Akadasi Padhan

Vs

State of Orissa

Petition No. 73 of 1962

(CJI B.P. Sinha, P. B. Gajendragadkar, K. N. Wanchoo, K. C. Das Gupta, J. C. Shah JJ)

05.12.1962

JUDGMENT

GAJENDRAGADKAR, J. –

In challenging the validity of the Orissa Kendu Leaves (Control of Trade) Act, 1961 (No. 28 of 1961) (hereinafter called the Act), this petition under Art. 32 of the Constitution raises an important question about the scope and effect of the provisions of Art. 19(6). The petitioner Akadasi Pradhan owns about 130 acres of land in village Bettagada, Sub-division Rairakhel in the District of Sambalpur, and in about 80 acres of the said land he grows Kendu leaves. Kendu leaves are used in the manufacture of Bidis; and so, prior to 1961, the petitioner used to carry on extensive trade in the sale of Kendu leaves by transporting them to various places in and outside the District of Sambalpur. But since the Act was passed in 1961 and it came into force on the 3rd of January, 1962, the State has acquired a monopoly in the trade of Kendu leaves, and that has put severe restrictions on the fundamental rights of the petitioner under Articles 19(1)(f) and (g). That, in substance, is the basis of the present petition.

The petition alleges that, in substance, the Act creates a monopoly in favour of certain individuals described as Agents by the relevant provisions of the Act, and in that sense, it is a colourable piece of legislation. Under the relevant provisions of the Act, three notifications have been issued, and the validity of these notifications is also challenged by the petition. The first notification published on the 8th of January, 1962 under section 5 of the Act, gives a schedule of the Districts, the number of units in which the districts are divided and the local areas covered by the said units. The District of Sambalpur in which the petitioner resides has been divided into five units and the petitioner's lands fall under units 2 and 5. On January 10, 1962, applications were called from persons who desired to be appointed as Agents of the Government of Orissa for purchase of and trade in Kendu leaves, and the notification by which these applications were called for made it clear that the Government reserved to itself the right to reject any or all applications in respect of any unit without assigning any reason whatsoever. Then followed the notification of the 25th January, 1962, which prescribed the price for the Kendu leaves @ 50 leaves per naya paisa. This notification stated that the said price had been fixed by the State Government in consultation with the Advisory Committee appointed under s. 4 of the Act. The last notification to which reference must be made is the notification which was issued on March 10, 1962, making certain corrections in the units of the local areas notified by the notification of the January 8, 1962. The validity of these notifications is challenged by the petitioner on the ground that the relevant provisions under which the said notifications are issued are invalid, and also on the general ground that the Act in its entirety is ultra vires.

The petition has averred that sections 3, 5, 6 and 16 of the Act are invalid because they contravene

Art. 14, but this part of the case has not been argued before us. The main attack has been directed generally against the validity of the whole Act and sections 3 and 4 in particular on the ground that they violate Art. 19(1)(f) and (g). The relief claimed by the petitioner is that this Court may declare that the whole Act is ultra vires and restrain respondent No. 1, the State of Orissa, from giving effect either to the provisions of the impugned notifications or to the provisions of the impugned Act.

The challenge made by the petitioner to the validity of the Act and the relevant notifications is met by respondent No. 1 mainly on the ground that the Orissa Legislature was competent to pass the Act and that its provisions do not contravene Art. 19(1)(f) or (g). It is urged that under Art. 19(6), the State Legislature is empowered to create a State monopoly in any trade or business and a monopoly thus created cannot be successfully challenged either under Art. 19(1)(f) or under Art. 19(1)(g). In support of its case that the prices fixed under the Act and the scheme of enforcing the State monopoly adopted by the Act are reasonable, respondent No. 1 has referred to the previous legislative history in respect of Kendu leaves, and has pointed out that the Act was passed in pursuance of the recommendations made by a Taxation Enquiry Committee appointed by the State Government in 1959. Besides, it has emphasised that 75% of the Kendu leaves produced in the State of Orissa grow in Government lands, and the monopoly created by the Act affects only 25% of the total produce of Kendu leaves in the State. The affidavit filed by respondent No. 1 also shows that the price fixed in consultation with the Advisory Committee is fair and reasonable and would leave a fair margin of profit to the grower of Kendu leaves. It is on these rival contentions that the validity of the Act as well as the notifications has to be considered in the present petition.

Before referring to the relevant provisions of the Act, it would be relevant to refer to the legislative background in respect of Kendu leaves. In 1949, the Government of Orissa had passed an order in exercise of its powers conferred on it by sub-section (1) of s. 3 of the Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1947. This Order was called the Orissa Kendu Leaves (Control and Distribution) Order, 1949. The broad scheme of this Order was that the area in the State was divided into units, and licences were issued to persons who were entitled to trade in Kendu leaves. The District Magistrate fixed the minimum rate from time to time and the Order provided that the licensees were bound to purchase Kendu leaves from the pluckers or owners of private trees and forests at rates not below the minimum prescribed. In other words, the trade of Kendu leaves was entrusted to the licensees who were under an obligation to purchase Kendu leaves offered to them at prices not below the minimum prescribed by the Order.

This Order was followed by the Orissa Kendu Leaves Control Order, 1960, passed under the same provision of the Orissa Act of 1947. The licensees were continued under this Order, but some other provisions were made, such as the appointment of a Committee for each District to fix the minimum price. In other words, the licensing system continued even under this latter Order.

It appears that when there was a change in the Government of Orissa, the monopoly created in favour of the licensees was changed over to controlled competition, and when the Congress Government, came back to power, it was faced with the problem that the controlled competition introduced by its predecessor had led to a loss in Government revenue. That is why, in pursuance of the recommendations made by the Taxation Enquiry Committee, the present Act has been passed with the object of creating a State monopoly in the trade of Kendu leaves. It would thus be seen that though the Act creates a State monopoly in the trade of Kendu leaves, a kind of monopoly in favour of the licensees had been in operation in the State since 1949, except for a short period when the experiment of controlled competition was tried by the Coalition Government which was then in

power.

Let us now examine the broad features of the Act. The Act consists of 20 sections, and as its preamble indicates, it was passed because the Legislature thought that it was expedient to provide for regulation of trade in Kendu leaves by creation of State monopoly in such trade. Section 2 of the Act defines "agent" as meaning an agent appointed under section 8, and "unit" as a unit constituted under section 5; "grower of Kendu leaves" means any person who owns lands on which Kendu plants grow or who is in possession of such lands under a lease or otherwise; and "permit" means a permit issued under section 3. Section 3(1) provides that no person other than (a) the Government; (b) an officer of Government authorised in that behalf; or (c) an agent in respect of the unit in which the leaves have grown; shall purchase or transport Kendu leaves. It is thus clear that by imposing restrictions on the purchase or transport of Kendu leaves, section 3 has created a monopoly. There are two explanations to s. 3(1) and two sub-sections to the said section, but it is unnecessary to refer to them. Section 4 deals with the fixation of sale price. Section 4(1) lays down that the price at which Kendu leaves shall be purchased shall be fixed by the State Government after consultation with the Advisory committee constituted under s. 4(2). After the price is thus fixed, it has to be published in the Gazette in the manner prescribed not later than the 31st day of January, and after it is published, the price would prevail for the whole of the year and shall not be altered during that period. The proviso to s. 4(1) permits different prices to be fixed for different units, having regard to the five factors specified in clauses (a) to (e). Clause (a) has reference to the prices fixed under any law during the preceding three years in respect of the area in question; cl. (b) refers to the quality of the leaves grown in the unit; cl. (c) to the transport facilities available in the unit; cl. (d) to the cost of transport; and cl. (e) to the general level of wages for unskilled labour prevalent in the unit. Section 4(2) provides that the Advisory committee to be constituted by the Government shall consist of not less than six members as will be notified from time to time; and the proviso to it lays down that not more than one-third of such members shall be from amongst persons who are growers of Kendu leaves. Under sub-section (3), it is provided that it shall be the duty of the Committee to advise Government on such matters as may be referred to it by Government; and sub-section (4) prescribes that the business of the Committee shall be conducted in such manner and the members shall be entitled to such allowances, if any, as may be prescribed. Section 5 allows the constitution of units, and s. 6 provides for the opening of depots, publication of price list and the hours of business etc. Section 7(1) imposes an obligation on the Government and the authorised officer or agent to purchase Kendu leaves offered at the price fixed under s. 4 in the manner specified by it; under the proviso, option is left to the Government or any officer or agent not to purchase any leaves which in their opinion are not fit for the purpose of manufacture of bidis. Section 7(2) provides for a remedy to a person aggrieved by the refusal of the Government to purchase the Kendu leaves. Section 7(3) deals with cases where leaves offered are suspected to be leaves from the Government forests and it lays down the manner in which such a case should be dealt with. Section 8 deals with the appointment of agents in respect of different units and it allows one person to be appointed for more than one unit. Under s. 9, every grower of Kendu leaves has to get himself registered in the prescribed manner if the quantity of leaves grown by him during the year is likely to exceed ten standard maunds. Section 10 authorises the Government or its officer or agent to sell or otherwise dispose of Kendu leaves purchased by them. Section 11 provides for the application of net profits which the State Government may make as a result of the operation of this Act; this profit has to be divided between the different Samitis and Gram Panchayats as prescribed by the said section. Section 12 deals with delegation of powers; s. 13 confers power of entry, search and seizure; s. 14 deals with penalty; s. 15 deals with offences and s. 16 makes the offences cognizable; Section 17 makes savings in respect of acts done in good faith; by section 18, Government is given

power to make rules; by section 19, the Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1955 is repealed in so far as it relates to Kendu leaves; and s. 20 gives the power to the State Government to remove doubts and difficulties. These are the broad features of the Act.

The first contention which has been raised by Mr. Pathak on behalf of the petitioner is that the creation of State monopoly in respect of the trade of purchase of Kendu leaves contravenes the petitioner's fundamental rights under Art. 19(1)(f) and (g). There has been some controversy before us as to whether the petitioner can claim any fundamental right under Art. 19(1)(g). The learned Attorney-General contended that the petitioner is merely a grower of Kendu leaves and as such, though he may be entitled to say that the restrictions imposed by the Act affect his right to dispose of his property under article 19(1)(f), he cannot claim to be a person whose occupation, trade or business has been affected. For the purpose of the present petition, we have, however, decided to proceed on the basis that the petitioner is entitled to challenge the validity of the Act both under Art. 19(1)(f) and Art. 19(1)(g); and that makes it necessary to examine the argument raised by Mr. Pathak that the creation of the State Monopoly contrivances Art. 19(1)(g).

Mr. Pathak suggests that the effect of the amendment made by the Constitution (first Amendment) Act, 1951 in Art. 19(6) is not to exempt the law passed for creating a Stage monopoly from the application of the rule prescribed by the first part of Art. 19(6). In other words, he suggests that the effect of the amendment is merely to enable the State legislature to pass a law creating a State monopoly, but that does not mean that the said law will still not have to be justified on the ground that the restrictions imposed by it are reasonable and are in the interests of the general public. On the other hand, the learned Attorney-General contends that the object of the amendment was to put the monopoly laws beyond the pale of challenge under Art. 19(1)(f) and (g). It would thus be noticed that the two rival contentions take two extreme positions. The petitioner's argument is that the monopoly law has to be tested in the light of Art. 19(6) : if the test is satisfied, then the contravention of Art. 19(1)(g) will not invalidate the law. On the other hand, the State contends that the monopoly law must be deemed to be valid in all its aspects because that was the very purpose of making the amendment in Art. 19(6).

Before proceeding to examine the merits of these contentions, it is relevant to recall the genesis of the amendment introduced by the Constitution (First Amendment) Act, 1951. Soon after the Constitution came into force, the impact of socio-economic legislation, passed by the legislature in the country in pursuance of their welfare policies, on the fundamental rights of the citizens in respect of property came to be examined by Courts, and the Articles on which the citizens relied were 19(1)(f) and (g) and 31 respectively. In regard to State monopolies, there never was any doubt that as a result of Entry 21 in List III both the State and the Union Legislatures were competent to pass laws in regard to commercial and industrial monopolies, combines and trusts, so that the legislative competence of the Legislatures to create monopolies by legislation could not be questioned. But the validity of such legislation came to be challenged on the ground that it contravened the citizen's rights under Art. 19(1)(f) and (g). As a typical case on the point, we may refer to the decision of the Allahabad High Court in Moti Lal v. The Government of the State of Uttar Pradesh (I.L.R. (1951) 1 All. 269.). The result of this decision was that a monopoly of transport sought to be created by the U.P. Government in favour of the State operated Bus Service, known as the Government Roadways, was struck down as unconstitutional, because it was held that such a monopoly totally deprived the citizens of their rights under Art. 19(1)(g). As a result of this decision it was realised by the Legislature that the legislative competence to create monopolies would not necessarily make monopoly laws valid if they contravened Art. 19(1). That is why Art.

19(6) came to be amended. Incidentally, it may be of interest to note that about the same time, the impact of legislative enactments in regard to acquisition of property on the citizens' fundamental rights to property under Art. 19(1)(f) also came for judicial review and the decisions of Courts in respect of the acquisition laws in turn led to the amendment of Art. 31 on two occasions; firstly, when the Constitution (First Amendment) Act was passed in 1951 and secondly, when the Constitution (Fourth Amendment) Act was passed in 1955.

Article 19(6) as amended reads thus :

> "Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, -
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> (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
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> (ii) the carrying on by the State or by corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

It would be noticed that the amendment provides, inter alia, that nothing contained in Art. 19(1)(g) will prevent the State from making any law relating to the carrying on by the State of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise; and this clearly means that the State may make a law in respect of any trade, business, industry or service whereby complete monopoly could be created by which citizens are wholly excluded from the trade, business, industry or service in question; or a law may be passed whereby citizens are partially excluded from such trade, business, industry or service; and a law relating to the carrying on of the business either to the complete or partial exclusion of citizens will not be affected because it contravenes Art. 19(1)(g). The question which arises for our decision is : what exactly is the scope and effect of this provision ?

In attempting to construe Art. 19(6), it must be borne in mind that a literal construction may not be quite appropriate. The task of construing important Constitutional provisions like Art. 19(6) cannot always be accomplished by treating the said problem as a mere exercise in grammar. In interpreting such a provision, it is essential to bear in mind the political or the economic philosophy underlying the provisions in question, and that would necessarily involve the adoption of a liberal and not a literal and mechanical approach to the problem. With the rise of the philosophy of Socialism the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the rationalist, nationalisation or State ownership is a matter of expediency dominated by considerations of economic efficiency and increased output of production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very must influenced by these considerations, and treated it a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic.

The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output.

The amendment made by the Legislature in Art. 19(6) shows that according to the Legislature, a law relating to the creation of State monopoly should be presumed to be in the interests of the general public. Art. 19(6)(ii) clearly shows that there is no limit placed on the power of the State in respect of the creation of State monopoly. The width of the power conferred on the State can be easily assessed if we look at the words used in the clauses which cover trade, business, industry or service. It is true that the State may, according to the exigencies of the case and consistently with the requirements of any trade, business, industry or service, exclude the citizens either wholly or partially. In other words, the theory underlying the amendment in so far as it relates to the concept of State monopoly, does not appear to be based on the pragmatic approach, but on the doctrinaire approach which socialism accepts. That is why we feel no difficulty in rejecting Mr. Pathak's argument that the creation of a State monopoly must by justified by showing that the restrictions imposed by it are reasonable and are in the interests of the general public. In our opinion, the amendment clearly indicates that State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of general public, so far as Art. 19(1)(g) is concerned.

The amendment made in Art. 19(6) shows that it is open to the State to make laws for creating State monopolies, either partial or complete, in respect of any trade, business, industry or service. The State may enter trade as a monopolist either for administrative reasons, or with the object of mitigating the evils flowing from competition, or with a view to regulate prices, or improve the quality of goods, or even for the purpose of making profits in order to enrich the State exchequer. The Constitution-makers had apparently assumed that the State monopolies or schemes of nationalisation would fall under, and be protected by Art. 19(6) as it originally stood; but when judicial decisions rendered the said assumption invalid, it was thought necessary to clarify the intention of the Constitution by making the amendment. It is because the amendment was thus made for purposes of clarification that it begins with the words "in particular". These words indicate that restrictions imposed on the fundamental rights guaranteed by Art. 19(1)(g) which are reasonable and which are in the interest of the general public, are saved by Art. 19(6) as it originally stood; the subject-matter covered by the said provision being justiciable, and the amendment adds that the State monopolies or nationalisation Schemes which may be introduced by legislation, are an illustration or reasonable restrictions imposed in the interests of the general public and must be treated as such. That is why the question about the validity of the laws covered by the amendment is no longer left to be tried in Courts. This brings out the doctrinaire approach adopted by the amendment in respect of a State monopoly as such.

This conclusion, however, still leaves two somewhat difficult questions to be decided; what does "a law relating to" a monopoly used in the amendment mean ? And what is the effect of the amendment on the other provisions of Art. 19(1) ? The Attorney-General contends that the effect of the amendment is that whenever any law is passed creating a State monopoly, it will not have to stand the test of reasonableness prescribed by the first part of Art. 19(6) and its reasonableness or validity cannot be examined under any other provision of Art. 19(1). Taking the present Act, he urges that if the State monopoly is protected by the amendment of Art. 19(6), all the relevant provisions made by the Act in giving effect to the said monopoly are also equally protected and the petitioners cannot be heard to challenge their validity on any ground. What is protected by the amendment must be held to be constitutionally valid without being tested by any other provisions of Art. 19(1). That, in substance, is the position taken by the learned Attorney-General.

In dealing with the question about the precise denotation of the clause "a law relating to", it is necessary to bear in mind that this clause occurs in Art. 19(6) which is, in a sense, an exception to the main provision of Art. 19(1)(g). Laws protected by Art. 19(6) are regarded as valid even though they impinge upon the fundamental right guaranteed under Art. 19(1)(g). That is the effect of the scheme contained in Art. 19(1) read with clauses (2) to (6) of the said Article. That being so, it would be unreasonable to place upon the relevant clause an unduly wide and liberal construction. "A law relating to" a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Art. 19(6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Art. 19(6). In other words, the effect of the amendment made in Art. 19(6) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may by incidental do not fall under the latter part of Art. 19(6) and would inevitably have to satisfy the test of the first part of Art. 19(6).

The next question to consider is : what is the effect of the amendment on the other fundamental rights guaranteed by Art. 19(1) ? It is likely that a law creating a State monopoly may, in some cases, affect a citizens rights under Art. 19(1)(f) because such a law may impinge upon the citizens' right to dispose of property. Is the learned Attorney-General right when he contends that laws protected by the latter part of Art. 19(6) cannot be tested in the light of the other fundamental rights guaranteed by Art. 19(1) ? The answer to this question would depend upon the nature of the law under scrutiny. There is no doubt that the several rights guaranteed by the 7 sub-clauses of Art. 19(1) are separate and distinct fundamental rights and they can be regulation only if the provisions contained in clauses (2) to (6) are respectively satisfied. But in dealing with the question as to the effect of a law which seeks to regulate the fundamental right guaranteed by Art. 19(1)(g) on the citizen's right guaranteed by Art. 19(1)(f), it will be necessary to distinguish between the direct purpose of the Act and its indirect or incidental effect. If the legislation seeks directly to control the citizens' right under Art. 19(1)(g), its validity has to be tested in the light of the provisions contained in Art. 19(6), and if such a legislation, as for instance, a law creating a State monopoly, indirectly or incidentally affects a citizen's right under any other clause of Art. 19(1) as for instance, Art. 19(1)(f), that will not introduce any infirmity in the Act itself. As was observed by Kania, C.J., in A.K. Gopalan v. The State of Madras ([1950] S.C.R. 88, 101.), if there is a legislation directly attempting to control a citizen's freedom of speech or expression, or his right to assemble peaceably and without arms etc., the question whether that legislation is saved by the relevant clause of Art. 19 will arise. If however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance, for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Art. 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detenue's life.

These observations were subsequently adopted by Patanjali Sastri, J., in Ram Singh. v. The state of Delhi ([1951] S.C.R. 451, 456.) who added that in Gopalan's case the majority view was that a law which authorises deprivation of personal liberty did not fall within the purview of Art. 19 and its

validity was not to be judged by the criteria indicated in that Article but depended on its compliance with the requirements of Articles 21 and 22, and since s. 3 satisfied those requirements, it was constitutional.

The same view has been accepted by this Court in Express Newspapers (Private) Ltd. v. The Union of India ([1959] S.C.R. 12, 128-130.) as well as in The State of Bombay v. R.M.D Chamarbaugwala ([1957] S.C.R. 874, 927.). Therefore, in dealing with the attack against the validity of a law creating state monopoly on the ground that its provisions impinge upon the other fundamental rights guaranteed by Art. 19(1), it would be necessary to decide what is the purpose of the Act and its direct effect. If the direct effect of the Act is to impinge upon any other right guaranteed by Art. 19(1), its validity will have to be tested in the light of the corresponding clauses in Art. 19; if the effect on the said right is indirect or remote, then its validity cannot be successfully challenges.

It will be recalled that clause (6) is co-related to the fundamental right guaranteed under Art. 19(1)(g) as other clauses are co-related to the other fundamental rights guaranteed by Art. 19(1)(a) to (f), and so, the protection afforded by the said clause would be available to the impugned statute only in resisting the contention that it violates the fundamental right guaranteed under Art. 19(1)(g). If the statute, in substance, affects any other right not indirectly but directly, the protection of clause 19(6) will not avail and it will have to be sustained by reference to the requirements of the corresponding clauses in Art. 19. The position, therefore, is that a law creating a state monopoly in the narrow and limited sense to which we have already referred would be valid under the latter part of Art. 19(6), and if it indirectly impinges on any other right, its validity cannot be challenged on that ground. If the said law contains other incidental provisions which are not essential and do not constitute an integral part of the monopoly created by it, the validity of those provisions will have to be tested under the first part of Art. 19(6), and if they directly impinge on any other fundamental right guaranteed by Art. 19(1), the validity of the said clauses will have to be tested by reference to the corresponding clauses of Art. 19. It is obvious that if the validity of the said provisions has to be tested under the first part of Art. 19(6) as well as Art. 19(5), the position would be the same because for all practical purposes, the tests prescribed by the said two clauses are the same. In our opinion, this approach introduces a harmony in respect of the several provisions of Art. 19 and avoids a conflict between them.

In this connection, it is necessary to add that in a large majority of cases where State monopoly is created by statute, no conflict would really arise, e.g., where under State monopoly, the State purchases raw material in the open market and manufactures finished goods, there would hardly be an occasion for the infringement of the citizens right under Art. 19(1)(f). Take, for instance, the State monopoly in respect of road transport to air transport; a law relating to such a monopoly would not normally infringe the citizen's fundamental right under Art. 19(1)(f). Similarly, a State monopoly to manufacture steel, armaments, or transport vehicles, or railway engines and coaches, may be provided for by law which would normally not impinge on Art. 19(1)(f). If the law creating such monopolies were, however, to make incidental provisions directly impinging on the citizens' rights under Art. 19(1)(f), that would be another matter.

What provisions of the impugned statute are essential for the creation of the monopoly, would always be a question of fact. The essential attributes of the law creating a monopoly will vary with the nature of the trade or business in which the monopoly is created; they will depend upon the nature of the commodity, the nature of commerce in which it is involved and several other circumstances. In the present case, the State monopoly has been created in respect of Kendu leaves, and the main point of dispute between the parties is about the fixation of purchase price which has

been provided for by s. 4. Mr. Pathak contends that the fixation of purchase price is not essential for the creation of monopoly, whereas the learned Attorney-General argues that monopoly could not have functioned without the fixation of such price. We are not prepared to accept the argument that the fixation of purchase price in the context of the present Act was an essential feature of the monopoly. It may be that the fixing of the said price has been provided for by s. 4 in the interests of growers of Kendu leaves themselves, but that is a matter which would be relevant in considering the reasonableness of the restriction imposed by the section. But take a hypothetical case where in creating a State monopoly for purchasing a commodity like Kendu leaves, the law prescribes a purchase price at an unreasonably low rate, that cannot be said to be an essential part of the State monopoly as such, and its reasonableness will have to be tested under Art. 19(1)(g). On the facts of this case and in the light of the commodity in respect of which monopoly is created, it seems difficult to hold that the State monopoly could not have functioned without fixing the purchase price. We are not suggesting that fixing prices would never be an essential part of the creation of State monopoly though, prima facie, it seems doubtful whether fixing purchase price can properly form an integral part of State monopoly; what we are holding in the present case is that having regard to the scheme of the State monopoly envisaged by the Act, s. 4 cannot be said to be such an essential part of the said monopoly as to fall within the expression 'law relating to" under Art. 19(6). Therefore, we are satisfied that the validity of s. 4 must be tested in the light of the first part of Art. 19(6) so far as the petitioner's rights under Art. 19(1)(g) are concerned, and under Art. 19(5) so far as his rights under Art. 19(1)(f) are concerned.

Thus considered, there can be no difficulty in upholding the validity of section 4. As we have just indicated, if the legislature had allowed the State monopoly to operate without fixing the prices, it would have meant hardship to the growers and undue advantage to the State. If the ordinary law of demand and supply was allowed to govern the prices, in all probability the said prices would have worked adversely to the interests of the growers and to the benefit of the State in the case of perishable commodities like Kendu leaves. That is why the legislature has deliberately provided for the fixation of prices and prescribed the machinery in that behalf. It is true that the prices fixed are not the minimum prices; but the fixing of minimum prices would have served no useful purpose when a State monopoly was being created, and so, prices which can be regarded as fair are intended to be fixed by s. 4. A representative advisory Committee has to be appointed and it is in consultation with the advice of the said Committee that prices have to be fixed. In fact, the present prices have been fixed according to the recommendations made by the said Committee. Thus, it is clear that the object of fixing the prices was to help the growers to realise a fair price. It is nobody's case that the prices are unduly low or compare unfavourably with the prices prevailing in the locality in the previous years. Therefore, we fell no hesitation in holding that restrictions in regard to the fixing of price prescribed by s. 4 are reasonable and in the interests of the general public both under Art. 19(5) and Art. 19(6). The result is that the challenge to the validity of section 4 fails.

At this stage, we may refer to four decisions of this Court in which the question about the construction of Art. 19(6) has been incidentally considered. In Saghir Ahmad v. The State of U.P. ([1955] 1 S.C.R. 707, 727.), this Court was called upon to consider the validity of the relevant provisions of the U.P. Road Transport Act (No. II of 1951) and the question had to be decided in the light of Art. 19(6) as it stood before the amendment. But at the time when the judgment of this Court was pronounced, the Amendment Act had been passed, and Mukherjea, J., who spoke for the Court, referred to this amendment incidentally. "The result of the amendment", observed the learned Judge, "is that the State would not have to justify such action as reasonable at all in a Court of law and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Art. 19(1)(g) of the Constitution. It is quite true that if the present statute was passed after the

coming into force of the new clause in Art. 19(6) of the Constitution, the question of reasonableness would not have arisen at all and the appellants' case on this point, at any rate, would have been unarguable." While appreciating the effect of these observations, however, we have to bear in mind the fact that the effect of the amendment did not really fall to be considered and the impact of the amendment in Art. 19(6) on the right under Art. 19(1)(f) has not been noticed.

In The Parbhani Transport Co-operating Society Ltd. v. The Regional Transport Authority Aurangabad ([1960] 3 S.C.R. 177, 187), this Court has observed that Art. 19(6) by providing that nothing in Art. 19(1)(g) shall affect the application of any existing law in so far as it relates to, or prevents the State from making any law relating to the carrying on by the State of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise, would seem to indicate that the State may carry on any business either as a monopoly, complete or partial, or in competition with any citizen and that would not have the effect of infringing any fundamental rights of such citizen. It is true that the last part of the statement refers to any fundamental rights of the citizen, but that, in the context, cannot be taken to mean a decision that a right under Art. 19(1)(f) would necessarily fall within the scope of the said observation.

In Dosa Satyanarayanamurty v. The Andhra Pradesh State Road Transport Corporation ([1961] 1 S.C.R. 642.), this Court has observed that sub-clause (ii) of Art. 10(6) is couched in very wide terms. Under it, the State can make law for carrying on a business or service to the exclusion, complete or partial, of citizens or otherwise..... There are, therefore, no limitations on the State's power to make laws conferring monopoly on it in respect of an area, and person or persons to be excluded. (p. 649).

To the same effect are the relevant observations made by this Court in the case of H.C. Narayanappa v. The State of Mysore ([1960] 3 S.C.R. 742, 752.).

We must now examine the validity of the argument urged by Mr. Pathak that the Act is bad because it seeks to create a monopoly in favour of individual citizens described by the Act as 'agents'. For deciding this question, we must revert once again to the amendment made in Art. 19(6). The argument is that though the State is empowered to create State monopoly by law, the trade in respect of which the monopoly is sought to be created must be carried on by the State or by a corporation owned or controlled by the State. There can be no doubt that though the power to create monopoly is conferred on the legislatures in very wide terms and it can be created in respect of any trade, business, industry or service, there is a limitation imposed at the same time and the limitation is implicit in the concept of State monopoly itself. If a State monopoly is created, the State must carry on the trade, or the State may carry it on by a corporation owned or controlled by it. Thus far, there is no difficult. Mr. Pathak, however, contends that the State cannot appoint any agents in carrying on the State monopoly, whereas the learned Attorney-General urges that the State is entitled not only to carry on the trade by itself or by its officers serving in its departments, but also by agents appointed by it in that behalf; and in support of his argument that agents can be appointed, the learned Attorney-General suggests that persons who can be treated as agents in a commercial sense can be validly appointed by the State in working out its monopoly. We are not inclined to accept either the narrow construction pressed by Mr. Pathak, or the broad construction suggested by the learned Attorney-General. It seems to us that when the State carries on any trade, business or industry, it must inevitably carry it on either departmentally or through its officers appointed in that behalf. In the very nature of things, the State as such, cannot function without the help of its servants or employees and that inevitably introduces the concept of agency in a narrow and limited sense. If the State cannot act without the aid and assistance of its employees or servants, it would be difficult to

exclude the concept of agency altogether. Just as the State can appoint a public officer to carry on the trade or its business, so can it appoint an agent to carry on the trade on its behalf. Normally and ordinarily, the trade should be carried on departmentally or with the assistance of public servants appointed in that behalf. But there may be some trades or businesses in which it would be inexpedient to undertake the work of trade or business departmentally or with the assistance of State servants. In such cases, it would be open to the State to employ the services of agents, provided the agents work on behalf of the State and not for themselves. Take the case of Kendu leaves with which we are concerned in the present proceedings. These leaves are not cultivated but grow in forests and they are plucked during 3 to 4 months every year, so that the trade of purchasing and selling them is confined generally to the said period. In such a case, it may not be expedient for the State always to appoint Government servants to operate the State monopoly, and agency would be more convenient, appropriate and expedient. Thus considered, it is only persons who can be called agents in the strict and narrow sense to whom the working of the State monopoly can be legitimately left by the State. If the agent acquires a personal interest in the working of the monopoly, ceases to be accountable to the principal at every stage, is not able to bind the principal by his acts, or if there are any other terms of the agency which indicate that the trade or business is not carried on solely on behalf of the State but at least partially on behalf of the individual concerned, that would fall outside Art. 19(6)(ii). Therefore, in our opinion, if a law is passed creating a State monopoly and the working of the monopoly is left either to the State or to the officers of the State appointed in that behalf, or to the department of the State, or to persons appointed as agents to carry on the work of the monopoly strictly on behalf of the State, that would satisfy the requirements of Art. 19(6)(ii). In other words, the limitations imposed by the requirement that the trade must be carried on by the State or by a corporation owned or controlled by the State cannot be widened and must be strictly construed and agency can be permitted only in respect of trades or business where it appears to be inevitable and where it works within the well recognised limits of agency. Whether or not the operation of State monopoly has been entrusted to an agent of this type, will have to be tried as a question of fact in each case. The relationship of agency must be proved in substance, and in deciding the question, the nature of the agreement, the circumstances under which the agreement was made and the terms of the agreement will have to be carefully examined. It is not the form, but the substance that will decide the issue. Thus considered, we do not think that s. 3 is open to any challenge. Section 3 allows either the Government or an officer of the Government or an officer of the Government authorised in that behalf or an agent in respect of the unit in which the leaves have grown, to purchase or transport Kendu leaves. We are satisfied that the two categories of persons specified in clauses (b) and (c) are intended to work as agents of the Government and all their actions and their dealings in pursuance of the provisions of the Act would be actions and dealings on behalf of the Government and for the benefit of the Government. Mr. Pathak's contention that the persons specified in clauses (b) and (c) are intended by the Act to work on their own account seems to us to be inconsistent with the object of the section and the plain meaning of the words used in the relevant clauses. We wish to make it clear that we uphold the validity of section 3 because we are satisfied that clauses (b) and (c) of the said section have been added merely for clarification and are not intended to and do not include any forms of agency which would have been outside the provision of s. 3 if the said two clauses had not been enacted. If section 3 is valid, then s. 8 which authorises the appointment of agents must also be held to be valid.

In the petition, the validity of sections 5, 6 and 9 was challenged on the ground that they contravene Art. 14. But as we have already mentioned, no contention has been urged before us in support of the plea that Art. 14 has been contravened by any section of the Act. The petition further avers that the Act was a colourable piece of legislation, but that argument really proceeded on the basis whether

the agreement entered into by the State Government with the agents to which we shall presently refer correctly represents the effect of ss. 3 and 8 of the Act. So far as the Act is concerned, the two sections which were seriously challenged were sections 3 and 4 and as we have already held, the provisions in these two sections are not shown to be invalid; and so, the argument that the Act is colourable, has no substance. The notifications which were impugned have also been issued under the relevant provisions of the Act and their validity also cannot be effectively challenged once we reach the conclusion that the Act is good and valid. We have already observed that the petitioner has not specifically and clearly alleged that the price actually fixed under s. 4 is grossly unfair and as such, contravenes his rights under Art. 19(1)(f). No evidence has been adduced before us to show that the price is even unreasonable. On the other hand, the counter affidavit filed by respondent No. 2 would seem to show that the price has been fixed in accordance with the recommendations made by the Advisory Committee and it does not compare unfavourably with the price prevailing in the past in this locally in respect of Kendu leaves. Therefore, the main grounds on which the petitioner came this Court to challenge the validity of the Act fail.

There are, however, two other points which have been urged before us and on which the petitioner is entitled to succeed. The first ground relates to the agreement actually entered into between respondent No. 1 and the agents. This agreement consists of ten clauses and it has apparently been drawn in accordance with Rule 7(5) of the Rules framed under the Act. It appears that on January 9, 1962, the Rules framed by the State Government by virtue of the power conferred on it by s. 18 of the Act were published. Rule 7 deals with appointment of Agent. Rule 7(2) prescribes the form in which an application for appointment as agent has to be made. Rule 7(5) provides that on appointment as agent the person appointed shall execute an agreement in such form as Government may direct within ten days of the date of receipt of the order of appointment failing which the appointment shall be liable to cancellation and the amount deposited as earnest money shall be liable to forfeiture. It is significant that though the Form for an application which has to be made by a person applying for agency is prescribed, no form has been prescribed for the agreement which the State Government enters into with the agent. The agreement is apparently entered into on an ad hoc basis and that clearly is unreasonable. In our opinion, if the State Government intends that for carrying on the State monopoly authorised by the Act agents must be appointed, it must take care to appoint agents on such terms and conditions as would justify the conclusion that the relationship between them and the State Government is that of agents and principal; and if such a result is intended to be achieved, it is necessary that the principal terms and conditions of the agency agreement must be prescribed by the rules. Then it would be open to the citizens to examine the said terms and conditions and challenge their validity if they contravene any provisions of the Constitution, or are inconsistent with the provisions of the Act itself. Therefore, we are satisfied that the petitioner is entitled to contend that Rule 7(5) is bad in that it leaves it to the sweet will and pleasure of the officer concerned to fix any terms and conditions on an ad hoc basis that is beyond the competence of the State Government and such terms and conditions must be prescribed by the rules made under section 18 of the Act.

That takes us to the terms and conditions of the agreement which has been produced before us. These terms indicate a complete confusion in the mind of the person who drafted them. Some of them are terms which would be relevant in the case of agency, while others would be relevant and material if a contract of Government forest was made in favour of the party signing those conditions; and some others would indicate that the person appointed as an agent is not an agent at all but is a person in whom personal interest is created in carrying on the so called agency work. Clause 4 of the agreement provides for the payment which the agent has to make in respect of the Kendu leaves from private lands as well as from Government lands. It is not easy to appreciate the

precise scope of the provisions of the respective sub-clauses of cl. 4 and their validity. But, on the whole, it does appear that after the agent makes the payment prescribed by the relevant clauses to the Government, he is likely to keep some profit to himself; and that would clearly show that the relationship is not of the type which is permissible under Art. 19(6)(ii), Under clause 4(iii), the agent has to pay a sum of Rs. 5/- per bag to the Government as consideration for being permitted by Government to enter into and collect leaves from Government lands and forests. It is remarkable that in the absence of any specific rule, the amount to be paid per bag can be determined differently from place to place and that is a serious anomaly. It is also not clear how this amount of Rs. 5/- per bag has been determined, and in the absence of any explanation it would be difficult to accept the plea of the learned Attorney-General that this amount has been fixed after making calculations about the profits which the agent was likely to secure and the price which the total produce of the forest was likely to acquire on an average basis. Under clause 4(v), it is conceded that the agent would be entitled to make some profits in some cases. Clause 4(vi) entitles the agent to claim deductions for the expenses and commission that he may be entitled to in respect of the number of bags of processed leaves; and it requires him to pay to Government the profits accruing from the trading in the leaves collected in four equal instalments in the manner specified. Under clause 4(ix) the agent has to finance all transactions involved in purchase, collections, storage, processing, transport and disposal of the Kendu leaves purchased or collected in the Unit. Then there are certain sub-clauses under this clause which would be appropriate if it was a matter of a contract between the Government and a forest contractor. Clause 4(ix)(i) requires the agent to keep a register of daily accounts. Under cl. 4(ix)(p) during the subsistence of the agreement, the agent is responsible for the disposal of the Kendu leaves collected or purchased by him and the Government shall not bear any liability whatsoever, except as indicated in sub-clause (vii) of cl. 4(ix).

Clause 6 provides that subject to other terms and conditions, all charges and outgoings shall be paid by the agent and he shall not be entitled to any compensation whatsoever for any loss that may be sustained by reasons of fire, tempest, disease, pest, flood, draught or other natural calamity, or by any wrongful act committed by any third party or for any loss sustained by him through any operation undertaken in the interest of fire conservancy. This clause clearly shows that the agent becomes personally liable to bear the loss which, under the normal rules of agency, the principal would have to bear. We have not thought it necessary to refer to all the clauses in detail because we are satisfied that even if the agreement is broadly considered, it leaves no room for doubt that the person appointed under the agreement to work the monopoly of the State is not an agent in the strict and narrow sense of the term contemplated by Art. 19(6)(ii). The agent appointed under this agreement seems to carry on the trade substantially on his own account, subject, of course, to the payment of the amount specified in the contract. If he makes any profit after complying with the said terms, the profit is his; if he incurs any loss owing to circumstances specified in clause 6, the loss is his. In terms, he is not made accountable to the State Government; and in terms, the State Government is not responsible for his actions. In such a case, it is impossible to hold that the agreement in question is consistent with the terms of s. 3 of the Act. No doubt, the learned Attorney-General contended that in commercial transactions, the agreement in question may be treated as an agreement of agency, and in support of this argument he referred us to the decision in Ex parte Bright In re Smith [(1879) 10 L.R. Ch. D. 566.], and Weiner v. Harris [[1910] 1 K.B. 285.]. It is true that an agent is entitled to commission in commercial transactions, and so, the fact that a person earns commission in transactions carried on by him on behalf of another would not destroy his character as that other person's agent. Cases of Delcredere agents are not unknown to commercial law. But we must not forget that we are dealing with agency which is permissible under Art. 19(6)(ii), and as we have already observed, agency which can be legitimately allowed under

Art. 19(6)(ii) is agency in the strict and narrow sense of the term; it includes only agents who can be said to carry on the monopoly at every stage on behalf of the State for its benefit and not for their own benefit at all. All that such agents would be entitled to would be remuneration for their work as agents. That being so, the extended meaning of the word "agent" in a commercial sense on which the learned Attorney-General relies is wholly inapplicable in the context of Art. 19(6)(ii). Therefore, we must hold that the agreement which has been produced before us is invalid inasmuch as it is wholly inconsistent with the requirements of s. 3(1)(c).

The result is, the petitioner succeeds only partially inasmuch as we have held that Rule 7(5) is bad and the agreement is invalid, and that means that the State Government cannot implement the provisions of the Act with the assistance of agents appointed under the said invalid agreement. We accordingly direct that a direction or order to that effect should be issued against the State Government. The main contentions raised by the petitioner against the validity of the Act and its relevant provisions on which specific reliefs were claimed, however, fail. The petition is accordingly partially allowed. There would be no order as to costs.

Petition allowed in part.

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