

PETITIONER:
NEW BIHAR BIRI LEAVES CO. & ORS.

Vs.

RESPONDENT:
STATE OF BIHAR & ORS.

DATE OF JUDGMENT 06/01/1981

BENCH:
SARKARIA, RANJIT SINGH
BENCH:
SARKARIA, RANJIT SINGH
PATHAK, R.S.

CITATION:
1981 AIR 679 1981 SCR (2) 417
1981 SCC (1) 537 1981 SCALE (1) 1

ACT:

Constitution of India 1950, Articles 19(6) clauses (i) & (ii)-Clauses whether distinct and separate-Law covered by the clauses whether to satisfy the test of reasonableness

Article 19(1)(g) citizen's right to enter into contract with State-Whether fundamental right can be enforced though contractual

Bihar Kendu Leaves (Control of Trade) Act 1973 & Bihar Kendu Leaves (Control of Trade) Rules, 1973-Clause 13 and Clause 4(bb) of agreement prescribed by rules-Whether unreasonable and violative of Articles 14 and 19

HELD:

Kendu leaves used in the manufacture of bidis are grown as forest produce in several States. On March 10, 1972 the State of Bihar issued the Bihar Kendu Leaves (Control of Trade) Ordinance, 1972, which was replaced by the Bihar Kendu Leaves (Control of Trade) Act, 1973. The purpose was to create a State monopoly in the matter of sale of Kendu leaves to the manufacturers of bidis to regulate the trade in relation to the grower of Kendu plants and their collection and sale through the agency of the State to the registered manufacturers of bidis. Section 4, empowered the State Government for the purpose of purchase and sale of Kendu leaves on its behalf, to appoint agents in respect of different units. Section 9 provided that the authorised agents will be bound to accept delivery of all those Kendu leaves which are fit for the purpose of manufacture of bidis.

In exercise of its rule-making powers the State Government notified the Bihar Kendu Leaves (Control of Trade) Rules, 1972, which was continued by Section 23 of the Act even after the repeal of the Ordinance. Provisions regarding the disposal of Kendu leaves were made in Rule 9. Sub-rule (I) provided that Kendu leaves collected or likely to be collected shall be sold or otherwise disposed of by tender on terms and conditions specified in the Tender Notice. The Tender was required by sub-rule (2) to be advertised in newspapers. Sub-rule (9) provided that the successful tenderer or successful bidder shall be appointed as purchaser and the entire quantity of Kendu leaves collected or likely to be collected or such lesser quantity out of it as may be offered to him by the State shall be

purchased by him on terms and conditions in the agreement to be executed by the purchaser. Sub-rule (10) required the purchaser to execute an Agreement in Form 'M' within 15 days of the receipt of the order of appointment.

By a Notification dated January 16, 1974 the Rules were amended and sub-clause (bb) after clause 4(b) was added in Form 'M' of the Agreement which provided that the purchaser shall not raise any objection against the quality of Kendu leaves or shortage of leaves. Condition 13 of the Tender Notice was also incorporated in the statutory Agreement, Form 'M' providing

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that for every unit a minimum royalty will be 'payable by the purchaser, and that this amount shall be payable by the tenderer even if by the end of the season, the price of Kendu leaves at the offered rate, collected and delivered to the purchaser, fell short of this amount, the amount being payable before the leaves are utilized or taken out and if not paid, realisable as arrears of land revenue.

In their writ petitions the petitioners who were carrying on trade in Kendu leaves, assailed the Rules framed under the Act and clause 13 and clause 4(bb) of the Tender Notice and the Statutory Agreement and the notices of demand issued demanding royalty in respect of the undelivered quantity of Kendu leaves.

It was contended that: (i) the provisions and conditions contained in clause 4(bb) and clause 13 amount to an unreasonable restriction on freedom to carry on trade or business in Kendu leaves guaranteed under Article 19(1) (g) of the Constitution and that they are not within the protection of sub-clause (ii) in the second part of clause (6) of Article 19; (ii) that the provisions in their immediate operation and effect, are harsh, unconscionable, arbitrary, unfair and oppressive, thereby violating Article 14, (iii) the foreclosure of the right of the purchaser to refuse delivery on the ground of the leaves offered, not being of requisite quality, is inconsistent and ultra vires of the proviso to Section 9(1) of the Act and (iv) that the auctions are held in January, while the Agents are not appointed till March or April, the plucking season, and consequently, no reasonable estimate of the expected yield is possible.

The respondents argued that (i) there is a paucity of skilled people who could be employed as Agents and the prevailing practice is that the persons appointed as Agents, are sponsored by the purchasers and that the terms of the Agreement, taken as a whole are not one-sided, (ii) if a person voluntarily takes upon himself under the terms of a contract, such risks and chances of benefit, he has no right in the event of suffering a loss to be compensated for it even under the ordinary law in a suit, much less the Court of writ jurisdiction can grant any such relief, (iii) the right to enter into a contract on particular terms with the State is not a fundamental right, (iv) as the petitioners had not paid amounts required to be adjusted against the remuneration of the Agents they are not entitled to relief under Article 32, and (v) the provisions are directly and essentially related to the operation of monopoly and, as such are within the protection of sub-clause (ii) of clause (6) of Art. 19.

Dismissing the petitions and appeal

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HELD: 1. The condition in 4(bb) in the Tender Notices and the statutory agreement is couched in peremptory, drastic and absolute language, not qualified by any words

showing that the bar envisaged in it will be attracted only in cases where the purchaser has had an earlier opportunity to raise his objection but failed to do so, or, where he had on an earlier occasion raised such an objection which was heard and overruled by the competent Forest Officer. Condition 4(bb) therefore is inconsistent with and repugnant to Section 9(1), proviso of the Act which contains a built-in-warranty, that the Kendu leaves offered would be fit for manufacture of bidis; that is to say, the leaves would be of merchantable quality and as such, invalid. [442D-H]

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2. The scheme of the Bihar Act and the Rules and Forms including that of the impugned condition 13 was designed remove the deficiencies, infirmities and vices pointed out in *Rashbihar's Panda v. State of Orissa* [1969] 3 S.C.R. 374. The impugned condition 13 satisfied the test of reasonableness under the first part of Articles 19(6). The contention, that in actual operation, the impugned provision (clause 13) creates a monopoly in favour of a class of middlemen consisting of 'Agents' and purchasers, and enables them to earn unduly large profits at the cost of the public or pluckers and growers is not acceptable. [439G-H, 440A-B]

3. (i). Clause (6) of Article 19 falls into two parts, indicating that the two parts of the clause are intended to be distinct and separate. The words "reasonable restrictions" which find pivotal mention in the first part, have not been repeated in the second part which omission makes it clear that a law covered by sub-clause (ii) is not required to satisfy the test of reasonableness under the first part of the clause and no objection to have validity of such a law is tenable on the ground that it infringes the right guaranteed under Article 19(1)(g). Sub-clause (ii) is thus an exception to the main substantive provision in clause (1) of the Article. [431G-H, 432A-B]

3(ii). The basic and essential features which are directly and immediately connected with the creation of the State monopoly are found in the body of the Act itself. The provisions incorporated in the Forms of Tender Notice and Agreement are merely subsidiary or incidental provisions, therefore, do not fall within the protection of sub-clause (ii) in the second part of Article 19(6). [432E-F]

3(iii). Where the business to be carried on by a citizen is in a commodity, the sale of which is a State monopoly, conditioned by some statutory terms, (analogous to the impugned conditions) which in operation, have a direct and immediate impact on the fundamental freedom of the citizen guaranteed under Article 19(1) (g), the citizen cannot enter into a contract with the Government for purchase of such a commodity except on the statutory terms laid down by the seller-State. The Tender Notice and the Agreement which the purchasers enter into with the Government, although couched in statutory Forms, are therefore, not bereft of their contractual character. [432G-H, 433A & C]

4. The minimum royalty or price payable being fixed on the basis of 75 per cent of the estimated annual yield in standard bags from the unit multiplied by the rates offered and accepted. Such an estimate, is made on the basis of the average actual yield from that unit for the preceding three years. Such an estimated yield is notified and published in the Tender Notices every year. Purchasers in the trade, know beforehand as to what they are bidding for, and they are generally persons who have been in the trade for several years and, as such have a special knowledge of forming their own estimates of the expected yield and the chances of

profit and loss from that particular unit in a particular year. [433F-G]

5. As the chances of profit and risks of loss are evenly divided between the seller-state and the purchasers, it cannot be said that the impugned condition in clause 13 of the Tender Notice and the Agreement is manifestly unreasonable. The impugned condition 13 is a restriction imposed in the general public interest. [434B-C]

6. Although the Act and the Rules contemplate that the Agents appointed by the Government will be under its full control and liable to compensate

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the Government for any shortage, damage or loss caused in collection or delivery or any defect in the quality of the leaves collected, to the Government, yet, in actual practice, the real position is that the Agents are generally persons sponsored by and otherwise, deeply interested in the purchasers. [435B-C]

7. The agents are to be appointed every year at short notice when the plucking season is at hand and as there is a dearth of suitable persons having adequate experience and skill of work as efficient agents, the Government is driven into a situation in which they have to appoint persons sponsored by the purchasers as Agents. The rules framed under the Act envisage a strict and exclusive control of the Government over the Agents and their activities, and provide for their liability to compensate the Government for the loss occasioned by their misconduct or neglect. The condition in condition 13 far from creating a monopoly in the trade in favour of middlemen, operates as an ironclad safeguard against leakage of the public revenue by assuring a minimum return to the public exchequer from the sale of Kendu leaves. The provision is aimed to secure the full benefit from the trade to the State leaving chances of making reasonable, marginal profit to the purchasers. [435C-D, 439B-E]

8. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim, is *qui approbat non reprobat*. A party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. [441E-H]

Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co. [1921] 2 K B.608 and *Douglas Menzies v. Umphelby* [1908] A.C. 224 at p. 232 referred to.

In the instant case the petitioners had by offering highest bids at public auctions or by Tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned condition 13 on the ground that this condition is violative of Article 19(1)(g) and 14 of the Constitution. The impugned conditions though bearing a statutory complexion, retain their basic contractual character. Though a person cannot be debarred from enforcing his fundamental rights on the ground of estoppel or waiver, the principle which prohibits a party to a transaction from approbating a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver. [442A-C]

JUDGMENT:

ORIGINAL JURISDICTION : Writ Petitions Nos. 2222-2252/77 & 121 to 125/79, 405 & 441/74, 46 & 47/75.

(Under Article 32 of the Constitution.)

AND

CRIMINAL APPEAL No. 300 OF 1974.

Appeal by Special Leave from the Judgment and Order dated 14-2-1974 of the Patna High Court in Criminal Writ Jurisdiction No.

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F. S. Nariman, Anil B. Devan, J. B. Dadachanji, K. J. John, J.S. Sinha and Tarini Prasad for the Petitioners in WPs. Nos. 121-125/79, 2222-2252/77 & 46-47/75.

Y. S. Chitale, K. K. Sinha and S. K. Sinha for the Petitioners in W.P. Nos. 405 & 441/74 and Crl. A. No. 300/74.

Lal Narain Sinha, Attorney General of India, Ram Balak Mahto, and U. P. Singh for the Respondents Nos. 1-2 in all W.Ps. and Appeal.

Miss A. Subhashini for Respondent No. 3 in WP Nos. 2222-2252/77.

The Judgment of the Court was delivered by

SARKARIA, J.- The common question that has been seriously pressed into argument in this batch of writ petitions and criminal appeal mentioned in the title, relates to the constitutional validity of certain Rules framed under the State of Bihar under the Bihar Kendu Leaves (Control of Trade) Act, 1973 (hereinafter referred to as the 'Act') particularly clause 13, clause 4 (bb) of the Tender Notice and of the Statutory Agreement notified by the Bihar Government in the Bihar Government Gazette, and the notices of demand issued under the impugned provisions demanding "royalty" from the petitioners in respect of the undelivered quantity of Kendu leaves.

All these writ petitions will be disposed of by this common judgment. The basic question being common, it will suffice to state the facts giving rise to Writ Petitions 2222 to 2252 of 1977, filed by the New Bihar Bidi Leaves Co.

The petitioners in all these writ petitions are either firms or individuals carrying on trade in Kendu leaves in the State of Bihar. However, petitioner No. 31 is an association of traders in Kendu leaves, of which the other petitioners are members.

Kendu leaves are grown as forest produce in several States, including the States of Bihar, Orissa, Andhra Pradesh, Maharashtra, Gujarat, Madhya Pradesh and a part of Uttar Pradesh. Under the old system in Bihar, the right to pluck and extract Kendu leaves from a forest coupe carved out by the Forest Department, was auctioned by the State Government.

On March 10, 1972, while the State of Bihar was under the President's rule, the Governor of Bihar issued the Bihar Kendu Leaves (Control of Trade) Ordinance, 1972. The provisions of this Ordinance were continued under successive Ordinances and ultimately replaced by the aforesaid Act of 1973. This Act created State monopoly in the matter of sale of Kendu leaves to the manufacturers of

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bidis. Its purpose is to regulate this trade in relation to the grower of Kendu plants and the collection and sale of the same through the agency of the State to the registered manufacturers of bidis. Under its scheme, a specified area of Kendu leaves is divided into units. The 'grower' is defined as 'a grower who holds lands on which Kendu plants grow or who is in possession of such lands under a lease or

otherwise, and includes the State Government.' Under Section 3, the State Government may, by notification in the Official Gazette, declare any area to be a specified area for the purposes of the Act and divide every such specified area into such number of units as it may deem fit. 'Unit' means a sub-division of a specified area constituted under Section 3. Under Section 4, the State Government may, for the purpose of purchase and sale of Kendu leaves on its behalf, appoint agents in respect of different units and any such agent may be appointed in respect of more than, any one unit but not more than three units. The terms, conditions and the procedure for appointment of agents have been prescribed by the Rules framed under the Act, which we shall presently notice. Section 5 places restriction on purchase or transport of Kendu leaves. Section 8 mandates the Forest Officer incharge of a Division to set up in each unit a number of depots. Section 9 is important and its material part runs as under:

"(1) The State Government or its authorised officer or agent shall purchase Kendu leaves offered for sale and deliver at the depot during the business hours at the rates fixed under Section 7:

Provided that it shall be open to the State Government or its authorised officer or agent, for reasons to be communicated in writing, to refuse to purchase or accept delivery of any Kendu leaves which, in their opinion, are not fit for the purpose of manufacture of bidis."

It will be seen that the proviso to sub-section (1) contains a built-in warranty inasmuch as it says that the authorised agents will be bound to accept delivery of all those Kendu leaves which, in their opinion, are fit for the purpose of manufacture of bidis. In other words, the Kendu leaves to be purchased by the authorised agents of the Government must be of merchantable quality.

The next relevant provision is to be found in Section 11 which is as follows

"(1) Every manufacturer of bidis within the State shall get himself registered within such period on payment of such fee and in such manner as may be prescribed.

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(2) Every manufacturer of bidis within the State registered under sub-section (1) shall furnish a declaration in such form by such date and in such manner as may be prescribed."

Section 12 provides that Kendu leaves purchased by the State Government or by its authorised officer or agent, shall be disposed of in such manner as the State Government may direct. Section 20 of the Act gives the State Government the power to make rules subject to the conditions of previous publication, to carry out all or any of the purposes of this Act. Sub-section (2) of that Section provides that such rules may provide for all or any of the following matters, namely:-

- "(a) procedure to be followed in making appointment of agents;
- (b) to (d);
- (e) the manner of registration under Section 10;
- (f) the manner of registration, the period within which such registration shall be made and the fee payable thereof under sub-section (1) of Section 11;
- (g) form of declaration, authority to whom, date by which and the manner in which the

declaration shall be furnished under sub-section (2) of Section 11;

(h)"

In exercise of its powers under the then extent Ordinance analogous to those under Section 20, the State Government of Bihar notified the Bihar Kendu Leaves (Control of Trade) Rules, 1972 (for short the 'Rules'). These rules were, as already noticed, continued by Section 23 of the Act, even after the repeal of the Ordinance concerned.

Rule 2(8) defines 'Purchaser' to mean a person to whom Kendu leaves have been sold by the State Government under Section 12. Under clause (1) of the same Rule, 'Standard bag' means a bag containing 1000 standard gaddis of Kendu leaves and where the standard gaddis are not bagged, reference to standard bag shall be construed as a reference to 1000 standard gaddis or 50,000 leaves. Under clause (11), "Standard gaddi" means a bundle containing 50 Kendu leaves.

Rule 3 provides the manner of appointing agents. The application for agency is to be submitted in Form "A". This Form requires

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the applicant for appointment as Agent to make a Declaration, inter alia, to this effect:

"I/We hereby declare that I/We have read and understood all the provisions of the Bihar Kendu Leaves (Control of Trade) Ordinance, 1972 and the rules made thereunder and the conditions of agency mentioned in the notice issued under rule 3(1) and I/we agree to abide by the same. I/we have personally inspected the unit No..... if I/we am/are appointed as an agent for the unit mentioned above, I/we undertake to purchase from growers and collect from land of State Government and deliver a quantity of Kendu leaves on both counts, which shall not be less than Standard bags as mentioned in the notice. I/we shall execute the agreement with the State Government in Form 'C' within 15 days.

Witness:

1.

2.

Signature of the applicant."

Under sub-rule (7) of Rule 3, if, in the opinion of the State Government, it is not possible to select a suitable agent for the purpose out of the persons who had applied for appointment as agent, or where any agency is terminated and there is not sufficient time for calling fresh applications, the State Government may appoint any person as agent who in their opinion is suitable for the work. Such a person to be appointed as Agent is required to furnish a declaration in Form 'B'. Sub-rule (9) requires that on appointment as an agent, the person so appointed shall execute an agreement in Form 'C' within fifteen days of the receipt of the order of appointment, failing which the appointment shall be liable to be cancelled and upon such cancellation, the security deposit shall be forfeited; and the agent shall be liable to pay the loss, if any, incurred by the State Government as a result of such cancellation of the appointment. Then, a formula has been provided as to how such loss on cancellation of the appointment shall be calculated. The loss so determined shall be recoverable from the agent or surety as arrears of land revenue. Sub-rule (10) requires the agent so appointed for a particular unit to deposit security before signing the Agreement. It also provides how the amount to be deposited should be calculated. Sub-rule (11) provides that the agent shall purchase Kendu leaves from growers and from such labourers who pluck Kendu leaves

from the Government forests and other lands at the depot opened by him or ordered to be opened by the Divisional Forest Officer. Clause (ii) of sub-rule (11) lays

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down that unless ordered by the Divisional Forest Officer or an officer authorised by him in writing, the agent shall not slacken or stop the purchase or collection in any depot within the unit. Sub-rule (12) requires the agent to deliver immediately the Kendu leaves purchased or collected by him to the purchaser appointed for the unit. Sub-rule (13) provides:

"The agent shall maintain such account and submit such periodical returns to the Divisional Forest Officer or to any other officer authorised by him as may be directed by the Divisional Forest Officer."

Sub-rule (14) requires the agent to furnish a list of persons employed by him with the unit, immediately to the Divisional Forest Officer, and he is bound to remove any such person whose employment is objected to by the Divisional Forest Officer. Sub-rule (15) is material and reads as under:

"If the agent during the period of agency has duly observed and performed all the terms and conditions of the agency to the satisfaction of the State Government and if the State Government is satisfied that he has done his best to collect maximum quantity of leaves from the unit, it may grant to the agent yearly renewal of agency for a period to be fixed by the State Government on such terms and conditions as may be decided upon for each year."

Sub-rule (16) provides that the agent shall be advanced such money for the performance of agency as may be directed by the State Government from time to time.

Rule 6(7) lays down the procedure of enquiry about rejected Kendu leaves. According to this procedure, on receipt of a complaint under sub-section (2) of Section 9 of the Act, the officer shall hold the enquiry after the necessary notice to the person concerned and pass such orders in terms of sub-section (3) or (4) of Section 9 as he deems fit.

Rule 9 makes provision regarding the disposal of Kendu leaves. Under sub-rule (1), Kendu leaves collected or likely to be collected by the State Government or by its authorised officer shall ordinarily be sold or otherwise disposed of by tender on such terms and conditions as are specified in the Tender Notice and Tender Form issued by the State Government or by an officer authorised by the State Government in this behalf. The Tender Notice is required by sub-rule (2) to be advertised in newspapers and in such other manner as the State Government may deem-fit. Sub-rule (8)

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provides: "Notwithstanding anything contained in the foregoing provisions, the State Government may sell or otherwise dispose of Kendu leaves collected or likely to be collected by it or by its officers or agents by auction on such terms and conditions as may be decided by it." Sub-rule (9) reads as under:

"The successful tenderer or successful bidder, as the case may be, shall be appointed as purchaser for the particular unit, and the entire quantity of Kendu leaves collected or likely to be collected from such unit or such lesser quantity out of it may be offered to him by the State, its officer or agent in such unit, shall be purchased by him in such manner and on such terms and conditions as may be specified in the

agreement to be executed by such purchaser under sub-rule (10)."

Sub-rule (10) requires the purchaser to execute an Agreement in Form 'M' within 15 days of the receipt of the order of appointment. Sub-rule (11) requires such purchaser before signing the agreement to deposit the security calculated as provided in that sub-rule. Sub-rule (13) provides that the purchaser, if he desires to consume the leaves within the unit or to remove the leaves delivered to him outside the unit immediately or at any time before the 30th June, shall pay the purchase price in full for the quantity of leaves delivered to him calculated at the rate specified in the purchaser's agreement. If the purchaser agrees in writing to keep the delivered leaves within the unit under his supervision and risk and under insurance against theft, fire and wastage at his expense but under the custody and control of the Divisional Forest Officer he may at the time of delivery of leaves pay only such part of the purchase price of the delivered leaves, as may be specified in the purchaser's agreement. The balance of the purchase price may be paid in instalments on the dates specified in the purchaser's agreement or on any earlier date before the leaves are removed outside the unit or are delivered for consumption within the unit. In no case the purchaser shall be allowed to remove all the leaves unless full price has been paid.

By Notification, dated January 16, 1974, published in the Extra-ordinary Gazette of Bihar Government of the same date, the Rules were amended, and sub-clause (bb) after clause 4(b) was added in Form 'M' of the Agreement. This sub-clause (bb) reads as under:

"The purchaser shall not raise any objection against the quality of Kendu leaves or shortage of leaves in the standard gaddis."

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This is one of the impugned provisions. The other impugned provision is to be found in condition (13) of the Tender Notices published in the Bihar Government Gazette, every year inviting tenders for the purchase of Kendu leaves. This condition (13) which is also incorporated in the statutory Agreement (Form-M), runs as follows:

"For every unit a minimum royalty will be payable by the purchaser. The amount of minimum royalty will be 75% of the amount arrived at by multiplying the notified yield in standard bags by the offer made by the purchaser per standard bag. This amount shall be payable by the tenderer even if by the end of the season, the price of Kendu leaves at the offered rate, collected and delivered to the purchaser, fell short of this amount. This whole amount will be payable before the leaves are utilized or taken out and, if not paid, will be realised as arrears of land revenue."

The first proposition canvassed by Mr. Nariman appearing for the petitioners in Writ Petitions 405 and 441 of 1974, is the Petitioners argued that the aforesaid impugned provisions/conditions comprised in the aforesaid clause 4(bb) and clause (13) amount to an unreasonable restriction on the petitioners' fundamental freedom to carry on trade or business in Kendu leaves; guaranteed under Article 19(1)(g) of the Constitution; that the impugned provisions are not within the protection of sub-clause (ii) in the second part of clause (6) of Article 19 because the impugned provisions are not "integrally and essentially connected" with the creation of the monopoly in favour of the State, but are only incidental or subsidiary to the

operation of the monopoly.

In support of this proposition, learned counsel has referred to the decisions of this Court in *Akadesi Padhan v. State of Orissa* and *Rashbihari Panda etc. v. State of Orissa*.

The second proposition propounded by Mr. Nariman is that the impugned provisions violate the fundamental rights of the petitioners' guaranteed under Article 14 of the Constitution, because in their immediate operation and effect, they are harsh, unconscionable, arbitrary unfair and oppressive; that even where the quantity offered to the purchaser is far less than 75% of the notified estimated yield, or the leaves offered are not of merchantable quality, the impugned provisions unreasonably obligate the purchaser to pay royalty for 75 per cent of the estimated yield irrespective of whether the shortfall in the quantity

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offered/delivered or the unmerchantable quality of the leaves offered is due to the fraud or negligence of the Agent who, under the Rules, is supposed to be independent of the purchaser and under the exclusive control of the Government; that the impugned provisions operate irrationally and unfairly as they make no discerning distinction between honest purchasers who are not blamable for the shortfall and dishonest purchasers who through their fraud or collusion with the agent or officers of the Government contribute to the shortfall. Thus, the impugned provisions tar honest and dishonest purchasers with one and the same brush which results in procrustean cruelty.

Third, the impugned provision which forecloses the right of the purchaser to refuse delivery on the ground of the leaves offered, not being of requisite quality, is inconsistent with and ultra vires of the Proviso to Section 9(1) of the Act which contains a built-in warranty that the leaves offered or delivered shall be fit for the purpose of manufacture of bidis.

Dr. Chitale, appearing for the petitioners in Writ Petitions 121 to 125 of 1979, has by and large adopted the arguments of Mr. Nariman. He has drawn our attention to Annexure 'C' to Writ Petition 47 of 1975, wherein quite a large number of instances are given to show that the shortfall in the actual delivery of the Kendu leaves to the purchasers as against the estimated yield is considerable. Learned counsel has emphasised that the auctions are held in January, while the Agents are not appointed till March or April, which is the plucking season, and in January, no reasonable estimate of the expected yield is possible. It is maintained that the allegations in the counter-affidavit filed on behalf of the State to the effect, that the purchasers inspect the units and make their own estimates of the expected yield is factually incorrect because in January no such estimate is possible.

Dr. Dewan, who has appeared for some of the petitioners, cited *Maneka Gandhi's* case in support of his contention, that the impugned provisions in their direct and inevitable effect, impinge upon the fundamental rights of the petitioners guaranteed under Articles 14 and 19(1) (g) of the Constitution. Learned counsel contrasted the impugned provisions with the Rules in vogue in the State of Andhra Pradesh, which, according to him, have a reasonable basis.

Mr. K. S. Sinha, appearing for the appellant in Criminal Appeal 300 of 1974, submitted that the validity of the impugned provisions was indirectly involved in this appeal, though in a different context. It is pointed out that the permit to remove the leaves was refused to

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the appellant on the ground that he had taken away the leaves without paying 75 per cent of the royalty and had contravened Rule 16. The point sought to be made out is that if the impugned Rules are not held to be valid, this appeal must, in consequence, succeed.

On the other hand, Mr. L. N. Sinha, learned Attorney-General submits on behalf of the respondents that there is a paucity of skilled people who could be employed as Agents; that in actual practice the persons appointed as Agents are sponsored by the purchasers.

(i) It is submitted that the terms of the Agreement, taken as a whole, are not one-sided. Whereas under the conditions of the Tender Notice and the Agreement the purchasers voluntarily bind themselves to pay the full price of the unit which is fixed according to the Rules, irrespective of any shortfall in the quantity offered and delivered, they, under the terms of the same Agreement get the benefit of purchasing Kendu leaves offered in excess of 75 per cent of the estimated yield at the concessional rate of 55 per cent only of the purchase price. It is argued that if the conditions of the Tender Notice and the statutory Agreement are considered as a whole, it is evident that the risks of loss and chances of benefit are equally divided between the purchasers and the State.

(ii) It is stressed that what is sold at the time of auction is the estimated produce from a unit, as such, and the highest bidder or tenderer gets the contract to purchase that unit at a price the minimum of which is fixed at 75% of the amount arrived at by multiplying the notified estimated yield in terms of standard bags from that unit. It is urged that (if a person voluntarily takes upon himself under the terms of a contract, such risks and chances of benefit, he has no right in the event of suffering a loss to be compensated for it even under the ordinary law in a suit, much less the Court of writ jurisdiction can grant him any such relief). It is pointed out that actually, in 110 out of 1000 units, that yield exceeded in the notified estimates, and as a result, the purchasers reaped full benefit of the excess supply at concessional rates.

(iii) (a) It is emphasised that the liability of the petitioners to pay the whole price for the unit arises from the contract and, as such, it cannot be considered to have a direct impact on the fundamental right of the petitioners to carry on their trade or business; that the right to enter into a contract on particular terms with the State is not a fundamental right. Even this Court-proceeds the argument-cannot reconstruct the terms and conditions voluntarily agreed between the petitioners and the State.

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(iii) (b) It is argued that it is not a fit case to be decided under Article 32 of the Constitution, because in several of these petitions the purchasers (petitioners) were in default, inasmuch as they did not pay the amounts required to be adjusted against the remuneration of the Agents; that in most of the cases the purchasers reaped that full benefits of the contract and only in stray cases, they suffered loss; that since they had availed of the chance of reaping and advantage, they could not turn round and attack the validity of the terms and conditions of the contract which they had voluntarily made and worked out.

(iv) Another point sought to be made out is that the impugned provisions are directly and essentially related to the operation of the monopoly and, as such, fall within the protection of sub-clause (ii) of clause (6) of Art. 19.

(v) In the alternative, it is submitted that the impugned provisions satisfy the test of reasonableness under the first part of clause (6) of the said Article, and in applying that test the voluntary nature of the contract and the obligations willingly undertaken by the purchaser with all the risks of loss and chances of gain should not be lost sight of that a purchaser who acts on a contract voluntarily entered into by him is precluded from repudiating some of its conditions which involve risk of loss and to accept those which are advantageous to him.

In support of the proposition that one who has received the benefits of statute is precluded from attacking the constitutionality of a condition attached by the statute, the learned Attorney-General has referred to these decisions of the Supreme Court of United States: *Berth Fisheries Co. v. Industrial Commission of the State of Wisconsin*; *St. Louis Casting Co. v. Construction Co.*; and *United Food Fuel Gas Co. v. Rail Road Commission*.

In reply, Mr. Nariman submits that writ petitions have been filed from 1973 onwards by various purchasers to challenge the validity of the impugned provisions, as notified every year for inviting tenders, in the High Court or in this Court, and from time to time interim orders staying the operation of the impugned provisions have been issued either by the High Court or this Court; that in view of this, it cannot be said that the petitioners are precluded from challenging the validity of the impugned provisions on the ground of acquiescence, waiver or estoppel. It is maintained that fundamental rights cannot be waived,

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particularly those under Article 14 of the Constitution and the principle of estoppel enunciated in the American decisions is not applicable in India. In support of this argument, reference has been made to the decision of this Court in *Basheshar Nath v. The Commissioner of Income-tax, Delhi & Rajasthan & Anr.*

The learned Attorney-General further submitted that his argument was not to the effect that the petitioners were incompetent to enforce their fundamental right on the ground of waiver or estoppel; but that a person who voluntarily enters into a contract cannot retain the benefit accrued to him thereunder and repudiate the other part of the contract which might have occasioned loss to him; that this principle is different from that of waiver or estoppel.

The first question for consideration is, whether the impugned provisions fall within the protection of sub-clause (ii) of Article 19(6) and therefore, it is not necessary for those provisions to satisfy the test of reasonableness under the first part of clause (6) of the Article.

The relevant part of clause (6) reads thus:

"(6) 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."

It will be seen that clause (6) falls into two parts. The first part commences with the phrase: "Nothing in sub-clause (g) of the said clause (1) of the Article". Phrase to the same effect, with the addition of pre-fixed words "and, in particular" are repeated at the commencement of the second part, also. This indicates that the two parts of the clause are intended to be distinct and separate. Further, the words "reasonable restrictions" which find pivotal mention in the

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first part, have not been repeated in the second part, which omission makes it clear that a law covered by sub-clause (ii) is not required to satisfy the test of reasonableness under the first part of the clause and no objection to the validity of such a law is tenable on the ground that it infringes the right guaranteed under Article 19(1) (g). Sub-clause (ii) is thus in the nature of an exception to the main substantive provision in clause (1) of the Article. Its language therefore, which is explicitly restrictive, has to be strictly construed. The protection of sub-clause (ii) in the second part is, in terms, available to the law only "in so far as it relates to" the carrying on by the State, or by a Corporation owned or controlled by the State, of any trade, business, industry, or service to the exclusion, complete or partial of the citizens or otherwise. The ambit of the words "in so far as it relates to" in the context of sub-clause (ii) in the second part of clause (6), came up for consideration before this Court in Akadasi Padhan's case (ibid). Gajendragadkar, J., as he then was, speaking for the Court, held that only those provisions of the law which are "integrally and essentially" connected with the creation of the monopoly are protected under the second part of clause (6), but those provisions which are not absolutely essential for creating the monopoly, but are merely incidental, subsidiary or helpful to the operation of the monopoly do not fall under the second part of clause (6) and their validity must be judged, under the first part of Article 19(6).

Now, let us apply this test to the provisions which are impugned in the instant case. These provisions are incorporated in the Forms of Tender Notice and the Agreement by Rules framed under the Act. The basic and essential features which are directly and immediately connected with the creation of the State monopoly are to be found in the body of the Act, itself. In any case, the impugned provisions are merely subsidiary or incidental provisions relating to the operation of the monopoly. The impugned provisions, therefore, do not fall within the protection of sub-clause (ii) in the second part of Article 19 (6).

The question, however, still remains whether the right to enter into a contract with the State on particular terms is a fundamental right falling within the purview of Article 19 (1) (g). The learned Attorney-General maintains that it is not.

Whatever may be the position with regard to contracts relating to other matters, where the business to be carried on by a citizen is in a commodity, the sale of which is a State monopoly, conditioned by some statutory terms, analogous to the impugned conditions, which, in operation, have a direct and immediate impact on the fundamental

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freedom of the citizen guaranteed under Article 19(1)(g), the citizen cannot enter into a contract with the Government

for purchase of such a commodity except on the statutory terms laid down by the seller-State. Sale of Kendu leaves for manufacture of bidis being a State monopoly, the petitioners-purchasers could, if they so desired, purchase the Kendu leaves only in the manner prescribed by the statutory rules on terms and conditions notified in the Tender Notices. Even so, these conditions leave sufficient room to the free volition of the intending purchasers, particularly in the matter of fixing the rates and the minimum price payable for the estimated yield from a particular unit in terms of standard bags. The Tender Notice and the Agreement which the purchasers enter into with the Government, although couched in statutory Forms, are not bereft of their contractual character, either.

Since the impugned provisions do not, as already noticed, fall within the protection of sub-clause (ii) in the second part of clause (6), they must satisfy the test of being a reasonable restriction under the first part of that clause.

The first point in this connection to be determined is, what actually is sold to the purchasers under the terms of the Tender Notice and the statutory Agreement? Is it an estimated yield of a unit in terms of standard bags which is sold or the actual yield in terms of standard bags offered or delivered? From the scheme of the Rules, particularly Rule 9(9) extracted in a foregoing part of this judgment, it is clear that what is sold to the successful bidder at the annual auction is the entire quantity of Kendu leaves collected or likely to be collected from a particular unit or such lesser quantity out of that unit as may be offered to him by the State or its agent or officer for a particular year at a price called 'royalty'. The minimum royalty or price payable being fixed on the basis of 75 per cent of the estimated annual yield in standard bags from the unit multiplied by the rates offered and accepted. Such an estimate, as it appears from the counter-affidavit is made on the basis of the average actual yield from that unit for the preceding three years. Such an estimated yield is notified and published in the Tender Notices every year. Purchasers in the trade, therefore, know before-hand as to what they are bidding for. Purchasers are generally persons who have been in the trade for several years and as such, have a special knowledge of forming their own estimates of the expected yield and the chances of profit and loss from that particular unit in a particular year. While it is true that the bidders have to enter into Agreement on the terms and conditions notified by the Government, yet it cannot be lost sight of that in spite of the fact that

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the impugned provisions in Condition 13 of the Agreement and the Tender Notice in 1973 and the impugned Condition 4(bb) has been notified annually since the amendment of the statutory Forms in January 1974, the petitioners and their fellowmen in the trade have been offering rates of bids and entering into agreement on the notified terms and conditions, including the impugned provisions. Only a few writ petitions have been filed now and then by certain purchasers who suffered loss, to challenge these impugned provisions since 1973. In view of the fact that the chances of profit and risks of loss are evenly divided between the seller-State and the purchasers and in the light of the aforesaid historical background, it cannot be said that the impugned condition in clause 13 of the Tender Notice and the Agreement is manifestly unreasonable. The impugned Condition 13 is a restriction imposed in the general public interest.

Fixation of a minimum price on the basis of estimated yield from a particular unit in a particular year operates as an insurance against loss or leakage of public Revenue due to connivance or collusion between purchasers on the one hand, and the servants and agents of the seller-State on the other. This method also assures a minimum wage to the pluckers of the Kendu leaves who, as has been affirmed in the counter-affidavit of the respondent-State, are generally Adivasis or persons belonging to economically backward classes.

We are unable to accept the contention of the learned counsel for the petitioners, that the impugned provisions are harsh and unreasonable inasmuch as they obligate the purchasers to pay for the undelivered shortfall of Kendu leaves even where such shortfall is due to the negligence or fraud of the Agent of the Government. The real position has been explained in the counter-affidavit filed on behalf of the State in Writ Petitions 2222 to 2252 of 1977, thus :

"Technically speaking the Agents were appointed by the State Government but the persons so appointed were actually sponsored by the respective purchasers. The Agents were the persons of the purchasers and were loyal to their old masters. This is an incontrovertible fact. In most of the cases the agents got the full amount of their commission and handling charges adjusted towards the purchase price of the units at the end of collection season. Specific instances are on record that in many cases the Agents were close relatives such as father, sons, brothers of the purchasers. In the case of firms, the Agents were partners in the same firm. In some cases the purchasers and the Agents interchanged their positions. Purchasers became Agents while the latter

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became purchasers. This was a common trick of the trade which is still in vogue.

Some of the instances showing the relationship between the petitioners/purchasers and the Agents are tabulated in Annexure 'A' hereto."

Although the Act and the Rules noticed earlier contemplate that the Agents appointed by the Government will be under its full control and liable to compensate the Government for any shortage, damage or loss caused in collection or delivery or any defect in the quality of the leaves collected, to the Government, yet, in actual practice, the real position is that the Agents are generally persons sponsored by and otherwise, deeply interested in the purchasers. In their counter-affidavit, the Government has explained that there is a dearth of suitable persons having adequate experience and skill of work as efficient Agents. The Agents are to be appointed every year at short notice when the plucking season is at hand. Circumstances being what they are, the Government is driven into a situation in which they have to appoint persons sponsored by the purchasers as Agents. From this real factual position, viz., the close bond and rapport between the purchasers and the agents, two inferences arise. First, that at the time of auction, the intending purchasers are in a position to form a reasonable estimate of the return which they are likely to have for the year concerned from that particular unit or units for which they offered the rates. Second, that if the purchase price were to be fixed not on the basis of any estimated annual yield from a particular unit but on the basis of the quantity actually delivered, the risk of loss or leakage of public revenue by reason of fraud and

collusion between the purchasers and the agents will manifestly increase. Looked at from this angle also, against the real factual background, the impugned Condition 13 cannot be said to be unreasonable.

Mr. Nariman contended that if the factual position, as stated in the counter-affidavit filed on behalf of the State, is correct, then the impugned condition 13 will be hit by the ratio of this Court's decisions in *Rashbihari Panda etc. v. State of Orissa* (ibid) and *Akadasi Padhan's case* (ibid), because in that situation the conclusion would be ineluctable that the monopoly is being worked by the State not for its exclusive benefit or in the public interest but to benefit a class of profiteers comprised of the purchasers and their agents, thereby creating a monopoly within a monopoly.

In order to appreciate this contention, it is necessary to notice *Rashbihari Panda's case*. To regulate trade in Kendu leaves and prevent exploitation of growers and pluckers, the State of Orissa enacted

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the Orissa Kendu Leaves (Control of Trade) Act, 1961. By Section 3 of that Act, which is analogous to Section 3 of the Bihar Act, no person other than the Government, an authorised officer of the Government, or an agent appointed by the Government, is entitled to purchase or transport Kendu leaves; and under Section 4 of that Act, 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 of that Act provided that the Kendu leaves purchased shall be sold or disposed of in such manner as the Government may direct, and under Section 11, at least one-half of the net profits derived by the Government is to be paid to Samitis and Gram Panchayats. In *Akadasi Padhan's case* (ibid), a grower of Kendu leaves challenged Sections 3 and 4 and Rule 7(5) made under that Act on the ground that it contravened his fundamental right under Articles 14 and 19(1)(a) and (g) in this Court. It was held that Sections 3 and 4 did not infringe Article 19(6) (ii), but the State Government 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 Article 19(6) (ii) since the law cannot be used by the State for the private benefit of agents. After the decision in *Akadasi Padhan's case*, the Orissa 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, it offered to renew the licences 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 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

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violative of the petitioner's fundamental rights under Articles 14 and 19(1) (g).

Reversing the decision of the High Court, this Court, in appeal, 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 Section 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 Section 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 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 middlemen 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 Article 19(6) (ii) as it is not open to the Government to create a monopoly in favour of third parties from its own monopoly.

(Head-note of the Official Report)

It was further held :

"The right to make offers being open to a limited class of persons the schemes 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 Articles 14 and 19(1) (g) and as the schemes were not integrally and

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essentially' connected with the creation of the monopoly, they were not protected by Article 19(6) (ii).

It was further observed that 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.

On the basis of this reasoning, it was finally held that the scheme could not be supported on the ground that it imposed reasonable restrictions, within the meaning of Article 19(6), on the fundamental rights of traders to carry on business in Kendu leaves. Hence, the plea that the action of the Government was bona fide could not be an effective answer to that challenge.

It may be noted that the decision of this Court in Rashbihari's case (ibid) was announced on January 16, 1969. The Bihar Act, with which we are concerned, was passed in 1973. The Bihar Legislature, therefore could not but be aware of the unconstitutional features pointed out by this Court in the schemes of the Orissa Act and the Rules framed thereunder. Care has been taken by the Bihar Legislature, and the Government to exercise the scheme of the Bihar Act and the Rules and Forms framed or prescribed thereunder, of the vices from which the schemes of Orissa Legislation suffered. This will be clear from a comparative study of the Orissa schemes and the Bihar scheme. Firstly, under the Orissa schemes, the monopoly was not being worked for the entire benefit of the State or in the general public interest, but was being used as a cloak for conferring private benefit upon a limited class of persons. The offers for purchasing Kendu leaves were restricted to a particular class of contractors and were not open to the general public. This vice does not exist in the Bihar scheme including the scheme of the impugned provisions. The notified estimate annual yield for a unit or units is sold either by inviting tenders from the public by publishing a Tender Notice or by public auction after a similar notice. Any person who wants to carry on the business of purchasing Kendu leaves for the purpose of manufacture of Bidis is entitled to submit his offer in the prescribed Tender Form in response to the public notice inviting tenders, or offer his bid at the auction, if the disposal is by public

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auction. Secondly, the scheme of disposal envisaged by the impugned provisions of the Orissa Act and the Orissa rules created a class of middlemen who could purchase from the Government at concessional rates and earn large profits disproportionate to the service rendered or duty performed by them. In contrast with this, the Bihar scheme in question does not operate to create any monopoly in favour of any particular class of purchasers. Nor does the Bihar scheme enable the purchasers to make unduly large profits at the cost of the public revenue or others. Even if the agents, in actual practice, are persons sponsored by the purchasers, then also, the rules framed under the Bihar Act envisage a strict and exclusive control of the Government over the Agents and their activities, and provide for their liability to compensate the Government for the loss occasioned by their misconduct or neglect. Under the impugned Condition 13, the minimum price payable for the unit or units concerned by a purchaser is 75 per cent of the notified estimated yield from that unit or units, in terms of standard bags multiplied by the rates or bid offered by the purchaser and accepted by the Government, even if the actual yield from that unit or units falls short of 75 per cent of the estimated yield. This condition far from creating a monopoly in the trade in favour of middlemen, operates as an

ironclad safeguard against leakage of the public revenue by assuring a minimum return to the public exchequer from the sale of Kendu leaves. The provision is aimed to secure the full benefit from the trade to the State leaving chances of making reasonable, marginal profit to the purchasers.

It was observed in Rashbihari's case, that it would be in the interest of State to invite tenders in the open market from all persons irrespective of their having taken contracts in the previous year. This suggestion has been adopted by the scheme of the Bihar Act and the Rules and the Forms of Tender Notice and Agreement prescribed thereunder. Some other defects pointed out by this Court in the operation of the Orissa schemes, were that the Government had not estimated the crop and the prevailing prices of Kendu leaves about the time when offers were made, nor the conditions in the market, nor offers of higher prices and the likelihood of offerers of higher prices carrying out their obligations. The scheme of the Bihar Act and the Rules, and Forms including that of the impugned condition 13 is designed to remove the deficiencies, infirmities and vices pointed out by this Court in Rashbihari's case.

For these reasons, we are unable to accept the contention, that in actual operation, the impugned provision (clause 13) creates a monopoly in favour of a class of middlemen consisting of 'Agents' and pur-

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chasers, and enables them to earn unduly large profits at the cost of the public or pluckers and growers.

The impugned Condition 13 satisfies the test of reasonableness under the first part of Article 19(6). We, therefore, repel the challenge to the validity of that condition on the ground of Article 19(6).

The next question is whether the impugned provisions are violative of the fundamental rights of the petitioners under Article 14 of the Constitution. The argument is that these provisions treat unequals as equals, even where crying dissimilarities exist and thus their operation results in Procrustean cruelty.

The point sought to be made out is that even if the shortfall in the quantity supplied or the substandard nature of the quality offered to the purchaser is solely due to the fraud, negligence or misconduct of the Agent or servant of the Government, the loss due to such shortfall or deficiency in quality must fall on the purchaser, notwithstanding the fact that he (purchaser) was in no way privy or contributory to that fraud, negligence or misconduct of the Agent or Government servant and thus the impugned provisions do not make any discerning distinction between honest purchasers and dishonest purchasers, but tar those dissimilarly situated classes with one and the same brush. The argument though attractive, does not stand a close examination.

At the time of inviting Tenders in the prescribed Form or inviting purchasers to bid at the publication, all tenderers or bidders are treated equally in the sense that they can offer their rates or bids subject to the statutory conditions including the impugned provisions. While accepting the highest Tender of rates per standard bag or the highest bid, it is not possible to classify the purchasers whose offers/bids have been accepted into 'honest' purchasers and 'dishonest' purchasers. Everybody whose offer or bid is accepted, is assumed to be honest.

Secondly, in entering into a contract of purchase of the notified estimated yield in terms of standard bags, the discretion and volition of the tenderer or bidder, also, plays an important part in calculating the minimum price

payable for the estimated yield from the particular unit. According to the impugned Condition 13 of the Tender Notice, which also forms a part of the prescribed Form in which tenders are invited, the successful tenderer or bidder whose tender or bid is accepted by the Department, has to pay a minimum royalty, also described as 'revenue' or price, which will be 75 per cent of the notified estimated yield in terms of standard bag by the tenderer or bidder.

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Thus, the volition of the purchaser also plays a prominent part in fixing the rate or price payable by him. By means of his offer in the Tender Form or by bidding at the auction, the purchaser binds himself to pay this minimum royalty even if by the end of the year, the number of bags collected is less than the notified estimated yield. The purchasers form their own estimates of the expected yield from a particular unit for a particular year and then make their offers of rates in the prescribed Tender Form, or when the disposal is by public auction, the purchasers make their bids subject to the terms published in the Tender or Auction Notices. If, according to the estimate of an intending purchaser, the unit concerned is not likely to yield the quantity notified, it is open to him either not to submit any tender or offer or rates at all, or not to offer a bid or an amount higher than that which, according to his own estimate or calculation, would be a reasonable price of the bargain. In other words, if a person with his eyes open tenders the highest rates per standard bag or offers the highest bid at public auction, as the case may be, of his own accord, it will be assumed that he did so because in his own estimation the acceptance of the contract at those rates and subject to the notified terms and condition would afford him a reasonable scope for making profit. Furthermore, under the scheme of the Bihar Act and Rules, the sale is not restricted to any particular class of persons as in *Rashbihari's* case. Anyone who wants to do business of purchase of Kendu leaves can submit his tender of rates in the prescribed Form, or offer his bid at the auction, as the case may be, subject to the notified conditions of the Tender Notice/Auction Notice.

It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbat non reprobatur*, (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (*Per Scrutton L.J. Verschures Creameries, Ltd. v. Hull & Netherlands Steamship Co.*; See *Douglas Menzies v. Umphelby*; See also *Stroud's Judicial Dictionary*, Vol. I, page 169, 3rd Edn.).

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The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by Tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned Condition 13 on the ground that this condition is violative of Articles 19(1)(g) and 14 of the Constitution. In this

connection, it will bear repetition, here, that the impugned conditions though bear a statutory complexion, retain their basic contractual character, also. It is true that a person cannot be debarred from enforcing his fundamental rights on the ground of estoppel or waiver. But the aforesaid principle which prohibits a party to a transaction from approbating, a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver).

For the foregoing reasons, the challenge to the impugned Condition No. 13, on the ground of Article 14, also, is unsustainable and is rejected.

Now, we take up the impugned Condition 4(bb). It provides that no objection from the purchaser with regard to the quantity or quality of the leave in the gaddis (bundles) offered would be tenable. This condition is couched in peremptory, drastic and absolute language. It is not qualified by any words showing that the bar envisaged in it will be attracted only in cases where the purchaser has had an earlier opportunity to raise this objection but failed to do so, or, where he had on an earlier occasion raised such an objection which was heard and overruled by the competent Forest Officer. We have already noticed that Section 9(1), proviso, of the Act contains a built-in-warranty, that the Kendu leaves offered would be fit for manufacture of bidis; that is to say, the leaves would be of merchantable quality. Condition 4(bb) therefore, is inconsistent with and repugnant to Section 9(1), proviso of the Act and, as such, invalid. It is, therefore, not necessary to test its validity on the ground of Articles 19 and 14 of the Constitution.

In the light of the above discussion, we would dismiss all the Writ petitions, namely, Writ Petitions 2222 to 2252 of 1977, Writ Petitions 121 to 125 of 1979, Writ Petitions 405 and 441 of 1974, Writ Petitions 46 and 47 of 1975, excepting to this extent that the aforesaid clause 4(bb) in the Tender Notices and the statutory Agreement in question, being inconsistent with the proviso to Section 9(1) of the Act, is declared to be invalid.

In Criminal Appeal 300 of 1974, the prosecution of the appellants for an offence under Section 379, Penal Code has already been quash-

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ed by the High Court by its judgment dated February 14, 1974; but the Order dated September 11, 1973 of the Sub-Divisional Magistrate, Saheb Ganj, taking cognizance of a case instituted by the Divisional Forest Officer, Dumka, for offences under Section 409, Penal Code and Section 5(2) read with Section 16 of the Bihar Kendu Leaves (Control of Trade) Ordinance (46 of 1973) was not quashed.

The main contention of appellant 1, Shankar Prasad Bhagat, was that he received only 650 standard bags as against the notified estimated 1500 bags, and the Condition 13 of the statutory Agreement under which he was required to pay for the undelivered or unoffered quantity of the leaves was unconstitutional.

Since we have held that the aforesaid Condition 13 is valid, this contention must fail. We, therefore, dismiss this appeal. The case shall now go back to the Sub-Divisional Magistrate for disposal in accordance with law. We advisedly abstain from making any observation with regard to the merits of the case.

N.K.A.

Petitions and Appeal dismissed.

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