

Rashbihari Panda Etc

Vs

State of Orissa

Civil Appeal Nos. 1472 to 1474 of 1968

(CJI M. Hidayatullah, J.C. Shah, V. Ramaswami - I, G.K. Mitter, A.N. Grover JJ)

16.01.1969

JUDGMENT

SHAH, J. -

1. These appeals arise out of orders passed in petitions moved before the High Court of Orissa challenging the scheme adopted by the Government of Orissa for sale of Kendu leaves in which the State has assumed a monopoly of trading by the Orissa Kendu Leaves (Control of Trade) Act, 28 of 1961.

2. Kendu tree is a wild growth. Its leaf is used mainly in the manufacture of bidis. To regulate the trade in Kendu leaves the State of Orissa had adopted diverse executive and legislative measures. In exercise of the powers conferred by Section 3(1) of the Orissa Essential Article Control and Requisitioning (Temporary powers) Act, 1947, the Government of Orissa issued the Orissa Kendu Leaves (Control and Distribution) Order, 1949, providing for the issue of licences to persons trading in Kendu leaves. The District Magistrate were authorised to fix the minimum rates for purchase of Kendu leaves and the order provided that the licences shall purchase Kendu leaves from the pluckers or owners of private trees and forest at rates not below the minimum prescribed. A trader in Kendu leaves challenged the validity of the Act and the order before the High Court of Orissa on the plea that the State Legislature was incompetent to enact the Act and that in any event the Act and the order infringed the guarantee of fundamental freedom to carry on business under Article 19(1)(g) of the Constitution. A Division Bench of the Orissa High Court upheld the validity of the Act : Jagdish Patel v. Patel Tobacco Company. (AIR (1952) Orissa 260) The court observed that the main purpose of the order was to prevent indiscriminate and unrestricted competition in the trade in Kendu leaves and to protect the growers and pluckers from exploitation.

3. The Order of 1949 was replaced by another order issued in 1960, but without any substantial changes in its principal provisions. Thereafter, the State Legislature enacted the Orissa Kendu Leaves (Control of Trade) Act, 28 of 1961. By Section 3 of the Act no person other than (a) the Government; (b) an officer of Government authorised in that behalf; (c) an agent in respect of the unit in which the leaves have grown, shall purchase or transport Kendu Leaves. By Section 4, it was enacted that the Government shall, after consultation with the Advisory Committee, fix the price at which Kendu leaves shall be purchased by any officer or agent from growers of Kendu leaves during any year. By Section 8, the Government was authorised to appoint agents for different units to purchase Kendu leaves. Section 10 provided that :

"Kendu leaves purchased by Government or by their officers or agents under this Act shall be sold or otherwise disposed of in such manner as Government may direct.

Out of the net profit derived by the Government, from the trade in Kendu leaves under the Act by Section 11 an amount not less than one half was to be paid to Samitis and Gram Panchayats. Sections 14, 15 and 16 dealt with penalties, attempts and abetment of offences and procedure of courts. Section 18 conferred upon the Government power to make rules for carrying out the purposes of the Act.

4. Agents were appointed by the Government of Orissa to purchase Kendu leaves. The agents were authorised under the agreements to purchase the Kendu leaves and also to trade in the Kendu leaves purchased.

5. A grower of Kendu leaves moved a petition in this court contending that the principal provisions of the Act infringed his fundamental rights under Articles 19(1)(f) and (g) and Article 14. He challenged Section 3 and 4 and Rule 7(5), as infringing the fundamental right under Article 19(1)(f) and (g) of the Constitution and Sections 5, 6, and 9 as contravening the equality clause of the Constitution.

This court held in *Akadash Padhan v. The State of Orissa* ((1963) Supp 2 SCR 691) that the Orissa Kendu (Control of Trade) Act, 1961 was a valid piece of legislation, and creation of a State monopoly in Kendu leaves was protected by Article 19(6) as amended by the Constitution (First Amendment) Act, 1951. In the opinion of the court, fixation of price prescribed by Section 4 was reasonable and in the interest of the general public both under Article 19(5) and Article 19(6) and Section 4 of the Act was on that account valid. The court further held that Section 3 which allowed the Government or an officer of the Government authorised in that behalf or an agent in respect of the unit in which the leaves were grown, to purchase or transport Kendu leaves for and on behalf of the Government, was not open to attack. But in the view of the court the categories of persons mentioned in clauses (b) and (c) of Section 3, i.e. officers of the Government and agents were intended to work for the Government and all their actions and dealings in pursuance of the provisions of the Act had to be actions and dealings on behalf of and for the benefit of the Government and since under the agreement obtained from the agent under Rule 7(5) to work the monopoly of the State, the appointees were not made agents in the strict sense of the term and were appointed to carry on trade on their own account, the agreement were invalid. The court accordingly held that the State Government was incompetent to implement the provisions of the Act through the agents appointed under those agreements.

6. Thereafter the Government of Orissa made some changes in the machinery for implementation of the monopoly and entered into agreements of sale of Kendu leaves after inviting tenders from traders. Even against this scheme objections were raised. It was claimed by persons interested in the production and trade in Kendu leaves that the Government of Orissa merely resorted to a device of introducing purchasers who were mere associates or nominees of the "so called agents", and that the position remained practically the same as in the days before the judgment of this Court.

7. On February 2, 1966, the Government of Orissa invited tenders from persons desirous of purchasing Kendu leaves purchased or collected by Government or by their officers or agents under the provisions of the Orissa Kendu Leaves (Control of Trade) Act, 1961, in the units as constituted under Section 5 of the Act. In the last paragraph of the tender notice it was stated :

"If the person appointed as purchaser during the currency of his agreement in respect of any unit duly observes and performs all the terms and conditions to the satisfaction of the Government and if the Government are satisfied that the purchaser has been prompt in taking delivery of leaves and making payments, the Government may grant to the purchaser a renewal of his appointment for one year on such terms and conditions as may be mutually agreed upon."

8. During the years 1966 and 1967 the prices of Kendu leaves ruled very high and when sales were effected on behalf of the Government of Orissa in certain cases by public auctions, prices considerably in excess of those at which tenders were accepted were realized. Early in 1968 letters were addressed to certain traders intimating that it had been decided by the Government of Orissa to renew "leases of Kendu leaf units" held by them for the year 1968 if they accepted the terms set out therein. Under this scheme the Government offered to these licensees who in their view had worked satisfactorily in the previous year and had paid the amounts due from them regularly to continue their licences with the added provision that the agents with whom they had been working in 1967 will also work during 1968. The link between the agent and the purchaser which had been the subject-matter of agitation in previous years, it was claimed, was extended by the scheme.

9. On January 24, 1968, a petition was moved by Rashbihari Panda in the High Court of Orissa under Article 226 of the Constitution challenging the action of the Government. The Government, it appears, had second thoughts and the offers to renew the previous licences were withdrawn and the licensees were informed that the Government had decided to invite offers for advance purchases from persons who had purchased Kendu leaves from individual units during the year 1967 and had not committed default in payment of the dues. Other writ petitions were filed challenging the legality of the new method adopted by the State Government of offering to enter into agreements for advance purchases of Kendu leaves by private offers in preference to open competition.

10. It was urged on behalf of the petitioners that in seeking to enter into agreements for advance purchase contract for Kendu leaves by private negotiation the State Government sought to support their party interests in preference to public benefit envisaged by the State monopoly, and that the so-called State monopoly trade in Kendu leaves "was a colourable device to make it appear constitutional and permissible under Article 19(6)(ii) Constitution", whereas in truth it was intended to benefit only the supporters of the party in power, and the scheme on that account "was a fraud on the Constitution". The new scheme it was said, was devised for the purpose of increasing the party funds to the detriment of public revenue, and on that account the act of the State Government was "mala fide and unconstitutional". The petitioners claimed that the Government of Orissa had classified the units into five sections raising the royalty or share of profit from the purchaser from Rs. 44/- to a maximum amount of Rs. 64/- whereas the offer of one of the petitioners who offered Rs. 100/- per bag in addition to the rates offered by the Government by a telegram early in January, 1968 and followed by a confirmatory letter, was not accepted. It was further said that an offer made by a manufacturer of bidis to purchase the entire crop for a total amount of rupees three crores was also not accepted.

11. On Behalf of the State it was submitted that till 1967 no rate was fixed for dried and processed leaves in the hands of the growers but when the new ministry assumed office in 1967, the minimum price was fixed at Rs. 35/- per bag processed leaves in the hands of the growers, which was later raised to Rs. 45/- per bag, and the remuneration payable to pluckers was also raised under orders issued by the Government, and as a result thereof it was anticipated that the pluckers and growers would earn Rs. 47 lakhs in addition to the amount they had earned in 1967; that the scheme

of making an offer to establish licensees was evolved with a view to "close the channels of corruption and the policy had eliminated all sorts of negotiations or personal approach in the matter of sale of Kendu leaves by the Government", and after careful consideration, the Government determined the fair price that may be realized by selling Kendu leaves; that the dealers who were given contracts for two years by the previous ministries had been offered options to purchase the leaves at rates higher than those obtaining during the last few years and that under the new policy the profit earned rose from Rs. 1,00,75,000/- in 1962-63 to Rs. 1,91,00,000/- in 1968-69. It was also submitted that under Section 10 of the Kendu Leaves (Control of Trade) Act, the Government was authorised to dispose of the Kendu leaves in such manner as the Government may direct, and thereby the authority vested in the Government to use their discretion "was not amenable to the writ jurisdiction of the High Court" and that from the data furnished it was clear that the Government had acted in the best interests of the State and the "figures showed their bona fides in the matter".

12. The High Court was of the view that the State having assumed monopoly of trading in Kendu leaves was alone entitled to purchase the Kendu leaves from the primary producers, and was by Section 10 authorised to dispose of the leaves "in such manner as the Government may direct". Section 10, in the view of the High Court, placed no restriction on the manner in which the Government may sell Kendu leaves, and the only question which the Court had to consider was whether in adopting the new scheme of offering to enter into advance purchase contracts by private negotiations for selling Kendu leaves in 1968 the Government had acted bona fide. The High Court observed :

"..... we hold that the Government's exercise of the power or discretion under Section 10, cannot be said to be arbitrary as it is open to the Government to direct the sale or disposal of Kendu leaves in any manner they may direct-either by advance purchase contracts by private negotiations or by public auction or by tender; it is not a case where the State Government has exercised this power or discretion without jurisdiction. The Court is not concerned with the propriety of the Government's action in adopting the particular manner of sale or disposal as it purported to direct. Evidently, the Government acted, as any prudent businessman would do for the purpose of getting the maximum revenue-not profit-from the trade in Kendu leaves. Government's direction, in exercise of the power of discretion conferred on them under Section 10, as to whether a particular manner of sale or disposal will be suitable in a particular year, will depend entirely on their subjective satisfaction, upon consideration of a number of factors which may vary from year to year. Such direction by the State Government as to the particular manner of sale or disposal in a particular year, as dependent on the subjective satisfaction of the Government as aforesaid, is not justiciable. There is also nothing on record to show lack of bona fides on the part of the State Government in adopting the manner it did private negotiations - in the matter of sale of Kendu leaves in 1968; nor have we been shown any material to hold that its action was capricious or arbitrary or in excess of its jurisdiction."

13. Article 19(1)(f) guarantees to confer upon the citizens the right to acquire, hold and dispose of property, and Article 19(1)(g) guarantees the right to practise any profession, or to carry on any occupation, trade or business. The right under clause (f) is subject to reasonable restrictions which the State may impose on the exercise of the right in the interests of the general public or for the protection of the interests of any Scheduled Tribe Clause (6) of Article 19 which was amended by the Constitution (First Amendment) Act, 1951, sets out the restrictions which may be imposed upon the right to practise a profession or to carry on any occupation, trade or business. It states :

"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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(ii) the carrying on by the State, or by a 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."

In Akadasi Padhan's case, ((1963) Supp 2 SCR 691) this court held that by the amendments in Article 19(6) it was intended that the State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of the general public; that the expression "law relating to" occurring in clause (ii) means "essential and basic provisions" enacted to give effect to the monopoly, i.e. provisions "integrally and essentially connected with the creation of the monopoly"; that the provisions which are incidental or subsidiary to the creation or operation of the monopoly must satisfy the test of the main clause, and that if the law infringes any other fundamental right in clause (1) of Article 19 it must be tested under the appropriate provision governing it. The Court accordingly held that Section 3 and 4 of the Act were valid but declined in substance to give effect to the monopoly because the agents appointed were not agents of the Government merely for purchasing Kendu leaves but were authorised to carry on trade in leaves purchased on their own account. The operation of the State monopoly was in the view of the court to give rise to a monopoly in favour of the agents which had not the protection of Article 19(6)(ii). The Court observed that the appointee must be "an agent of the Government strictly so-called" acting for and on behalf of the Government and not on his own behalf. The Court while upholding the grant of monopoly by Section 3 of the Act to the Government to carry on the business of purchasing Kendu leaves was of the view that the law cannot be used by the State for the private benefit of agents; it must only be administered for the benefit of the general public and any arrangement in which under the guise of a monopoly the State permitted a set of persons to make profit for themselves by carrying on business in Kendu leaves on their own behalf was invalid.

14. It is urged by the appellants that the machinery devised by the Government for sale of Kendu leaves in which they had acquired a monopoly to trade was violative of the fundamental rights guaranteed under Article 14 and 19(1)(g) of the Constitution. It is said that the purchasers are merely nominees of the agents. It is also claimed that after this Court struck down a scheme under which the agents were to carry on business in Kendu leaves on their own account and to make profit for themselves, the Government with a view to help their party-men set up a body of persons who were to be purchasers to whom the monopoly sales were to be made at concessional rates and that the benefit which would have otherwise been earned by the State accrued to those purchasers.

15. Section 10 of the Act is a counterpart of Section 3 and authorises the Government to sell or otherwise disposed of Kendu leaves in such manner as the Government may direct. If the monopoly of purchasing Kendu leaves by Section 3 is valid in so far as it is intended to be administered only for the benefit of the State, the sale or disposal of Kendu leaves by the Government must also be in the public interest and not to serve the private interest of any person or class of persons. It is true that it is for the Government, having regard to all the circumstances, to act as a prudent businessman would, and to sell or otherwise dispose of Kendu leaves purchased under the monopoly acquired

under Section 3, but the profit resulting from the sale must be for the public benefit and not for private gain. Section 11 which provides that out of the net profits derived by the Government from the trade in Kendu leaves an amount not less than one half is to be paid to the Samitis and Gram Panchayats emphasises the concept that the machinery of sale or disposal of Kendu leaves must also be quashed to serve the public interest. If the scheme of disposal creates a class of middlemen who would purchase from the Government Kendu leaves at concessional rates and would earn large profits disproportionate to the nature of the service rendered or duty performed by them, it cannot claim the protection of Article 19(6)(ii).

16. Section 10 leaves the method of sale or disposal of Kendu leaves to the Government as they think fit. The action of the Government if conceived and executed in the interest of the general public is not open to judicial scrutiny. But it is not given to the Government thereby to create a monopoly in favour of third parties from their own monopoly.

17. Validity of the schemes adopted by the Government of Orissa for sale of Kendu leaves must be adjudged in the light of Article 19(1)(g) and Article 14. Instead of inviting tenders the Government offered to certain old contractors the option to purchase Kendu leaves for the year 1968 on terms mentioned therein. The reason suggested by the Government that these offers were made because the purchasers had carried out their obligation in the previous year to the satisfaction of the Government is not of any significance. From the affidavit filed by the State Government it appears that the price fetched at public auctions before and after January, 1968, were much higher than the prices at which Kendu leaves were offered to the old contractors. The Government realised that the scheme of offering to enter into contracts with the old licensees and to renew their terms was open to grave objection, since it sought arbitrarily to exclude many persons interested in the trade. The Government then decided to invite offers for advance purchases of Kendu leaves but restricted the invitation to those individuals who had carried out the contracts in the previous year without default and to the satisfaction of the Government. By the new scheme instead of the Government making an offer, the existing contractors were given the exclusive right to make offers to purchase Kendu leaves. But in so far as the right to make tenders for the purchase of Kendu leaves was restricted to those persons who had obtained contracts in the previous year the scheme was open to the same objection. The right to make offers being open to a limited class of persons it effectively shut out all other persons carrying on trade in Kendu leaves and also new entrants into that business. It was *ex facie* discriminatory, and imposed unreasonable restrictions upon the right of persons other than existing contractors to carry on business. In our view, both the schemes evolved by the Government were violative of the fundamental right of the petitioners under Article 19(1)(g) and Article 14 because the schemes gave rise to a monopoly in the trade in Kendu leaves to certain traders, and singled out other traders for discriminatory treatment.

18. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e., effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is *ex facie* arbitrary, it had no direct relation to the object of preventing exploitation of pluckers and growers of Kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade to the State.

19. Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test whether the entire benefit arising therefrom is to ensure to the State, and the

monopoly is not used as a cloak for conferring private benefit upon a limited class of persons. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu leaves from carrying on their business. The scheme of selling Kendu leaves to selected purchasers or of accepting tenders only from a specified class of purchasers was not "integrally and essentially" connected with the creation of the monopoly and was not on the view taken by this Court in Akadasi Padhan's case ((1963) Supp 2 SCR 691) protected by Article 19(6)(ii) : it had therefore to satisfy the requirement of reasonableness under the first part of Article 19(6). No attempt was made to support the scheme on the ground that it imposed reasonable restrictions on the fundamental rights of the traders to carry on business in Kendu leaves. The High Court also did not consider whether the restrictions imposed upon persons excluded from the benefit of trading satisfied the test of reasonableness under the first part of Article 19(6). The High Court examined the problem from the angle whether the action of the State Government was vitiated on account of any oblique motive, and whether it was such as a prudent persons carrying on business may adopt.

20. No explanation has been attempted on behalf of the State as to why an offer made by a well-known manufacturer of bidis interested in the trade to purchase the entire crop of Kendu leaves for the year 1968 for rupees three crores was turned down. If the interest of the State alone were to be taken into consideration, the State stood to gain more than rupees one crore by accepting that offer. We are not suggesting that merely because that offer was made, the Government was bound to accept it. The Government had to consider, as prudent businessmen, whether, having regard to the circumstances, it should accept the offer, especially in the light of the financial position of the offeror, the security which he was willing to give and the effect which the acceptance of the offer may have on the other traders and the general public interest.

21. The learned Judges of the High Court have observed that in their view the exercise of the discretion was not shown to be arbitrary nor was the action shown to be lacking in bona fides. But that conclusion is open to criticism that the Government is not shown to have considered the prevailing prices of Kendu leaves about the time when offers were made, the estimated crop of Kendu leaves, the conditions in the market and the likelihood of offerors at higher prices carrying out their obligations, and whether it was in the interests of the State to invite tenders in the open market from all persons whether they had or had not taken contracts in the previous year. If the Government was anxious to ensure due performance by those who submitted tenders for purchase of Kendu leaves, it was open to the Government to devise adequate safeguards in that behalf. In our judgment, the plea that the action of the Government, was bona fide cannot be an effective answer to a claim made by a citizen that his fundamental rights were infringed by the action of the Government, nor can the claim of the petitioners be defeated on the plea that the Government in adopting the impugned scheme committed an error of judgment.

22. That plea would have assisted the Government if the action was in law valid and the objection was that the Government erred in the exercise of its discretion. It is unnecessary in the circumstances to consider whether the Government acted in the interest of their party-men and to increase party funds in devising the schemes for sale of Kendu leaves in 1968.

23. During the pendency of these proceedings the entire year for which the contracts were given has expired. The persons to whom the contracts were given are not before us, and we cannot declare the contracts which had been entered into by the Government for the sale of Kendu leaves for the year

1968 unlawful in these proceedings. Counsel for the appellants agrees that it would be sufficient if it be directed that the tenders for purchase of Kendu leaves be invited by the Government in the next season from all persons interested in the trade. We trust that in accepting tenders, the State Government will act in the interest of the general public and not of any class of traders so that in the next season the State may get the entire benefit of the monopoly in the trade in Kendu leaves and no disproportionate share thereof may be diverted to any private agency. Subject to these observations we make no further order in the petitions out of which these appeals arise.

24. There will be no order as to costs in all these appeals throughout.

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