

In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 21709 of 2022

IFB Agro Industries Limited & Anr.

VS.

State of West Bengal & Ors.

For the petitioners : Mr. Ratnanko Banerji, Sr. Adv.
Mr. Soumya Roy Chowdhury, Adv.
Mr. Arunabha Deb, Adv.
Mr. Ayush Jain, Adv.

For the respondents : Mr. S. N. Mookherji, Ld. AG.
Mr. Anirban Ray, Adv.
Mr. Raja Saha, Adv.
Mr. Debasish Ghosh, Adv.
Mr. Varun Kothari, Adv.

Last Heard on : 16.11.2022.

Delivered on : 22.11.2022.

Moushumi Bhattacharya, J.

1. The petitioners seek quashing of a communication dated 24.6.2022 issued by the Superintendent of Excise, Diamond Harbour Excise District directing the petitioners to deposit Rs. 1.45 crores for effecting four alleged

changes in management in the petitioner Company from 1.4.2017 to 31.3.2022 without notice to the Collector of Excise. The alleged obligation on the part of the petitioners arises out of the West Bengal Excise (Change in Management) Rules, 2009 notified on 11.2.2010. The Rules are applicable in cases of changes in management of all excise licensees granted under the Bengal Excise Act, 1909 and the rules framed under the said Act except for licenses which are settled by auction.

2. The petitioners say that the four events, termed as changes in management, from 1.4.2017 to 31.3.2022 consist of the appointment of an independent woman Director to the Company on 26.7.2019, resignation of a Joint Managing Director on 18.10.2017, expiry of the term of an independent woman Director on 1.4.2019 and the death of an independent Director on 9.7.2019. The petitioners informed the Excise authority of these events in 2019, were served with hearing notices in February, 2022 and replied to the notices on 8.3.2022. Orders were passed against each of these events and the petitioners made payment of the composition money in August, 2022.

3. The petitioners, through their learned counsel say that the petitioners are covered by Rule 5 of the 2009 Rules. The petitioners also rely on a subsequent notification dated 11.2.2020 amending the 2009 Rules, if the Rules are held to be applicable to the impugned orders. All the four events constituting the alleged change in management were of 2019.

4. The learned Advocate General appearing for the State relies on Rules 3 and 5 of the Consolidated Rules under section 85 of the Bengal Excise Act, 1909, which provide for an appellate authority for a person aggrieved by an order of the Collector or the Excise Commissioner. It is also submitted that

the petitioners had filed an earlier writ petition asking for the same relief which is pending as on date. Counsel submits that the petitioners have in any event complied with the impugned order by agreeing to pay the composition money of Rs. 1.50 lakhs as noted in the order dated 8.3.2022.

5. The controversy before the court is essentially whether appointments, resignation, expiry of term and death of directors would amount to “change in management” under the West Bengal Excise (Change in Management) Rules, 2009. Under Rule 5, the Collector is under an obligation to allow a change in management of a licence after realizing 1.5 times the initial grant fee similar to the one applicable for grant of a new licence. The proviso to Rule 5 qualifies the aforesaid to the extent that no initial grant fee of licence shall be payable for change in management in case of Clauses (a) – (e). Proviso (e) to Rule 5(1) specifies that initial grant fee of license shall not be payable for change in management in case of death or a change in the usual course of business of a public limited company incorporated under the Companies Act, 1956. The petitioner No. 1 is a Public Limited Company. The event of death of the Independent Director on 9.7.2019 hence stands excluded from the alleged change in management of the first petitioner.

6. Whether the other three events, namely, appointment, resignation and expiry of term of the three Directors would amount to a "change in management" is hence to be tested. All of these three events were in the usual course of business under Rule 5(1) proviso (e) of the 2009 Rules. It is well settled that a "change in management" is an outcome of a change in the shareholding pattern of a Company. It implies a change of control and a consequent impact on the voting rights of the members and shareholders of a

Company. This has been the consistent view of the Courts including in *Commissioner of Income Tax vs Mahadeo Ram Kumar*; 1986 SCC OnLine Cal 352. In *Vodafone International Holdings BV vs. Union of India*; (2012) 6 SCC 613 the Supreme Court defined "controlling interest" as vesting in the voting powers of a company's shareholders which translates to determining of the management of the company. The accepted principle is of controlling interest forming an inalienable part of the shares of a company where transfer of a large number of shares would necessarily result in shifting of controlling interest and consequently a change in management. Hence, "change in management" must inextricably be linked to a change in the shareholding pattern of a company where the controlling interest of a group of shareholders would determine the management of or essentially who controls the affairs of the company.

7. In the present case, appointments or resignation of a Director can, by no means, be equated with a change in the shareholding pattern of the first petitioner and hence a shift in the management of the first petitioner. A shift or change in the management means a substantial and significant movement of the shares of a Company leading to a shift in the management structure.

8. The objections taken on behalf of the State with regard to existence of an alternative remedy is not acceptable since Rules 3 and 5 of the Consolidated Rules under section 85 of the Act providing for an appellate forum to a person aggrieved by an order of the Collector or Additional District Magistrate cannot be the forum of choice where the vires of the 2009 Rules is under challenge. The earlier writ petition filed by the petitioners in 2018 cannot also be a ground against entertaining the present writ petition since

the cause of action in the instant proceeding is founded on the communication dated 24th June, 2022 directing the petitioners to deposit Rs. 1.45 crores in terms of the 2009 Rules. The fact that the respondent authorities also viewed the two causes to be distinct would be reflected in their communication of 12th September, 2022.

9. It is also well settled that levy of a fee is different in concept and source from levy of tax. Fees are a sort of return or consideration for service rendered and entails an element of *quid pro quo* for its imposition. The power to impose a tax and the power to impose a fee were held to be different by a 3-Judge Bench of the Supreme Court in *The Government of Andhra Pradesh vs. Hindustan Machine Tools Ltd.*; (1975) 2 SCC 274. In the facts of the present case, changes in the Board of Directors as a result of appointment, death or retirement cannot imply rendering of any service by the Excise authorities since the changes happened in the usual course of business. Thus, the justification of demanding an amount of Rs. 1.45 crores for such routine events in the usual course of business is contrary to the law laid down by the courts.

10. Even if the petitioners are brought within the purview of the amended Rule 3 under the later Notification of 11th February, 2020, the petitioners would be protected by Rule 3(i)(d) where 'Change in Management' in the case of a public limited company has been defined as any change in directorship other than appointment/cessation of independent directors within the meaning of The Companies Act, 2013 or any change of shareholding amongst shareholders beyond 10% of the existing shareholding pattern. There is admittedly no change in the shareholding pattern of the first petitioner in the

period stated in the impugned letter of 24.6.2022. The petitioners agreeing to pay the composition fee in lieu of having their license suspended cannot be seen as waiver of the petitioners' rights under the prevailing laws.

11. For the reasons as stated above, there is no justification for the Excise Authorities in demanding the amount of Rs. 1.45 crores from the petitioners on the ground of changes in management brought about by the four events stated above. It is clear that the demand of fees for appointment, resignation, retirement and death of the directors of the petitioner no. 1 has no nexus with the perceived changes in the management and control of the petitioner no. 1. The respondents are seeking to interpret the 2009 Rules in a manner which is contrary to the settled law on the subject. The respondents cannot unjustly enrich themselves in a manner extraneous to the Rules and the law pronounced by the Courts.

12. Since the relief prayed for is restricted to the demand of Rs. 1.45 crores as directed in the communication dated 24.6.2022, nothing further remains to be decided in the writ petition. WPA 21709 of 2022 is accordingly allowed and disposed of by quashing the letter dated 24.6.2022 and the direction contained therein asking the petitioners to deposit Rs. 1.45 crores within the time-frame recorded in the said letter.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)