ORDER SHEET
HIGH COURT OF SINDH AT KARACHI

Suit No.866 of 2017

DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

Present:-
Mr.Justice Muhammad Ali Mazhar

Hajj Organizers Association
of Pakistan & others .....Plaintiffs

Versus

Federation of Pakistan
& others.....Defendants

For hearing of CMA No.5438/2017

Dates of hearing: 09.05, 23.05, 30.05, 31.05 & 01.06.2017.

M/s.Abid Shahid Zuberi, Ayan Mustafa Memon, Farhan Shah and M.Arif Ansari, Advocates for the Plaintiffs.

Mr.Salman Talibuddin, Additional Attorney General for Pakistan.

Mr.Sohail Mehmood, D.A.G.

Mr.Abdul Wasey Khan Kakar, D.A.G.

Mr.Abdul Qadir Leghari, Assistant Attorney General.

M/s.Shaikh Jehangir Ishtiaq, and M.Fazl-e-Rabi Shaikh, Advocate for the Defendant No.4.

Syed Imtiaz Ali Shah, Deputy Director (Hajj), Ministry of Religious Affairs, Government of Pakistan, Karachi is also present.

Mr.Javed Yousuf Siddiqui, Advocate for Intervenors (CMA No.7874/2017).

Mr.Kumail Shirazi, Advocate for Intervenors (CMA Nos.8386 and 8387/2017).

Mr.Irfan Aziz, Advocate for Intervenor (CMA No.8021/2017) along with Intervenor Abu Bakar.

Mr.Hasan Rashid Qamar, Advocate for the Intervenors (CMA Nos.6605 and 8042/2017).

Mr.Muhammad Bashir Intervenor in person (CMA No.7281/2017)

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Muhammad Ali Mazhar, J: To all intents and purposes, this suit for declaration, mandatory and permanent injunction has been brought to challenge and contest the reduction in the quota of Private Hajj Sector/organizers from 50% to 40% of Pakistan's allocated quota. The plaintiffs postulate and predicate that this curtailment is illegal, arbitrary and mala fide and in violation of fundamental rights of the plaintiffs.

2. Mr.Abid Shahid Zuberi, the learned counsel for the plaintiffs argued that the plaintiff No.1 is an association, representing 742 quota holders of "Hajj Group Organizers". (hereinafter referred to as HGOs) which has been recognized by the Superior Courts. At this moment in time, the curtailment in quota has been made through a letter dated 22.3.2017 written by the defendant No.7 to the Minister for Hajj and Umrah, Royal Kingdom of Saudi Arabia. He further contended that rights of HGOs are fully protected under the Memorandum of Understanding dated 4.7.2013 which has been upheld by the apex court in C.P.Nos.1270, 1308 and 1309/2014 and in C.P.Nos.1180, 1265 and 1297/2016. Through the MoU, vested rights have been created in favour of the plaintiffs which cannot be taken away. He further pointed out that in the year 2007 on denial of quota to new entrants, some travel agents approached to the Lahore High Court however the judgment passed by the Lahore High Court was challenged in the apex in CPLA Nos.565 to 570/2007. The Supreme Court formed a Committee and directed the defendant No.1 to issue a comprehensive Haj policy. He added that Hajj Policy 2017 stresses upon building a strong partnership with private Sector (HGOs) for the provision of better services and quality logistic arrangements to the entire satisfaction of Hujjaj as well as Government of Pakistan and Saudi Arabia. Learned counsel also pointed out that each

HGO has to sign service provider's agreement with certain mandatory conditions. It is also provided in the service agreement that service provider will offer up to 03 packages to the intending pilgrims and the details of additional facilities and amount charges against each facility and in case of any violation, 10% quota will be cancelled for the next year.

3. He further argued that 2013 policy was based on matrix system which excluded new entrants as a result of construction work of Haram Sharif. The Lahore High Court in WP.No.7253/2013 sought a report from Competition Commission but said directions were impugned in the Supreme Court. Eventually the apex court disposed of the matters vide judgment reported in **PLD 2014 SC 1** and laid down the law and guidelines for future Hajj Policies. The MoU dated 4.7.2013 expressly provides that any change in quota due to extraordinary circumstances shall be without prejudice to the original quota of the members of the plaintiff No.1. The learned counsel further contended that in the year 2016 also quota was curtailed and a constitution petition was filed in this court which was dismissed nonetheless the order was challenged in the apex court which pleased to restore the 50% quota of H.G.Os for the Haj year 2016. The learned counsel further augmented that due to certain mandatory conditions, it is not possible to match the Government Hajj package by the HGOs. He referred to the minutes of second meeting of Hajj Policy Formulation Committee, 2017 and pointed out that in the first meeting out of 05 members of the Committee 03 members agreed bifurcation of quota in the ratio of 60:40 to provide facility to low income citizen of the country to perform Hajj under economic package. The representative of Ministry of Law and CCP opined that according to MoU signed between Ministry and HOAP in the year 2013 after restoration of quota

will have to be distributed equally, however, the minutes do show that after majority vote of ratio 3:2, it was decided to recommend ratio of 60:40 between the Government and Private Scheme for Hajj Policy and Plan 2017.

4. While referring to the judgment of the apex court passed in Civil Petition Nos.1180, 1265 & 1297/2016, the learned counsel contended that though Government has exclusive powers to review and reframe the Hajj Policy, but he made much emphasis that this should have been done keeping in view the latest developments and expediencies subject to guidelines given by the apex court in Dossani case. Thenceforth he quoted Hajj Policy-2013, 2016 & 2017 and asserted that the quota of HGOs is allocated with the concept of public private partnership to provide competition in the market and even in Hajj Policy 2017 the quota has been allocated on the same concept with multiple Hajj packages under strict monitoring regime to provide choice and competition in the market. He dispelled the impression gives birth to the Hajj Policy 2017 that on persistent demand of general public to perform Hajj under Government Scheme, 50% quota of the HGOs has been reduced to 40%. Furthermore, he shown me the copies of Crl.M.A. Nos.620, 621 and 622 of 2017 filed in hon'ble Supreme Court in Criminal Original Petition No.65/2016, Criminal Original Petition No.95/2016 and Criminal Original Petition No.67/2016 respectively. Learned counsel also produced a copy of order passed by hon'ble Supreme Court on 21.4.2017 on various applications moved for non-compliance of the judgments of the apex court dated 27.8.2013 and 21.7.2014 passed in Civil Appeal No.800-L of 2013 and C.P. Nos.1270 of 2014. The arguments advanced by the learned counsel are reproduced in paragraph 7 of the order. He in the apex court,

while addressing arguments likewise opposed the reduction from 50% to 40% being violative of MoU but it is clearly reflecting from the order of apex court rendered in HOAP's case on 3.5.2016 that the said judgment do not stand in the way of the Government in framing a just, fair and lawful Hajj policy. The apex court copiously pointed out this case (order dated 3.5.2016) may not be cited as a precedent which would debar the Government from exercising their exclusive powers to review/reframe the Hajj Policy every year keeping in view the latest development and expediencies which would be subject to the guidelines given in the Dossani case. So far as the order of apex court dated 21.4.2017 is concerned, he argued that it is only in relation to the contempt proceedings in which while taking a lenient view the apex court granted opportunity to the alleged contemnors to review their decision and reframe their policy. Learned counsel argued that basically in the above case the defendants in clear violation and defiance of the dictum laid down by the apex court avoiding to grant quota to the non-quota holder HGOs. However against this order the Secretary, Ministry of Religious Affairs and Inter-Faith Harmony has filed Intra Court Appeal under Section 19 of the Contempt of Court Ordinance 2003 which is pending. The purpose of placing this arguments was to demonstrate that last judgment of the apex court has no effect on the reduction of 10% quota and this court in this suit can independently decide as to whether 10% reduction in quota of HGOs is without lawful justification or not. In support of his line of arguments, he cited following judicial precedents:

Dossani Travels (Pvt) Ltd versus Travels Shop (Pvt) Ltd, reported in PLD 2014 S.C 1, Supreme Court unreported judgment in Civil Petition No.1270/2014 (Federation of Pakistan vs. Muhammad Arif), Civil Petition No.1308/2014 (Federation of Pakistan vs. M/s. Alzair Travels & Tours (Pvt.) Limited), Civil Petition No.1309/2014 (HOAP vs. M/s. Alzair Travels & Tours), Civil Petition No.1180/2016 (Hajj Organizers Association of Pakistan vs. Federation of Pakistan), Civil Petition No. 1265/2016 (Al-Qasim Hajj & Umrah Services (Pvt.) Ltd.

vs. Federation of Pakistan), Civil Petition 1297/2016 (Jabal-e-Noor Travel & Tours (Pvt.) Ltd vs. Federation of Pakistan) and PLD 1969 S.C. 599 (Nabi Ahmed and another v. Home Secretary, Government of West Pakistan, Lahore & Others), 1998 SCMR 1404 (Messrs M.Y. Electronics Industries (Pvt.) Ltd. v. Government of Pakistan), 1986 SCMR 916 (Federation of Pakistan & others v. Ch. Muhammad Aslam & others), PLD 1990 S.C. 1092 (Aman Ullah Khan & others v. The Federal Government of Pakistan), 2002 SCMR 510 (Federation of Pakistan v. Ammar Textile Mills (Pvt.) Limited), 2002 SCMR 772 (Mumtaz Ali Bohio v. Federal Public Service Commission) and 1986 SCMR 1917 (Al-Samrez Enterprise v. The Federation of Pakistan).

5. The learned DAG, Mr.Sohail Mahmud for the defendant No.1,2 and 7 argued that the Ministry under Rule 2 (iii) Schedule II, 27 (1) of Rule of Business 1973 is duty bound to manage pilgrimage and in this regard planning, management and operation of pilgrimage is being regulated every year through Hajj Policy duly approved by the Federal Cabinet/Prime Minister of Pakistan. The current Policy has been framed by the Committee constituted by the Supreme Court. The Hajj quota allocated to Pakistan is not in the name of plaintiffs but it is the prerogative of Government to distribute the Hajj quota between public and private sector. As far as MoU is concerned it was concluded in 2013 and its operation has been honoured by the defendant Ministry in 2014. The plaintiffs cannot claim allocation of Hajj quota as of right. The letter under reference regarding bifurcation of Hajj quota is part of bilateral negotiation between two countries based on recommendations of majority vote by the Hajj Formulation Committee constituted by hon'ble Supreme Court. The Supreme Court vide its judgment reported in PLD 2014 SC 1 has empowered the defendant Ministry to regulate the Hajj operation as per Hajj policy. He further contended that the allocation of Hajj quota is not inherent right of the plaintiffs to claim but this quota to the private sector is being allocated on yearly basis as per current Hajj Policy. It was further averred that this court on the same issue dismissed the case of plaintiffs in C.P.No.896/2016 vide order dated

15.4.2016 by upholding the decision of defendant Ministry regarding distribution of hajj quota between Government and private scheme at ratio of 60:40 and the honorable Supreme Court in the appeal of plaintiffs in C.P.No.1180/2016 upheld the prerogative of government under paragraph 18 of the judgment to review/reframe the Haj policy keeping in view the latest developments and expediencies which would be subject to the guidelines given in the Dossani case

6. The learned D.A.G. also relied on the order passed by the apex court on miscellaneous applications filed in Criminal Original Petition No.59/2016 and some other similar petitions. He pointed out figures of applications received in previous years and argued that in the year 2017 “338696” applications have been received which shows manifold increase. He further pointed out that in the year 2016 50% quota of HGOs came to “71368” hujjaj but after restoration of 20% quota by Saudi Arabia their present 40% quota is equivalent to “71684” which is more than 50% of their previous quota. The Government retained 60% quota i.e. “107556” Hujjaj keeping in view the latest development and expediencies and it is clear from the judgment of the apex court that the Government policy cannot be strike down unless it is mala fide or arbitrary, the plaintiffs have failed to make out any case of mala fide nor any particular instance has been quoted in the plaint to demonstrate any mala fide or malice on the part of the defendants. It was further avowed that the Secretary, Ministry of Religious Affairs and Inter-Faith Harmony filed Intra Court Appeal against the judgment dated 21.4.2017 in relation to paragraph 15 of the judgment which is relevant to the observation made for non-quota holder HGOs those were denied quota due to non-availability of surplus quota available to the Government of Pakistan. So far as the other findings are

concerned, learned counsel DAG argued that even in this judgment too no restriction has been imposed on framing the Hajj Policy by the Government and right of Government to frame Hajj Policy is duly protected in view of the dictum laid down in the Dossani case. He further argued that 2nd meeting of the Hajj Policy Formulation Committee was convened on 10.3.2017 where the decision was taken to curtail the HGOs quota from 50% to 40% as majority decision whereas the letter written by defendant No.7 to the Minister for Hajj and Umrah, Royal Kingdom of Saudi Arabia on 22.3.2017, which is much after taking the decision by Hajj Policy Formation Committee with regard to the reduction in 10% quota of HGOs.

7. He further argued that the defendant Ministry formulated Hajj Policy 2017 and before doing so, the Committee discussed the MoU, performance of Government Hajj scheme, increased number of applicants under Govt. Hajj Scheme, consistent demand of General Public for increase of quota in Govt. Scheme and resolutions of three provincial assemblies i.e. Punjab, KPK and Baluchistan, recommended with majority vote for increase of Government Hajj quota to accommodate more Hujjaj from low income group for performing Hajj at economical rates as compared to Hajj packages of private sector whereas the plaintiffs' interest is business oriented to serve privileged class which does not constitute 50% of country population. The plaintiffs have no justification to snatch lawful right of common people to perform Hajj at economical Hajj package as compared to expensive Hajj packages introduced and announced by the plaintiffs.

8. At some point, a number of Intervenors approached and filed applications under Order 1 Rule 10 CPC for impleading

them as party to this suit. In the case of **Jiand Rai vs. Abid Esbhani,** reported in **SBLR 2010 Sindh 1526**, I have discussed in detail the nictitates and nitty-gritties of Order 1 Rule 10 C.P.C and held that the necessary party is one who ought to have been joined and in whose absence no effective adjudication could take place or decree passed while proper party is the party whose presence is necessary before the Court in order to completely and effectually adjudicate upon and settled all questions involved in the suit. Only those persons are necessary and proper parties to the proceedings whose interest were challenged in suit and without their presence the suit could not be decided on merits. If a dispute in a suit could be effectually be adjudicated in absence of a person such person is not necessary party to be impleaded in the suit. The provision does not mean that any person who had any distant or indirect relationship or connection with either the plaintiff or defendant ought to be joined as a party to the proceedings. However the minutiae of Intervenors applications are as follows:

CMA No.7874/2017:

This application has been filed by 15 non-quota holders Hajj group operators (HGOs) registered in the year 2012. During course of hearing their learned counsel himself pointed out that hon'ble Supreme Court has already given some directions in the order passed on contempt applications in Crl. Orig. Petition No.59/2015 so after arguing at some length, the learned counsel decided not to press this application. *Application is dismissed as withdrawn.*

CMA No.8042/2017.

M/s. Urooj Aviation Services (Pvt.) Ltd. & others filed this application under Order VII Rule 10 CPC with the prayer that the plaint may be returned back to the plaintiff to file it in a proper

jurisdiction. Presently, the said applicants are not party to the suit. I have heard the arguments on injunction application and in order to save the time in such an important issue of Hajj, I prefer to defer this application to be decided subsequently. *Office is directed to issue notice of this application to the plaintiffs.*

CMA No.8021/2017.

This application under Order 1 Rule 10 C.P.C has been preferred by Pasban Pakistan through its Director Public Issues for impleading them as party to the proceedings. Their learned counsel argued that this applicant wants to become party in the larger public interest to safeguard 10% quota curtailed from HGOs quota and allocated to general public in addition to 50% quota so that the poor people of this country may perform Hajj on government Haj package. He argued that MORA has right to alter quota in best interest of public demand. It is choice of public how to utilize Hajj quota without consent of Hajj traders/business community. Hajj Policy 2017 has been formulated rightfully to maintain 60% quota under the Government Scheme. At least 18000 Hujjaj have been put on waiting list till decision of the injunction application in this suit. He argued that the Hajj quota is Government/public property. The Haj package under the government was Rs.262,232/- in the year 2014, while Rs.261941/- in the year 2015 and for this year (2017) Rs.270,000/- while the minimum Hajj package of HGO starts from Rs.480,000/-. Besides various other facilities, MORA also provides Takaful (Insurance) to the affected Hujjaj within the economy package including 540 Doctors with Ambulance for welfare of Government Hujjaj and proper Hajj monitoring system and day to day complaint redress system i.e. free toll cell number, mobile SMS service and on line complaint registration portal. Since this Intervenor approached to assist this court in the larger public interest so they have been provided ample opportunity of hearing but they are not proper or necessary party in whose absence the court may not be able to decide the case but at best may be

classified as proforma party or their role may be ruminated and reckoned as whistleblower. In fact they support learned DAG. who vigorously reinforced the act of reducing 10% quota bona fide and kosher. *The assistance rendered to me will be considered in the order passed on the injunction application. The application is disposed of accordingly.*

CMA No.8386/2017 & CMA No.8387/2017.

These two applications have also been preferred under Order 1 Rule 10 CPC by M/s. Mars Hajj & Umrah Services (Pvt.) Ltd. and M/s. National Tourism Management Services (Pvt.) Ltd. Though their learned counsel argued that these Intervenors want to become party to provide proper help and assistance to this court but when their learned counsel was confronted that the issue primarily relates to the reduction of 10% quota of HGOs and the plaintiffs in fact have approached this court to save the reduction of 10% quota across the board, the learned counsel on this premise preferred not to press both these applications. *The applications are dismissed as not pressed.*

CMA No.7281/2017.

This application has been filed by Muhammad Bashir son of Muhammad Fareed for self and on behalf of his other family members on the ground that despite being declared successful his name has been kept on the waiting list till decision of the injunction application in this suit. He stated that packages announced by the private Hajj operators are much expensive than Government Hajj scheme. Mere keeping any individual on waiting list by the Government on 10% reduced quota from HGOs quota under Government Hajj scheme does not make him entitle to become party to the proceedings particularly when the official defendants have already fought out the matter by tooth and nail to look after the interest of all such Hujjaj of Government scheme on

waiting list. So in my view the presence of this Intervenor is not necessary to decide the lis. *Application is disposed of in the above terms.*

CMA No.6605/2017.

This application has been filed by M/s. Urooj Aviation Services (Pvt.) Ltd. and 27 other Hajj Tour Operators. Again this application is under Order 1 Rule 10 CPC for impleading them as necessary party in this suit. The learned counsel argued that the applicants are Hajj Group Organizers (HGOs) and they are fully satisfied with the relevant criteria, the applicants were enrolled with the Ministry of Religious Affairs & Inter-Faith Harmony (MORA) and non-quota holders HGOs. Basically, the applicants want to be impleaded for the grant of quota to them but here the controversy is altogether different. At present I am not dealing with any issue of past or new entrants in the field or non-quota holders HGOs but issue is only related to 10% reduction in HGOs quota in 2017 so in my view neither the applicants are necessary party nor proper party in whose absence the court may not be able to decide the lis. The application is dismissed.

9. Heard the arguments. Seeing as plenteous reliance has been placed on the instrument of MoU dated 4.7.2013 executed between MoRA and HOAP for readjustment of Hajj quota for the Hajj 2013 and the learned counsel for the plaintiff accentuated that MoU is still in the field with its binding effect so for the ease of reference, I would like to first reproduce the terms and conditions of MoU as under:-

> **"Subject: MEMORANDUM OF UNDERSTANDING**
>
> **This Memorandum of Understanding is signed between the Ministry of Religious Affairs and Hajj Organizers Association of Pakistan (HOAP) for the adjustment of Hajj Quota for Hajj 2013 on 4th July 2013 at Islamabad.**
>
> **Whereas both parties have mutually agreed and resolved that:-**

(a) The current reduced allocation of the quota of Private Hajj Group would be increased by 3000 pilgrims for Hajj 2013

(b) For Hajj 2014, the quota granted to Pakistan shall be distributed equally between the private and public sector with an additionality of 12000 pilgrims in the private sector and corresponding reduction in the public sector.

(c) The restriction on the Hajj Group Organizers on change in point of departure shall be relaxed for Hajj 2013 to facilitate inter regional accommodation between the members of HOAP. The deadline in the private Hajj Group Organizers fixed earlier 20th July 2013 shall be extended to 30th Ramazan, 1434 subject to concurrence by Saudi authorities.

(d) The change in quota necessitated by the extraordinary circumstances shall be without prejudice to the original quota of Hajj group Organizers in 2013 before announcement of reduction or revision.

(e) The distribution of additional 3000 and the subsequent 12000 next year shall be on pro-rata basis amongst all Hajj Group Organizers.

(f) That HOAP would facilitate through their Hajj Group Organizers on other Provinces the Hajj Group Organizers of Karachi to fulfill their contractual liabilities for Hajj 2013, and assured to provide a quota upto 5000 with mutual arrangements."

10. In fact the reduction was made in overall quota by the Government of Saudi Arabia on account of ongoing expansion work hence MoRA was compelled to reduce quota of HOAP members from 50% to 40%. However, in clause (a) it was provided that the current reduced allocation of the quota of Private Hajj Group would be increased by 3000 pilgrims for Hajj 2013. Much emphasis were also made on clause (d) of MoU that change in quota necessitated by the extraordinary circumstances shall be without prejudice to the original quota of Hajj 2013 before announcement of reduction or revision. One can see the preamble of this MoU that it was basically executed between the said parties for readjustment of Hajj quota for Hajj 2013 without mentioning its tenure or currency. Though in clause (d) the change in quota said to be without

prejudice to the original quota in 2013, but this covenant does not mean that the MoU has ultimate and or everlasting/eternal effect in view thereof Government has given up or renounced their rights to diminish the quota for all future Hajj policies keeping in view the expediencies and conveniences.

11. Before moving frontward, I would like to refer to the erstwhile dictum laid down in the case of **Dossani Travels Pvt. Ltd vs. Messrs Travels Shop (Pvt) Ltd.** reported in **PLD 2014 S.C. 1** disposed of by the apex court on 27.8.2013. The civil appeals were filed against the order dated 24.6.2013 passed by the Lahore High Court and as an interim measure MORA was directed to invite top 60 enrolled Hajj Group Operators for specifying the details of their respective packages and the price for a Hajj. It was further directed that Hajj quota be allocated through bidding process and the candidates who would offer packages satisfying the requirements should be given quota of 50 Hujjaj each at a time. The hon'ble Supreme Court observed that the performance of Hajj is a sacred duty for Muslims but the quota allocated to Government of Pakistan by the Saudi Government is limited and within that limited quota it allocates a certain portion to private HGOs. In paragraph 8 of the judgment the hon'ble Supreme Court has also reproduced the recommendations made by the Competition Commission. The apex court held that since the Hajj operation is a time bound exercise, arrangements have to be made within that limited time. The court issued directions that Hajj policy be framed well in time in such a manner which is fair, just, inspires confidence and evokes minimum criticism. It was also found imperative by the apex court that the Hajj policy for the next year should be announced at the

earliest after conclusion of Hajj and issued following directions:-

> **"51.Before we part with the judgment, we may add that the performance of Hajj is a sacred duty for Muslims. But the quota allocated to Government of Pakistan by the Saudi Government is limited and within that limited quota, it allocates a certain portion to private HGOs. Since several hundred HGOs apply for allocation of quota from the Private Hajj Scheme share as worked out by the MORA, all applicants HGOs cannot be accommodated and the dismay of those who are left out is understandable. We are conscious that the MORA has to take several steps to ensure that travel, accommodation and other arrangements are made to the satisfaction of Hujjaj. It requires a couple, of weeks to complete the exercise. However since Hajj operation is a time bound exercise; arrangements have to be made within that limited time. It is therefore, imperative that the Hajj Policy be framed well in time in such a manner which is fair, just, inspires confidence and evokes minimum criticism. It is also imperative that the Hajj Policy for the next year should be announced at the earliest after the conclusion of Hajj. In these circumstances, we are persuaded to direct as under:**
>
> **(i) The Hajj Policy should be framed, announced and placed on the website of MORA preferably within six weeks of the arrival of last flight of Hajis from KSA under intimation to the Registrar of this Court. This of course would be subject to any policy decision of the Saudi Government regarding allocation of Hajj quota for Pakistan;**
>
> **(ii) The Hajj Policy should be framed by a Committee headed by the l Secretary, Ministry of Religious Affairs (MORA); a nominee of the Competition Commission of Pakistan; a nominee of the Secretary, Ministry of Foreign Affairs, Government of Pakistan; a nominee of the Secretary Ministry of Law and Justice Division and Parliamentary Affairs; and a nominee of the Attorney General for Pakistan;**
>
> **(iii) The credentials of each applicant/HGO should be examined and decision taken on merit;**
>
> **(iv) While framing the Hajj Policy, the MORA should be guided, inter alia, by the recommendations made by the Competition Commission of Pakistan to which reference has been made in Para 8 above; and**
>
> **(v) The MORA should constantly monitor the working and performance of each HGO during Hajj and this assessment should form basis for further improvements in Hajj Policy for next year's Hajj."**

Finally in paragraph 52, the hon'ble Supreme Court allowed the petitions and set aside the impugned order and also reproduced the short order, which is copied as under:-

> **"52. For what has been discussed and observed above, we allow these petitions and set aside the impugned order. These are the reasons for our short order dated 27-8-2013 which is reproduced hereinbelow:-**
>
> > **For reasons to be recorded later in the detailed judgment, Civil Appeals Nos. 800-L to 802-L/2013 are allowed, Civil Petitions Nos.1148 and 1348 of 2013 are converted into appeals and allowed and C.M.As. Nos. 278-L, 279-L of 2013, 285-L of 2013, 289-L of 2013, 5328 to 5333 of 2013, 5378 of 2013, 5463 of 2013, 5464 of 2013 and 5477 of 2013 are disposed of and we hold and declare as under:**
> >
> > **(i) that the order of the learned High Court dated 24-6-2013 passed in Writ Petition No. 7253 of 2013 is violative of the principle of trichotomy of powers, which is one of the foundational principles of the Constitution of Islamic Republic of Pakistan;**
> >
> > **(ii) <u>that it is not the function of the High Court exercising jurisdiction under Article 199 of the Constitution to interfere in the Policy Making Domain of the Executive; [Emphasis applied].</u>**
> >
> > **(iii) that the learned High Court in the exercise of its Constitutional jurisdiction directed selection of Hajj Group Organizers through bidding process and thereby substituted the criterion laid down in the Hajj Policy framed by the Ministry of Religious Affairs without hearing the appellants/Hajj Group Organizers and others who had already been allocated quota and had made arrangements for intending Hujjaj, which is not tenable in law;**
> >
> > **(iv) <u>that the High Court can under Article 199 of the Constitution annul an order or a Policy framed by the Executive, if it is violative of the Constitution, law or is product of mala fides. However, nothing has been placed before this Court to indicate that the Hajj Policy challenged before this Court seriously suffered from any of these infirmities; and [Emphasis applied].</u>**
> >
> > **(v) <u>that Ministry of Religious Affairs shall continue to regulate the operation of Hajj i.e. enrollment, registration and allocation of quota every year in the light of a fair and transparent policy and the guidelines to be laid down by this Court in the detailed judgment". [Emphasis applied].</u>**

12. In the above judgment the apex court discernably held that it is not the function of the High Court exercising jurisdiction under Article 199 of the Constitution to interfere in the policy making domain of the executive. High Court can annul an order or policy framed by the executive, if it is violative of the Constitution, law or is product of mala fides and MoRA shall continue to regulate the operation of Hajj, enrolment, registration and allocation of quota every year in the light of a fair and transparent policy and the guidelines to be laid down by the apex court (Dossani's case). It is imperative to point out that the judgment in the Dossani case was rendered by the apex court on 27.8.2013 while MoU referred to by the counsel for the plaintiffs was signed on 4.7.2013. Despite the fact apex court held and amplified that MoRA shall regulate operation of Hajj which includes enrolment, registration and allocation of quota every year. Though the learned counsel for the plaintiffs acknowledged and conceded to that nevertheless the Government has right to frame a policy but in the existence of MoU vested rights have been created in favour of plaintiffs which cannot be annulled or withdrawn. This plea essentially connotes and insinuates that the Government cannot revisit or curtail the HGOs quota from 50% in future which is not well-founded in my view. In the compendium and anthology of judicial precedents on Hajj policy matters, the leading judgment is virtually Dossani case which has been referred to the apex court in all posterior judgments on the same issue. The learned counsel for the plaintiff also referred to judgment passed by the apex court in C.P.No.1270, 1308 and 1309/2014 and in Civil Petition Nos.1180, 1265 and 1297/2016. The relevant excerpts of unreported judgments are reproduced as under:-

Civil Petition No.1270/2014 (The Federation of Pakistan & others vs. Muhammad Arif Adress & others), Civil Petition No.1308/2014 (The Federation of Pakistan and another vs. M/s. Alzair Travels & Tours (Pvt.) Limited & others), Civil Petition No.1309/2014 (Hajj Organizers Association of Pakistan vs. M/s. Alzair Travels & Tours (Pvt.) Limited & others) and Civil Misc. Application No.4094/2014 in C.P. No.1309/2014 (Hajj Organizers Association of Pakistan vs. M/s. Alzair Travels & Tours (Pvt.) Limited & others).

> **"5. Every year issues arise out of the allocation of pilgrim quota which are brought before the Court. This Court in the case Dossani Travels Pvt. Ltd. and others (ibid) laid down the principles guiding interference by the Courts in the framing and implementation of Hajj Policies. While emphasizing the principle of trichotomy of power enshrined in the Constitution it was held that the High Court under Article 199 should generally refrain from interfering in the policy making domain of the Executive. The Court held that the allocation of quota for making arrangements for the pilgrims fell within the policy making domain of MORA and in the absence of any illegality or establishment of *mala fide* it was not open for the High Court to annul the policy framed by the competent authority....."** [Emphasis applied].

Civil Petition No.1180/2016 (Hajj Organizers Association of Pakistan, Islamabad, etc. vs. Federation of Pakistan & another), Civil Petition No. 1265/2016 (Al-Qasim Hajj & Umrah Services (Pvt.) Ltd. and another vs. Federation of Pakistan & another), Civil Petition 1297/2016 (Jabal-e-Noor Travel & Tours (Pvt.) Ltd. etc. vs. Federation of Pakistan & another) and Civil Misc. Applications No.2725 & 2865/2016.

> **Note. In the above case, the honourable Supreme Court for the reasons to be recorded separately, converted the petitions into appeal and allowed in the terms that Haj quota of Private Tour Operators and Public Sector for the year 2016 is restored to that which was in the year 2015 i.e., 50% each. However relevant and significant paragraphs contributed in the reasons by the apex court are reproduced as under:-**
>
> > **"8. We have heard learned counsel for the parties and with their able assistance have also gone through the entire record. It is not uncommon for this Court to be presented with disputes of this nature pertaining to the Federation's Hajj Policy and more specifically the distribution of quota amongst private and government schemes in the Hajj Service Provider Industry. *Whilst it is not within the domain of this Court to interfere in the policymaking of the government, it is imperative that such policies be subject to judicial scrutiny in order to assess whether the genesis of such policy suffer from any legal infirmity and whether it was formulated in an arbitrary or whimsical manner. The Dossani case (supra) lays down essential directions which are to be adopted and complied with in the formulation of the annual Hajj Policy by the government.* [Emphasis applied] In C.P. Nos.1270, 1308 and 1309 of 2014, this Court found the Government's allocation of 15000 pilgrims quota from the government schemes to the**

private schemes to be based upon sound reasoning in law as such act was purportedly undertaken in light of the Memorandum of Understanding 2013 entered into between the government and the Hajj Organizers Association of Pakistan (in short "HOAP") which stipulated that the reduction in Hajj quota of the private schemes in the year 2013 would be compensated for and increased in the year 2014. The 50:50 ratio of the government and private schemes in the year 2013 could not be maintained due to reduction in overall quota of Pakistani Hujjaj coupled with the fact that the Government had already committed itself to the pilgrim arrangements of that specific year.

18. ***Before parting with this judgment, we may emphasize here that the Government has the exclusive power to review/reframe the Hajj Policy every year keeping in view the latest developments and expediencies which would be subject to the guidelines given by this Court in Dossani case (supra) and this case may not be cited as a precedent which would debar the Government from exercising such powers as such there would be no restriction on the Government to alter or vary the Hajj Policy (quota system)".*** **[Emphasis applied].**

13. One more order is also somewhat germane and domineering passed by the hon'ble Supreme Court on 21.4.2017 in Criminal Original Petition No.59/2015 and other connected Criminal Original Petitions **(Muhammad Arif Idress & others vs. Sohail Aamir and others).** Indeed some contempt applications were filed due to non-compliance of the judgments of the hon'ble Supreme Court dated 27.8.2013 and 21.7.2014. For the ease of reference, the relevant excerpts of the order are also reproduced as under:-

Criminal Original Petition Nos.59 of 2015, 65, 66, 67, 68, 84, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 105, 104, 112, 113, 140, 227 and 233 of 2016, 50, 89, 88, 87, 86, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78 and 79 of 2017, Crl.M.A. Nos. 752, 863, 909, 910, 918, 862, 911, 912, 973, 974, 891, 892, 1003, 1004, 1021, 1112, 1028, 1044, 1179, 1360, 1424, 1627, 1263, 1717, 1995, 1300, 1303, 1783, 1784, of 2016, 44, 65, 66, 653, 620, 621, 622, 573, 574, 575. 643, 645, 661, 662, 685, 686, 687, 688, 689, 691, 698, 699 and 700 of 2017 AND C.M.Appeal No.126 of 2016 in Const.P.No.Nil of 2016, C.M.Appeal No.159 of 2016 in Const.P.No.Nil of 2016 and C.M.Appeal No.162 of 2016 in Const.P.No.Nil of 2016 (Muhammad Arif Idress & others vs. Sohail Aamir and others).

"7. Mr. Abid Zuberi further submitted that it was on the faith of the aforesaid MoU, and on the assurance of its adherence,

that the members of HOAP were persuaded to accept the reduction in their quota of 50% to 40%, for the Hajj 2013 and that it was in pursuance of the above MoU and keeping in view the future prospects thereunder, that the members of HOAP made heavy investments to increase/maintain their capacity and resources to be able to make arrangements of the magnitude commensurate to their respective quotas in terms of the MoU, and also raised their respective paid up capital as required by MORA. Mr. Zuberi further submitted that the judgment of this Court in Dossani Travels' case (supra) has nowhere ordered the curtailment of the quota as granted/maintained and promised to the members of the HOAP in terms of the aforesaid MoU, and that the orders of the High Court's curtailing the said quota, or for dispensing the same to others through auction, or otherwise, have been set-aside by this Court at least thrice, thus endorsing the legality, propriety and currency of the aforesaid MoU. He submitted that through yet another judgment, rendered in the case of Hajj Organizers Association of Pakistan Islamabad etc. v. Al-Qasim Hajj & Umrah Services (Pvt.) Ltd and another, (in CP No.1180, 1265 and 1297 of 2016 etc.), on 03.5.2016, (the third judgment), this Court found the proposed reduction of the quota of the members of HOAP from 50% of the national quota, to 40% thereof to be violative of the aforesaid MoU, whereby the original quota in favour of the members of the HOAP has been protected. He further submitted that a vested right in the maintenance of the original quota has been created in favour of the members of HOAP……."

13. As regards the judgment dated 03.5.2016 rendered in HOAP's case (supra), and relied upon by Mr. Abid Zuberi, it may be crucial to note that the learned Judges, while rendering the said judgment, have in their wisdom found it necessary to mention in the judgment itself, that the same "may not be cited as a precedent, which would debar the government from exercising" their "exclusive powers to review/reframe the Hajj policy every year, keeping in view the latest developments and expediencies, which would be subject to the guidelines given by this Court in Dossani's case (supra)", and that "there would be no restriction on the government to alter or vary the Hajj policy (quota system)", and therefore the decision as contained in the said judgment, or any observation made therein, do not stand in the way of the government in framing a just, fair and lawful Hajj policy, and the same certainly does not come in the way of this Court in passing an appropriate order in the instant matter. The said judgment has in fact sanctified and reinforced the judgment in Dossani Travels' case which required the government to frame future Hajj policy as directed therein and non-compliance, rather defiance whereof has provided a cause of action for the present petitions. (emphasis supplied).

17. In the case of Muhammad Arif Idrees (supra), this Court ordered that directions as contained in the case of Dossani Travels (supra) must be strictly adhered to in formulating Hajj policy in future. Whereas in the case of HOAP v. Al.Qasim Hajj & Umra Services (Pvt.) Ltd. (supra), this Court, whilst holding that government has the exclusive power to review or reform Hajj policy, has bridled the same with the guidelines as contained in Dossani Travels (supra). However, the official respondents in clear violation and defiance of the above dicta

of this Court and their clear undertaking as discussed above, are still avoiding to grant any quota to the non-quota holder HGO, including the petitioners, and have thus, prima facie, made themselves liable to be proceeded against accordingly. We would, however, taking a lenient view, grant an opportunity to them to review their decision and reframe their policy, allocate quota to the petitioners and all other like them in the light of the above judgments".

14. Against the aforesaid order passed by the 03 Members Bench in the contempt of court proceedings, two Intra Court Appeals were filed under Section 19 of the Contempt of Court Ordinance, 2003. The learned Additional Attorney General submitted copy of order which shows that Intra Court Appeals were fixed before honourable five Members Bench of Supreme Court on 06.06.2017 and disposed of in the following terms:-

Intra Court Appeals No.10 to 17 of 2017 in Crl. O. P. Nos.65, 67, 95 of 2016 & 59 of 2015 (Hajj Organizers Association of Pakistan & others vs. M/s. Kaif Intl (Pvt) Ltd & others) decided on 06.06.2017.

"6. In the circumstances, we find that there is hardly any dispute on the point of implementation of judgment of this Court in Dossani's case which has also been followed and approved in subsequent two judgments of this Court in the cases of Muhammad Arif Idrees and HOAP. The submission made by Mr. Abid S. Zuberi, learned ASC has already been dealt with in the impugned judgment and we find no reason to disagree with the same.

7. <u>The respondent Ministry of Religious Affairs, in the circumstances is directed to ensure that the remaining 40% quota is allocated to HGO's according to the guidelines laid down in Dossani's case and to the extent the impugned judgment is maintained and all the Intra Court Appeals are disposed of accordingly.</u> [Emphasis applied]. The CMAs are also disposed of."

15. Learned counsel argued that in the case of **Muhammad Arif Idress & others (supra)** the hon'ble Supreme Court ratified the sanctity of MoU. Though MoU has been discussed in the judgment to some extent but the main emphasis in this judgment on Dossani's case. The court held that the allocation

of quota for making arrangements for the pilgrims fell within the policy making domain of MoRA and in the absence of any illegality or establishment of mala fide it was not open for the High Court to annul the policy framed by the competent authority. Before parting with the judgment the hon'ble Supreme Court in this vary case reiterated that though the directions in Dossani and others' cases were expressly made for the Hajj Policy 2014 the same must be adhered to and strictly followed in formulating Hajj Policies in future. These findings in my view unequivocally demonstrate that it is the Dossani's case which is to be followed for making Hajj Policy rather than the conditions of MoU heavily relied upon by the learned counsel for the plaintiffs. There is nothing like that the Government attributable to the alleged rigors of MoU for all times to come is debarred and disqualified from making any revision or reduction in the Hajj quota of HGOs for future years.

16. The Civil Petition Nos.1180, 1265 & 1297/2016, **Hajj Organizers Association of Pakistan** (supra) were filed against the judgment dated 15.4.2016 passed by this court (SHC) in C.P.No.D-896/2016. The petitioners approached this court against reduction of 10% quota in the HGOs share for the year 2016 but the petition was dismissed by the learned Division Bench of this court. The order was challenged in the apex court in Civil Petition Nos.1180, 1265 & 1297/2016. Consequently, the three Members Bench of the hon'ble Supreme Court converted the petition into appeal and allowed in the terms that Hajj quota of Private Tour Operators and Public Sector for the year 2016 is restored to that which was in the year 2015 i.e. 50% each but it was further observed in the judgment that had such decision regarding the 2016 Hajj Policy been unanimously formulated and approved by all the

interested stakeholders represented on the Special Committee and as per directions contained in the Dossani's case, this court would have found no reason to interfere in the same. However in paragraph 18, the hon'ble Supreme Court held that the Government has the exclusive power to review/reframe the Hajj Policy every year keeping in view the latest development and expediencies which would be subject to the guidelines given by this court in Dossani's case. The apex court further held that this case may not be cited as precedent which would debar the Government form exercising such powers as such there would be no restriction on the Government to alter or vary the Hajj Policy (quota system). The repercussions and ramifications of the above judgment is that while maintaining quota for Hajj 2016 at the ratio of 50:50, the apex court simultaneously clarified that this judgment may not be cited as precedent and the Government has been left open to alter or vary the Hajj Policy (quota system). The binding effect of the judgment of honourable Supreme Court is well known. Under Article 189 of the Constitution, any decision of the Supreme Court to the extent that it decides question of law or enunciates a principle of law is binding on all other courts in Pakistan. In all fairness the aforesaid judgment is not accommodating and supportive to the case of plaintiffs the moment the hon'ble Supreme Court pronounced that the said judgment may not be cited as precedent which would debar the Government from exercising powers to alter or vary the Hajj Policy (quota system).

17. In the order dated 21.4.2017 passed by the apex court in Criminal Original Petition No.59/2016 and other connected petitions, Mr.Abid S. Zuberi, Advocate had filed applications for HGOs/HOAP to safeguard the interest of their clients. His arguments are reflected in paragraph (7) of the order where he

analogously argued on the prospects and providence of MoU and also elucidated the situation why the members of HOAP were persuaded to accept the reduction in their quota of 50% to 40% for the Hajj 2013. While arguing in detail to protect and shield the sanctity of MoU in the above case before apex court, he also referred to the judgment passed in HOAP vs. Al-Qasim Hajj & Umrah Services (Pvt.) Ltd. (C.P. Nos.1180, 1265 and 1297 of 2016). In paragraph 13 the hon'ble Supreme Court while refereeing to the judgment dated 3.5.2016 rendered in HOAP's held that in the said judgment the learned judges have in their wisdom found it necessary to mention that the same may not be cited as a precedent. Along these lines, the hon'ble Supreme Court in the order dated 21.4.2017 held that the decision contained in the HOAP's case or any observation made therein do not stand in the way of Government in framing just, fair and lawful Hajj Policy. On the implication and interpretation of this judgment learned counsel for the plaintiffs argued that it was limited and confined to the contempt proceedings relating to the non-awarding quota to new entrants HGOs but I am not convinced to this argument. None of the aforesaid judgments put any embargo or incapacitation on the Government from exercising their right to frame Hajj Policy in future.

18. Learned counsel further argued that the Hajj 2017 stresses upon building a strong partnership with private Sector (HGOs) for the provisions of better services and quality logistic arrangements in which the HGOs have to comply with service provider's agreement. It was further averred that recommendations made for formulating Hajj Policy by the Members were not unanimous. The minutes reflecting that 02 Members referred to MoU for the restoration of quota and one Member amongst them also submitted observation in writing

that MoU is not a past and closed transaction having legal effect for distribution of quota for Hajj 2017. The minutes of the 2nd Meeting of Hajj Policy Formulation Committee for Hajj 2017 convened on 10.3.2017 are unambiguously demonstrating that after majority vote of 3:2 it was decided that the bifurcation of quota in the ratio 60:40 between Government and Private Scheme may be incorporated in the Hajj Policy and Plan 2017. If the arguments of the learned counsel for the plaintiffs are accepted to be correct then in case of any note of dissent no Hajj Policy could be framed whereas it is quite common tradition, precept and convention that while taking decision on any issue, the majority decision is prevailed and dominated. So the decision to curtail HGOs quota from 50% to 40% is as a result of majority decision which cannot be declared null and void or annulled austerely for the reasons that one member shown his dissent in writing while other Member representing Competition Commission of Pakistan pointed out that if MoU is not being considered for quota distribution then there is no need to mention it in the draft of Hajj Policy 2017.

19. Learned counsel referred to various judgments to show that on the basis of MoU some vested rights have been created in favour of the plaintiffs which cannot be curtailed or narrowed down. He further argued that the quota is always given to provide choice and competition in the market. The Hajj Policy and Plan 2017 aims to develop efficient Hajj arrangements through provisions of service and logistic during Hujjaj stay at Makkah and Madina. It is further provided in the Hajj Scheme 2017 that on the persistent demand of the general public to perform Hajj under Government Hajj Scheme where number of applicants was increased manifold. The learned DAG provided statistics that in the year 2014

"129056" applications were received while in the year 2015 "269328" and in the year 2016, "280617" whereas in the year 2017 "338696" applications were received. He further pointed out that in the year 2016, 50% quota of HGOs came to "71368" and after restoration of 20% quota by Saudi Arabia their present 40% quota is equivalent to "71684" which is more than 50% of their former quota. He further argued that the Government retain 60% quota in view of the latest development and expediencies. To elaborate and expound the principle governing the vested rights, the learned counsel for the plaintiff cited judicial precedents i.e. *PLD 1969 S.C. 599 (Nabi Ahmed and another v. Home Secretary, Government of West Pakistan, Lahore & Others), 1998 SCMR 1404 (Messrs.' M.Y. Electronics Industries (Pvt.) Ltd. v. Government of Pakistan), 1986 SCMR 916 (Federation of Pakistan & others v. Ch. Muhammad Aslam & others), 2002 SCMR 510 (Federation of Pakistan v. Ammar Textile Mills (Pvt.) Limited), 2002 SCMR 772 (Mumtaz Ali Bohio v. Federal Public Service Commission) and 1986 SCMR 1917 (Al-Samrez Enterprise v. The Federation of Pakistan).* The collective ratio deducible from the aforesaid dictums is as under:-

(i) A vested right is free from contingencies, but not in the sense that it is exercisable anywhere and at any moment.

(ii) By 'vested right' can be meant no more than those rights which under particular circumstances will be protected from legislative interference (unless it is clearly intended).

(iii) Vested rights cannot be allowed to be overridden, unless it takes place by unequivocal words, by an organ or authority competent to impair of override the vested rights.

(iv) It is a principle evolved by equity to avoid injustice and though commonly named 'Promissory Estoppel', it is neither in the realm of contract nor in the realm of estoppel. The true principle of

Promissory Estoppel seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it.

(v) The doctrine of Promissory Estoppel need not be inhibited by the same limitation as estoppel in the strict sense of the term. It is an equitable principle evolved by the Courts for doing justice and there is no reason why it should be given only a limited application by way of defence. There is no reason in logic or principle why Promissory Estoppel should also not be available as a cause of action.

(vi) The doctrine of Promissory Estoppel cannot be invoked against the Legislature or the laws framed by it because the Legislature cannot make a representation.

(vii) Promissory Estoppel cannot be invoked for directing the doing of the thing which was against law when the representation was made or the promise held out.

(viii) No agency or authority can be held bound by a promise or representation not lawfully extended or given.

(ix) The doctrine of Promissory Estoppel will not apply where no steps have been taken consequent to the representation or inducement so as to irrevocably commit the property or the reputation of the party invoking it; and

(x) The party which has indulged in fraud or collusion for obtaining some benefits under the representation cannot be rewarded by the enforcement of the promise."

(xi) Vested rights originate from contracts, statutes, and by operation of law.

(xii) If a binding contract was concluded between the appellants and the Exporter or steps were taken by the appellants creating a vested right to the then existing notification granting exemption, the same could not be taken away and destroyed in modification of the earlier one.

20. It is obvious and evident beyond any shadow of doubt that Hajj quota is granted to Pakistan and not to any individual or HGOs so that they may dictate their terms to the government within the realm and sphere of policy making domain but it is discernably sovereign and independent right of government of Pakistan to frame au fait, equitable and evenhanded Haj Policy for utilization of quota fair and square amongst the citizens of Pakistan in view of the directions contained in the Dossani case (supra). The learned DAG pointed out from the minutes that before formulating Hajj Policy 2017, the Committee discussed the MoU and consistent demand of General Public for increase of quota in Govt. Scheme. In this regard, resolutions were also passed with majority votes by the provincial assembly of Punjab, KPK and Baluchistan for the increase of Government Hajj quota to accommodate more Hujjaj from low income group at economical rates as compared to Hajj packages of private sector. Fact remains. The perception and discernment “to haves and have-nots” is not a new phenomenon but a ground reality. The Government Hajj Scheme is introduced to cater the need of public at large so that they may perform revered and sacred obligation of Hajj with the benefit of uniformed economy/low-cost package across the board including non-privileged class. It is not possible to the populace to afford expensive and luxurious Hajj packages introduced and launched by the HGOs for the elite class or cream of the crop. Even the lowermost or minimum package of the HGOs has no match or comparison with the Government Hajj package. So in my view the plaintiffs cannot claim any vested rights that their 50% quota cannot be reduced nor any case of promissory estoppel is made out on the basis of MoU. The judicial precedents cited in this regard are distinguishable in the above backdrop and circumstances.

21. The learned counsel for the plaintiffs argued the reduction in quota amounts to violation and contravention of the plaintiffs' fundamental rights. Article 18 of the Constitution of Islamic Republic of Pakistan protects the rights of citizens to engage in any profession or occupation or trade or business. It declares in unequivocal terms that every citizen shall have the right to conduct any lawful business but this right is subject to such qualification as may be prescribed by law and this right given by Article 18 must be read to the proviso which permits the state by law to do a number of things. All these must lead to the conclusion that the right assured by Article 18 is not an absolute right. The apex court in the Dossani Travels case (supra), held in paragraph 16 that "a bare perusal of Article 18 would show that the right of freedom of trade, business or profession is not an absolute right rather it is qualified by the expression, "subject to such qualifications, if any, as may be prescribed by law" and there are three exceptions which stipulate: (a) the regulation of any trade or profession by a licensing system; (b) the regulation of trade, commerce or industry in the interest of free competition therein; and (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". These qualifications empower the government to lay down a policy and the Hajj Policy has been framed in terms of the power of the government stipulated in the foregoing exceptions..". In the case of **Pakistan Muslim League (N) vs. Federation of Pakistan, reported in PLD 2007 SC 642**, the apex court held that *"the Fundamental Rights can neither be treated lightly nor interpreted in a casual or cursory manner but while interpreting Fundamental rights guaranteed by the Constitution, a cardinal principle has always to be borne in*

mind that these guarantees to individuals are subject to the overriding necessity or interest of community. A balance has to be struck between these rights of individuals and the interests of the community. If in serving the interests of the community, an individual or number of individuals have to be put to some inconvenience and loss by placing restrictions on some of their rights guarantee by the Constitution, the restrictions can never be considered to be unreasonable". At this juncture, I would like to refer to the order of Intra Court Appeal Nos.10 to 17 of 2017 passed by the 05 Members Bench of the hon'ble Supreme Court. Paragraph 4 of the order reminiscences that the counsel appearing in ICA No.16 of 2017 argued that the judgment in Dossani's case is per incuriam on the basis of provision of Article 253 (b) of the Constitution on which the hon'ble bench observed that *"the reference to Article 253 (b) of the Constitution is wholly misconceived. The said provision of the Constitution authorizes the enactment of a law to create a complete or partial monopoly over any trade or business in favour of the Federal or Provincial Government. It is a provision, which restricts the Fundamental Right of trade and business enshrined in Article 18 of the Constitution. The said Article cannot be interpreted in a manner to restrain the Government, Federal or Provincial from carrying on any activity or providing any service except through a law creating a complete or partial monopoly in its favour. Even otherwise, while for the appellant HGO's making arrangements for Haji's may be a commercial activity but for the Government it is perhaps a facility provided to its citizens for the fulfillment of their religious obligations" [Emphasis applied].* In this order too somehow the apex court sanctified 40% quota allocated to the HGOs with the directions to ensure that the quota is allocated according to the guidelines laid down in Dossani's case.

22. The learned D.A.G. pointed out that in the year 2016, 50% quota of HGOs was “71368” but after restoration of 20% quota by Saudi Government, their (HGOs) present 40% quota is equivalent to “71684” which is more than 50% quota of previous year. The whys and wherefores lead me to the finale and resoluteness that the quota of HGOs has been curtailed keeping in view the latest development and expediencies and no defilement of Dossani’s case seems to have been committed in the Hajj Policy 2017 as far as its relates to the decision for curtailing or abridging the quota from 50% to 40%. So far the allegation of mala fide is concerned, it is well settled proposition now that this has to be explicit and specific but not ambiguous, elusive or evasive in absence of which the order passed or policy framed by the competent authority cannot be annulled. It is also well-entrenched and deep-rooted principle of judicial review of administrative action that in the absence of some un-rebuttable material on record qua mala fides, the court would not annul the order of Executive Authority which otherwise does not reflect any illegality or jurisdictional defect. Neither I have find out or detected nor could the learned counsel depict or bring to light any mala fide at the back of reduction in quota.

23. In the case of **Al-Tamash Medical Society versus Dr. Anwar Ye Bin Ju & others**, reported in **2017 MLD 785**, I have held that an injunction is an equitable relief based on well-known equitable principles. Since the relief is wholly equitable in nature, the party invoking the jurisdiction has to show that he himself was not at fault. The phrase prima facie case in its plain language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried and this phrase ‘prima facie’ need not to be confused with ‘prima facie title’. Before granting

injunction the court is bound to consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favour, the injunction may not be granted. A party seeks the aid of the court by way of injunction must as a rule satisfy the court that the interference is necessary to protect from the species of injury which the court calls irreparable before the legal right can be established on trial. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy. In the case in hand, neither the plaintiffs have made out any prima facie case nor balance of convenience lies in their favor nor any question of irreparable injury arises.

24. In the wake of above discussion, the injunction application (C.M.A No.5438 of 2017) is dismissed.

Karachi:-
Dated.16.6.2017 **Judge**