

(2023) 07 CAL CK 0103
In the Calcutta High Court
Case No : WPA No. 15287 Of 2023

M/S. Downtown Temptations Private Limited And Another	APPELLANT
Vs	
State Of West Bengal And Others	RESPONDENT

Date of Decision : 25-07-2023

Acts Referred:

West Bengal Excise (Change in Management) Rules, 2009 — Rule 2A, 3, 4, 4(1), 4(2), 4(3), 4(4), 4(5), 14(1), 14(2)
West Bengal (Selection of New Sites and Grant of License for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003 — Rule 14, 14(1), 14(2), 14(2)(b), 14(2)(c)
Companies Act, 2013 — Section 2(20), 2(55), 171, 180

Citation : (2023) 07 CAL CK 0103

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Soumya Majumder, Arindam Jana, Saptarshi Banerjee, Anirban Ray, Tanoy Chakraborty, Ronodeep Dutta, Subhojit Ghosh, Shaunak Banerjee

Final Decision : Partly Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. Learned counsel for the petitioner argues that the impugned orders, respectively of the Excise Commissioner refusing to renew the excise license of the petitioner no.1-Company, and of the Collector cancelling the said license, are illegal, being de hors the statute and the rules framed thereunder. It is submitted that the matter is governed by West Bengal (Selection of New Sites and Grant of License for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003 (hereinafter referred to as, "the 2003 Rules") and the West Bengal Excise (Change in Management) Rules, 2009 (in brief, "the 2009 Rules").

2. It is argued that the limited scope of the Excise Commissioner in considering the question of renewal of the petitioners' excise license was delineated by the previous orders of co-ordinate Benches of this Court. However, the Excise Commissioner traversed beyond the scope of the Rules, in refusing to so renew.

3. As regards the statutory challenge already preferred before the appropriate authority by the petitioners against the said refusal to renew, it is unambiguously submitted by learned counsel for the petitioner, on the query of Court, that the petitioners do not want to proceed with the said appeal any further and choose to incorporate the challenge to the said order of the Excise Commissioner in the present writ petition as well, along with the challenge to the subsequent cancellation of license.

4. It is argued that there was no breach of Rule 4(2) of the 2009 Rules by the petitioners in the present case. Learned counsel contends that there is inherent contradiction between the different paragraphs of Rule 4 of the 2009 Rules.

5. Rule 4(1) requires an application for a change in management to be considered by the Collector. Such a change in management, juxtaposed to the role of Collector in Rule 4(3), leads to the only possible inference that the license is being sought to be transferred to some other entity, for which an application is required to be made to the Collector.

6. It is argued that Rule 4(3) seems unworkable and contrary to law, since it militates against Rule 4(1). If, by legal fiction, the license stands determined, there can be no consideration of any application by the Collector. Again, the Collector being subordinate to the Competent Authority (State Government) for the purpose of approval of change in management, it cannot be perceived that even after such approval by the Government, the Collector will consider an application for similar purpose. Such a construction of the Rule, it is argued, is absurd.

7. Again, Rule 4(2) creates a legal fiction of determination of license of a company on any change of membership of the company or in the management thereof unless prior approval of the State Government is obtained. Hence, the State Government is the prior approving authority. In such a case, the role of the Collector, which is two stages subordinate to the State Government in terms of hierarchy in appeal, cannot be conceived. If, by legal fiction, the license stands determined, it is argued, then how can any question arise for further enquiry for granting permission by the Collector?

8. It is next argued that the legislators imply permission of Collector to be required for change in management of a partnership firm, society and cooperative society, and the approval of the Excise Commissioner for companies. Therefore, a company and other juristic entities have been treated differently by legislators in the matter of change in management or change of membership.

9. Again, the second part of Rule 4(2), although made subject to the requirement to the approval by the State Government, makes a distinction between change in management and change in Board of Directors of a company. This part of the sections speaks of a post facto application to the Collector for regularization, which leaves no scope of discretion to the Collector.

10. Thus, there is clear inconsistency and disharmony in Rules 4(1) and 4(2) of the 2009 Rules and the interplay of the two sub-rules creates a wholly anomalous and unworkable situation.

11. It is argued that if change in management results in automatic determination of license, the entire exercise contemplated thereafter through the role of the Collector and Excise Commissioner is meaningless.

12. If prior approval of the State Government is necessarily required to be taken by a company for change in management, then other provisions contained in various sub-rules of Rule 4, requiring such change to be brought to the notice of the Collector for regularization or issuance of show cause notice by the Collector, are meaningless.

13. It is submitted that change in management is not the same as change in Board of Directors. "Change in management" was not defined in the Rules of 2009. However, on February 11, 2020, the Rules were amended to define it as a change of directors or any change of shareholding beyond ten per cent of the existing shareholding pattern.

14. In the present case, the application for renewal of license is for 2017-18; therefore, the amended Rules of 2020 have no manner of application, it is contended.

15. Learned counsel for the petitioners places reliance on the definition of "Company" in Section 2(20) and the definition of "Member" in Section 2(55) of the Companies Act, 2013 (in short, "the 2013 Act"). Section 171 of the Act makes the position clear that the Board of Directors is different from the members, since the members can inspect the works of the Board. Again, Section 180 of the 2013 Act empowers the Board of Directors to exercise certain powers with the consent of the company; therefore, the Board of Directors is also not the management of the company.

16. Learned counsel also seeks to distinguish the judgments cited by the respondents on facts and law.

17. The petitioners submit that, in the impugned order, the Excise Commissioner has interchangeably used words like "change in management", "controlling interest" and "change in shareholding pattern", thereby applying a completely wrong legal test, thus vitiating the said order.

18. The fourth question formulated by the Excise Commissioner was answered in the negative, due to which it is to be understood that the alleged change in management was not deliberately concealed to cause loss of revenue. It is argued that, therefore, there was no intelligible reason for treating the petitioner company differently than others, whereby the scope of regularization through payment of fee could not be allowed.

19. Rule 4(2), it is argued by the petitioners, is unworkable and does not cast an

obligation to apply for change in the Board of Directors or for shareholding pattern. In any event, the Rules of 2009 have themselves made a clear distinction between change in management and in the Board of Directors. The order of the Excise Commissioner does not take note of this aspect, it is argued; hence, the impugned orders, refusing renewal and the consequential cancellation of the license of the petitioner no.1, be set aside.

20. Learned Government Pleader, appearing for the State Respondents, submits that the Rules-in-question, that is, Rule 14(1) and Rule 4(2) of the 2003 and 2009 rules respectively lay out a specific scheme in accordance with law.

21. It is argued that the renewal application of Hotel Downtown was not in consonance with Rule 14(1) of the 2003 Rules, since it was signed by one Jagjit Singh, who held 50% of the total equity along with one Kulwinder Kaur, who held the remaining 50% of the equity, at the inception. At present, neither Jagjit nor Kulwinder are shareholders of the company. From 2010 onwards, there have been consecutive changes in shareholding pattern of the petitioner no.1- Company and at present there is 100% change in shareholding pattern. The shareholding pattern from 2010 onwards has been enumerated in the writ petition itself. Such changes in shareholding pattern and change of directors, it is argued, are tantamount to change in management. At no point of time was the said fact brought to the notice of the concerned authorities. In response to the query of the respondent-Authorities about change in shareholding, the petitioner no.1 had refused such change in shareholding, as evident from their own supplementary written notes.

22. Learned Government Pleader places reliance on a Notification dated October 15, 1938, to highlight that if there is change in management, the license would stand determined under Rule 2A, and it was the duty of the licensee to intimate the change in shareholding.

23. With regard to Rule 4 of the 2009 Rules, the State respondent submits that the amendment to the said Rules, by the Notification dated February 11, 2020, operates and should be applied at the date when the order is passed and not when the application is made.

24. Hence, the change of over 10% of the existing shareholding pattern applies to the present case.

25. It is argued that Rule 4(2) conceives of three different situations.

26. First, prior approval of the State Government before any change in membership or management of the company.

27. Secondly, apropos the next clause starting with the words "Subject to the above requirement" and the first proviso to Rule 4(2), a situation is contemplated where permission for post facto regularization is made within 7 days after change in management. An exception to the definition has been carved out for mergers, demergers, etc.

28. Thirdly, the second proviso of Rule 4(2) contemplates a situation where there is neither any approval of the State Government nor any application made to the Collector for regularization, and what steps are to be taken for determining the excise license where a show cause notice is required to be issued as to why the existing license ought to be determined.

29. Sub-rules (3), (4) and (5) of Rule 4 highlight the steps to be taken for regularization if any application is made and the scheme of Rule 4 is clear that, for change of management of a company, the State Government is the final authority.

30. The respondents place reliance on a judgment reported at (2014) 14 SCC 486 [Somdev Kapoor Vs. State of West Bengal and others] for the proposition that the Rules which are prevalent on the date when the application is considered are to be applied, and not the date when the application is made.

31. Another judgment, reported at (2004) 8 SCC 1 [Zile Singh Vs. State of Haryana and others], is cited by the respondents in support of the proposition that amendment by substitution will result in repeal of the original statute, by replacing it with the new provision. Rule 3, in the present case, has been amended by way of substitution and therefore the same would come into effect from the date of coming into force of the 2009 Rules.

32. Admittedly, the writ petitioner had changed its shareholding, as contemplated in the substituted Rule 3 of the 2009 Rules. The fact of not informing about the change in shareholding would also be in violation of the terms of the license and the 1938 Rules. Further, Rule 4(2) of the 2009 Rules has been violated, which leads to an automatic termination, particularly since there was no application under Rule 4 by the petitioner.

33. Hence, the order of the Excise Commissioner was justified.

34. Learned Government Pleader lastly submits that the Collector's order is a consequence of the finding of the Excise Commissioner and that due to efflux of time and the admitted change in management by the petitioners, without prior approval or subsequent regularization, the license is liable for deemed determination under Rule 4(2) of 2009 Rules. Thus, there was no requirement of providing show cause notice or an opportunity of being heard to the petitioner.

35. Two sets of Rules framed under the Bengal Excise Act, 1909 are relevant in the context. The first is the 2009 Rules and the other is the 2003 Rules.

36. The impugned order was passed under Rule 14 of the 2003 Rules. Sub-rule (2) of Rule 14 stipulates that the Collector may refuse to grant a license to the existing holder for the next period of settlement if such holder –

a. has been convicted by a criminal court for commission of non-bailable offence, or

b. has committed serious violation of the terms and conditions of the license, or

c. is a defaulter in the payment of excise revenue to the Government.

37. The last two sub-clauses are relevant in the present case.

38. In the license granted to the petitioners, as a special note at the bottom, it has been stipulated that infraction of any provisions of the Bengal Excise Act or of any Rules/Orders made under the Act will subject the license to cancellation/suspension and penalties.

39. Thus, Rule 14(2), proviso (b) also takes into its fold violation of terms and conditions of the Act and the Rules framed thereunder.

40. The entire arguments in the present case, rightly so, have been advanced on the interpretation of Rule 4 of the 2009 Rules, which is the relevant consideration here. As such, a proper interpretation of the same is vital to the adjudication of the present lis.

41. The scheme of Rule 4 of the 2009 Rules resembles a Venn diagram in three dimensions. There are several overlapping provisions within the said Rule on a horizontal two-dimensional scale, as well as interplay between several classes of categorization extending to different dimensions depth wise.

42. In a broad sense, the first three paragraphs of the said Rule have a notional identity, relatable to sub-rule (1) of Rule 4. Sub-rule (1) provides for change in management of an excise license. For example, if "X" entity was running the liquor business, the same is handed over and changed to "Y" entity.

43. The said sub-rule contemplates a prior application to the Collector (after operation of the license at least for five years), in case of a change of management of an excise license, irrespective of the character of the entity, be it a company (public or private), or a partnership firm, society or co-operative society. In case of a company, the prior approval is to be taken of the State Government, whereas in case of a partnership firm, society or co-operative society, a prior permission of the Collector, coupled with an approval of the Excise Commissioner, has to be taken.

44. The effect of not taking such approval as per the said sub-rule is provided in the first paragraph of sub-rule (2), which provides that unless such prior approval is taken (of the State Government in case of a company or of the Collector and Commissioner in case of the other entities), the license stands determined.

45. However, a glimpse of the second paragraph of sub-rule (2) shows that such determination is not absolute. A lease of life is given to the determined license, under the second and third paragraphs of sub-rule (2), to apply within seven days for approval before the Collector and for regularization, along with deposit of a non-refundable registration fee for application similar to grant of new license.

46. The distinction between the second and third paragraph is only with regard to the type of change in management. The second paragraph envisages, in

respect of a company, a change in management or the Board of Directors, whereas, in the case of a society or co-operative society, it contemplates a change in membership.

47. The third paragraph of sub-rule (2) takes within its fold a cross-character change in the entity. Such changes comprise of a transition from an individual/firm/society/co-operative society to a company, or from a private limited to a public limited company and vice versa, or a takeover, acquisition, amalgamation, or merger of a company by or with another company. Hence, the difference between the second and third paragraphs of sub-rule (2) is only in the quality and character of change. However, in case of both the second and third paragraphs, the remedy remains the same, that is, an application for approval and regularization before the Collector with non-refundable registration fee equivalent to an application for a new license.

48. Thus, the first three paragraphs of sub-rule (2) deal with cases where the management of the licensee undergoes a change, in some manner or the other. The first paragraph stipulates the conditions to be fulfilled by way of approval/permission from the appropriate authority, in the absence of which the license stands determined.

49. The second and third paragraphs, on the other hand, go one step further and provide a subsequent seven-day window to the licensee to regularize such determination by way of taking certain actions.

50. However, such action on the part of the licensee is further subjected to a scrutiny by a hierarchy thereafter, which is envisaged in sub-rules (3) and (4) of Rule 4. In sub-rule (3), the Collector, on receipt of the application as discussed above, shall hold enquiries, thereby considering whether the proposed transferee is fit and eligible to hold an excise license and whether the change in management is necessary for proper management of the license.

51. Under sub-rule (4), the Collector shall thereafter forward the proposal for change in management to the Excise Commissioner, along with the Collector's opinion, except in certain cases as stipulated therein, such as death of licensee, etc., in which case the Collector shall be the competent authority to approve such change without forwarding it further.

52. In the forwarded matters, sub-rule (5) provides that the Excise Commissioner shall, upon obtaining the proposal from the Collector, allow such change in management. However, in cases pertaining to companies, the Excise Commissioner is not the competent authority to deal with the same and has to forward it further to the State Government, for taking a decision thereon.

53. The last stage in such applications for regularization is provided in sub-rule (6) of Rule 4, which states that, upon receiving the decision of the State Government, the Excise Commissioner shall merely convey the same to the concerned Collector for taking necessary action.

54. Thus, we get the entire hierarchy in cases where the stipulated prior approval/permission is not taken from the appropriate authority under Rule 4(2), first paragraph.

55. If the second or third paragraphs are not resorted to by the licensee by applying for a regularization in time, the effect of the first paragraph of sub-rule (2) persists, being that the license stands determined and remains so. Such a determination would be conclusive under normal circumstances if something further was not added by the fourth paragraph of Rule 4 (2).

56. Coming back to the fourth paragraph of sub-rule (2) of Rule 4, which is also the second proviso to sub-rule (2), the same contemplates cases where no prior approval of the State Government or prior permission of the Collector and approval of the Excise Commissioner, as the case may be, under the first paragraph of sub-rule (2), is taken and, by necessary implication, no application for regularization has also been filed. In such cases, the Collector shall forthwith ask the society, co-operative society or company to show cause within seven days as to why the license should not be "taken to be determined", consider the explanation if any, and send his opinion and recommendation, along with explanation, through the same hierarchy to the Excise Commissioner, who shall further forward it to the State Government in appropriate cases, which shall review the case after granting the party an opportunity of being heard and pass necessary orders which may be "final". It is obvious that the expression "as the case may be" used between the Excise Commissioner and the State Government pertains respectively to societies and co-operative societies on the one hand and companies on the other.

57. It is conspicuous to note that the fourth paragraph of sub-rule (2) (also, the second proviso) is a second channel being opened for the licensee to revive the (otherwise determined) license, the first channel being a regularization under the second and third paragraphs of sub-rule (2).

58. The fourth paragraph envisages cases where the license stands determined and no regularization has been asked for by the licensee.

59. In such a case, although the license has been "determined" under the first paragraph of sub-rule (2), a further layer is left for the Collector to give a chance to the recalcitrant licensee to show cause within seven days as to why the license should not be taken to be determined and to consider the explanation and send his opinion and recommendation along with the explanation to the Excise Commissioner soon thereafter. The process, in case of a company, culminates with a "final" order by the State Government.

60. The language used in fourth paragraph, accordingly, is that the show cause is to be issued as to why the license should not "be taken to be determined".

61. Irrespective of such show-cause notice, the effect is that the license stands determined. The question which arises here is whether the fourth paragraph-

provision of the Collector giving a further show-cause notice to the licensee is mandatory or not. In the absence of the said fourth paragraph, there is nothing in the Rules to give another chance to a licensee whose license stands determined under the first paragraph of Rule 4(2) and has not been regularized under the second and third paragraphs of Rule 4(2) read with sub-rules (3) to (6).

62. It is to be noted that the language used in the fourth paragraph to qualify the action taken by the Collector is "shall" and not "may", thereby lending a mandatory character thereto. Hence, even in cases where no regularization has been sought and the license stands determined as per the previous paragraphs of Rule 4(2), the Collector is mandated by the fourth paragraph to issue a show-cause notice against the society, co-operative society or company concerned to show cause within seven days as to why the license should not be taken to be determined, consider the explanation and send his opinion and recommendation as well as explanation to the appropriate authority, be it the Excise Commissioner or the State. In the present case, as per the scheme of sub-rule (2), in case of companies, the State Government is the appropriate authority taking the final call, to whom the Collector is to forward the explanation along with his comments, through the Excise Commissioner.

63. Harmoniously read, the entire scheme of Rule 4 (2) is that the "determination" for contravention of the first paragraph thereof is not absolute. There are two layers of chances given for the determination to be reversed. First, regularization; second, reply to show cause.

64. Hence, it was the mandatory duty of the Collector, even after the determination by virtue of Rule 4(2)(first paragraph), to issue a show-cause notice to the petitioner-Company. It is important to note that, unlike in case of regularization, where the concerned authorities merely move the decision up the ladder with their opinions, in case of the fourth paragraph (second proviso), the Rule contemplates a show cause to be given to the licensee by the Collector, followed by a consideration of the explanation and sending his opinion and recommendation by the Collector. The reviewing authority, in case of a company the State Government, then undertakes a review after granting the party an opportunity of being heard and only then pass orders which may be final. Thus, until and unless the entire process envisaged in the fourth paragraph is completed, it cannot be said that the determination of license attains finality or can be taken as conclusive.

65. There is nothing on record, however, to indicate that any such notice was given by the Collector, within seven days or otherwise, to the present petitioners, despite the petitioners not having sought prior approval of the State Government.

66. However, insofar as the violation of Rule 14(2) [proviso (b) and (c)] of the 2003 Site Rules are concerned, there cannot be any doubt that both the said clauses were satisfied, since there was a hundred per cent change in the

management as well as directors of the company holding the license that the petitioner-Company.

67. Thus, the petitioner-Company was duty-bound to comply with the terms and conditions of the 2009 Rules as well as to pay excise revenue to the Government by way of filing applications for regularization. Having not done so, the petitioner no.1-Company is guilty of contravention of clauses (b) as well as (c) of the proviso to Rule 14(2) of the 2003 Rules.

68. Thus, insofar as the refusal to renew the license is concerned, the said act on the part of the respondent-Authorities was fully justified, since the petitioners came within the purview of Rule 14 (2) of the 2003, as they chose not to comply with the first three paragraphs of Rule 4(2) of the 2009 Rules, either by seeking prior approval from the State Government or seeking regularization within seven days, upon deposit of appropriate fees equivalent to an application for new license before the State Government or the Collector respectively.

69. Hence, the first impugned action of the respondent-Authorities, that is, passing of the order dated February 15, 2023 by the Excise Commissioner, thereby refusing to renew the license of the petitioners, was fully justified.

70. However, the subsequent cancellation of the license on April 17, 2023 was bad in law, being vitiated in the absence of issuance of any show-cause notice and/or giving any opportunity of hearing to the petitioners and/or referring the matter to the State Government with the Collector's opinion and recommendation, followed by a review by the Government with a hearing to the petitioners, as contemplated in the fourth paragraph of Rule 4(2) of the 2009 Rules.

71. Accordingly, WPA No.15287 of 2023 is only partially allowed, thereby setting aside the order dated April 17, 2023 passed by the Collector, whereby the license of the petitioner no.1-Company was cancelled. However, the order dated February 15, 2023 passed by the Excise Commissioner, refusing to renew the license of the petitioner no.1-Company, is affirmed.

72. The Collector shall issue a show-cause notice to the petitioner no. 1-company, within the contemplation of the fourth paragraph of Rule 4(2) of the 2009 Rules, within 7 days from the passing of this order. Thereafter, upon considering the explanation, if any, the Collector shall send his opinion and recommendation, along with the explanation, to the State Government which shall, thereupon, review the case after granting the party an opportunity of being heard and pass orders which may be final, all in terms of the fourth paragraph of Rule 4 (2) of the West Bengal Excise (Change in Management) Rules, 2009.

73. The entire process, as enumerated above, shall be concluded as expeditiously as possible, positively within September 30, 2023.

74. There will be no order as to costs.

75. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.