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IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No. D-6376 of 2017

Presented on 22-9-17

Additional Registrar (Writ)

1. Arshad Fawad s/o Muhammed Yousuf
2. Arif Atiq s/o Atiq ur Rehman
3. Atif Saya Abdullah s/o Abdullah Abdul Ghani
4. Ayesha Imran w/o Imran Ahmed Baghpati
5. Jahanger Kamal Khan s/o Fida Muhammad Khan
6. Junaid Rafi Batla s/o Muhammed Rafi Batla
7. Fayyaz Memmon s/o Haroon Memmon
8. Muhammed Irfan Taqi s/o Taqi Ibrhaim
9. Ishrat Ganatra s/o Abdul Latif
10. Faisal Ashraf s/o Muhammad Ashraf
11. Haris Sultan s/o Sultan Ahmed
12. Raheel Iqbal Sheikh s/o Muhammed Iqbal Sheikh
13. M. Khalid s/o Suleman
14. Muneeb Tariq s/o Tariq Mumtaz
15. Manzoor Ahmed s/o Hassan Ali
16. Muhammed Shakeel s/o Abdul Latif
17. Yasmeen Shams w/o Shams uz Zafar
18. M. Junaid s/o Suleman
19. Muhammed Adnan Jan Muhammed s/o Jan Muhammed
20. Masood Rafi Batla s/o Muhammed Rafi Batla
21. Umair Idrees s/o Muhammed Idrees
22. Muhmmed Fahim s/o Muhammed Moosa
23. Rohail Mirza s/o Muhammad Azeem Mirza
24. Obaid Hussain Khan s/o Yousuf Hussain Khan
25. Sumeira w/o Mustafa Baig
26. Syed Sajid Hameed s/o Syed Hameed Ahmed
27. Shayan Younus s/o Muhammed Younus
28. Shazia Habib d/o Syed Habib Ahmed
29. Danish Mateen s/o Abdul Mateen Chandna
30. Salma Raheel w/o Raheel Iqbal Sheikh
31. Zakir Mohyuddin s/o Anwar Uddin
32. Abdul Waseem s/o Abdul Khaliq
33. Zubair Ahmed s/o Muhammed Ahmed
34. Umair Sultan s/o Sultan Ahmed
35. Rashid Jamal s/o Muhammed Anees
36. Ramzan Ali s/o Haider Ali
37. Muhammed Rizwan Amiwala s/o Abdul Razzaq Amiwala
38. Muhammed Imran Amiwala s/o Abdul Razzaq Amiwala

39. Muhammed Imran s/o Muhammed Jan Muhammed
40. *Kashif Saeed s/o Abdul Saeed Khan*
41. Syed Asif Rasool s/o Syed Ikhlaq Rasool
42. Arif Saeed s/o Muhammed Saeed
43. Muhammed Ahmed s/o Muhammed Rafiq
44. Fatima Shahrukh w/o Shahrukh Amir
45. Muhammed Adeel Hasan s/o Syed Jaafer Raza
46. Pervaiz Khan s/o Abid ur Rehman
47. Muhammad Ali Bari s/o Zafar Ahmed
48. Ahmed Yousuf s/o Younus Gagan
49. Zeeshan Manzoor s/o Jawed Manzoor
50. Abdul Rehman s/o Muhammed Ismail
51. Muhammed Faisal s/o Abdul Aziz
52. Farah Ovias w/o Ovais Alam Mughal
53. Sabeen Naqvi w/o Saqlain Naqvi
54. Arshad Wahid s/o Abdul Wahid
55. Muhammed Moin Khan s/o Muhammed Idrees Khan
56. Muhammed Adnan Salat s/o Noor Muhammed Salat
57. Umair Riaz s/o Riaz Ahmed
58. Jawad Masood Butt s/o Masood Ahmed Butt
59. Khurram Salman s/o Abdul Mateen
60. Lohana Jiwat Pradhan s/o Issar Das
61. Muhammed Safwan Hameed s/o Abdul Hameed
62. Muhammed Kashif s/o Muhammed Yaqoob
63. Salman Jawed s/o Muhammed Yahya Jawed
64. Tahir Ilyas s/o Sheikh Muhammed Ilyas
65. Muhammad Salman s/o Haji Allah Dawayi
66. Farhad Masood Butt s/o Masood Ahmed Butt
67. Kamran Sultan s/o Muhammed Sultan
68. Muhammed Munir s/o Haji Rafiq
69. Muhammed Wasim s/o Noor Muhammed
70. Faraz Iqbal s/o Muhammed Iqbal
71. Mustafa Bawany s/o H. Yaqoob Bawany
72. Saleem Iqbal s/o Iqbal Dinar
73. Shabbir Ahmed s/o Abdul Razzaq
74. Faraz Awais Mughal s/o Hafeez ullah Mughal
75. Nadeem Hameed s/o Muhammed Hamidullah
76. Naveed Ahmed Sheikh s/o Shabbir Ahmed Mughal
77. Umair Ahmed s/o Shabbir Ahmed
78. Muhammed Khurram s/o Muhammed Sabir
79. Faiza Asim w/o Muhammed Asim
80. Zubair Ijaz s/o Ijaz Ahmed
81. Faisal Abdul Ghaffar s/o Abdul Ghaffar

82. Noor Muhammed s/o M. Iqbal Moten
83. Marium Saeed Kazmi w/o Syed Omair Hassan
84. Sadia Sohail w/o Syed Sohail Hasan
85. Aamir Bin Yousuf s/o Muhammed Yousuf
86. Nizam Sikander s/o Sikander Sultan
87. Salman Sabir s/o Ghulam Sabir
88. Kamran Jafri s/o S. Ansar Ahmed Jafri
89. Kamran Shamim s/o Shamim Ahmed
90. Sohail Shamim s/o Shamim Ahmed
91. Raja Muneer s/o Muhammed Qasim
92. Adnan Arshad s/o Muhammed Arshad
93. Adnan Shamim s/o Shamim Ahmed
94. Sheikh Ali Ahmed Jameel s/o Sheikh Ghulam Ahmed Jameel
95. Sumera Noor w/o Noor Muhammed
96. Muhammed Hafeez s/o Anees Muhammed
97. Abdul Rehman s/o Naqi Ahmed
98. Dur e Shehwaar w/o Tariq
99. Alia Jamal w/o Jamal Ahmed
100. Faisal Wahab s/o Abdul Wahab
101. Sohail Ahmed s/o Sultan Ahmed
102. Kamran Naseem s/o Muhammad Naseem
103. Ghulam Rasool s/o Muhammad Ghulam
104. Muhammad Ilyas s/o Muhammad Sadiq
105. Anwer Shamim s/o Muhammad Shamim
106. Muhammad Iqbal s/o Muhammad Saeed
107. Khalid Anees s/o Muhammad Anees
108. Muhammad Imran s/o Abdul Ghaffar
109. Atif Gulfam s/o Gulfam Yousuf
110. Mohammed Farrukh s/o Mohammed Anis
111. Mohammed Izhar Khan s/o Mohammed Afsar Khan
112. Aijaz Ali Qaimkhani s/o Yaqoob Ali Qaimkhani
113. Muhammad Noman s/o Muhammad Saleem
114. Aslam s/o Haji Muhammad Qasim
115. Afsheen Abubaker w/o Abubakar Ismail
116. Rizwan Ashraf s/o Muhammad Ashraf
117. Rashid Saeed Chawla
son of Shaikh Muhammed Saeed,
Attorney of the Petitioners
Muslim adult,
Resident of House No. 2, Block 7/8,
Oversees Cooperative Housing Society.
Main Muhammad Rafi Road,
Karachi.....PETITIONERS

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VERSUS

1. **PROVINCE OF SINDH**
   Through Chief Secretary
   Sindh Secreteriate
   Karachi.

2. **DEPARTMENT OF EDUCATION & LITERACY**
   Through its Secretary
   Sindh Secreteriate
   Karachi.

3. **DIRECTORATE OF INSPECTION & REGISTRATION OF PRIVATE INSTITUTIONS SINDH**
   Through Director General
   Ground floor, Government College for women
   Shahrah Liaquat Saddar
   Karachi.

4. **BEACON HOUSE SCHOOL SYSTEMS**
   Through its administrator
   Regional office, 12, Block 7/8,
   Jinnah Co-operative Housing Society,
   Karachi.....RESPONDENTS

CONSTITION PETITION UNDER ARTICLE 199 OF THE CONSTITION OF ISLAMIC REPUBLIC OF PAKISTAN, 1973.

SEAL OF THE HIGH COURT OF SINDH

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Const. Petition No. **D – 6274** of 2017
a/w C.P.Nos. D – 6376, 6822, 6977, 6978, 7043,
7570 of 2017 & 1380 of 2016

Date	Order with signature of Judge

Priority Case.

1. For orders on Misc. No.3401/18 (U/A)
2. For hearing of Misc. No.26059/17
3. For hearing of main case.

06.06.2018

M/s. Amar Naseer & Abdul Razzaque, advocates for the petitioners.

Ms. Mehreen Ibrahim, advocate for the petitioners.
Barrister Faizan Hussain Memon, advocate for the petitioners in C.P.No.D-6822/2017.
Mr. Kamal Azfar a/w M/s. Asad Shakil & Dhani Bux Malik, advocates for respondents (C.P.Nos.D-6376 & 7570 of 2017).
Mr.Khalid Javed, advocate for the respondents (C.P.Nos.D-6822 & 6977 of 2017).
Mr. Muhammad Ali Lakhani, advocate for the respondents.
M/s. Abid Naseem & Arshad Mehmood, advocates for respondent No.3 (C.P.No.D-1380/2016).

Mr. Ghulam Shabbir Shah, Addl. A.G. Sindh a/w Ms. Rukhsana Mehnaz Durrani, Counsel for the State.
Mr. Faisal Naqvi a/w Shahan Karimi, advocates for the proposed intervenor.

Arguments heard. Judgment is reserved.

Interim order passed earlier to continue till announcement of the judgment.

sd/- Aqeel Ahmed Abbasi
Judge.

sd/- Muhammad Ali Mazhar.
Judge.

sd/- Ashraf Jahan
Judge

IN THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Muhammad Ali Mazhar
Justice Mrs. Ashraf Jahan

Const. Petition No.D-6274 of 2017

Bushra Jabeen and others.....Petitioners.

Vs.

Province of Sindh and others.....Respondents.

Const. Petition No.D-6376 of 2017

Arshad Fawad and others.....Petitioners.

Vs.

Province of Sindh and others.....Respondents.

Const. Petition No.D-6822 of 2017

Faraz Hussain Memon and others.....Petitioners.

Vs.

Province of Sindh and others.....Respondents.

Const. Petition No.D-6977 of 2017

Muhammad Amir Qazi and others.....Petitioners.

Vs.

Province of Sindh and others.....Respondents.

Const. Petition No.D-6978 of 2017

Saqib Farooq and others.....Petitioners.

Vs.

Province of Sindh and others.....Respondents.

Const. Petition No.D-7043 of 2017

Kashif Jamil and others.....Petitioners.

Vs.

Province of Sindh and others.....Respondents.

Const. Petition No.D-7570 of 2017

Khalid Fayyaz and others.....Petitioners.

Vs.

Province of Sindh and others.....Respondents.

Petitioners	:	Through Mr. Amar Naseer, Advocate (C.P.No.D-6274/2017) Mr. Abdur Razzak, Advocae (C.P.Nos.D-6977, 6978, 7043 & 7570 of 2017) Ms. Mahreen Ibrahim, Advocate (C.P.Nos.D-6376 & 6976 of 2017). Barrister Faizan Hussain Memon, Advocate (C.P.No.D-6822/2017)
Respondents	:	Through Mr. Kamal Azfar a/w M/s. Asad Shakil & Dhani Bux Malik, Advocates (C.P.Nos.D-6376 & 7570 of 2017). Mr.Khalid Javed, Advocate (C.P.Nos.D-6822 & 6977 of 2017). Mr. Muhammad Ali Lakhani, Advocate (C.P.No.D-6274/2017) Mr. Ghulam Shabbir Shah, Addl. A. G. Sindh a/w Ms. Rukhsana Mehnaz Durrani, Counsel for the State. Mr. Faisal Naqvi a/w Mr. Shahan Karimi, advocates for the proposed intervenor.
Dates of hearing	:	28.05.2018, 30.05.2018, 31.05.2018, 01.06.2018 & 06.06.2018.
Date of judgment	:	03.09.2018

JUDGMENT

AQEEL AHMED ABBASI, J :- Above petitions have been filed by large number of students through their parents, who are studying in different grades in the private schools of respondents, whereas, a common grievance has been expressed against exorbitant increase of school fee in each academic year by the respondents' schools which according to petitioners is without any lawful basis, reason or justification, and also in violation of Sindh Private Educational

Institutions (Regulation and Control) Ordinance, 2001, duly amended by Amendment Act 2003 and 2005 as well as in violation of Rule 7(iii) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2002. Common relief(s) sought in the above petitions can be summarized in the following terms:-

a) *Direct the Respondents to act strictly in terms of Rule 7(3) of the Sindh Private Educational Institutions (Regulation & Control) Rules 2002.*

b) *Direct the Respondent No.1-3 to enforce the provisions of the Sindh Private Educational Institutions (Regulation & Control) Ordinance 2001 and subsequent amendments of 2003 & 2005 strictly against the Respondent No.4 and 5, including provisions pertaining to admission fee, enhancement of fee and scholarship to the student.*

c) *Direct the Respondent No.1 to 3 to take punitive action against the Respondent No.4 and 5 including but not limited to recovery and refund the excess amount received by them from the Petitioners since 2005 till July 2017 in violation of provision of Rule 7(3) of the Sindh Private Educational Institutions (Regulation & Control) Rules 2002 read with provisions of the Sindh Private Educational Institutions (Regulation & Control) Ordinance 2001 and subsequent amendments of 2003 & 2005.*

d) *Declare that the sudden increase in fee structure is arbitrarily, un-justified, illegal and of no legal effect.*

e) *Permanently restrain the Respondent No.4 & 5, their employees, officers, servants, representatives or any person action for and on their behalf from receiving the enhanced amount of fees for the year 2017-2018 and for future further be restrained from increasing the fee of more than 5% on year basis so also by any means, not to take any action detrimental to the interest and wellbeing of the students in the pursuit of education.*

f) *Any other relief which deems fit and property.*

g) *Grant cost of Petition.*

2. Notices of above petitions were issued to the respondents for various dates, whereas, in one of the petitions i.e. Const. Petition No.D-6274/2017 on 20.09.2017, following order was passed:-

"20.09.2017

M/s. Muhammad Nouman Jamali and Abdur Razzaq, Advocates for Petitioners.

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1. Urgency granted.
2. Exemption application is granted subject to all just exceptions.
3-4. Notice to Respondents, also to learned AAG for 27.9.2017. Till the next date no action by way of enhancement of fees or otherwise prejudicial to any student whose parent/guardian is petitioner in this petition shall be taken by the Respondent schools including and in particular but not limited by way of action on the reminder

notices sent to parents/guardians in relation to enhanced fees some copies of which are annexed along with petition."

3. Above petitions were adjourned from time to time at the instance of respondents seeking time for filing comments. During pendency of these petitions, Court was informed that similar petitions have already been heard by a Divisional Bench of this Court, wherein, judgment has been reserved. However, the similar interim orders passed in such petitions by the learned Divisional Bench also remained operative in the instant petitions, whereas, on 07.03.2018, it was informed that another Divisional Bench of this Court in the earlier petitions in respect of same subject controversy i.e. C.P.No.D-5812/2015 (along with other connected petitions) has already announced the judgment. Such fact was brought to the notice of the Divisional Bench of this Court on 07.03.2018 when following order was passed:-

"***07.03.2018***

M/s. Muhammad Nouman Jamali & Abdur Razzaq, advocates for the petitioners.

M/s. Kamal Azfar, Khalid Javed and Muhammad Ali Lakhani, advocates for the respondents.

Mr. Ghulam Shabbir Shah, Addl. A.G. Sindh.

Mr. Kamal Azfar, learned counsel for the respondent No.4 in C.P.No.D-6376/2017, has placed on record the copy of judgment dated 05.03.2018, recently announced by a Divisional Bench of this Court in the connected petitions, involving the similar controversy, (i.e. C.P.No.D-5812/2015 and connected petitions), along with copies of the reported judgments, which according to learned counsel, have been mentioned in the said judgment by the Division Bench of this Court, and submits that respondents are satisfied with the judgment except clause "h" of para 39 of the said judgment. Learned counsel further submits that, in view of a judgment in the case of Multiline Associates v/s Ardershir Cowasjee (PLD 1995 SC 423) this Court may, by following the aforesaid judgment as a binding precedent, may dispose of all the connected petitions in the similar terms.

Mr. Khalid Javed, learned counsel appearing on behalf of the respondents in C.P.Nos.D-6822/2017 and 6977/2017 submits that since he has not examined the aforesaid judgment nor has been instructed by the management of City School with regard to the fate of the aforesaid judgment, therefore, requests for time to assist this Court on the next date of hearing.

Learned counsel appearing on behalf of the petitioners have also requested for time to assist this Court as to whether instant petition(s) may also be disposed of in terms of the aforesaid judgment passed by the Divisional Bench of this Court in line of Multiline Associates v/s Ardershir Cowasjee (PLD 1995 SC 423) or they will assist this Court to take a different view in the instant matter and to refer the same for constitution of larger bench in case of any difference of opinion on the legal issue in the instant matter.

At this juncture, Mr. Muhammad Ali Lakhani, learned counsel appearing for the respondent/Foundation Public School submits that some of the students in the garb of interim order operating in the connected petitions, are even not making payment of their monthly fee as per old fee structure since September, 2017, hence requests that the petitioners and such defaulting students may be directed to make payment of their monthly fee as per old fee structure, however, without charging late fee. Learned counsel for the petitioners submits that petitioners will ensure that order passed by this Court on 19.01.2018 may be complied with in letter and spirit and all the students will make payment of outstanding amount as per old fee structure, however, without payment late fee, however, requests that respondents may be directed to issue fee challans for the defaulting monthly fee without charging late fee surcharge. Such statement of the learned counsel for the petitioners is acceptable to the learned counsel for the respondents. It is expected that needful will be done within 15 days from the date of this order. It is clarified that this order will apply in all the pending petitions mutatis mutandis till further orders.

Adjourned to 05.04.2018 at 12.00 noon. Interim order passed earlier to continue till next date of hearing."

4. However, on 05.04.2018, when above petitions were taken up for hearing, the learned counsel for the respondents, while relying upon the decision of the Divisional Bench of this Court in C.P.No.D-5812/2015 (along with other connected petitions) for disposal of above petitions in the similar terms, whereas, learned counsel for the petitioners argued that the judgment of the Divisional Bench of this Court in the above petitions is per-incuriam and contrary to law, hence of no legal effect nor it is binding on this bench, therefore, it was prayed that instant petitions may be decided on merits in accordance with settled legal position on the subject legal controversy. The above petitions were again taken up for hearing on 24.04.2018, when after hearing all the learned counsel for the parties at some length, a detailed order was passed, and the matter was referred to the Hon'ble Chief Justice for constitution of a larger bench. The relevant

paragraph 6 of the order passed by the Divisional Bench of this Court on 24.04.2018 is reproduced hereunder for the sake of brevity and ready reference:-

> "6. After hearing the learned counsel for the parties, and from perusal of the relevant Constitutional provisions and the Rules of Sindh Private Educational Institutions (Regulation and Control) Rules 2005 as well as the reported judgments of the Hon'ble Supreme court as referred to hereinabove by learned counsel for the petitioners, we are of the opinion that the subject controversy, relating to fee structure of private schools and its periodic increase, requires comprehensive analysis of constitutional provisions as well as determination of the scope and application of provisions of Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001 and Sindh Private Educational Institutions (Regulation and Control) Rule 2005, in the light of judgments as referred to hereinabove, keeping in view the amended provisions of Rule 7(1) and 7(3) of Sindh Private Educational Institutions (Regulation and Control) Rules 2005, as it may lead to a different conclusion as drawn by a learned Divisional Bench of this Court in the case of **Shahrukh Shakeel Khan & others V/S Province of Sindh & others [C.P.No.D-5812/2015 (and other connected petitions)**. Accordingly, in the light of judgment of the Hon'ble Supreme Court in the case of **Multiline Associates v/s Ardershir Cowasjee (PLD 1995 SC 423), we would refer this matter to the Hon'ble Chief Justice for constitution of a Larger Bench so that subject dispute relating to fee structure of private schools and its periodic increase may be finally decided in accordance with law**. Since the matter is of public importance as interest of large number of students and their parents is involved, we would direct the office to place the matter before the Hon'ble Chief Justice immediately so that appropriate order may be passed by the Hon'ble Chief Justice in this regard."

5. The matter was accordingly placed before the Hon'ble Chief Justice, Sindh High Court, who vide order dated 02.05.2018 on the office note placed by the Assistant Registrar (Writ)/Incharge Cause Roster (AS), constituted a larger bench comprising of three members i.e. Mr. Justice Aqeel Ahmed Abbasi, Mrs.Justice Ashraf Jahan and Mr. Justice Nazar Akbar. However, record shows that an application was filed under Section 151 CPC by Mr. Kamal Azfar, learned counsel for the respondent in C.P.No.D-6376/2017 on administrative side before the Hon'ble Chief Justice stating therein that the bench constituted by the Hon'ble Chief Justice comprising of three members, is a full bench and not a larger bench which should have been constituted pursuant to Court's order dated

7. *Mr. Amar Naseer Advocate, while leading arguments on behalf of the* petitioners has vehemently opposed the continuous exorbitant increase of school fees for each academic year by the respondents, which according to learned counsel, besides having no legal or factual justification, is being increased in violation of Rule 7(1) & (3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005. It has been contended by the learned counsel for the petitioners that petitioners, like most of the students studying in the private schools and their branches/campuses of respondents, are compelled to take admissions in private schools for the reason that Government has failed to provide free and compulsory education to all children upto 5 – 16 years in terms of Article 25-A of the Constitution, whereas, according to learned counsel, most of the students belong to middle or lower middle class, and cannot afford to pay the exorbitant fee and its yearly enhancement arbitrarily being determined by the respondent private schools, in violation of Law and the Rules framed for such purpose. Per learned counsel, the private schools do not only get the fee structure fixed from the Government functionaries as per their own choice at the time of Registration and Re-registration, but also manage to get the approval of yearly enhancement of fee in excess of 5%, in violation of Rule 7(3) of Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, whereas, neither any Notice to the students or their parents has been issued, nor any justification is submitted before the Registration Authority for seeking yearly enhancement of school fees. Learned counsel for the petitioners has argued that to provide education or to impart knowledge is a Noble Cause and service, which can be adopted as a profession or occupation as well, however, it cannot be treated at par with a free market trade or business activity, which determines its own unlimited profits, as per formula of demand and supply. On the contrary, per learned counsel, to get free and compulsory education is a fundamental right of every children, justice like right of life, which also includes right of education as well. Per learned counsel, importance of such right has been duly recognized by inserting the Constitution provisions which include Article 3, 4, 18, 25 and 25A of the Constitution of Islamic Republic of Pakistan. According to learned counsel for the petitioners, respondents have violated the provisions of Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, duly amended

in 2003 and 2005, as well as the provisions of Rule 7(1) and (3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, while increasing the yearly tuition fee over and above 5% of the last fee schedule, whereas, Registration Authority has failed to enforce the above legal provisions of law, and to restrain the private schools from enhancing the school fee exorbitantly, much in excess of 5% of the maximum limit as provided under Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005. Learned counsel for the petitioners while explaining the scheme of law as envisaged in the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, has referred to Section 3, which according to learned counsel, provides that no Institution shall be established or continued except in accordance with the provision of Ordinance, whereas, Section 4 provides that any person intending to establish or continuing any existing institution is required to make an application to the Registering Authority in the prescribed form accompanied by such documents and fee as may be prescribed, whereas, in terms of Section 5 of the Ordinance, 2001, after inquiry and inspection by the Committee, recommendations are to be made to the Registering Authority, who is required to pass appropriate order for granting or rejecting the application while recording reasons after hearing the parties. Similarly, according to learned counsel, Section 6 provides the mechanism for Registration of an institution and issuance of certificate of registration to the applicant in such form and containing such terms and conditions as may be prescribed. Learned counsel for the petitioners has also referred to the Proviso (ii) of sub-section (I) of Section 6, which according to learned counsel, provides that **fee structure of an institution shall be fixed with prior approval of the Government**. Learned counsel for the petitioners has also referred to Section 15 of the Ordinance, 2001, which provides that Government may make Rules to carry out the purpose of this Ordinance, and has also referred to Section 15 sub-section (2) (C), which according to learned counsel, relates to provision of facilities to students, **fixation of tuition fee and other sum to be realized from the student of an institution**. After having referred to above provisions of the Ordinance 2001, learned counsel for the petitioners has also referred to the relevant provisions of Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, with

particular reference to Rule 7(1), (2) and (3) of the Rules, 2005. According to learned counsel, Sub-Rule (1) provides that Inspection Committee is authorized to recommend the fee structure of an institution, after detailed inspection of the institution at the time of Registration or Renewal of Registration of the institution to the Registering Authority, whereas, Sub-Rule (2) provides that the fee schedule once approved, shall not be increased at any time during the academic year. According to learned counsel, Sub-Rule (3) of Rule 7, provides that the fee may be increased upto 5% of last fee schedule, subject to proper justification and approval of the Registration Authority, whereas, any increase in school fee over and above 5% is not permissible. Learned counsel for the petitioners has argued that the private institutions (Schools) have been given reasonable authority to determine their own fee structure at the time of Registration as well as at the time of Renewal of Registration after every three years, however, per learned counsel, through Rule 7(2) & (3), a reasonable restriction has been imposed only to the effect that fee schedule once approved shall not be increased, at any time during academic year, and thereafter, yearly fee may be increased upto 5% of last fee schedule however, subject to proper justification and approval of the Registering Authority. Learned counsel for the petitioners has argued that once an opportunity has been provided to the respondents/private schools regarding fixation of their fee structure at the time of Registration and also at the time of Renewal after three years, whereas, Annual 5% increase of fee is also permitted in terms of Rule 7(3), the respondents are not justified in law and fact to argue that the limitation placed by the legislation on such yearly increase of school fee violates their right to carry on business and profession of their choice as guaranteed under Article 18 and 25 of the Constitution. Per learned counsel, in terms of Article 18 of the Constitution the right of a citizen to enter upon any lawful profession or occupation, and to carry on any lawful business or trade is not an absolute right, on the contrary, it is subject to such qualification as may be prescribed by law, therefore, according to learned counsel, the contention of the respondents that any restriction on their right to enhance the school fee in any manner would violate their constitutional right or amounts to creating any unreasonable restriction, is totally misconceived and contrary to the constitutional provisions as well as the provisions of Sindh Private Educational Institutions

(Regulation and Control) Ordinance, 2001, and the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005. Learned counsel for the petitioners has referred to the provisions of Section 6 of the Ordinance, 2001, which according to learned counsel, provides for the mechanism for Registration of an Institution, as well as fixation of fee structure with the prior approval of the Government and also regulates the pay scales, allowances, leave and other benefits to be admissible to the teachers and other staff of an institution. Learned counsel has also referred to Section 15 of the Ordinance, 2001, which according to learned counsel, authorizes the Government to make Rules to carry out the purposes of the Ordinance, 2001, and also provides for criteria for Registration of Institution, facilities to the students, fixation of tuition fee and other sums to be realized from the student of an institution. According to learned counsel, the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, have been framed by the Government pursuant to powers given under Section 15 of the Ordinance, 2001, whereas, Rule 7 provides a criteria for registration of an institution as well as the mechanism for fixation of fee structure at the time of Registration of Institution (School) as well as Renewal of Registration after every three years and also prescribed a limit of 5% for enhancement of yearly fee by the institution for each academic year, however, respondents have made exorbitant increase in school fee during last several years in violation of above Rules, and without approval of the competent authority, which may be declared as illegal, and the respondents may be directed to refund such amount or to adjust the same against fee for future months accordingly. After having made out submissions on the merits of the case while referring to the relevant constitutional and legal provisions of Ordinance 2001 and Rules, 2005, in this regard, learned counsel for the petitioners has als assailed the finding of the learned Divisional Bench of this Court as recorded in C.P.No.D-5812/2015 in the case of ***Shahrukh Shakeel Khan and others v. Province of Sindh and others reported as 2018 SBLR Sindh 922*** and has argued that the finding as recorded by the learned Divisional Bench in sub-para e, f and g of Para 39 of the judgment is contrary to law, and based on misinterpretation of Article 18, 19 and 25 of the Constitution and also in violation of provisions of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, and the Sindh Private

Educational Institutions (Regulation and Control) Rules, 2005. Per learned counsel, the order passed by the Divisional Bench of this Court is per-incuriam as the learned Divisional Bench has failed to take into consideration the correct legal position existed at the time of hearing and deciding the above petitions, as according to learned counsel, provision of sub-rule (1) of Rule 7 as per gazetted Rules, which infact was also existing even prior to such gazette Notification, has been ignored by the Hon'ble Divisional Bench, whereas, a finding has been recorded in respect of sub-rule (3) of Rule 7 by declaring the same to be ultravires to Article 18 of the Constitution. Per learned counsel, any judgment or decision passed while ignoring the existing Law or Rule is otherwise per-incuriam, and cannot be given effect, nor can be treated as a precedent to be followed by subsequent bench. It has been further argued that the only reason which has been given by the Hon'ble Division Bench in his judgment, whereby, sub-rule (3) of Rule 7 has been declared to be ultravires to Article 18 of the Constitution is that it provides one stage procedure, which is constitutionally impermissible. According to learned counsel, the finding of the learned Divisional Bench of this Court while declaring Rule 7(3) as ultravires to Article 18 of the Constitution is based on an incorrect assumption that the word reasonable restriction is not available in Article 18 of the Constitution, therefore, Rule 7(3) cannot be judged on the principle of reasonable restriction. Per learned counsel, such interpretation of the provision of Article 18 by the learned Divisional Bench in the aforesaid judgment is contrary to the settled legal position as interpreted by the Hon'ble Supreme Court of Pakistan in large number of reported judgments, wherein, while interpreting the scope and application of Article 18 of the Constitution of Islamic Republic of Pakistan, it has been held that the term "**Regulation**" as used in Article 18 of the Constitution of Islamic Republic of Pakistan, 1973 covers the principle of **reasonable restriction** as embodied under Article 19(i)(g) of the Indian Constitution, whereas, it has been further held **that the power to regulate means to power limits and restrain**. While making further submissions in this regard, learned counsel has specifically referred to the seven Members judgment of the Hon'ble Supreme Court in the case of ***Arshad Mehmood v. Federation of Pakistan and others (PLD 2005 SC 193)***, wherein, according to learned counsel, it has been held that the word **"Regulation"** as

used in the Article 18 of the Constitution has been interpreted by the Courts of our country keeping in view the provisions of Article 19(1)(g) of the Indian Constitution, whereas, it has been further held that the word reasonable restriction did not say that it would also mean prohibition or omission completely however, under exceptional circumstances. Learned counsel has also referred to the judgment of the Hon'ble Supreme Court in the case of ***Pakcom Limited v. Federation of Pakistan and others (PLD 2011 SC 44)***, wherein, according to learned counsel, while interpreting the provision of Article 18 of the Constitution of the Islamic Republic of Pakistan it has been held that the right of freedom of trade, business or profession guaranteed by Article 18 of the Constitution is not absolute as it can be subject to reasonable restriction and regulation as may be prescribed by law. Such right is, therefore, is not unfettered or absolute in any manner, and the same is always subject to regulations and reasonable restrictions as may be prescribed by law. In support of his contention, learned counsel for the petitioners has placed reliance in the case of Shahrukh Shakeel Khan and 2 others v. Province of Sindh through Chief Secretary and 4 others (PLD 2017 Sindh 198), Arshad Mehmood and others v. Govt. of Punjab through Secretary Transport Civil Secretariat, Lahore and others. (PLD 2005 Supreme Court 193), Pakcom Limited v. Federation of Pakistan (PLD 2011 SC 44), Pakistan Broadcasters Association and 10 others v. Pakistan Electronic Media Regulatory Authority through Chairman and another (PLD 2014 Sindh 630), Pakistan Broadcasters Association and others v. Pakistan Electronic Media Regulatory Authority and others (PLD 2016 Supreme Court 692), Multiline Associates v. Ardeshir Cowasjee and 2 others (PLD 1995 Supreme Court 423), Engineer Iqbal Zafar Jhagra and another v. Federation of Pakistan and others (2013 SCMR 1337) and Unreported order dated 03.05.2018 passed by the Hon'ble Supreme Court in Suo Motu Case No.1 of 2010.

8. To support his contention to the effect that the judgment passed by the learned Divisional Bench of this Court in the case of ***Shahrukh Shakeel Khan and others v. Province of Sindh and others reported as 2018 SBLR Sindh 922 is per-incurium***, it has been contended by the learned counsel that the Hon'ble Divisional Bench did not take into consideration the gazetted version of Rule 7(1) of Rules, 2005, inspite of the fact that it was the correct legal position

as existed at the time of hearing and deciding the petitions and was taken note by the Hon'ble bench as specific Notice was issued to the parties to examine this aspect of the matter, therefore, the Hon'ble Divisional Bench was under legal obligation to give decision on the basis of interpretation of the existing provision of law/rules, and not on the basis of some incorrect law/rules, which was not even in existence nor was available in the official gazette. Moreover, according to learned counsel, the decision of the Divisional Bench is based on the assumption that the procedure provided under Rule 7(1) is a single step procedure, whereas, according to learned counsel, in view of correct reading of the existing gazetted Rule 7(1) of Rules, 2005, it is clearly a multiple stage procedure, therefore, does not otherwise violate the provisions of Article 18 of the Constitution. It has been argued by the learned counsel for the petitioners that Rule 7(3) of Rule 2005, places a reasonable restriction on private Institutions (School) to increase tuition fee upto 5% of last Schedule fee, every year to meet the burden of some additional charges or increase in utilities etc, whereas, in the absence of this rule, the private schools can demand any exorbitant increase as per their own wish, which will seriously prejudice, will adversely affect the millions of students and their parents on account of additional financial burden, and ultimately, such students will be deprived of their right and to get better education at reasonable cost. It has been further argued by the learned counsel for the petitioners that the right to education is part of right to life as guaranteed under the Constitution. In this regard the learned counsel has referred to the judgment of the Divisional Bench of this Court in the case of ***Imdad Hussain v. Province of Sindh and 3 others (PLD 2007 Karachi 116)*** and also the judgment of the Hon'ble Supreme Court in Suo Motu Case No.13 of 2009 (PLD 2011 SC 619). On the point of judgment being per-incuriam, learned counsel for the petitioners has placed reliance in the case of ***Syed Shabbar Raza Rizvi and others v. Federation of Pakistan, Ministry of Law and Justice Division through Secretary, Islamabad and others (2018 SCMR 514)***, whereas, on the point relating to issuance of gazetted Notification and its effect, learned counsel for the petitioners has placed reliance on the Full Bench Judgment of the Hon'ble Supreme Court of Pakistan in the case of ***Muhammad Idrees v. Tajammal Hussain and others (PLD 2002 SC 261)***, *wherein, according to learned counsel for the petitioners, it*

has been held that non-publication in the official gazette could not shear off its statutory status. While concluding his arguments, learned counsel for the petitioners has prayed that this Court may be pleased to hold that the private schools can only charge fee strictly in accordance with the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, and the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, and to further declare that the impugned increase in the yearly fee by the private school, has been made without approval of the Registration Authority and in violation of Rule 7(1) of the Rules, 2005, therefore, illegal and of no legal effect, which may be set-aside and the respondents may be directed to either refund such excess amount of fee to the petitioners or the same may be adjusted against the tuition fee for the future months.

9. Ms. Mehreen Ibrahim, learned counsel for the petitioners in C.P.Nos.D-6376/2017 and 6976/2017, while adopting the arguments advanced by Mr.Amar Naseer, learned counsel for the petitioners, has submitted that the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, as well as the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, do not violate any provisions of the Constitution of Islamic Republic of Pakistan 1973, particularly, Article 18, 19 and 25 of the Constitution, as according to learned counsel, the freedom of trade, business or profession as guaranteed in terms of Article 18 of the Constitution is not absolute or unfettered, rather it is subject to such qualification as may be prescribed by law. Per learned counsel, in terms of proviso to Article 18 of the Constitution, there is no bar against Regulation of any trade or profession by a licensing system or regulation of trade, commerce or industry in the interest of free competition thereon, therefore, the Government is authorized to regulate any trade, profession or business by placing reasonable restrictions as per Constitutional mandate in accordance with law. Learned counsel for the petitioners has further argued that right of education is a fundamental right of every citizen, whereas, in terms of Article 25-A of the Constitution, it is the duty of State to provide free and compulsory education to all children of the age of 05-16 years, therefore, according to learned counsel, it is the responsibility of the State to provide free and compulsory education to all the children and also to ensure that if such education is being provided by the private

sector as well, then such profession or business shall be regulated in such a manner to achieve the mandate of Constitution by placing reasonable restriction as may be prescribed by Law, Rules and Regulation framed for such purpose. While concluding her arguments, learned counsel for the petitioners has argued that the decision of the learned Divisional Bench of this Court in the case of Shahrukh Shakeel Khan and others v. Province of Sindh and others reported as 2018 SBLR Sindh 922 is per-incuriam as it does not depict correct legal position, whereas, the same is based on interpretation of non-existent rule 7(1) of Rule, 2005. It has been prayed by the learned counsel for the petitioners that petitions filed on behalf of large number of students against unauthorized exorbitant enhancement of fee may be allowed, whereas, such increase in the fee being in violation of Law and the relevant Rule 7(1) & (3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, may be declared as illegal and without lawful authority.

10. Barrister Faizan Hussain Memon, learned counsel representing the petitioners in C.P.No.D-6822/2017, while adopting the arguments of M/s.Amar Naseer and Mehreen Ibrahim, learned counsel for the petitioners, has further argued that in terms of Section 15 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, the authority to make rules has been delegated to the government, which also includes the authority to provide provisions of facilities to the students, fixation of tuition fee and other sums to be realized from the student of an Institution, therefore, according to learned counsel, it cannot be argued by the respondents that Rule 7(1) & (3) are violative of law or Article 18 of the Constitution. It has been further contended by the learned counsel that the parent Statute i.e. Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, does not provide for the Rules to be Gazetted, therefore, the Rules framed pursuant to Section 15 shall remain valid and applicable since framing of such Rules, even prior to the date when such Rules have been Gazatted. In support of his contention, learned counsel for the petitioners has referred to Section 23 of the General Clauses Act, 1897, and has placed reliance in the case of ***Bahadur Khan and others v. Federation of Pakistan through Secretary, Ministry of Finance, Islamabad and others (2017 SCMR 2066)***.

11. Conversely, Barrister Kamal Azfar, appearing on behalf of the respondent No.4/Beaconhouse School System in C.P.No.D-6376/2017, controverted the submissions made by the learned counsel for the petitioners and has denied that the contention of petitioners regarding exorbitant increase in yearly school fee by the respondents. According to learned counsel, keeping in view the quality and standard of education being provided by the private schools to its students, reasonable amount of fee is being charged by the respondents from its students which is affordable and has been designed to cater to the urban middle class of the province of Sindh. It has been contended by the learned counsel for the respondents that respondents cannot be deprived of their right to carry on any trade, business or profession freely in accordance with law, therefore, any restriction imposed upon such right of the respondents as guaranteed under Article 18 & 25 of the Constitution of Islamic of Pakistan, 1973, is illegal and contrary to law. Per learned counsel, in the above petitions, petitioners seek implementation of Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, whereas, the above Rule was challenged by the respondents in C.P.No.D-379/2005 before the learned Divisional Bench of this Court, who has passed a judgment dated 05.03.2018 by holding that putting a cap of 5% upon the increase of yearly fee is ultravires to Article 18 of the Constitution, therefore, the same has been quashed, whereas, directions have been issued to the Government of Sindh to frame new Rules/Regulations in accordance with guideline provided in paragraph 39 of the judgment, whereas, as per his instructions, Government of Sindh has started such exercise and the parties have not filed CPLAs against such judgment. Learned counsel for the respondent has further argued that putting a cap on the increase of fee upto 5% of last fee schedule in terms of sub-rule (3) of Rule 7 is otherwise illegal and ultravires to Section 6 of the Ordinance, 2001, which provides that fee structure of an Institution/School shall be fixed with prior approval of the Government, whereas, as per Rule 7(3), such increase has been made subject to approval of the Registration Authority. It has been argued by the learned counsel that while incorporating Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, the respondent No.3 (in C.P.No.D-6376/2017) has not taken prior approval of respondent No.1 as provided under Section 6(1) of the

Ordinance, 2001 as per amended Act 2003. Per learned counsel, unless the petitioners are in a position to establish the Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, is intravires to the Constitution and Law, its implementation cannot be sought through aforesaid petitions, particularly, when according to learned counsel, Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, has already been declared to be illegal, ultravires to the Article 18 of the Constitution of the Islamic Republic of Pakistan, 1973, by Divisional Bench of this Court in the case of Shahrukh Shakeel Khan and others v. Province of Sindh and others (C.P.No.D-5812/2015) reported as 2018 SBLR Sindh 922. Learned counsel for the respondent has further argued that without prejudice to above legal submissions on the merits of the case, the relief sought by the petitioners in the above petitions, seeking refund of fee charged pursuant to impugned enhancement in fee during last several years cannot be granted retrospectively, as according to learned counsel, the gazette Notification of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, has been published on 29.09.2017, therefore, the same cannot be given effect prior to its publication in gazette. In this regard, learned counsel for the respondent has placed reliance in the case of ***Government of Sindh through Secretary Agriculture and Livestock Department and others (PLD 2011 SC 347)***. While concluding his arguments, learned counsel for the respondent No.4 has submitted that fee structure has to be determined for each school system in the province of Sindh keeping in view the cost plus reasonable return, whereas, according to learned counsel, such increase in cost includes the increase in the pay scale of the teachers, rent of premises , utility charges, and maintenance of infrastructure as well as other facilities being provided by the private school to its students, therefore, to place a blanket cap of 5% under Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, is otherwise arbitrary unreasonable, hence contrary to law. Per learned counsel, over 90% of the students, of respondent No.4 in Karachi are studying under Cambridge System of 'O & A' Level, and not under Matriculate, whereas, cost of providing tutorial services to students of 'O' & 'A' level is much higher because of higher salaries paid to the teachers, who are equipped and qualified to educate

the students as per required international standards as prescribed by University of Cambridge, London. It has been finally concluded by the learned counsel for the respondent that the Annual tuition fee has to increase at certain level because of enhancement of rent of school building, enhancement in salaries of teachers, inflation and also rise in the utility charges and the amount of taxes and surcharge paid by the respondent, therefore, putting a cap of 5% on yearly increase is otherwise not justified, which has been rightly declared to be illegal by the learned Divisional Bench of this Court in the aforesaid judgment. In support of his contention, learned counsel for the respondent has placed reliance on the following reported decisions i.e. ***Bahadur Khan and others v. Federation of Pakistan through Secretary, Ministry of Finance, Islamabad and others (2017 SCMR 2066), Shahrukh Shakeel Khan and others v. Province of Sindh and others reported as PLD 2017 Sindh 198,*** unreported judgment of Lahore high Court in ***Writ Petition No.29724/2015 in the case of City School (Pvt) ltd. vs. Government of Punjab etc.*** dated 15.03.2018 and also in the case of ***Union of India and another v. Raghubir Singh (Dead by Lrs. Etc. (1989) 2 Supreme Court Cases 754.***

12. Mr. Muhammad Ali Lakhani Advocate appearing on behalf of the respondent i.e. Foundation Public School and Headstar in C.P.No.D-6274/2017, has candidly stated that in terms of Article 18 of the Constitution, Province can legislate to Regulate the profession/business of education by private Sector and can also formulate Rules and Regulations in this regard, however, it has been contended by the learned counsel that the power to fix or enhance the fee structure cannot be delegated to the Registration Authority, as has been done while incorporating Rule 7 (3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005. It has been further contended by the learned counsel that Annual increase in the fee is necessary to sustain the infrastructure and the facilities being provided by the school to the student and also to meet the expenses towards Annual rent of school premises, increases in the salary of the teachers and staff, rise in taxes and utility charges and also to cater the inflationary trend of our economy. Per learned counsel, private school must be given an authority to calculate their income and expenditure every year and to determine the monthly tuition fee accordingly, and if after each year,

schools can justify the enhancement in yearly fee which is subject to approval by the Government, then there should be no cap provided as it has been done through Sub-Rule (3) of Rule of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005. It has been further argued by the learned counsel for the respondent that the authority to fix the fee structure and its yearly enhancement shall vest in the provincial Government and not in the Registration Authority as provided under Section 6 of Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, therefore, the learned Divisional Bench of this Court in the case of Shahrukh Shakeel Khan and others v. Province of Sindh and others reported as 2018 SBLR Sindh 922 has rightly declared Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, to be ultravires to the Constitution and contrary to law. It has been prayed by the learned counsel for the respondent that above petitions filed on behalf of students may be dismissed and the enhancement made by the respondent schools may be declared to be legal and justified in law and fact. In support of his contention, learned counsel for the respondent has placed reliance in the following cases i.e. Syed Nazeer Agha and another v. Govt. of Balochistan through Chief Secretary and 4 others PLD 2014 Baluchistan 86 and Petition regarding miserable condition of the schools in Const. Petition No.37 of 2012 (2014 SCMR 396).

13. Mr. Faisal Naqvi Advocate, who was permitted by the Court to make his submissions on behalf of those private schools, who were party in the earlier petitions, which have been decided by the learned Divisional Bench of this Court in the case of Shahrukh Shakeel Khan and others v. Province of Sindh and others (2018 SBLR Sindh 922), has argued that every citizen of Pakistan has the right to carry on any trade, business or profession of his choice in accordance with law, which right cannot be subjected to any restrictions. It has been contended by the learned counsel that from perusal of the scheme of the Constitution, it appears that wherever there was a need to incorporate the words **reasonable restriction**, such words have been incorporated in the Articles of the Constitution such as Article 15, 16, 17, 19 and 151, whereas, according to learned counsel, such words do not find any mention in Article 18 of the Constitution, which shows that any Law, Rules or Regulations, which may place

any restriction upon the right of a citizen to carry on any trade, business or profession will be ultravires to Article 18 and 25 of the Constitution. It has been further contended by the learned counsel that the private schools are infact sharing the burden of the Government, and provide social service to large number of children in Pakistan, whereas, quality education is being imparted through private schools. According to learned counsel, every citizen has a right to enter into any lawful trade, business or profession and to earn profit of his choice, keeping in view the economic factors such as, demand and supply and should be given freedom to fix the price of goods or services in the open market, instead of placing restriction upon such right. According to learned counsel, to put a cap of 5% towards increase in the annual fee amounts to creating unreasonable restrictions and to curtail the right of a citizen to carry on business, profession or trade in accordance with law, as guaranteed under Article 18 and 25 of the Constitution of Islamic Republic of Pakistan, 1973. Learned counsel has further argued that Rules cannot be outside the scope of parent Act, whereas, according to learned counsel, Rule 7 of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, is illegal and contrary to Section 6 of the of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, , 2001, which authorizes the Government of Sindh to fix the fee structure, whereas, as per Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, such authority has been given to the Registration Authority. It has been further contended by the learned counsel that the Government of Sindh cannot delegate such authority to approve the fee structure of private schools to the Registration Authority. While concluding his submissions, Mr. Faisal Naqvi Advocate has further argued that his clients are not satisfied with the reasoning of the learned Divisional Bench of this Court in the case of Shahrukah Shakeel and others v. Province of Sindh and others reported as 2018 SBLR Sindh 922, therefore, they have filed CPLA before the Hon'ble Supreme Court, however, candidly stated that neither leave has been granted so far, nor the operation of the judgment has been suspended by the Hon'ble Supreme Court. It has been prayed that Section 6 of the Ordinance, 2001, and Rule 7 alongwith Rules 5, 6 & 10 of Rules, 2005 may be declared to be ultravires to Article 18 & 25 of the Constitution. In support of his contention,

learned counsel has placed reliance in the following case law i.e. In the matter of (Action taken on the news clippings regarding scandal of billions of rupees of National Police foundation Land), **SUO MOTU CASE No.11 of 2013 P.L.D 2014 Supreme Court 389, 422,** pages 1-70,34, In the matter of (Action on press clippings from the Daily "Patriot", Islamabad dated 04.07.2009 regarding Joint Venture Agreement between CDA and Multi-Professional Cooperative Housing Society (MPCHS) for development of land in Sector E-11 Islamabad), **SUO MOTU CASE No.13 of 2009, P.L.D 2011 Supreme Court 619**, pages 71-100,85, **PEARL CONTINENTAL HOTEL AND ANOTHER VS. GOVERNMENT OF N.W.F.P AND OTHERS, P.L.D 2010 Supreme Court 1004,1018, 1020,** pages 101,115, 117, **Khawaja AHMAD HASSAN VS. GOVETRNMENT OF PUNJAB AND OTHERS, 2005 S.C.M.R 186, 2290230** (para 34-37), pages 118, 167, 161,162, **PAKISTAN through Secretary Finance, Islamabad and 5 others Vs. ARYAN PETRO CHEMICAL INDUSTRIES (PVT.) LTD., PEHSAWAR and others, 2003 S.C.M.R 370, 388** (para 11) pages 168-186-187, **THE CHAIRMAN, RAILWAY BOARD, LAHORE and others Vs. Messrs M. WAHABUDDIN & SONS, P.L.D 1990 Supreme Court 1034,1041** (para-8) pages 188,195,197, **PROVINCE OF PUNJAB through Collector Sialkot and others Vs. RANA ZILADAR KHAN, 2013 S.C.M.R 219,224** (para-7) pages 198,203, 204, **Messrs MUSTAFA IMPEX, KARACHI and others Vs. The GOVERNMENT OF PAKISTAN through Secretary Finance, Islamabad and others, P.L.D 2016 Supreme Court 808,871** (para-84), pages 205,251, in the matter regarding **PENSIONARY BENEFITS OF THE JUDGES OF SUPERIOR COURTS FROM THE DATE OF THEIR RESPECTIVE RETIREMENTS, IRRESPECTIVE OF THEIR LENGTH OF SERVICE AS SUCH JUDGES), P.L.D 2013 Supreme Court 829, 945** (para-69(g)), pages 1-196, 117, **WILLIAM MARBURY vs. JAMES MADISON, Secretary of State of the United States, 2 L. ed. 60, 72**, pages 197, 211, 209, **GOVERNMENT OF PAKISTAN vs. (1) Syed AKHLAQUE HUSSAIN AND(2) WEST PAKISTAN PROVINCE, P.L.D 1965 Supreme Court 527, 566**, pages 212-151-290 and **Malik ASGHAR and 3 others vs. GOVERNMENT OF PUNJAB through Secretary, Transport, Civil Secretariat, Lahore and 3 others, P.L.D 2003 Lahore 73,** pages 291-312.

14. Mr. Khalid Javed Advocate appearing on behalf of the respondents in C.P.Nos.D-6822 & 6977 of 2017 has adopted the arguments advanced by M/s.Kamal Azfar and Muhammad Ali Lakhani, learned counsel for the respondents and prayed that above petitions may be dismissed in view of Divisional Bench judgment of this Court in the case of Shahrukh Shakeel Khan and others v. Province of Sindh and others (2018 SBLR 922). It has been however intimated that his clients who were also party in the above petitions have not filed any CPLA before Hon'ble Supreme Court.

15. Mr. Ghulam Shabbir Shah, Addl. A.G. Sindh has however, supported the case of the petitioners, and while adopting the arguments advanced by the learned counsel for the petitioners in the above petitions has further argued that respondents' schools were not authorized under the law to enhance the yearly school fee in violation of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, with particular reference to Rule 7(3) of the said Rule, which according to learned Addl. A. G. Sindh provides that fee may be increased upto 5% only of last fee schedule, however, subject to proper justification and approval of the Registration Authority. It has been argued by the learned Addl. A.G.Sindh that neither the provincial government in terms of Section 6 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, nor the Registration Authority in terms of read with Rule 7(1) and (3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, has approved the exorbitant increase of yearly fee by the private schools, therefore, any enhancement by the private schools in violation of Law and Rules is totally illegal and liable to be set-aside. According to learned Addl.A.G., in the earlier round of proceedings when such exorbitant enhancement was challenged by the large number of students before the learned Divisional Bench of this Court, all the constitutional and legal aspects of the case were duly examined by the learned Divisional Bench, who was pleased to allow such petitions and to set-aside such enhancement of yearly school fee by the private schools in the case of ***Shahrukh Shakeel Khan and others v. Province of Sindh and others, reported as PLD 2017 Sindh 198***, wherein, it was declared "that respondents' schools who have increased their tuition fee over 5% per annum for the last three years from the date of their respective registration/re-registration, no further

enhancement be permitted until their re-registration, whereupon enhancement be regulated in strict compliance of Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005". However, according to learned Addl. A.G. Sindh, CPLAs were filed against the aforesaid judgment of the Divisional Bench of this Court by the private schools including Generation School (Pvt) Ltd., Foundation Public School (Pvt) Ltd. and Beaconhouse School System, being Civil Appeal No.7-K/16-K/2017 before the Hon'ble Supreme Court, wherein, it was argued that since petitions filed on behalf of Schools being C.P.No.D-1074/2006, C.P.No.D-375/2005 and C.P.No.D-813/2005 challenging the vires of Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, are still pending and have not been decided by the High Court while deciding the above petitions of the students, therefore, the matters may be remanded to the High Court to decide all the petitions of the students as well as of the schools afresh, therefore, according to learned Addl.A.G.Sindh, the Hon'ble Supreme Court was pleased to dispose of all the appeals without dilating upon the merits of the case, by remanding the matter to Sindh High Court to be decided afresh. According to learned Addl. A.G. Sindh, there was no finding recorded by the Hon'ble Supreme Court on the merits of the case, or the legality or otherwise of the finding as recorded by the earlier Divisional Bench of this Court in the above matter, reported as ***PLD 2017 Sindh 198,*** therefore, such decision or the reasoning otherwise, could not have been totally ignored by the subsequent Divisional Bench of this Court, which appears to has considered such decision and the reasoning as illegal on the incorrect assumption that in view of the order of remand passed by the Hon'ble Supreme Court the finding of the earlier Division Bench relating to the vires of Rule 7(3) is also incorrect, and has, therefore, recorded its own finding, however, on the basis of incorrect reading of Rule 7(1), which was non-existent at the time of hearing and deciding the petitions. Learned Addl. A.G.Sindh has vehemently argued that the judgment reported as 2018 SBLR Sindh 922, is per-incuriam as correct legal provisions and the ratio of the judgment of the Hon'ble Supreme Court of Pakistan on the scope and application of Article 18 of the Constitution has been ignored and over looked by the Hon'ble Division Bench of this Court. According to learned Addl.A.G.Sindh, an important fact was disclosed to the

Hon'ble Divisional Bench relating to correct version of Rule 7(1) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, to the effect that there was omission of the words "or renewal of the registration" in the Non-Gazetted version placed on record by the private schools, whereas, gazette Notification dated 29.06.2017 was placed on record before the Hon'ble Division Bench during the course of hearing the above petitions, according to which, the exercise of increasing the Annual tuition fee is multiple stage process, however, such aspect of the matter has been totally ignored, whereas, the judgment of the Divisional Bench is based on the incorrect version of Rule 7(1) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, on the presumption that since it is a single stage process, therefore, Rule 7(3) and the upper cap of 5% is violative of law and Article 18 of the Constitution. Learned A.G. Sindh has further argued that provisions of Article 18 of the Constitution have also been misinterpreted by the learned Divisional Bench in the above judgment, as according to learned Addl.A.G.Sindh, the right of a citizen to carry on any trade, business or profession is not an absolute or unfettered right, rather it is subject to qualifications, regulations and reasonable restrictions as may be imposed by law. While making his further submissions with regard to the scope of Article 18 of the Constitution, learned Addl. A.G.Sindh has argued that in view of judgments of Hon'ble Supreme Court as well as of this Court, it has been settled "that the expression as used in Article 18 of the Constitution has been defined to explain that any kind of restriction can be imposed on trade, business and profession including a complete ban, whereas, according to learned Addl.A.G. State has the authority to impose greater restriction under Article 18 of our Constitution and to regulate any trade or business more effectively as compared to Article 19(1)(g)(6) of the Indian Constitution. According to learned Addl.A.G., Constitution of Islamic Republic of Pakistan has been framed in such a manner that private rights of individuals are protected in accordance with law, however, public rights of the citizen at large have to be given preference over individual rights, if situation may so arise. According to learned Addl.A.G, in above petitions the interest of large number of students and their parents who belong to middle or lower middle class, whose fundamental rights and financial interest has to be protected and as per scheme of Constitution as well as in

accordance with Law and the Rules formulated for such purpose. Whereas, if the matter requires resolution between individual rights of particular class and the rights of public at large then preference has to be given to the rights of large number of students and their parents against individual rights of schools. According to learned Addl.A.G, if any law or rule is required to be read down to protect the public interest, the Courts should adopt such interpretation of Constitutional and Legal provisions which may favour public at large, and shall not declare such legal provision as illegal or ultravires to protect the interest of some individual(s). It has been further contended by the learned Addl.A.G.Sindh that Rule 7(1) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, relates to fixing of fee structure and renewal of registration by the Government, whereas, Rule 7(3) the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, relates to annual increase in the fee by the Registration Authority, therefore, there is distinction between the authority of the Government and the authority of the Registration Authority in terms of Section 6(I) read with Section 15 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, therefore, according to learned Addl.A.G.Sindh, ratio of the judgment in the case of Mustafa Impex reported as PLD 2016 SC 808 does not apply in the instant petitions. Learned Addl.A.G.Sindh has also referred to Article 25-A and Article 27 of the Constitution, which according to learned Addl.A.G.Sindh, casts responsibility upon the State to provide free and compulsory education to all the children in such a manner as may be determined by law and also to promote social justice, whereas, according to learned Addl.A.G.Sindh, the private schools are also under legal obligation to achieve the noble task to educate the children and to share such burden while following the law, rule and regulation prescribed by the Government in this regard. According to learned Addl.A.G.Sindh, it is the domain of the legislation, whereas, in the instant case, provincial government to regulate the business/occupation of private schools by placing reasonable restriction keeping in view the Constitutional mandate and to ensure that maximum education shall be provided to all the children of Pakistan to promote the social justice, therefore, the respondents are not authorized to raise any objection in this regard, more particularly, when they have already been provided the maximum authority to

determine and to get their fee structure approved at the time of Registration and Renewal of such Registration after three years, and in addition to such determination of fee structure after every three years, they have been further provided an opportunity to increase the school fee Annually, however, upto 5% of last scheduled fee structure, subject to approval by the Registration Authority. According to learned Addl.A.G.Sindh, the exorbitant enhancement of fee by the private schools in violation of Section 6(1) of Ordinance, 2001, and Rule 7(1) and (3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, without approval of the Government and the Registration Authority may be declared to be illegal. While concluding his arguments, learned Addl. A.G. Sindh contended that the reliance placed by the learned counsel for the private schools on the recent judgment of the Divisional Bench of this Court in the case of ***Shahrukh Shakeel Khan and others v. Province of Sindh and others (2018 SBLR Sindh 922)*** is misplaced for the reason that above judgment is based on incorrect legal provisions of Rule 7(1) of the Rules, 2005, and also result of misinterpretation of Constitutional provisions i.e. Article 18 of the Constitution, whereas, finding as recorded in the above Divisional Bench judgment is also contrary to the decisions of the Hon'ble Supreme Court on the subject legal issue, hence the said judgment is **per-incuriam** and cannot be referred to or relied upon as precedent in terms of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973. It has been prayed by the learned Addl. A.G.Sindh that the Rule 7(3) or any other Rule framed under the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, pursuant to Section 15 read with Section 6 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001. may be declared to be **intravires** to the Constitution, and the above petitions filed on behalf of students may be allowed, whereas, all the private schools may be directed not to charge the enhanced fee more than 5% of last fee schedule approved by Competent Authority, and also to Refund/Adjust the excess amount of fee charged from students over and above 5% upper limit as prescribed by law.

16. In addition to hereinabove submissions made by the learned Addl.A.G.Sindh on behalf of respondent No.4, learned Addl.A.G.Sindh has also referred to the comments filed and the report submitted on behalf of respondent No.3 i.e. Directorate of Inspection and Registration of Private School Sindh, wherein, it has been stated that no approval has been granted to the private schools to enhance their tuition fee more than 5% in violation of Rule 7(1) & (3) of the Sindh Private Educational Institutions (Regulation and Control) Rules,

2005, whereas, Directorate General Private Institution Sindh has issued directive from time to time to all the private schools and their management to follow the law, rules and regulations in this regard, and not to increase the yearly fee as per their own choice, in violation of the aforesaid Rules. According to learned Addl. A. G. Sindh, during the session 2017-2018 about 1239 schools in different Regions of province of Sindh have been granted permission for 5% enhancement in tuition fee, whereas, such similar permission has been granted to about 283 schools and its branches for the session 2018-2019 after proper verification in accordance with Law and as per Rules, whereas, the respondents' schools have increased the tuition fee exorbitantly as per their own wish and choice without seeking approval/permission from the competent authority for which they have been issued Notices. However, in view of pendency of petitions filed on behalf of students as well as the private schools, such proceedings are still pending. It has however, been submitted by the learned Addl. A.G. Sindh that action has been taken by the Directorate on the complaints received from parents against various schools in accordance with law, who were not party in the above petitions, detail of which has been enumerated in the comments filed and the report submitted on behalf of the respondent No.3 to this effect. According to learned Addl. A.G. Sindh, most of the private schools, have managed to open number of branches all over Pakistan, and have formed a cartel, and do not follow the legal course nor do theygive any heed to the Regularity Authority and to the Notices issued to them against violation of provisions of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, and the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, on the contrary, they continue to enhance yearly tuition fee and other charges and earn profit of their own choice in violation of Law and Rules as referred to hereinabove. It is however submitted that Competent Authority may be permitted to take appropriate action against the private schools who have enhanced the school fee in violation of Law and Rules.

17. We have heard the learned counsel for the petitioners and respondents, as well as the learned counsel for the proposed intervenor and the learned Addl. A. G. Sindh, perused the record, and have also gone through both the judgments passed by two Divisional Benches of this Court in the case of ***Shahrukh Shakeel***

Khan v. Province of Sindh and others reported as PLD 2017 Sindh 198 (earlier round of proceedings) and ***2018 SBLR Sindh 922*** (after remand by the Hon'ble Supreme Court). We have also examined the relevant Constitutional provisions as well as provisions of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, and the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, and also carefully gone through the judgments cited and relied upon by the learned counsel for the parties during the course of arguments.

18. In the opening paragraph of instant judgment, we have already given the background relating to subject controversy and the reason for constitution of instant Larger Bench by the orders of Hon'ble Chief Justice of Sindh High Court. However, we would like to briefly recapitulate relevant facts and to highlight the legal controversy to be resolved by this Larger Bench, which primarily relates to (i) the grievance expressed by large number of students through their parents against exorbitant enhancement of yearly tuition fee by the private schools, in violation of provisions of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, read with Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, and (ii) The challenge by the private schools to the vires of certain provisions of the above Ordinance 2001, and the Rules 2005 for being ultravires to Article 18 and 25 of the Constitution and the Law. It is pertinent to mention that in none of the aforesaid petitions there is any petition filed on behalf of the private schools/institutions, whereby, the vires of any of the provisions of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, or the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, would have been challenged, on the contrary, all the aforesaid petitions have been filed on behalf of large number of students through their parents, who are studying in the respondents' schools/institutions in different grades and have expressed their grievance against exorbitant enhancement of yearly tuition fee in violation of Law and Rules as referred to hereinabove. However, keeping in view the peculiar facts and circumstances of instant case, which include the earlier round of proceedings in relation to subject controversy decided by a Divisional Bench of this Court in the case of *Shahrukh Shakeel Khan v. Province of Sindh and others reported as*

PLD 2017 Sindh 198, the order dated 04.04.2017 passed by the Hon'ble Supreme Court in Civil Appeal No.7-K to 16-K/2017 *in the case of Generation* School Private Limited and others v. Province of Sindh and others, whereby, the matter was remanded back to the Divisional Bench of this Court to be decided afresh, as well as the subsequent judgment of the Divisional Bench of this Court after remand by the Hon'ble Supreme Court in the same case reported as 2018 SBLR Sindh 922, we have deiced to examine not only the grievance expressed on behalf of the students against enhancement of yearly school fee by the private schools, but will also examine the constitutionality and legality of relevant provisions of Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001 as well as the provisions of Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, in the light of arguments advanced by the learned counsel appearing on behalf of the petitioners, respondents as well as learned counsel for the proposed intervenor and the learned Addl.A.G. so that an authoritative pronouncement could be made on the subject controversy relating to constitutionality and legality of certain provisions of the Ordinance, 2001 and Rules, 2005 impugned by the private schools, fixation of fee structure and its yearly enhancement in terms of provisions of the Ordinance 2001 and Rules, 2005. From perusal of the judgment passed by the Divisional Bench of this Court in the earlier round of proceedings, whereby number of petitions filed on behalf of students through their parents were disposed of vide common judgment reported as PLD 2017 Sindh 198, it has been observed that the enhancement of yearly fee by the private schools/institutions in violation of Rule 7(1) and (3) of Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, has been declared to be illegal and without lawful authority, whereas, while reaching to such conclusion, the Hon'ble Divisional Bench of this Court was also pleased to examine the legal frame work designed for the creation of operation of the private schools by referring to various provisions of Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001 as well as the provisions of Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, relating to fixation of fee structure and its enhancement, Registration and Re-registration of the schools, suitability and availability of infrastructure, courses of studies to be

adopted by the institution and standard of education and discipline etc. and has also been pleased to hold that challenge to the vires of sub-rule (3) of Rule 7 of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, in Constitution Petition No.D-5651/2015 filed by **Generation School Private Ltd.** with particular reference to fixing upper limit of 5% is **intravires to Article 18 of the Constitution**. However, after remand of the case by Hon'ble Supreme Court with directions to decide all the petitions, including the petitions filed on behalf of the private schools, afresh, the subsequent Divisional Bench of this Court has been pleased to hold that Rule 7(3), whereby upper cap of 5% has been placed, is ultravires to Article 18 of the Constitution. It will be advantageous to examine the constitutionality of the relevant provisions of Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, as well as relevant provisions of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, which were impugned by the respondents' institutions in the earlier round of proceedings and have also been agitated before this Court for being ultravires to the Constitution, the said are reproduced hereunder:-

Section 6 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001.

6. Registration of an institute. - (1) Where the Registering Authority grants the application, it shall register the institution and issue a certificate of registration to the applicant in such form and containing such terms and conditions as may be prescribed: Provided that –

(i) no donation, from a student, voluntary or otherwise, for development projects of an institution shall be permissible;

[(ii) the fee structure of an institution shall be fixed with prior of approval of Government;

(ii-a) the institution shall provide and maintain required infrastructure including building, class rooms, laboratory, library, play ground, canteen and safe-drinking water facilities;

(ii-b) the pay scales, allowances, leave and other benefits to be admissible to the teachers and other staff of an institution shall be commensurate with its fee structure;]

(3) the facilities allowed to a student at the time of admission shall not be subsequently withdrawn or reduced.

(iv) curriculum taught in an institution shall be at least, at par with the curriculum approved by Government for its schools and institutions; and

(v) the institution shall ensure teaching of the Sindhi Language in accordance with existing law and rules.]

(2) The Registering Authority shall maintain a register containing such particulars of an institution which is registered and granted certificate of registration, as may be prescribed.

(3) The person to whom the certificate of registration is issued shall be responsible for due compliance of the provisions of this Ordinance, rules, the terms and conditions of the certificate & registration and the orders, if any passed or instructions issued from time to time by the Registering Authority.

Rule 7 of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005

7. (1) The Inspection committee shall recommend the fee structure of an institution after a detailed inspection of the institution at the time of registration or renewal of registration of the institution to the registering authority.

(2) The fees schedule once approved, shall not be increased, at any time during the academic year.

(3) The fees may be increased upto five percent only of last fees schedule subject to proper justification and approval of the Registration Authority.

(4) Any fee other than tuition fee shall be charged only after approval from the Registration Authority subject to the condition that no fee, charges or voluntary donation would be charged by the institution on account of any development activity.

(5) The institute shall ensure that all the conditions of admission alongwith the schedule of fees dully approved by the registering authority shall be printed on the prospectus or on the admission form and shall be provided to the parents or guardians at the time of the admission.

(6) Any complaint regarding the tuition fees in violation of the rules or charging of any fee other than tuition fees shall be liable to be punished under section 11 of the Ordinance.

(7) The institute shall ensure that admission fee is charged from the student only at the time of his first admission into the institution which shall not be more than three months tuition fees of the respective class in which the student is admitted.

19. Learned counsel appearing on behalf of the private schools/institutions, who challenged the vires of Section 6, particularly, proviso (ii) , (II-a), (ii-b) and

(iv) of Sub-section (1) of Section 6, Section 10, 13 and 15(2)(aa) and (bb) of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, as well as, Rule 6 to 10 of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, in the earlier petitions, have mainly argued that the aforesaid provisions are violative of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, as according to learned counsel, no restriction can be imposed by any Law or Rules framed thereunder, to prevent any citizen of Pakistan from carrying on any lawful trade, business, profession or occupation. It was the case of the learned counsel representing the private schools that the term **reasonable restriction** does not find any mention in Article 18 of the Constitution, whereas, such term has been specifically mentioned in other Articles of the Constitution, including Article 15, 16, 17 and 151 of the Constitution, which reflects upon the intention of the framers of the Constitution that no restriction can be imposed upon the right of a citizen to carry on any trade, business, profession or occupation, therefore, above provisions of Ordinance, 2001 and Rules, 2005 are ultravires to Article 18 and 25 of the Constitution. Such Interpretation of **Article 18** of the Constitution of Islamic Republic of Pakistan, 1973, is not only **contrary** to the express provisions of Article 18, but also **in conflict** with the judgments of the Hon'ble Supreme Court, as well as of this Court, whereby, the scope and application of Article 18 of the Constitution, with particular reference to the terms **"Regulations"** and **"Reasonable Restriction"** has already been defined authoritatively. From bare perusal of Article 18 of the Constitution, it is clear that though, the right of a citizen to carry on any lawful trade, business or profession has been recognized as a fundamental right, whose enforcement can be sought through process of law, however, such right is not absolute or unfettered, as it is subject to such **qualifications**, as may be prescribed by law. Moreover, Provisos (a) to (c) to Article 18 of the Constitution make it further clear that the freedom of trade, business or profession **shall not prevent the regulation of any trade or profession by a licensing system; or the regulation of trade, commerce or industry in the interest of free competition therein or carrying on, by the Federal Government or the Provincial Government or by a Corporation controlled by any such Government, of any trade, business, industry or**

service, to the exclusion complete or partial of every person. In other words, there can be a situation whereby, any trade, business, profession or occupation, which otherwise is lawful, can be excluded from the domain of any other person(s) completely or partially, and can only be allowed to be carried on by the Federal Government, Provincial Government, Corporation, controlled by any such Government etc. A Divisional Bench of this Court while examining the scope of Article 18 and 19 of the Constitution with particular reference to Rule 15 of Pakistan Electronic Media Regulatory Authority Rules, 2009, in the case of **Pakistan Broadcasters Association and others v. PEMRA and others (PLD 2014 Sindh 630)**, while placing reliance on the judgment of the Hon'ble Supreme Court in the case of **Pakcom Limited and others v. Federation of Pakistan and others (PLD 2011 SC 44)** has held as under:-

> *"11. From careful reading of hereinabove provisions of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, it can be gathered that the right of a citizen and freedom of trade, business or profession has been recognized as fundamental right of every citizen of Pakistan, which can be enforced by process of law, however, it will not be out of place to observe that such right is not absolute and is subject to such qualifications as may be prescribed by law.*
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> *12. Similarly, Article 19 of the Constitution of Pakistan recognizes and guarantees the right of a citizen of freedom of speech and expression as well as freedom of press, however, subject to reasonable restrictions which may be imposed by law in the interest of glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, commission of or incitement to an offence.*
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> *13. From careful reading of Article 19, it can be gathered that the right of a citizen of Pakistan relating to freedom of speech and expression as well as freedom of the press has been recognized as a fundamental right, whose enforcement can be sought through law, however, that right is also not absolute, but it is subject to reasonable restrictions which may be imposed by any law. It can be safely concluded that the rights of a citizen as guaranteed under Article 18 and 19 of the Constitution of Pakistan are not absolute or unfettered, but the same are subject to law and reasonable restrictions which may be imposed by law. Reference in this regard can be made in the case of **Pakcom Limited and others v. Federation of Pakistan and others PLD 2011 SC 44**, wherein the Hon'ble Supreme Court, while examining the scope of various provisions*

of constitution including Articles 18, 23, 24 and 25 of the Constitution of Islamic Republic of Pakistan has held as under:

> *"52. The interpretation of Article 18 has been made variously and the judicial consensus seems to be that the "right of freedom of trade, business or professions guaranteed by Art. 18 of the Constitution is not absolute, as it can be subjected to reasonable restrictions and regulations as may be prescribed by law. Such right is therefore not unfettered. The regulation of any trade or profession by a system of licensing empowers the Legislature as well as the authorities concerned to impose restrictions on the exercise of the right. They must, however be reasonable and bear true relation to 'trade' or profession and for purposes of promoting general welfare. Even in thus countries where the right to enter upon a trade or profession is not expressly subjected to conditions similar to this Article, it was eventually found that the State has, in the exercise of its police power, the authority to subject the right to a system of licensing, i.e., to permit a citizen to carry on the trade or profession only if he satisfied the terms and conditions imposed by the prescribed authority for the purposes of protecting and promoting general welfare" (PLD 1989 Kar. 219, Govt. of Pakistan v. Akhlaque Hussain PLD 1965 SC 527)."*

20. The aforesaid judgment of this Court was assailed before the Hon'ble Supreme Court in Civil Appeal No.1-K/2016, however, the bench of Hon'ble Supreme Court headed by the Hon'ble Chief Justice of Pakistan, while dismissing the aforesaid appeal, has not only confirmed the aforesaid judgment of the Divisional Bench of this Court with particular reference to scope of Article 18 and 19 of the Constitution as well as the legality of Rule 15 of Pakistan Electronic Medical Regulatory Authority Rules, 2009, but has also been pleased to define more elaborately the correct interpretation of the provisions of Article 18 and 19 of the Constitution and the term "**reasonable restriction**" in the case reported as **Pakistan Broadcasters Association and others v. PEMRA and others (PLD 2016 SC 692)** in following terms:-

> *"16. Undoubtedly no one can be deprived of his fundamental rights. Such rights being incapable of being divested or abridged. The legislative powers conferred on the State functionaries can be exercised only to regulate these rights through reasonable restrictions, and that too only as may be mandated by law and not otherwise. The authority wielding statutory powers conferred on it must act reasonably (emphasis supplied) and within the scope of the powers so conferred.*
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> *17. It is certainly not easy to define "reasonableness" with precision. It is neither possible nor advisable to prescribe any abstract standard of universal application of reasonableness. However, factors such as the nature of the right infringed, duration and extent of the restriction, the causes and circumstances prompting the restriction, and the manner as well as the purpose for which the restrictions are imposed are to be*

considered. The extent of the malice sought to be prevented and/or remedied, and the disproportion of the restriction may also be examined in the context of reasonableness or otherwise of the imposition. It needs to be kept in mind that "reasonable" implies intelligent care and deliberation, that is, the choice of course that reason dictates. For an action to be qualified as reasonable, it must also be just right and fair, and should neither be arbitrary nor fanciful or oppressive.

18. However, in examining the reasonableness of any restriction on the right to freedom of expression it also should essentially be kept in mind as to whether in purporting to exercise freedom of expression one is infringing upon the aforesaid right of others, and also violating their right to live a nuisance free life, as to whether one's right to time and space is being violated. It should also be kept in mind that none can be forced to listen or watch that he may not like to, and that one cannot be invaded with unsolicited interruptions while eagerly watching or listening to something of his interest. The State is not supposed to remain oblivious of such violation/invasions and cannot detract from its obligation to regulate the right to speech when it comes in conflict with the right of the viewers or listeners. It was perhaps keeping in view, inter alia, the foregoing that the framers of our Constitution, though secured the right to free speech, but have not left the same unchecked, and have provided for reasonable restriction as postulated under Article 19 of the Constitution. Indeed the State has a compelling interest in regulating the right to speech when it comes in conflict with the rights of other individuals, or other societal interests.

19. It is indeed true that freedom of expression being a natural fundamental right cannot be suppressed unless the same is being exploited and/or is causing danger to, or in it lies the imminent potential of hurting public interest, or putting it at stake directly, and also that the anticipated danger should not be remote, conjectural or far fetched. It should rather have proximate and direct nexus with the expression.

20. However it may be kept in mind that in a civilized and democratic society, restrictions and duties co-exist in order to protect and preserve the right to speech, it is inevitable to maintain equilibrium, and for that to place reasonable restriction on this freedom in the maintenance of "public order" and unless the restriction strikes a proper balance between the freedom guaranteed by Article 19 of the Constitution and the social control permitted thereby, it must be held to lack the attributes of reasonableness. Government should therefore strike a just and reasonable balance between the need for ensuring the right of people of freedom of speech and expression on the one hand and the need to impose social control on the business of publication and broadcasting.

23. It was to meet the above situation and to regulate rather enable the television broadcasters to achieve the goals as set out in the preamble to the PEMRA Ordinance, 2002 (such as improvement of standard of information, education and entertainment and widening the choice for news current affairs etc) and to meet the mandate of the provisions of subsections (3) and (5) of section 19 of the PEMRA Ordinance, which provides for prescribing terms and conditions governing the transmission permitted under the licence issued under the said provision, and also to devise a code of conduct for programmes and advertisements for compliance by the licensees, that the subject rule was framed, and clause 10.4 which is in conformity with the said rule, was incorporated. The said rule has been framed also under the mandate as contained in section 39 of the PEMRA Ordinance, 2002, which empowers respondent No. 1-authority, to make rules to carry out the purpose of the Ordinance, more particularly to prescribe terms and conditions of the license issued under the said Ordinance. ***The subject rule and clause are also in conformity with the provision of Article 18 of the Constitution, whereby, though a right to conduct a lawful business has been protected, but it has also been provided that qualification for the same may be prescribed by law, and has also been made permissible to regulate any trade or profession by a licensing system."***

21. The provisions of Article 18 have also been examined by the Hon'ble Supreme Court in seven members' bench judgment in the case of **Arshad Mehmood v. Government of Punjab (PLD 2005 SC 193)** authored by the then Honorable Chief Justice of Pakistan, Justice Iftikhar Muhammad Chaudhry, wherein, while placing reliance on large number of judgments of the Hon'ble Supreme Court of Pakistan and also by referring to the judgments of the Indian Supreme Court relating to similar provisions of Article 19(1)(g)(6) of Indian Constitution, has been pleased to hold as under:-

"24. It is to be noted that our Constitution stands in sharp contrast to the corresponding provisions of Indian Constitution. A comparison of Article 18 of the Constitution and Article 19(1)(g)(6) of the Indian Constitution manifestly makes it clear that in later Constitution, words "lawful" and "regulation" are conspicuously omitted ***but while defining the word "regulation" our Courts have followed the interpretation of Indian Supreme Court of expression "reasonable restriction", while dealing with the concept of "free trade / business etc." under Article 18 of the Constitution, despite the distinction noted herein above.*** *In this behalf,*

reference may be made to ***Administrator Market Committee, Kasur, etc. v. Muhammad Sharif (1994 SCMR 1048).***"

> *"No doubt the regulation and governance of a trade may involve the imposition of restrictions on this exercise. . . . . Where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think that there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."*

22. From perusal of hereinabove authoritative pronouncements by the Hon'ble Supreme Court on the interpretation of the provisions of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, any reference or reliance upon the judgments of foreign jurisdiction on the subject controversy, in our humble view, would not only be a futile exercise but will also violate the Constitutional mandate as enshrined under Article 189 of the Constitution based on the principle of "Stare decisis" according to which, any decision of the Supreme Court shall, to the extent it decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan. Accordingly, any arguments advanced by the learned counsel for the private schools, and any reference or reliance upon the foreign judgments, contrary to the decision by Hon'ble Supreme Court of Pakistan on the subject legal issue i.e. interpretation of the provisions of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, and the terms **"regulation and reasonable restriction"**, does not require any specific rebuttal by us, as the same is of no legal consequence. It is pertinent to note that while challenging the vires of Section 6 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, and Rule 7(1) and (3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, it has not been specifically argued by any of the learned counsel representing the private schools/institutions that aforesaid provisions are unreasonable, on the contrary, it has been argued that Article 18 of the Constitution does not authorize imposition of any restriction upon the right of a citizen of Pakistan to carry on any lawful trade, business or profession. Learned counsel have not been able to demonstrate as to how, the impugned

provisions as referred to hereinabove, do not qualify the test of **reasonableness.** Moreover, through aforesaid provisions of the Ordinance, 2001 and Rule, 2005, a mechanism has been provided for the purpose of regulating the private education sector which includes Registration of the private institution (school), its Renewal after three years, fixation of fee structure/schedule with the approval of Competent Authority, provision for school building, class rooms, laboratory, library, playground, canteen, safe drinking water, pay scale and allowances in respect of Teachers and staff, and also the curriculum to be taught in the schools, whereas, annual increase of tuition fee, in addition to its determination after every three years, has also been allowed upto 5% of last fee schedule. The above provisions are neither arbitrary, confiscatory or contrary to Article 18 of the Constitution, as no amount of tuition fee or profits to be earned by private schools has been fixed, rather it has been reasonably regulated as public policy. It is settled principle of interpretation of law, that a law should be interpreted in such a manner that it should be saved rather than destroyed. The Courts should lean in favour of constitutionality of legislation. It is, therefore, incumbent upon the Courts to be extremely reluctant to strike down any law as unconstitutional. Reliance in this regard can be placed in the case of **Multiline Associate v. Ardeshir Cowasji (PLD 1995 SC 423)**, wherein, it has been held as under:-

> *"35. Cardinal principle of interpretation of statutes is that a law should be interpreted in such a manner that it should be saved rather than destroyed. The Courts should lean in favour of upholding constitutionality of legislation and it is, therefore, incumbent upon the Courts to be extremely reluctant to strike down laws as unconstitutional. This power should be exercised only when absolutely necessary, for injudicious exercise of this power might result in grave and serious consequences. In support of the proposition reference can be made to the case of Province of East Pakistan v. Sirajul Haq Patwari (PLD 1966 SC 854). The same principle of interpretation shall apply to subordinate legislation including Regulations as in this case."*

23. After having examined the scope of relevant Constitutional provisions, particularly, Article 18 and 25-Aof the Constitution in the light of the judgments of the Hon'ble Supreme Court of Pakistan as referred to hereinabove, we would now examine as to whether the provisions of Section 6 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, and rule 7(1) and (3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, are ultravires to the Constitution, as argued by learned counsel for the respondents, and may further examine as to whether, the fixation of fee

structure/schedule of private schools at the time of their Registration and Re-Registration (Renewal), with the approval of the Government, and enhancement of yearly tuition fee upto 5% of last fee schedule, with the approval of Registration Authority, amounts to placing **unreasonable restriction** on the business/profession/occupation of private schools. Preamble of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, provides that Ordinance, 2001, has been promulgated to provide for **regulation** and **control** of private educational institutes in the Province of Sindh, whereas, such authority was exercised by the then Governor of Sindh in view of proclamation of 14th October, 1999 and the PCO Order No.1 of 1999, whereby, Provincial assembly stood dissolved. Section 2 of the Ordinance 2001, provides for definitions of various terms used therein, whereas, Section 3 of the Ordinance 2001 provides that no institution(school) shall be established and continued, except in accordance with the provisions of this Ordinance. Section 4 provides that any person intending to establish or continue any existing institution(school) shall make an application to the Registering Authority in the prescribed form accompanied by all such documents and fee as may be prescribed. Whereas, Section 5 provides that the application for Registration will be subject to inquiry and recommendations by Inspection Committee, who shall submits its recommendations to the Registering Authority within 30 days of the receipt of application, whereas, the Registering Authority, after having considered the report of Inspection Committee, and making such further inquiry as it considered necessary, either grant or reject the application of the institution, however, while doing so, the Registering Authority shall record reasons, provided no order of refusal shall be made without providing an opportunity of being heard to the concerned person. Section 6 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, prescribes the procedure for Registration of an Institution(school), according to which, where the Registering Authority grants the application, it shall register the institution and issue a certificate of registration to the application in such form and containing such terms and condition as may be prescribed provided that,

(i) that no donation, from student, voluntary or otherwise, for development projects of an institution shall be permissible,

(ii) the fee structure of an institution shall be fixed with prior approval of the Government,

(ii-a) the institution shall provide and maintain required infrastructure including building, class rooms, laboratory, library, playground, canteen and safe drinking water facilities:

(ii-b) the pay scales, allowances, leave and other benefits to be admissible to the teachers and other staff of an institution shall be commensurate with its fee structure;]

(3) the facilities allowed to a student at the time of admission shall not be subsequently withdrawn or reduced.

(iv) curriculum taught in an institution shall be at least, at par with the curriculum approved by Government for its schools and institutions; and

(v) the institution shall ensure teaching of the Sindhi Language in accordance with existing law and rules.]

Whereas, in terms of subsection (2) of Section 6 of the Ordinance, 2001, the Registering Authority is required to maintain a register containing such particulars of an institution which is registered and granted certificate of registration, as may be prescribed. In terms of subsection (3) of Section 6 of the Ordinance, 2001, provides that the person to whom such certificate is issued shall be responsible for due compliance of the provisions of this Ordinance, rules, the terms and conditions of the certificate and Registration, and the orders, if any, passed or instructions issued from time to time by the Registering Authority. Learned counsel representing the private institutions(schools) have not been able to show as to how aforesaid provisions of Section 6 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, are in violative of **Article 18** or any other Article of the Constitution for that purpose, nor could assist as to how registration of an institution(school) or fixation of fee structure of an institution(school) with prior approval of the Government and other legal requirements to be followed by the institution(school), would possibly deprive any citizen his right to enter into any lawful trade, business, profession or occupation. Nor it has been argued before us that through aforesaid provisions of Ordinance, 2001 and Rules, 2005, **unreasonable restrictions** have been imposed against their right as guaranteed under Article 18 of the Constitution, whereas, in view above referred

judgments of Hon'ble Supreme Court of Pakistan, such right is subject to **qualifications** as may be **prescribed** by **Law**, and also subject to **regulations** which also includes **reasonable restrictions** to be imposed by law. We are of the opinion that none of the aforesaid provisions of Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, particularly, Section 6 of the Ordinance, 2001, is **ultravires** to Constitution nor such provisions of law, in any manner, create any **unreasonable restrictions** upon the right of a citizen to carry on the lawful trade, business, profession or occupation, as guaranteed under the Constitution of Islamic Republic of Pakistan, 1973. Since no other provision of the aforesaid Ordinance, 2001, has been specifically challenged before us for being ultravires to the Constitution, nor any of the learned counsel appearing on behalf of the private institutions(schools) as well as the learned counsel representing the proposed intervenor has particularly argued ot this effect, therefore, we would not dilate upon the constitutionality of the remaining provisions of the Sindh Private Educational Institution (Regulation and Control) Ordinance, 2001, in the instant petitions. However, we would like to examine the provisions of **Section 15** of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, whereby, the Government has been given an authority to make rules to carry out the purpose of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001. From careful perusal of the provisions of Section 15, it appears that it is not merely a formal section, whereby authority to make rules is delegated to the Government, to carry out purpose of any Enactment or Ordinance, but it further shows that without prejudice to the generality of delegating the authority to make rules, certain other powers have also been delegated to be exercised under the rules accordingly, which include; the authority to provide for:-

(a) criteria for registration of an institution;

(aa) infrastructure including building, class rooms, laboratory, library, play ground canteen and safe-drinking water facilities;

(b) mode and procedure for monitoring and inspection of an institution;

(bb) the procedure to be followed for settlement of dispute arising between the parents or guardian of a student or teachers or other staff of an institution and its management.]

(c) provisions of facilities to students, fixation of tuition fees and other sums to be realized from the students of an institution;

(d) grant of fee concessions and scholarships to the students of an institution;

(e) establishment and functions of the teachers employed in an institution; and

(f) any other matter required under any of the provisions of this Ordinance to be prescribed by rules.

24. Perusal of Section 15(2)(c) shows that, in addition to formal delegation of authority to the Government to make Rules, additional authority to make **provisions of facilities to the students, fixation of tuition fees and other sums to be realized from the students of an institution** has also been delegated by law itself. It is pertinent to note that provisions of aforesaid law has neither been challenged before us in any of the aforesaid petitions; nor it has been argued on behalf of the learned counsel representing the private institution (school) that the authority to fix the tuition fee at the time of Registration or its renewal, provided in terms of Section 6 of the Ordinance, 2001, cannot be further delegated to the Government, inspite of aforesaid delegation by law in terms of Section 15(2)(c) of the Ordinance, 2001.

25. Keeping in view hereinabove legal position as emerged from perusal of above provisions of Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, we would now examine the provisions of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, with particular reference to Rule 7, as the vires of Rule 7(3) relating to yearly increase of tuition fee upto 5% of last fee schedule, was challenged before a Divisional Bench of this Court in the earlier round of proceedings, and the said rule has been declared to be **ultravires** to Article 18 of the Constitution in the case of ***Shahrukh Shakeel Khan and others v. Province of Sindh and others reported as 2018 SBLR (Sindh) 922.***

26. Perusal of Rule 7 shows that in addition to provisions of Section 6 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, which provides a mechanism for Registration of a private institution(school), **fixation of fee structure with the prior approval of Government**, pay scales, allowances and other benefits to the teachers and staff, curriculum to be taught in an institution, required infrastructure including building, classroom, laboratory, library, playground, canteen and safe drinking water facilities etc. **sub-rule (I) of Rule 7 also provides for fixation of fee structure on the recommendation by Inspection Committee at the time of Registration or Renewal of Registration of institution to the Registering Authority**. The above sub-rule provides two step procedure for fixing the fee structure firstly, at the time of Registration of the private institution (school) and secondly, at the time of Renewal of Registration after every three years as per Rule 6 of Rules, 2005. Sub-rule (2) of Rule 7, provides **that fee schedule once approved by the Competent Authority, shall not be increased at any time during the academic year**, which means that the fee structure of any private institution (school) approved in terms of sub-rule (1) of Rule 7 by the competent authority, cannot be increased during the same academic year for any reason whatsoever, and the private institution (school) are required to charge the same fee during entire academic year from its students. Sub-rule (3) of Rule 7 provides **that the tuition fee can be increased upto 5% only of last fee scheduled, however, subject to proper justification and approval of the Registration Authority**. This increase however, is not permissible during the academic year and can be allowed after expiry of academic year, therefore, can be treated as yearly increase in tuition fee upto 5% of last fee scheduled, subject to approval of the Registration Authority. This yearly increase of fee appears to be in addition to fixation of fee structure/schedule at the time of Registration and Renewal of Registration of a private institution(school) after every three years, whereas, in the parent Statute, there seems no provision, which may permit any private institution(school) to increase the tuition fee annually after every academic year. However, in terms of Section 15(2)(c) of Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, the Government has been delegated the powers to make Rules and also to provide for **provisions of facilities to**

students, fixation of tuition fee and other sums to be realized from the students of the institution(school), therefore, yearly increase of tuition fee upto 5% of last fee schedule, however, subject to proper justification and approval of the Registration Authority, is not outside the purview, or in conflict with, the provisions of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001. Similarly, restricting the increase of yearly fee upto 5% of last fee schedule is also not in violation of, or in conflict with, the provisions of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, or the provisions of Article 18 of the Constitution for the reason that right to carry on any trade, business or profession is subject to **qualifications as may be prescribed by law**, and also subject to such **Regulations**, which includes **reasonable restrictions** and even **prohibition**, if any. It is pertinent to mention here that at the time of Registration of Institution(School), such institution is at liberty to prepare the entire feasibility, and to calculate and determine the proposed fee structure/schedule to be charged from the students and get its approval from the Government/Registration Authority, whereas, they can repeat such exercise by revising the fee structure/schedule after every three years at the time of Renewal of Registration as well, however, subject to justification and approval by the Competent Authority. We are of the opinion that such authority given to the private institution(school) **firstly**, at the time of initial Registration, and **secondly**, at the time of Renewal of Registration after every three years, subject to justification and approval by the Competent Authority, does not in any manner, violate their right to carry on their any business/profession/occupation of running private institution (schools), as guaranteed in terms of Article 18 of the Constitution. Moreover, in addition to aforesaid right to determine and to seek approval of their fee structure/schedule in the above terms, further opportunity has been provided to the private institution(school) to seek yearly increase in the tuition fee upto 5% of the last fee schedule, however, subject to justification and approval of the Registering Authority. Such increase in the school fee upto 5% is certainly, an additional benefit made available to the private institution(school), however, to the disadvantage to the students, as it creates an additional financial burden upon the students and their parents every year, therefore, cannot be treated as a **unreasonable restriction** upon the right of private

institution(school) as guaranteed in terms of Article 18 and 25 of the Constitution in any manner. Nothing has been placed before us, which may suggest that the provisions of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, particularly, Section 6 of the Ordinance, 2001, or the provisions of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, particularly, Rule 7 of the Rules, 2005, are unconstitutional or contrary to Article 18 of the Constitution. It needs no reiteration that right to life includes right to education, therefore, it is one of the Fundamental Rights of every citizen of Pakistan, whereas, in terms of Article 25-A of the Constitution of Islamic Republic of Pakistan, 1973, it has now become the duty of the State, to be performed through Government(s), to provide free and compulsory education to all the children of the age of five to sixteen years in such a manner as may be determined by law. However, unfortunately, Education Sector is being neglected throughout by all the Governments during last seventy (70) years, whereas, a nominal percentage in budget is allocated to Education Sector, whereas, most of which either remains unutilized or the same is misappropriated by unscrupulous officials through menace of corruption. This constant lack of interest towards educating our children has not only destroyed the Public Education Sector of the country at one hand, but also created a vacuum in the Education Sector, which has encouraged the Private Education Sector to enter into this lucrative business/occupation, whereas, in most of the cities of Province of Sindh, it has acquired the status of a high profit earning industry. Such private schools operate in such a manner that they dictate their own terms by charging fee of their choice, having least control or supervision by the Government. Though by induction of private educational institutions(schools) in the education sector, the burden of the Government to provide compulsory education to all the children has been reduced to certain extent, however, at much higher cost and huge financial burden to be borne mostly by middle or lower middle class families, who are compelled to provide basic education to their children in the private institutions (schools) even on payment of exorbitant amount of fee charged by the private schools. The prime reason for the growth of private education institution is that Public Sector has miserably failed to fulfill such constitutional commitment of providing compulsory free education or to provide quality

higher education also to the children at some affordable cost to be fixed while keeping in view, the prevailing economic conditions, per capita income of an individual, and the poverty level subsisting in our country for the last many decades. To achieve above constitutional mandate, Government is required to put all possible efforts to improve the public education sector by increasing the education budget in the first plan, and to formulate a uniform education policy for both public and private education sector, however, in such a manner that there shall be no difference in the quality and standard of education provided by public and private education institutions (schools), whereas, the private sector needs to be regulated in such a manner that, while permitting them to carry on the business/occupation of running private institutions(schools), they shall keep in mind the Constitutional mandate as given under Article 18, 25 & 25-A of the Constitution, and shall ensure to charge a reasonable amount of tuition fee from the students, which shall not only be affordable but the same shall commensurate to the services being provided to the students, whereas, "profit motive" must yield to the "service motive" in the private education sector also. We are of the view that parting knowledge is otherwise a divine service, whereas, providing education is a noble task, which must not be treated at par with some profit earning business or profession, having no element of service to the children of our country, particularly, when Right to free compulsory education has been recognized as one of the Fundamental Rights under Article 25-A of the Constitution. The ultimate constitutional mandate of providing social justice and free education to all the children of Pakistan cannot be compromised while regulating the private education sector, and it has to be ensured that the element of **reasonableness** in charging tuition fee from the students, shall always be kept in mind, so that students may be in a position to continue their studies in such private institutions (schools) on payment of affordable tuition fee, which shall not be permitted to be increased every year nor it shall be left un-qualified and un-regulated at the hands of private education sector.

27. It will not be out of place to refer to a famous judgment of the Hon'ble Supreme Court in the case of **Elahi Cotton Mills (supra) PLD 1997 SC 582**, wherein, while expounding certain principles of interpretation of Constitution and the Statute with particular reference to the challenge to the vires of any law, rule or regulation, the Hon'ble Supreme Court has been pleased to hold as under:

"(iii) *That Frankfurter J., in Morey v. Doud (1957) U.S. 457 has remarked that "in the utilities, tax and* ***economic regulation cases****, there are good reasons for* ***judicial self-restraint*** *if not judicial deference to the legislative judgment";*

(viii) *That while interpreting Constitutional provisions* ***Court should keep in mind, social setting of the country, growing requirements of the society/nation, burning problems of the day and the complex issues facing the people****, which the Legislature in its wisdom through legislation seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid.*

(ix) ***That the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of a legislation*** *keeping in view that the rule of Constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of a Constitutional provision."*

As we have already observed that, in terms of Article 18 of the Constitution, the right to carry on any trade, business or profession is subject to **Qualification** and **Regulation** as may be prescribed by law, whereas, there is a presumption in favour of constitutionality of the legislative enactment. However, such Law, Rule or Regulation can only be declared as unconstitutional, **if it is arbitrary, discriminatory or demonstratively irrelevant to the public policy**. Reliance in this regard can be placed on Divisional Bench judgment of this Court in the case of ***Pakistan Broadcasters Association and 10 others v. Pakistan Electronic Media Regulatory Authority through Chairman and another (PLD 2014 Sindh 630)***, wherein, it has been held as under:-

"The competent authority is at liberty to regulate its affairs and unless such regulation is arbitrary, discriminatory or demonstrably irrelevant to the policy, which the legislature is free to adopt, ***cannot be interfered on the grounds of mere commercial expediency or some financial implications****, as have been argued by the counsel for the petitioners in the instant case."*

In the above petitions, challenge to the vires of the provisions relating to putting a upper cap of 5% on the Annual increase in tuition fee is based on two grounds i.e. that in terms of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, no restriction can be imposed on trade, business or profession, whereas,

private Institution (school) require Annual increase to meet the commercial expediency i.e. rise in rent of premises, increase of teachers' salary, and also increase in taxes and utility charges etc. However, it could not be established that 5% upper cap on the Annual increase of tuition fee is arbitrary, discriminatory or contrary to public policy, or does not qualify the test of being a **reasonable restriction,** which is otherwise permissible under the Article 18 of the Constitution, to obligate the constitutional rights, including the right to carry on any lawful trade, business or profession, however, subject to **qualification** and **regulation** as may be prescribed by law.

28. To sum up hereinabove discussion, and while keeping in view the ratio of the judgments of the Hon'ble Supreme Court as referred to hereinabove, relating to subject controversy, we hereby declare as under:-

I) The right to carry on any lawful trade, business or profession as guaranteed under Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, is a fundamental right of every citizen of Pakistan, however, is not absolute or unfettered right as it is subject to qualifications, regulations and reasonable restrictions, as may be prescribed by law.

II) The judgment of the learned Divisional Bench of this Court in the case of Shahrukh Shakeel Khan and others v. Province of Sindh and others (***2018 SBLR Sindh 922***), to the extent, whereby, it has been held that "*provisions of Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005 are ultravires to Article 18 of the Constitution, as it provides one-stage procedure, which is constitutionality impermissible, and further, that the right to carry on any lawful trade, business or profession as guaranteed under Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, is not subject to reasonable restriction, as permissible under Article 19(1)(g)(6) of the Indian Constitution*", is not in conformity with the judgments of the Hon'ble Supreme Court. in the case of ***East & West steamship C v. Pakistan (PLD 1958 SC (Pak) 41), Pakcom Limited v. Federation of Pakistan (PLD 2011 SC 44), Tariq Khan Mazari v. Government of***

Punjab (PLD 2016 Sc 778) and 7 member judgment of Arshad Mehmood (PLD 2005 SC 193), Pakistan Broadcasters Association and 10 others v. Pakistan Electronic Media Regulatory Authority through Chairman and another (PLD 2014 Sindh 630) and Pakistan Broadcasters Association and others v. Pakistan Electronic Media Regulatory Authority and others (PLD 2016 Supreme Court 692), therefore, does not lay correct law on the interpretation of Article 18 of the Constitution as well as on the vires of Rule 7(3) of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, hence of no legal effect.

III) Accordingly, it is declared that provisions of Section 6 of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, and Rule 7 of the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, particularly, sub-rule (3) of Rule 7, do no suffer from any constitutional defect or legal infirmity, hence the same are **intravires** to the Constitution and Law. The plea raised on behalf of private institutions (schools), challenging the vires of aforesaid provisions of law and rule is hereby rejected.

IV) Consequently, the relief sought by the students in above Constitutional Petitions, seeking declaration to the effect that the impugned enhancement by the private institutions (schools) in the Annual tuition fee, without approval of the competent authority and in violation of the provisions of the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001 and Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, may be declared to be illegal, is hereby accepted, and **it is declared that the impugned enhancement in the Annual tuition fee, over and above 5% from the last fee schedule, by the private institutions (schools) is illegal and without lawful authority**, therefore, private institutions (schools) are directed to either to refund the amount of tuition fee collected in excess of 5%

from the last fee schedule, to the petitioners within three months from the date of this order, or to adjust the said excess amount against future monthly fee of the students, however not beyond the period of three months.

The above petitions are allowed in the aforesaid terms along with listed applications.

Before parting with this judgment, we may clarify that the declaration as made hereinabove shall apply **in rem** to all the students, and the private institutions (schools) which are governed under the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001, and the Sindh Private Educational Institutions (Regulation and Control) Rules, 2005, and have enhanced annual fee in excess of 5% of last schedule fee in violation of law and rule, for the reasons that through instant judgment, we have decided a legal controversy regarding constitutionality of above provisions of law and rule, and also the validity of the impugned enhancement of Annual tuition fee by private institutions (schools).

Sd/- Aqeel Ahmed Abbasi
Judge

GE

Sd/- Muhammad Ali Mazhar.
Judge.

GE

Sd/- Akhtar Jahan
JUDGE

SEAL OF THE HIGH COURT OF SINDH

Announced by us

3/9/2018

Nadeem 3/9/2018

CERTIFIED TO BE TRUE COPY

05/9/18.

Assistant Registrar (Copying)

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