

CASE NO.:
Appeal (civil) 2539 of 1998

PETITIONER:
B.P. SHARMA

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT: 18/08/2003

BENCH:
BRIJESH KUMAR & ARUN KUMAR

JUDGMENT:
JUDGMENT

2003 Supp(2) SCR 684

The Judgment of the Court was delivered by

BRIJESH KUMAR, J. The above-noted civil appeals involve the same question of fact and law hence, they are being disposed of by this common judgment. The appellants are Guides by profession and held identity cards as "approved guides". The identity cards were issued by the Regional Director, Tourism, Government of India, Regional Tourist Office, 88, Janpath, New Delhi and counter-signed by the Director, Monuments, Archaeological Survey of India.

The guides as commonly known conduct the tourists to the historical monuments and other places of interest of tourists and explain the background and the importance of such places as well as acquaint them with the historical facts relating to the monuments and many landmarks of the area. This job developed into a kind of a specialized profession and they have to handle local tourists, foreign tourists, tourist parties and many dignitaries visiting the places. They charge for rendering such services. In this background it appears that it was thought necessary to regulate this profession and a need also seems to have been felt to issue identity cards to those persons who may act as authorized guides and charge fee for the service rendered. So as the guides may be presentable, well-up in their knowledge and their conduct towards the tourists may be cultured and ethical, certain conditions have been laid down including one relating to holding a test which any of such person is required to pass before being entitled to be issued an identity card as a guide. Detailed instructions in that connection have been issued in 1979 by the Ministry of Tourism and Civil Aviation, Department of Tourism, Government of India. A few of the conditions are that they should charge their remuneration only at the rates fixed by the Department of Tourism; they would not solicit tips or other material gains from the tourists; they would maintain good conduct and behaviour; they would carry out the assignments as may be made by the Department of Tourism for conducting any tour or site seeing etc. and they are also supposed to undergo written and oral examination conducted by the Tourism Department. One of the conditions with which we are concerned in the present appeals is contained in clause 17. It provides "When a guide attains the age of 60 years the identity card issued to him/ her will not be renewed further". It may be pertinent to note that sometime during the pendency of the litigation, it is informed that the age has been extended to 65 years.

The authorities, in accordance with the guidelines issued, declined to renew the identity cards of the appellants, on the ground of age hence the guides approached the High Court by filing petitions under Article 226 of the Constitution of India but failed. The present appeals have thus arisen from an order passed by the Allahabad High Court dismissing the writ petitions. The High Court, expressed its agreement with an earlier judgment

of the Division Bench of the same Court in Virender Kumar Chadha v. Union of India and Ors., rendered in W.P. No. 10714 of 1991 on September 10, 1992. The judgment in the above noted case deals with and repels several points raised by the petitioners in that bunch of petitions including the challenge made to fixing of age. Learned counsel appearing for the appellants before us, has raised a grievance only in regard to fixation of age beyond which identity card is not liable to be renewed merely on the event of attaining a particular age.

In connection with fixing of age beyond which no renewal of identity card is permissible, the case of respondents is that job of a guide requires a lot of physical stamina as sometimes they have to take the tourist parties outside the station and they have also to climb steps and have to walk long distances in the monuments etc. It is further pleaded that normally a person after attaining the age of 60 years tends to lack physical stamina, which the nature of the job very much requires. The judgment in Virender Kumar Chadha (supra) refers to the decision of Delhi High Court in J.K. Agarwal v. Union of India, in Writ Petition No. 948 of 1970 and quoted a passage from that judgment which reads as under :

"I do not think that the profession of tourist guides can be compared to a profession of lawyers and doctors. The said professions are primarily concerned with the mental skills and mental faculties. On the other hand, a tourist guide is required to perform the function which is basically physical or manual. The improvement of general health standard is no ground for not fixing the upper age limit. In most of the employments (Government as well as private), the persons are retired at the age of 58. It is true that there is no such thing as retirement in a profession. In that sense a private tourist guide, who does not bother about the Government's approval, is free to carry on his profession as long as he wants. There would be no age bar. However, the considerations are different when it comes to the approval of guides by Government. A guide who has crossed the age of sixty years may not develop any physical handicap. But if the younger guides are available they would be more energetic and would ultimately be of greater assistance to the tourist. The validity of the age limit prescribed by clause 17 cannot be tested merely on the basis of the physical fitness of a particular guide. Young, energetic guide would certainly promote better tourism business in comparison. I, therefore, hold that clause 17 is neither arbitrary nor unreasonable."

The Court then observed in the case of Virendra Kumar Chadha (supra) that it was in respectful agreement with the reasons given in the judgment as quoted above J.K. Agarwal's case.

It would be relevant to consider some of the provisions as indicated by the learned counsel appearing for the respondents so as to be able understand the legal sanction behind the conditions laid and restrictions placed on the profession of guides.

The Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958) was enacted to provide for preservation of ancient and historical monuments and archaeological sites and remains of national importance, for the regulation of archaeological excavations and for the protection of sculptures, carvings and other objects of the kind. Our attention is drawn to Section 18 of the Act which reads as under :

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"18. Right of access to protected monument-Subject to any rules made under this Act, the public shall have a right of access to any protected monument."

Section 38 provides for power of the Central Government to frame rules for carrying out the purpose of the Act. Sub-section (2) provides :

"In particular, and without prejudice to the generality of the foregoing

power, such rules may provide for all or any of the following matters, namely :-

- (a) xxxx xxx xxxx
- (b) xxxx xxx xxxx

(c) the right of access of the public to a protected monument and the fee, if any, to be charged therefor;

(d) the form and contents of the report of an archaeological officer or a licensee under clause (a) of sub-section (1) of section 23;

xxx xxx xxx"

Consequently, the Government framed rules known as the Ancient Monuments and Archaeological Sites and Remains Rules 1959. Our attention has been drawn to rule 8 which is to the following effect :

"8. Prohibition of certain acts within monuments .- No person shall within a protected monument;.

- (a) do any act which causes or is likely to cause damage or injury to any part of the monument; or
- (b) discharge any fire-arms; or
- (c) cook or consume food except in areas, if any, permitted to be used for that purpose; or
- (d) hawk or sell any goods or wares or canvass any custom for such goods or wares or display any advertisement in any form or show a visitor round for monetary consideration except under the authority of, or under and in accordance with the conditions of a licence by, an archaeological officer; or
- (e) beg for alms; or
- (f) violate any practice, usage or custom application to or observed in the monument; or
- (g) bring, for any purpose other than the maintenance of the monument,
- (i) any animal, or (ii) any vehicle except in areas reserved for the parking thereof."

The main stress is on clause (d) of Rule 8 which provides that no person shall show a visitor around for monetary consideration except under the authority of, or under and in accordance with the conditions of a licence granted by, an archaeological officer.

On the basis of the above provisions, it is sought to be explained on behalf of the respondents that by statutory rules framed under the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958, the profession of such persons who may take visitors around for monetary consideration can be regulated by laying down conditions of a licence granted for the purpose by an archaeological officer. An Archaeological Officer is defined under Section 2(c) of the Act :

"2(c): "Archaeological officer" means an officer of the Department of Archaeology of the Government of India not lower in rank than Assistant Superintendent of Archaeology;"

The learned counsel for the appellant has vehemently urged that the powers derived by virtue of Rule 8(d) framed under the authority of Section 38 to

give effect to Section 18 of the Act by no means empowers an Archaeological Officer to fix age beyond which a person may not be allowed to carry on the profession of guide. We find that Section 18 of the Act only creates a right in the public to have access to any protected monument. It would of course, be subject to any rule made under the Act, but by no stretch of imagination this provision can be pressed into service for prescribing any age beyond which a guide shall not have the right to hold a licence to carry on his profession. The right of access to monuments given under Section 18 to the public is apparently not connected with the profession which is carried on by the guide holding an identity card/licence issued by a competent authority. As a member of the public even a guide may have a right to visit or enter into a protected monument complying with the rules which may be applicable to any visitors/tourist as member of the public. It is not compulsory that a tourist must take a guide with him. Therefore, in our view a reference to Section 18 made on behalf of the respondent has no direct bearing on the point under consideration, it's indirect impact, however, we may consider a little later.

Now coming to Section 38, we find that the Central Government under clause (c) of sub-section (2) can make rules in respect of right of access of the public to a protected monument and the fee etc. which may be charged therefor. It is certainly referable to Section 18 of the Act. It may be that by implication, the access to the protected monument may include the entitlement of the members of the public to know about the details of the monument, its historical background and other connected matters, which information they generally obtain through the guides. Therefore, it could be considered necessary to regulate the other related matters of right to access to monuments eg. matters pertaining to the profession of guides. The Central Government might like to see that the tourists are properly informed and not misguided or fleeced by unscrupulous guides or such element posing to be guides, though to engage a guide is optional on the part of the tourist. In this light we now advert to Rule 8(d) of the Rules which provides certain prohibitions, saying that no person shall show a visitor around for monetary consideration except under the authority or conditions of licence granted by an archaeological officer. The purpose of rule 8(d) is clear that the place may remain protected, be maintained and be kept well and no person may charge a visitor for taking him around the place except one who is authorized as approved guide. His charges would be, as fixed.

The whole reading of all three provisions viz. Sections 18, 38 and Rule 8(d) lead only to the conclusion that the nature of power is only regulatory. It does not in any manner lead to creation of relationship of master and servant between the State and the approved guides; nor even to any relationship, contractual in nature. It is already indicated in reference to the conditions laid, that minimum standard of basic knowledge has been provided for and the conduct and behaviour of guides has been channelised in many ways but it is to be seen as to whether the condition of Clause no. 17 can be said to be within the regulatory power derived from the above noted provisions or not.

It may be pertinent to mention that one of the submissions made on behalf of the petitioners is that the identity card has been issued and conditions have been laid by Regional Director, Tourism, Government of India and not by the Archaeological Officer of the Archaeological Survey of India, Government of India. As a fact, we find that an officer of the Archaeological Survey of India has counter-signed the identity card and the conditions laid down by the Department of Tourism. However, it may not be necessary to go into that aspect of the matter since no other objection has been raised before us in respect of any other condition laid down in the identity card for the approved guides. The case of the respondents is that the two departments namely, Archaeological Survey of India and the Department of Tourism; they have to work in collaboration of each other as access to the protected monuments is intimately connected with the tourism and the tourists. Therefore, both departments are equally involved ... An

officer of the Archaeological Survey of India has also counter-signed the identity card and the conditions laid for their conduct etc. We would like to leave this matter here alone without going into any other detail since it will not be necessary for deciding the validity of Clause 17 on the ground we propose to test.

So far as the fixation of age beyond which it is provided under the Clause no. 17 that the identity card shall not be renewed, does not seem to be within the scope of the provisions indicated above. The guides profess their independent profession. Since they come in touch and have to deal with the members of public and the tourists from within and outside the country, the Government of India considered it necessary to regulate the conditions of their profession. For example the fee etc. which would be chargeable by them, the way they will conduct their profession and behave with the tourists and many do's and don't's have been provided. So far so good, since it is undoubtedly only regulatory in nature and they have to conform to certain norms laid necessarily suitable for the profession, which as a matter of fact is for the benefit and to protect the interest of the visitors and tourists seeking access to the protected monuments. But otherwise the State or the Government of India does not figure into the picture in any role whatsoever. There is no relationship of master and servant between them nor there exists any contractual relationship. No benefit is conferred nor any emolument etc. is payable to the guides by the Government. No kind of protection nor any other benefit is provided to them by the Government. This is as much a matter of self-employment and private profession, as many others. In absence of any such relationship as that of master and servant or contractual in nature, ordinarily there would be no good reason for the State to completely prohibit at its choice, to carry on a private profession or self-employment, on attaining a certain age. The High Court expressed its agreement with an earlier decision of Allahabad High Court in the case of Virender Kumar Chadha, (supra) which in turn expressed its agreement with reasons given in the case of J.K. Agarwal, (supra), a passage from which has been quoted earlier. In the case of J.K. Agarwal, (supra), a distinction has been sought to be made between the profession of the tourists guides and the professions like that of lawyers and doctors and it has been observed that while the latter are primarily concerned with mental skills and mental faculties the former relates basically to physical or manual conditions. It cannot be said that the doctors and lawyers do not need to have energy, stamina and strength to practice their profession, though may be it is required lesser in degree. We feel that this kind of a distinction is misconceived in the matter of private profession which is self-employment of a person equipped in a particular discipline or profession; it is better left to the client, patient or consumer of the related service to choose as to whose services they may like to avail of. Besides doctors and lawyers there are innumerable categories of persons who are self-employed, earning their livelihood exerting themselves physically and manually also. It does not mean that they can be subjected to total curtailment of their right to earn their livelihood at any given stage. We also fail to understand the logic that young and energetic would certainly promote better tourism business. The visitors come to see the places of interest, not because of the energetic guides but due to the importance of a monument, its beauty, historical background or things like that. If young and old guides both are available, it would be for the visitors to choose whom to engage; those who are less energetic may not undertake very arduous engagement and may still be able to perform and profess their profession restricting activities according to their ability to manage the assignment. At times it is quite possible that a more matured and elder guide may be more informative and may make the tour more interesting. Hence, in private professions it is better left to the consumer of the service to make his own choice, whatever be the profession. The observation in J. K. Agrawal's, case (supra) that a Guide may not bother about the conditions laid for approved guides and may continue with the work of guide; true there is no such restriction for it under Rule 8(d) but it cannot be with charges for the job. Where there may be no such restriction without charges there is no good reason to prohibit

charging for it. A profession cannot be carried on without any remuneration. Therefore, the line of reasoning adopted in the case of J.K. Agrawal, (supra) with which agreement has been expressed in the case of Virender Kumar Chadha, (supra) followed in the impugned judgment does not appeal to reason. Regulatory measures may be for better efficiency, conduct and behaviour in the public interest, but ordinarily it cannot prohibit a person totally debarring him from carrying on his profession at an age chosen by the Government unless there may be special reasons for it.

The right which is guaranteed to all citizens under Article 19(1)(g) of the Constitution of India is to practice any profession or to carry on any calling, trade or business. Clause (6) of the article 19(1) however, places a restriction that nothing would prevent the State from making any law imposing reasonable restrictions in exercise of the right in the interest of general public Sub-clauses (i) and (ii) further provide that professional and technical qualification as may be thought necessary for practicing the profession can always be prescribed and exclusion of carrying on of any calling, trade or business etc. is also envisaged which is also carried on by a State or by a Corporation owned and controlled by the State. Subject to above noted restrictions the valuable right as provided under Article 19(1)(g) is available to all the citizens who are free to choose any trade, business, calling or profession etc. It obviously, also includes the manner and terms in which they will carry on their profession, but again subject to reasonable restrictions which may be thought necessary by the State in the interest of general public. On the other hand, once a citizen voluntarily chooses to join government service or any other service, he would obviously be free to do so but he would be bound by the terms and conditions of the service as may be provided under the law or by contract of service.

The freedom under Article 19(1)(g) can also be completely curtailed in certain circumstances eg. where profession chosen is so inherently pernicious that nobody can be considered to have a fundamental rights to carry on such business, trade, calling or profession like gambling, betting or dealing in intoxicant or an activity injurious to public health and morals. It may be useful to refer to few decisions of this court on the point at this stage, viz. in [1955] 1 SCR p. 707 = AIR (1954) SC 728, Saghir Ahmad and Anr. v. State of U.P. and Ors., [1996] 6 SCC 665 and J.K. Industries Ltd. and Ors. v. Chief Inspector of Factories and Boilers and Ors. The main purpose of restricting the exercise of the right is to strike a balance between individual freedom and social control. The freedom, however, as guaranteed under Article 19(1)(g) is valuable and cannot be violated on grounds which are not established to be in public interest or just on the basis that it is permissible to do so. For placing a complete prohibition on any professional activity, there must exist some strong reason for the same with a view to attain some legitimate object and in case of non-imposition of such prohibition it may result in jeopardizing or seriously affecting the interest of the people in general. If it is not so, it would not be a reasonable restriction if placed on exercise of the right guaranteed under Article 19(1)(g). The phrase in the interest of general public' has come to be considered in several decisions and it has been held that it would comprise within its ambit the interests like public health and morals (Refer to AIR (1970) SC 1157 the State of Maharashtra and Anr. etc. etc. v. Himmatbhai Narbheram Rao and Ors. etc.), economic stability AIR (1957) SC 414 State of Assam and Ors. and etc. etc. v. Sristikar Dowerah and etc. etc., stability of the country, equitable distribution of essential commodities at fair prices (AIR (1960) SC 475, Union of India and Ors. v. M/s Bhanamal Gulzarimal Ltd. and Ors.), for maintenance of purity in public life, prevention of fraud and similar considerations. On consideration of a catena of decisions on the point, this Court, in a case reported on [1998] 8 SCC p. 227, M.R.F. Ltd. v. Inspector, Kerala Government and Ors., has laid certain tests on the basis of which reasonableness of the restriction imposed on exercise of right guaranteed under Article 19(1)(g) can be tested. Speaking for the Court, Saghir Ahmad, J. (as he then was), laid such considerations as follows :

"(1) While considering the reasonableness of the restrictions the court has to keep in mind the Directive Principles of State Policy.

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by clause (6) of Article 19.

(5) Prevailing social values as also social needs which are intended to be satisfied by restrictions have to be borne in mind. (See State of U.P. v. Kaushaliya, AIR (1964) SC 416 = [1964] 4 SCR 1002.

(6) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption favour of the constitutionality of the Act will naturally arise. (See Kavalappara Akottarathil Kochuni v. States of Madras and Kerala, O.K. Ghosh v. EX. Joseph, AIR (1960) SC 1080=[1960] 3 SCR 887, AIR [1963] SC 812 = [1963]Supp 1 SCR 789."

Thus testing the restriction of age, in the light of law as indicated in the preceding paragraphs, clause no. 17 of the conditions of the identity card/ licence issued by the respondent, on the face of it, does not seem to be a reasonable restriction. It amounts to total prohibition to carry on the profession of one's own choice after attaining a particular age. It is true, even total prohibition upon carrying on one's profession can be imposed by way of regulatory measure but for doing so condition-of public interest must be fulfilled. It is not to be taken lightly; it must pass through a stringent test. There are a number of callings and professions in which people are engaged even after attaining the age of 60 or 65 years and in pursuing such self-employment and private profession they find means of their livelihood, without causing any harm to public interest. Such is the case in hand too. The reason which has been indicated in the case of J.K. Agarwal, (supra) which found favour in the Division Bench decision of V.K. Chadha, (supra) followed in the impugned judgment of the High Court does not contain such reasons which can be said to be reasonable enough to curtail totally the right of carrying on profession of one's choice on attaining a particular age. No element of public interest is involved. It is better to leave it for those who are in the field namely, carrying on their profession and the consumers of their services. The purpose sought to be achieved as indicated in J.K. Agarwal's case (supra) that it may promote tourism is far fetched and unrealistic. We have already considered this object sought to be achieved by placing the restriction of age. The tourists are attracted by the place, its beauty, importance and historical background etc. and not because of the more energetic guides. No harm is going to be caused to the general public if young and old people both are professing their profession of guides and are available for the service to the tourists.

It is always better, nay, necessary too that the freedoms as guaranteed under the Constitution should be allowed to be enjoyed by the citizens to the fullest extent without putting shackles of avoidable cobweb of rules and regulations putting check and restrictions in the enjoyment of such freedoms. We find no reasonable ground to have put a condition of age bar, whereafter a guide may not be allowed to continue his profession as it does not fall in any of such categories which may justify placing such restrictions completely debarring him to act as guide. Curtailment of

freedom must have some strong reasons and real nexus with the purpose sought to be achieved. It would not be imposed merely because it is permissible for the State to do so.

For the reasons indicated above, we allow the appeals, set aside the judgment and order passed by the High Court and the orders impugned by the appellants refusing to renew their 'identity cards' and we hold the Clause No. 17 of the conditions as ultra vires and the same is quashed.

The respondents shall bear the costs of the appeals, which we assess at Rs. 10,000 for each appeal.

JUDIS