

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**Present**

Mr. Justice Iftikhar Muhammad Chaudhry  
Mr. Justice Rana Bhagwandas  
Mr. Justice Syed Deedar Hussain Shah  
Mr. Justice Hamid Ali Mirza  
Mr. Justice Sardar Muhammad Raza Khan  
Mr. Justice Faqir Muhammad Khokhar  
Mr. Justice Tassadduq Hussain Jillani

**CIVIL APPEALS No. 224 TO 227 OF 2003 &  
CONSTITUTION PETITION No. 18 OF 2004  
A/W C.M.As.No. 1383, 2376 & 2604 OF 2004.**

(On appeal from the judgments/orders dated  
19.04.01, 10.12.02 and 20.01.03 passed by Lahore  
High Court Lahore in Writ Petitions No. 660/2000,  
19239/02, 2418/01 & 692/03)

**CA No. 224/2003 & CMA No. 2604/04.**

Arshad Mehmood & others. ... .. Appellants.

Versus

The Government of Punjab  
through Secretary, Transport  
Civil Secretariat, Lahore & others. ... .. Respondents.

For the appellants : Mr. Muhammad Akram Sheikh Sr. ASC.  
Mr. M. A. Zaidi, AOR.

For the respondents. : Syed Shabbar Raza Rizvi AG(Punjab)  
a/w Mrs. Afshan Ghazanfar AAG Punjab.  
Mr. Maqbool Illahi Malik Sr. ASC.

For the applicant : Ch: Muhammad Anwar Khan, AOR/ASC  
(in CMA No. 2604/04)

**CA No. 225 OF 2003.**

Muhammad Younas, etc. ... .. Appellants.

Versus

Government of Punjab etc. ... .. Respondents.

For the appellants. : Mr.A. K. Dogar Sr. ASC.

For the respondents. : Syed Shabbar Raza Rizvi AG (Pb.)  
a/w Mrs. Afshan Ghazanfar AAG(Pb).  
Syed Ali Zafar ASC  
Ch. Muhammad Akram AOR.

**CA No. 226 OF 2003.**

Malik Asghar, etc. ... .. Appellants.  
Versus  
Government of Punjab etc. ... .. Respondents.

For the appellants. : Mr. Nasir Saeed Sheikh Sr. ASC.  
  
For the respondents. : Syed Shabbar Raza Rizvi AG (Pb.)  
a/w Mrs. Afshan Ghazanfar AAG(Pb).  
Mr. Aftab Gul, ASC.  
Mr. Arshad Ali Ch: AOR.

**CA No. 227/2003 & CMA No. 1383/2004.**

Mukhtar Ahmed & others. ... .. Appellants.  
Versus.  
Secretary District Regional  
Transport Authority, Faisalabad. ... .. Respondents.

For the appellants/  
Applicants : Mr.Tariq Mehmood ASC.  
Maher Khan Malik, AOR.  
  
For the respondents. : Syed Shabbar Raza Rizvi AG (Pb.)  
a/w Mrs. Afshan Ghazanfar AAG(Pb).  
Ch: Muhammad Akram AOR.

**CONST. PETITION NO. 18/2004.**

Javed Akhtar & others. ... .. Petitioners.  
Versus.  
Province of Punjab & others. ... .. Respondents.

For the petitioners. : Mr. Habib-ul-Wahab-ul- Khairi Sr. ASC.  
Maher Khan Malik, AOR.  
  
For the respondents. : NR.

**CIVIL MISC. APPLICATION NO. 2370 OF 2004**

Mukhtar Ahmed & others. ... .. Appellants.  
Versus.  
Secretary District Regional  
Transport Authority, Faisalabad. ... .. Respondents.

For the applicant : Nemo.  
  
For the respondents : Syed Shabbar Raza Rizvi AG (Pb.)  
a/w Mrs. Afshan Ghazanfar AAG(Pb).  
Ch: Muhammad Akram AOR.

Dates of hearing. : 25.10.2004 to 29.10.2004.  
.....

**JUDGMENT**

**IFTIKHAR MUHAMMAD CHAUDHRY, J.** – *In above noted appeals, judgments of the Lahore High Court, Lahore, details whereof are mentioned in above title, have been challenged in pursuance whereof Section 69-A of the West Pakistan Motor Vehicles Ordinance 1965 [herein after referred to as ‘the Ordinance’] as amended by the Province of Punjab has been held valid piece of legislation.*

2. *Listed petition under Article 184(3) of the Constitution of Islamic Republic of Pakistan [herein after referred to as ‘the Constitution’] has been filed by invoking original jurisdiction of this Court to challenge Section 69-A of the Ordinance, independently. Whereas Civil Misc. Applications No. 1383/2004 and 2604/2004 have been moved by the Transports who got the franchise rights with regard to route permits mentioned therein.*

3. *As common question of law and facts have been raised in these matters, therefore, they are being disposed of by means of instant judgment.*

4. *Facts of each case need not be narrated in details as common question raised in all of them is whether Section 69-A of the Ordinance, inserted by the Government of Punjab is contrary to the fundamental rights of the appellants, enshrined in Article 18 of the Constitution because in pursuance thereof, appellants have been restrained/ousted completely from the trade/ business of transport, which they were carrying on against valid route permits issued by competent authority under the provisions of the Ordinance for the last many years and in which for it they had made huge investment for purchase of vehicles i.e. wagons, suzukies, etc. The franchise of routes on which they were plying their stage carriages have been given to the private respondents in pursuance of the scheme of Section 69-A of the Ordinance. Thus feeling dissatisfied by the grant of franchise to private*

*respondents, appellants preferred Constitutional Petitions under Article 199 of the Constitution, before the Lahore High Court, Lahore, questioning validity of Section 69-A of the Ordinance being unconstitutional, void, unlawful and of no legal effect being violative of Article 18 of the Constitution, which guarantees right of freedom of trade, business or profession to the citizens. A learned Division Bench of the High Court pronounced its judgment in W.P. No.9436 of 2000 on 1<sup>st</sup> February 2001, declaring Section 69-A of the Ordinance intra vires of the Constitution. In another Writ Petition No.660 of 2000, instituted by appellants (impugned in Civil Appeal 224 of 2003), a learned Division Bench of High Court dismissed it on 19<sup>th</sup> April 2001 in view of earlier judgment referred to above. Later on, a larger bench, in Writ Petition No.19239 of 2002 alongwith other petitions, examined vires of Section 69-A of the Ordinance and declared it intra vires of the Constitution vide judgment dated 10<sup>th</sup> December 2002 (impugned in Civil Appeal No.225 of 2003). Subsequent thereto, another Division Bench of the High Court in view of the judgment of the full bench, dismissed another Writ Petition No. 692 of 2003 in limine, which has been challenged in Civil Appeal No. 227 of 2003. It may be noted that in this case, respondent M/s Manthar Metro General Bus stand, a franchise holder, was not impleaded as party, therefore, Civil Misc. Application No. 1383 of 2004 was filed on its behalf for impleadment as party, which was allowed. Similarly, M/s Bashir & Sons, transporters/operators of franchised Bus Service in Faisalabad also moved an application for impleadment as party, which has been allowed and learned counsel permitted to argue the case. Similarly, M/s Baloch Transport Company Ltd. also filed Civil Misc. Application No.2376 of 2004 to join as party in the above appeals but no one has appeared on their behalf to plead their application. Constitution Petition No. 18 of 2004 has been filed under*

*Article 184 (3) on behalf of members of the general public, who have to travel in stage carriages as passengers. Their grievance is also against the promulgation of Section 69-A of the Ordinance as according to them, their right of movement cannot be limited by compelling them to undertake journey in the transport owned by private respondents because they have obtained franchise rights and are charging exorbitant fare compared to other transporters who used to ply buses on the same route, and if competition is allowed, they will charge less fare from them, as such citizens, having limited resources of income are not bound to pay fare to respondents transporters at high rates.*

5. *The conclusions drawn by learned High Court in the impugned judgments are as under:-*

- i) The right guaranteed through Article 18 of the Constitution, pertaining to freedom of trade, is not absolute in terms and it is subject to reasonable restriction, which can be imposed by law, which is a clog on the fundamental rights.*
- ii) A citizen under Article 18 of the Constitution could enter upon a lawful profession, occupation and trade/business which is to be regulated by a licencing system under the supervision and control of the Government.*
- iii) The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance V of 1970 is not absolute in command as Section 5(2) permits even apparently monopolistic steps in the contribution towards financial or promotion of public interest or the benefit arising out of said steps would outweigh the said competition or lessening the competition.*

- iv) *The obvious object and purpose of the provisions of Section 69-A of the Ordinance is to rid the commuting public of hazardous, dangerous, unreliable and undignified means of transport and also to lessen the congestion on roads by introducing large occupancy vehicles instead of low occupancy wagons, etc.*
- v) *The appellants/petitioners are not being thrown out of business because according to the Government, they have been offered alternative routes in same city.*
- vi) *The power to regulate a trade/business necessarily includes the power to prohibit business while regulating the same.*
- vii) *By enacting Section 69-A of the Ordinance, which is a regulatory provision, Article 18 of the Constitution has not been violated because while examining the vires of a statute, it is always presumed that the legislature would not flout the Constitutional provision and all efforts have to be made to lean in favour of the constitutionality of the law in order to save it rather than to destroy it.*
- viii) *The Government of Punjab and Secretary, Regional Transport Authority, while granting franchise to the specific routes to the respondents in exercise of powers under Section 69-A of the Ordinance, have conducted proceedings in a transparent manner as open tenders were invited from the interested transporters to secure franchise on the specific routes, therefore, no monopoly has been created in favour of the respondents by the Government.*

6. *Leave to appeal was granted to examine the following questions:-*

- (a) *“Whether the insertion of Section 69-A in Punjab Motor Vehicles Ordinance 1965 by virtue of Punjab Ordinance No. XLVI of 1999 is in the public interest and is not violative of the constitutional guarantee of right of trade and business under Article 18 of the Constitution of Islamic Republic of Pakistan, 1973 and is in consonance with the provisions of Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance No. V of 1970.*
- (b) *The addition of Section 69-A in the Punjab Motor Vehicles Ordinance 1965 would not amount to protect and promote the vested interest of a specific class by depriving large number of people associated with the transport business of their legitimate right of earning and they have not been denied the equal and fair opportunity of right of business as provided under the Constitution of Islamic Republic of Pakistan, 1973.*
- (c) *The exclusion of wagons and mini bus owners from transport business under franchise routes scheme is not a departure to the policy of constitution of free competition and would not amount to take away the right of people from using the vehicle of their own choice as means of transport and compel them to travel through the franchise transport.*
- (d) *The imposing of unreasonable restriction on the free trade and business is not a social and economic exploitation as provided in Article 3 of the Constitution of Islamic Republic of Pakistan, 1973.*
- e) *The provision of Section 69-A ibid for exclusion of wagons and mini buses as stage carriages from the franchise routes in the private sector is not a discriminatory law and the distinction created is based on reasonable classification.”*

7. *Learned counsel appearing for appellants argued against the constitutionality of Section 69-A of the Ordinance from different aspects but essentially it being contrary to Article 18 of the Constitution is liable to be declared void in terms of Article 8 of the Constitution.*

8. *Conversely, learned counsel for respondents as well as Advocate General of Punjab stated that the provision of Section 69-A of the Ordinance, is not contrary to any fundamental right, therefore, it cannot be declared to be void as well as invalid under Article 8 of the Constitution and the learned Division Bench of the High Court as well as the Full Bench vide impugned judgments had thoroughly examined its vires in the light of the precedent law, referred to therein, as such it must be saved in the public interest because it has advanced/promoted the cause of general public interest.*

9. *Mr. A. K. Dogar, learned ASC contended that monopoly in trade and business by grant of franchise is against Article 18 proviso (b) of the Constitution which guarantees the regulation of the trade, commerce or industry in the interest of public, subject to competition. He further explained that except the Federal or Provincial Government or by a corporation controlled by such Government under Article 18 proviso (c) of the Constitution no private person can be allowed to monopolize a trade or business and as franchise routes have been given to the private respondents under Section 69-A of Ordinance therefore, it is liable to be struck down on this score alone. To substantiate his plea he relied upon “**Grammar of Politics**” by Harold J. Allasky 5<sup>th</sup> Edition (page 175) and referred to its following para:-*

*“men may begin to acquire property to safeguard their lives from want but they continued to acquire it because of the distinction which comes from its possession. It*



*satisfies their vanity and their lust for power. It enables them to attune well of society to their own”.*

*Learned counsel further contended that the respondents on account of their resources, influence and contacts have exploited the appellants' rights as they were not in a position to arrange the buses having capacity of 70 seats or more than it, due to their poor financial conditions. On the other hand the respondents have not only been obliged by granting franchise of specified routes to them, according to their choice, the Banks had also provided them fabulous loans of 70% against their equity of 30% for purchase of stage carriages. Therefore, in this manner, Provincial Government has also violated Article 3 of the Constitution as well, according to which the State is responsible to ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle from each according to his ability to each according to his work.*

*Similarly, appellants have also been deprived of their right to life as they are not in a position to earn their livelihood, therefore, the security which has been provided to them under Article 9 of the Constitution has been denied to them as held in Administrator Market Committee, Kasur v. Muhammad Sharif (PLD 1994 SC1048).*

*It is further contended by him that as per the objective resolution, which is now a part of the Constitution i.e. Article 2-A , it is the duty of the State to provide social, economic and political justice to all its citizens and to achieve the object. It is the duty of the Government to frame such policies which ensure promotion of social and economic well being of the people as required by provisions of Article 38 of the Constitution, but in the instant case the Government of Punjab by inserting Section 69-A has not only denied certain Constitutional rights to the appellants but has also discriminated them in violation of Article 25 of the Constitution.*

10. Mr. Muhammad Akram Sheikh, learned counsel contended that the action of Punjab Government, by excluding the appellants from the trade of transport, without cancelling the route permits granted to them under Section 62 of the Ordinance, tantamounts to forfeiture of their property contrary to the Constitutional protection under Article 24.

The provisions of Section 69-A of the Ordinance are confiscatory in nature because of execution of agreement between the franchise holders and Government all route permits possessed by the appellants have been virtually cancelled. Moreover, abovesaid provisions being against the principles of natural justice, i.e. audi alteram partem in derogative of the spirit of Articles 2-A and 18 of the Constitution and violative of the principles of State policy deserve to be struck down.

He further contended that the High Court without recording evidence has made adverse observations against the appellants namely that Section 69-A of the Ordinance has been promulgated to rid the commuting public of hazardous traffic, unreliable and undignified means of transport etc. He stated that if at all the High Court wanted to determine the factual aspects of the case it should have embarked upon an inquiry and on the basis of the same ought to have recorded a finding merely on the basis of conjectural and capricious reasons the judgments are not sustainable.

He was also of the opinion that the Government by enacting Section 69-A of the Ordinance has created monopoly in favour of the private respondents contrary to the Constitution. In support of his arguments he has relied upon Saghir Ahmed Vs. The State of UP & others (AIR 1954 SC 728).

11. Mr. Nasir Saeed Sheikh ASC, in his arguments mostly highlighted on factual side of the case which would be discussed at later stage, if need be.

12. *Mr. Habib-ul-Wahab-ul-Khairi ASC, contended that Section 69-A is contrary to the Article 18 of the Constitution, and the petitioners on whose behalf he is appearing being the passengers cannot be compelled to travel in a transport of respondents, who got franchise for specified routes and are charging exorbitant fare than ordinary fare, meant for same journey, without any legal justification.*

13. *Syed Ali Zafar, learned ASC contended that proviso (a), (b) and (c) of Article 18 of the Constitution are disjunctive from each other, therefore, are to be interpreted independently. As per proviso (b) of Article 18 of the Constitution, the Government is authorized to regulate the trade, commerce or industry, being fully aware that there could be traders who would be interested to obtain franchise of a particular trade, subject to competition amongst equals, who are placed under same conditions, as such introduction of “franchise system” is not prohibited under this clause, as argued by the learned counsel for appellants. Therefore, for such reason, Government of Punjab by enacting Section 69-A of the Ordinance, had not violated Article 18 of the Constitution in any manner. He further contended that Section 69-A of the Ordinance was made as a general law, not for any particular person and, therefore, its validity has to be examined as a free standing law. According to him under Section 69-A of the Ordinance the Government is authorized either to put up franchise of particular routes or all the routes, therefore, invitations were given to the persons interested in obtaining franchise of all the existing routes by inviting open tenders, from time to time and whosoever was found suitable in competition, was declared entitled without any discrimination. Nor it could be argued that Section 69-A of the Ordinance had monopolized the trade of transport, against the provisions of Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance V of 1970 [herein after referred to as*

*“the Ordinance, 1970], thus attaching malafides to the conduct of the Government is not fair. It is also contended by him that appellants are not debarred from doing business as transporters on the same routes, provided they fulfill the conditions laid down for obtaining franchise rights under Section 69-A of the Ordinance and their objection that they are being thrown out of business of transport is misconceived. Thus no case of violation of Article 25 of the Constitution is made out as well. He also argued that proviso (a) of Article 18 of the Constitution stipulates that if a person does not qualify for the business, he is prohibited from doing it under the licencing system and in pursuance of these provisions, the Government has laid down a policy with certain qualifications to control traffic hazards and for the welfare of the people. Appellants who do not fulfill such qualifications, could not be heard to say that their fundamental right under Article 18 of the Constitution has been denied, because it is always subject to law.*

14. *Mr. Aftab Gul, ASC has adopted the arguments put forward by Syed Ali Zafar, ASC and also highlighted the factual aspects of the case to counter the arguments advanced by Mr. Nasir Saeed Sheikh, ASC. These factual aspects of the case will be considered at a later stage, if need be.*

15. *Mr. Tariq Mehmood, ASC adopted the arguments of Syed Ali Zafar, ASC and also added that respondents got franchise in an open competition because the appellants did not compete for the same, therefore, they are estopped from agitating against the promulgation of Section 69-A of the Ordinance. He further stated that Courts are not required to examine the vires of Section 69-A of the Ordinance as they have no powers to question the wisdom of the legislature, who have framed law in pursuance of policy of the Government. According to him, if at all a monopoly has been created by granting franchise to respondents on specified routes, they have an*

*alternate remedy available to approach the competent forum for redressal of their grievance, in stead of invoking the constitutional jurisdiction of the High Court as well as of this Court.*

16. *Syed Shabbar Raza Rizvi, learned Advocate General Punjab contended that under Article 18 of the Constitution, a citizen shall have a right to enter upon any lawful profession subject to law, therefore, no absolute right has been conferred upon the appellants, as such provisions of Section 69-A of the Ordinance cannot be questioned, being contrary to Article 18 of the Constitution and, according to him, it has been enacted lawfully. He was also of the opinion that under Section 5(2) and 6(2) of the Ordinance, 1970, the Government is empowered/ competent to promulgate the law, authorizing a selected party to run the business to the exclusion of the others. Lastly he adopted the arguments of the learned counsel who appeared on behalf of the respondents/interveners.*

17. *As the arguments put forward on behalf of the appellants' counsel call for examination of the constitutionality of Section 69-A of the Ordinance, being allegedly against their fundamental rights, guaranteed under Article 18 of the Constitution, therefore, same is reproduced herein below for convenience:-*

**“18. Freedom of trade, business or profession:-**

*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:*

*Provided that nothing in this Article shall prevent—*

- (a) the regulation of any trade or profession by a licensing system; or*
- (b) the regulation of trade, commerce or industry in the interest of free competition therein; or*

- (c) *the carrying on, by the Federal Government or a 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 other persons.”*

*It may be noted that appellants have sought declaration that Section 69-A of the Ordinance is ultra vires of above provisions of the Constitution, on the touchstone of Article 8 of the Constitution, scheme of which is that any law, custom or usage, having the force of law in so far as it is inconsistent with the rights conferred by this chapter shall, to the extent of such inconsistency, be void and the State shall not make any law which takes away or abridges the right so conferred and any law made in contravention of Sub-Article (2) of Article 8 shall, to the extent of such inconsistency, be void.*

*It is to be born in mind that this Court has held that the Constitution is a living document which portrays the aspiration and genius of the people and aims at creating progress, peace, welfare, amity among the citizens, and the nations abroad. It is the basic structure on which the entire edifice is built, therefore, it has to be interpreted in a manner to keep it alive and blossom under all circumstances and in every situation. See **Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others** (PLD 1993 SC 341).*

*Likewise in the case of **M/s Illahi Cotton Mills and others v. Federation of Pakistan and another** (PLD 1997 SC 582) important principles of law have been highlighted keeping in view the earlier case law and treatises namely that “while interpreting Constitutional provisions Courts 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 by 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.*

*18. In the Province of Punjab, in order to provide facility of high standard transport to the citizens/general public, licencing system has been made applicable under the provisions of the Ordinance and the rules framed thereunder. As per its Section 48 an applicant not being a Government servant having any financial interest in the stage carriage (vehicles) either directly or indirectly is eligible to apply for a route or routes of the area within which he intends to operate the vehicle for a permit. It is significant to point out that under Section 2 (37) of the Ordinance “stage carriage”, means a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at a separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey”. On receipt of the application for grant of permit of the stage carriage the Regional Transport Authority after processing the same is competent to grant the route permit subject to the conditions to be attached thereto under Sections 50, 58 and 61 etc of the Ordinance . The Transport Authority also retains powers, under Section 62, for cancellation or suspension of the route permit.*

*19. In the instant case, appellants being the valid permit holders were plying their stage carriages in different cities of the Province of Punjab including Rawalpindi, Lahore, Faisalabad etc when vide Ordinance XXXV of 1998 dated 9<sup>th</sup> December 1998 Section 69-A was inserted in the Ordinance by the Government of Punjab and it was kept alive by issuing successive Ordinances as it could not be laid before Provincial Assembly, as per the mandate of Article 128 of the Constitution, when on 14<sup>th</sup> day of*

*October 1999 National and Provincial Assemblies were suspended due to military take over, therefore, under Laws Continuation in Force Order 1999, it remained operative and subsequent thereto has been saved under Article 270-AA of the Constitution. Section 69-A of the Ordinance, reads as under thus :-*

**“69-A. Franchise.—(1)** *The provisions of this Section shall have effect notwithstanding anything contained in this Ordinance.*

(2) *In this Section “franchise” means a permit granted to an operator for operation of stage carriages with a carrying capacity of 70 or more passengers by a Bus Service providing and maintaining the prescribed facilities on routes in respect of which it is declared by the Government that only a Bus Service of the nature referred to above shall be allowed to operate stage carriages thereon to the exclusion of other stage carriages.*

(3) *The Government may direct the Regional Transport Authority to grant a franchise.*

(4) *Where the Regional Transport Authority grants a franchise under sub-section (3) all existing stage carriage permits in respect of routes or a route or a portion of a route to which the franchise relates shall stand cancelled on the date notified for the purpose by the Regional Transport Authority concerned and the Regional Transport Authority may not grant fresh stage carriage permits for such routes or a route or a portion of a route for duration of the franchise.*

(5) *The provisions of 60 shall not apply to a franchise.*

(6) *In the case of stage carriages in relation to which a franchise is granted the power to fix maximum fares shall vest in the Regional Transport Authority.*

(7) (a) *The Regional Transport Authority concerned may cancel a franchise, or may suspend a franchise for such period as it deems fit:-*

- (i) *for the breach of any condition attached to the franchise or of any condition or on any ground contained in the prescribed franchise Agreement; or*



- (ii) *on any other ground mentioned in Section 62:*

*Provided that no franchise shall be cancelled or suspended unless the holder of the franchise has been given an opportunity of being heard.*

*Provided further that the Regional Transport Authority may after such hearing, rather than cancel or suspend the franchise, vary the terms and conditions thereof.*

- (b) *Where a franchise is cancelled or suspended or the terms and conditions thereof are varied, the Regional Transport Authority shall record in writing the reasons for such cancellation or suspension, or variations and shall deliver a copy thereof to the holder of the franchise.*

- (c) *On cancellation of a franchise, the holder of the franchise shall, unless the Regional Transport Authority in the order of cancellation directs to the contrary, be entitled to refund to the franchise fee for the unutilized portion of the franchise period.*

- (8) *Refusal to transfer a franchise or revise fares on routes to which a franchise relates shall be appealable under section 62.*

- (9) *A franchise shall not be transferable in any manner whatsoever except with the prior permission in writing of the Regional Transport Authority and subject to such conditions as may be stipulated in this behalf.*

- (10) *Notwithstanding anything contained in Chapter VIII of the Motor Vehicles Act, 1939 (IV of 1939) the Regional Transport Authority may attach to a franchise such conditions relating to insurances as it may deem fit.*

- (11) *Save in so far as provided otherwise in this section the provisions of this Ordinance or any other law relating to Motor Vehicles shall apply mutatis mutandis to a franchise.*

- (12) *all actions taken by the Government for introducing the franchise system before the coming into*

*force of this Ordinance shall be deemed to have been validly taken.”*

20. *Perusal of Section 69-A of the Ordinance reveals that it has introduced “franchise system” for operating “stage carriages” absolutely different from the system prescribed by the Ordinance. One of the salient features of this law is that under its Sub-Section (2) Government has been empowered to declare the routes “franchise”, to be granted under its instructions by the Regional Transport Authority, to the exclusion of all other operators of stage carriages and upon grant of a “franchise” on a specified route, the Regional Transport Authority under Sub-Section (4) has been empowered to cancel all existing stage carriages permits on such routes or a portion of route. Such oppressive provision has been inserted in the statute without realizing that the operators of stage carriages are already carrying on a lawful trade under valid permits, since long without any allegation of violating the law under which route permits were granted to them. Further more, no notice, before cancelling their lawful licences, were given to them as Section 69-A does not envisage such provision. Thus it can be safely held that a right which has accrued to them to carry on a lawful business, according to the Ordinance, could not be denied to them by introducing “franchise” system by the Provincial Government, in view of the guarantees, provided to them under Article 18 of the Constitution. It is to be noted that under the scheme of the Ordinance, the Provincial Government, except supervising, had no administrative role to play as the trade of transport is regulated by the Regional or Provincial Transport Authority. Thus, we have reason to believe that under Section 69-A of the Ordinance, an administrative role has been given to the Provincial Government for effectively carrying out its object including the exclusion of all other transporters, who are already in a lawful business, because if an*

*operator possesses valid route permit for plying the vehicles on a route or the routes obtained by it from Regional Transport Authority or the Provincial Transport Authority, legally Government cannot exclude him from the business except in terms of Section 62 of the Ordinance. However, it is no body's case that the Regional Transport Authority after insertion of Section 69-A in the Ordinance ever exercised its jurisdiction under Section 62 of the Ordinance and cancelled their permits.*

21. *In view of above background it seems appropriate to examine the constitutionality of Section 69-A of the Ordinance, particularly power of Government of Punjab to grant franchise in the trade/business of transport.*

22. *The word "franchise" has been defined in a good number of cases by various Courts including the Courts of United State of America as reported in **American Jurisprudence** 2<sup>nd</sup> Edition Volume 36 (page 723), according to which it means:-*

- i) *"A franchise represents the right and privilege of doing that which does not belong to citizen generally, irrespective of whether net profit accruing from the exercise of the right and privilege is retained by the franchise holder or is passed on to a state, school or to vehicle subdivisions of the state. State XREL Williamson Vs. the Garrison (Okla) 348 P-2 D 859.*
- ii) *Whether all persons including corporations are prohibited from transacting a banking business unless authorized by law the claim of a banking corporation to exercise the right to do a banking business a claim to a franchise. The right of banking under such a restraining act is a privilege or immunity by grant of the legislature and the exercise of the right is an assertion of a grant from the legislature to exercise that privilege and consequently it is usurpation of a franchise unless it can be shown that the privilege has been granted by the legislature,*

*People State XREL Attny. Gen. Vs. Utica Ins.  
Johns (NY) 358.*

iii) *Similarly in UTAH Light and Traction Company  
Vs. Public Serv Com. 101 UTAH 99, 118 P 2<sup>nd</sup>  
683 has defined franchise as follows:-*

*“A franchise is a right or  
privilege granted to a  
corporation or individual to do  
things which such corporation  
or individual otherwise could  
not do such as the construction,  
maintenance and operation of  
utility transmission lines either  
above or beneath the surface of  
the State street and allies.*

*The ‘American Jurisprudence’ generally has explained the nature of the  
incidence of franchise that “as a rule, when a franchise is granted subject  
to the condition and the terms upon which it may be held it becomes the  
property of the “grantee” and is a private right subject only the  
Governmental control going out of it other enter has publicity juries”.*

*Likewise in **Black’s Law dictionary** 5<sup>th</sup> Edition (page 592)  
‘franchise’ has been defined as follows:-*

*“A special privilege conferred by Government  
on individual or corporation, and which does not belong  
to citizens of country generally of common right.  
Artesian Water Co. v. State Dept. of High Ways and  
Transp. Del. Super 330 A. 2d 432, 439, In England it is  
defined to be a royal privilege in the hand of a subject.*

*A privilege granted or sold, such as to use a  
name or to sell products of services. The right given by a  
manufacturer or supplier to a retailer to use his  
products and name on terms and conditions mutually  
agreed upon.*

*In its simplest terms, a franchise is a license  
from owner of a trademark or trade name permitting  
another to sell a product or service under the name or  
mark. More broadly stated a “franchise” has evolved  
into an elaborate agreement under which the  
franchisee undertakes to conduct a business or sell a  
product or service in accordance with methods and  
procedures prescribed by the franchisor through*

*advertising, promotion and other advisory services.*  
*H&R Block., Inc. v. Lovelace, 208 Kan. 538, 493 P.2d*  
*205, 211.”*

*From the above definitions it is concluded that “franchise” is a Privileged contract between the “grantor” and “grantee” in respect of a trade or business to the exclusion of any one else, which does not belong to citizens generally, with a view to create a “monopoly” in respect thereof, which is also known as CARTEL.*

23. *It is well settled that the right of trade/ business or profession under Article 18 of the Constitution is not an absolute right but so long a trade or business is lawful a citizen who is eligible to conduct the same cannot be deprived from undertaking the same, subject to law which regulates it accordingly. The word “regulation”, as used in Article 18 of the Constitution has been interpreted by the Courts of our country keeping in view the provisions of Article 19(1)(g)(6) of the Indian Constitution. It would be appropriate to reproduce it herein below for convenience:-*

**“19. Protection of certain rights regarding freedom of speech etc.----** (1)**All citizens shall have the right-----**

(a).....

(b).....

(c).....

(d) .....

(e).....

(f).....

(g) *to practice any profession or to carry on any occupation trade or business.*

(2) .....

(3).....

(4) .....

(5) .....

(6) *anything in sub-clause (g) of the said clause shall effect the operation of any existing law in so far as it imposes or prevents the State from making any law imposing, in the interest of the general public, reasonable restriction on the exercise of the right*

*conferred by the said sub-clause and any particular [nothing in the said sub-clause shall effect the operation of any existing law in so far as it relates to or prevent the State from making any law relating to---*

*(i) the profession or educational qualification necessary for practicing any profession or carrying on any occupation, trade or business*

*(ii) the carrying on by the State or by a corporation owned or controlled by the State of any trade business industry or service] whether to the exclusion complete or partial of citizens or otherwise.”*

*It may be noted that word “reasonable” was inserted in Article 19 of the Indian Constitution, vide Constitution (First Amendment Act 1951), but it has not defined the expression “reasonable restriction” itself. However, from different judicial pronouncements following definitions can be considered for purpose of ascertaining the meaning of “reasonableness of restriction” on the fundamental rights of the citizens, to conduct any lawful trade or business:-*

- i) The limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. M/s Dwarka Prasad v. State of U.P. (AIR 1954 SC 224), P.P. Enterprises v. Union of India (AIR 1982 SC 1016)].*
- ii) The Court would see both to the nature of the restriction and procedure prescribed by the statute for enforcing the restriction on the individual freedom. Not only substantive but procedural provisions of statute also enter into the verdict of its reasonableness. Kishan Chand v. Commissioner of Police (AIR 1961 SC 705).*
- iii) The principles of natural justice are an element in considering reasonableness of a restriction but the elaborate rules of natural justice may be excluded expressly or by necessary implication*

where procedural provisions are made in the statute. Haradhan Saha v. State of W.B. [(1975) 3 SCC 198]

- iv) Absence of provision for review makes the provisions unreasonable. K.T. Moopil Nair v. State of Kerala (AIR 1961 SC 552).
- v) Retrospectivity of a law may also be the relevant factor of law, although a retrospectivity of law does not make it automatically unreasonable. Narottamdas v. State of Maddhya Pradesh and others (AIR 1964 SC 1667).
- vi) Reasonable restriction also includes cases of total prohibition of a particular trade or business which deprive a person of his fundamental right under certain circumstances. Narindra Kumar Vs. Union of India (AIR 1960 SC 430)

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).

Whereas in **Black’s law Dictionary** the word ‘regulation’ has been defined as follows:-

“**Regulation.** The act of regulating; a rule of order prescribed for management or government; a regulating principle; a precept. Rule of order prescribed by

*superior or competent authority relating to action of those under its control. Regulation is rule or order having force of law issued by executive authority of government.”*

*Perusal of above definition persuades us to hold that there cannot be denial of the Government’s authority to regulate a lawful business or trade, but question would arise whether under the garb of such authority, the Government can prohibit or prevent running of such a business or trade. To find out the answer to this question, reference may be made to the case of Municipal Corporation of the City of Toronto v. Virgo (1896 A.C. 88, 93), where Lord Davey while discussing a statutory power conferred on a Municipal Council to make bye-laws for regulating and governing a trade made the following observation:-*

*“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.”*

*The above judgment has also been cited in Saghir Ahmed’s case\_(ibid), which has also been relied upon by the learned counsel for appellants, particularly Mr. Muhammad Akram Sheikh, Sr. ASC. We may observe that some of the principles highlighted in this case may not be attracted in the facts of the case in hand because it was pronounced prior to Constitutional amendment in 1951, in pursuance whereof the word “reasonable’ was*



*added before the word “restriction”. But at the same time this judgment also contained at least two other important observations, which will be referred to at a later stage. At this juncture, reference to the case of Government of Pakistan through Secretary Ministry of Commerce and another v. Zamir Ahmed Khan (PLD 1975 SC 667), seems to be important, with reference to proposition under discussion. In this case, respondent Zamir Ahmed challenged the amendment in SRO No.54(i)/72 dated 15<sup>th</sup> May 1972 in pursuance whereof cinematograph films were allowed to be imported from abroad subject to presentation of a licence form for authentication by the licencing authority etc. Subsequently this notification was amended as per gazette notified on 10<sup>th</sup> August 1972 whereby private respondents were disqualified from importing cinematograph films and the agencies to be specified by the Ministry of Information and Broadcasting were allowed to import the films. The licence to import the films was declined to the respondent, therefore, he invoked the constitutional jurisdiction of the High Court but no relief was given to him and the petition was dismissed on the ground that no right in his favour had been created. An appeal was filed against this order which was allowed by latter’s Patent Bench. The Government preferred appeal before this Court, wherein while interpreting Article 18 of the Constitution, this Court made following observations:-*

*“It will be appropriate to examine in the first instance, whether the respondent can invoke any provision of the Constitution in the Chapter relating to the Fundamental Rights for the grant of licence for the import of films. Article 18 of the Constitution, which relates to the freedom of trade, business or profession, which corresponds to Article 15 of the Interim Constitution, and which incidentally held the field at the relevant time, assures the citizens the right to enter upon any “lawful profession or occupation” and “to conduct any lawful*

*trade or business". It is important to point out that the word "lawful" qualifies the right of the citizen in the relevant field. This clearly envisages that the State can by law ban profession, occupation, trade or business by declaring it to be unlawful which in common parlance means any thing forbidden by law. Prostitution, trafficking in women, gambling, trade in narcotics or dangerous drugs are common place instances of unlawful profession or trade. These are inherently dangerous to public health or welfare. Therefore, on the wording of occupation or to conduct trade or business can hardly be described to be a constitutional or fundamental right when such right may be denied by law."*

*The above judgment was maintained in review petition in the judgment reported as **Zamir Ahmed Khan v. Government of Pakistan and another** (1978 SCMR 327). Aforesaid conclusion seems to be in consonance with the judgment in the case of **Municipal Corporation of the City of Toronto** (ibid).*

25. *It may be noted that broad principles laid down in the judgments of Indian jurisdiction, some of which have been noted herein above, interpreting the word "reasonable restriction", did not say that it would also mean "prohibition" or "prevention" completely, except under certain circumstances.*

26. *Now we have got before us the definition of the word "reasonable restriction" as defined by the Courts of Indian jurisdiction and the definition of the word "regulation" according to our own Court, and as per its dictionary meanings. Therefore, it would be seen that in order to resolve the controversy, which definition, out of two, is to be followed. But before doing so, we consider it appropriate to examine the judgments cited by the learned counsel for respondents, to contend that Government can prohibit and prevent any trade or business in the public interest:-*

Case Law

- i) Mehtab Jan and another v. Municipal Committee Rawalpindi  
(PLD 1958 W.P. Lahore 929)

- ii) Government of Pakistan v. Syed Akhlaque Hussain and another (PLD 1965 SC 527)  
  
M/s Haider Automobile Ltd. v. Pakistan  
(PLD 1969 SC 623)

Discussion

In this case while examining Article 12 of the Constitution of 1956, with regard to a case in which notice was issued by the Municipal Corporation Rawalpindi that “all owners, tenants, residents and prostitutes”, who reside in the area known as Serai Beli Ram for the purpose of adultery, should vacate their premises within a month, reason for the notice being that the use of the locality in question as “chakla” was injurious to the morals of the residents, held that “morality and decency are as fundamental as the fundamental rights themselves, and in the context of our Constitution, bearing in mind the preamble and the directive principles, a fundamental right is like the moon and morality like the disk of light surrounding it. A profession whose practice Pakistan’s Constitution guarantees to the citizen could not conceivably be a profession involving indecency or immorality”. It is further held that “the advocacy of a “full and free” right to practice prostitution violates both the spirit and the letter of the Constitution”. Therefore this case has no application to the instant case.

In both these cases, the respondents, who were former Judges of the High Court were banned to practice before the High Courts, which were adorned by them as permanent Judges, under the Legal Practice (Disqualification) Ordinance (II of 1964), therefore, they challenged the vires of this Ordinance on the ground that it has violated their fundamental right of practice or profession. This Court keeping in view the peculiar facts and circumstances of the case, particularly the respect and dignity of the retired Judges of the Superior Courts held as under:-

“The fact of partial disbarment is however plain, and where this occurs in diminution of a franchise which has been enjoyed for a period, the question would arise whether the law can effectively produce such a loss of a property right, consistently with the requirement of the Constitution. Speaking generally, the law as an instrument for the advancement of the public interest must be adapted to existing requirements, being specially sensitive to the existence of any elements of mischief or injury which it finds in operation. The law moves

*slowly, and therefore, conservatively, but instances are not uncommon of the law moving to remedy gross inefficiency and inequalities which have grown up under its protection in the past, even at the cost of deprivation of the existing rights of property. There is the instance of the land reform, which was found necessary in the entire sub-continent following upon the century during which, under British rule, a condition had developed leading to monopolization and inefficient exploitation of land, to the detriment of the prosperity of the common people. The technique of decartelization in industry and commerce in many countries through legal instruments, affords another example of the removal of existing mischiefs by the deprivation of existing rights of ownership, because such rights having developed in unbalanced fashion, so as to produce real dangers to the public interest in the shape of unhealthy monopolies. The Constitutional right in respect of property is expressed in the following simple terms, viz.:---*

*“No person shall be deprived of his property save in accordance with law.”*

*In this case, the loss of a property right through partial disbarment has been operated by a law. It has no quality of a “bill of attainder” such as was found by the majority of the Supreme Court of the United States in the case of Garland. That Court had under consideration a law of Congress depriving attorneys of their entire right of practicing the profession of law, unless they took an oath denying that they had ever participated on behalf of the Confederacy of the Southern States in the American Civil War. The case was one of the treason being visited with punishment through legislative instrumentation. Here, it is not a case of punishment at all. The Ordinance of 1964 operates in*

*aid of maintenance of the judicial machinery at the apex of the system in that State of dignity, which is essential to its proper operation. In the case of Garland, it was found that the law also operated ex post facto, that is, it applied to an act not punishable when it was performed, a punishment of later devising. Such a prohibition is contained in the Pakistan Constitution in Fundamental Right No. 4, but that right is clearly not attracted, for here indeed there is nothing in the nature of a punishment being applied. Nor can it be said that there is violation of the right of equality of citizens expressed in Fundamental Right No. 15, in the following terms viz.---*

*All citizens are equal before law and are entitled to equal protection of law."*

*As a result of above observation, the petition filed by the Government was accepted.*

*Same rule has been followed in the case of **Haider Automobile Ltd.**, where this Court had examined the judgment of the High Court in the case of Manzoor Qadir, (former Judge).*

*The above judgments are also not applicable because by means of Ordinance 1964, the former/retired Judges of the Superior Courts were completely debarred to practice later. However, they were prevented to do so before the High Court, which they had served as former Judge. As such the judgments are not applicable.*

iii) **Government of Pakistan through Secretary Ministry of Commerce and another v. Zamir Ahmed Khan**  
(PLD 1975 SC 667)

*The facts of this case in brief have already been noted herein above. Learned counsel has highlighted the principle namely that "licence does not create a right in favour of its holder". There is no dispute with this principle but it is to be noted that the appeal filed by the Government had succeeded on the point that Section 3(1) of the Export (Control) Act (XXXIX of 1950) read with Import Policy Order 1972 were not challenged and the respondent had in fact show his grievance only in respect of amended notification dated 10<sup>th</sup> August 1972 whereby official agency through Ministry of Information and Broadcasting*

was allowed to import cinematographic films, therefore, he failed to get relief from the Court. Thus for this reason this judgment is also not applicable.

iv) M/s East and West Steamship Co. v. Pakistan.  
(PLD 1958 SC 41)

In this judgment it was held that “a right given by Article 12 has to be read subject to clause (a) of the proviso, which expressly states that a trade may be regulated by a licencing system, and if the effect of a licencing system is prohibition then it follows that prohibition of a trade by a licencing system was contemplated by the framers of the Constitution”. In our considered opinion, Article 12 of the Constitution of 1956 is distinguishable from proviso (b) of Article 18 of Constitution of 1973 which had introduced the element of competition amongst the traders and this Court in the case of Government of Pakistan (ibid) has explained the meaning of the “regulation” holding that prohibition or prevention of a trade is possible only if the same is unlawful. Therefore, this judgment is also not attracted.

27. The edifice of the arguments of Syed Ali Zafar, learned ASC is based on premises that as appellants were not qualified to get franchise of specified routes, therefore, in terms of Article 18 (a) of the Constitution, they were excluded from the business of transport as per the provisions of Section 69-A of the Ordinance. But in our opinion, in Article 18 of the Constitution, word “qualification” has been used to confer a right upon a citizen to enter upon any lawful profession or occupation and not to conduct any lawful trade or business. Admittedly Section 69-A of the Ordinance had not prescribed a qualification for the transporters. As per ordinary meanings of, “qualification” a quality, which is legally necessary to render a person eligible to fill an office or to perform any public duty or function like a qualified voter, who meets the residence, age and registration requirements etc. [**Black’s law Dictionary** (page 1116)], therefore, it can be safely concluded that a person without having a qualification can run a business or trade of transport. Perhaps learned counsel wanted to convey that as appellants were not in a position to

*operate stage carriages with capacity of carrying 70 or more passengers, therefore, under Section 69-A of the Ordinance, they were disqualified to get franchise. This assumption is not correct because, the appellants were not competing for franchise routes as they were already in possession of valid route permits, which were not cancelled for violation of the law, under which the same were issued to them i.e. Section 62 of the Ordinance, therefore, in absence of any competition between the appellants and respondents, they were qualified to ply their stage carriages on the same routes.*

*It may be noted that in pursuance of sub-section (4) of Section 69-A of the Ordinance, route permits of the appellants have been cancelled in violation of principles of natural justice, as sub-section (4) of Section 69-A, expressly or by necessary implication provides that they would be entitled to right of hearing before the cancellation of their permits to run a valid stage carriage, which they were possessing since long and on the basis of the same, were plying their vehicle on the specified routes.*

*Argument of learned counsel for respondents is that competent authority can regulate any trade or profession by a licencing system. There may be no cavil but this clause has to be read conjunctively with proviso (b) of Article 18 of the Constitution, according to which an element of free competition to regulate a trade, commerce or industry has been introduced because if competition in the trade is discouraged, it would negate the provisions of Article 3 of the Constitution, which deals with the elimination of all forms of exploitation and if due to non-competition, franchise is granted on specified routes, it would tantamount to monopolize the trade/business of transport, as held in the case of Harman Singh v. R.T.A. Calcutta Region. (AIR 1954 SC 190). Relevant para therefrom is reproduced herein below for convenience:-*

“(8) The next contention of Mr. Choudhry that the introduction of small taxis in the streets of Calcutta will bring about a total stoppage of the existing motor taxi cab business of large taxi owners in a commercial sense and would thus be an infringement of the fundamental right guaranteed under Article 19(1)(g) of the Constitution is again without force. Article 19(1) (g) declares that all citizens have the right to practice any profession, to carry on any occupation, trade or business, Nobody has denied to the appellants the right to carry on their own occupation and to ply their taxis. This article does not guarantee a monopoly to a particular individual or association to carry on any occupation and if other persons are also allowed the right to carry on the same occupation and an element of competition is introduced in the business, that does not in the absence of any bad faith on the part of the authorities, amount to a violation of the fundamental right guaranteed under Article 19(1)(g) of the Constitution. Under the Motor Vehicles Act it is in the discretion of the Regional Transport Authority to issue permits at different rates of tariff to different classes of vehicles plying in the streets of Calcutta and if that power is exercised in a ‘bona fide’ manner by the Regional Transport Authority for the benefit of the citizens of Calcutta, then the mere circumstance that by grant of licence at different tariff rates to holders of different taxis and different classes of vehicles some of the existing licence holders are affected cannot bring the case under Article 19 (1)(g) of the Constitution.”

*In the instant case as well, the Government of Punjab, instead of promulgating Section 69-A of the Ordinance for the purpose of granting franchise on specified routes to the respondents by excluding all other transporters, running their stage carriages against valid route permits on the same routes, ought to have granted route permits to respondents as well under the Ordinance, in order to cater the pressure of the passengers on those routes with clear direction to them to charge less fare from passengers, compared to the fare which is being charged by the appellants*



*transports, who are already plying their vehicle on the same routes and if owing to such free competition, if any of them had failed to compete, it could have excluded itself from the business, instead of providing a cause of grievance to the appellants, to whom right to live has been denied as they are not in a position to survive, on account of being excluded from the business in terms of Article 9 of the Constitution. The word “life” used in this Article of the Constitution has been defined in the case of Shehla Zia v. WAPDA (PLD 1994 SC 693), according to which “life” includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally”. It is further explained therein that the word “life” in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Moreover, under the objective resolution which is a part of the Constitution, it is the duty of legislature to ensure an egalitarian society, based on Islamic concept of fair play and social justice, as held in the case of Shaukat Ali v. Government of Pakistan (PLD 1997 SC 342). Relevant para therefrom reads as under thus:-*

*“4. Since the Railways intend to grant licences in the above terms in order to ensure that no one is discriminated or favoured for the reason other than the well-being of the people and the country at large, no purpose will be served by granting leave. We may observe that since Pakistan is founded on the basis of religion of Islam, efforts should be made to bring about an egalitarian society based on Islamic Concept of fair play and social justice. The State functionaries like Railways are expected to act fairly and justly, in a manner which should not give to any one cause of complaint on account of discriminatory treatment or otherwise. While discharging official functions, efforts should be made to ensure that no one is denied to earn his*

*livelihood because of the unfair or discriminatory act on the part of any State functionary. It is hoped that the petitioners who had been earning livelihood for considerable long period on the basis of licences granted by the Railways, will be treated fairly.”*

*As observed herein above, Constitution is a living document which portrays the aspirations and genius of the people and aims at creating progress, peace, welfare, amity among the citizens, therefore, while interpreting its different Articles particularly relating to the fundamental rights of the citizens, approach of the Courts should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. As such, following this principle and also keeping in view other provisions of the Constitution, including Article 3, 9, 18 as well as Article 38 of the Constitution, which deals with the principles of State policy, we are inclined to hold that if the definition of word “regulation” as laid down in the judgments cited herein above, is applied to hold that under licencing system, unless the business is unlawful or indecency is involved therein, the legislature can enact laws, which will promote a free competition in the fields of trade, commerce and industry. At any rate, if restrictions are to be imposed to regulate such trade or business, those should not be arbitrary or excessive in nature, barring a majority of persons to enjoy such trade. In the instant case, as per the requirement of Section 69-A of the Ordinance, the appellants, who are the owners of the stage carriages as per the definition under Section (2) 37 of the Ordinance, would not be in a position to run the business on the specified routes, franchise of which has been offered to the respondents because it has been inferred from the facts of the case put forward by parties’ counsel that for one route they have to arrange a fleet of stage carriages. Obviously the appellants are not in a position to arrange such fleet, on account of their financial position or*

*being un-influential person. They are also not in a position to obtain hefty loans from the financial institutions, as have been given to respondents at 70% and 30% ratio, and thus unable to compete with the respondents. Consequently, such conditions would appear to be not only arbitrary but oppressive in nature and tend to deprive them from enjoying the fundamental right of freedom of trade and business, as per Article 18 of the Constitution. Therefore, in such situation it becomes duty of the Court to see the nature of the restrictions and procedure prescribed therein for regulating the trade and if it comes to the conclusion that the restrictions are not reasonable then the same are bound to be struck down.*

*As discussed herein above, the conditions imposed under Section 69-A of the Ordinance are held to be very harsh, unjust, arbitrary, oppressive and contrary to principles of natural justice, because by the time it is well settled that if an adverse action is likely to be taken against a person, detrimental to his interest, he is entitled to the right of hearing before finalization of such action. In this behalf, reference can be made to the case of **Pakistan International Airlines (PIAC) v. Nasir Jamal Malik** (2001 SCMR 935). Relevant para therefrom is reproduced herein below for convenience:-*

*“Though the principle of audi alteram partem is not universally accepted principle but emphasis on its application has always been made on those proceedings where adverse action is being contemplated to be taken against the person/persons who have at least a right to defend such action or during course of time they have acquired a right to negate allegations on basis of which an action adversely affecting their interest is being taken. To strengthen the arguments reference may be made to Chief Commissioner, Bahawalnagar and others (PLD 1964 SC 461), (iv) Abul Alla Maudoodi v. Government of West Pakistan (PLD 1964 SC 673) (v) University of Dacca v. Zakir Ahmed (PLD 1965 SC 90),*

(vi) *Muhammad Hayat v. Province of West Pakistan* (PLD 1964 SC 321). (vii) *Massers East-end-Export, Karachi v. The Chief Controller of Imports and Exports. Rawalpindi and another* (PLD 1965 SC 605), (viii) *Pakistan and others v. Public At Large and others* (PLD 1987 SC 304), (ix) *Khaliluz Zaman v. Supreme Appellate Court, Lahore and 4 others* (PLD 1994 Sc 885), (x) *Ghulam Mustafa Jatoi v. Additional District and Sessions Judge/Returning Officer, N.A. 158, Naushero Feroze and others* 1994 SCMR 1299 and (xi) *Faqir Ullah v. Khalil-uz-Zaman and others* (1999 SCMR 2203).”

28. *It may be noted that Section 69-A of the Ordinance is couched in such a language that one feels no difficulty to draw an inference that a new system is being introduced, which is absolutely different and distinct from the licencing system of running the transport as has been provided under the Ordinance 1965, without providing right of hearing to these stage carriages’ owners, who are being excluded from the trade, as observed herein above but no right of appeal or revision against the order of Secretary, Regional Transport Authority or the Government, has been provided, therefore, due to this reason as well, Section 69-A seems to be unreasonable law. Thus it can be safely concluded that the restrictions imposed by Section 69-A of the Ordinance leading to exclude the appellants from the trade/business of transport had prevented/prohibited the appellants and many other transporters to enjoy the guaranteed fundamental right of freedom of trade/business as per Article 18 of the Constitution.*

29. *Next question for consideration would be as to whether Article 18 of the Constitution permits introduction of franchise system in the trade/business. Definition of “franchise” from the American Jurisprudence and Black’s Law Dictionary has already been noted herein above, crux of*

*which is that a special privilege granted to a particular person/party to do a specific business, to the exclusion of all other persons, dealing in the same business would not be reasonable . A perusal of proviso (b) of Article 18 of the Constitution indicates that regulation of the trade, commerce or industry is permissible in the interest of free competition therein. Meaning thereby that without free competition amongst traders, no trade commerce or industry can be regulated. To understand the concept of free competition, this clause may be read, keeping in view proviso (c) of Article 18 of the Constitution, according to which only Federal Government or Provincial Government or a Corporation controlled by such Government can carry on any trade, business, industry or service to the exclusion, complete or partial, of such other person, which would mean that under clause (c), a right has been given only to the Government to create monopoly and confer right of franchise to any of the functionaries mentioned therein for the purpose of carrying on a business. As far as private persons are concerned, they cannot be excluded from carrying on trade for the purpose of creating monopoly and granting franchise of a particular trade. The concept of franchise is alien to the Indian Constitution as well as to our own Constitution because with reference to running of transport on the route owned by the public, all citizens have equal rights and they cannot be deprived from the same for the reason that some of them had obtained franchise on the said route. In this behalf it is to be noted that we are informed that on some of the routes granted to the private respondents i.e. Varan Tours in Islamabad – Rawalpindi, the franchise holder is also plying the stage carriages on the highway i.e. Peshawar road etc. This fact has not been disputed by the other side, therefore, we are of the opinion that the provisions of Section 69-A of the Ordinance cannot be pressed into service to exclude all other citizens*

*including the appellants, preventing them from use of the highways for the purpose of running the business of transport. In this behalf in the following para, Indian Supreme Court in Saghir Ahmed's case (ibid) has elaborately discussed this aspect of the case:-*

*“But the right of the public to use motor vehicles on the public road cannot, in any sense, be regarded as a right created by the Motor Vehicles Act. The right exists anterior to any legislation on this subject as an incident of public right over a highway. The State only controls and regulates it for the purpose of ensuring safety, peace, health and good morals of the public. Once the position is accepted that a member of the public is entitled to ply motor vehicles on the public road as an incident of his right of passage over a highway, the question is really immaterial whether he plies a vehicle for pleasure or pastime or for the purpose of trade and business. The nature of the right in respect to the highway is not in any way affected thereby and we cannot agree with the learned Advocate General that the user of a public road for purposes of trade is an extraordinary or special use of the highway which can be acquired only under special sanction from the State.”*

*After having explained the public right to use a public road or highway their lordships proceeded to examine whether grant of franchise to a private person is permissible under the Indian Constitution or not and after taking into consideration the material available on record it was concluded as under:-*

*“We do not think that this is the law of India under our Constitution. The cases referred to above were noticed by the Allahabad High Court in the Full Bench decision of Motilal v. Uttar Pradesh Government, and two of the learned Judges constituting the Full Bench expressed their opinion that this ‘doctrine of exceptional user’ might have been evolved by the American Courts in the same way as they evolved the ‘doctrine of police powers.’ They both held that this American rule did not embody the English or the Indian law on the subject.*

*This identical point was investigated with considerable thoroughness in a recent decision of the Madras High Court in C. S. S. Motor Service v. State of Madras, and it was pointed out by Venkatarama Ayyar J. who delivered the judgment of the Court, that the rule of special or extraordinary use of highways in America had its roots in the doctrine of 'franchise', which is still a recognized institution in that country. The doctrine of 'franchise' or 'privilege' has its origin in English Common Law and was bound up with the old prerogative of the Crown. This doctrine continued to live in the American legal world as a survival of the pre-independence days, though in an altered form. The place of the royal grants under the English Common Law was taken by the legislative grants in America and the grant of special rights by legislation to particular individuals or companies is regarded there as a 'franchise' or 'privilege' differing from the ordinary liberties of a citizen. The carrying on of transport buses by common carriers on the public road in America is a 'franchise' and not a common law right, which could be claimed by all citizens and a distinction is made, as the cases cited above will show, between contract carriers who carry passengers or goods under particular contracts and common carriers whose business is affected with public interest. Over the latter the State claims and exercises a plenary power of control. Ayyar J. has, in our opinion, rightly pointed out that this doctrine of 'franchise' has no place in our Constitution. Under the Indian Constitution the contract carriers as well as the common carriers would occupy the same position so far as the guaranteed right under article 19(1) (g) is concerned and both are liable to be controlled by appropriate regulations under clause (6) of that article. The law on the point, as it stands at present, has been thus summed up by the learned Judge.*

*"The true position then is, that all public streets and roads vest in the State, but that the State holds them as trustees on behalf of the public. The members of the public are entitled as beneficiaries to use them as a matter of right and this right is limited only by the similar rights possessed by every other citizen to use the pathways. The State as trustees on behalf of the public is*

*entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally; ..... but subject to such limitations the right of a citizen to carry on business in transport vehicles on public pathways cannot be denied to him on the ground that the State owns the highways.”*

*We are in entire agreement with the statement of law made in these passages. Within the limits imposed by State regulations any member of the public can ply motor vehicles on a public road. To that extent he can also carry on the business of transporting passengers with the aid of the vehicles. It is to this carrying on of the trade or business that the guarantee in article 19 (1) (g) is attracted and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under clause (6) of that article”.*

*The question of non-recognition of the doctrine of franchise, as per the mandate of Article 19 (1) (g) of the Indian Constitution as discussed above, was reaffirmed in the case of **Krishna Kakkan v. Government of Kerala and others** (AIR 1997 SC 128) i.e. under clause (1) (g) of Article 19 of the Indian Constitution, all citizens have a confirmed right to choose their own employment or take upon any trade or business subject to the limits as may be imposed by the State in the interest of public welfare and other guarantees mentioned in clause (6) of Article 19 but it may be emphasized that the Constitution does not recognize franchise or right to business which depends on the guarantees*

30. *In our opinion, there is no distinction in the Indian Constitution as well as our own Constitution to the extent of grant of franchise in a trade, therefore, we are persuaded to hold that in the trade of transport by inserting Section 69-A of the Ordinance, grant of franchise on specified routes is contrary to the provisions of Article 18(b) of the Constitution, therefore, deserves to be declared void, under Article 8 of the Constitution.*



31. *It is important to note that Ordinance of 1999 could not be placed before the Provincial Assembly to make it an Act because during its subsistence Provincial Assembly was suspended on account of Military takeover on 12<sup>th</sup> October, 1999, therefore, it may be legitimately presumed that in the enactment of Section 69-A of the Ordinance the public views through elected representative are not included. Thus in the absence of public opinion in promulgating Section 69-A of the Ordinance, it may not be difficult to infer that it was not promulgated in the public interest and general welfare etc. Indeed had this law been discussed in the Assembly, through the representatives of the public, it might have changed its complexion, to bring it within the command of Article 18 of the Constitution.*

32. *In the alternative it may be observed that the High Court seized with the writ petition ought to have conducted an inquiry in the interest of justice to ascertain as to whether addition of Section 69-A of the Ordinance is for the public interest and general welfare and thus a valid law according to Article 18 of the Constitution. Such exercise can always be undertaken in the interest of justice or the Court can always direct the Government to conduct inquiry in this behalf and to decide the validity of Section 69-A of the Ordinance as done in the case of **Pratap Pharma (Pvt.) Limited v. Union of India** (AIR 1997 SC 2648).*

33. *Mr. Maqbool Ellahi Malik, learned ASC for respondents i.e. Varan Tours, raised altogether a novel of argument in an attempt to save Section 69-A of the Ordinance. According to him, respondent Varan Tours is an instrumentality of the Government of Punjab because the contents of the agreement signed between them specifically provide that “fares” in respect of the journey on the routes will be determined from time to time with the consultation of the Regional Transport Authority, therefore, according to*

him the system of franchise is permissible under proviso (c) of Article 18 of the Constitution. In support of his argument he relied upon Aitchison College Lahore v. Muhammad Zubair (PLD 2002 SC326).

Learned counsel appearing for the appellants seriously controverted this view point. Similarly Mr. Aftab Gul learned ASC, who also appeared on behalf of Varan Tours did not subscribe to his contention. However, we have examined the proposition put forward by him but we are persuaded to disagree with his proposition because the Varan Tours is a private concern, who has got franchise on route No.1 and 7 of Rawalpindi - Islamabad, and neither the Federal Government nor the Provincial Government controls its business nor the company is setup or established by them. As far as the judgment cited by the learned counsel is concerned it is completely distinguishable because in that case Government of Punjab had taken over the administration of Atchison College under the control of Education Department by amending its Rules of Business.

34. There is no cavil with the proposition that the Federal Government or the Provincial Government or a Corporation controlled by any one of them can create a monopoly to the exclusion of any other person for the purpose of running a business, as per the mandate of clause (c) of the proviso to Article 18 of the Constitution, as held in Kondala Rao v. Andhra Pradesh S.R.T. Corporation (AIR 1961 SC 82). Relevant paras therefrom are reproduced herein below for convenience:-

“(9) The only question is, how far and to what extent Art. 19(6) secures the validity of Ch. IVA of the Act from attack that it offends against Art. 19(1)(g)? Learned Counsel for the petitioners contends that Art. 19(6)(ii) provides only for partial exclusion of citizens, that is, the exclusion of a certain class of persons as a whole and not far partial exclusion of some among the same class. As S. 68C, the argument proceeds, enables the State Transport Undertaking to frame a scheme for

*excluding some among the same class, the said provision is not saved by Art. 19(6) of the Constitution. Relevant portions of S. 68C of the Act read:*

*“Where any State transport undertaking is of opinion that ..... it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State transport undertaking, whether to the exclusion, complete or partial, of other persons or otherwise.....”.*

*Under this section a scheme may be framed in respect of road transport service in general or in respect of a particular class of such service empowering the State Transport Undertaking to run the said service; it may be in relation to any area or route or a portion thereof; it may also be to the exclusion of all or some of the persons running the said service in general or a particular class of it. The section enables the State to take over a particular class of a service, say, the bus service, and exclude all or some of the persons doing business in that class of service. Learned counsel says that this section confers a wide power beyond the permissible limits of Art. 19(6)(ii) of the Constitution. To State it differently, the argument is that while Art. 19(6)(ii) does not enable a partial exclusion of some among the same class of service, S. 68C permits the said exclusion.*

*(10) The answer to this argument depends upon the true meaning of the provisions of the said Article. Under sub-cl. (ii) of Art. 19(6), the State can make a law relating to the carrying on by the State or by a corporation, owned or controlled by the State, of any particular business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. Article 19(6) is only a saving provision and the law made empowering the State to carry on a business is secured from attack on the ground of infringement of the fundamental rights of a citizen to the extent it does not exceed the limits of the scope of the said provision. Sub-cl. (ii) is couched in very wide terms. Under it the State can make law for carrying on a business or service to the exclusion complete or partial of citizens or*

*otherwise. The law, therefore, can provide for carrying on a service to the exclusion of all the citizens; it may exclude some of the citizens only; it may do business in the entire State or a portion of the State, in a specified route or a part thereof. The word “service” is wide enough to take in not only the general motor service but also the species of motor service. There are, therefore, no limitations on the State’s power to make laws conferring monopoly on it in respect of an area, and person or persons to be excluded. In this view, it must be held that S. 68C does not exceed the limits prescribed by Art. 19(6) (ii) of the Constitution”.*

35. *Syed Ali Zafar, learned counsel for one of the private respondents argued that Government of Punjab in pursuance of a policy to eliminate congestion of traffic, to reduce inconvenience to the public at large during journey, to control pollution as well as to check unfortunate degradation of human being, introduced the franchise system of transport, therefore, interference in the policy decision of the Government is not called for. Reliance in this behalf was placed by him on Deputy Assistant Iron and Steel Controller, Madras v. L. Manickchand Proprietor K.M Corporation (AIR 1972 SC 935).*

*It may be noted that in the above said judgment it was held that import licence cannot be claimed as of right. Similarly, in State of Maharashtra v. Lok Shikshan Sanstha (AIR 1973 SC 588), it was held as under:-*

*“the question of policy is essentially for the State and such policy will depend upon an overall assessment and summary of the requirements of residents of a particular locality and other categories of persons for whom it is essential to provide facilities for education. If the over all assessment is arrived at after a proper classification on a reasonable basis, it is not for the*

*Courts to interfere with the policy leading up to such assessment.”*

*In the case of **Government of Pakistan v. Zamir Ahmed Khan** (ibid), it was observed as under:-*

*“the amendment made on 10<sup>th</sup> August 1972 in Item No.49 signified a change in policy and the respondent was informed that he was being refused licence because of “the change in policy” and not because of any other reason. On these facts, it is not possible to subscribe to the proposition that a writ of mandamus would lie against Licencing Authority, which would have the effect of defeating the policy, competently made by the Federal Government.”*

*Learned counsel also relied upon on **M/s Illahi Cotton Mills** (ibid).*

*We have gone through the judgments cited by the learned counsel. The facts narrated therein are distinguishable. However, we are of the opinion that in the instant case, right of franchise on specified routes has not been granted to private respondents in pursuance of any directives of the policy but in accordance with provisions of Section 69-A of the Constitution and this Court is not debarred to examine its validity on the touchstone of Article 8 of the Constitution, because if any law is promulgated in derogation of fundamental rights, it would be declared void because at the cost of fundamental rights, guaranteed by the Constitution, the executive Government is not empowered to frame a policy. Resultantly, the argument so raised by learned counsel has no force.*

36. *Mr. Tariq Mehmood, learned counsel for one of the respondents contended that competent authority granted franchise of specified routes to respondents by adopting a transparent procedure as the offers/applications were invited through private media and competition was allowed, following the principle laid down in the case of **Chairman RTA v. Pak. Mutual***

**Insurance Co.** (PLD 1991 SC 14). He further argued that appellants have been granted alternative routes, therefore, they should have no grievance against grant of franchise on specified routes to the respondents and for this reason, appeals are liable to be dismissed. In this behalf reliance was placed on **Administrator Market Committee Kasur** (ibid).

The contentions raised by the learned counsel do not call for examination in depth for the reason that if a law, under which certain proceedings have been drawn, fails to stand the test of Article 8 of the Constitution and is liable to be declared void then any proceedings drawn under it, howsoever, solemn, cannot sustain in law.

37. It may be observed that so far we have considered the validity of Section 69-A of the Ordinance on the touchstone of Article 8 and 18 of the Constitution. We have not entered into factual controversy with regard to proper exercise of discretion by the competent authority, in the discharge of its functions under Section 69-A of the Ordinance and its effect, whether alternative routes have been granted to the appellants to operate their stage carriages and the controversy which has been raised in respect of grant of franchise on the specified routes with mala fide intention, as contended by Mr. Nasir Saeed Sheikh, learned counsel for appellants in Civil Appeal No.226 of 2003, and my Mr. Aftab Gul, learned ASC for one of the franchise holders, for the reason that in impugned judgments, learned High Court has not attended to the factual aspects of the case. In our view, it would not be fair and in the interest of justice to enter into factual controversy for the first time also because it would be against the well settled practice of this Court.

38. Learned counsel for appellants, also argued that the provisions of Section 69-A of the Ordinance are discriminatory in nature because by granting franchise to the respondents, contrary to the provisions of Article

18 of the Constitution, Government has violated Article 25 of the Constitution, which guarantees equal protection of law amongst the persons, similarly placed. To elaborate their arguments, they contended that the respondents to whom franchise has been granted on specified routes are being treated differently because their induction has excluded the appellants from the same business. Reliance has been placed by them on **I.A. Sharwani and others v. Government of Pakistan through Secretary Finance Division, Islamabad** (1991 SCMR 1041).

On the other hand learned counsel for respondents contended that the competent authority is empowered to make reasonable classification, which is permissible because equal protraction of law does not envisage that every citizen is to be treated alike in all circumstances, therefore, classification under Section 69-A of the Ordinance, is not contrary to Article 25 of the Constitution.

It may be noted that appellants and the respondents both are similarly placed being owners of stage carriages and prior to the grant of franchise to the private respondents, appellants were in possession of valid route permits for plying their stage carriages on the specified routes but their route permits stood cancelled due to grant of franchise to the respondents in view of the provisions of Section 69-A of the Ordinance. It means that Section 69-A of the Ordinance has created a classification between franchise holders and appellants-transporters. Such classification is not permissible under Article 25 of the Constitution, because the differentia between both the classes must have rational nexus to the object, sought to be achieved by such classification. As such we are of the opinion that Section 69-A of the Ordinance is also violative of Article 25 of the Constitution.

39. *In view of above discussion, we are persuaded to observe that it is not too late for the Government of Punjab:-*

- a) To suitably amend the Motor Vehicle Ordinance, 1965, if need be, in the public interest and welfare, consistent with the provisions of Article 8 of the Constitution of Islamic Republic of Pakistan, ensuring fair opportunity to the transporters to conduct their business freely, with a provision of better facilities of travel to the passengers in a dignified manner, through reliable stage carriages.*
- b) It has been noticed that the respondents while obtaining franchise on specified routes have obtained 70% loans against their equity of 30%, therefore, the Government may examine to run transport on the specified routes itself, as contemplated by the proviso (c) of Article 18 of the Constitution.*
- c) Government may take any other constitutional or administrative steps, which are deemed fit by it in the public interest for solving the problems of transport in the urban areas of the province of Punjab.*

*Thus for the foregoing reasons, the appeals/petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan are accepted. Section 69-A of the Motor Vehicle Ordinance, 1965 (as amended) is hereby declared ultra vires of the Constitution of Islamic Republic of Pakistan, as a consequence whereof the impugned judgments are set aside. However, existing arrangements may continue for a period of four months enabling the Provincial Government to take appropriate legislative/administrative measures in accordance with Constitution and law. No order as to costs.*



*Herein above are the reasons for the short order dated  
29<sup>th</sup> October 2004.*