Therefore, we are of the view that the Federal Government had, in terms of Section 7(1) of the ICT-PEIRA Ordinance 2006 (which is in *pari materia* to the Islamabad Capital Territory Private Educational Institution (Registration and Regulation) Act, 2013 ("ICT-PEIRA Act, 2013"**)), determined Mr. Qureshi's appointment to be made on permanent basis.**

21. As mentioned in paragraph 4 above, Mr. Qureshi's appointment was challenged in writ petition No.403/2019 before this Court. Mr. Qureshi was respondent No.3 in the said writ petition. This Court, in its order dated 13.01.2020, had directed the Secretary, Establishment Division and the Secretary, Ministry of FE&PT to prepare a summary for the Cabinet for consideration as to whether the appointment of Mr. Qureshi could be regulated on the basis of tenure or otherwise. For purposes of clarity, paragraphs 3 to 5 of the said order dated 13.01.2020 are reproduced herein below:-

> ***"3. Keeping in view the mandate of the law, this Court deems appropriate that the matter shall be referred to the Federal Government as referred in the PLD 2016 SC 808 titled (Mustafa Impex Vs. Government of Pakistan), who shall determine/decide the case of respondents No.3 & 4 in terms of Section 7 of the PEIRA Ordinance, 2006, whose appointments have been made in the year 2009, i.e. before the promulgation of amended Rules, 2015.***

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> ***4. Learned Assistant Attorney General as well as learned counsel for respondents No.3 & 4/PEIRA also conceded the above referred view of this Court.***
> ***5. In view of above background, the Secretary, Establishment Division and the Secretary, Ministry of Education, Government of Pakistan are directed to prepare a summary and transmit the same to the Cabinet Division, who shall place the same before the Cabinet in its upcoming meeting for consideration as to whether the said positions of respondents No.3 & 4 can be regulated (on the basis of tenure) or otherwise. It is expected that the Federal Government shall decide the matter within two months and submit its report to that effect, on the next date of hearing.***
> ***6. Copy of this Order shall be transmitted to the Secretary, Establishment Division and the Secretary, Education, Government of Pakistan."***

22. After the Order dated 13.01.2020 was passed by this Court in writ petition No.403/2019, the Ministry of FE&PT, on 01.04.2020, submitted a summary titled *"decision on the regularization on the basis of tenure or otherwise of Members PEIRA on directions of Islamabad High Court"* to the Cabinet. In paragraph 5 of the said summary, it is mentioned that Mr. Qureshi's appointment was made in 2009 on permanent basis by the Ministry of Education in the absence of duly approved recruitment rules for the post of Member (Academics), and that such rules were framed later in 2015. In paragraph 6 of the said summary, it is stated that the principle of statutory interpretation requires that law must be interpreted with the view to avoid legal absurdity, and that the rules cannot be interpreted in a manner that allows Mr. Qureshi to hold the position on permanent basis and for an indefinite period of time. Furthermore, it is stated that the position of Member (Academics) is a tenure position as the 2006 Rules do not apply to Chairman and Members of ICT-PEIRA. The said Ministry sought a declaration from the Cabinet that Mr. Qureshi's appointment can be regulated on the basis of tenure on the principle laid down in Rule 7 of the 2015 Rules.

23. The Cabinet had raised certain queries on the summary pertaining to the appointment of Mr. Qureshi's appointment. The answer to these queries required certain clarifications from the Establishment Division after seeking an opinion from the Law and Justice Division. O.M. dated 10.06.2020 from the Cabinet Division

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also shows that the Ministry of FE&PT had been requested to seek the views / comments of the Law and Justice Division and incorporate the same in the summary for the Cabinet.

24. The order sheet in writ petition No.403/2019 reveals that on 07.09.2020 and 02.10.2020, the Assistant Attorney-General informed this Court that in compliance with the order dated 13.01.2020, the matter had been placed before the Cabinet but due to certain queries raised by the Cabinet, clarification had been sought from the Establishment Division after seeking an opinion from the Law and Justice Division, and that after receiving the opinion from the Law and Justice Division, the matter shall be placed once again before the Cabinet. On 06.11.2020, the Assistant Attorney-General informed this Court that the Law and Justice Division had not given its opinion as yet.

25. At this stage, it may be mentioned that while the 2015 Rules were in the process of finalization, Mr. Qureshi had made a representation dated 17.11.2015 to the Secretary, Establishment Division seeking for the said Rules not to be made applicable to the persons already appointed to the posts of Member (Academics) and Member (Registration) in ICT-PEIRA. Vide O.M. dated 18.11.2015, the Establishment Division had expressed its view that *"the revised qualification and experience shall have prospective effect and would not in any manner affect the terms and conditions of service of the existing Members (i.e. their regular appointment may not be converted into tenure appointment)."*

26. On 13.04.2020, the Establishment Division issued an O.M. in which reference was made to its earlier views expressed vide O.M. dated 18.11.2015. The said O.M. dated 13.04.2020 sets out the said Division's views on the matter regarding appointment to the positions of Member (Academics) in ICT-PEIRA. In the said O.M., it is mentioned that Section 7 of the ICT-PEIRA Ordinance 2006 provides that the Chairman and Members of ICT-PEIRA shall be appointed by the Government on such terms and conditions as it may determine; that under Section 22 of the said Ordinance, rules could be made with the approval of the

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Government for the purpose of giving effect to the provisions of the said Ordinance; that the 2006 Rules are not applicable to the appointments of Chairman and Members of ICT-PEIRA; that on 18.11.2015, the Establishment Division conveyed its views on the draft Terms and Conditions for the posts of Chairman and Members (Academics and Registration); and that at the time of the appointment of Member (Academics) on permanent basis in 2009, the 2015 Rules had not been framed. In the said O.M., it has been mentioned that the summary had been prepared by mutual consultation between the Ministry of FE&PT and the Establishment Division.

27. The Law and Justice Division sent its opinion to the Ministry of FE&PT through the O.M. dated 13.07.2021. In the said opinion, it has explicitly been mentioned that the Member (Academics) had been appointed on 05.10.2009 on the recommendations of the Selection Board and with the approval of the competent authority on permanent basis. Reference was made to Section 7 of ICT-PEIRA Ordinance, 2006 which provided that the Chairman and Members of ICT-PEIRA shall be appointed by the Government on such terms and conditions as it may determine. The Law and Justice Division's view was that the terms and conditions on which Mr. Qureshi was appointed were set out in his notification for appointment dated 05.10.2009 which clearly provided that the appointment was on permanent basis. It was also clarified that the 2015 Rules applied only to the Chairman and Members who are to be appointed under the said Rules. The Law and Justice Division concurred with the views of the Establishment Division contained in the O.M. dated 18.11.2015 and opined that the 2015 Rules are to have prospective effect and *"would not in any manner affect the terms and conditions of service of the existing members."*

28. On 16.11.2021, the Ministry of FE&PT submitted a second summary for the Cabinet. We have gone through the said summary with great interest and keenness -- and at times more amusement than keenness. It projects an impression that the proposal for the need for Mr. Qureshi's appointment to be

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terminated having been made in the absence of rules had been made in implementation of orders passed by this Court in writ petition No.403/2019. The summary is titled *"Implementation of orders of the Islamabad High Court in WP 403/2019 appointment of Members in "Private Educational Institutions Regulatory Authority (ICT PEIRA)"*. In the said summary, the Ministry of FE&PT sought approval of the Cabinet to terminate Mr. Qureshi's appointment as Member (Academics), ICT-PEIRA. For the purposes of clarity, paragraph 6 of the said summary is reproduced herein below:-

> *"6. In view of the above facts, it is evident that the appointment of existing members (Mr. Imtiaz Ali Qureshi Member (Academics) and Mr. Waqas Mehmood Kiyani, Member (Registration) are illegal as their appointment was made in the absence of Rules and as such their services need to be terminated with immediate effect. Subsequent to the termination of their services, the process for appointment of Members shall be initiated fresh in accordance with the Rules titled "ICT PIERA Chairman and Member (Academics) & Member (Registration) (Appointment and Qualification) Rules, 2015" on a tenure basis after observing due procedure."*

29. In paragraph 3 of the said summary, it has been mentioned that after the 2015 Rules were notified in the official Gazette, the appointment of Chairman, ICT-PEIRA had been made on tenure basis. In paragraph 4, it has been mentioned that Mr. Qureshi had been appointed as Member (Academics) in the absence of rules, and that the said appointment suffered from the following *"major discrepancies"*:-

> *"i. Appointment of Members in 2006 on a contract basis and subsequently, on regular basis, in 2009 and 2010 was made **in the absence of rules**.*
> *ii. Audit for Financial Year 2017-18, 2019-20 conducted by Federal Audit, also pointed out that appointment of Members is irregular and unauthorized (Annex-V).*
> *iii. A high-level committee was constituted by the Ministry of Federal Education & Professional Training wherein it was concluded that the appointment of members was made illegally and **in the absence of Rule**."*
>
> **(Emphasis added)**

30. The primary justification given in the Ministry of FE&PT's summary dated 16.11.2021 submitted to the Cabinet for terminating Mr. Qureshi's appointment as Member (Academics) was that the said appointment had been made *"in the absence of*

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rules." **This is explicitly mentioned in paragraphs 4 and 6 of the said summary. It is well settled that the mere fact that rules have not been prescribed providing for the qualifications and experience required for making an appointment to a statutory post would not mean that an appointment without rules could not be made at all or that if an appointment in the absence of rules is made, it would only be of a temporary nature. In the case of All Pakistan ZTBL Workers Union Vs. Federation of Pakistan (2021 PLC 1), this Court held as follows:-**

> ***"36. Once power is conferred by statute on a particular authority, here the Federal Government, in the matter of appointment, that power cannot be rendered redundant on the pretext that rules for exercising such power had not been framed. There is no inviolable position that a post could be filled up only after framing rules therefor. A simple reading of Section 4 of the I.R.A. makes it clear that the Federal Government can appoint an R.T.U. The substantive power to appoint an R.T.U. given to the Federal Government by Section 4 of the I.R.A. has not been made subject to framing of rules. The framing of rules is not a condition precedent to the exercise of the power to appoint an R.T.U. expressly and unconditionally conferred by Section 4 of the I.R.A. on the Federal Government. If rules are not framed providing for the method of appointment of an R.T.U., there is no void and the Federal Government is not precluded from exercising the power conferred by Section 4 ibid.***
>
> ***37. Even if it is assumed for the sake of argument that rules governing the appointment of the R.T.U. had to be made under Section 86 of the I.R.A., or that the method of appointment of the R.T.U. prescribed in the notification dated 01.12.2016 was inapplicable, I am of the view that the process for the appointment of the R.T.U. could not be stalled on this pretext. The words "the Government may make rules" employed in the said Section only indicate that in case rules are made by the Federal Government, the purposes of the said Act should be effected in accordance with the rules and, if no rules are framed, the substantive power conferred on the Federal Government by the said Act will not become redundant and the Federal Government can exercise the powers conferred by the said Act, including the power to appoint an R.T.U. The word used in respect of framing of rules in Section 86 of the I.R.A. is "may" but not "shall." After all, making the rules is only to avoid confusion or ambiguity in carrying out the purport of the Act more effectively. In other words, it is a procedural or internal regulation as to how authorities have to discharge their powers and by whom the power has to be exercised. When the appointment of an R.T.U. is within the ambit of the power of the Federal Government, the absence of rules dealing with the method of appointment will not make an appointment of an R.T.U. made by the Federal Government in terms of Section 4 of the I.R.A. illegal."***

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31. We would echo the reasons given in the said judgment for holding that the mere fact that rules prescribing the method of appointment to the post of Member (Academics) had not been made did not render Mr. Qureshi's appointment on permanent basis unlawful or liable to be terminated when such rules (providing for the appointment to be tenure-based) were made many years after his appointment.

32. The unpardonable wrong committed by the Ministry of FE&PT was that the summary dated 16.11.2021 does not make any mention of the Law and Justice Division's opinion set out in the O.M. dated 13.07.2021. This, in our view, is a suppression of a material document by the delinquent officials in the Ministry of FE&PT as well as the Establishment Division (with whose concurrence the said summary had been prepared). Had the said opinion been submitted along with the summary dated 16.11.2021, it would have belied the position taken by the Ministry of FE&PT in the said summary. The omission to make any mention of the Law and Justice Division's said opinion renders the said summary not just irregular and improper but downright dishonest. The withholding of the Law and Justice Division's opinion (after taking a clear position before this Court that the summary would be re-submitted to the Cabinet after obtaining the views of the Law and Justice Division) renders the officials in the Ministry of FE&PT as well as the Establishment Division responsible for the said suppression to be proceeded against for misconduct / maladministration.

33. Article 99(1) of the Constitution provides that all executive actions of the Federal Government shall be expressed to be taken in the name of the President whereas Article 99(2) provides *inter alia* that the Federal Government shall by rules, specify the manner in which orders and other instruments made and executed in the name of the President shall be authenticated. Article 99(3) provides that the Federal Government shall also make rules for the allocation and transaction of its business. The Rules of Business, 1973 ("**Rules of Business**") were made by the Federal Government in exercise

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of the powers conferred by Article 99(3) of the Constitution. The Superior Courts have, in the cases of Mustafa Impex Vs. Government of Pakistan (PLD 2016 S.C. 808), Tariq Aziz-ud-Din's case (2010 SCMR 1301), Pakistan Sugar Mills Association Vs. Federation of Pakistan (PLD 2021 Islamabad 55), Senator Taj Haider Vs. Government of Pakistan (2018 CLC 1910), Sardar Muhammad Vs. Federation of Pakistan (PLD 2013 Lahore 343) and Amin Jan Vs. Director-General, T&T (PLD 1985 Lahore 81), emphasized the importance and binding nature of the Rules of Business and have stressed the need for strict adherence therewith.

34. Rule 18(1) of the Rules of Business obligates the Secretary of a Division to transmit to the Cabinet Secretary a summary giving *inter alia "the background and relevant facts."* The Law and Justice Division's opinion contained in the O.M. dated 13.07.2021 was most certainly a relevant fact which ought to have been mentioned by the Ministry of FE&PT in the summary dated 16.11.2021. By not doing so, the Secretary, Ministry of FE&PT clearly violated Rule 18(1) of the Rules of Business. Furthermore, Rule 18(4) provides that where a case concerns more than one Division, the summary shall not be submitted to the Cabinet unless it has been considered by all the Divisions concerned, and that in the event of a difference of opinion between them, the points of difference shall be clearly stated in the summary, a copy of which shall be sent by the sponsoring Division to the other Division concerned simultaneously with the transmission of the summary to the Cabinet Division. In the instant case, the Law and Justice Division came within the ambit of the meaning of the term *"Division concerned"* since on behalf of the Ministry of FE&PT, the Assistant Attorney-General had taken a clear position in the proceedings in writ petition No.403/2019 that a summary would be submitted to the Cabinet after obtaining the views of the Law and Justice Division. Since the views of the Law and Justice Division contained in the O.M. dated 13.07.2021 were not in consonance with the views of the Ministry of FE&PT, it was obligatory for the Secretary, Ministry of

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FE&PT to have shown compliance with Rule 18(4) of the Rules of Business by setting out in the summary the points of difference in the opinions between the Law and Justice Division and the Ministry of FE&PT. By not doing so, the officials in the Ministry of FE&PT transgressed the requirements of Rule 18(4) of the Rules of Business.

35. The reason why the concealment of the Law and Justice Division's opinion summary from the Cabinet is of such vital importance is that in the case of Shaikh Zayed Hospital Vs. Dr. Muhammad Saeed, (2010 PLC (C.S.) 967), the Division Bench of the Hon'ble Lahore High Court held *inter alia* that where a decision is taken by the Prime Minister on the basis of a summary, the decision cannot be judicially reviewed without reviewing the summary preparation process. Paragraph 30 of the said report is reproduced hereinbelow:-

> ***"30. The quality of discretion exercised by the Prime Minister is fundamentally dependent on the quality of the "summary" put up before the said authority by the concerned Division. Therefore, the "summary preparation process" is an intrinsic and integral part of the final discretion exercised by the Prime Minister. The decision of the Prime Minister cannot be judicially reviewed in isolation. This exercise would be deficient and cosmetic unless and until the "summary preparation process" is also judicially reviewed. Failure of discretion at any stage of the "summary preparation process" will result in the collapse of the entire discretionary edifice including the final order. Therefore, when we judicially review the impugned order passed by the competent authority we are also judicially reviewing the entire appointment process."***

36. The opinion of the Law and Justice Division had not been obtained gratuitously but pursuant to the requirements in Rule 14(1) of the Rules of Business, which mandates that the said Division shall be consulted on any legal question arising out of any case or on the interpretation of any law. The matter at hand clearly concerned the interpretation of Section 7(1) of the ICT-PEIRA Ordinance, 2006 which *inter alia* provided that the Members of ICT-PEIRA shall be appointed on such terms and conditions as the Government may determine as well as the interpretation of the 2015 Rules which had provided for the Members of ICT-PEIRA to be appointed under the said Rules for a fixed tenure. Therefore, concealing the opinion of the Law and

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Justice Division from the Cabinet by the Ministry of FE&PT was to render the mandate of Rule 14(1) *ibid* futile.

37. In the case of Sardar Muhammad Vs. Federation of Pakistan (PLD 2013 Lahore 343), the Hon'ble Lahore High Court has emphasized on the importance of adherence to the requirements in the Rules of Business in the process of the preparation of a summary to the Prime Minister or the Cabinet. In paragraph 44 of the said report, it was *inter alia* held as follows:-

> ***"44. The best control is to follow the law. The discretion to be exercised by the Prime Minister i.e., Competent Authority is largely dependent on the quality of Summary placed before him. It is for this reason that Rule 15(2) of the Rules requires a "self-contained, concise and objective summary" to be placed before the Prime Minister. The objective Summary under Rule 15 to be placed before the Prime Minister should have disclosed all the relevant facts including the bypassing of the Office Memorandum of the Establishment Division dated 6-2-2003; Procedure formulated by the Cabinet Division; lack of public advertisement; bypassing of interview; handpicked selection of Respondent no.5; disregard of the divergent views of the two Divisions and the monopolizing role of Establishment Division. If the summaries put up before the Prime Minister lack in material particulars the discretion so exercised by the Competent Authority on the basis of the summaries remains irreparably defective."***

38. Since the said judgment was authored by a Judge who rose to grace the Hon'ble Supreme Court, it deserves reverence and respect. The said judgment also addresses a situation where conflicting views are given on a matter by two different Divisions of the Government. In the said case, the Establishment Division had not agreed with a summary put up by the Cabinet Division. The Hon'ble Lahore High Court held that the conflicting opinions should have been placed before the competent authority who, after weighing the view points of both the Divisions, should have exercised discretion.

39. In the case of Munir Ahmed Vs. Federation of Pakistan (2018 PLC (CS) 746), one of the grounds on which the Hon'ble Lahore High Court set aside the appointment of the Chairman, Pakistan Electronic Media Regulatory Authority was that *"there was no proper summary before the Prime Minister to enable the Prime Minister to make the selection."* Furthermore, it was held that the summary submitted to the Prime Minister did not fulfill

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the requirements of Rule 15(2) of the Rules of Business which require a self-contained, concise and objective summary to be placed before the Prime Minister stating the relevant facts and points for decision.

40. The validity of the appointment of Chairman, Oil and Gas Regulatory Authority came to be considered by the Hon'ble Supreme Court in the case of Muhammad Yasin Vs. Federation of Pakistan (PLD 2012 S.C. 132). In the said case, it was held by the Hon'ble Supreme Court that it was essential for government servants entrusted with the responsibility of assisting in decision-making and governance to provide necessary information to the final decision-maker, and that not disclosing crucial information in the summary subverts the decision-making process.

41. In the case at hand, it is an admitted position that the summary dated 16.11.2021 submitted by the Ministry of FE&PT did not mention the Law and Justice Division's O.M. dated 13.07.2021 which contained the said Division's opinion on whether the making of the 2015 Rules could adversely affect the permanent nature of the appointment of Member (Academics) made in the year 2009. The Law and Justice Division's views expressed in the said opinion are mutually exclusive with the contents of the said summary dated 16.11.2021. It is obvious that the said opinion was suppressed and not disclosed to the competent authority, i.e. the Cabinet, in furtherance of the nefarious design by the delinquent officials in the Ministry of FE&PT to secure a decision from the Cabinet to terminate the services of Mr. Qureshi as Member (Academics). This leads us to hold that the learned Judge-in-Chambers was absolutely correct in observing that the Cabinet had been *"misguided"* and that *"the relevant officials of the Ministries ha[d] not placed clear picture before the Federal Cabinet in terms of Rules of Business, 1973 and the previous detail[ed] opinion of the Law Division was not referred along with the summary, which resulted into wrong decision."*

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42. The *"Instructions for submission of cases to the Cabinet / Cabinet Committees"* issued by the Cabinet Division through letter No.F.2-3/2008-Cab dated 24.01.2018 further provide *inter alia* that *"if a case concerns more than one Division, the summary should not be submitted to the Cabinet / Cabinet Committee Division unless all the Divisions concerned have been consulted and their views / comments, whether positive or negative, are clearly reflected in the summary."* The said Instructions do not just require the divergent views of the Divisions to be clearly spelled out in the summary but also make it obligatory to annex the views / comments of the relevant Division to the summary. The Ministry of FE&PT, by concealing the opinion of the Law and Justice Division, also violated the policy enshrined in the said instruction of which it had sufficient notice.

43. In the summary dated 16.11.2021, the Ministry of FE&PT enumerated three *"major discrepancies"* in Mr. Qureshi's appointment as Member (Academic), ICT-PEIRA. Reference to these so called discrepancies has been made in paragraph 29 above. We intend to deal with each of these grounds. As regards the ground as to Mr. Qureshi's appointment on *"regular basis"* in the absence of rules, this has been addressed in paragraphs 16 to 31 above.

44. The second ground taken by the Ministry of FE&PT in the summary dated 16.11.2021 for terming Mr. Qureshi's appointment as Member (Academics) as suffering from *"major discrepancies"* was that the Federal Audit, while conducting audit for the financial year 2017-18 and 2019-20 had pointed out that the appointment of the Members, ICT-PEIRA was irregular and unauthorized. We have gone through the draft audit reports for the said years and have noticed that in the first report, it had been stated that *"Section 7 of PEIRA (Regulation & Promotion) Act, 2013 states that the appointment of Chairman, Member (Academics and Registration) shall be made 100% by initial appointment on tenure basis for an initial period of three years, extendable for another term..."* Section 7 of the ICT-PEIRA Act,

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2013 does not provide so. Section 7(1) of the ICT-PEIRA Act, 2013 which is in *pari materia* to the ICT-PEIRA Ordinance, 2006, simply provides that the Chairman and the Members shall be appointed by the Government on such terms and conditions as it may determine. However, Rule 7 of the 2015 Rules requires the appointment of Chairman, Member (Academics) and Member (Registration) is to be made 100% by initial appointment on tenure basis for an initial period of three years extendable for another term. The observation of the Directorate General Audit, in its inspection report for the period 2018-19 and 2019-20, was that the posts of Member (Academics) and Member (Registration) were tenure posts in terms of the 2015 Rules, and the appointment of Mr. Qureshi and Waqas Mehmood Kayani to the said posts on permanent basis was in violation of the ICT-PEIRA Act, 2013. The said observation of the Directorate General Audit was also in total contrast with the views of the Establishment Division taken in its O.Ms. dated 18.11.2015 and 13.04.2020 as well as those of the Law and Justice Division taken in its O.M. dated 13.07.2021.

45. Plainly put, the objection of the Directorate General Audit was that the appointment of Mr. Qureshi was not in consonance with the requirements of Rule 7 of the 2015 Rules since his appointment was on permanent basis whereas Rule 7 envisaged the appointment of Member (Academics) to be for a tenure of three years. The Directorate General Audit appears to have been ignorant of the canons of statutory interpretation as well as the well settled principle that Rules made in exercise of statutory powers cannot be given retrospective effect so as to adversely affect vested rights acquired by persons prior to the framing of the Rules. Reference in this regard may be made to the following case law:-

(i) In the case of Senior Member, BOR Vs. Sardar Bakhsh Bhutta (2012 SCMR 864), the respondent had been selected as a Naib Tehsildar against a promotion quota prior to the framing of the rules. It was held by the Hon'ble Supreme Court that rules could not be given a

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retrospective effect so as to adversely affect the respondent's rights created by his selection as Naib Tehsildar prior to the framing of the rules. Furthermore, it was held as follows:-

> *"It is by now a well settled principle of statutory interpretation that the insertion or deletion of any provision in the rules or the law, if merely procedural in nature would apply retrospectively but not if it affects substanti[ve] rights, which already stood accrued at the time when the un-amended rule or provision was in vogue."*

(ii) In the case of Water and Power Development Authority Vs. Haji Abdul Aziz (2012 SCMR 965), it was held as follows:-

> *"It is an established law that the rules operate prospectively and if a right is created in favour of an employee under the old rule, it cannot be taken away, inter alia, on the ground that the amended rule has allowed others to compete."*

(iii) In the case of Controller General of Accounts Vs. Abdul Waheed (2023 SCMR 111), it was held *inter alia* that amendments in promotion rules could not be applied retrospectively unless specifically so mentioned. In the said case, it was also held that where the statute affects substantive rights, it operates prospectively unless, by express enactment or necessary intendment retrospective operation has been given to it.

(iv) In the case of Government of Pakistan Vs. Village Development Organization Landrwan (2005 SCMR 492), it was held *inter alia* that executive orders or notifications which confer rights and are beneficial would be given retrospective effect and those which adversely affect or invade upon vested rights cannot be applied with retrospective effect.

46. As regards the third ground about the conclusion of a High Level Committee constituted by the Ministry of FE&PT that the appointment had been made in the absence of Rules, we have gone through the report of the High Level Inquiry Committee and have found that the said Committee had in fact come to the conclusion that *"the appointment of Member Academics and*

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Member Registration i.e. Mr. Imtiaz Ali Qureshi and Waqas Mehmood Kiani was made on permanent basis in violation of rule 2(i) of the Employee Service Rules, 2006". **Now, Rule 2(i) of the 2006 Rules clearly provides that they do not apply to the Chairman and Members, ICT-PEIRA. The Establishment Division, in its O.M. dated 13.04.2020, had also specifically brought into the notice of the Secretary Ministry of FE&PT that** ***"Rule 2 of the said Rules provides that these Rules shall not be applicable to Chairman & Members of the Authority".***

47. The Law and Justice Division, in its opinion in O.M. dated 13.07.2021, had set out in unequivocal terms that the 2006 Rules do not apply to the Members of ICT-PEIRA. For the purpose of clarity, paragraph-3 of the said O.M. is reproduced herein below:-

> ***"3. The Member Academic and Registration were appointed on 5th October, 2009 on the recommendations of the Selection Board and with the approval of the competent authority on permanent basis. It is imperative to stress on the fact that since the ICT PEIRA Employees (Service) Rules, 2006 were not applicable on the Members, their appointment to the said posts was to be governed by the requirements laid down under section 7 of the ICT Private Educational Institution (Regulation and Promotion) Ordinance, 2006. The Ibid section is reproduced hereunder:-***
>
> > ***Section 7: "The Chairman and the Members shall be appointed by the Government on such terms and conditions as it may determine""***

48. After having gone through the report of the High Level Committee as well as the Establishment Division's O.M. dated 13.04.2020 and the Law and Justice Division's O.M. dated 13.07.2021, we are of the view that the conclusion of the High Level Committee referred to in the summary dated 16.11.2021 is totally flawed. Since the 2006 Rules were not applicable to the appointment of Chairman and Members, ICT-PEIRA, the question of violation of the said Rules in the appointment process of Mr. Qureshi as Member (Academics), ICT-PEIRA does not arise.

49. Had the Ministry of FE&PT made full disclosure as to the opinion of the Law and Justice Division, it would not have just addressed all the grounds taken by the said Ministry in its summary dated 16.11.2021 in support of its proposal to

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terminate the appointment of Mr. Qureshi, but would have also destroyed the narrative built by the said Ministry against him.

50. There is an unexplained stark contrast in the approval being sought from the Cabinet by the Ministry of FE&PT in its two summaries dated 01.04.2020 and 16.11.2021. In the first summary, the Ministry of FE&PT had solicited a declaration from the Cabinet to the effect that Mr. Qureshi's appointment as Member (Academics), ICT-PEIRA could be regulated on the basis of tenure on the principle laid down in Rule 7 of the 2015 Rules whereas in the second summary, the said Ministry had sought approval for the termination of Mr. Qureshi's appointment on the ground that his appointment was illegal on account of having been made in the absence of rules. The two crucial intervening events between the dates of the submission of the said summaries were the issuance of **(i)** O.M. dated 13.04.2020 by the Establishment Division (to which reference has been made in paragraph 26 above) and **(ii)** O.M. dated 13.07.2021 by the Law and Justice Division (to which reference has been made in paragraph 27 above). The intervening event as to the Law and Justice Division's opinion would have operated to the benefit of Mr. Qureshi but for its concealment from the Cabinet by the Ministry of FE&PT.

51. During the period when the competitive process for the said appointment was undertaken and when Mr. Qureshi was appointed as Member (Academics), the Islamabad Capital Territory Private Educational Institutions Ordinance, 2007 (Ordinance No.XLV of 2007) (**"ICT-PEIRA Ordinance 2007"**) promulgated on 03.10.2007 would be deemed to be operational. We say so because the ICT-PEIRA Ordinance 2007 was promulgated on 03.10.2007 but before it could lapse, Emergency was proclaimed on 03.11.2007. By virtue of Article 4 of the Provisional Constitutional Order, 2007, all Ordinances that had not lapsed when the Emergency was proclaimed were given permanence. The proclamation of Emergency as well as the Provisional Constitutional Order were declared null and void by the Hon'ble Supreme Court vide its judgment on 31.07.2009

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reported as Sindh High Court Bar Association Vs. Federation of Pakistan (PLD 2009 S.C. 879). In the said judgment, it was held *inter alia* that all Ordinances that were holding the field on 03.11.2007 would remain valid for a period of 120 days with effect from 31.07.2009 unless they were enacted as Acts of Parliament with retrospective effect. Since ICT-PEIRA Ordinance 2007 had not been placed before Parliament within 120 days with effect from 31.07.2009, it lapsed on 28.11.2009.

52. The right acquired by Mr. Qureshi on his appointment as Member (Academics) made on 05.10.2009, during the validity period of the ICT-PEIRA Ordinance 2007, would be protected in terms of Article 264(b) and (c) of the Constitution, which protects "anything duly done" or "any right, privilege, obligation or liability acquired, accrued or incurred" under the repealed law. Under Article 89(2) of the Constitution, an Ordinance has the same force and effect as an Act of Parliament and under Article 89(2)(a)(i), if an Ordinance is laid before the National Assembly it shall stand "repealed" at the expiration of 120 days from the date of its promulgation or, if before the expiration of that period a resolution disapproving it is passed by the National Assembly, upon the passing of that resolution. For all intents and purposes, the ICT-PEIRA Ordinance, 2007 would be deemed to have been repealed on the expiration of 120 days from the Hon'ble Supreme Court's judgment dated 31.07.2009 as it was never laid before the National Assembly. In the cases of Mir Ahmad Nawaz Khan Bughti Vs. Superintendent, District Jail, Layallpur (PLD 1966 SC 367) and Mahmood Hassan Harvi Vs. Federation of Pakistan (PLD 1999 Lahore 320), it was held that the effect of repeal of a statute is to be given where an Ordinance expires by virtue of the Constitution or is repealed by another statute. Even otherwise the grounds on which the decision to terminate Mr. Qureshi's appointment as Member (Academics) as set out in the summary dated 16.11.2021 made by the Cabinet does not include the ground that the appointment was made during the currency of an Ordinance that had lapsed.

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53. As mentioned above, through writ petition No.403/2019, the petitioner in the said petition had sought the issuance of a writ of *quo warranto* regarding Mr. Qureshi's appointment as Member (Academics) on permanent basis. The Ministry of FE&PT zealously contested the said petition. In the written comments filed by the Ministry of FE&PT in the said proceedings, the said Ministry had defended Mr. Qureshi's appointment. In its written comments, the Ministry of FE&PT had pleaded as follows:-

> ***"As regards ICT – PEIRA Chairman and Member Academics and Member Registration Appointment and Qualification Rules 2015 are concerned, these rules do not apply to existing Member Academics and Member Registration as already clarified by Establishment Division O.M. No.6/6/2006-R-III dated 18-11-2015 on the same date when Rule 2015 were being notified / processed. Establishment Division has clearly notified that revised qualification and experience shall have prospective effect and would not, in any manner, affect the terms and conditions of the service of the existing Members."***
>
> ***"The maximum tenure of 6 years is provided under the ICT – PEIRA Chairman and Member Academics and Member Registration Appointment and Qualification Rules 2015 but these rules do not apply to the existing Member Academics and Member Registration as already clarified by Establishment Division O.M. No.6/6/2006-R-III dated 18-11-2015 on the same date when Rules 2015 were being notified / processed. Establishment Division has clearly notified that revised qualification and experience shall have prospective effect and would not, in any manner, affect the terms and conditions of the service of the existing Members."***

54. The learned Assistant Attorney-General did not present any explanation for the *volte-face* of the Ministry of FE&PT or for taking contradictory positions qua Mr. Qureshi's appointment in the proceedings in writ petition No.403/2019 and writ petition No.4517/2021.

55. In view of the above, both the appeals are dismissed; the impugned judgment dated 22.07.2022 is upheld save to the extent of granting back benefits to Mr. Qureshi (since he had not sought such relief in his writ petition). Mr. Qureshi shall forthwith resume his duties as Member (Academics), and the Ministry of FE&PT as well as ICT-PEIRA shall not place any obstacle in Mr. Qureshi's way for doing so.

56. But for Section 35-C of the Code of Civil Procedure, 1908 which insulates the Government from the penalty of costs, we

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would have imposed exemplary costs on each of the public functionaries in the Ministry of FE&PT for the preparation and submission of a misleading summary dated 16.11.2021 to the Cabinet, in addition to making them liable to pay Mr. Qureshi's costs. ICT-PEIRA, however, is a statutory / autonomous body and does not fall within the meaning of "Government." Therefore, the dismissal of the appeal filed by ICT-PEIRA shall be with costs throughout payable by ICT-PEIRA. Additionally, for filing a frivolous and vexatious appeal, costs equivalent to Mr. Qureshi's salary for the entire period that he had been kept out of ICT-PEIRA's service are imposed on ICT-PEIRA in terms of Section 35(1)(iii) C.P.C.

(ARBAB MUHAMMAD TAHIR)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 27.03.2023.

(JUDGE) **(JUDGE)**

APPROVED FOR REPORTING.

Ahtesham*

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