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SOMDEV KAPOOR

v.

STATE OF WEST BENGAL & ORS.  
(Civil Appeal No. 9016 of 2013)

OCTOBER 7, 2013

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[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

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*West Bengal Excise (Selection of New Sites and Grant of Licence for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003 - r.8 (as amended in 2004) - Application for issuance of licence for retail sale of liquor made in 1992 - Granted in 2006 - PIL seeking cancellation of licence being in violation of amended r.8 - High Court held that licence was in violation of amended r.8 which prohibited grant of licence for retail sale of liquor at a new site within 1000 feet from educational institutions/religious places - On appeal, plea that application having been made in 1992 rules applicable at that time were applicable and not subsequent amended rules - Held: 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 - In view of the facts, application of the appellant was to be governed by new Rules of 2003 as amended in 2004 - On the basis of the amended new Rules, appellant could not have been granted the licence - West Bengal Excise Rules, 1993 - r.8 - Circular dated 28.9.2005 issued by the Excise Commissioner, West Bengal.*

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**The appellant made an application on 28.8.1992 before Collector of Excise, for issuance of licence to operate foreign liquor bar and restaurant. He sent another application on 8.9.2005 giving reference to the earlier application. Thereafter, he was given temporary licence to run the liquor bar. Respondent Nos.5 and 6, a Society and its President respectively, filed writ petition as Public Interest Litigation seeking cancellation of the**

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**licence, on the ground that the licence was in violation of r.8 of the West Bengal Excise (Selection of New Sites and Grant of License for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003, as amended in the year 2004, whereby there was bar on grant of license for the retail sale of liquor or any other intoxicant at a new site within 1000 feet from any college/educational institution/religious places. High Court allowed the petition. Hence the present appeal.**

**Dismissing the appeal, the Court**

**HELD: 1. West Bengal Excise Rules, 1993 were promulgated vide Notification dated 22nd March 1993. As per Rule 8 of Rules 1993, in its original form, there was bar for grant of license for retail sale of spirit or any other intoxicant at a new site which is situated in "close proximity" to an educational institution or traditional place of worship, hospital or bathing ghat for public use. There was no specific distance stipulated therein, defining the expression "close proximity" in arithmetical/ numerical terms. However, when West Bengal Excise (Selection of New Sites and Grant of License for Retail Sale of Liquor and Certain other Intoxicants) Rules, 2003 came into force in supersession of earlier Rules of 1993 with effect from 29.9.2003, the words "close proximity" were replaced by the expression "vicinity". The term "vicinity" was defined as a distance of 300 ft. Rule 8 of Rules, 2003 was amended with effect from 15.4.2004 and as per the amended provision, distance of 1000 ft. was prescribed in the definition of 'vicinity'. Thus, there was a shift from the position contained in Rules, 1993 which prohibited the grant of license for the retail sale of spirit or any other intoxicant in "close proximity" from the educational institution and religious places etc. to the grant of license within "vicinity of such places" and the term 'vicinity' was explicitly and precisely defined to be a distance of 300 ft.**

A in the unamended Rule 8 of Rules, 2003 and increased to 1000 ft. by way of amendment in the year 2004, from educational institution and religious places. [Para 6] [458-E-H; 459-A-B]

B 2. It cannot be said that in view of the Circular dated 28.9.2005 issued by the Excise Commissioner, West Bengal to its functionaries, pending applications were to be considered on the basis of un-amended Rules, 2003. This circular has no application to the facts of the present case. The circular deals with the situation where C applications for grant of license had been submitted after 29.7.2003 when Rules, 2003 were promulgated prescribing a distance of 300 ft. in Rule 8(1) of those Rules to define 'vicinity' and before this definition of "vicinity" was amended vide Notification dated 2.4.2004. D [Paras 7-9] [459-E-F; 461-G-H; 462-A]

E 3. Though the application of the appellant was made in the year 1992, it was processed much after 2004 and the license is also granted after 2004. The application of the appellant, was submitted in 1992 but had not been F taken up for consideration at all for number of years, even the appellant had not taken any steps by sending any reminder or followed it up with any request to the department to grant him bar license on the basis of said application. This position remained even during the G operation of Rules, 1993 which remained operative for 10 years and were replaced by Rules, 2003. During this period also, no steps were taken. After Rules, 2003 there was an amendment in Rule 8 thereof. Thereafter the Excise Commissioner, issued clarification in the year H 2005 in respect of applications which were submitted pursuant to Rules, 2003 but either had not been dealt with upto the amendment notified on 2.4.2004 or were rejected after 2004 applying the amended Rules. Though, the circular was totally unconnected and unrelated to the case of the appellant, at this stage, the appellant woke up

from slumber and started insisting that his application submitted in the year 1992 be considered. The appellant very well knew that on the basis of new Rules he would not be able to get bar license. Therefore, the strategy adopted was to resuscitate the application of 1992 and demand its consideration on the basis of un-amended rules. [Paras 7 and 10] [459-D; 462-E-H; 463-A-B]

4. The application of the year 1992 was not even proper and valid application as no fee etc. was paid along with the said application. That would be the reason that the said application was never processed. The application has to be supported by appropriate fee which was not given earlier. Such a fee was deposited only in the year 2006 in compliance with the provisions of Rule 9 of the Rules, 2003. As per the copy of letter which he enclosed along with communication dated 1.11.2004 and it shows that only a letter was submitted, though, as per the Rules, application was also not made in Form I or Form II annexed with these Rules. [Para 10] [463-B-D]

5. 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. Thus the appellant had first made application on 28.8.1992 and then again on 8.9.2005 giving reference to the first application. The first application was not even proper application and second application was dated 8.9.2005. It had to be governed by the new Rules, namely, Rules 2003, as amended in 2004. On the basis of these Rules, the appellant could not have been granted for foreign liquor bar and restaurant license as there were many religious and educational institutions within the 1000 ft. of place from where the appellant was operating. [Paras 11-13] [463-E-G; 464-G]

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SCALE 789 - relied on.

**A Case Law Reference:**

**2013 (2) SCALE 789** relied on **Para 12**

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**B** From the Judgment and Order dated 14.12.2012 of the High Court at Calcutta in a Public Interest Litigation being W.P. No. 9 of 2011.

**C** K.K. Venugopal, Jaideep Gupta, Kailash Vasdev, Kalyaan Bandopadhyay, R. Aggarwal, Yadunandan Bansal, Abhijat P. Medh, Shneyans Singhvi, Umrao Singh Rawat, Saurabh Trivedi, Anip Sachthey, Snonik Singhvi, Suryanarayana Singh, Pragati Neekhra for the appearing parties.

**D** The Judgment of the Court was delivered by

**A.K. SIKRI, J. 1. Leave granted.**

**E** 2. The appellant herein is a proprietor of a Hotel and Restaurant under the name and style of "BHIMSAIN VAISHNAV" which is being run since 1954. On 28th August 1992, he made an application before the Collector of Excise, Calcutta (now known as Kolkata) for issuance of license to operate foreign liquor bar and restaurant. This application, for the reasons not available on record, kept pending for number of years.

**F** Thereafter, on 1.11.2004 he made a request that his earlier application dated 28th August 1992 may be processed and he be granted foreign liquor bar and restaurant license. It was followed by another reminder dated 8.9.2005. Thereafter, the appellant was given temporary license to run the liquor bar in

**G** January 2006, purportedly on the basis of his application submitted in the year 1992.

**H** 3. Respondent Nos. 5 and 6 herein, namely, Muslim Khawateem Khilafat Tanzeem, a Society and Nazia Elahi Khan, President of the said society respectively, filed a Writ Petition

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as Public Interest Litigation, with the prayers to cancel, rescind and revoke the aforesaid temporary license issued to the appellant. The plea raised was that it was not open for the appellant to run a liquor bar in the said restaurant which was in the vicinity of religious places and school, namely, Gurudwara Bara Sikh Sangar, Shree Digambar Jain Vidyalyaya, Shree Jain Swetambere Panchayati Temple, Shree Laxmi Narayan Mandir, Shree Shree Satya Narayanji Mandir and also a mosque. These respondents in the said Writ Petition alleged that the aforesaid religious places and school were situated within the distance of 550 feet of the premises where the license to operate the bar by the Excise Department was granted to the appellant and this was in violation of Rule 8 of the West Bengal Excise (Selection of New Sites and Grant of License for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003 (hereinafter referred to as "Rules of 2003"), as amended in the year 2004. Amended Rule 8 of the said Rules imposed a ban on the grant of license for the retail sale of liquor or any other intoxicant at a new site which is within 1000 feet from any college/educational institution /religious places. This plea has been accepted by the High Court and vide impugned judgment dated 14th December 2012, the Excise Department is directed not to renew the license of the appellant which was expiring in the month of January 2013.

4. It is not in dispute that there are few religious places as well as a school within a distance of 1000 feet from the restaurant of the appellant where he runs his liquor bar as well. The precise distance of these places from the appellant's restaurant is as under:

Gurudwara Bara Sikh Sangar is at a distance of 430 ft., Shree Digambar Jain Vidyalyaya is at a distance of 580 ft., Shree Jain Swetambar Panchayati Temple is at a distance of 630 ft., Shree Laxmi Narayan Mandir is at a distance of 730 ft., and Shree Shree Satya Narayanji Ka Mandir is at a distance of 780 ft.

A 5. It is also not in dispute that Rule 8 proscribes grant of  
license for retail sale of liquor or any other intoxicant at a new  
site which comes within the range of 1000 ft. However, case  
set up by the appellant is that since the application for grant of  
license was filed in the year 1992, the rules which were  
B prevailing at that time would be applicable to the case of the  
appellant. Under Rules, 1993, the restriction was within a  
distance of 300 ft. from such places and since the religious  
places and school pointed out by respondent Nos. 5 and 6 are  
situated beyond the vicinity of 300 ft., the license was validly  
C granted. In this scenario, the question that falls for determination  
is as to whether Rules, 1993 would govern the case of the  
appellant or the license was to be granted keeping in mind  
Rules, 2003 (as amended). Before we embark on this issue, it  
would be essential to tread the events leading to the  
D promulgation of the aforesaid Rules and certain Government  
instructions issued in the matter.

6. As mentioned above, the appellant had applied for  
Foreign Liquor Bar and Restaurant license on 28.8.1992.  
Within few months thereof, West Bengal Excise Rules, 1993  
E were promulgated vide Notification dated 22nd March 1993.  
These Rules were made in exercise of powers conferred by  
Sections 85, 86 read with Section 30, 31, 36, 37 and 37A of  
the West Bengal Excise Act, 1909. As per Rule 8 of Rules  
1993, in its original form, there was bar for grant of license for  
F retail sale of spirit or any other intoxicant at a new site which is  
situated in "close proximity" to an educational institution or  
traditional place of worship, hospital or bathing ghat for public  
use. There was no specific distance stipulated therein, defining  
the expression "close proximity" in arithmetical/ numerical  
G terms. However, when Rules, 2003 came into force in  
supersession of earlier Rules 1993 with effect from 29.9.2003,  
the words "close proximity" were replaced by the expression  
"vicinity". The term "vicinity" was defined as a distance of 300  
ft. Rule 8 of Rules, 2003 was amended with effect from  
H 15.4.2004 and as per the amended provision, distance of 1000

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ft. was prescribed in the definition of 'vicinity'. Thus, there was a shift from the position contained in Rules, 1993 which prohibited the grant of license for the retail sale of spirit or any other intoxicant in "close proximity" from the educational institution and religious places etc. to the grant of license within "vicinity of such places" and the term 'vicinity' was explicitly and precisely defined to be a distance of 300 ft. in the unamended Rule 8 of Rules, 2003 and increased to 1000 ft. by way of amendment in the year 2004, from educational institution and religious places.

7. Reverting to the case of the appellant, we would also like to emphasize here that Rule 8 of Rules, 1993 as well as Rule 8 of Rules, 2003 apply only to new sites. Its implication is that those restaurants/ hotels etc. who were already granted license, before coming into force the respective Rules, would not be hit by the mischief of these rules and are allowed the continuation of such a bar license, as pointed out, though the application of the appellant was made in the year 1992, it was processed much after 2004 and the license is also granted after 2004. Therefore, normally the application would be governed by the Rules prevalent on the date of grant of liquor license. However, Mr. K.K.Venugopal, learned senior counsel appearing for the appellant drew our attention to the Circular dated 28.9.2005 issued by the Excise Commissioner, West Bengal to its functionaries and on that basis, he made emphatic plea that pending applications were to be considered on the basis of un-amended Rules, 2003. Since the entire foundation of the appellant's case rests on this communication, we would like to reproduce the same in its entirety:

"Sub: Settlement of Excise Licenses in favour of the applicants/licensees who have applied for the same before publication of the Excise Department's Notification No. 527-Ex dated 02.04.2004.

A Sir,

B With reference to above noted subject, it has come to the notice of the undersigned that several applications have been received by the District Authorities for grant of Foreign Liquor 'On' Shop Licenses as well as shifting of the existing shop before the Excise Department's Notification No.527-EX dated 02.04.2004 came into force.

C It is further noticed that some applicants/licenses who applied for 'On' shop License/shifting of existing licenses and who were not granted licenses as the sites proposed by them attracted the provisions of the aforesaid notification, moved the Hon'ble High Court for processing their applications in terms of the provisions existing prior to coming into force or Notification No.527-EX dated D 02.04.2004.

After careful consideration of the matter, the following.....;

E (a) All the applications received before the 15th April, 2004 being the date of publication of the above notification, by the concerned District Authorities for grant of Foreign Liquor 'On' Shop Licenses and not rejected by the Collector may kindly be sent to this Directorate, if not sent already, after suitable F processing as per Rule 8(1) of the Excise Department's Notification No.800-EX dated 29.7.2003.

G (b) All the petitions received before 15th April, 2004 duly rejected by this Directorate and/or the Collectors due to coming into force of the Excise Department's Notification No. 527-EX dated 02.04.2004 should also be sent to this Directorate for further consideration, after processing of the H same in terms of Rule 8(1) of the Excise

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**Department's Notification No.800-EX dated 29.7.2003;** A

**(c) If the licenses in respect of Foreign Liquor 'On' Shops duly approved by the Govt. In the Excise Department and communicated to the district authorities by this.....also be sent to this Directorate after necessary processing as per Excise Department's Notification No.800-EX dated 29.7.2003.** B

**(d) It has also come to the notice of the undersigned that several applications for grant of Foreign Liquor 'On' Shop Licenses received by the District Excise Authorities are being rejected at their end.** C

**All such applications should be sent to the undersigned in terms of Rule 9(3) of the Rules framed under Excise Department's Notification No.800-EX dated 29.7.2003.** D

**You are, therefore, requested to take necessary steps in the matter and ensure the compliance of these instructions."** E

**8. Seeking to draw sustenance from the aforesaid circular, Mr. Venugopal's endeavour was to make us agree to his submission that those applications which were received before 15th April, 2004 and had not been rejected by the time circular dated 28.9.2005 came to be issued, were to be processed as per unamended Rule 8 which fixed the upper limit of 300 ft. as prohibitory limit. However, we don't feel persuaded by this plea. In our view, this circular has no application to the facts of the present case for the reasons stated hereafter.** F G

**9. On the face of it, it is visible that the circular deals with the situation where applications for grant of license had been submitted after 29.7.2003 when Rules, 2003 were promulgated** H

A prescribing a distance of 300 ft. in Rule 8(1) of those Rules to  
 define 'vicinity' and before this definition of "vicinity" was  
 amended vide Notification dated 2.4.2004. The question was  
 as to whether applications which were given after 29.7.2003  
 but before 2.4.2004, were to be governed by original Rules 8(1)  
 B or the amended Rule 8(1). It seems that a Writ Petition was  
 filed in the High Court of Calcutta by those who were not granted  
 license because of the amended Rules. During the pendency  
 of the said Writ Petition, the matter was considered and the  
 decision was taken that all the applications received before the  
 C amended Rules came into force, which had not been rejected  
 by the Collector, should be processed in terms of unamended  
 Rules and sent to the Directorate. Even those applications  
 which were received before 15th April, 2004 and had been  
 rejected applying amended Rule were also directed to be sent  
 D to the Directorate for further consideration, after processing in  
 terms of unamended Rules. These applications were to be sent  
 in terms of Rule 9(3) of the Rules. Ex-facie, the case of the  
 appellant has no such factual parity.

10. We would like to point out, at this stage, that when the  
 E application of the appellant, which was submitted in 1992 but  
 had not been taken up for consideration at all for number of  
 years, even the appellant had not taken any steps by sending  
 any reminder or followed it up with any request to the  
 department to grant him bar license on the basis of said  
 F application. This position remained even during the operation  
 of Rules, 1993 which remained operative for 10 years and were  
 replaced by Rules, 2003. During this period also, no steps were  
 taken. After Rules, 2003 there was an amendment in Rule 8  
 thereof. Thereafter the Excise Commissioner, West Bengal  
 G issued clarification in the year 2005 in respect of applications  
 which were submitted pursuant to Rules, 2003 but either had  
 not been dealt with upto the amendment notified on 2.4.2004  
 or were rejected after 2004 applying the amended Rules.  
 Though, this circular was totally unconnected and unrelated to  
 H the case of the appellant, at this stage, the appellant woke up

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from slumber and started insisting that his application submitted in the year 1992 be considered. The appellant very well knew that on the basis of new Rules he would not be able to get bar license. Therefore, the strategy adopted was to resuscitate the application of 1992 and demand its consideration on the basis of un-amended rules. In fact, Mr. Kailash Vasdev, learned senior counsel appearing for respondent Nos. 5 and 6 is right in submitting that his application of the year 1992 was not even proper and valid application as no fee etc. was paid along with the said application. That would be the reason that the said application was never processed. The application has to be supported by appropriate fee which was not given earlier. Such a fee was deposited only in the year 2006 in compliance with the provisions of Rule 9 of the Rules, 2003. In his letter dated 1.11.2004 the appellant referred to his application submitted on 28.8.1992 in which the appellant stated that he had applied for the license as per the copy of letter which he enclosed along with communication dated 1.11.2004 and it shows that only a letter was submitted, though, as per the Rules, application was to be made in Form I or Form II annexed with these Rules.

11. Before filing the Writ Petition, respondent Nos. 5 and 6 had obtained information from the department under Right to Information Act. Information supplied to them mentions that the appellant had first made application on 28.8.1992 and then again on 8.9.2005 giving reference to the first application. Thus, we find that the first application was not even proper application and second application was dated 8.9.2005. It had to be governed by the new Rules, namely, Rules 2003, as amended in 2004.

12. It would also be significant to state that as per the law laid down by this Court, 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. This is so held in *State of Kerala & Ors. Vs. Kandath Distilleries* 2013 (2) SCALE 789 in the following words:

A "We have gone through the Government Order dated  
 11.10.2006 in extenso and we are not prepared to say that  
 the application of the respondent was rejected solely on  
 the ground that the application dated 12.1.1987 could not  
 be treated as an application put forward by a firm based  
 B on a partnership deed, which came into existence on  
 10.4.1991, as per Clause 3 of the Partnership Deed but  
 on various other grounds as well. The State Government,  
 in our view, has considered the respondent's application  
 dated 12.1.1987 with regard to the conditions that existed  
 C in the year 1998. The Government letter dated 28.6.1994  
 would indicate that, apart from the respondent, few other  
 applications were also pending prior to the year 1994.  
 Over and above, the State Government during the year  
 1998, from 3.2.1998 to 21.11.1998, had received 52  
 D applications for establishing compounding, blending and  
 bottling units in IMFLs in various parts of the State. The  
 Excise Commissioner vide his letter dated 25.11.1998  
 had reported that there was an unprecedented flow of  
 applications, that was the situation prevailing in the year  
 1998, a factor which was taken note of in not entertaining  
 E the respondent's application, whether it was submitted on  
 12.1.1987 or on 22.11.1998. We cannot, in any way,  
 activate an out-moded, outdated, forgotten liquor policy  
 of 1998, in the year 2013, by a Writ of Mandamus."

F 13. We fail to comprehend as to how the application filed  
 in 1992 could be considered in 2010. In any case, as per the  
 dicta aforesaid, when the request of the appellant was  
 considered in the year 2010, Rules of 2003 as amended in  
 2004 had to be applied. On the basis of these Rules, the  
 G appellant could not have been granted for foreign liquor bar and  
 restaurant license as there are many religious and educational  
 institutions within the 1000 ft. of place from where the appellant  
 is operating.

H 14. Mr. Venugopal has tried to make an attempt to impute

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malafides on the part of the respondent Nos. 5 and 6 alleging that there is another restaurant run by respondent No.4 which is also operating from a place that is less than 1000 ft. from religious places etc. However, proceedings against the said respondents were dropped by respondent Nos. 5 & 6. First of all, this argument would be of no avail to the appellant inasmuch as when it is found that the appellant was not entitled for bar license, the High Court has rightly issued mandamus not to renew the same. Even if, we presume that some other person is also operating in an infringing manner, that would not legalize the license of the appellant. That apart, after going through the record, we find that the case of respondent No.4 was not of a new license but existing license. Rule 8 applied to new sites only and in so far as those who were operating already and having existing license, they are not hit by the mischief of this Rule.

15. The result of the aforesaid discussion would be to uphold the judgment of the High Court and dismiss the appeal with costs. Since the license was renewed on the basis of interim orders passed by this court, which is valid till December 2013, it would not be renewed thereafter. We order accordingly.

K.K.T.

Appeal dismissed.