IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-
The Hon'ble Justice Moushumi Bhattacharya

WPA 4873 of 2018

New Kenilworth Hotel Private Limited and another
vs
State of West Bengal and others

For the petitioner	:	Mr. Sabyasachi Chowdhury, Adv. Mr. Rajarshi Datta, Adv. Mr. V.V.V. Sastri, Adv. Mr. Debjyoti Saha, Adv..
For the State	:	Mr. Anirban Ray, Ld. GP. Mr. T. Chakraborty, Adv. Ms. Ashmita Chakraborty, Adv.
Last Heard on	:	22.11.2023
Delivered on	:	06.12.2023

Moushumi Bhattacharya, J.

1. The petitioners pray for a declaration that Clause (d) of the proviso to Rule 5 of the West Bengal Excise (Change in Management) Rules, 2009, be declared ultra vires the Constitution of India.

2. The petitioners also pray for quashing of the demands made on the petitioners by the respondent Excise authorities including a revised demand dated 27.2.2018. The petitioners also seek refund of the sum of Rs. 64.50 lacs along with interest and a direction on the respondent authorities to deposit the sum before the Registrar General of this Court.

Introduction

3. The petitioner no. 1 owns and operates a 4 star hotel in Kolkata which was incorporated on 29.4.1970 under the Companies Act, 1956. The petitioner no. 1 initially carried on business under its present name "New Kenilworth Hotel Private Limited". The petitioner no. 1 became a deemed public limited company with the applicability of section 43A (1B) of the 1956 Act and a second certificate of incorporation was issued to the petitioner on 23.8.1995. The petitioner was reconverted into a private limited company under section 43A (2A) of the said Act by operation of law. The petitioner no. 2 is one of the directors of the petitioner no. 1 company.

A brief background of the present dispute

4. The respondent sought information pertaining to the renewal of the petitioners' excise license in the present name i.e. New Kenilworth Hotel Private Limited in 2009 as the earlier excise license was under the name of "New Kenilworth Hotel Limited". The petitioner responded by its letter dated 3.11.2009 explaining the factual position which has been stated above. The petitioner no. 1 received a Memo dated 9.9.2013 from

the respondent no. 4/Collector of Excise, Kolkata (Central) demanding Rs. 22,50,000/- as fees towards change in management and in status of the Excise License from New Kenilworth Hotel Limited to New Kenilworth Hotel Private Limited and for the induction of new directors. The petitioners responded to the Memo by a letter dated 14.9.2013 stating that the change in status of the company was by operation of law and the induction of two new directors in the petitioner no. 1 was to fill the vacancy created by the death of two of its erstwhile directors. The petitioner stated that the petitioner no. 1 was exempted under the provision of Rule 5(1) of the West Bengal Excise (Change in Management) Rules, 2009. The respondent authorities did not consider any of the representations made by the petitioners.

5. The petitioners received another Memo dated 27.3.2017 from the respondent no. 3/ Collector of Excise, Kolkata (South) containing audit queries on receipt and refund of Excise duty. The respondents claimed Rs. 4,50,000/- as short levy on the initial sum of Rs. 22,50,000/- which was paid by the petitioners in 2013 as well as another Rs. 25,00,000/- in terms of a notification dated 9.11.2010. The respondent no. 3 also further directed the petitioners to pay the aforesaid sum by way of a letter dated 5.7.2017 on the ground of the petitioners' change from a public limited company to a private limited company.

6. The petitioners challenged the Memo in a writ petition being WP 22151(W) of 2017 which was disposed of by giving the petitioners liberty to appeal from the order of the respondent authorities. The petitioners

filed a second writ petition being WP 30525(W) of 2017 which was dismissed by an order dated 14.12.2017. During pendency of the appeal, the Excise Commissioner passed an order dated 18.12.2017. The appeal was disposed of on 21.12.2017 setting aside the order passed by the Excise Commissioner on 18.12.2017 and directing the Appellate Authority to give a fresh hearing subject to the petitioners depositing Rs. 20, 00, 000/- which the petitioners subsequently deposited.

7. The Excise Commissioner heard the petitioners on 25.1.2018 and passed the impugned order dated 16.2.2018. The impugned order passed by the Excise Commissioner, West Bengal, relied on the Rules of 2009 and held that the petitioner was liable to pay the fees stipulated in the Rules. The Collector of Excise, Kolkata (South) was directed to issue a fresh notice on the ground that a change had been affected in the Board of Directors of the petitioner company. The Excise Commissioner held that the change in the Board of Directors would entail levy of new license fees as the petitioner would not be covered by the exceptions under the 2009 Rules.

8. The Collector of Excise by a letter dated 27.2.2018 raised a renewed demand adjusting the earlier payments and demanding a further payment of Rs. 22,00,000/-. The petitioner paid this amount under protest by a letter dated 13.3.2018.

Arguments advanced on behalf of the parties

The petitioners

9. Learned counsel appearing for the petitioner submits that a change in the Board of Directors in the usual course of business does not amount to change in management in the context of direct levy of license fees. Counsel submits that changes in the Board of Directors in the petitioner no. 1 cannot require the petitioner having to apply for a new excise license in terms of Rule 4(2) of the 2009 Rules since a change in management has been equated with the transfer of ownership of the company.

10. The petitioners argue that clauses (d) and (e) of the proviso to Rule 5(1) of the 2009 Rules violates Article 14 of the Constitution of India since a separate mechanism has been provided for a private limited company for exemption from payment of license fees under Rule 5(1). Counsel submits that classification of a private limited company and a public limited company under clauses (d) and (e) respectively, is not based on intelligible differentia and also does not have any rational nexus to the object sought to be achieved by the 2009 Rules. Counsel submits that clause (d) to the proviso to Rule 5(1) should accordingly be declared ultra vires the Constitution of India or be suitably read up to include change in management in the usual course of business in a case of a private limited company in the same manner as clause (e) to the proviso to Rule 5(1) of the Rules.

The respondents

11. The respondents are the Commissioner of Excise and the Collector of Excise, Kolkata (South and Central). The impugned order dated 16.2.2018 was passed by the Excise Commissioner, West Bengal whereby, the Collector of Excise Kolkata (South) was directed to raise a fresh demand notice. The Collector of Excise, Kolkata (South) passed the revised demand dated 27.2.2018 calling upon the petitioner to pay Rs. 22 lakhs.

12. Learned Government Pleader appearing for the respondents, urges that the difference between the exemptions for a Private and a Public Limited Company can be found under the Corporate Laws of India. Learned counsel submits that there were inductions on the Board of the petitioner no. 1 in 2011 and that the petitioners made payments towards the demand raised on the petitioner no. 1 pursuant to notices raised on the petitioners. Counsel submits that the Notification of 2020 leaves little scope for interpretation of the expression “change in management” and that the writ petitioners have not challenged the earlier notices including a notice of 9.9.2013. It is also submitted that the Notification issued by the Finance Department of the State on 11.2.2020 sought to amend Rule 3 of the 2009 Rules and that the said amendment is by way of substitution of the original Rule 3 whereby the meaning of “change in management” stands crystallised.

Decision

13. The controversy is presented to the Court on two planks. The first is on whether death of a Director and consequent appointment of another director to the Board would amount to a “change in management” under The West Bengal Excise (Change in Management) Rules, 2009. The second issue is whether clause (d) to the proviso to Rule 5 of the 2009 Rules is discriminatory and offends the right of the petitioner no. 1 to equal treatment under Article 14 of the Constitution of India.

14. The West Bengal Excise (Change in Management) Rules, 2009 was notified under sections 85 and 86 of the Bengal Excise Act, 1909 on 11.2.2010 and published in the Gazette on 23.2.2010. The Rules were in supersession of the earlier Notification dated 18.11.2005. The 2009 Rules were made applicable in case of change in management of all excise licenses granted under the Bengal Excise Act, 2009 and the Rules therein save and except those licenses which were settled by auction.

15. This judgment is articulated in two sections in accordance with the issues state above. The conclusions of the Court are stated in the captions to the sections; the reasons for the conclusion are in the discussion which follows the captions.

Changes in the Board of Directors in the usual course of business does not amount to “change in management”

16. This issue arises from the impugned order dated 16.2.2018 whereby the Excise Commissioner found that changes in the petitioner Company's Board of Directors in the usual course of business would attract levy of new license fees and would not be covered within the exception carved out under the proviso to Rule 5(1) of the 2009 Rules. In other words, the Excise Commissioner was of the view that the petitioner no. 1, being a Private Limited Company, would be held captive to clause (d) to the proviso of Rule 5(1) which exempts payment of the initial grant fee only upon death of a director of a private limited company.

17. The issue whether changes in the Board of Directors of a company would entitle levy of 1.5 times of the initial grant fee under Rule 5(1) was considered by this Court in *IFB Agro Industries Limited vs. State of West Bengal; WPA 21709 of 2022*. The facts before the Court in that case involved appointments, resignations, expiry of terms and death of directors of the petitioner and whether facts such as these would amount to "change in management" under the 2009 Rules. The petitioner in that case was a Public Limited Company (as opposed to the petitioner no. 1 being a Private Limited Company in the present case) which was aggrieved by levy of 1.5 times the initial grant fee similar to the one applicable for grant of a new license. The Court held that a "change in management", in ordinary parlance as well as in Company Law, would be a change in the shareholding pattern of a Company with an implication on the voting rights of the members and shareholders of a

Company. The Court also relied on *Vodafone International Holdings BV vs. Union of India; (2012) 6 SCC 613* which defined "controlling interest" as vesting in the voting powers of a company's shareholders and ascertaining who controls the affairs of a company. Even if the decision in *IFB Agro* is kept aside, a "change in management" necessarily implies a movement of a body of shares with a consequent change in the shareholding pattern of the company concerned and a change in the exercise of power and control of the Company. Appointments to the Board of Directors would not have any impact on the shareholding pattern of a Company so as to impact the controlling hands thereof.

18. This would also be evident from Rule 4(2) of the 2009 Rules which mentions, *inter alia*, "*... change of membership of the company...*" and continues the implication in the first proviso to Rule 4(2) where "*change in management*" has been equated with a change in the form and structure of a company, for instance:

> *".... or from a private limited company to a public limited company and vice versa or in case where there has been a takeover or acquisition or amalgamation or merger of a private or public limited company .... the management so changed....."*

Apart from this, Rule 4(3) mentions the words "*proposed transferee(s)*".

19. Read together, the only possible conclusion would be that *"change in management"* would be a change in the fundamental structure and controlling / ownership pattern of the company. The change must be in the formation of, or creation of a new company

transferring its ownership, its command and structure, shareholding composition / rights and voting rights. Therefore, appointments to the Board of Directors can, by no means, be equated with a change in management.

20. Although not relevant for the present proceeding, the Finance Department of the Government of West Bengal appears to have become wiser to the implications of "change in management" which would be reflected in the Notification dated 11.2.2020 where Rule 3(i)(c) defines "change in management" in the case of a Private Limited Company to mean

> *"...when there is any change of Directors or any change of shareholding amongst shareholders beyond 10% of the existing shareholding pattern"*

21. In conclusion, appointment of new directors either by reason of death of an existing director or in the usual course of business, without any impact to the shareholding pattern or membership of the Company, does not amount to any "change in management" since there is no transfer or movement of the shares in the company. Induction of a new director into the Board would also not fall within the meaning of the expression "transferee". In other words, a "change in management" of a Company should be of a nature so as to determine the ordinary Excise License in terms of Rule 4(2) and result in a "*proposed transferee*" in terms of Rule 4(3).The usual fitness and eligibility criteria for holding an

excise license would come with consideration only after there is a structural change in the company.

The classification made under Clause (d) and (e) of the proviso to Rule 5(1) is not founded on intelligible differentia and does not have a rational nexus to the object of the 2009 Rules.

22. The second plank of the petitioners' argument is mounted on clause (d) of the proviso to Rule 5(1) of the West Bengal Excise (Change in Management) Rules, 2009. The clause in controversy, together with the relevant part of Rule 5(1) is set out below.

> *"5. Payment of fees for change in management. – (1) After getting approval of the State Government or the Excise Commissioner, as the case may be, the Collector shall allow change in management of a license after realizing one and a half time (1 ½ times) the initial grant fee similar to the one applicable for grant of a new excise license of the same category, of the same local area. The Collector shall also record such change in the concerned licence :*
>
> *Provided that no initial grant fee of license shall be payable for change in management in case of –*
>
> *(d) death of director(s) of a Private Limited Company;"*

23. The charge of discrimination would be better understood if clause (d) is contrasted with (e); the latter is set out below.

> *"5.1.(e) death or change in management in the usual course of business of a public limited company, incorporated under the Companies Act, 1956."*

24. If clauses (d) and (e) are read in the context of Rule 5(1) and the proviso thereto, the construction would inevitably be : the requirement

of the payment of 1.5 times the initial grant fee similar to the fee applicable for grant of a new excise license for the Collector to permit change in management of a license would not be applicable in the case of death of a director for a private limited company and death of a director + change in management in the usual course of business for a public limited company.

25. The disparity in the applicability of the proviso to Rule 5(1), namely, exemption from payment of 1.5 times the initial grant fee of license for a public limited company compared to a private limited company would thus be apparent from clauses (e) and (d), respectively, in the proviso to Rule 5(1) itself.

26. To hammer the disparity home, the exemption from payment of license fee pursuant to a change in management is much broader in the case of a public limited company where, apart from death of a director, any change in management in the usual course of business, would also entitle the public limited company for exemption. A private limited company, however, would get the benefit of exemption only upon death of a director and nothing more. Private limited companies have thus been left out of the purview of change in management in the usual course of business.

27. Therefore, increasing the zone for exemption for public limited companies from payment of license fees under the proviso to Rule 5(1) no doubt sets the ground for unequal treatment in the matter of payment of license fees for change in management.

28. The inequality must however be tested on whether the classification of "private limited company" and "public limited company" in clauses (d) and (e) respectively, satisfies the twin tests of

a) being founded on an intelligible differentia, and

b) the differentia having a rational nexus to the object sought to be achieved by the 2009 Rules.

29. The disparity, which is apparent in clauses (d) and (e) of the proviso to Rule 5(1), is one which also does not find any front-end support from the preceding part of the Rules. This view would be buttressed by the following:

i) Rule 4 of the 2009 Rules does not envisage a separate procedure for public and private limited companies. Rule 4(2) repeats the expression "company" in several places without any distinction being made between a private and public limited company.

ii) The second paragraph of Rule 4(2) significantly clarifies *".... any change in management in a company .... or any change in the Board of Directors of the company - both private limited company or public limited company ....."*

iii) Rule 4(3) authorises the Collector to enquire into *"whether the proposed transferee(s) is / are liable to hold an excise license ....".*

The test of fitness and eligibility of the "proposed transferee" is not made with reference to either a public limited or a private limited company and must hence revert to the second paragraph of Rule 4(2) which specifies *"both private limited company or public limited company".*

30. Hence, carving separate provisions out for the first time in Rule 5(1) and the proviso thereto is unreasonable and without the support of the Rules themselves.

31. There is also no rationale disclosed for making two separate groups from the (hitherto) general head of "company" in clauses (d) and (e) of the proviso to Rule 5(1). The offending proviso has carved out different provisions for levy of fees and exemption from payment of license fees pursuant to change in management for private and public limited companies.

32. Creating two distinct groups and bestowing a larger zone of exemption for one of the two groups must be supported by intelligible differentia in the creation of the two groups. The 2009 Rules does not satisfy this test.

What is *intelligible differentia*?

33. Article 14 of the Constitution of India guarantees to all persons equality before the law and equal protection of the laws within the territory of India. To translate this vision into meaningful action, the State is authorised to create groups or classes for grant of certain benefits or exclude certain groups from those benefits. Article 14 of the Constitution is not violated by creation of classes based on rational differences since the State can step in through affirmative measures in aid of the constitutional goal of equality. However, the requirement which must be fulfilled is of shared characteristics of persons within a group which justifies their being grouped together as opposed to those

who are outside the group. The distinction between those inside and those outside must be intelligible, that is, be measurable by reasonable parameters. The persons who have been excluded from the group must understand that they have been left outside the group in view of not possessing those defining features.

34. The test of intelligible differentia is vital to the constitutional charter of equality since creating groups is antithetical to equality. The distinguishing markers is the differentiator which justifies classification with or without those markers. It is of utmost importance that groups or classifications promote equality by way of intervention and do not undermine the same.

35. The State's power to take the vision of Article 14 forward cannot be done through random classifications where persons inside the class do not have homogeneous or defining features which distinguishes them from those who are outside the classification. The word "intelligible differentia" underscores classification which is based on comprehensible differences as opposed to arbitrary groupings without comprehensible differences.

What is *rational nexus* to the object?

36. The classification sought to be made of persons with shared features distinguishing them from persons who are excluded from the classification can only be justified where the distinguishing features or "*differentia*" have a rational link to the object sought to be achieved by

the statute in question. The classification can be founded on different characteristics including geographical, occupational or socio-economic markers. The persons thus classified would have the same distinctive characteristics. It is necessary that there must be a nexus or connection between the basis of classification and the object of the act under consideration: *State of West Bengal v. Anwar Ali Sarkar; AIR 1952 SC 75, Budhan Choudhry v. State of Bihar; AIR 1955 SC 191*. A Full Bench of the Supreme Court in *Confederation of Ex-servicemen Associations v. Union of India; (2006) 8 SCC 399* reinforced that every classification must be founded on intelligible differentia and must have a rational nexus to the object sought to be achieved by the statute or the legislation in question in order to be legal and valid.

37. The object of the 2009 Rules would be clear from Rule 4 which is set out:

> *"4. Procedure or application for change in management. – ……….*
>
> *(2) A licence granted under the Bengal Excise Act, 1909 to a company, society, co-operative society or a firm shall stand determined on any change of membership of the company, society, co-operative society or in the partnership of the firm or in the management thereof, unless in the case of the company, prior approval of the State Government and in the case of a partnership firm, society or co-operative society prior permission of the Collector and the approval of the Commissioner, to such change is obtained.*
>
> *Subject to the above requirement, any change in management in a company registered under the Companies Act, 1956, or any change in the Board of Directors of the company- both private limited company, or public limited company, or membership in*

case of a society registered under the Societies Act or Co-operative Societies Act shall be brought to the notice of the Collector within a period of 7 days, with application for regularization of the same along with a non-refundable application fee similar to the one applicable for grant of a new excise licence of the same category in the same local area :

Provided further, that in cases of change in management from a firm/society/co-operative society to a company which is registered under the Companies Act, 1906, or from a private limited company to a public limited company and vice versa, or in case where there has been a takeover, or acquisition, or amalgamation, or merger of a private or public limited company holding an excise license by or with another company registered under the Companies Act, 1956, the management so changed, shall, subject to the requirement of prior approval, mentioned above, bring the matter to the notice of the Collector within a period of seven days, with application for regularization of the same along with a non-refundable application fee similar to the one applicable for grant of a new excise licence of the same category in the same local area:

………………..

(3) On receipt of the application, the Collector, under whose jurisdiction the site is situated, shall hold such enquiries as he may deem fit. In making such enquiries, the Collector shall consider whether the proposed transferee (s) is / are fit and eligible to hold an excise licence and, whether the said change in management is necessary for the proper management of the licence."

38. The change in management of a Company should be of a nature so as to determine the earlier excise license in terms of Rule 4(2). Rule 4(2) speaks of determination of license granted under the Bengal Excise Act, 1909 to a company pursuant to any change of membership of the

company which creates a "proposed transferee" under Rule 4(3). The Collector would then consider the fitness and eligibility of the "proposed transferee" to hold a license in terms of Rule 4(3).

39. Rule 5(1) relates to payment of fees, which is 1.5 times of the fees of the initial grant, treated at par to *"grant of a new excise license of the same category"* (terminology of Rule 5(1)).

40. The object of the West Bengal Excise (Change in Management) Rules, 2009 is therefore to require the changed management of a company to apply for a new excise license and the Collector to assess the eligibility of the changed entity for the purpose of grant of a new license. The payment of fee is subject to the change in management falling outside the exemption under the proviso to Rule 5(1) of the 2009 Rules. As stated above, the Rules seek to classify a "Private Limited Company" and a "Public Limited Company" in two separate categories for the purpose of eligibility for the exemption.

41. Apart from the absence of any intelligible differentia in the classifications, by no stretch of imagination can it be said that appointments of new Directors in the usual course of business or for filling up of a vacancy caused by the death of a Director in a Private Limited Company is equal to having a "proposed transferee" for grant of a new license of the same category under Rule 5(1) of the 2009 Rules.

42. The larger zone of exemption for a Public Limited Company from payment of license fee pursuant to change of management should have had a comprehensible connection to the object of the 2009 Rules in

terms of determination of the earlier Excise License and grant of a new Excise License to the “proposed transferee”. The disparity in the scope of exemption for a Private and a Public Limited Company or, in other words, reducing the area of exemption for a Private Limited Company does not preserve the object of the 2009 Rules. The link between the classifications created under clauses (d) and (e) of the proviso to Rule 5(1) thus snaps and is broken in the attempt to connect it to the object of the 2009 Rules.

43. Therefore, the differentia made for classifying Private and Public Limited Companies under two separate groups under clauses (d) and (e) of the proviso to Rule 5(1) does not have an intelligible basis. The differentia for the classification do not also have a rational nexus to the object of the 2009 Rules.

<u>Article 14 prohibits unequal treatment of equals – and *vice-versa*</u>

44. The proposition that Article 14 prohibits unequal treatment of persons similarly-situated is too well-settled to merit a detailed discussion. The 2009 Rules clearly indicates that private limited companies and public limited companies are similarly-situated and have been treated as such in Rule 4(2). Therefore, clauses (d) and (e) of the proviso to Rule 5(1) violates the constitutional guarantee of equality by creating two separate groups/classifications for the purpose of exemption from payment of license fees.

45. *Jagannath Prasad Sharma v. State of Uttar Pradesh; AIR 1961 SC 1245* cited by the respondents refers to *Syed Qasim Razvi case (1953)*

SCR 589 and contains an exposition on the twin tests of discriminatory treatment. The Supreme Court opined that a mere possibility of unequal treatment is not sufficient. This squarely fits in with the facts of the present case where the petitioner no. 1 paid Rs. 70 lacs on being called upon to do so for changes in its Board of Directors in the usual course of business without there under being any change in the management of the company. A Constitutional Bench of the Supreme Court in *The State of Jammu and Kashmir v. Shri Triloki Nath Khosa; (1974) 1 SCC 19* cautioned the Courts from embarking upon a mathematical evaluation of the basis of classification or to substitute their own judgment for that of the legislative or the Rule-making authority. The Supreme Court was of the view that classification must truly be found on substantial differences with a rational nexus to the object sought to be achieved.

46. *State of A.P v. Nallamilli Rami Reddi (2001) 7 SCC 708* spoke of permissible classification where the law will not be viewed as discriminatory if there is uniformity in each group. The Supreme Court made room for fortuitous circumstances arising out of peculiar situations where some persons included in a class may get an advantage over the others and a classification would thus be justified unless it is arbitrary. In the present case, of private limited and public limited companies within the context of change in management and the consequent exemption from payment of license fees is undoubtedly an instance where the differentia is neither real nor substantial and the rational nexus thereof to the object of the Rules is wholly absent.

The absence of Intelligible Differentia and a Rational Nexus to the object of the 2009 Rules Impacts the Constitutional Validity of clause (d) of the Proviso to Rule 5(1) of the 2009 Rules.

47. Without repeating the discussion in the earlier section of this judgment, the inevitable conclusion must be that clause (d) of the proviso to Rule 5(1) of the 2009 Rules offends Article 14 of the Constitution in terms of equal treatment of a Private Limited Company when compared to the right conferred to a Public Limited Company. The petitioners have made out a case for a declaration that clause (d) of the proviso to Rule 5(1) of the 2009 Rules is *ultra vires* to the Constitution of India.

Response to the respondent's arguments

48. The respondent's arguments with the courts view are:

a) Argument of the respondents: Rule 3 of the Notifications dated 11.2.2020 and 6.3.2020 has been substituted so as to incorporate the definition of "change in management" as given in the said Notifications.

The Court

The respondents say that since the definition has been brought by way of a substitution the same would relate back to the original Rule 5(2) and the proviso thereto and shall be deemed to have been given effect to from 2009. To understand the purport of the argument, the new definition given to "change in management" in the Notifications dated 11.2.2020 and 6.3.2020 are set out below.

"(i) Change in Management" means, -

(a) in case of Proprietorship Firm, when the proprietor nominates the trade licence in favour of any other nominee;

(b) in case of a Partnership Firm or a Limited Liability Partnership (LLP) when any of the Partner retires or new Partner is inducted or the ratio of profit-sharing changes;

(c) in case of a Private Limited company when there is any change of Directors or any change of shareholding amongst shareholders beyond 10% of the existing shareholding pattern;

(d) In case of a Public Limited Company any change in Directorship other than appointment / cessation of Independent Directors within the meaning of 149 of the Companies Act, 2013 or any change of shareholding amongst shareholders beyond 10% of the existing shareholding pattern;

(e) In case of Societies or Co-operative Societies any change in Governing Body of the Society registered under the Societies Registration Act or a Co-operative society incorporated or registered under any law;

(f) In case of any other forms of registration when there is any change of ownership or control over the organisation."

This argument cannot be accepted since the two Notifications cannot have any retrospective effect. The Notifications came into force "*with immediate effect*" i.e from 11.2.2020 and 6.3.2020, respectively. This would be evident from the two Notifications themselves.

Further, substitution would only be applicable when there is a "pre-existing" provision which is substituted by the new Rule/Notification. In other words, the new Rule substitutes the pre-existing Rule whereby the latter ceases to exist on and from the day of the new Rule being notified. In the present case, there was no such pre-existing definition of "change in management" in the 2009 Rules which could be substituted by the Notifications dated 11.2.2020 and 6.3.2020. Substitution cannot be in a vacuum or take the place of a provision which did not exist at an earlier point of time.

Zile Singh v. State of Haryana; (2004) 8 SCC 1 would hence not have any application to the facts of the present case. Substituting the 2009 Rules or a specific provision thereto with the 2020 notification with regard to the definition of change in management would also result in uncertainty. In *Zile Singh*, it was held that substitution of one text for the other subsisting pre-existing text which is implied in legislative drafting has to be distinguished from supersession of an existing provision. The definition given by the Supreme Court in *Zile Singh* is wholly irrelevant for the present case since there was no pre-existing text for the meaning of "change in management" with regard to a private limited company.

The uncertainty would also be at several levels. The present writ petition was filed in 2018 and is being disposed of in 2023. The Notifications of 2020 did not exist at the time of filing of the writ petition; hence, if the writ petition had been heard in 2018 or in 2019, the result would have been completely different. An adjudication cannot culminate in a different decision simply because the matter is being heard in 2023 and not in 2018/2019. Substitution must always lend clarity and add meaning to a provision. It cannot lead to anomalies and uncertainties.

Further, the interpretation given to the new Notifications by the respondent presumes retrospective effect of the Notifications under the garb of substitution. A procedural statute cannot have retrospective application where the result would be creation of new disabilities, obligations or imposition of new duties in respect of a transaction which has already been accomplished; *Maharaja Chintamani Saran Nath Shahdeo vs State of Bihar; (1999) 8 SCC 16.*

b) Argument of the respondents: Article 14 of the Constitution is not attracted since a private limited company falls in a different class from that of a public limited company. The respondents rely on The Companies Act, 2013 and its predecessor statutes in support of this argument.

<u>The Court</u>

The 2009 Rules do not differentiate between a "public limited company" and a "private limited company". As stated above, the word "company" appears in several places, or to be more precise, in Rule 4(2) where the provisions have equally been applied to both public and private limited companies. This is also clarified in the second paragraph of Rule 4 which expressly refers to any change in the Board of Directors of the Company *"..... both private limited company, or public limited company ....".* Therefore, Rule 5 cannot carve separate conditions out in clauses (d) and (e) applicable to a private and public limited company, respectively.

The test is whether "intelligible differentia" exists for making separate provisions for public limited companies and private limited companies in the context of the 2009 Rules and more specifically for the payment of license fees under Rule 5(1) thereto.

49. The provisions of The Companies Act, 2013 or its predecessor statutes are not relevant for satisfaction of the test of intelligible differentia in interpreting the 2009 Rules since the differentia must also have a rational connection to the object of the 2009 Rules. This aspect has already been dealt with in the earlier section of this judgment and is not being repeated.

50. The Companies Act discloses intelligible differentia for making separate provisions for public and private limited companies. The definition given to private and public companies under section 2(68) and (71) respectively in The Companies Act, 2013, would show that the differentia between the two relate to restriction on the right of transfer, limiting the number of members and prohibition from invitation to the public for subscription of securities. Unlike The Companies Act, 2013, Rule 4(2) of the 2009 Rules does not make any distinction between a private limited company and a public limited company in the matter of determination of license.

51. Hence, the departure from the generality of the import of the expression “company” as used in Rule 4(2) becomes even more pronounced when a public limited and a private limited company are treated as two separate groups only for the purpose of exemption from payment of license fees.

52. *Shri Kishan Singh v. Th. Ther Singh; AIR 1955 SC 795* is not applicable to the present facts since the basis of the decision was the

failure of the petitioner to establish that the conditions which prevail in other areas in the State of Rajasthan are similar to those existing in the Marwar Region of the State. The issue before the Supreme Court was the constitutionality of certain sections of the Marwar Land Revenue Act No. 40 of 1949, where the argument was of violation of the fundamental rights of the petitioners under Article 14 of the Constitution.

Is there any alternative to clause (d) to the Proviso to Rule 5(1) of the 2009 Rules being declared constitutionally invalid?

53. The offending clause namely (d) of the Proviso to Rule 5(1) may suitably be "read up" so as to include "change in management in the usual course of business" in case of a Private Limited Company in the same manner as provided in clause (e) to the Proviso to Rule 5(1) of the 2009 Rules.

What is "*Reading Up*"?

54. Constitutional Law experts and practitioners have often come across the expression - to "*read down*" a statutory provision where the width of the provision is shrunk or curtailed in order to give the intended effect to the legislative intent in consonance with the object of the statute. Simply put, the surplusage is trimmed in girth in order to prevent the provision from becoming absurd or discordant with its context.

55. To "read up" would therefore mean the reverse; that is where the provision is fleshed out by supplying words or filling up the lacuna so as to make the provision consonant in line with the context of the statute.

56. The shaping-up is really a sideways filling-in or trimming rather than a vertical movement. The excess space for interpretation is filled in by appropriate words in order to close the gap when “reading up” a statute. In the same manner, the excess flab is cut down for the words to snugly-fit into the space which would offer the meaning which is most conducive to the statutory object. The aim is to size-up the provision for a perfect-fit into the interpretative-space. The aim is to interpret the word or provision so as to prevent discordance, absurdity and repugnancy to the object of the statue. The provision is therefore to be suitably “read down” or “read up” to preserve the legislative intention.

57. If the concept of equality is given a graphic dimension and seen as a horizontal straight line, in order to pull the offending clause (d) up to the line of equality, the words “*change in management in the usual course of business*” should be added to clause (d). The inequality between clauses (d) and (e) of the Proviso to Rule 5(1) of the 2009 Rules would then be erased.

58. Thus, if clause (d) is suitably “read up” as explained above, the zone of exemption for a Private Limited Company from payment of license fees would be increased and made equal to that of a Public Limited Company. In effect, a Private Limited company would be entitled to exemption from payment under the same circumstances as that of a Public Limited Company; that is death of a Director or change in management in the usual course of business.

59. The intention in the present case is to ensure the level-playing field guaranteed under Article 14 of the Constitution in terms of treating a Private Limited Company on an equal plane; specifically when the basis for creating a distinction for the required purpose is found to be absent. This is all the more necessary since the earlier Rules of 2005 did not make any such distinction.

> *"3(6)(f). Death or retirement of a member or members or change in Management in the usual course or business of the Public or Private Limited Companies incorporated under the Companies Act, 1956 (Act 1 of 1956)."*

<u>The above reasons entitles the petitioner no. 1 to consequential relief</u>

60. The sum of Rs. 64.50 lakhs which was paid / adjusted by the petitioner no. 1 in terms of the revised demand dated 27.2.2018 and the further sum of Rs. 5.5 lakhs, which was paid subsequent to filing of the present writ petition, aggregates to Rs. 70 lakhs. This amount should be refunded by the respondent authorities to the petitioner.

61. The impugned order dated 16.2.2018 is contrary to the interpretation given to the 2009 Rules as stated above. The Excise Commissioner relied on the Companies Act to hold that Private and Public Limited Companies have different fields of operation. The Excise Commissioner accordingly found that changes in the Board of Directors of the petitioner no. 1 should be construed as "change in management" and the petitioner no. 1 is accordingly liable to pay the fees stipulated in

the Rules. The Collector of Excise, Kolkata (South) was consequently directed to raise a fresh demand notice on the petitioner.

62. The impugned order dated 16.2.2018 is found to be contrary to the Court's view of clause (d) of the Proviso to Rule 5(1) of the 2009 Rules being violative of Article 14 of the Constitution and against the object of the 2009 Rules. The impugned Order dated 16.2.2018 is accordingly quashed and set aside.

63. As a further consequence to the above, the revised demand dated 27.2.2018 of Rs. 22 lakhs is also quashed.

64. It is relevant to state that the petitioner has already paid the amount of Rs. 22 lakhs demanded by the Collector of Excise, Kolkata (South) in the revised notice.The respondents shall hence refund the amount of Rs. 22 lakhs to the petitioners within a fortnight from the date of this judgment.

65. The above reasons persuade the Court to allow the writ petition by declaring clause (d) of the proviso to Rule 5(1) of the West Bengal Excise (Change in Management) Rules, 2009 to be ultra vires the Constitution of India and set aside the order dated 16.2.2018 along with the revised demand dated 27.2.2018.

66. WPA 4873 of 2018 is disposed of in terms of the above.

Later

67. Learned counsel appearing for the respondents prays for stay of the operation of this judgment. Considering the facts and the law

discussed as also the fact that the writ petition was filed in 2018 consequent to the impugned demands, the prayer for stay is considered and refused.

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

(**Moushumi Bhattacharya, J.**)