2026:CHC-AS:338-DB

In the High Court at Calcutta

Civil Appellate Jurisdiction

Appellate Side

The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
And
The Hon'ble Mr. Justice Supratim Bhattacharya

FMA No.226 of 2024

IA No: CAN 1 of 2024

State of West Bengal and Others
Vs.
New Kenilworth Hotel Private Limited and Others

For the appellants	:	Mr. Kishore Datta, Ld. AG, Ms. Sumita Shaw, Ms. Ashmita Chakraborty, Mr. Soumen Chatterjee
For the respondents	:	Mr. Sabyasachi Choudhury, Sr. Adv., Mr. Arvind Jhunjhunwala, Mr. Rajarshi Dutta, Mr. VVV Sastry, Mr. Debjyoti Saha
Heard on	:	16.12.2025, 15.01.2026, 29.01.2026, 12.02.2026 & 17.02.2026
Reserved on	:	17.02.2026
Judgment on	:	26.02.2026

Sabyasachi Bhattacharyya, J.:-

1. The present appeal has been preferred against a judgment dated December 6, 2023 passed in WPA No. 4873 of 2018, thereby declaring Clause (d) of the proviso to Rule 5(1) of the West Bengal Excise (Change in Management) Rules, 2009 (for short, the "2009 Rules") to be *ultra vires* the Constitution of India and setting aside the impugned order of the Excise Commissioner dated February 16, 2018 along with the consequential revised demand issued by the appellant-Authority dated February 27, 2018.

2. The brief backdrop of the case is that the respondent no.1-Company owns and operates a four-star Hotel in Kolkata. Originally a Private Limited Company, respondent no.1 became a deemed Public Limited Company by operation of an amendment in Section 43-A(1B) of the Company Act, 1956. Again, on February 26, 2002, the respondent no.1-Company was converted into a Private Limited Company by operation of law.

3. In the year 2009, a query was raised by the State-Authority as to why renewal of the Excise license was made in the name of "New Kenilworth Hotel Private Limited", whereas the original excise licenses were granted in the name of "New Kenilworth Hotel Limited", to which the respondent no.1-Company responded by its letter dated November 3, 2009.

4. By a Memo dated September 9, 2013, the appellant No.4 demanded a sum of Rs.22,50,000/- on account, *inter alia,* of "change in management and in status of the Company", as new Directors were inducted in the Company. Despite the ensuing correspondence between the parties, the respondent

no.1 made payment of the said amount for renewal of its excise licenses under protest.

5. By a further Memo dated July 5, 2017, the State-Authority demanded an additional sum of Rs. 45,00000/- for the main bar and Rs. 25,00000/- toward non-realization of fees for the additional five bars. The said Memo was challenged by way of a writ petition, culminating in an order dated September 4, 2017 directing the respondent no.1 to approach the Appellate Authority. The Excise Commissioner, West Bengal, being the Appellate Authority, passed an order dated December 18, 2017 which, however, was set aside by an order dated December 21, 2017 passed in appeal, requiring the Appellate Authority to give a fresh hearing to the respondent No.1-Company and to pass a reasoned order in accordance with the applicable Rules/Regulations.

6. Pursuant thereto, a demand was issued by the appellant no.3, Collector of Excise, Kolkata (South) on February 27, 2018, demanding a sum of Rs. 22,00,000/- after giving credit to the previous payment made by the Company to the tune of Rs.42,50,000/- as against a total demand of Rs. 64,50,000/-.

7. The said demand was made pursuant to an order dated February 16, 2018 passed by the Appellate Authority, by which the Memo dated July 5, 2017, was set aside, directing the appellant no.3 to raise a fresh demand notice on the respondent no.1. The Appellate Authority, *inter alia,* observed that the change in status of the Company from a Public Limited company to a Private

Limited Company had occurred due to amendment of law in the 1956 Act, based on cogent reasons.

8. However, in the Memo dated July 5, 2017, it was mentioned that it is a case of change from a Public Limited Company to a Private Limited Company and covered under Rule 5 of the said Rule.

9. The respondent thereafter filed WPA No.4873 of 2018, challenging the order dated February 16, 2018 and the consequential revised demand dated February 27, 2018, seeking refund of the payment made by the Company and challenging the *vires* of Clause (d) of the proviso to Rule 5 of the 2009 Rules.

10. By the judgment impugned herein dated December 6, 2013, the said writ petition was disposed of by declaring Clause (d) of the proviso to Rule 5(1) of the 2009 Rules to be *ultra vires* the Constitution of India. Consequentially, the order dated February 16, 2018 and the consequential revised demand dated February 27, 2018 were set aside.

11. While disposing of the writ petition, the learned Single Judge observed , *inter alia,* that if Clause (d) is suitably "read up", the zone of exemption for a Private Limited Company from payment of license fees would be increased and made equal to that a Public Limited Company.

12. Learned Advocate General (AG), appearing for the appellant, argues that the grant of excise license involves parting with a privilege of the State as contemplated in Sections 22 and 23 of the Bengal Excise Act, 1909 (hereinafter referred to as "the BE Act"). Section 38 of the said Act permits charging of fees for grant of license, permit or pass under the Act, whereas

Section 42 empowers the State Government to cancel or suspend the license, permit or pass. Section 86 of the BE Act, it is submitted, empowers the State Government to frame Rules for various enactments including prescribing the scale of fees and regulating the time, place, manner of payment of such fees.

13. Learned AG argues that there is no fundamental right of citizens to carry on business in liquor.

14. It is further argued that Private Limited Companies are closely held companies whereas Public Limited Companies are widely held, in which the public are substantially interested. On such premise, it is argued that the two classes of companies can be treated differently.

15. Learned AG submits that various provisions of the Companies Act, 1956 and the Companies Act, 2013 create a distinction between Private Limited Companies and Public Limited Companies on diverse aspects, including the grant of exemptions.

16. It is further contended by the appellants that exemptions always come with conditions. Rule 5(1), proviso of the 2009 Rules grant of exemption in certain cases and not others.

17. Learned AG argues that the State Government has the exclusive ownership of the privilege to sell liquor. Thus, a permissive privilege to deal in liquor is not a 'right' at all. In support of his contention, learned AG relies on *State of Punjab and another v. Devans Modern Breweries Ltd. and another*, reported at *(2004) 11 SCC 26*.

18. By placing reliance on *State of U.P. and others v. Hindustan Aluminium Corpn. and others,* reported at *(1979) 3 SCC 229*, *Cellular Operators Assn. of India v. TRAI,* reported at *(2016) 7 SCC 703*, and *Dental Council of India v. Biyani Shikshan Samiti,* reported at *(2022) 6 SCC 65*, it is contended that subordinate legislations can be challenged primarily on six grounds:

i) Legislative competence;

ii) Fundamental rights violation;

iii) Violation of any provision of the Constitution of India;

iv) Not conforming/exceeding authority granted under the parent Statute;

v) Repugnancy to the laws of the country, that is, any enactments;

vi) Manifest arbitrariness/unreasonableness, that is, where it is found that the Legislature did not give authority to make such Rules.

19. The appellants argue that the matter involves the economic policy of the State and the Rule-making bodies and expert bodies which are aware of their own requirements. The judiciary, it is submitted, ought not to substitute the wisdom of the Rule-making bodies by its own opinion.

20. It is next argued by learned AG that different treatment of Private Limited Companies and Public Limited Companies is permissible in law. By way of example, learned AG cites the following decisions:

a) Lord Krishna Bank Ltd. v. CIT, reported at 1972 SCC OnLine Ker 43;

b) Hindustan Paper Corpn. Ltd. v. Govt. of Kerala, reported at (1986) 3 SCC 398; and

c) Shashikant Laxman Kale v. Union of India, reported at (1990) 4 SCC 366.

21. Citing *State of Bombay and another v. F.N. Balsara*, reported at *(1951) SCC 860*, learned AG argues that there was no wrong in the Legislature according special treatment to persons who fall under a class by themselves, in the context of applicability of Article 14 of the Constitution.

22. In *State of W.B. v. Anwar Ali Sarkar, reported at (1952) 1 SCC 1*, a Constitution Bench of the Hon'ble Supreme Court observed that a systemic arrangement of things into groups or classes in accordance with some definite scheme does not offend Article 14 of the Constitution of India and that any and every differentiation is not contrary to the said Article.

23. Relying on *of A.P. v. McDowell & Co.,* reported at *(1996) 3 SCC 709*, and *State of Punjab v. Devans Modern Breweries Ltd.,* reported at *(2004) 11 SCC 26*, learned AG argues that the Government being the exclusive owner of the privilege to sell liquor, reliance on Articles 19(1) (g) and 14 of the Constitution becomes irrelevant, since fundamental rights are not applicable to liquor business.

24. It is next argued by learned AG that the doctrine of *quid pro quo* is inapplicable in the field of regulatory fees. Fees in the matter of grant of privilege are regulatory in nature, where the doctrine of *quid pro quo* is not attracted.

25. In support of his contention, learned AG cites *Devans Modern Breweries Ltd (supra)*[1] and *Delhi Race Club Ltd. v. Union of India*, reported at *(2012) 8 SCC 680*.

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[1] ***State of Punjab v. Devans Modern Breweries Ltd., reported at (2004) 11 SCC 26***

26. Learned AG further argues that the amendment of the 2009 Rules effected by Notification No. 212-F.T. dated February 11, 2020, by which the expression "change in management" in Rule 2 of the 2009 Rule was defined, is clarificatory in nature and, accordingly, has retrospective effect. Learned AG places reliance on *State Bank of India v. V. Ramakrishnan,* reported at *(2018) 17 SCC 394*, in support of such proposition.

27. Accordingly, it is argued that the learned Single Judge erred in law in holding Clause (d) of the proviso to Rule 5(1) *ultra vires* and consequentially setting aside the impugned order and demand.

28. Learned senior counsel appearing for the writ petitioners/respondents, on the other hand, argues that the original cause of action of change in management was abandoned in the Memo dated July 5, 2017, by citing change from a Public Limited Company to a Private Limited Company.

29. It is submitted that the 2009 Rules have been made in exercise of powers conferred under Section 86 of the BE Act.

30. Learned counsel takes the court through the provisions of the 2009 Rules. In Rule 2, it is pointed out, it has been stipulated that the 2009 Rules apply in cases of change in management to all excise licences.

31. The scheme of sub-rules (1), (2) and (3) of Rule 4, it is argued, does not distinguish between Public Limited and Private Limited Companies. Although Rule 5 prescribes that change in management would be allowed after realizing one and half times of the initial grant fee similar to one applicable for grant of a new excise license, five exemptions have been envisaged in Clause (a) to (e) of the proviso to Rule 5(1).

32. Whereas Clause (e) grants exemption in respect of payment of initial grant fee for change in management in case of death or in the usual course of business for a Public Limited Company, Clause (d), although permitting such exemption in case of death of Directors, does not grant exemption in respect of change in management in the usual course of business for a Private Limited Company. Thus, the said provision, it is contended, is discriminatory without any reasonable premise, between Private and Public Limited Companies.

33. It is argued that the expression "change in management" in the 2009 Rules has to construed in the context of the object of the Rules, which in turn has to be culled out from Sections 86(7) and 86(9)(viii). On a conjoint reading of the charging provision and the exempting provision, it would be evident that the object of the transfer is to regulate the transfer of the excise license. The said object would also be evident from an analysis of the 2009 Rules which provides that while any change in management or the Board of Director of a Private Limited Company and Public Limited Company are both required to be brought to the notice of the Collector, only in cases which amount to transfer of a license, consequential fees for change in management is also to be levied on such transfer. Thus, there must be a "transferee" within the meaning of Rule 4(3), whose eligibility has to be assessed by the Collector and in that context, the necessity of change in management has to be reassessed. Every change in management, either by way of a change in the Board of Directors or otherwise, cannot amount to a transfer.

34. The proviso to Rule 5 of the 2009 Rules, it is argued, clearly recognizes that events like death or change in management in usual course of business, while resulting in a change in the Board of Directors and/or consequential change in management, cannot amount to such a change as would result in a levy of fees under the said Rule. Learned senior counsel relies on *IFB Agro Industries Ltd. and Another v. State of W.B. and others*, reported at *2022 SCC OnLine Cal 3707*, the decision of the learned Single Judge who passed the impugned judgment, in such context.

35. It is argued that there is no intelligible differentia as to why a change in management in the usual course of business in a public limited company will stand on a different footing than a similar change in a private limited company. Learned senior counsel relies on the twin tests enumerated in *Budhan Choudhry and others v. State of Bihar*, reported at *(1954) 2 SCC 791* and *State of W.B. v. Anwar Ali Sarkar*, reported at *(1952) 1 SCC 1*.

36. It is contended that the amendment to the definition of "change in management" brought about by the 2020 Rules cannot have retrospective application as the same has the effect of changing the law rather than being merely clarificatory. The amendment directly affects the substantive rights of the respondents and hence should not be given a retrospective application. *Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and others*, reported at *(1999) 8 SCC 16* is cited in such context.

37. Learned senior counsel for the respondents further submits that the exceptions mentioned in Rule 3(6), Clause (f) of the previous Rules of 2005 do not make any distinction between public and private limited companies.

38. Prior to the 2009 Rules coming into effect on and from February 28, 2009, the 2005 Rules were prevalent. Under Rule 6 thereof, no initial grant fee of licence was payable for a change in management in case of death or retirement of a member or members or change in management in the usual course of business, both for public and private limited companies.

39. It is submitted that the respondent no.1-Company is not claiming a privilege, which has already been granted but is now being taken away in terms of Section 86(9)(viii) by treating two similarly situated groups in a completely different manner.

40. Learned senior counsel next seeks to distinguish the judgments cited by the appellants.

41. Upon hearing the parties and considering the materials on record as well as the impugned judgment, the court arrives at the following findings:

Exemption in licence fee – whether State largesse

42. Learned AG has raised a question as to whether a concession or a privilege in respect of grant of licence can be termed as a largesse at all.

43. Distribution of largesse may come in different forms. It may be undertaken by way of grant of benefits to a particular individual/entity or class of individuals/entities can be both in positive and negative modes.

44. An example of positive grant of largesse is distribution of State resources such as land, employment, etc., which may also come in the form of incentives.

45. On the other hand, a negative distribution of largesse would come in the shape of disincentives or exemptions granted to particular entities or class of entities while depriving others, which would create a dent in the public exchequer by waiver of fees/revenue which could be earned by the State.

46. To consider whether an act of the State amounts to a distribution of largesse, we are to take into account the primary factor involved in distribution of largesse, which is whether the State's resources and/or the public exchequer is adversely affected or dented in any manner.

47. In *Ramana Dayaram Shetty v. International Airport Authority of India,* reported at *(1979) 3 SCC 489*, the Hon'ble Supreme Court observed that power or discretion of the Government in the matter of grant of largesse, including award of jobs, contracts, quotas, licences, etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down unless it can be shown by the Government that the departure was not arbitrary but was based on some valid principle which itself was not irrational, unreasonable or discriminatory.

48. Thus, the award of licences has also been included by the Hon'ble Supreme Court in the said decision within the contemplation of grant of largesse.

49. Hence, the distinction sought to be drawn by learned AG between parting with privilege and distribution of largesse is somewhat artificial.

Inter-class and intra-class distinction

50. The Government has a free play in the joints and greater latitude in cases of legislation pertaining to economic policy. Thus, there is little scope of interference by the courts into matters of creation of different categories or classes of entities by the State for the purpose of distribution of privileges in general. However, justiciability on the touchstone of violation of fundamental rights comes into play as soon as discrimination is meted out *inter se* entities belonging to the same class, having the same common characteristics vis-à-vis the object of the grant. Whereas the State has larger discretion in creating different classes and choosing to grant exemptions to some of such classes in exclusion of the others, intra-class distinction can be tested in judicial review on the ground of reasonableness and intelligible differentia.

Applicability of fundamental rights in the sphere of subordinate legislation and the economic policy of the State

51. In order to properly appreciate the questions involved in the appeal, the 2009 Rules are required to be considered as a whole. The said Rules are set out hereinbelow:

> ***"1. Short title.—*** *These rules shall be called the West Bengal Excise (Change in Management) Rules. 2009.*
>
> ***2. Application.—*** *These rules shall apply in case of change in management of all excise licences granted under the Bengal Excise Act, 1909 and rules framed thereunder, except for those licences which are settled by auction.*
>
> ***3. Definitions.—*** *In these rules, unless there is anything repugnant to the subject or context, the words and expressions used*

shall have the same meaning as respectively assigned to them in the Bengal Excise Act, 1909 and rules framed thereunder.

4. Procedure for application for change in management — *(1) The application for change in management of an excise license may be made to the Collector in whose jurisdiction the site is situated. No application for change in management of a license shall be considered unless it is accompanied by an appropriate receipted Treasury Challan showing payment of a non-refundable application fee similar to the one applicable for grant of a new excise license in the same category in the same local area.*

Provided that no such change in management shall be considered by the Collector unless the licence has operated for at least five years at a stretch, except in circumstances where such change is required due to death, usual course of business in case of a Society or a Co-Operative Society or a Limited Company and/or such reasons which are beyond the control of the licencee(s) and which on enquiry are found to be justified by the Collector.

(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 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 license 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, 1956, 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 license of the same category in the same local area.

Provided also that in cases where changes occur without the prior approval of the State Government or without the prior permission of the Collector and the approval of the Excise Commissioner as the case may be. the Collector shall forthwith ask the society, or the co-operative society or the company to show cause within seven days as to why the licence should not be taken to be determined, consider the explanation if any and send his opinion and recommendation along with the explanation to the Excise Commissioner soon thereafter. The Excise Commissioner or the State Government as the case may be. shall thereupon review the case after granting the party an opportunity' of being heard and pass orders which may be final.

(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 license and, whether the said change in management is necessary for the proper management of the licence.

(4) The Collector shall thereafter forward the proposal for change in management of the excise license to the Excise Commissioner, along with his opinion, except in those cases where the change in management occurs due to death of the licensee/joint licensees of a retail excise licence, run as a proprietary business, in which case the Collector shall be the competent authority to approve such change as per existing rules.

(5) The Excise Commissioner shall, after obtaining the proposal from the Collector, forward the same to the State Government, only in cases concerning the change in management in a Private Limited Company or a Public Limited Company, with his opinion if any. In all other cases, the Excise Commissioner shall be the competent authority to allow such change in management.

(6) When the decision of the Government, for the change in management is received by the Excise Commissioner, he shall convey the same to the concerned Collector for taking necessary action.

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 times (1½ 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—

(a) death of an individual licensee or proprietor(s) of any proprietorship firm, when the new licensee(s) and / or proprietor(s) is/are selected from amongst the legal heir(s) or representative(s) of such deceased licensee or proprietor and when such newly selected licensee(s) or proprietor(s) is/are willing and otherwise eligible to hold the license:

(b) death of one or more of the joint licensees, when such new licensee(s) is/are selected from amongst the legal heir(s) or representative(s) of such deceased joint licensees and when such newly selected licensee(s) is/are willing and otherwise eligible to hold the license along with the surviving licensee(s):

(c) death of any member(s) of a Partnership firm, or a Co-operative Society registered under the West Bengal Co-operative Societies Act, 1953 or a Society registered under the West Bengal Societies Registration Act, 1961 and when the Partnership firm/ Society / Co-operative Society is newly re-constituted by way of selection from amongst the legal heir(s) or representative(s) of such deceased member(s) and the surviving members) and when such newly selected legal heir(s) or representative(s) is/are willing and otherwise eligible to hold the license along with the surviving member(s);

(d) death of director(s) of a Private Limited Company.

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

(2) No initial grant fee shall be payable in case of Government Undertakings where the management is changed in the usual course of business.

6. Change of name :—*An application for change of name and style of an establishment having excise license shall be accompanied by a non-refundable application fee similar to the amount applicable at the time of grant of a new excise license of the same category in the same local area. No initial grant fee shall be realized in such circumstances. Approval for such change of name and style shall be granted by the Collector in respect of a licence granted to an individual or a proprietorship firm. All other applications shall be sent to the Excise Commissioner, who shall be the competent authority for according such change in the name and style of a partnership firm or a society, or a co-operative society. Proposal for change in the name and style of a Company shall be sent to the Government. No such change shall be given effect, unless approved by the Government.*

7. Overriding effect of rules.— *These rules shall have effect notwithstanding anything to the contrary contained in any other rules*

or orders relating to transfer of license for the time being in force and all such rules or orders shall be subject to these rules.

8. Interpretation.— *The power of interpreting these rules is reserved to the State Government."*

52. In *State Madhya Pradesh & Ors. v. Nandlal Jaiswal,* reported at *(1986) 4 SCC 566,* the Hon'ble Supreme Court observed that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights, such as freedom of speech, religion, etc., and that the Legislature should be allowed some play in the joints because it has to deal with complex problems, which may not be amenable to solutions through any doctrinaire or strait-jacket formula, particularly in case of legislation dealing with economic matters. In such context, it was held that unless it appears to be plainly arbitrary, irrational or *mala fide*, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the Courts would hesitate to intervene and strike down what the State Government has done.

53. However, in the present case, it is not the authority of the State Government to grant the privilege of licence which has been questioned by the writ petitioners/respondents, but the curtailment of rights of private limited companies as opposed to public limited companies vis-à-vis the exemptions granted. The economic policy of the State is reflected in its regulations in respect of grant of privilege, which is not in contention here. However, it can be tested by Courts as to whether entities belonging to the same class, when

seen through the prism of the object of the exemptions, can be discriminated against in grant of such exemptions.

54. In *Dental Council of India (supra)*[2], it was reiterated by the Hon'ble Supreme Court that a challenge to a subordinate legislation on the ground of arbitrariness can only be upheld when it is found that it is not in conformity with the statute or offends Article 14 of the Constitution of India. Although the Hon'ble Supreme Court went on to observe that it would be wrong for the Court to substitute its own opinion for that of the Legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act, nonetheless, the ground of arbitrariness was retained as a valid yardstick of challenge under Article 14 of the Constitution of India.

55. Again, in *Cellular Operators Assn. of India (supra)*[3], the Hon'ble Supreme Court laid down the tests of challenging subordinate legislations, one of which is manifest arbitrariness/unreasonableness and the other is violation of fundamental rights and/or any other provision of the Constitution of India.

56. Let us now consider the scope of challenge in the present case in conformity with the above broad principles. At the outset, it must be noted that the distinction created between private and public limited companies in Company Law Jurisprudence, both in the Companies Act, 1956 and the Companies Act, 2013, may not be germane for the present consideration,

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[2] ***Dental Council of India v. Biyani Shikshan Samiti, reported at (2022) 6 SCC 65***
[3] ***Cellular Operators Assn. of India v. TRAI, reported at (2016) 7 SCC 703***

since corporate jurisprudence operates in a separate field, regulating corporate governance, whereas the 2009 Rules pertain to grant of privileges and licences, governed by regulatory and revenue-earning considerations, thus being distinct and different from the scope of applicability of company jurisprudence.

Applicability of fundamental rights in the specific context of grant of liquor licence

57. Coming to the specific domain of restrictions in respect of grant of liquor licences, the appellants have argued that the permissive privilege to deal with liquor is not a justiciable right. However, in the present case, the question is not about the right to get a privilege, which has already been granted to both public and private limited companies, but whether there is arbitrary discrimination without any intelligible differentia between entities within the same class, both being 'limited companies'. In such context, it is also to be ascertained as to whether public and private limited companies can be distinguished on any yardstick having a reasonable nexus with the objective of the impugned provision.

58. In *F.N. Balsara (supra)*[4], the Hon'ble Supreme Court reiterated the principles governing Article 14 of the Constitution of India. The Hon'ble Supreme Court, in the said case, was considering the grant of exemption to consumption of liquor in military canteens. While doing so, the Hon'ble Supreme Court observed that there is an understandable basis for

[4] ***State of Bombay and another v. F.N. Balsara*, reported at (*1951) SCC 860**

exemptions granted to military canteens by the concerned statute since the Armed Forces have their own traditions and mores of life, conditioned and regulated by rules and regulations which are the product of long experience and which aim at maintaining at a high level their morale and those qualities which enable them to face dangers and perform unusual tasks of endurance and hardship when called upon to do so. On such ground, it was held that there is nothing wrong *prima facie* in the Legislature according special treatment to persons who form a class by themselves. Thus, in the above report, relied on by the appellants, the Hon'ble Supreme Court clearly recognized the applicability of Article 14 even in case of exemptions regarding liquor business and reiterated that exemption could be given to a particular class as opposed to the others. However, in the case at hand, the argument of the respondents revolves around unjust exemption being given to different entities within the same class, that is, limited companies.

59. In *Anwar Ali Sarkar (supra)*[5], the Hon'ble Supreme Court observed that a systematic arrangement of things into groups or classes in accordance with the same definite scheme does not offend Article 14 of the Constitution of India. There cannot be any quarrel with such proposition in principle.

60. Again, in *McDowell*'s case[6], the Hon'ble Supreme Court held that due to the vicious and pernicious nature of intoxicating liquors, dealing in the said commodity is *res extra commercium* (outside commerce). The Hon'ble Supreme Court also took into consideration Article 47 of the Constitution of

[5] ***State of W.B. v. Anwar Ali Sarkar, reported at (1952) 1 SCC 1***
[6] ***State of A.P. v. McDowell & Co., reported at (1996) 3 SCC 709***

India, which mandates the State to endeavour to bring about prohibition in such businesses. In the said context, the Hon'ble Supreme Court justified the prohibition and severe restrictions imposed on liquor sales. It was observed that the nature of business is an important element in deciding reasonableness of the restriction.

61. Thus, the Hon'ble Supreme Court did not take the view that the reasonableness of the restriction is not justiciable but, in the specific context of Article 47, interpreted the relevant provisions of the statute to be justified, since those pertained to restrictions on liquor sales.

62. However, in the present case, the question is not about the power of the State of imposing restrictions on liquor business, which power is not in doubt at all. Rather, the question involved here is whether exemptions can be granted to one category within the same class as opposed to the other, thereby restricting commerce intra-class.

63. Again, in *Devans Modern Breweries Ltd. (supra)*[7], the issue being decided was whether Article 301, pertaining to free trade, commerce and intercourse, was applicable to potable liquor business. The Hon'ble Supreme Court reiterated the power of the State to impose fees in such context. The said proposition is not questioned in the present case at all, since the issue at hand is whether, by creating an artificial distinction between public and private limited companies, the State has created an arbitrary and unreasonable discrimination between similar entities.

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[7] ***State of Punjab and another v. Devans Modern Breweries Ltd. and another*, reported at *(2004) 11 SCC 26***

64. In *Delhi Race Club (supra)*[8], the Hon'ble Supreme held that a licence fee imposed for regulatory purposes is not conditioned by the fact that there must be a *quid pro quo* for the services rendered, but that such licence fee must be reasonable and not excessive.

65. However, the power of the State to impose a licence fee is not under challenge here. The question involved in the present case is whether the exemption granted to Public Limited Companies, as opposed to Private Limited Companies, which in turn deprives Private Limited Companies of such exemption, is unreasonable, arbitrary and/or discriminatory. Irrespective of the nature of the levy (whether a tax or a fee), if the distinction is tainted by irrational discrimination between the same class of entities having similar characteristics vis-à-vis the exemption granted, the same is subject to scrutiny by Courts in judicial review on the ground of violation of Article 14 of the Constitution of India.

66. Even otherwise, the imposition of initial licence fee here is directly relatable to the privilege of operating a liquor sale/dealership outlet and, *inter se* grantees of such licence who have similar characteristics, there cannot be any discrimination without intelligible differentia having a nexus with the object sought to be achieved by such distinction.

67. Rather, the proposition in *Ramana Dayaram Shetty (supra)*[9] is apt in the context of the present case. The Hon'ble Supreme Court, relying on *V. Punnen Thomas v. State of Kerala*, reported at *AIR 1969 Ker 81* and *Erusian*

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[8] ***Delhi Race Club Ltd. v. Union of India, reported at (2012) 8 SCC 680***
[9] ***Ramana Dayaram Shetty v. International Airport Authority of India, reported at (1979) 3 SCC 489***

Equipment & Chemicals Ltd. v. State of West Bengal and another, reported at *(1975) 1 SCC 70*, held therein that the Government is not and should not be as free as an individual in selecting the recipients of its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal. The activities of the Government, it was reiterated, have a public element and therefore, there should be fairness and equality. It was further held that the State need not enter into a contract with anyone but if it does so, it must do so fairly without discrimination and without unfair procedure. The said proposition was held in *Ramana Dayaram Shetty (supra)*[10] to hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege.

68. The Hon'ble Supreme Court went on to observe that it must be taken to be the law where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas "or licences" or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its actions must be in conformity with a standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse, including award of jobs,

[10] ***Ramana Dayaram Shetty v. International Airport Authority of India, reported at (1979) 3 SCC 489***

contracts, quotas, "licences", etc., it was held, must be confined and structured by rational, relevant and non-discriminatory standards or norms and if the Government departs from such standards or norms in any particular cases or case, the action of the Government would be liable to be struck down unless it can be shown by the Government that the departure was not arbitrary but was based on some valid principle which in it itself was not irrational, unreasonable or discriminatory.

69. In *Budhan Choudhry (supra)*[11], the Hon'ble Supreme Court reiterated that in order to pass the test of permissible classification, two conditions must be fulfilled, namely - (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute-in-question. The classification, it was held, may be founded on different bases, namely geographical or according to objects and occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It was also held to be well-established by the decisions of the Hon'ble Supreme Court that Article 14 condemns discrimination not only by a substantive law but by a law of procedure.

70. Applying such principle, in the present case, it is evident that the discrimination sought to be meted out against private limited companies, as opposed to public limited companies, in respect of granting exemption in

[11] ***Budhan Choudhry and others v. State of Bihar*, reported at *(1954) 2 SCC 791***

payment of initial licence fee for change in management *in the usual course of business*, does not have a rational nexus with the object sought to be achieved, by imposing licence fees. The underlying refrain of the entire 2009 Rules is that in case of change in management, barring inevitable ones such as due to death of a director or change in usual course of business (over which the company does not have any control), it will be deemed that there is an implicit transfer of management and accordingly necessary approval/regularization has to be obtained and license fees have to be paid afresh as if a new entity comes in place of the older one. However, the very basis of such implicit transfer is lost if the change is inevitable, such as in usual course of business, which has been recognized even in Clause (e) of the proviso to Rule 5 of the 2009 Rules for public limited companies, but overlooked in Clause (d) for private limited companies, without any reasonable basis.

71. The argument that a private limited company, as opposed to a public limited company, is more closely held among less number of individuals, and any significant change in management would tantamount to change in the persona of the company, is only relevant if there is a voluntary element in such change in management and there is a deliberate transfer of management involved. However, such logic is not attracted when the change in management is involuntarily, necessitated due to death or in usual course of business, over which the management of the company has no direct control.

72. In fact, the involuntary nature of change in management in usual course of business has been recognized in the proviso to Rule 4 (1) of the 2009 Rules, which grants exemption to the five-year rule for consideration of change in management in cases of death and usual course of business on equal footing, by using expressions such as "where such change *is required*" and "reasons which are *beyond the control of the licencee(s)*" to qualify such changes, and applying such exceptions across the board to *all Limited Companies*, thereby placing public and private limited companies on an equal footing. Hence, even in the perception of the State Government, as reflected in the self-same Rules, changes in management in usual course of business are involuntary and inevitable, thus denuding such a change of any deliberate or wilful ploy of the company to bring about a change in the management.

73. Thus, insofar as changes in management *in the usual course of business* is concerned, there cannot be any rational distinction between a public limited company or a private limited company on the basis of limited holding of shares in the latter. Such a change would evidently not be voluntary or deliberate and could not add an element of discretion in favour of the current management of a private limited company to wilfully alter the entire structure of management to effect a virtual transfer of the management to a different group of entities/individuals. The restriction inbuilt in the expression "usual course of business" is a sufficient check and bound to such arbitrary alteration in management intending to transfer the interest in the management of the company to a different body altogether.

74. Hence, there is neither any rationale nor reasonableness behind such an intra-class discrimination between similarly placed entities, that is, limited companies.

75. Insofar as *IFB Agro Industries Ltd. (supra)*[12] is concerned, the learned Single Judge, in our view rightly, held in paragraph no.9 thereof that levy of a fee is different in concept and source from levy of tax, as fees are a sort of return or consideration for service rendered and entail an element of *quid pro quo* for their imposition whereas the power to impose a tax is different.

76. Even if we do not rely on the concept of change in management, discussed in the context of company jurisprudence in paragraph no. 6 of the said decision (as there might be some distinction between the operation of the Companies Act, 1956 or 2013 and the purpose of the present Rules, which govern regulation and imposition of fees for excise licence), even going by the purport of the 2009 Rules itself, it is clear as to what is meant by change in management therein and also that the entire Rules, as particularly reflected in Rules 2 and 4 thereof, does not discriminate between change in management in a public or a private limited company. Rule 4 thereof clearly subjects all changes of management to the same regulatory regime and imposition of initial licence fees. Thus, Rule 5(1), proviso (d) thereof is clearly an aberration, being contrary to the scheme of the 2009 Rules itself.

77. Coming to *State of Orissa and others v. Harinarayan Jaiswal and others*, reported at *(1972) 2 SCC 36*, there cannot be any quarrel with the

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[12] ***IFB Agro Industries Ltd. and Another v. State of W.B. and others*, reported at *2022 SCC OnLine Cal 3707***

proposition laid down in the said judgment insofar as the power reserved by the Government being conferred on it by the Legislature is concerned. Since the impugned Rules have been framed under Sections 85 and 86 of the BE Act, it is those provisions from which the 2009 Rules derives its source of power.

78. Section 20 of the said Act provides that no intoxicant, etc., shall be sold except under the authority and in accordance with the terms and conditions of a licence.

79. Section 18 of the Act prevents any person from having in possession any intoxicant which has not been obtained from a licensed vendor.

80. Section 2(12a) of the Act, as amended, includes any liquor within the definition of "intoxicant".

81. Again, Section 27 of the Act confers power on the State Government to impose excise duty or an additional duty or a countervailing duty on any excisable article.

82. Read in conjunction, the aforementioned provisions amply empower the State Government to frame rules in connection with regulation and imposition of fees in respect of sale to carry out the objects of the Act or any other law for the time being in force relating to excise revenue.

83. Hence, there cannot be any doubt that, in principle, the State Government has the rule-making power to further the objects of the BE Act and the 2009 Rules cannot be challenged on such ground.

84. In any event, neither the 2009 Rules as a whole nor the power of the State Government to frame such Rules has been called into question in the

present litigation. The limited challenge thrown by the writ petitioners/respondents is restricted to the unequal grant of exemption, which in turn translates to unequal imposition of excess initial licence fees, on a particular group of entities as opposed to another, despite both coming within the same genre of entities, having similar characteristics vis-à-vis the restriction imposed.

85. Thus, the last-mentioned decision is not of much relevance in the present context.

Private vs. Public Limited Companies

86. The moot question involved here is whether there is a reasonable nexus between the distinction created between public and private limited companies and the object of the 2009 Rules. As stated in Rule 2 of the said Rules, the Rules would apply in case of change in management of *all excise licences* granted under the BE Act and Rules framed thereunder, except for those licences which are settled by auction.

87. Hence, the application of the Rules is universal.

88. A mere perusal of the provisions of Rule 4 clearly exhibit that even in the perception of the State, as reflected in the said Rule, no line of distinction has been drawn vis-à-vis change in management between private and public limited companies.

89. The proviso to sub-rule (1) of Rule 4 provides universal exemption from the minimum five-year rule if change is required due to death, usual course of business or reasons beyond the control of the licensee (on enquiry found to

be justified by the Collector). Such exemption is applicable to all companies, private and public.

90. Sub-rule (2) of Rule 4, in its first paragraph, provides that the licence will stand determined on change of membership of companies, both private and public, unless, in case of a company (both public and private), prior approval of the State Government is obtained.

91. In the second paragraph of sub-rule (2), in addition to the provision of the first paragraph, if there is change in the management or Board of Directors in respect of both public and private limited companies, the same is to be brought to the notice of the Collector within seven days with an application for regularisation with a fee similar to a new licence.

92. The third paragraph of Rule 4(2) stipulates the self-same regularisation criteria for both public and private limited companies even in case of a major change of character of a company from public to private or vice versa or a major reshuffle or change in management, such as by way of takeover, acquisition, amalgamation or merger of the company. In such case also, the applicable fee would be the same as new licence fee.

93. Again, in the fourth paragraph of sub-rule (2), even if there is no initial approval as contemplated in the first paragraph, a Show-Cause Notice of seven days would be given to the erring company and thereupon a decision as to whether the licence is deemed to be determined would be taken. Here also, no distinction is drawn between public and private companies. The necessary corollary would be that even in case of a decision to the effect that there has been a determination of the licence, a new licence has to be

applied for with the regular licence fee, which provision is uniformly applicable to public and private limited companies.

94. Moving on to sub-rule (3) of Rule 4, in respect of application for regularisation [under the second or third paragraphs of sub-rule (2)], the same criteria are made applicable to private and public limited companies.

95. Thus, the net effect of Rule 4 is that in case of either regularisation or new licence, both on payment of regular new licence fee, the yardsticks of change of management are the same, both for private and public limited companies. Hence, going by Rule 4, even in the perception of the State, as reflected in the Rules, the parameters applicable to change in management are the same for both private and public limited companies.

96. However, a marked distinction is drawn in Rule 5. Although under sub-rule (1) of Rule 5, the Collector, after getting approval of the State Government or the Excise Commissioner, as the case may be, shall allow change in management of a licence after realising 1½ times the initial grant fee similar to that applicable for grant of a new excise licence of the same category or the same local area, the proviso stipulates exemptions in respect of payment of initial grant fee in case of change of management.

97. All on a sudden, going against the grain of the rest of the 2009 Rules, a distinction is drawn between public and private limited companies in the exemption clauses, inasmuch as Clause (d) of the proviso stipulates only change of management in case of death of Directors to be eligible for exemption for a private limited company, whereas Clause (e) stipulates that even apart from death, change in management in the usual course of

business would also make a public limited company eligible to such exemption.

98. It is evident that there is no intelligible differentia for such classification within the same category of entities, that is, limited companies.

99. To understand the structure of a company, we have to take note of the fact that both in respect of public and private limited companies, the profit earned by the company is distributed between the shareholders and the Directors are paid their salaries, which may or may not be linked to the profits of the company.

100. Hence, the Directors, although a part of the management of the company, do not determine the change of hands as such, unless there is a significant change, without reasonable basis, in the management. Of course, in case the entire, or a substantial part of, the body of shareholders in case of a private limited company are altered, it may be deemed to be a change in management.

101. Hence, there is no plausible reason why a change in management in the usual course of business should be different in case of a private and a public limited company vis-à-vis the objective sought to be achieved by granting exemption in payment of initial licence fee.

102. In *Lord Krishna Bank Ltd. (supra)*[13], the Division Bench of the Kerala High Court was considering a distinction made in the Income Tax Act, 1961, read with the provisions of the Finance Act, 1964, between "companies in which the public are substantially interested" (termed in the said judgment as

[13] ***Lord Krishna Bank Ltd. v. CIT, reported at 1972 SCC OnLine Ker 43***

"widely held companies") and those in which the public are not substantially interested (termed in the said judgment as "closely held companies"). In such context, the Kerala High Court held that there is an intelligible differentia in the classification challenged and it also had a rational relation to the object sought to be achieved by the Legislation, since such classification did not lead to "obvious inequality" in the incidence of taxation among companies similarly situate. Thus, the challenge based on Article 14 of the Constitution of India was turned down. While doing so, the Court held that economic developments involve differentiations and divisions and tendencies to create monopolies have to be discouraged to prevent concentration of wealth to the common detriment. It was held further that in the national interest, there is reason for differentiating between widely held and closely held companies, since unlike closely held companies, in the case of widely held companies, the public have a predominant voice in their management.

103. However, the said ratio is not applicable to the present case, since all public limited companies are not "widely held companies", in which the public are substantially interested. The reliance of the State on the said judgment is erroneously premised, seeking to equate all public limited companies with companies in which the public are substantially interested, merely because the word "public" is common between the two. In order to understand the fallacy in the said logic, we are to look at the structure of limited companies. The primary distinction between a public and the private limited company is that while in the former, the shares are open to the public, in the latter, the

shares are closely held, there being a limit to the shares which are permissible to be circulated. However, fact remains that even in public limited companies, the profits and dividends earned by the company and/or the loss incurred by the same are distributed among the specific shareholders who have a say in the management. It is not necessary that the particular shareholders of the company, to whom the distribution of profits is restricted, represent the public at large.

104. Hence, the proposition laid down in the said report is not germane for the present consideration.

105. In *Hindustan Paper Corpn. Ltd. (supra)*[14], the Hon'ble Supreme Court was deciding a challenge against benefits given by way of reduced prices for forest produce to Government companies and undertakings, as opposed to other entities. The Hon'ble Supreme Court held that as far as Government undertakings and companies are concerned, it has to be held that they form a class by themselves since any profit that they may make would in the end result in the benefits to the members of the general public and the profit, if any, enriches the public coffer and not the private coffer.

106. However, all public companies cannot be equated with Government companies and undertakings on the same logic as enumerated above. Thus, the said decision is also not germane for the present consideration.

107. In *Shashikant Laxman Kale (supra)*[15], the Hon'ble Supreme Court was considering a challenge to differentiation in a taxing statute between Public

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[14] ***Hindustan Paper Corpn. Ltd. v. Govt. of Kerala, reported at (1986) 3 SCC 398***
[15] ***Shashikant Laxman Kale v. Union of India, reported at (1990) 4 SCC 366***

Sector and Private Sector companies. As observed above, Public Sector companies obviously operate for the benefit of the public at large, as opposed to Private Sector companies, which are intended to advance profit-making for private entities. On such premise, the Hon'ble Supreme Court held that greater latitude in taxing statutes is permissible in favour of Public Sector companies. Apart from the fact that the Public Sector versus Private Sector distinction is not applicable between public limited and private limited companies in general, since all public limited companies do not operate in the Public Sector domain, even in the said judgment, the Hon'ble Supreme Court applied the tests of 'palpable arbitrariness' and 'reasonable classification'. Upon applying the said tests, the Hon'ble Supreme Court held that in order to ascertain whether persons clubbed under the same bracket by a taxing statute are "similarly placed", one must look beyond the classification and to the purposes of the law.

108. Applying the same tests here, insofar as the exemptions relating to payment of initial licence fees are concerned, in the specific context of change in management, we do not find any dissimilarity between public and private limited companies insofar as change in 'usual course of business' is concerned. By circumscribing the change in management by the expression "in usual course of business", such change is restricted only to inevitable and unavoidable alterations in the management, necessary in the usual course of running the company. Thus, the element of voluntary and deliberate act of a company to transfer its management by way of alteration therein is taken out by confining the change in management only to the

usual course of business, arising out of business exigencies. Insofar as such limited change in management is concerned, there is neither any intelligible differentia nor any reasonableness in the discrimination between public and private limited companies.

109. Hence, the aforesaid decision cannot come to the aid of the appellants in the present context.

Applicability of the 2020 Rules

110. In *State Bank of India (supra)*[16], relied on by the State, the Hon'ble Supreme Court observed that in the said case, the amendment was to clarify and set at rest what the Committee thought was an overbroad interpretation of Section 14 of the Insolvency and Bankruptcy Code, 2016.

111. However, the said decision has to be read in the context of the narrative laid down in the previous paragraphs of the report. In Paragraph No. 31, the Hon'ble Supreme Court observed that the Insolvency Law Committee, appointed by the Ministry of Corporate Affairs, by its Report dated March 26, 2018, made certain key recommendations, one of which was to *clear the confusion* regarding treatment of assets of guarantors of the corporate debtor vis-à-vis the moratorium on the assets of the corporate debtor, in which context it was recommended *to clarify by way of an explanation* that all assets of such guarantors of the corporate debtor shall be outside the scope of the moratorium imposed under the Code. Further observations of the Committee were considered and, ultimately, in Paragraph No. 33, the

[16] ***State Bank of India v. V. Ramakrishnan, reported at (2018) 17 SCC 394***

Hon'ble Supreme Court held that the Report of the said Committee makes it clear that the *object of the amendment was to clarify and set at rest* what the Committee thought was an overbroad interpretation of Section 14 and hence, such clarificatory amendment was held to be retrospective in nature, in the context of which the Hon'ble Supreme Court also considered other previous judgments of the Supreme Court.

112. While discussing *CIT v. Vatika Township (P) Ltd.*, reported at *(2015) 1 SCC 1*, the Supreme Court noted that it had held therein that if a new Act is "to explain" an earlier Act, it would be without object unless construed retrospective. An explanatory Act, it was held, is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act and it is well-settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended.

113. In *CIT v. Shelly Products*, reported at *(2003) 5 SCC 461*, it was held in the facts and circumstances of the case that it is well-settled that the Legislature may pass a declaratory Act to set aside what the Legislature deems to have been a judicial error in the interpretation of statute, seeking only to clear the meaning of a provision of the principal Act and make explicit that which was already implicit.

114. However, in the present case, the said ratio is not applicable at all. In the definition clauses in both the 2005 Rules, which preceded the 2009 Rules, and the 2009 Rules itself, respectively Rules 2 and 3 thereof, provided that in the Rules, unless there is anything repugnant to the subject or context, the words or expressions used shall have the same meaning as respectively

assigned to them in the BE Act and the Rules framed thereunder. However, there was no definition of the expression "change in management" in either the BE Act or the Rules framed therein.

115. Conspicuously, in the Preamble of Notification No. 212-F.T. dated February 11, 2020, issued in exercise of powers conferred by Sections 85 and 86 of the BE Act, it was clearly provided that the amendments to the 2009 Rules incorporated thereby were to come into force "with immediate effect". There is no element of clarification of anything which was already there in the 2009 Rules, since the 2009 Rules were completely devoid of any definition whatsoever of "change in management".

116. The said logic is further strengthened by the fact that the proposed amendment provided that in the 2009 Rules, the original Rule 3 (referred to above) would be "substituted" and an entirely new regime of definition of "change in management" in respect of entities of different kinds was introduced.

117. Hence, it was neither intended in the 2020 Notification nor contemplated by its scheme to clarify something which was already there in the 2009 Rules or to give retrospective effect to the amendments so brought forth.

118. Accordingly, the ratio, on which the Hon'ble Supreme Court held in *State Bank of India (supra)*[17] that the concerned provision of statute was clarificatory and retrospective, is not applicable to the 2020 Notification at all.

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[17] ***State Bank of India v. V. Ramakrishnan, reported at (2018) 17 SCC 394***

119. Rather, the ratio laid down in *Maharaja Chintamani Saran Nath Shahdeo (supra)*[18] is more apt in the present context, where the Hon'ble Supreme Court held that the concerned provision being discussed therein could not be accepted to be retrospective, since the amending Act provided clearly that it would come into force "at once", that is, from the date of publication in the Gazette. In the provisions of the amending Act, it was not mentioned that the Act would have retrospective effect and if it was so held, it would go against the intention of the legislation. The Hon'ble Supreme Court applied the Golden Rule of construction in observing that in the amending Act there was nothing to show that Act could have retrospective effect, as the essential idea of a legal system is that current law should govern current activities.

120. Similarly, in the present case as well, the 2020 Notifications were explicitly stated to come into force "with immediate effect", without any iota of retrospectivity being intended in the 2020 Notification. Thus, the State's argument that the definition of "change of management" in the 2020 Notification would have retrospective effect, being clarificatory in nature, is not tenable in the eye of law and hereby turned down.

CONCLUSION

121. In view of the above discussions, this Court does not find any impropriety or illegality in the impugned judgment of the learned Single Judge, to the extent that Clause (d) of the proviso to Rule 5(1) of the 2009 Rules was read

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[18] ***Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and others, reported at (1999) 8 SCC 16***

up to incorporate change in management "in the usual course of business", keeping in parity with Clause (e) of the proviso.

122. However, we find a discrepancy in the concluding portion of the said judgment inasmuch as, despite reading up the provisions of Clause (d), the learned Single Judge struck down Clause (d) in the same breath by holding the same to be *ultra vires* the Constitution of India.

123. The devices of "reading up" and "reading down" provisions of statutes and subordinate legislation have been formulated by Courts to save the Constitutionality of statutory provisions and to retain the provisions in the statute book. Hence, if a provision is read up or down to bring it within the domain of Constitutional validity, it would be a contradiction in terms if the said provision is struck down in the same breath.

124. Also, the effect of totally striking down Clause (d) would be counter-productive and defeat the very intent of reading up, not only because the provision would then be deleted altogether from the Rules but also because of the devastating effect of such deletion on the very entities which are intended to be the beneficiaries of such reading up.

125. In the event Clause (d) of the proviso to Rule 5(1) is struck down in its entirety, the exemption given to private limited companies in respect of remission of initial grant fee of licence in case of change in management would be altogether taken away, also including the death of Directors, which is already granted by the said provision.

126. Thus, the appropriate course of action for the learned Single Judge would have been to read up the provision and retain it in the Rules in such modified form, in parity with Clause (e) of the proviso to Rule 5(1).

127. If so read up, Clause (d) would read as follows:

> *"(d) death of Director(s), or* ***change in management in the usual course of business*** *of a private limited company."*

128. Thus, by addition of the words indicated in bold above, Clause (d) would stand modified in parity with Clause (e), which grants similar relief in case of public limited companies.

129. In view of such reading up, the necessary consequential directions as passed by the learned Single Judge, regarding refund of the excess initial licence fees exacted from the writ petitioners/respondents is also justified and no interference is called for in that regard.

130. In view of the above, FMA No. 226 of 2024 is disposed of, thereby modifying the impugned judgment dated December 6, 2023, passed in WPA No. 4873 of 2018 by reading up clause (d) of the proviso to Rule 5(1) of the West Bengal Excise (Change in Management) Rule, 2009 as follows:

> *"(d) death of Director(s), or* ***change in management in the usual course of business*** *of a private limited company."*

131. The portion of the impugned judgment where Clause (d) is set aside as *ultra vires* to the Constitution of India is, however, set aside.

132. It is made clear that the other portions of the impugned judgment, as indicated above, including setting aside of the order dated February 16,

2018 along with the consequential revised demand dated February 27, 2018, are affirmed.

133. CAN 1 of 2024 is also disposed of accordingly.

134. There will be no order as to costs.

135. Urgent certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Supratim Bhattacharya, J.)