

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

WRIT PETITION (CIVIL) NO.631 OF 2016

UNITED AIR TRAVEL SERVICES

***Through* ITS PROPRIETOR**

A.D.M. ANWAR KHAN

....PETITIONER

Versus

UNION OF INDIA

***Through* SECRETARY**

(MINISTRY OF EXTERNAL AFFAIRS)

....RESPONDENT

WITH

Writ Petition (Civil) No.636 of /2016

Writ Petition (Civil) No. 634 of 2016

Writ Petition (Civil) No. 934 of 2016

Writ Petition (Civil) No. 941 of 2016

Writ Petition (Civil) No. 938 of 2016

Writ Petition (Civil) No. 11 of 2017

Writ Petition (Civil) No. 94 of 2017

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. A batch of writ petitions raises the issue of Private Tour Operators (for short 'PTOs') who are, *inter alia* conducting the travel business for *Hajj* and *Umrah* being disqualified for grant of registration for the year 2016 for the *Hajj* pilgrimage. The prayer is for quashing the identical communications dated 27.7.2016 issued by the respondent rejecting the application of the petitioners for registration and allocation of quota for the *Hajj* 2016 on the ground that they have not complied with certain clauses of the policy for the PTOs as laid down by this Court.

2. The issue relating to the *Hajj* policy and the registration of these PTOs has resulted in two judicial pronouncements by this Court in ***Union of India v. Rafique Shaikh Bhikan***¹ and ***Al Ismail Haj Tour v. Union of India***². The policy presented on behalf of the Government was approved by this Court with slight modifications and was annexed as Appendix-I to the order in ***Union of India v. Rafique Shaikh***

1(2013) 4 SCC 699

2(2016) 15 SCC 246

*Bhikan*³ case referred to aforesaid to be called as ‘Policy for Private Tour Operators for hajj 2013 – 2017’. The policy was to remain valid for a period of five years and was not to be questioned in any court or authority. The petitioners were all eligible to be qualified as PTOs for the year 2015 for *Hajj* pilgrimage but in the process of draw of lots dated 7.8.2015, luck did not favour them and they thus did not get quota. The relevant extract of the policy is as under:

“Appendix I

Ministry of External Affairs

(Gulf and Haj Division)

Registration of Private Tour Operators — Haj 2013

The Government of Saudi Arabia has notified that Private Tour Operators (PTOs) registered with the Government of India and involved in the preparation of the Haj Pilgrimage will be eligible for grant of Haj group visas subject to fulfilment of other terms and conditions as laid down by the Saudi Authorities.

2. Applications are invited from eligible PTOs for registration for Haj 2013. The eligibility criteria are at Annexures A and B. The applications must be submitted in the prescribed format (Annexure C) directly to MEA or any other agency appointed by it.

³(supra)

3. It is to be noted that the Government of Saudi Arabia has stipulated that effective Haj 2013, a PTO should facilitate at least 150 pilgrims. Accordingly, the PTO Policy has been reframed. For registration and allotment of quota of Haj seats for Haj 2013, interested PTOs may apply under the following two categories:

Category I	PTOs registered with MEA and facilitated Hajis at least for 7 Haj operations or more.
Category II	PTOs registered with MEA and facilitated Hajis for at least for 1 to 6 Haj operations and PTOs which have facilitated at least 50 umrah pilgrims in a year for any five years.

4. 70% of the overall quota of seats will be allocated to eligible PTOs under Category 3(I) and 30% to eligible PTOs under Category 3(II). Distribution of seats among qualified PTOs will be done as follows:

(a) 70% of the Haj 2013 PTO seats (31,500) will be allocated to eligible PTOs under Category 3(I) at the rate of 150 seats per PTO. In case the number of PTOs exceeds 210, the allocation of seats will be done on draw of lots. If the number of qualified PTOs is less than 210, each PTO will be allocated 150 seats and surplus seats, if any, will be distributed equally among them.

(b) 30% of Haj 2013 PTO seats (9000) will be allocated to eligible PTOs under Category 3(II) at the rate of 150 seats per qualified PTO. If the number of qualified PTOs exceeds 90, the allocation of seats will be done by draw of lots. In case the number of PTOs is less than 90, each PTO will be allocated 150 seats. Balance seats, if any, will be transferred to Category I and distributed equally among them. A qualified PTO which fails to get selected under the draw of lots in any year will be allocated 150 seats in the ensuing year without qurrah if it remains a qualified PTO.

5. This Policy is expected to remain valid for five years 2013-2017 unless there are substantive developments which affect it. The allocation of seats to qualified PTOs in each category will be done every year on the basis of the overall quota of PTO seats specified in the Annual India-Saudi Arabia Haj Agreement and the number of qualified PTOs remaining in each category. The policy envisages cross-category upward movement of PTOs from Category II to Category I. A qualified PTO shall remain qualified unless it is otherwise disqualified either by the Government of India or by the Government of Saudi Arabia for valid reasons. It is to be noted that the PTOs who do not wish to take a minimum of 150 Hajis or are unable to do so, need not apply.

6. Last date for receipt of applications which should be addressed to the MEA or any other agency appointed by it.

(emphasis supplied)

3. In terms of the aforesaid policy since the qualified PTOs exceeded 90, a draw of lots was held. Further, since the petitioners were not successful in the draw of lots, they were entitled, under clause 4(b) of the policy aforesaid, to be allocated 150 seats in the ensuing year without *Qurrah* if they remain qualified as PTOs. We may note at this stage that as per the submissions advanced, in view of certain changes in the policy of the Saudi Government, the number of seats to be allocated for 2016 would have been 50.

4. It is also apparent from the Press Release of 7.8.2015 giving the

list of PTOs who have qualified but did not get quota, that the petitioners figured in the said list.

5. On 29.4.2016, the Ministry of External Affairs published the norms for registration of PTOs for *Hajj* 2016. Para 3 of this reads as under:

“3. All the terms and conditions laid down in Annexure A & B will also apply on PTOs that qualify under Category-II by virtue of facilitating a minimum of 50 Umrah pilgrims in a year for any 5 years, but with the exception of the terms and conditions contained under Clause (vii), (x), (xi) and (xii) of Annexure A. In addition, these PTOs are also required to submit the proof of payment made through banking or any other authorised channels towards purchase of tickets and hiring of accommodation in Makkah and Madinah in respect of Umrah pilgrims facilitated by them in support of their claim.”

6. The aforesaid, thus, provided that persons like the petitioners who had qualified for the year 2015 but were not successful in the draw of lots would have the benefit of exemption of terms and conditions contained in clauses (vii), (x), (xi) and (xii) of Annexure A.

7. For purposes of completion of record, we enumerate hereinbelow the said clauses of Annexure A:

“ANNEXURE-A

**Terms and Conditions for Registration of
Private Tour Operators (PTOs) for Haj-2016**

Each PTO should establish that it is a genuine and established Tour Operator having experience in sending tourists/pilgrims abroad for which it should produce the following documents:

Sl. No.	Terms and Conditions
vii	Proof of payment made through banking (Bank Statement) or other authorized channels towards purchase of tickets and hiring of accommodation in Makkah/Madinah for the financial year 2013-14 (Haj2013) or 2014-15 (Haj 2014). Payments towards purchase of tickets, hiring of accommodation for pilgrims in Makkah/Madinah, by any other means, would not be accepted.
x	Copies of Registration Certificate issued to the PTO in support their aim-wise and PTO-wise.
xi	Contract for hiring of buildings for pilgrims and “Tasreeh” together with English translations PTO category wise. (Please enclose rental receipts and a copy of lease deed, duly signed with the Saudi owners for Haj.
xii	Copy of Munazzim Card and relevant Haj visa pages of the Passport of the Proprietor/Owner.

8. The petitioners, however, faced identical rejection letters of 26.7.2016 (sent through e-mail dated 27.7.2016), the contents of which

are as under:

“Subject: Intimation regarding non-allocation of quota to Private Tour Operators (PTOs) for Haj-2016.

Dear Sirs,

This has reference to your application regarding registration for Haj 2016.

2. On scrutiny of your application submitted for Haj-2016, your firm has not been found eligible for registration and allocation of quota for Haj 2016 on the following grounds:

PTO has not complied with clause vii, x, xi and xii of Annexure A of PTO.

Policy as laid down by Hon'ble Supreme Court for any one of the Haj year.

3. Your ineligibility for registration and allocation of quota for Haj 2016, however, does not prejudice your right to debar you from applying for registration for Haj 2017 on the basis of the required conditions for Haj 2017.”

9. A bare perusal of the aforesaid letter would show that the reason cited for disqualification was non-compliance of the very clauses of which exemption had been granted to the petitioners.

10. Learned Additional Solicitor General appearing for the respondents could not dispute the aforesaid position but sought to canvas that the reasons were wrongly communicated in the rejection letter, and there was actually, some other reason for the rejection. The aforesaid plea can hardly be countenanced in view of the reasons referred to and communicated.

11. Learned counsel for the petitioner has, thus, rightly drawn our attention to the Constitution Bench judgment of this Court in

Mohinder Singh Gill v. Anr. v. The Chief Election Commissioner, New Delhi & Ors.⁴ to submit that such a plea cannot be accepted. We may note that this is a well settled legal position in many judicial pronouncements of this Court, but it is not necessary to revert to the same. In para 8 of the aforesaid judgment, V.R. Krishna Iyer, J, in his inimitable style states as under:

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji*:

“Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.”

12. The aforesaid legal position, thus, makes the stand of the

⁴(1978) 1 SCC 405

respondent unsustainable, resulting in the quashing of the impugned letters of rejection.

13. The question, however, rises what relief can be granted in such a situation. The passage of time has made certain reliefs infructuous. The time period for conducting *Hajj* tours for 2016 as well as 2017 is over. Thus, even the alternative relief prayed for 2017 has become infructuous. In three of the writ petitions, i.e., WP (C) Nos.631/2016; 634/2016 & 636/2016, there is a specific alternative plea for compensation to the petitioners for the loss accrued due to non-grant of registration for the *Hajj* of 2016. While there is no such specific plea in the other writ petitions, given the identical situation, we are of the view that the same principle ought to be applied in all these cases. The petitioners cannot be left remediless. The mindless action of the respondents in rejecting the eligibility of the petitioners for the year 2016 on the very grounds on which they were exempted necessitates that the petitioners should be entitled to damages in public law so that they are compensated, at least, to some extent for not having been able to carry on with their business on account of illegal action of the respondents.

14. The principles of damages in public law have to, however, satisfy certain tests. In *Nilabati Behera v. State of Orissa*⁵, it was observed that public law proceedings serve a different purpose than private law proceedings. In that context, it was observed as under:

“The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court molds the relief by granting ‘compensation’ in proceedings under Articles 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making ‘monetary amends’ under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of ‘exemplary damages’ awarded against the wrong doer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.”

It was also emphasized that it is a sound policy to punish the wrongdoer and it is in that spirit that the courts have molded the relief

⁵ (1993) 2 SCC 746

by granting compensation in exercise of writ jurisdiction. The objective is to ensure that public bodies or officials do not act unlawfully. Since the issue is one of enforcement of public duties, the remedy would be available under public law notwithstanding that damages are claimed in those proceedings.

15. The aforesaid aspect was, once again, emphasized in ***Common Cause, a Registered Society v. Union of India***⁶. We may also usefully refer to ***N. Nagendra Rao & Co. v. State of A.P.***⁷ qua the proposition that the determination of vicarious liability of the State being linked with the negligence of its officer is nothing new if they can be sued personally for which there is no dearth of authority.

16. In the facts of the present case, the arbitrariness and illegality of the action of the authority is writ large. The petitioners have been deprived of their right to secure the quota on a patently wrongful order passed for reasons, which did not apply to them and for conditions, which had been specifically exempted. What could be a greater arbitrariness and illegality? Where there is such patent arbitrariness and illegality, there is consequent violation of the principles enshrined

⁶ (1999) 6 SCC 667

⁷ (1994) 6 SCC 205

under Article 14 of the Constitution of India. The facts of the present case are, thus, undoubtedly giving rise to the satisfaction of parameters as a fit case for grant of compensation.

17. On a conspectus of the aforesaid facts including the number of pilgrims for whom the petitioners would have been entitled to arrange the *Hajj* pilgrimage, an amount of Rs.5 lakh per petitioner would be adequate compensation for the loss suffered by them and sub-serve the ends of justice. We are conscious of the fact that there is no quantification based on actual loss, but then the award by us is in the nature of damages in public law.

18. The amount for each of the petitioners be remitted by the respondents within two months from the date of this order failing which the amount would carry interest @ 15 per cent per annum apart from any other remedy available to the petitioners. It will be open to the respondents to recover the amount of damages and costs from the delinquent officers responsible for passing such unsustainable orders.

19. The writ petitions are allowed in the aforesaid terms with costs quantified at Rs.10,000 per petition.

.....J.
[J. Chelameswar]

.....J.
[Sanjay Kishan Kaul]

**New Delhi.
May 07, 2018.**