

## STATE OF ORISSA

January 16, 1969

[M. HIDAYATULLAH, C.J., J. C. SHAH, V. RAMASWAMI,  
G. K. MITTER AND A. N. GROVER, JJ.]

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*Orissa Kendu Leaves (Control of Trade) Act (28 of 1961) s. 10—Scheme of Government for sale and disposal of leaves purchased by it—Contracts with, and invitation to offer, restricted to licencees of previous year—If violative of Arts. 14 and 19(1)(g) of Constitution—Art. 19(6) (ii)—Monopoly of Government—Tests for validity—Bona fides of Government and error of judgment by Government—If a defence to discrimination.*

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*Kendu* tree is a wild growth and its leaf is used mainly in the manufacture of bidis. To regulate trade in *Kendu* leaves and prevent exploitation of growers and pluckers the respondent-State adopted diverse measures. In 1961, the Orissa *Kendu* Leaves (Control of Trade) Act, 1961, was enacted. By s. 3 of the Act no person other than the Government, an authorised officer of the Government, or an agent appointed by the Government, shall purchase or transport *Kendu* leaves; and under s. 4 the Government is authorised to fix the price at which the leaves shall be purchased from the growers by the officer or agent of the Government. Section 10 provides that the *Kendu* leaves purchased shall be sold or disposed of in such manner as the Government may direct, and under s. 11, at least one half of the net profits derived by the Government is to be paid to *Samitis* and *Gram Panchayats*. A grower of *Kendu* leaves challenged ss. 3 and 4 and r. 7(5) made under the Act as infringing his fundamental rights under Arts. 14 and 19(1)(f) and (g). This Court, in *Akudasi Padhan v. State of Orissa*, [1963] Supp. 2 S.C.R. 691, held that ss. 3 and 4 did not infringe Art. 19(6)(ii), but that the State was incompetent to implement the provisions of the Act and give effect to its monopoly, because, the agents appointed were not really agents of the Government but were authorised to carry on trade in the leaves purchased not on behalf of the Government but on their own account, and that it thus gave rise to a monopoly in favour of the agents which was not protected by Art. 19(6)(ii) since the law cannot be used by the State for the private benefit of agents. Thereafter, the State made some changes in the implementation of its monopoly. In 1966, it invited tenders from persons desirous of purchasing *Kendu* leaves purchased by the officers and agents of the Government. During the years 1966 and 1967, the prices of *Kendu* leaves ruled very high and when sales were effected by public auction, prices considerably in excess of those at which tenders were accepted were realised. Early in 1968, the State evolved another scheme under which, the State offered to renew the licencees of those traders who in the State's view had worked satisfactorily in the previous year and had paid the amounts due from them regularly. The scheme was objected to, and realising that, the scheme arbitrarily excluded many persons interested in the trade, and hence was objectionable, the Government 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, that is, the existing contractors were given the exclusive right to make offers to

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- A purchase *Kendu* leaves. This new method of offering to enter into agreements for advance purchases of *Kendu* leaves by private offers in preference to open competition, was challenged by writ petitions in the High Court as violative of the petitioner's fundamental rights under Arts. 14 and 19(1)(g).

- B The High Court held that under s. 10 of the Act the Government could dispose of the leaves in such manner as it thought fit, that the only question for the Court was whether in adopting the new scheme of offering to enter into advance purchase contracts by private negotiation the Government had acted *bona fide*, and that the petitioners failed to show that in exercising its discretion the Government acted arbitrarily or without *bona fides*.

In appeal to this Court,

- C HELD : The validity of a 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 enure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of persons. The monopoly of purchasing *Kendu* leaves under s. 3 may be held to be valid if, it be administered only for the benefit of the State. Similarly, the right to sell or dispose of *Kendu* leaves by the State under s. 10, in such manner as the Government may direct, would be valid if it be exercised in public interest and not to serve the private interests of any person or class of persons. The profit resulting from the sale must be for the public benefit and not for private gain. Section 11 also emphasises the concept that the machinery of sale or disposal of the leaves must also be geared to serve the public interest. If the scheme of disposal creates a class of middle men who could purchase from the Government at concessional rates and earn large profits disproportionate to the nature of the service rendered or duty performed by them, it cannot claim the protection of Art. 19(6)(ii) as it is not open to the Government to create a monopoly in favour of third parties from its own monopoly. [383 D—G; 385A—B]

- F In the present case, 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 as well as new entrants into the trade. Both the schemes, evolved by the Government, namely : the one of offering to enter into contracts with certain named licencees, and the other of inviting tenders from licencees who had in the previous year carried out their contracts satisfactorily gave rise to a monopoly in the trade in the leaves to certain traders and singled out other traders for discriminating treatment. Therefore, they were violative of the fundamental right of the petitioners under Arts. 14 and 19(1)(g) and as the schemes were not 'integrally and essentially' connected with the creation of the monopoly they were not protected by Art. 19(6)(ii). [384 E-H; 385 B-D]

- H (a) If the only anxiety of the Government was to ensure due performance by those who submitted tenders, Government could devise adequate safeguards. But the classification based on the circumstance that certain existing contractors had carried out their obligation 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 objects sought to be achieved namely, the effective execution of the monopoly in public interest, the prevention of exploitation of pluckers and growers of *Kendu* leaves, or the securing of the full benefit from the trade, to the State. [384G-H; 386B-D]

(b) The scheme could not be supported on the ground that it imposed reasonable restrictions, within the meaning of Art. 19(6), on the fundamental rights of traders to carry on business in *Kendu* leaves. [385C-D] A

(c) The plea that the action of the Government was *bona fide* cannot be an effective answer, because, the Government had not considered, the prevailing prices of *Kendu* leaves about the time when offers were made, the estimated crop, the conditions in the market, offers of higher prices and the likelihood of offerors of 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 irrespective of their having taken contracts in the previous year. [385H; 386A-B] B

(d) It could not also be said that the Government merely committed an error of judgment in adopting the impugned scheme. It is not a case of the Government erring in the exercise of its discretion, but the action of the Government was itself not valid. [386 B-D] C

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1472 to 1474 of 1968.

Appeals by special leave from the judgment and order dated May 8, 1968 of the Orissa High Court in O.J.C. Nos. 49, 52 and 132 of 1968. D

*J. B. Dadachanji*, for the appellant (in C.As. Nos. 1472 and 1473 of 1968).

*A. S. R. Chari*, *Govind Das* and *J. B. Dadachanji*, for the appellant (in C.A. No. 1474 of 1968).

*C. K. Daphtary*, *Santosh Chatterjee* and *R. N. Sachthey*, for the respondent (in all the appeals). E

The Judgment of the Court was delivered by

**Shah, J.** 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. F

*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 has adopted diverse executive and legislative measures. In exercise of the powers conferred by s. 3(1) of the Orissa Essential Articles 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 person trading in *Kendu* leaves. The District Magistrates were authorised to fix the minimum rates for purchase of *Kendu* leaves and the Order provided that the licensees shall purchase *Kendu* leaves from the pluckers or G

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- A owners of private trees and forests 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
- B Art. 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*<sup>(1)</sup>. 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.
- C 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 s. 3 of the Act no person other than (a) the Government; (b) an officer of Government authorised in that behalf; (c) an agent in
- D respect of the unit in which the leaves have grown shall purchase or transport *Kendu* leaves. By s. 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 s. 8 the Government was authorised to appoint
- E 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.”

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

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.

- H A grower of *Kendu* leaves moved a petition in this Court contending that the principal provisions of the Act infringed his

(1) A.I.R. 1952 Orissa 260.

fundamental rights under Arts. 19(1)(f) & (g) and Art. 14. A  
He challenged ss. 3 and 4 and rule 7(5) as infringing the  
fundamental right under Art. 19(1)(f) and (g) of the Consti-  
tution, and ss. 5, 6 and 9 as contravening the equality clause  
of the Constitution. This Court held in *Akadasi Padhan v. The*  
*State of Orissa*<sup>(1)</sup> that the Orissa Kendu (Control of Trade)  
Act, 1961, was a valid piece of legislation, and creation of a B  
State monopoly in *Kendu* leaves was protected by Art. 19(6) as  
amended by the Constitution (First Amendment) Act, 1951.  
In the opinion of the Court, fixation of prices prescribed by s. 4  
was reasonable and in the interest of the general public both under  
Art. 19(5) and Art. 19(6) and s. 4 of the Act was on that  
account valid. The Court further held that section 3 which allow-  
ed the Government or an officer of the Government authorised C  
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  
cls. (b) & (c) of s. 3 i.e. officers of the Government and agents D  
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 r. 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 E  
agreements 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.

Thereafter the Government of Orissa made some changes in  
the machinery for implementation of the monopoly and entered F  
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 re- G  
mained practically the same as in the days before the judgment  
of this Court.

On February 2, 1966, the Government of Orissa invited  
tenders from persons desirous of purchasing *Kendu* leaves pur-  
chased or collected by Government or by their officers or Agents H  
under the provisions of the Orissa Kendu Leaves (Control of

(1) [1963] Supp. 2 S.C.R. 691.

- A Trade) Act, 1961, in the units as constituted under s. 5 of the Act. In the last paragraph of the tender notice it was stated :

B "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."

- C 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 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 will also work during 1968.
- E 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.

- On January 24, 1968, a petition was moved by Rashbihari Panda in the High Court of Orissa under Art. 226 of the Constitution challenging the action of the Government. The Government, it appears, had second thoughts and the offers to renew the previous licenses 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.

- H It was urged on behalf of the petitioners that in seeking to enter into agreements for 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 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 Art. 19(6)(ii) of the 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.

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 of 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 established 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 profits 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 s. 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".

- A 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 s. 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
- B 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
- C the power or discretion under s. 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
- D 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 business-
- E man would do, for the purpose of getting the maximum revenue—net profits—from the trade in *Kendu* leaves. Government's direction, in exercise of the power of discretion conferred on them under s. 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
- F 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
- G 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."

- Article 19(1)(f) guarantees the citizens the right to acquire, hold and dispose of property, and Art. 19(1)(g) guarantees the
- H right to practise any profession, or to carry on any occupation, trade or business. The right under cl. (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 pro-



tection of the interests of any scheduled tribe. Clause (6) of Art. 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, —

(i)

(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 *Akadsji Padhan's case*<sup>(1)</sup> this Court held that by the amendments in Art. 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 cl. (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 cl. (1) of Art. 19 it must be tested under the appropriate provision governing it. The Court accordingly held that ss. 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 Art. 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 s. 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

(1) [1963] Supp. 2 S.C.R. 691.

- A 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.

- B 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 Arts. 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.

- D Section 10 of the Act is a counter-part of s. 3 and authorises the Government to sell or otherwise dispose of *Kendu* leaves in such manner as the Government may direct. If the monopoly of purchasing *Kendu* leaves by s. 3 is valid, insofar 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 interests 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 business-man would, and to sell or otherwise dispose of *Kendu* leaves purchased under the monopoly acquired under s. 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 *Grama Panchayats* emphasises the concept that the machinery of sale or disposal of *Kendu* leaves must also be geared to serve the public interest. If the scheme of disposal creates a class of middle-men 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 Art. 19(6)(ii).

- H 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.

Validity of the schemes adopted by the Government of Orissa for sale of *Kendu* leaves must be adjudged in the light of Art. 19(1)(g) and Art. 14. Instead of inviting tenders the Government offered to certain old contractors the option to purchase *Kendu* leaves for the years 1968 on terms mentioned therein. The reason suggested by the Government that these offers were made because the purchasers had carried out their obligations 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 insofar 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 Art. 19(1)(g) and Art. 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.

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.

- A 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 enure 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*<sup>(1)</sup> protected by Art. 19(6)(ii): it had therefore to satisfy the requirement of reasonableness under the first part of Art. 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 Art. 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 person carrying on business may adopt.

- 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 interests 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 a prudent businessman, 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.

- 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*

(1) [1963] Supp. 2 S.C.R. 691.

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. The 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.

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 agree 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.

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

V.P.S.

*Scheme declared invalid.*