

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

**WP (C) no. 540/2022
CM no. 1339/2022 c/w
i) OWP no. 828/2018
ii) SWP no. 1151/2018
iii) WP (C) no. 631/2022**

**Reserved on 24.11.2022
Pronounced on 15.12.2022**

i) Javaid Ahmad Akhoon and others
ii) Abdul Rashid Khan
iii) Mohammad Hanief Dar and others

.... Petitioners
Through: Mr Arif Sikander, Advocate

v.

Union Territory of JK and others

... Respondent(s)

Through: Mr Mohsin Qadri, Sr. AAG with
Ms Insha Rashid, GA

CORAM:

Hon'ble Ms Justice Moksha Khajuria Kazmi, Judge

JUDGMENT

1. These four writ petitions have been filed by the petitioners challenging and seeking quashment of the two Government Orders bearing No. 17-Flori/G&P of 2018 dated 23.02.2018 and 32-Flori/G&P of 2018 dated 07.06.2018, hereinafter for short as impugned orders, issued by Commissioner-Secretary to the Government, Floriculture Department, Civil Secretariat, Srinagar/ Jammu, (respondent no. 3 in the lead case), on the grounds taken in the memo of writ petitions.

2. The two Government orders being questioned in the instant writ petitions pertain to and are aimed at to regulate the photographers' trade in the gardens and parks of the Floriculture department. Since all the writ petitions raise a similar point for consideration, therefore, these are taken up together for disposal and this judgment shall govern all.

3. Precisely, the case of the petitioners is that they are registered photographers with the Tourism Department under the provisions of Jammu and Kashmir Registration of Tourism Act, 1978/82 and have been earning their livelihood by carrying out their professional activities in different tourist areas as shown in their respective registration certificates.

4. While the petitioners were carrying on such professional/ business activities, the respondent no. 3 issued certain guidelines to regulate the trade of photography in the parks and gardens vide Order No. 17-Glori/G&P of 2018 dated 23.02.2018 *inter alia* prescribing the age of the photographers between 21-40 years for first permission and not more than 45 years in case of renewal on 1st January of the year in which application was made.

5. Aggrieved of such stipulation prescribed in the guidelines, the petitioners challenged the same by filing writ petitions, OWP no. 828/2018; & SWP no. 1151/2018. This court, while issuing notice to the other side, in SWP no. 1151/2018, stayed the operation of the Government Order No. 17-Flori/G&P of 2018 dated 23.02.2018.

6. During the pendency of the writ petitions, the respondents, in modification of order no. 17-Flori/G&P of 2018 dated 23.02.2018, issued Government Order No. 32-Flori/G&P of 2018 dated 07.06.2018 by virtue of which the eligibility in respect of age was modified and enhanced to 60 years instead of 45 as provided earlier.

7. Aggrieved of such modification, the petitioners have filed two writ petitions, being WP (C) nos. 540/2022 and 631/2022 to challenge the same *inter alia* on the grounds that, a) the respondent no. 3 had no power under Jammu and Kashmir Registration of Tourism Trade Act, 1978/82 to issue the guidelines in question; b) the impugned guidelines are having the effect of overriding the provisions of Jammu and Kashmir Registration of Tourism Act, 1978/82 which provides the

eligibility conditions for the trade in question; c) it restricts the professionals from freely carrying on their trade amounting to violation of Article 19(1)(g) of the Constitution which guarantees all citizens the right to practice or carry on any occupation, trade or business; d) the impugned order has no statutory backing to impose restrictions; e) the impugned order is violative of Article 21 of the Constitution; etc.

8. Upon notice, the respondents appeared; filed their objections and resisted the claim of the petitioners. The grounds taken in opposition to all the writ petitions are almost similar. It is *inter alia* stated therein that petitioners have raised disputed questions of fact; no cause of action has accrued to the petitioners as none of their right is infringed; the order impugned bearing No. 32-Flori/G&P of 2018 dated 07.06.2018 has been passed only after taking into consideration the grievances of the petitioners; the impugned order dated 23.02.2018 upon being challenged in the court of law was reviewed and modified by order dated 07.06.2018 which also has been challenged after a span of four years; the petitioners do not have a valid renewed registration as on date in terms of Tourism Trade Act 1978, therefore, should not be allowed to operate in the gardens; the petitioners falling at S.Nos. 9,11,16,24 and 26 do not have license to operate near any Mughal Garden as per their own record and have falsely included themselves for the benefits of photography in Mughal Gardens; the guidelines do not curtail the livelihood of any photographer but only regulates the mode of operation and tenure of renewal; the respondents are bound to ensure discipline, fair charging, safety of visitors and proper work conduct in the gardens under their administrative control; allowing all those who have a valid registration for a particular location would lead to permitting all such photographers in the Garden falling in that location as such a course would result in chaos and overcrowding in the gardens beyond the fixed intake capacity of photographers; the guidelines have been issued by the

respondents earlier also in the year 2008 vide Government Order No. 17-CM-(F) of 2008 dated 08.05.2008 laying down identical conditions therein; the respondent no. 3 is competent to issue guidelines in question; and the guidelines have been issued with utmost regard to the rule of law and principles of natural justice.

9. Heard learned counsel for the parties and perused the material made available.

10. Learned counsel for the petitioners while reiterating the grounds of writ petition, submits that the impugned guidelines are not only irrational but unreasonable and illogical too as the photography skill cannot be restricted to a particular age. He submits that persons above 60 years upto 70-80 years can click a photograph with utmost ease provided he is otherwise physically fit to do so. He further submits that the trade/ business of the petitioners is solely the concern of the Tourism department and the respondents have absolutely no role to play to regulate such trade/ business. He submits that the petitioners are holding a valid registration granted by the department of Tourism and it can only be the department of tourism who has the authority to regulate the business of the petitioners that too in consonance with the rules governing the subject.

11. Learned counsel for the petitioners further submits the impugned guidelines are not even the executive instructions in terms of Article 162 of the Constitution, therefore, do not have the force of law. He submits that even if it is assumed that the impugned guidelines qualify to be the executive instructions, yet the same are bad in law for having been issued by a department other than the one with which the petitioners are registered.

12. The learned counsel further submits that the guidelines are always aimed at to supplement the rules and not supplant it. He submits that the impugned guidelines are violative of Article 19 (1) (g) of the Constitution as the reasonable restrictions can be put in place through a legislative act only.

13. In support of his submissions, the learned counsel for the petitioners refers to and relies upon the judgments of the Hon'ble Apex Court delivered in cases titled *Pharmacy Council of India v. Rajeev College of Pharmacy and others* reported as 2022 *LiveLaw (SC)* 768; *Bijoe Emmanuel and others v. State of Kerala and others* reported as (1986) 3 *SCC* 615; *Kharak Singh v. State of U.P and others* reported as *AIR 1963 SC 1295*; *Union of India and another v. Ashok Kumar Aggarwal* reported as (2013) 16 *SCC* 147; *A. A. Calton v. Director of Education and another* reported as (1983) 3 *SCC* 33. Learned counsel also referred to a judgment delivered by the High Court of Allahabad in case titled *Vijay Singh and others v. State of Uttar Pradesh and others* reported as 2005 (2) *AWC* 1191.

14. On the other hand, Mr Mohsin Qadri, learned Sr. AAG, who is representing both Tourism and Floriculture departments, submits that the parks and gardens are required to be managed by the Floriculture Department only and the Tourism Department has no role in such management and the impugned guidelines have been issued in such direction only. He submits that the tourism department has only to register the photographers and their movement in the parks and gardens is to be regulated by the respondents only, therefore, the respondents were well within their authority to issue the impugned guidelines.

15. The learned senior AAG further submits that the impugned guidelines are the executive instructions having been issued to fill in the gaps left by the relevant Statute and there is no restraint upon the respondents to issue such instructions. He refers to and relies upon the the judgments of the Hon'ble Apex Court delivered in cases titled *State of Madhya Pradesh vs. Kumari Nivedita Jain* reported as 1981(4) *SCC* 296 and *B. N. Nagarajan: Lingappa Veerappa Shindal v. State of Mysore* reported as 1966 *AIR (SC)* 1942.

16. Considered the submissions made.

17. At the very outset the order dated 23.02.2018 impugned in these petitions is desired to be reproduced herein, thus:

“Government Order No: 17-Flori/G&P of 2018 dated 23-02-2018

In supersession to all previous orders, sanction is hereby accorded to issuance of the guidelines regarding permission to the registered photographers to enter in the Parks & Gardens of the Floriculture Department. The photography trade in the gardens/parks of the department shall henceforth be governed by these norms/guidelines detailed in the annexure to this Government Order. These norms/ guidelines shall have effect from 01.04.2018.”

Annexure to Government Order No:17-Flori/G&P of 2018 dated 23.02.2018.

01. Grant of permission for photography in the Parks/Gardens as per these guidelines will come into force w.e.f. 01.04.2018. The permission due for renewal henceforth shall also be renewed in accordance with these guidelines.

02. Permission shall be granted strictly on recommendation for each Garden/Park District wise which will be conducted under the supervision of a Committee of Officers of the Department Headed by Director, Floriculture of respective Divisions.

03. Eligibility:-

- 1. The candidate must be resident of J&K State.*
- 2. The candidate must be un-employed and be registered with Tourism Department under TTA-1978.*
- 3. The age shall be between 21 to 30 years for first permission and not more than 45 years in case of renewal on 1st January of the year in which application is made.*

- 4. The minimum education qualification shall be 10th Pass.*
- 5. Preference shall be given to candidates having diploma in photography from a recognized institute.*

04. The Competent Authority to issue/renew/cancel permission shall be the Director, Floriculture of the concerned Division.

05. The candidates shall apply on the prescribed Form, which will be issued by Floriculture Department against the payment of Rs. 500/-.

06. Documents to be attached with application form:-

- i) Registration Certificate of photography duly issued by the competent authority (Director Tourism, K/J) under TTA-1978, which should be in force on the date of application.*
- ii) Date of Birth Certificate.*

- iii) *State Subject Certificate.*
- iv) *Qualification Certificate.*
- v) *Four (4) recent passport size photographs.*
- vi) *Firm Registration Certificate, if any, with the name of firm owner showing complete address of firm and firm owner.*
- vii) *Character Certificate as on date duly issued by the concerned Superintendent of Police (SP).*
- viii) *Affidavit duly registered in the Court of Law indicating that he/she is not employed in any Government/ Semi Government/ Corporation/ Private Organization/ or is working a contractor in Private or Public Sector.*

07. *The number of photography permissions to be granted in the gardens/parks of the department shall not exceed the sanctioned intake capacity of each garden/park to be issued by the Director, Floriculture, Jammu/Kashmir.*

08. **Permission for photography shall be granted initially for a period of one year, which may be renewed from year to year on deposition of fee and holding of valid registration under TTA, 1978, subject to a maximum tenure of 5 years or 45 years of age whichever is earlier.**

09. *The Director, Floriculture shall transfer the photographers from one park to another park and it shall be allowed for a fixed period and only in case of specific or genuine reasons without changing the intake capacity of the gardens/parks.*

10. *The Director, Floriculture will issue identity cards to the persons holding valid permission for photography and they shall be required to wear these identity cards while on work in Garden/ Park.*

11. *The permission issued shall be non-transferable. However, in case of death/handicap of a photographer, permission can be transferred to the NOK of the permission holder, subject to the condition that he/she is registered with Tourism Department under TTA, 1978 in the photography trade. In the case of adopted sons, the Muslim Personal Law of 2007 shall be binding.*

12. *Applicant found eligible for grant of permission shall not sublet his/her permission to any other person or engage his/her workers for photography, permittee shall have the photography in the garden/park himself/herself as allotted by the department. The carrying capacity of the garden as fixed by the concerned Director. No substitute under whatsoever circumstances shall be allowed except when a registered photographer has been declared*

unfit by the competent authority (Medical Board) his/her permit can be transferred to his legal heir.

13. *Permitted photographers shall use only still cameras for photography within Gardens/Parks.*

14. *Permitted photographer will not be allowed to carry more than 5 (five) local dressed for photography inside Gardens/Parks.*

15. *An annual fee of Rs. 10,000/- (Rupees ten thousand only) shall be charged for each permission, to be deposited with Floriculture Department in lump sum at the time of issuance of permission and on each renewal which shall be due on 1st April of every year. In case of non submission of annual renewal fee of Rs. 10,000/- , no permission shall be granted/renewed.*

16. *The permission issued can be suspended/cancelled by the competent authority, if at any time it is found that the permission holder is:-*

- a. Not performing his/her professional duty satisfactorily.*
- b. Mis-behaving with the tourist or visitor.*
- c. Not complying the instructions or cooperating with the Department.*
- d. Found involved in any criminal activity.*
- e. Found involved in any immoral activity.*
- f. Found to have sub-let his/her permission.*
- g. Found over-charging or cheating the Tourist or visitor.*
- h. Found that the registration certificate issued by the Tourism Department, J&K under TTA, 1978 has become invalid or has been cancelled by Tourism Department.*
- i. Any complaint is received from tourist/visitor against him/her & found genuine.*
- j. If carrying other business or Government service.*

17. *Concerned officer in each Garden shall be responsible to monitor the permitted photographer for acts as indicated hereinabove. He shall be responsible to report to Director Floriculture within two days of happening of any act along with his recommendations for action.*

18. *Permission granted shall not be cancelled without giving due opportunity of being heard to the permission holder and recording the reasons of cancellation in writing.*

19. *Photographers holding valid permission shall charge fixed rates from the customers and rate list to be displayed at site.*

20. *The fee for films and other documentaries, in departmental parks/gardens shall be as under:-*

- a. Film shooting by film industry (Bollywood) Rs. 5000/- per hour.*

b. Shooting of Tele films/short films/documentary/Tele serial National level/Tele serial/song programme etc. @ Rs. 1000/- per hour.” **(Emphasis supplied)**

18. The said order was subsequently modified vide Government Order No. 32-Flori/G&P of 2018 dated 07.06.2018, in the following manner:

“In partial modification to Govt. Order No. 17-Flori/G7P of 2018 dated 23.02.2018 sanctioned is hereby accorded to the:-

1. The permission for the photography shall be granted for a period of one year and which may be renewed from year to year on deposition of fee and holding a valid registration under TTA 1978 up to the age of 45, after attaining the age of 45 all photographers have to produce valid medical fitness certificate duly issued by the District Medical Board regarding their fitness particularly eyes and locomotive organs before renewal of their licences up to the age of 60.

2. There shall be no minimum qualification for the existing or already registered photographers for renewal of their photography licenses, but the minimum qualification shall remain in force as 10th passed for the new licence holders with other qualification as prescribed in the Govt. order.

The above conditions are only for existing/registered photographers who are registered with the Department in Floriculture, Gardens & Parks. ”(Emphasis supplied)

19. The submission of the learned counsel for the petitioners that the impugned guidelines are without authority as it is the department of Tourism which can regulate the affairs of the petitioners in the parks and gardens being registered with it, has no substance, in that, there is no provision in the Tourist Trade Act, 1978 that mentions about the manner and method in which the photography trade would be regulated. Merely because the petitioners stand registered with Tourism Department would not in itself mean that only the Tourism authority has the power

to regulate their business. It is equally true for the respondent-Floriculture department as there is nothing on record to suggest that they have the authority to regulate the business/ affairs of the petitioners.

While going through the reply filed by the respondents, the court came across a Government Order issued in the year 2008 by the respondent-Floriculture department prescribing thereby certain conditions for regulation of the petitioners trade which has not been challenged by anybody, there is no record available at least to that extent, therefore, whether the challenge laid to the modified guidelines through the medium of instant writ petitions, in absence of any challenge to the basic order issued way back in the year 2008 on the subject, is legally tenable? The court will not make an endeavour to answer this question lest that may prejudice the rights of the petitioners.

20. It would be also apt to mention here that in the impugned guidelines it is very specifically mentioned that the above guidelines would only be applicable to those who are registered with the department of Floriculture. The petitioners, admittedly, are not registered with the Floriculture department and the registration that they are relying upon is of the Tourism department and as per the documents available on record, the said registration has also expired in most of the cases if not in all.

21. Admittedly, the impugned guidelines have been issued by the Government and the court cannot lose sight of the fact that the Government can place necessary restrictions for smooth functioning of a particular trade on the desired levels, however, such restrictions must not be unreasonable particularly when the same are aimed at to regulate the trade of unemployed skilled youth of a troubled area whose livelihood is dependent on such trade.

22. Be that as it may, assuming that the respondent-Floriculture department, in terms of the Jammu and Kashmir Reorganization Act, 2019-Transaction of

Business of the Government of Union Territory of Jammu and Kashmir Rules, 2019, by virtue of which the parks and gardens have been assigned to Floriculture Department, had the authority to issue the guidelines in question, yet the court, upon having been challenged before it, can test its reasonableness by a judicial review. The principle of reasonableness also called a *Wednesbury principle* developed in the case of *Associated Provincial Picture House v. Wednesbury Corporation (1948) 1 KB 223 Lord Green* put forth the following circumstances under which an administrative action could be categorized as unreasonable; a) if the administrative action has no backing in law; b) there is no evidence to back the action of the authority; c) the action is based on irrelevant and extraneous consideration; d) the action is outrageous and so unreasonable that no reasonable person in their wildest of dreams would reach to that particular conclusion.

23. Testing the conditions of the impugned guidelines vis-à-vis the upper age limit and the deposition of annual fee of Rs. 10,000/- on the touchstone of the *Wednesbury principle* and the ratio laid down by the Hon'ble Supreme Court in case titled *Rameshwar Prasad (VI) v. Union of India* reported as (2006) 2 SCC p. 1, the same appear to be wholly unreasonable, in that, the skill cannot be restricted to a particular age especially in today's advanced era and it does not further appear to be achieving any kind of object not to speak of a reasonable object. The condition in respect of deposition of annual fee of Rs. 10,000/- also appears to be unreasonable as the petitioners are admittedly performing their professional duties in the tourist areas and are solely dependent upon the tourist inflow which obviously lasts for only few months, therefore, a seasonal worker, depending solely on tourist inflow, cannot logically be earning as handsome an income as would bear the annual deposition of Rs. 10,000/- for maintaining his registration.

24. For all what has been said hereinbefore, the court finds the condition in respect of upper age appearing at serial no. 1 in the Government Order No. 32-

Flori/G&P of 2018 dated 07.06.2018 read with condition No. 8 of the Government Order No. 17-Flori/G&P of 2018 dated 23.02.2018, as unreasonable, therefore, quashed. The respondents are directed further to review the condition envisaging deposition of annual fee of Rs. 10,000/- as the same is appearing to be harsh too.

25. Before parting with the file, it needs to be emphasized here that during the course of arguments certain observations were made by the court on 24.11.2022 and while the judgment in the case was reserved, the learned counsel for the respondents produced a copy of a communication bearing No. LS/DOF/F-121/1182-83 dated 25/11/2022 issued by the Director, Floriculture department Kashmir, addressed to the Government Counsel, wherein it is reflected that the authorities shall be reviewing certain conditions of the impugned guidelines. The Government would be at liberty to take a fresh look at the impugned guidelines and pass any modification deemed appropriate in the facts and circumstances of the cases, taking into account the observations made by this Court in the instant judgment.

26. Disposed of along with all CMs, on the above lines.

27. Registry shall place a copy of this judgment on each file.

(Moksha Khajuria Kazmi)
Judge

Srinagar
15.12.2022
Amjad lone, Secretary

Whether approved for reporting: Yes/No