

Trilochan Mishra, Etc.

Vs

State of Orissa and Others

Writ Petitions Nos. 159 to 163 of 1969

(S. K. Hegde, A. N. Grover, G. K. Mitter JJ)

21.01.1971

JUDGMENT

MITTER, J. -

1. The petitioners in all these petitions under Article 32 of the Constitution pray for a declaration that Sections 3(2)(a), Section 8(1) and Rule 5-B(6), (7), (8), (9) and (16) and Rule 6(3) and Rule 7(1) of the Orissa Kendu Leaves (Control of Trade) Act, 1961, as amended and the rules framed thereunder are violative of the fundamental rights of the petitioners guaranteed under Articles 14, 15 and 19(1) of the Constitution, for a declaration that the "revised policy" as enjoined by the said Orissa Kendu Leaves (Control of Trade) Amendment Act, 1969 and rules framed is arbitrary, discriminatory and mala fide and for a writ or direction in the nature of a mandamus quashing the appointment of Respondents 2 to 108 as purchasers.

2. To appreciate the grievances of the petitioners it is necessary to note in brief how the trade in Kendu leaves has been taken over by the State of Orissa by successive legislation and two decisions of this Court bearing thereupon. Kendu leaves appear to have formed a lucrative source of revenue for the State of Orissa for many years past. After the merger of the Indian States with the Province of Orissa the Government of Orissa passed an order in exercise of the powers under Section 3(1) of the Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1947 by which the Kendu leaves growing areas in the State were divided into units and licences were issued to persons entitled to trade in such leaves. The District Magistrate fixed the minimum rates 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. The licensees were however not fettered in the matter of the sales of the leaves after purchase. This was followed by the Orissa Kendu Leaves Control Order, 1960, which effected some changes in the scheme previously adopted. In 1961 Orissa Kendu Leaves (Control of Trade) Act was passed with the object of creating a State monopoly in the trade of these leaves. Section 3(1) of that Act provided that no person other than the Government, an officer of Government authorised in that behalf or an agent in respect of the unit in which the leaves are grown shall purchase or transport Kendu leaves. Sub-section (2) provided for transport of leaves from one place to another within the unit wherein such leaves have grown to any other place in that unit. By sub-section (3) any person desiring to sell Kendu leaves was at liberty to sell them to the aforesaid Government officer or agent at any depot situated within the said unit. Under Section 4 the Government was to fix the price at which the leaves were to be purchased by them or by any Officer or agent from the growers after consultation with the Advisory Committee. Section 5 enabled the Government to divide each district into such number of units as they thought fit. Under Section 7 the Government or their authorised officer or agent were bound to purchase at the price fixed under Section 4 the leaves which were

offered to them for sale at the depots. Under Section 3(1) Government was authorised to appoint agents on their behalf in respect of different units for the purpose of purchase of and trade in Kendu leaves in respect of different units and any such agent might be appointed in respect of more than one unit. Under Section 10 Kendu leaves purchased by Government or their officers or agents under the Act were to be sold or otherwise disposed of in such manner as the Government might direct.

3. The whole Act and the notification thereunder were challenged in this Court, particularly Sections 3 and 4, on the ground that they were in conflict with Articles 19(1)(f) and (g) and 19(6) of the Constitution in *Akadasi Pradhan v. State of Orissa*. (1963 (2) SCR Supp 691 SC 1047 : (1964) 2 SCR 37.) It was held therein by this Court that the Act was a valid piece of legislation although it created a State monopoly. The validity of Section 3 was upheld as the persons specified in sub-clauses (b) and (c) were intended to work as agents of the Government and all their actions and dealings in pursuance of the provisions of the Act were to be actions and dealings on behalf of the Government and for the benefit of the Government. The validity of Section 4 was also upheld but Rule 7(5) promulgated under the Act was held to be bad because it left in to the sweet will and pleasure of the officer concerned to fix any terms and conditions regarding agents on an ad hoc basis on the ground that the agency permitted under Article 19(6)(ii) of the Constitution had to be an agency in the strict and narrow sense of the term and could only include agents who could 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.

4. In effect this Court upheld the creation of a State monopoly and the employment of agents for carrying on the monopoly business by the State but Rule 7(5) was held to be invalid for the reasons indicated. According to the petitioner after the judgment of this Court the form of the agreement for agents known as the 'G' form was introduced under the rules and two sets of persons were employed to carry on the business of the State monopoly, one set known as the 'agents' and the other 'purchasers'. The agents were to purchase and collect Kendu leaves on behalf of the Government and the purchasers were to purchase from the Government, the rates of purchase and the price of sale being fixed by the authorities. On this basis auctions of Kendu leaves were held for the years 1966 and 1967.

5. It appears that early in 1968 letters were addressed to certain traders by the authorities intimating them that it had been decided by the Government of Orissa to renew leases of Kendu leaves held by them for the year 1968 if they accepted the terms set out therein. Under this scheme the Government offered to those 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 would also work during 1968. A petition was moved before the Orissa High Court challenging this action of the Government in January 1968. Government withdrew the offers to renew the previous licences and informed the licensees that it had been decided to invite offers for advance purchase 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 purchase of Kendu leaves by private offers in preference to open competition. It was urged on behalf of the petitioners that by entering into agreements of advance purchase contracts for Kendu leaves by private negotiation the State Government sought to support their party interests in preference to public benefit envisaged by a proper scheme of State monopoly. In appeal from the orders of the High Court (*Rashbehari Panda v. State of Orissa* ((1969) 3 SCR 74 : 1969 (1) SCC 414.) this Court held the State monopoly could only be administered for the benefit of the general public and any arrangement used as a cloak for

conferring private benefit upon a limited class of persons by carrying on business on their own behalf was invalid. The Court also observed :

"... 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."

The Court found that no explanation had been attempted on behalf of the State as to why an offer made by well-known manufacturer of Bidis interested in the trade to purchase the entire crop of Kendu leaves for the year 1968 for three crores of rupees was turned down. The plea put forward on behalf of the Government that its action was bona fide was held not to be an effective answer to a claim made by a citizen that his fundamental rights were infringed, by the action of the Government. It however appeared to this Court that during the pendency of the proceedings the entire year for which the contracts were given had expired and the persons to whom the contracts were given were not before the Court. In these circumstances counsel for the appellants agreed that "it would be sufficient if it was directed that the tenders for purchase of Kendu leaves be invited by the Government in the next season from all persons interested in that trade". Acting upon this suggestion the Court directed that the State Government would act in the interest of the general public and not of any class of traders so that in the next season the State might get the entire benefit of the monopoly in the trade in Kendu leaves and no disproportionate share thereof might be diverted to any private agency.

6. The petitioners' case in this series of petitions is as follows. They claim to be growers of Kendu leaves (which form the wrapper of tobacco smoked as Bidi) in certain districts of the State of Orissa. They also claim to be traders and businessmen by vocation dealing primarily in such leaves. The petitioner in Petition No. 159 of 1969 claims to be a purchaser since 1965 for unit No. 60 in Bolangir Division and claims to have been working as such till the year 1968. He participated in the tender for appointment of purchasers for 1962 and had furnished solvency certificate worth Rs. 75,000/- had deposited earnest money and complied with all the terms and conditions required under the provisions of the Act and the rules for making a valid tender. His complaint is that although his tender was the highest, i.e., Rs. 213-50 per quintal, it was settled in favour of one A. K. Guha, a respondent, at the rate of Rs. 200/- only per quintal, a rate below that offered by the petitioner. His main grievance is that he was refused the appointment as purchaser as he was neither willing nor able to pay contribution at Rs. 10/- per bag which amounted approximately to Rs. 15,000/- for his area to the political fund of the Swatantra Party which happened to be at the relevant time the major partner in the Coalition Cabinet of Orissa. His case is that a suggestion was made to him for such contribution by a member of the Legislative Assembly of the Swatantra Party, Radha Mohan Mishra and also by Murari Prasad Mishra, Minister for Forest belonging to the same party and he was given to understand that his tender would not be considered if he was not prepared to make the payment. According to the petitioner the Government of Orissa tried to wriggle out of the findings of this Court in Rashbehari Panda's case (supra) by subterfuges in order to implement their policy of conferring the benefit of the trade on a chosen few for political and selfish financial ends of the party in power. It was alleged that as a preliminary to this they amended the Act and the rules framed thereunder. The main attack in the petition is directed against the addition of a provision to Section 3(2) by which a registered grower might be permitted to transport his leaves

from any place within the unit wherein such leaves were grown to any other place outside the unit for the purpose of sale to the Government or any agent in respect of the unit for the authorised to purchase the same from him. Complaint was also made about the amendment of Section 8(1) relating to the appointment of agents by the addition of the proviso :

"that the Government may for the purpose of purchase of leaves from the registered growers, appoint an additional agent in respect of one or more units".

Challenge was also made to several clauses in Rule 5-B which provide for disposal of Kendu leaves. These clauses are (6), (7), (8), (9) and (16) which run thus :

"(6) At the time of opening of the tenders, the tenderers shall produce a certificate of solvency for at least one-fourth of the total annual purchase price according to the rate quoted by him, granted by a Revenue Officer not below the rank of a Sub-divisional Officer if the tenderer has landed property at a place, wherein the Orissa Public Demand Recovery Act, 1962, is in force or a Bank guarantee for an equal amount.

(7) Government may accept or reject all or any of the tenders so received for any unit without assigning any reason therefor. The earnest money deposit shall, in case of an unsuccessful tenderer be refunded to him and in case of a successful tenderer, it shall, subject to the provisions of sub-rule (11), be adjusted towards payment of security deposit required by sub-rule (12) :

Provided that in rejecting a tender Government shall take into consideration the following among other grounds :

1. Inadequacy of price offered, 2. Speculative offers, 3. Past conduct of parties in the trade, 4. Transport facilities at the command of the offerer, 5. Solvency of the offerer, 6. Experience in the trade.

(8) If the tenders received for a unit are not considered acceptable, the Government may select as purchaser or purchasers for such unit or units any person or party of persons or parties on such terms and conditions as may be mutually agreed and such unit or units. All the rules applicable to a successful tenderer shall apply mutatis mutandis to persons or parties selected as purchasers under his sub-rule.

(9) Notwithstanding anything contained in the foregoing provisions Government may sell or otherwise dispose of Kendu leaves collected by purchase or otherwise by Government or by their officers or agents in such manner as Government may deem proper.

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(16) Notwithstanding anything contained in the foregoing provisions, the purchaser who is selected to purchase the Kendu leaves procured through the additional agent of any unit by the Government, shall on selection as such execute an agreement in Form J."

Besides the above the petitioner also challenged the validity of sub-rule (3) of Rule 6 and the new

Rule 7 substituting the old rule. Rule 6(3) enabled a registered grower who wished to transport his leaves outside the unit in which he was registered for sale to an additional agent, if any, of the said unit appointed under the proviso to Section 8(1) on an application for a transport permit in Form D to be granted by the Divisional Forest Officer.

7. The above rule is really a complement to the proviso to Section 8(1) in order to allow additional agents to function. Rule 7 in effect provided as follows. Under clause (1) Government was empowered to appoint agents for a unit or units under sub-section (1) of Section 8 and to publish a notice in the Official Gazette and in such other manner as was thought fit, giving terms and conditions of agency and inviting any applications for such agency, provided that no application need be invited for appointment of the additional agent referred to under the provisions of sub-section (1) of Section 8 and such additional agent might be appointed directly by Government subject to such terms and conditions as might be decided upon, the additional agent having to execute an agreement in Form I. By clause (2) the application for agency was to be in Form E and was to be submitted to such authority by such date and in such manner as may be specified in the notice. Under clause (3) every application was to be accompanied by a treasury challan showing a cash deposit of Rs. 500/- in the name of the Divisional Forest Officer as advance security deposit. The applicant was also to furnish a certificate of solvency for a sum calculated at the rate of Rs. 10/- per bag for the stipulated number of bags for the respective unit, granted by a Revenue Officer not below the rank of a Sub-divisional Officer if the agent had landed property at a place wherein the Orissa Public Demand Recovery Act, 1962, was in force, or a bank guarantee for an equivalent amount. Clause (4) enabled the Government to accept or reject any application without assigning any reason therefor. Under clause (5) Government was empowered in case it was not possible to select suitable agents for the purpose out of those who had applied for appointment as agents, to call for fresh applications, or if the time at their disposal was not sufficient, to appoint a person or party as agent who in the opinion of the Government was suitable for the work. Under clause (6) an agent or party appointed in terms of clause (5) had to execute an agreement in Form G within 15 days of the order of appointment failing which the appointment was liable to be cancelled. Under clause (8) the agent was to maintain registers and accounts as might from time to time be directed by the Government which were to be submitted when called for. Under clause (9) the agent was to furnish a list of persons employed by him within the unit and any such person so appointed if objected to was to be forthwith removed from employment by the agent. Under clause (10) Government was at liberty to grant to the agent renewal of his agency for such period not exceeding one year at a time if it was found during the period of his agency that he had duly observed and performed the terms and conditions to the satisfaction of the Government.

The petitioner alleged that -

(a) As a result of the judgment in Akadasi Pradhan's case (supra) the profit which could go to the agents was greatly reduced and they could have little interest in the scheme. The purchasers therefore set up their own men as agents and the pretended dichotomy between agents and purchasers was a mere eyewash. The agents were not really agents of the Government. A table shown as Annexure B to the petition purported to show how the agents were related to the purchasers.

(b) By virtue of the various amendments to the Act and Rules and by the conduct of the Government no outsider or no one other than the existing purchasers could and did submit tenders.

(c) The provisions relating to the solvency certificate and the provision for appointment of additional agents and additional purchasers at the discretion of the Government and the power to authorise registered growers to transport their leaves outside the unit in which they were grown were all aimed at confining the business in the hands of a chosen few completely ousting others.

(d) No principle was followed in accepting tenders. The claims of highest bidders were ignored to accommodate favourites of authorities. Appointments were in some cases made of persons whose tenders were lower than the highest ones offered. In some cases areas were settled with persons who had never submitted any tender for the area and in others settlement was made with a non-tenderer at a lower price.

8. Before us, learned counsel for the petitioners limited himself to the following objections -

1. Agents could not be allowed to be nominees of purchasers. They ought to be independent contractors.

2. The provision for appointment of additional agents under the proviso to Section 8 and Rule 7(1) were unreasonable and arbitrary.

3. The appointment of purchasers who were not the highest tenderers was also arbitrary and mala fide. Rule 5-B(7) which allowed the Government to accept or reject all or any of the tenders without assigning any reason therefor was gravely objectionable in that it permitted the Government to make discrimination in favour of men of their choice and allowed the extraction of money for party funds. The demand for production from tenderers of a certificate of solvency for at least 1/4th of the total annual purchase price from a Subdivisional Officer if the tenderer had landed property in Orissa or a bank guarantee in the case of others was also discriminatory. It was said that the power to appoint additional agents and additional purchasers after the auction had been held was for the purpose of Government benefiting anyone it liked to the detriment of the interest of the general public and the interest of the State.

9. Our attention was drawn to the special forms which had been incorporated in the rules and the differences between them, as for instance, Forms G and H which applied in the case of an agent and purchaser and Forms I and J which applied to the cases of additional agents and additional purchasers.

10. It was submitted that the scheme as envisaged after the amendment of the Act in 1969 was not really in aid of establishing a State monopoly and it left loopholes for patronage by the party in power in Government of their own favourites by the extraction of money for party funds and otherwise. Counsel further submitted that agents if they were nominees or relations of purchasers, were really not bona fide agents of the Government. He drew our attention to the activities of the agents before the leaves were sold to show that a good deal of money had to be invested and quite a number of operations performed before the leaves could be put up for auction and it was submitted that if they were the nominees of the purchasers they really acted in the latter's interest and not that of the Government. Under the terms of the agreement in Form G the agents had to open depots and storage godowns at such centres within the unit as directed by the Sub-divisional Officer and he could transport his leaves from the collection depot to the storage godowns. They were also

prevented except with the permission of the Divisional Forest Officer from moving the Kendu leaves to places outside the unit.

11. We are not satisfied that there can be any legitimate grievance against the amendment of the Act and the promulgation of new rules set forth above. They all appear to be necessary to enable the Government to control the business in Kendu leaves effectively. Nothing was shown to us as to how any of these provisions of Form G for the appointment of agents and Form I for the appointment of additional agents worked against the interest of the Government working a monopoly business. The provision for appointment of additional agents and additional purchasers are not per se bad. The exigency of business may require such appointments. Further we find ourselves unable to appreciate the points sought to be made on the basis that some of the agents were nominees or relations of the purchasers. We do not see how this can affect the scheme of State monopoly. An agent had to purchase Kendu leaves from growers at prices fixed by the Government under Section 4(1) and he had to deliver processed Kendu leaves to such persons as were to be directed by the Forest Officers. He was to be entitled to various charges including -

(1) a fixed sum per bag of processed leaves towards costs incurred for collecting the leaves, storage, transport, packing and other charges, and

(2) remuneration at the rate fixed for each bag of processed leaves which he secured by selection or purchase.

He had also to pay collection charges to persons for collecting the leaves from Government forests and lands as may be specified in writing by the Government. It may be that on the actual rates fixed by Government the agents could not secure much profit. It is also possible that purchasers would rather deal with agents who carried out the processing and storing business in a manner which was conducive to production of good finished products than with strangers whose business methods were not known to them. But by itself such a course of dealing could not affect the interest of a Government running the monopoly business.

12. In the counter-affidavits filed herein there is a denial by the Minister concerned and by Radha Mohan Mishra that any suggestion was ever made to any of the petitioners that they would have to pay Rs. 10/- for each bag if they wanted their tenders accepted. On the face of this we are not in a position to hold that the grievance of the petitioners as regards choice of persons as purchasers who were willing to contribute to party funds has been proved.

13. With regard to the appointment of additional agents, the counteraffidavits show that only the State Forest Corporation had been appointed such an agent. It goes without saying that the appointment of such a corporation as an additional agent can in no way detract from Government monopoly. The counter-affidavits also show that no additional purchasers had been appointed.

14. With regard to the grievance that in some cases the bids of persons making the highest tenders were not accepted, the facts are that persons who had made lower bids were asked to raise bids to the highest offered before the same were accepted. Thus there was no loss to Government and merely because the Government preferred one tenderer to another no complaint can be entertained. Government certainly has a right to enter into a contract with a person well known to it and specially one who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, Government is not bound to accept the highest tender but may accept a lower one in case it thinks that the person offering the lower tender is on an overall

consideration to be preferred to the higher tenderer.

15. We may in this connection refer to the manner in which the contracts current at the time of the filing of the petition had been settled. The counter-affidavit on behalf of the State of Orissa shows that forest and other lands producing Kendu leaves were divided into 180 units for the years 1969, 1970 and 1971. Three units out of these were reserved for the Orissa Forest Corporation; the remaining 177 units for the public tender. Out of these 167 units were settled at the highest prices offered. 139 out of 167 were settled in favour of persons who actually made the highest tenders. 29 units were settled at the highest prices offered but in favour of other tenderers on consideration such as past experience, clean past records etc. One unit was settled by negotiation at a price higher than the highest tender received. In the case of 5 units persons who had offered inflated and speculative prices did not turn up and the units were settled with the next best tenderers. In the case of one unit on the highest tenderer withdrawing his tender it was settled in favour of another tenderer who was to pay the next highest price. In the case of another unit the highest tenderer who had been a defaulter in the previous year had his tender rejected and the unit was settled in favour of the tenderer who had offered the next highest price. In the case of one unit on the highest tenderer failing to furnish bank guarantee it was settled in favour of the next highest tenderer. In the case of still another unit the claims of the sole tenderer who had filed a forged bank guarantee was not considered and the unit was settled by negotiation at the highest available price. Lastly in the case of six units no tenders had been received and these were settled by negotiation at the best available prices. The five writ petitions concerned only seven units in respect of which tenders which tenders of the petitioners had not been accepted.

16. In our view, the counter affidavit showing the manner in which the units were disposed of completely demolishes suggestions of fraudulent preference of one tenderer to another. As the petitioners have not been able to satisfy us that the amendments effected in 1969 either in the Act or in the rules are against the exercise of a monopoly in the business of Kendu leaves by the Government of Orissa and as they have further failed to make out any case of arbitrary or mala fide action on the part of the State authorities, the petitions must be dismissed with costs.

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