

IN THE HIGH COURT OF SINDH AT KARACHI

**Present:
Mr. Justice Muhammad Shafi Siddiqui**

Judicial Company Misc.No. 29 of 2020

Dr. Amir Bux Channa & another

Versus

Isra Islamic Foundation (Guarantee) Ltd. & others

Date of Hearing: 06.09.2022, 22.09.2022, 29.09.2022,
04.10.2022, 05.10.2022, 06.10.2022,
07.10.2022, 10.10.2022, 12.10.2022 and
13.10.2022

Petitioners: Through M/s. Arshad Tayebally and Omer Memon Advocates.

Respondent No.1: Through Mr. Raashid Anwar Advocate.

Respondent No.2: Through Mr. Mamoon N. Chaudhry Advocate.

Respondent No.3: None present.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- Before I start considering the respective arguments of the counsels¹ who assisted me, I feel necessary to give a brief history that led to these multiple disputes amongst the educators.

2. Prior to formation of respondent No.1 i.e. Isra Islamic Foundation (IIF) under the Companies Law, a raw idea was conceived by a group of individuals working in Saudia Arabia, who later claimed themselves as founding members of respondent No.1. This group was able to convince those who matters in Kingdom of Saudi Arabia and the idea of these individuals was initially forwarded by Imam and Khateeb of Holy Mosque i.e. Sheikh Muhammad Subail Abdullah who on 20.06.1986 claimed to have laid down the foundation stone. This event was then followed when the purported founding members approached Mufti-e-Azam Abdul Aziz

¹ (1) M/s. Arshad Tayebally and Omer Memon, (2) Mr. Salahuddin Ahmed, (3) Mr. Shabbir Shah, (4) Mr. Raashid Anwar, (5) Mr. Ali Almani, (6) Mr. Ayan Mustafa Memon and (7) Mr. Mamoon N. Chaudhry Advocate.

Bin Abdullah i.e. the General Director for Scientific Research Initiative Advocacy in Saudi Arabia who issued certificate of notification on 25th Moharram 1409 Hijri/7th September, 1988. These founding members then carried this certificate of Mufti-e-Azam with them to all mosques of Riyadh, Jeddah and Dammam etc. During Jumma prayers the Imams of different mosques were then used to deliver Sermons to apprise people about the foundation of this charitable institute and convince them for donations. Those Nimazis and pilgrims, influenced and convinced, contributed whole heartedly and generously towards the cause. It is claimed that approximately 1.5 Million Saudi Riyals were collected in that period through this campaign. Respondent No.2 claimed to have brought this money in Pakistan and invested, which has now transformed into a fortune and hence the fight among the founders commenced.

3. A statutory entity was then formed as respondent No.1 i.e. Isra Islamic Foundation (Guarantee) Limited on 28.08.1990 (IIF) to bridle this fortune collected by them. It is now that so called founding members have their respective disagreement over the fortune that led to filing of not only this JCM but as a sequel to it, numerous suits have been filed; summary of which is as under:-

S. No	Suit No.	Parties	Date of filing	Subject matter
1.	Suit 1841/2020	UMER KAZI & OTHERS V. ASADULLAH KAZI & OTHERS	24-Nov-20	Plaintiffs seeking declaration, permanent injunction that Impugned notifications are illegal (Impugned letter dated 19-Oct-2020, whereby Isra University (herein after referred as "IU") asked the Isra Islamic Foundation (herein after referred as "IIF" to withdraw notification nominating the chancellor being without due process. and Notification issued by IU dated 20-Oct-2020, whereby it was clarified to all concerned that nomination regarding Chancellor was not received by IU from IIF and District and Session Judge Hyderabad has granted ad-interim order by restraining Dr. Hameedullah Kazi and Ghulam Qadir Kazi in interfering the university affairs)
2	Suit 1842/2020	UMER KAZI & OTHERS VS ASADULLAH KAZI & OTHERS	24-Nov-20	Plaintiffs seeking declaration, permanent injunction that Impugned notifications are illegal (Impugned letter dated 19-Oct-2020, whereby Isra University (herein after referred as "IU") asked the Isra Islamic Foundation (herein after referred as "IIF" to withdraw notification nominating the

				chancellor being without due process. and Notification issued by IU dated 20-Oct-2020, whereby it was clarified to all concerned that nomination regarding Chancellor was not received by IU from IIF and District and Session Judge Hyderabad has granted ad-interim order by restraining Dr. Hameedullah Kazi and Ghulam Qadir Kazi in interfering the university affairs)
3	Suit 1872/2020	UMER KAZI & OTHERS VS ASADULLAH KAZI & OTHERS	24-Nov-20	Impugned Notifications of IU dated 24.10.2020 (abolishment of Pro-Vice Chancellors Positions), 03.11.2020 (Fixation of the Salary of VC), 17.11.2020, (Disciplinary Action/Termination from Service of Prof: Dr. Hameedullah Kazi), 17.11.2022 (Office Order that those members/Director of IIF working in IU will have same pay and benefits as entitled to others) and 20.10.2022 (Show cause Notice to Mr. Ahmed Waliullah Kazi) as ultra Vires to Isra University Act-1997, seeking permanent Induction for any actions to be taken on basis of above notifications
4	Suit 1873/2020	AHMED WALIUULLAH KAZI VS NAZIR LEGHARI & OTHERS	27-Nov-20	Plaintiffs seeking declaration, permanent Injunction that he was lawfully appointed As Acting VC of IU
5	Suit 810/2021	NAZEER ASHRAF LAGHARI & ANOTHER VS UMAR KAZI & OTHERS	27-Nov-20	Plaintiffs seeking declaration and permanent Injunction that 1.officers and authorities are responsible for affairs of IU and not Defendants. 2. Plaintiff No:1 is on tenure post and cannot be removed or suspended 3. Plaintiff NO.2 is the registrar of IU. That Defendant be restrained from removing them
6	Suit 2383/2021	ISRA UNIVERSITY VS ISRA ISLAMIC FOUNDATION (GUARANTEE) LIMITED & ORS	1-Apr-21	Suit for Declaration and Permanent Injunction, filed on behalf of IU, that all affairs be governed and managed by university and defendants be restrained to interfere or disposing any property of IU. (20 Prayers)
7	Suit 2604/2021	ISRA UNIVERSITY & OTHERS VS ASADULLAH KAZI & OTHERS	14-Oct-21	Plaintiff impugned 3 Show causes dated 04-08-2021, issued by defendant 3 (As registrar) as per decision of BoG to Plaintiff no 2 to 4, seeking suspension of these notifications.
8	Suit 2604/2021	NAZEER ASHRAF LEGHARI VS PROVINCE OF SINDH & OTHERS	10-Nov-21	/mpugned Notification (Circular) of IU dated 05.11.2021,with subject "UPDATE OF ISRA UNIVERSITY" that Mr.Assadullah Kazi has accepted resolution of the BOD of IIF dated 18-10-2020 and withdrawn his petition (JCM 29/2020), in consequential effect Mr.Hameedullah Kazi is Chancellor, plaintiff seeking declaration that its without law full Authority and any inductions to Foundations' council of Management in excess of 10 are unlawful and Void ab-initio. That Foundation may be restrained from appointing Chancellor until JCM-29/2020 is decided. That no interference be allowed by Defendants in the performance of plaintiffs function as VC and Acting Chancellor.
9	Suit 3058/2021	ISRA UNIVERSITY & ANOTHER VS DR. NAZIR ASHRAF LAGHARI & ANOTHER	23-Dec-21	Impugned Notification of IU dated 03.11.2021, which states that Chancellor of University Mr.Assadullah Kazi not attending the duties and his whereabouts could not be ascertained, so Mr.Nazir Ashraf Laghari VC in pursuance of section 7 (5) of Act-1997 will perform functions of Chancellor and Impugned Circular dated: 11.11.2021, whereby it was circulated that in terms of Order dated 10-11-2021, passed by Hon'ble High Court in suit 2604 of 2021, Prof: Dr. NAzir Ashraf Laghari VC of IU, remain Acting Chancellor As well . Plaintiff seeking suspension of these notification and circular.

10	Suit 231/2022	ISRA ISLAMIC FOUNDATION (GUARANTEE) LTD & OTHERS VS NAZIR ASHRAF LAGHARI & OTHERS	11-Feb-22	Plaintiffs Seeking declarations that IIF is managing IU through Plaintiff NO 3 and 4 (Chancellor and Acting VC) in accordance with Act 1997, Defendants be restrained to disturb the ingress and egress of plaintiff's. Also seeking submission of list and students and collected fees from 26.11.2020
11	Suit 380/2022	NAZEER ASHRAF LEGHARI VS PROVINCE OF SINDH & OTHERS	2-Mar-22	Plaintiff has challenged the Section 7(1) of the Act regarding Appointment of Chancellor as Ultra Vires to Article 25 and 25-A of the Constitution 1973 and Judgments of superior Courts. On the other hand he has also challenged the appointments of Defendant NO.3 and 4 and their actions being ultra vires to Article 9, 25 and 25-A of the Constitution.(17 Prayers)
12	Suit 1149/2022	PROF. DR. HAMEEDULLAH KAZI & OTHERS VS ABDUL QADIR MEMON & OTHERS	5-Aug-22	Plaintiffs Challenged the Statement given by Defendant no 1 as malicious, defamatory and scandalous .That defendants through different media sources sought parents and students attention and published that persons occupying Islamabad and Karachi Campus are awarding fake degrees and collecting amounts.

4. I have heard learned counsels appearing for the parties and have perused the material available on record of this J.M. 29 of 2020. While I was hearing counsel, I thought of deciding the controversy, as raised in this JCM as this would perhaps serve the purpose. Most of the issues originated have a direct nexus with the proceedings of IIF and the conduct of council members of IIF and it may decide most of the controversies one way or the other. Thus, I propose to decide the main JCM (No.29 of 2020) and all counsel were in agreement to this disposal first.

5. The main document on the premise of which entire set up of ISRA/IIF is based is a certificate enunciating the preamble, true English translation of which is as under:- (Text is as provided and not opposed).

“Dated 25th Muharram, 1409 Hijri

Subject: Certificate of notification for an Islamic center of propagation and those responsible for it in the region of Sindh Pakistan.

All praise is for Allah, to proceed,

The idea of opening an Islamic center started in Sindh Pakistan due to the many difficulties. Islam is belief and methodology of life, and it will return to being strange amongst people as innovations; polytheistic ideas and destructive schools of thought spread. And when the economic; cultural; social and health level drops the enemies of Islam are able to spread Christianity and their

hidden and destructive ideas among people, at times hiding behind the pretext of medicine, and at other times through the pretext of science and economic aid to those in need.

From this perspective, a group of Islamic educators amongst doctors and others of Pakistani origin working as Professors in Saudi universities came forward and were given support by their colleagues among the Saudi doctors and teachers in bringing about this project aimed at reviving the spirit of tawheed and service to Islam by way of education and cultivation in areas of technology; medical care and social services.

By Allah's praise, the project started, and this group of individuals, through their unique efforts; were able to buy some land approximately 30,366 square meters costing 1.5 million rupees in order to establish a masjid; a school and hospital large enough to contain 300 beds. The foundation rock was laid by Sheikh Muhammad bin Abdullah As-Subayel the imam and khateeb of the holy masjid in Makkah in brief and all praise is for Allah now the phases for implementation of the project have started and some people have participated in this project may Allah reward them immensely.

From what we know of the urgent need of the Muslims for such projects, then we encourage the people of good to contribute to whatever they deem for to the people that are carrying this project forward as they are known to us as trustworthy; up righteous and honest. We ask Allah to give them the ability to carry out this project in the best possible way ad accept their efforts and all those that aid them.

The founders for this project are as follows:

- 1. Dr. Ghulam Qadir Qazi (Pakistani), Head of the Project, Assistant Professor, Department of Ophthalmology, University of King Faisal, Faculty of Medicine and Medical Sciences. P.O. Box 2114 Dammam, KSA.*
- 2. Dr. Yahya Nassir Khawaji (Saudi), Project Secretary, Deputy Head & Assistant Professor, Faculty of Medicine, University of King Faisal. P.O. Box 2114 Dammam, KSA.*
- 3. Dr. Amir Bakhsh Channa (Pakistani), Member, Assistant Professor, Faculty of Anesthesia, Kind Saud University, Riyadh, KSA*
- 4. Dr. Ghulam Hussain Siddiqui (Pakistani), General Secretary of the Project, Co-teacher, College of Engineering, Kind Saud University, Riyadh, KSA.*

5. *Dr. Asadullah Qazi (Pakistani) Member, Professor, Department of Geological Engineering, Faculty of Earth Sciences, Abdul Aziz University, Jeddah, KSA.*
6. *Dr. Nazir Ahmed Laghari (Pakistani) Member, Eye Specialist, Military Hospital, Riyadh, KSA.*
7. *Sheikh Abdul Qadir bin Habibullah Sindhi (Saudi) Member, Lecturer at the Islamic University, Madina, KSA.*
8. *Dr. Aadi Abdul Aziz Arashood (Saudi) Member, Assistant Professor, Department of Ophthalmology, Faculty of Medicine, King Faisal University, P.O. Box 2114 Dammam, KSA.”*

Preliminary issue of maintainability

6. Mr. Omer Memon and Mr. Raashid Anwar have assisted me on the subject issue. The JCM was filed under section 286 of the Companies Act, 2017 by (i) Dr. Aamer Bux Channa and (ii) Mr. Asadullah Qazi. These are two out of five founders of ISRA Islamic (Guarantee) Foundation, as not disputed.

7. After filing of this JCM on 12.11.2020, Mr. Asadullah Qazi, being original petitioner No.2, subsequently moved an application² on 02.11.2021 (after a year) to withdraw himself from the proceedings to his extent, which was allowed³. It is this preliminary objection which has been raised by respondent’s counsel that on account of withdrawal of petitioner No.2 from the petition, minimum threshold i.e. 10% shareholding, to maintain a petition under section 286 of Companies Act, 2017 ceases from the date of withdrawal of petitioner No.2. It is claimed by the respondent that as there were 19 council members (*in terms of subsequent induction, challenged in this J.C.M*), minimum of two petitioners is required to maintain the petition to represent 10% cap of shareholding. This threshold is required to be maintained throughout till its disposal, as argued.

8. Followed by withdrawal of petitioner No.2, an intervener’s application bearing CMA No.430 of 2021 was filed on 23.11.2021, by

² (CMA No.390/2021)

³ Vide order dated 04.11.2021

Prof. Dr. Nazir Ashraf Leghari (another founding member of the foundation). Until hearing of the main JCM, none of the respondents filed any counter-affidavit or objections to this application. Although this may not be the consideration for allowing the application to become a party, but Prof. Dr. Nazir Ashraf Leghari was/is otherwise a proper and necessary party on numerous counts such as he being one of the founding member, certain directions having been issued as being Vice Chancellor of the University in relation to monetary aspects of the matter, signing of some transactions of the Bank account of the university, being managed by Nazir of this Court, and also that on 20.11.2021 while hearing Suit No.2604 of 2021 with consent, interim order passed in the pending proceedings ordered to continue, irrespective of withdrawal of Mr. Asadullah Qazi, petitioner No.2.

9. Although the last above reason could have been a tentative assessment, but in substance Prof. Dr. Nazir Ashraf Leghari who initially did not join the proceedings, sailing in the boat of petitioner No.1 and has submitted same grounds to be a party as petitioner No.2. The intervener application was also allowed to maintain 10% threshold , by short order while main JCM was reserved on 13.10.2022. For Identification, the newly added petitioner is identified as 2A. The strict principles of order I Rule 10 CPC should be read with Section 151 CPC, in view of facts of the case. I maintain the above reasons for allowing the intervener's application.

10. The question of maintainability of JCM 29 of 2020 on this reasoning as such stands diluted by the induction of intervener as co-competitioner, and it was only for a short period when petitioner No.2 (earlier one) suddenly, without informing petitioner No.1, withdrew himself from the proceedings and no sooner it was realized, the intervener application was filed to rescue the petitioner No 1 from the

situation, if at all any deficiency existed, which I doubt in view of following understanding of law.

11. Notwithstanding the above independent conclusion, when this JCM was filed it was filed by two petitioners and those two petitioners contributed towards minimum threshold of 10% to maintain this petition under section 286 of Companies Act, 2017 on the purported membership of 19 council members. This apparently, under the above circumstances, seems to be a case of first impression, as stated, as no one has cited any judgment of this Court and/or of apex Court that could have ideally encountered the situation especially in company matters. The case law however has developed in the neighbouring jurisdiction to cover the issue conclusively, such as in the case of Rajahmundry Electric Supply Corporation Ltd.⁴, and also in the case of Jagdish Chand Mehra⁵ where identical issue was discussed.

12. Maintainability of the petition has to be adjudged on the day of its presentation and the event subsequent to it may not ordinarily come in the way. In the case of Rajahmundry ibid view as expressed on the subject is as under:-

“The number of members of the Company is stated to be 603. If, therefore, 65 members consented to the application in writing, that would be sufficient to satisfy the condition laid down in S. 153-C, sub-cl. 3(a)(i). But it is argued that as 13 of the members who had consented to the filing of the application had, subsequent to its presentation, withdrawn their consent, it thereafter ceased to satisfy the requirements of the statute, and was no longer maintainable.

We have no hesitation in rejecting this contention. The validity of a petition must be judged on the facts as they were at the time of its presentation, and a petition which was valid when presented cannot, in the absence of a provision to that effect in the statute, cease to be maintainable by reason of events subsequent to its presentation. In our opinion, the withdrawal of consent by 13 of the members, even if true, cannot affect either the

⁴ AIR 1956 SC 213 (215 Para 5) (Rajahmundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao)

⁵ AIR 1964 Punjab 401 (Page 402 Para 7) (Jagdish Chand Mehra v. New India, Embroidery Mills.

right of the applicant to proceed with the application or the jurisdiction of the court to dispose of it on its own merits.”

13. Similar is the view in the case of Jagdish (supra) which was later in time.

14. Thus, my conclusion on the issue of maintainability, as raised, is that it was never an issue as the event of maintainability on the above count has to be judged on the day this petition was presented and notwithstanding above it was even cured by a bona fide attempt when petitioner No.2A was added as co-petitioner.

Merit/posed questions

15. The submissions of learned counsel, including those which may embark upon functioning and operation of the Isra University under Isra University Act, 1997 give rise of some multiple issues. The key issues as arises out of the JCM, being respondent No.1 as a key element to be probed, certain questions/points have been surfaced as I discovered, these are:

- i) Whether induction of members/directors to the Council of Management of the Foundation in the year 2011 and 2017 whereby minimum number of directors/members was taken beyond 10, was violative of the law and/or Memorandum & Articles of Association of the foundation?
- ii) Whether the Foundation and University have been separated and segregated in the practical and legal sense or does the foundation has any right to interfere in governing the affairs of University?
- iii) Whether forensic audit be conducted to ascertain if the funds of the Foundation (incoming and outgoing) were embezzled and if yes by whom?

16. These are some of the core points which I feel go to the root of the dispute and conclusion of these may decide the wrongs being done and/or the culprits.

Point/Question No.(i)

17. Since respondent No.1 is an outcome and creation of Memorandum & Articles of Association, it is to be seen that its operation and function should also be within the frame of its constitution i.e. Memorandum & Articles of Association. These statutory companies are regulated and governed by Securities & Exchange Commission of Pakistan. Whosoever has donated or contributed in a cause prior to the formation of respondent No.1 is now immaterial as it is now the company which governs and regulates it through its members, as entrusted to it, ever since it was incorporated. The assets in the shape of moveable and immovable belongs to the foundation and regulated by its members, hence nothing will impress me if it is said that the funds were contributed by some individuals as these are now under the clutches of foundation (IIF) and the question of lifting of veil is not a fundamental requirement in these proceedings. I am proceeding with these matters, considering that the funds and donations are now rest with the IIF.

18. Article 5 of Articles of Association is crucial. When these Articles of Association of Foundation were made at the time of incorporation of Foundation, it was as under:

“No person shall be admitted as a member of foundation unless he is approved and admitted by the Council and the Council shall have full discretion as to admission and may refuse to admit any person to membership assigning any reason whatsoever.”

19. While reading and interpreting Article 5 above, it is necessary to oversee Article 32 and 33 of Articles of Association which are reproduced as under:-

“32. The number of members of the Council shall not be less than seven and more than ten. The affairs of the Foundation shall be managed by the Council of Management comprise of following designation:

1. <i>President</i>	1
2. <i>Vice President</i>	1
3. <i>General Secretary</i>	1
4. <i>Joint Secretary</i>	1
5. <i>Treasure</i>	1
6. <i>Ordinary Members</i>	2 to 5

	7 to 10
	=====

33. *The first Council of Management shall be comprised of the following with designation shown against each and they shall carry on till the 1st. Annual General Meeting of the Foundation in which the first election of the Council shall be held:*

1. <i>Dr. Ghulamqadir Kazi</i>	<i>President</i>
2. <i>Dr. Asadullah Kazi</i>	<i>Vice President</i>
3. <i>Dr. Ghulam Hussain Siddiqi</i>	<i>General Secretary</i>
4. <i>Dr. Nazir Ahmed Leghari</i>	<i>Joint Secretary</i>
5. <i>Dr. Amir Bux Channa</i>	<i>Treasurer</i>
6. <i>Mr. Saleem Kazi</i>	<i>Member</i>
7. <i>Dr. Muhammad Saleh Memon</i>	<i>Member”</i>

20. The first Council of the management, as formed, was of seven individuals and respective designations were assigned, as disclosed above. It shows with clarity that the maximum cap of members/directors of the council could have been only ten, though initially they were seven (minimum requirement), as inducted to Council. Any change in this number of members/directors of the Foundation could only be done by amending Article 32, in accordance with Article 5 of Articles of Association as written above, which may cause any amendment in the corresponding Articles such as 32, which fixes minimum and maximum members of council.

21. No doubt the first induction to this Council of Foundation was made in the year 2011 i.e. on 28.07.2011, as disclosed in the minutes of the meeting held. This meeting shows that five persons were inducted as members/directors of the Council. These members/new directors may have been in close relations with any of the then existing council member but then their induction could only be through a lawful process. This induction apparently was in violation of Memorandum & Articles of

Association of the Foundation, particularly Article 5, 32 and 33 thereof, which had maximum cap of 10 members of the Council, which was exceeded when the aforesaid five members were inducted and it was never amended by the existing council. It cannot be seen as past and close transaction because material change to corresponding Article 32 was brought recently and that too in presence of newly inducted council members.

22. The second indictment of 2017 was via meeting of 08.04.2017. This meeting was held in the absence of three out of five foundation members who chose to remain absent. They may have chosen to remain absent but the responsibility of attending members was by application of law. Six persons were inducted as members/directors of the Council and though it may have been stated that most of them were in close relations with respondent No.2 as it included his son and daughter but the fact remains that it is to be executed in terms of requirement of Memorandum & Articles of Association of the foundation.

23. The significant part of the subsequent meeting was that those who were illegally inducted as members/directors of the Council without any amendment in Articles 32 and 33 respectively, voted for the additional/second illegal induction, referred above. It is in this meeting when respondent No.2 resigned as president and chief executive officer of the foundation as perhaps there was apparently a clash of interest in being chairman of the foundation and Vice Chancellor of the University, as identified by Pakistan Council of Philanthropist (PCP).

24. Mr. Asadullah Qazi, ex-petitioner No.2, though himself was a beneficiary then took notice while he was incharge and issued notification on 28.08.2018 that such inductions were in violation of Memorandum & Articles of Association and withdrew them as being unlawful and thus nullified the action of their induction being void, in

respect thereto. This was followed by an Annual General Meeting to be held on 27.10.2018 on completion of the tenure of Vice Chancellor by respondent No.2. In the said meeting 17 persons were present including those who were yet to be lawfully inducted as member/directors of Council. These members, against whom a serious allegation was that their indictment was illegal and unlawful and in violation of Article 5 and 32, 33 of Articles of Association voted for their own illegal induction as members of the Council/Board of Directors of the Foundation. These members/directors could not have voted for their own cause and consequently on the strength of their vote, Article 32 of Articles of Association, so existed, amended, which increased the minimum threshold of 10 to 20. This increase of the maximum cap from 10 to 20 in Article 32 should have been voted out by the existing/original members of the Council and not those who were likely to be inducted on occasion of this amendment in maximizing cap of council members, since they were beneficiary of this cause.

25. Petitioners may have been the beneficiaries of the last meeting when Asadullah Kazi was nominated by Foundation on 22.10.2018 as Chancellor of University, as until then there was no ratification of earlier induction of new members, however, petitioner's nomination by council members also includes all original members of Council and thus it would not have matter as far as nomination of Asadullah Kazi is concerned as against subsequent meeting when all original members were not present and outsiders/newly inducted voters prevailed in the amendment cause. Surprisingly on 27.10.2018 foundation in its AGM ratified these inductions but in presence of new inductees. Resolution was passed, in the absence of petitioner too to amend Article 32 of the Articles of Association to allow maximum strength of Council of Management from 10 to 20 but those inductions were not ratified by all original members.

26. Litigation centers as to whether Chancellor and consequently Vice Chancellor who were appointed by foundation and chancellor respectively were the outcome of a lawful council members. Consequently all resolutions passed and decisions made/taken by the extended members of Council must be revisited by “original members of the council” in exclusion of new inductees. The question No.(i) is thus answered in the above terms.

Point/Question No.(ii)

27. Now the controversy could have ended here with the conclusion of Question No.(i) but this would not conclude the relationship between foundation and university and will remain an unsettled issue insofar as the management of university and financial issues are concerned. Thus, I need to discuss how far the two entities could be segregated or could be made dependent.

28. We need to understand the role of foundation in the affairs of a Isra university, under the Isra Act, 1997.

29. M/s Salahuddin Ahmed and Shabbir Shah gave their valuable assistance for a proper interpretation of ISRA Act. Mr. Salahuddin has taken me to all provisions of the Act. It is their case that it is to be seen whether there is an apparent overlapping or conflict between the statutory provisions couched in general words and statutory provisions couched in specific words and while reconciling them Court must weigh and give priority to specific provisions over and above general provisions.

30. Mr. Shabbir Shah’s arguments were that (i) the right to education is a fundamental right; (ii) the University is a statutory body performing sovereign functions; (iii) the Chancellor is the most important officer of the University and controls the entire university; and (iv) the Chancellor must, therefore, be appointed through a transparent process including inviting applications from the public.

31. It was further highlighted by the two counsels that publicly owned and privately owned universities do not lose their statutory powers and hence a privately owned university cannot be given such benefit as is being claimed by the foundation while interpreting the provisions of ISRA Act, 1997 for enforcing the dictation given by the foundation to Chancellor. The controversy, as raised by M/s Salahuddin Ahmed and Shabbir Shah, is whether management and control of Isra University vest, as per Isra Act, in the Foundation or in the University's Board of Governors and the primary dispute in this regard is of course nothing but related to monetary consideration when one of the founding members claimed to have forwarded loan of Rs.1 Billion approximately to university and also when foundation insisted that the University should pay rent to the tune of millions of rupees to the foundation.

32. To consider the points raised, we may discuss salient provisions of Isra Act. In terms of Section 3(2)⁶, the Foundation owns, manages and administers the university. Chancellor is to be nominated by it under Section 7(1)⁷ of the Act for administering such affairs. Section 17(1)⁸ of the Act 1997 identified Board of Governors as the executive body of the University which overview university's affairs, except those separately discussed in the Act.

33. In order to see whether there is an overlapping provision in the Act or whether the IIF could pierce in, through their dictation to Chancellor, we need to understand the applicability of different provisions of Isra Act insofar as they apply.

⁶ 3(2) The University shall be a body corporate by the name of the Isra University, Hyderabad, owned, managed and administered by the Foundation and shall have perpetual succession and a common seal, and may sue and be sued by the said name.

⁷ 7(1) The Foundation shall nominate one of its Directors, who shall preferably be a person of eminence in letters, sciences or social work, to be the Chancellor of the University for a period of three years which may be extended by the Foundation.

⁸ 17(1) The Board shall be the executive body of the University and shall, subject to the provisions of this Act, and the statutes, exercise general supervision over the affairs and management of the University,

34. One thing that should not lose sight is that we are overseeing the working and functioning of a private university. If we are to take away the powers of an entity which created such university, then the creators of entity would be regarded as naïve in creating such an entity to which they have no lawful control under statutory frame.

35. I have had the privilege of going through the Act with the assistance of M/s Salahuddin Ahmed and Shabbir Shah and to me it reflects unambiguous legislation and respective powers and role of the foundation and the Board of Governors of the University are clear and categorical and none of them are subservient to other at least to the arguments raised by learned counsel. Each entity has its own ambit to revolve and such powers are exercised in terms of the Act.

36. Isra Act 1997 provides that Board of Governors is executive body of the University as defined in Section 7(1). It exercises general supervision over the affairs and management of the university and except for specific executive powers provided to particular persons and authorities, all the residual executive powers vest with the Board of Governors.

37. In accordance with Section 3(2) of the Isra Act, the Foundation owns, manages and administers the university and such is being done through Chancellor who is a nominee within the Board of Governors as required in terms of Section 7(1) of the Act 1997. Independence of Board of Governors of University is such that the foundation is at no position to overrule any decision of Board of Governors of the university. The university is not bound to act in accordance with the whims and wishes of the foundation, in contravention of the directions of the Board of Governors of the university. Indeed the foundation under the Act is empowered to nominate one of its council member as a chancellor but that is a mandate of the Act, and particularly in a private university

affairs. There is no doubt that the university is owned by foundation and foundation is the entity who manages and administers it but with the education policy of the provincial government which is such that it may not takeover any of the three sectors i.e. ownership, management and administration.

38. In response to the submissions of Mr. Shabbir Shah that a transparent mechanism in the appointment of a chancellor is to be adhered otherwise it loses the confidence of public even when it is in relation to a privately owned university, I am not convinced with these submissions in the case of a privately owned university. There are parameters and guiding principles attached in the Act 1997 as to the characteristics of a chancellor and that is how a private entrepreneur manages a university. It is private entity's prerogative to nominate chancellor amongst his directors/council members under the Act. Had it been a public university the contention of Mr. Shabbir Shah would have certainly prevailed.

39. Mr. Shabbir perhaps has got the two issues mixed up i.e. nomination and appointment. He rather oversees the Chancellor's nomination as an appointment and hence seeks transparent mechanism.

40. There is fundamental difference between nomination and an appointment; prior represents the interest of the nominating authority and serves at its pleasure whereas the latter is in relation to an independent position and serves in accordance with terms and conditions of the post to which he or she is/was appointed. Though there is a time frame for a nominee chancellor as well but even then serves at the pleasure of foundation. The foundation thus, as a nominating authority, has a privilege to withdraw his nominee at any time. It is not strictly a tenure post/ time bound nomination as is identified under section 30(2) of Act 1997, which is reproduced as under:-

30. (1)

(2) The office of a nominated member shall become vacant if he resigns or fails to attend three consecutive meetings of the Authority without sufficient cause or leave of absence, or his nomination is changed by the nominating Authority.

41. The University in terms of the statutory requirement has no role to disagree with such nomination except that a formal notification is required to be issued by Registrar of the University. This is however without prejudice to the conclusion drawn above insofar as induction of new directors in the Council of foundation is concerned, which may have its consequences if an inductee without lawful amendment of Article 32 and 5 has been nominated as Chancellor. If the foundation is not allowed to nominate any of its nominees and a public advertisement is to be made, then it would amount to overriding the requirements of Section 7(1) of the Act 1997. This is perhaps a distinction between privately owned university and publicly owned university. If an entity which created the university is not allowed to nominate Chancellor or not allowed to own, manage and administer the affairs of its university, then it does not need to launch a university.

42. This is similar to other private universities, which were cited by Mr. Almani during the course of his arguments; for instance:

- i) Section 8 of Agha Khan University Order provides that the Chairman of Agha Khan Foundation shall be the Chancellor of the University;
- ii) Section 8(1) of Ziauddin University Act, 1995 provides that the Chief Trustee of Ziauddin Hospital Trust shall be the Chancellor of the University.
- iii) Section 8(2) of Habib University Act, 2012 provides that the Chairman of Habib Foundation shall be the Chancellor of the University.

43. This distinction between nominees and appointees has been explained by the superior Courts in the following cases:-

- i) Prof. Dr. Asad Aslam Khan⁹ wherein a Full Bench deliberated upon difference between nominate and appoint in two different university statutes and it was observed in the concurring note that:-

“5. To elaborate further, it can be seen from reading of KEMU Act and UOA Act that the offices/posts under the two statutes are not of same nature. There are offices to which persons are nominated, and there are posts to which persons are appointed. Then there are expressly ex-officio posts. Different posts are of different natures and status.... Then there are posts to which a person is appointed for a term e.g. Vice Chancellor. There are office holders who are nominated e.g. Pro-Vice Chancellor, members of Senate and Syndicate....And thus, their terms of office depends on the nature of their status.”

- ii) Case of Wasim Majid Malik¹⁰ concerns the Board of Directors of Sui Northern Gas Pipeline Limited wherein the Court while distinguishing between nominated and elected directors observed:-

“....The fundamental difference between a nominee director and elected director is that a nominee director holds office at the pleasure of the nominator whereas the elected director is given a three year tenure under the Act and secondly that a nominee director has to safeguard the interests of its nominator first and foremost whereas an elected director has a fiduciary duty to the company and all its shareholders. So the nominee director participates in the proceedings of the BOD as per the terms of its arrangement with the nominator to ensure that nominators' investment or interest is safeguarded, to act as a liaison between the nominator and the company and also in the larger picture consider the overall policies and working of the company....”

⁹ Prof. Dr. Asad Aslam Khan v. Government of Punjab - unreported judgment dated 27.10.2020 passed in WP. No.256002 of 2018

¹⁰ Waseem Majid Malik v. Federation of Pakistan (2020 CLD 1207)

iii) In the case of Dr. Muhammad Iqbal Zafar¹¹ the issue before the Court was whether a professor who had been nominated as a pro-vice chancellor could continue in that position even after he had retired as professor and while that he could not it was observed that:

“When we minutely scrutinize Section 15-A of the Act, which postulates that the nomination of Pro-Vice Chancellor amongst the three senior most Professors. Therefore, it is not appointment against a tenure post as claimed by the appellant. This nomination is at the most for additional duties only and similarly when a Professor who is nominated as Pro-Vice Chancellor is no more a Professor on superannuation is also no more a Pro-Vice Chancellor. We are clear in our mind that it is a nomination and not an appointment upon a tenure post, therefore, the stance of the appellant is absolutely worthless.”

44. To explain it more, for instance, Section 16(ii) of *ibid* Act 1997 provides that one of the members of the Board of Governors is “Chief Justice of Sindh High Court or a Judge of High Court nominated by him”. Similarly, Section 16(iii) provides that one of the members of the Board of Governors is “Chairman, University Grants Commission or whole time member of the Commission nominated by him”.

45. In these instances, the judge or member nominated by the Chief Justice or Chairman represents the nominating authority. As discussed in the judgments referred above, a post to which a person is nominated is not a tenured post. His nomination can be withdrawn at any time by the nominating authority, although it has to be seen whether nominating authority is constituted legally.

46. This general principle is codified in Section 30(2) of the Act 1997 in relation to all authorities of the University. In accordance with Section 15 of the Act 1997, these authorities include the Board of

¹¹ Dr. Muhammad Iqbal Zafar v. The Province of Punjab (2019 PLC (CS) 63)

Governors, Academic Council, Board of Faculties and others whose nominated and appointed members serve for defined periods of time. Section 30(4) provides that the office of a nominated member of any authority shall become vacant if his nomination is changed by the nominating authority.

47. Conversely, Section 8(1) provides that the Vice Chancellor will be appointed by the Chancellor. Section 10(1) provides that the Registrar will be appointed by the Board of Governors. Similarly, under section 11(1) the Director Finance is appointed by the Board of Governors. An appointment is made to a tenured post. There is no equivalent provisions to Section 30(4) of the Act 1997 for posts to which persons are appointed.

48. In this case, the Chancellor is the nominee of the Foundation. The general principle codified in Section 30(4) of the Act 1997 is equally applicable to him. He serves at the pleasure of the Foundation. As such his nomination can be withdrawn by the foundation at any time.

49. Mr. Shabbir Shah's arguments are un-convincing in several ways. Firstly while there is no doubt that education is a fundamental right, the protection of this right requires the State to ensure that all citizens are provided an opportunity to obtain education. It does not require that the State should control and interfere in every aspect of all educational institutions. State should come so strong in relation to public institutions that these private universities get no chance to compete, but this is not the case, though we could only hope for the betterment. If we allow Mr. Shabbir's logic to prevail, this argument would require the State to ensure the appointment of almost all employees of private educational institutions, including principals and teachers of primary schools, through a transparent process including inviting applications from the public. It would effectively paralyze the private education system, which

in the absence of structured educational system of this province for all classes of citizens is the only paramount hope for imparting education.

50. Like any other profession, the private universities are also being regulated and governed, but it does not mean that they will be taken over. The university is a statutory body; it remains a private university (since it has been established by the foundation and not the State) and does not perform any sovereign functions though operate and function within the frame of Act. It is for this reason that superior Courts have consistently refused to issue writs of quo warranto to private universities even though they were established through statutes. The distinction between public and private universities was acknowledged and upheld in the cases of Salman Shahid¹², Aown Abbas Bhatti¹³ and Anoosha Shaigan¹⁴.

51. Even otherwise private universities in Sindh are governed by the Sindh Private Educational Institutions (Regulation and Control) Ordinance, 2001 (Ordinance 2001). This distinction between public and private universities is maintained in the Sindh Higher Education Commission Act, 2013 (Act 2013), which separately defines and deals with public sector institutions. There is no provision in the Ordinance 2001 or Act 2013 that requires officers of private universities to be appointed in a particular manner.

52. In every private university, whether it is Agha Khan University, Habib University, Ziauddin University or SZABIST, the chancellor is either the head of the body that established the university or is nominated by the body. If this umbrella is lifted it would sound death knell for all private universities because the Chancellor is the person who represents and carry sound of the entities which have established these

¹² Salman Shahid v. University of Management & Technology (2022 CLC 1328)

¹³ Aown Abbas Bhatti v. Forman Christian College (PLD 2018 Lahore 435)

¹⁴ Anoosha Shaigan v. Lahore University of Management Sciences (PLD 2007 Lahore 568)

universities. By requiring the Chancellor of a private university to be appointed in the manner, as suggested, the body which established the university, would be completely removed from any representation in the university. Resultantly, no charitable, professionals and/or entrepreneurs would come forward to fill the gap or to provide healthy competition.

53. Petitioners' insistence of reading down the Act 1997 is neither matured nor is required to be applied. This principle of reading down is applied when a provision is capable of more than one interpretation and one or more of those interpretations would render the other provisions either redundant or illusory or in conflict with main frame of the Statute. In such cases, Courts will read down the provision in a manner that saves the provision as is observed in the cases of Peoples University of Medical & Health Sciences for Women¹⁵, Muhammad Arif Ice Factory¹⁶ and Province of Sindh¹⁷.

54. Section 7(1) is clear, unambiguous and capable of only one interpretation which neither renders it unconstitutional or is in conflict with any provision of the Act 1997 itself. In these circumstances, no occasion arises to read down section 7(1).

55. If this Court were to approve the nomination of the Chancellor by the foundation subject to approval and appointment by the Board of Governors of University, it would amount to rewriting Section 7(1) as there is no such requirement in Section 7(1) or any other provision of the Act 1997; it would destroy the distinction between nominate and appoint that has been intentionally created by the legislature in the Act 1997 and every person to be nominated under the Act 1997 would then also have to be appointed by the Board of Governors. This would necessitate

¹⁵ Peoples University of Medical & Health Sciences for Women v. Pakistan Ministry of Health (PLD 2021 Sindh 256)

¹⁶ Muhammad Arif Ice Factory v. Federation of Pakistan (2021 PTD 1608)

¹⁷ Province of Sindh v. M.Q.M. (PLD 2014 SC 531)

rewriting of all provisions that relate to nominated posts under the Act 1997, it would defeat the purpose and intent of the Act 1997, which is to provide the foundation a role in the affairs of the university through the Chancellor and instead make the foundation subservient to the Board of Governors; and lastly if this argument is approved it would destroy the very fabric that distinguishes the nomination and appointment.

Point/Question No.3

56. We are now left with one more critical point that concerns with the audit and appointment of Receiver under the circumstance of the case. After above thorough discussion in the above terms and considering all pros and cons, in relation to funds of IIF, which have been retrieved by the foundation, it is claimed that a number of other projects have been undertaken by this foundation where the money is being spent. Mr. Almani, learned counsel has conceded that the foundation is running a number of clinics and schools etc. where funds of the foundation are being channelized since 2011, however since the induction of the council members has been successfully disputed by petitioners; hence I am of the view that the audit of the foundation is also inevitable. I, therefore, deem it appropriate to pass order for an audit of the accounts of the foundation of the last ten years through a renowned audit firm. The Secretary of the foundation shall provide complete details of the accounts as and when required by the auditing firm to be jointly named by counsel, failing which court will appoint on its own.

57. Insofar as the appointment of Official Liquidator is concerned, for the time being that is deferred since it is an educational institution and to such extent it is being run successfully, however, if the situation reached to such an extent where such appointment is inevitable, the petitioner may have a fresh cause to initiate appropriate proceedings.

58. In my tentative assessment claim of rent by foundation is neither illegal nor illogical, however one may argue on the quantum and an arbitrary way of fixing the rent. This should have been done without any influence and coercion from either side. The quantum has to be justified and it may not be only on the basis of university's income, rather be fair and justified as university has other expenditures also, and university is competent to deal with these issues and affair without being influenced. It is an issue to be decided by uninfluenced Board of Governors of university and the Court is not supposed to interfere.

59. In view of above, this JCM is allowed and disposed of in the following terms:-

- i) The Foundation is restored to its original members as it stood in 2011 prior to induction of new members.
- ii) The council so restored is at liberty to amend Memorandum & Articles of Association and consequently induct any or as many member council as the amended Articles permits. This should be done, if they so chooses in accordance with law.
- iii) The restored council may announce a date of meeting for nominating a Chancellor in two week's time and until the Registrar of university shall perform daily functions in routine.
- iv) Audit of Foundation (IIF) to be conducted of last ten years.
- v) Claim of rent is neither illegal nor illogical but should be fair as far as quantum is concerned.

Dated: 09.12.2022

JUDGE