IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Constitutional Petition No. D- 111 of 2018

Petitioners:	**Majmua-Tun-Noor Haj & Umra Service** through Mr. Muhammad Ali Napar, Advocate.
Respondents:	**Federation of Pakistan & Others** Mr. Jamshed Ahmed Faiz, Assistant Attorney General; a/w Ghulam Mustafa, Assistant Director (Hajj) Sukkur. Mr. Faayaz Ahmed Soomro, for Respondent No. 15.
Date of hearing:	31.01.2018
Present:	Nadeem Akhtar & Yousuf Ali Sayeed, JJ

JUDGMENT

YOUSUF ALI SAYEED, J:- This Petition under Article 199 of the Constitution assails the Hajj Policy 2018 (the "**Policy**") on the ground that it introduces certain criteria as to eligibility of applicants, in as much as it is stipulated therein that (1) a person who has performed Hajj in the past through the Government scheme is not eligible to apply in the Government scheme again, (2) any person who has performed Hajj during the preceding three years would be ineligible to apply under the private scheme; and (3) persons intending to perform Hajj-e-Badal are not eligible to apply in the Government scheme. It is submitted that such qualifications are repugnant to the injunctions of Islam and Shariah, as they fetter the rights of aspirant pilgrims and are liable to be struck down accordingly.

2. At the outset, the learned AAG raised an objection to the maintainability of the Petition on the ground that that the challenge raised by the Petitioner does not fall within the scope of Article 199, in as much as no violation of any fundamental right has been pleaded.

3. He submitted that under Article 203-D of the Constitution, the examination of any law or policy on the touchstone of Islamic injunctions as enunciated in the Holy Quran and Sunnah lies solely within the constitutional domain of the Federal Shariat Court, and the jurisdiction of a High Court in such a matter stands barred by virtue of Article 203-G. He placed reliance on the judgment of a full bench of the Lahore High Court in the case reported as Pakistan Lawyers Forum & others v. Fed. Of Pakistan & others PLD 2004 Lahore 145.

4. Faced with this objection, learned counsel for the Petitioner contended that the jurisdiction of the Federal Shariat Court under Article 203-D was confined to examination of 'law or any provision of law', which, per learned counsel, meant a statute or particular provision thereof but not a policy, as was under challenge in the matter at hand, hence such jurisdiction was not attracted in the instant case. Furthermore, with reference to a judgment of the Honourable Supreme Court in the case reported as Dossani Travels Pvt. Ltd v. Messrs Travels Shop Pvt. Ltd PLD 2014 SC 1, he further submitted that a policy could be examined and struck down within the writ jurisdiction under Article 199 if the same was mala fide. However, when queried as to the case set up by the Petitioners on the point of mala fides, learned counsel was unable to point to any assertion in that regard. Indeed, a perusal of the pleadings reveals that the same are bereft of any averment in that regard, or for that matter as to any violation of a fundamental right, and it is evident that the Petitioner's challenge to the Policy rests solely on the ground of alleged repugnancy of the aforementioned qualifications to Islamic injunctions.

5. Be that as it may, learned counsel for the Petitioner sought to argue that the Policy was mala fide, simply on the basis that no qualifications similar to those contained therein had ever been imposed in prior policies formulated in previous years. Suffice it to say that mala fides must be pleaded with particularity. An allegation in that regard has to be supported by a specific case set up in the pleadings and cannot merely be alleged as an afterthought in the absence of any foundation. In the instant case, nothing has been pleaded or otherwise placed before this Court to indicate that the Policy challenged suffers from any such infirmity.

6. Thus, turning to the objection of maintainability in the context of the specific scope of the Petition, it merits consideration that the parameters of the jurisdiction under Article 199 are well defined, and we can do no better than to reproduce the observations of the Honourable Supreme Court in the very case of Dossani Travels (Supra), wherein it was stated as follows:

> *We judges are mere mortals but the functions we perform have divine attributes. By the nature of our calling, we dispense justice under the law and provide relief. However, "justice" in its generic sense is a relative concept and unless regulated by law, the dispensation, notwithstanding the noble intent would be rather subjective. While exercising powers under Article 199(1) of the Constitution, Courts should always keep in view the following three parameters of their jurisdiction:- (i) A High Court is the apex court in the province or in the case of Islamabad, of the capital territory, but they are the creatures of the Constitution and they have only that jurisdiction which has been conferred by the Constitution or under any law for the time being in force. Article 175(2) specifically mandates, "no court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law." (ii) The power of the High Court under Article 199 is "subject to the Constitution" and it can make any of the following orders, "if it is satisfied that no other adequate remedy is available,"*

(i) "directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or (ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or (b) on the application of any person, make an order---- (i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or (ii) requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or (c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II." (Fundamental Rights as interpreted by the Supreme Court of Pakistan). (iii) The ambit and scope of the power of High Court under Article 199 of the Constitution is not as wide, as of the Supreme Court under Article 187 of the Constitution to pass any order or issue any direction or decrees for doing "complete justice".

7. Furthermore, as to the justiciability of the matter at hand in these proceedings in light of Articles 203-D and 203-G of the Constitution, it merits consideration that in the case reported as Zahid Rehman v. The State PLD 2015 SC 77, it was held by the Apex Court as follows:

It must never be lost sight of that by virtue of the provisions of Article 203G of the Constitution of the Islamic Republic of Pakistan, 1973 this Court, or even a High Court, has no jurisdiction to test repugnancy or contrariety of any existing law or legal provision to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and such jurisdiction vests exclusively in the Federal Shariat Court and the Shariat Appellate Bench of this Court.

8. As to the argument raised by learned counsel that the Haj Policy was not a law, hence not within the contemplation of Article 203-D, suffice it to say that the legal basis of the Policy was considered in the case of Dossani Travels (Supra), where it was observed 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.*

9. Furthermore, in the case of Pakistan Lawyers Forum (Supra), which pertained to a challenge of "privileges and perks" enjoyed by different functionaries and dignitaries on the basis that the same violated/offended the Islamic concepts of simplicity and equality, it was observed by the learned full Bench of the Lahore High Court that:

> *It has already been observed by us above that all such so-called "privileges and perks" are based upon some laws, rules or instructions, etc. and for getting a declaration regarding their repugnancy to the Injunctions of Islam the applicants have to approach the Hon'able Federal Shariat Court under Article 203-D of the Constitution. By virtue, of the provisions of Article 203-G of the Constitution this Court's jurisdiction has clearly been ousted in that regard.*

10. As such, we are of the view that it is not within the purview of this Court to make any determination in these proceedings as to whether a law, provision of law or indeed a policy for that matter is repugnant to Islamic injunctions, and we are confined in our scope to the specific parameters delineated in Article 199, resting on a violation of fundamental rights, which is evidently not a ground of challenge in this case. Accordingly, we find that the Petition is not maintainable.

11. These are the reasons for our short Order dictated in open Court on 31.01.2018, whereby the Petition was dismissed with no order as to costs.

JUDGE

JUDGE

Sukkur

Dated ___________