

IN THE HIGH COURT OF SINDH, KARACHI

**Present: The Chief Justice
Mr. Justice Zulfiqar Ahmad Khan**

Const. Petition No.D-5812 of 2015

(Shahrukh Shakeel Khan & others

vs.

Province of Sindh through Chief Secretary, Sindh and others)

Const. Petition No.D-5651 of 2015

(Generation's School (Pvt.) Ltd

vs

Province of Sindh through Secretary, Education, Government of Sindh)

Const. Petition No.D-6171 of 2015

(Syed Shah Wajid Hussain & another

vs

Province of Sindh through Chief Secretary, Sindh & others)

Const. Petition No.D-6219 of 2015

(Syed Moiz Ishaq and others

vs

Province of Sindh through Chief Secretary, Sindh & others)

Const. Petition No.D-6383 of 2015

Tehseen Muzammil and others

vs

Province of Sindh through Chief Secretary, Sindh & others)

Const. Petition No.D-6943 of 2015

(Mrs. Kiran Nadeem

vs

Province of Sindh through Chief Secretary, Sindh & others)

Const. Petition No.D-5867 of 2015

(Syed Muhammad Ali and others

vs

Province of Sindh through Secretary, Education and Literacy Department
and another)

Const. Petition No.D-7390 of 2015

(Muhammad Imran Maqbool

vs

Province of Sindh through Chief Secretary and others)

Const. Petition No.D-7901 of 2015

(Azmat Hussain

vs

Province of Sindh and others)

Date of Hearing : 09.09.2016
Petitioners : Through Mr. Abdur Rehman, Advocate for
Petitioners in C.P No.D-5867/2015
: Mr. Salahuddin Ahmed, Advocate for the
Petitioner in C.P No.D-6219/2015
: Ms. Mehreen Ibrahim and Mr. Shajee
Siddiqui, Advocates for Petitioners in

C.P No.D-5812, 6171, 6219, 6983, 6943
& 7390/2015

- : Mr. Haris Rasheed Khan, Advocate
alongwith Petitioner Sardar Azmat
Hussain in C.P No.D-7901/2015
- Respondents : Through M/s. Jam Asif Mehmood,
Saim Hashmi and Ms. Zahrah Sahar Viyani,
Advocates [Generation School (Pvt.) Ltd]
alongwith
Mr. Shoaib Siddiq, Administrator
- : Khawaja Shamsul Islam, Advocate for
Respondent No.2 in C.P No.D-5867/2015
- : Mr. Kazim Hasan, Advocate [Beacon
House School Systems]
- : Mr. Mustafa Mahesar, AAG
- : Dr. Mansoob Hassan Siddiqui,
D.G Private Institution Sindh

JUDGMENT

Zulfiqar Ahmad Khan, J: In all of the above petitions there is commonality of issues raised about hike of fees by private schools *vis-a-vis* schools' right to such a hike; questioning the mechanism provided by the provincial government for regulating such fee increases.

Law related to the regulations of private schools in the province of Sindh is contained in the form of Sindh Private Educational Institutions (Regulations and Control) Ordinance, 2001 ("the Ordinance") and Sindh Private Education Institutions (Regulations and Control) Rules, 2002, ("the rules"). The contention of the students/parents in nutshell is that the private educational institutions are taking the parents to ransom by unusually enhancing the school fees as and when they deem convenient; and the government's regulatory mechanism i.e. Department of Education, Government of Sindh has not come forward to check the same and have thereby failed to perform their legal and constitutional obligations. On the hand, the counsels for schools vehemently challenged

the vires of legislation in terms of which schools are barred from escalating their fee from 5% within an academic year.

Since the matter touches to the hearts and soul of every parent, it would be appropriate that our discussion commences citing Article 25-A of the Constitution of Pakistan 1973 inserted by the 18th Amendment with the intent of giving education as one of the fundamental rights of the people of Pakistan. The article provides that “the State shall provide free and compulsory education to all children of five to sixteen years in such a manner as may be determined by law”. Though this importance given to education is quite recent in the constitutional history of Pakistan, however, importance of seeking knowledge (*Illm*) has been part of Islam which is evident from the injunctions of the Holy Quran directing people to seek *Illm*. Also of importance is Article 22(3)(b) which provides that “no citizen shall be denied admission to any educational institution receiving aid from public revenue on the ground only of race, religion, caste or place of birth”. As well as, it would also be useful to reproduce Article 18 from the Constitution here which, in its relevant part, provides that “subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business”.

Just a glance of the above referred constitutional provisions depicts that while the state has the primary responsibility to establish educational institutions, it also have the duty to efficiently secure operation of educational institutions at the same time regulated through appropriate regulatory mechanism. From the submissions made before us, it was not hard to deduce that charging of increased school fees coupled with the alleged failure of the education department in regulating private schools, the rift between these two sides is growing with every passing day and at

the same time the failing role of state to impart education through public schools is also giving impetus to private individuals to fill this vacuum resulting in mushroom growth of private schools throughout the country.

Hearing school's side of story, the charge of increase in fees was defended by making suggestions that the cost of running and operating private schools since largely depends on the facilities provided therein and the level and expertise of teachers, with increasing cost of utilities (electricity and water, conservancy, etc.) and rate of taxes coupled with the fact that private school being treated as industrial and commercial entity and taxed accordingly, seem to have opposite force.

To the contrary, allegations leveled against the private schools include charging astronomical admission fees, random demands of money for school projects, sale of books, bags, uniforms and others items either sold at higher prices by the schools themselves or through certain specific outlets seemingly having some sort of alliance with the schools' management.

More recently, throughout the country, schools have to afford higher costs as they have to install effective security measures, as well as, the government coming with revised enhanced minimum wages, and induction of free education students under compulsory education laws are also raised as plausible grounds in private school's defense.

Notwithstanding therewith, the parties across the board agree that private schools should not be allowed to fleece the parents by raising fee unreasonably and refusing to obey the rules of law. Many a times parents take head-on collision with school's management and reach courts seeking relief against private schools from charging excessive fees, which has also happened in the instant case.

To give a more in-depth legal perusal to the issue of the legal framework designed for the creation and operation of private schools, we commence our review with the Ordinance, which enlightens us to the following:-

- (i) The Ordinance defines institutions to include private managed school and the term “private managed” means not owned or managed by Government or by anybody or authority set up or controlled by the Government.
- (ii) Section 3 restricts operation of any institution, except in accordance with the provisions of the Ordinance.
- (iii) In terms of section 4, a mechanism has been provided for the registration of a new institution, as well as registration of an existing institutions.
- (iv) Term “Registering Authority” is introduced in the Ordinance to mean Director of School Education of the relevant region. The Registering Authority is given powers under section 5.
- (v) When an application for registration of a private school is made and before a registration certificate is granted, the law requires that the following consideration must have to be complied with:
 - (a) No donation, from a student, voluntary or otherwise, for development projects of an institution shall be permissible;
 - (b) the fee structure of an institution shall not be interfered with by the Registering Authority, but fee shall not be increased during the course of an Academic year;
 - (c) the facilities allowed to a student at the time of admission shall not be subsequently withdrawn.
- (vi) Pursuant to section 7, it is a responsibility of the Registering Authority to set up monitoring teams in order to have periodical inspection of the institutions with regards school’s compliance with the

provisions of the Ordinance, the rules and other terms and conditions of the Certificate of Registration issued;

- (vii) Section 8 empowers Registering Authority to cancel or suspend any Certificate of Registration after making such inquiry or inspection as it deem fit and after having satisfied itself that no contravention of any of the provisions of the ordinance and rules or terms and conditions of the registration has been made. It is pertinent to mention that the cancellation proceedings could also start upon receipt of a complaint, or otherwise;
- (viii) Section 10 provides that the institutions shall furnish to Government each year report annual audit accounts report on the activity of the institution during the preceding year; and
- (ix) Section 17 repeals the Sindh Registration of Un Recognized Educational Institutions Ordinance, 1962.

While the Ordinance seems to create a skeleton of the mechanism set up for the registration and of operation of private schools, it would not be out of place to bring to surface key issues which the said mechanism does not cater for, which inter alia include:-

- (a) Does the school has sufficient seed funds to ensure its functional set up like payment of salaries and allowances to its teacher and employees; and
- (b) Does it has the teachers with prescribed qualifications?

Having considered the key features of the Ordinance, we now look at the some of the relevant provisions of the Rules.

- (i) Pursuant to rule 3, before registration is accorded to a school, the committee is required to enquire into the following issues:

- (a) Suitability of the location of the institution;
 - (b) availability and suitability of infra-structure provided by the institution including, building, class rooms, furniture, equipment, laboratory, library , playground, canteen, safe drinking water and clean functional toilet facilities;
 - (c) suitability, adequacy and service condition of the teaching and non-teaching staff;
 - (d) arrangement for compulsory physical training and sports;
 - (e) courses of study adopted by institution and standard of education and discipline;
 - (f) suitability of tuition fees and any other subscription charged from students; and
 - (g) ratio of students teachers in the institutions.
- (ii) Pursuant to rule 5, registration certificate to an institution is initially granted for a period for three years on the terms and condition mentioned therein and per rule 6, the certificate of registration may be renewed for period of three years upon satisfaction with the working and curricular activities of the institutions.
- (iii) Fee structure of schools is provided in rule 7, which is reproduced in verbatim hereunder:
- (a) The Inspection Committee shall recommend the fee structure of an institution after a detailed inspection of the institution at the time of registration of the institution to the registering Authority.
 - (b) The fee schedule once approved, shall not be increased, at any time during the academic year.
 - (c) The fee may be increased up to five percent only of last fees schedule subject to proper justification and approval of the Registration Authority.

- (d) Any fee other than tuition fee shall be charged only after approval from the registration Authority subject to the condition that not fee, charges or voluntary donation would be charged by the institution on Account of any development activity.
- (iv) The institute shall ensure that all the conditions of admission along with schedule of fees dully approved by the registering authority shall be printed on the prospectus or on the admission for and shall be provided to the parents or guardians at the time of the admission.
- (v) 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.
- (vi) The institutes shall ensure that admission fee is charged from the student only at the time of his first admission in to the institution which shall not be more than three months tuition fees of the respective class in which the student is admitted.
- (vii) Per rule 10, minimum salary and allowances of a full time teacher except in the case of institution running by the trust or communities are required to be not be less than four times the monthly fee of the single student in the highest class charged by the institution and the scale and allowances of non-teaching staff of the institution shall be at least at par with the respective Government pay scales.
- (viii) As per rule 13 the institution are required to allow fee concession to deserving students and award scholarships to students having meritorious record; provided that at least ten percent of the total strength of the students in the institution shall be granted full free ship.
- (ix) Rule 14 requires institutions to have a fund, to which shall be credited: (a) income from fees, donations,

grants in-aid given by Government; (b) income from the property of the institution or from any other sources; and (c) contribution by the institution.

- (x) As per rule 18, the registering authority on receipt on the complaint or information regarding a dispute arising between an institution and parents or guardian of a student of the institution or between an institution and its teachers or other members of staff is required to institute an enquiry committee comprising of such number of members from civil society and the officers of the Education and literacy Department as it deems fit. The committee is required to enquire into the dispute and submit its finding along with its recommendations to the Registering Authority within thirty days from the date of order issued to it.

Substantial arguments on behalf of the schools were put forward by Mr. Jam Asif Mehmood, counsel for the Generation School (Pvt.) Ltd in C.P No.D-5651/2015 where he challenged the vires of sub-rule 3 of the rule 7 alleging that the said sub-rule is in violation of the freedom of commerce guaranteed under Article 18 of the Constitution on grounds that through the said sub-rule, freedom of commerce has been attacked by fixing prices of the goods and services, as state cannot fix the prices of the goods and services. The counsel contended that the private educational institutions ought to have autonomy in its administration and financial affairs including fixation of the fees to enable them impart education at the highest standards and since these institutions do not receive any aid from the Government, imposition or fixation of school fees is unreasonable, because it directly amounts to intrude into the private affairs of these educational institutions. The learned counsel also submitted that the above referred sub-rule is also discriminatory, because no such prices have fixed for other like social sectors including, health and

entertainment; therefore being discriminatory, it also violates Article 25 of the Constitution.

While the entire thrust of the learned counsel's submission was to challenge the vires of the said sub-rule, however when the Court asked him how would he react if the figure of 5% annual increase as provided for in the said sub-rule would have been increased to 15% or 20%? At this juncture, the learned counsel was unable to provide any suitable assistance, and we gather therefrom that the very objection of the learned counsel is not on the mechanism of setting of maximum increase in fees under sub-rule 7(3), rather it is on the amount specified as 5%, which per counsel, is not at par with other competing business of the health and entertainment, that makes it a question of determination of facts and taking of evidence which cannot be exercised by this court in writ jurisdiction. The learned counsel also agitated by making reference to Article 25(A) of the Constitution and submitted that whence state is failing to perform her obligation under the said Article of providing free education to every child, she is trying to shift her onus towards private educational institutions and attempting to reduce profitability thereof to bare-minimum, which is unhealthy for the private educational sector, therefore, such an act of the state is also full of mala fide. The learned counsel also submitted that the said 5% increase is not in line with the annual rate of inflation, which usually stays in double digits.

In support of his contentions the learned counsel relied upon the outcome of the Writ Petition bearing No.3178 of 2015, where the Hon'ble Islamabad High Court set aside a similar notification issued in respect of constrained increase in school fees and submitted that in the instant petition of identical nature, the court should also pass orders to remedy the restriction imposed under sub-rule 7(3) restricting annual school fees

increase to mere 5% per annum. During the course of arguments, the learned counsel's attention was drawn to paragraph-35 of the above referred Writ Petition, where the Court held that the Notification being illegal and without legal effect, primarily on the ground that rules under the Private Educational Regulation Authority were not framed and the Authority in the absence of these rules, merely issued the impugned notification which at a first glance appears to be a wrong. To contrast, the learned counsel's attention was drawn that in the province of Sindh, above referred rules have already been framed wherein a mechanism has been established where once a school is registered and its fee has been fixed for the next 3 years' term, school can only increase annual fee to a maximum of 5%. However, after the expiry of 3rd year as the school is required to re-apply for its registration (via the established renewal of registration mechanism) and if the school has made substantial investments in the school's infrastructure or in the quality of education imparted to the children, school can ask for the enhancement of initial slab fixed at that grant of the registration certificate, and once the slab has been elevated, school for next three years can only increase fees for not over 5% per annum. However, once again after the expiry of this 2nd term of 3 years, school can apply for re-registration/renewed with enhancement of the original slab if the merit dictates. Therefore, facts of the Islamabad case are completely different and distinguishable as no rules were made by the Authority there and the notification was issued in the absence of rules, thus court rightly cancelled the notification and ordered that rules be framed before any such notification is issued.

These assertions of the learned counsel for the schools were vehemently challenged by learned counsel for the parents/students, who submitted that the rules adequately provided a mechanism for increasing

tuition fees in a dynamic fashion, which per counsel, is not comparable with any other social sector. The learned counsel further submitted that the Constitution does not grant absolute freedom rather that the rights granted have to be properly regulated through a legislative mechanism, which has been created through the above referred ordinance and rules. Per counsel, before their enactment, these provisions were sufficiently debated and from the perusal of the above legislation, it is very clear that the stakeholders were consulted who tendered valuable assistance to create a sustainable mechanism for the operation of private schools keeping a balance between the interest of the school owners and the students/parents. Per counsel such mechanism is lot more liberal then available to any other profession. The learned counsel while going to the example of 'cup of tea' (as placed before this court by the learned counsel of the schools that depending on one's choice, one can have a cup of tea at a local *dhaba* for Rs.20 and at a five star hotel for Rs.500) the learned counsel for the patent/student submitted that while the price of 'cup of tea' is not regulated, however, prices of sugar, as well as, milk are regulated. Therefore, no sector is left to the mercy of the private profiteers to fix prices at their own freewill, and in particular, since education is a basic need and not an industry, still the mechanism provided by the above referred legislature, if used effectively, can give reasonable return on investment (RoI) to private enterprises, who establish such educational institutions. Giving the example of large number of group of colleagues and school chains, the learned counsel submitted that as a matter of fact this (education) sector seem to have made more profits than any other sector in the country since statistical data-analysis can visibly prove that no business has shown so much growth, which private educational sector has shown over the years in very length and breadth of the country.

The learned counsel contended the above mushroom growth of private schools making a windfall of profits is only because the mechanism provided for the restriction to 5% increase and renewal/re-registration of the schools after every 3rd year is neither adhered by the schools, nor enforced by the department. One such example was shown to us by Mr. Abdur Rehman, counsel for the petitioner in C.P No.D-5867/2015, where school fees were increased over 100% in the last few years. Per counsel, such act of schools is like taking parents a hostage since schools having made cartels know that it would not be any easy task for the parents to take children away from one school and have them admitted in another. The learned counsel also submitted that children and the parents, who reach courts against such illegal fee enhancement face discrimination from the school management. Mr. Rehman submitted that in the case of Generation School, where more than 400 parents have been united against the (unreasonable) enhancement of school fees, students of those parents who have come to this court are discriminated against to the extent that these children are placed in isolated sections and sometimes these children are not even allowed to leave classrooms during the interval. Per counsel, such students are treated as 'untouchables' and they are not encouraged to participate in any extracurricular activities arranged in or outside the school, as well as, their names are not forwarded for and citywide, inter-provincial or international events and competitions. Relying on the statement submitted by the said school, where details of the number of students in various classrooms have been provided, the counsel led us to traverse the same to reach to a shocking finding that out of over a dozen of classes only 24 contesting students have been placed along with the large number of contesting children, while factual findings cannot be given in writ jurisdiction, one wonders that placement of the

children in such discriminatory way must have caused agony which eventually would hamper social and mental development these children. Other counsels presenting children and parents of children adopted arguments of Mr. Rehman.

Heard the counsel, perused the record. The present controversy which is dividing contesting parents and schools away from each other by every passing day has not come by surprise as it could be seen, with the increasing trend of schools having once established a branch, speedily proceeding to open a series (and groups) of branches in various parts of the city, province or throughout the country appears to be the result of lack of enforcement of regulations as provided by the above legislature. The school management seems to funnel the funds received from one (milking) branch of the school to set up new branches, with the defense that it has been so done in the interest of better utilization of the funds and to reach a level of desired number of student so the school can operate with stability (this line of argument sounds too familiar and repeated umpteen times when negotiating the number of franchises to be allowed by a master franchisor of fast food restaurants – the business term for such profiteering is called the economy of scales (EoS)). This EoS seems to be an outcome of utter commercial mindedness of private school owners and criminal failure of the regulators to force schools from taking profits from one school and investing them into another.

In this regard it is pertinent to mention that under Indian school management laws, schools are barred from shipping profits from one branch of school to other branches or to new business ventures of the owners. Idea behind such policy is that even if profits are made by schools, they are re-invested in the same school for making infrastructure better therein and by bringing more experienced teaching staff, rather

than milking the parents and sending profits to create a chain (or group) of schools or colleges, which is quite common in our country.

Also, school management whenever posed with the question of increasing fee, always respond that the fee charged commensurate with the facilities provided by the school and to maintain standard of education imparted by them. They claim that their business method is based on the open market principle of “you get - what you pay for”, which is a shameful admission in respect of the noble profession of imparting of education.

To conclude:

(a) with regards ultra vires of sub-rule 7(3) as stated in the foregoing, the grievance of the schools is not on the mechanism of such increase, rather it is on the quantum (5%) of such increase, thus the question is about the determination of this percentile which requires taking into consideration of many factors like cost of doing business, minimum salaries payable, taxes, cost of utilities etc., requiring consideration of facts and taking of evidence, which is beyond the scope of the writ jurisdiction as being agitated by the private schools in the present petitions and as such no illegality has been shown that above sub-rule is inherently violative of Article 25 of the Constitution, thus such petitions of schools are dismissed;

(b) with regards arbitrary increases in fees by private schools, it is evident from the foregoing discussion that the current mechanism provided for in the form of the said Ordinance and rules though looks glossy, however, the loggerhead position of parents against the schools and *vice*

versa is a clear depiction of the fact that private schools are not following the said mechanism and there is no compulsion on these to do so from the Department. It is painful to note that no statement has been provided by the Department as to its receipt of each year's audited accounts report from private schools and its enforcement of the restricted 5% increase of the tuition fees. Department to strictly act in accordance with law and to ensure compliance of the rules and regulations and submit quarterly reports to this court in respect of such audit and 5% rule. Petitions filed by parents/students are thus allowed in the term that respondent schools shall only increase tuition fees no more than 5% per annum from the date of their registration for three years and in case there has been no re-registration after the said period of three years, fees shall not be increased unless school re-registers itself; and

(c) The respondent schools who have increased their tuition fees 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 Sub-rule 7 (3) of the Rules 2002 .

Dated: 7th October, 2016

Judge

Chief Justice