

(1995) 04 KL CK 0015
In the High Court Of Kerala
Case No : O.P. No. 3545 of 1990

B. Sundaresan

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 18-04-1995

Acts Referred:

Constitution of India, 1950 — Article 19(1), 19(6), 245, 304

Citation : AIR 1995 Ker 307

Hon'ble Judges : D.J. Jaganadha Raju, J

Bench : Single Bench

Advocate : Benny Gorvanis, for the Appellant; Pirappanoode N. Sreedharan Nair and Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

D.J. Jaganadha Raju, J.—This batch of 10 Original Petitions are filed questioning the constitutional validity of several of the provisions of the Kerala Raw Cashew Nuts (Procurement and Distribution) Act, 1981 (Act 14/81), hereinafter referred to as "the Act". In O.P. Nos. 3267, 1364 and 6080 of 1994, the validity of the entire Act is challenged, and it is claimed that the entire Act should be struck down. It is contended that if several of the provisions which are unconstitutional are struck down, the remaining portion of the Act cannot stand. Hence the entire Act has to be declared as unconstitutional and invalid. In O.P. Nos. 3545/90, 1704/91 and 12189 of 1994, the main attack is against certain provisions of the Act which are considered to be arbitrary and unconstitutional. There is also a prayer to declare the entire Act as invalid and ultra vires the provisions of the Constitution. In O.P. No. 9506/92 the attack is against the constitutionality of Sections 4, 5, 19, 20 and 25 of the Act. In O.P. No. 4230 of 1994 the prayer is to declare Sections 3 to 5, 15, 19, 20 and 25 as unconstitutional. In the alternative for a declaration that Sections 4 and 15 are not applicable to cashew cultivators. In O.P. No. 12509 of 1994, the prayer is that the entire Act is unconstitutional and that Sections 3 to 5 are bad as they impose unreasonable restriction in an

arbitrary manner.

2. Before we go into the various contentions it would be pertinent to give the historical development of the law, which is now being challenged.

3. In 1976, the State of Kerala promulgated Kerala Raw Cashew Nuts (Marketing and Distribution) Order of 1976. It was done under the powers conferred by the Defence and Internal Security of India Rules, 1971. Subsequently after the Defence of India Rules were withdrawn in 1977, the 1976 Order was cancelled, and the State then issued a declaration that cashew nut is an essential article under Clause (2) of Section 2 of the Kerala Essential Articles Control (Temporary Powers) Act, 1961. Then the State Government issued Kerala Raw Cashew Nuts (Procurement and Distribution) Order 1977. The 1977 order was challenged in the Supreme Court and in the decision reported in K. Janardhan Pillai and Another Vs. Union of India (UOI) and Others, delivered on 23-1-1981, the Supreme Court held that the raw cashew nut is a foodstuff within the meaning of Section 2(a)(v) of the Essential Commodities Act and hence it cannot be declared as an essential article u/s 2(a) of the Kerala Act. Consequently no order can be passed by the Government of Kerala u/s 3 of the Kerala Act in respect of raw cashew nut. The Court held that the action of the Kerala Government is beyond the power conferred on it by the Kerala Legislature. Accordingly, the declaration was quashed. While quashing the declaration, the Supreme Court made some observations in paragraph 30 to the following effect:

".....It was submitted that the cashewnut industry in Kerala was a labour oriented industry and if the declaration and the Order were struck down, a number of workmen would be adversely affected. It was also submitted that the entire economy of the State of Kerala which largely depended on the export trade in cashewnuts would be disrupted. If any such serious problem arises, it can always be set right by the competent Legislature or the appropriate Government taking needful remedial action in the light of Entry 33 of List III of the Seventh Schedule to the Constitution."

Within 10 days of the Supreme Court delivering the judgment, the State Government issued Ordinance 1/81 on 2-2-1981, and then passed the impugned Act, Act 14/81. u/s 1(3) the Act was deemed to have come into force on 2-2-1981, the date on which the Ordinance was promulgated. Subsequently the Act was amended twice in 1983 and 1988. The 1983 Amendment Act is Act 5/83. That amending Act also was preceded by Ordinance 7/83. Subsequently in 1988 by Amendment Act, 5/88, various amendments were made. This 1988 Amendment Act was also preceded by the Kerala Raw cashewnuts (marketing, transport and fixation of Minimum Price) Ordinance, 1988 (Ordinance 6/88). After the 1988 amendment, the situation became too difficult for the cultivators of cashew crop and then these writ Petitions were filed.

4. It should be remembered that the Writ Petitions were not filed immediately after 1981 Act was promulgated because the Government itself did not enforce

the Act during certain years. For the period from 1983-87, the act was not enforced. In 1988 Act was implemented. In 1993 the Act was not implemented. When the Government tried to implement the law in 1994, a large number of Writ Petitions were filed.

5. Bearing in mind the above historical background, we have to judge this batch of Writ Petitions. Though different advocates have argued the case with regard to the prayers pertaining to their Writ Petitions, comprehensive arguments were advanced by Mr. B. Radhakrishnan and Sri Benny Ger-vasis. They challenged the validity of the entire Act on different grounds. In their arguments, they also challenged the arbitrary and unreasonable character of the various provisions of the Act.

6. Sri Radhakrishnan contends that the present enactment infringes the fundamental right under Article 19(1)(g) which guarantees to the citizen the right to practice any profession or to carry on any occupation, trade or business. He further contends that Article 19(6) qualifies Sub-clause (g) only with regard to the existing law, and it does not prevent the State from making any law imposing in the interests of the general public reasonable restrictions in exercise of the right conferred by the said Sub-clause. Clause 6(ii) only gives protection for the State or a Corporation owned or controlled by the State doing any monopoly business or trade to the exclusion of complete or partial of the citizens. He further contends that the Act offends Article 301 of the Constitution which postulates that trade, commerce and intercourse throughout the territory of India shall be free. He contends that Part XIII of the Constitution looks at the economy unity of the nation as a whole. According to him, the State enacted this legislation in haste. It has promulgated an ordinance within 10 days of the Supreme Court Judgment and then passed the 1981 Act by 2-4-1981 without even obtaining the prior sanction of the President of India as provided under Article 304(b) of the Constitution of India. According in construing the remarks in paragraph 30 of the Supreme Court judgment. While the Supreme Court said that remedial action can be taken, it also said that it can be set right by the competent Legislature or the appropriate Government in the light of Entry 33 of List III of the Seventh Schedule. The State Government presumed that the competent Legislature is the State Legislature. This is a fundamental mistake. If we see the provisions of Entry 33 of List III it reads as follows :

"33. Trade and commerce in, and the production, supply and distribution of,--

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates;

(d) raw cotton, whether ginned or unginned, and cotton seed; and

(e) raw jute."

It is true that foodstuff is one of the items mentioned under (b). The State has the competence to enact legislation in regard to foodstuff, if there is no central legislation in the field. Obviously the State Government enacted this legislation thinking that it has the competence under Entries 26 and 27 of List II, namely, State List. Entries 26 and 27 of List II read as follows :

"26. Trade and commerce within the State subject to the provisions of Entry 33 of List III.

27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List III."

Where the State Legislature as well as the Union Legislature are competent to enact laws, a special procedure is contemplated under Part XIII. Under Article 305 there is a saving of existing laws and laws providing for State monopolies. Under Article 304 the proviso contemplates that no bill or amendment for the purpose of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President. Article 304 is an overriding provision, Under Clause (b) the State may by law impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. If we read the provisions of Part XIII and give a harmonious interpretation, this type of the impugned legislation has necessarily to be introduced after obtaining the previous sanction of the President. After the bill is passed into an Act, by the State Legislature, it must obtain the consent of the President. In the present case we find that the State Government never received the consent of the President. It only received the assent of the Governor on 2-4-1981. It did not receive the assent of the President. Similarly the amending Act 1983 and 1988 were introduced in the Legislature without the previous sanction of the President, nor did, they receive the President's assent. There is a total lack of legislative competence in enacting this three Acts. Though the preamble of the Act indicates that the Act is to provide for trade in raw cashewnuts by the State to the exclusion of all others, thus trying to create a monopoly, in fact no monopoly for the State or a Corporation owned or controlled by the State is created. The provisions of the Act show that only agents authorised by the Government and the subagents authorised by the Government are alone entitled to sell raw cashewnuts within the State. The entire trade is controlled by the agents and sub-agents. There is nothing to indicate in the Act that the State provides funds for the Agents purchasing the commodity of raw cashewnuts or that the cashewnuts are purchased and processed for the State. The Agents are to sell the cashewnuts to the Cashew Factories u/s 11, and there is nothing in the Act to show that the processed cashewnut should be sold to the State. Thus the Act imposes an unreasonable restriction. Article 13(2) prohibits law against fundamental rights. Sri Radhakrishnan contends that if we see the Act as whole, the authority or personality in whose favour a monopoly is created is not State or a Corporation

owned or controlled by the State. Hence the law enacted is outside, the pale of Article 19(6). An agent does not form the State, nor does he represent the State or a corporation controlled by the State.

7. Sri Benny Gervasis contends that as indicated in O.P. No. 12189 of 1994, the statute is invalid as there is neither the previous administrative sanction of the President nor is there the assent of the President for the Act. The Act is processed and enacted in haste, construing the words "competent legislature in paragraph 30 of the Supreme Court Judgment as State Legislature. In fact in the Sub-committee's report, there is a dissenting note by two members. Under Article 254(2) where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State. In this particular case, the impugned enactment violates Article 254 as well as Article 255. Sri Gervasis contends that under Article 304(b) previous consent has necessarily to be obtained. It has not been done.

The preamble portion of paragraph 6 of the Act clearly mentions that the Act is for creating monopoly in favour of the State to the exclusion of all others. But the methodology adopted in the Act is such that there is absolutely no State control or no monopoly for the State or a Corporation controlled by the State. Various restrictions are imposed. There are no guidelines for fixing or notifying the price. Without a permit a cultivator cannot transport for sale more than 50 KGs. of raw cashewnuts. He cannot transport cashewnuts for any other purpose.

8. Both Sri Gervasis and Sri Radhakrishnan in addition to the constitutional arguments have argued elaborately regarding each provision and the arbitrary and illegal character of the various provisions of the Act. I shall refer to them later.

9. The other advocates who had advanced arguments for the petitioners adopted the arguments of Sri Radhakrishnan and Sri Benny Gervasis, and they mostly concentrated on the unreasonable character of the provisions, and the hardship caused to the cultivators by virtue of this enactment.

10. The learned Advocate General classified the various arguments of the petitioners' counsel under four heads; According to him, the arguments deal with (1) absence of legislative competence for the State legislature; (2) Whether the provisions of the Act are liable to be struck down due to violation of Article 19(1)(g) and as they are not saved by the phrase "reasonable restriction" contemplated under Article 19(6)(ii); (3) whether the Act is violative of Article 19(6) as there is no monopoly for the State or State owned Corporation; and (4) whether there is contravention of Part XIII of the Constitution. Elaborating his arguments, the learned Advocate General, Sri S. Narayanan Poti submits that the

Supreme Court did not deal with the legislative competence of the State Legislature to legislate on raw cashewnuts. It is open to the State to enact this law, as it comes within the ambit of Entries 26 and 27 of List II of the Seventh Schedule to the Constitution. According to him, Entry 33 of List III is nothing more than Entries 26 and 27 of List II and a few other items are put under head of one entry. Only if there is a Central law regarding procurement and distribution of cashewnuts it will prevail over the State law. Here as there is no Central law, regarding procurement and distribution of cashewnuts, there is no impediment under the Constitution for the State law being enforced. He contends that the State Legislature is fully competent to enact this law under Entry 33 of List III. It will be valid if it passes the test of reasonableness under Articles 19 and 304. Under Article 19(6) the State is doing monopoly business. It can do it through its agents. The monopoly of the State is not destroyed by giving "right to purchase" to agents and by agents appointing sub agents. He contends that the law of Agency does not contemplate that the funds of the State should be involved in the trade. Hence the system contemplated under the Act is one of trade by the Government through agents, who are under the control of the Government. He admits that with regard to fixation of price no guidelines are indicated. The principles to be borne-in-mind regarding fixation of price are laid down in the Decision of the Supreme Court in *Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc.*, Dealing with Section 4 of the Act and the restriction regarding quantity of cashewnuts to be held on possession as 50 Kgs, the learned Advocate General contends that below the limit of 50 Kgs. he cultivator can deal with the cashewnuts as he likes. He can process them, carry them or sell them. Dealing Section 19, which deals with search and seizure, he admits that a large number of officials were given the power of search and seizure. A limitation on this particular aspect would have been better. There is unreasonableness in empowering large number of officials. That Section cannot be sustained. Dealing with Sections 20 and 21, he admits that as the Sections stand, there is scope for the RDO abusing these provisions by not ordering prosecution, so as to deny the cultivator getting the crop back in case he is found not guilty. As regards the defect under Articles 304 and 254 and 255 the learned Advocate General submits that the assent of the President can be obtained later and the defect is a curable defect. He lastly contends the if the Court finds some of the provisions are arbitrary and unsustainable, only offending provisions should be struck down, and there is no necessity for declaring the entire Act as unconstitutional.

11. The points that arise for determination in this batch of O.Ps. are :

(1) Whether the State Legislature is competent to enact the Kerala Raw Cashewnuts (Procurement and Distribution) Act, 1981, as amended by the Amending Act of 1983 and 1988?

(2) Whether this legislation has been enacted in strict conformity with the provisions of the Constitution?

(3) Is the entire enactment liable to be declared as unconstitutional and invalid, or, whether only certain offending Sections are liable to be declared as unconstitutional?

12. Points 1 and 2 : It is the contention of the petitioners" advocates that the State is not competent to enact this law. The Preamble of the Act indicates that this is an Act to provide for trade in raw cashewnuts by the State to the exclusion of all others by the procurement and sale thereof at fair prices. The Preamble also mentions that similar legislation on this particular topic has been quashed by the Supreme Court by its judgment dated 23-1-1981. To get over that judgment, the present law is brought into existence. As indicated earlier, on 23-1-1981 the Supreme Court pronounced the judgment and within 10 days the Kerala Raw Cashewnuts (procurement and Distribution Ordinance of 1981 (Ordinance 1/1981) was promulgated. The Ordinance was promulgated on 2-2-1981. Though during the course of arguments, the Court directed the learned Advocate General and the Government Pleader to produce the records and the files relating to the processing of the bill and its examination by the law-department to see whether the constitutional validity aspect was examined by the law department before the bill was introduced, no such records have been produced. During the course of arguments, the learned Advocate General contends that by reason of Entries 26 and 27 of List II and by reason of Entry 33 of List III, the State Legislature is competent to enact this law. A full reading of the judgment of the Supreme Court in K. Janardhan Pillai and Another Vs. Union of India (UOI) and Others, clearly shows that the Supreme Court held raw cashewnuts as a foodstuff and that it comes within the ambit of Section 2(a)(v) of the Essential Commodities Act. The Court pointed out that the expression "foodstuff should be given a wider meaning as including even the raw materials which ultimately result in edible articles. After having declared that no order can be made by the Government of Kerala u/s 3 in respect of a raw cashewnuts, the action of the Kerala Government is beyond the powers conferred by the Kerala Legislature. In the last but one paragraph, the Supreme Court made certain remarks in view of the argument of practical difficulties faced by the State. The Court's remark is in the following terms :

".....If any such serious problem arises, it can always be set right by the competent Legislature or the appropriate Government taking needful remedial action in the light of Entry 33 of List III of the Seventh Schedule to the Constitution."

This observation does not mean that the State Legislature can enact a law ignoring the Entries of Lists II and III of Seventh Schedule to the Constitution. It is a common legislative practice to examine the legislative competence aspect before a bill is sought to be drafted for bringing in legislation. No files are shown to the court to indicate that this particular aspect was examined by the State law and Legislative Department and the concerned administrative department. In fact at the committee level there was a dissenting note. This legislation which is

meant to provide monopoly trade in raw cashewnuts by the State to the exclusion of all others can only be brought under the purview of Entry 33 of List III which deals with trade and commerce in, and the production and supply and distribution of foodstuff, etc. It should be remembered that Entries 26 and 27 of List II are subject to the provisions of Entry 33 of List III. So this legislation can only be traced to Entry 33 of List III. If it is the legislation under Entry 33 of List III, and if it is to create a monopoly for the State alone trading in the commodity, then it has necessarily to conform to the strict provisions of Article 19(6)(ii) because it offends against Article 19(1)(g). It should be remembered that Article 19(1)(g) can be violated by a law imposing in the interest of the general public reasonable restrictions in the exercise of the right conferred by the said sub-clause and it will not prevent the State from making any law relating to monopoly trade by the State or by a corporation owned or controlled by the State. If we examine the provisions of the entire Act, though the preamble declares that it is an Act meant to provide State monopoly in trade in raw cashewnuts, that object is not achieved by the various other provisions of the Act. In fact the State is defined u/s 2(k) as the State of Kerala. So the monopoly should be for the State of Kerala. The Preamble does not contemplate monopoly of trade even by a State owned Corporation, much less, it does not contemplate trade by Agents or sub-agents. Section 3 imposes a total embargo on sale of raw cashewnuts within the State except to the Agent of the Government authorised by the Government by a notification in the gazette or a sub-agent. u/s 4 a person including a grower is prohibited from having in his possession at any time raw cashewnuts in excess of 50 Kgs. Section 5 deals with price to be paid by the agent and sub-agent. He has to pay the price at the rate notified for the locality by the Government. An examination of the Act reveals that there are absolutely no provisions to indicate procurement for the purposes of the State or monopoly trade by the State. There is also no provision anywhere indicating that any Government controlled or Govt. owned Corporation will be conducting the trade. The provisions only indicate that agents will be purchasing and then selling to cashew factories. After processing how cashew kernels are disposed of is not prescribed under the Act. If we see the entire gamut of the Act it looks as if this enactment is a device meant for the benefit of the cashew factory owners and the persons appointed as agents and sub-agents. Incidentally it may provide employment for the workers in the factories.

13. If legislation under the Concurrent List is to be introduced, it has necessarily to conform to Articles 254 and 255. Article 254(2) clearly lays down that where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then the law so made by the legislature of such State "shall, if it has been reserved for the consideration of the President and has received assent, prevail in that State. In the present case on hand the Act has not been reserved for the consideration of the President nor was there any assent by the President.

So also the Amending Acts of 1983 and 1988 have not received the assent of the President. The further fact is that the provisions of Part XIII of the Constitution are violated in this case. Article 301 contemplates that trade, commerce and intercourse throughout the territory of India shall be free. Article 302 contemplates that Parliament may by law impose such restrictions on the freedom of trade and commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Article 304 contemplates that notwithstanding Articles 301 or 303 the Legislature of a State may by law impose such reasonable restrictions on the freedom of trade, commerce and intercourse with or within that State as may be required in the public interest, provided that no Bill or amendment for the purpose of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President- In the present case on hand, there is no previous sanction of the President for introducing the Bill in the Legislature. So the Bill was introduced ignoring the provisions of Article 304(b) and the proviso to that Article. It is clear from a reading of the Act and the provisions of the Constitution that the State Legislature neither had the competence to legislate this particular piece of legislation nor was this legislation enacted in strict conformity with the provisions of the Constitution. It never obtained the previous sanction of the President. The Act passed was never reserved for the assent of the President, though this Legislation is traceable to Entry 33 of List III.

14. It is also liable to be struck down as unconstitutional because the avowed object of the legislation is to create a monopoly trade in raw cashewnuts for the State. The Act does not carry out that avowed object. On the other hand, the Act appears to have been enacted with the ostensible excuse of providing employment for a large number of cashew workers, but in reality, it benefited only cashew factory owners and the agents and sub-agents. The objects sought to be achieved are not at all achieved by this enactment. It should also be remembered that various authorities who were concerned with the cashew crop and export of cashewnuts have asked for deletion of this law. The Cashew Export Promotion Council, the third respondent in O.P. No. 6080 of 1994 asked for scrapping this law. It is also submitted during the course of arguments that the object of providing employment for cashew factory workers is not achieved by this enactment because, there were 70 factories of the Cashew Development Corporation, by 1988. Originally it acquired 36 factories under 1974 Cashew Factories Acquisition Act. When Government started running 70 factories from 1988, the working days dwindled. Earlier to 1988, the factories used to work for 155 days. In 1993 these factories worked for only 12 days. In 1994 till 30th April, 1994, there was not a single working day in anyone of the Government factories. At the same time, the private factories are working for 262 days in a year. The argument of the State is that the agents are not able to procure the cashewnuts because of financial stringency. There is no provision anywhere in the Act for the State arranging finance for the Agents, namely, the co-operative

societies for procuring raw cashewnuts. The purpose and object of the Act are totally defeated.

15. For the various reasons indicated above. I hold points 1 and 2 in favour of the petitioners.

16. Point No. 3 : Before I deal with point No. 3, it would be pertinent to refer to the historical development and the circumstances under which the Act has been enacted in 1981 and the subsequent amendments in 1983 and 1988. It will also be proper to have a quick glance at the various provisions of the Act, which are now sought to be impugned as violative of Articles 14 19(1)(g) 21 246 254 and 301 - 304. As earlier mentioned in brief, the Supreme Court decision in K. Janardhan Pillai and Another Vs. Union of India (UOI) and Others, was delivered on 23-1-1981. It struck down the pre-existing law. An ordinance was enacted within 10 days of the Supreme Court delivering the judgment on 2-2-1981. It is Ordinance 1/81. Subsequently, the impugned Act, Act 24 of 1981, was brought into existence giving it retrospective effect from 2-2-1981.

17. A reading of the decision of the Supreme Court in K. Janardhan Pillai and Another Vs. Union of India (UOI) and Others, clearly shows that what was challenged before the Supreme Court by way of Writ Petitions under Article 32 of the Constitution is the validity of the declaration made by the State Government of Kerala on March 20, 1976, declaring that raw cashewnut was an essential article. That declaration was made in exercise of the powers under Clause (a) of Section (2) of the Kerala Essential Articles Control (Temporary Powers) Act, 1961. Under the powers of that Act, the Kerala Raw Cashewnuts (Procurement and Distribution) Order, 1977 was issued. It is quite clear that what was struck down by the Supreme Court is almost analogous to the impugned Act, namely Act 14/81. The Court based its decision mainly on the ground that the enactment is based upon entries 26 and 27 of the State List. The court found that raw cashewnut is a foodstuff as per the definition of "essential commodities" in Section 2(a)(v). The Court in its Judgment in paragraph 10 dealt with Entry 33 of List III, which deals with trade and commerce in, and production supply and distribution of, various commodities, including foodstuff. In that batch of Writ Petitions filed by the owners of the Cashewnut processing factories, one of the arguments advanced is that the impugned declaration and the Order seriously interfered with the right of the petitioners to purchase sufficient quantities of raw cashewnuts for processing in their factories, and imposed several other restrictions on them. Various other grounds of challenge were also urged. But in paragraph 29 of the judgment, the Court observed that all the other contentions including those relating to alleged infringement of fundamental rights of the petitioners raised in these petitions are left open. Mainly on the ground of conflict between a Central legislation and the State legislation the Court came to the conclusion that no order can be made by the Government of Kerala u/s 3 of the Kerala Raw Cashewnuts (Procurement and Distribution) Order 1977 and that the action of the Kerala Government is beyond the power conferred on it by the

Kerala Legislature.

18. Article 213 of the Constitution deals with the power of Governor to promulgate Ordinances during recess of Legislature. The proviso to Clause (1) of Article 213 specifically lays down that the Government shall not, without instructions from the President, promulgate any such ordinance, if :

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the legislature; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President, or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President."

It is clear from the language of Article 213(1) and the proviso thereto, even for issuing an Ordinance in the matter of this nature, the previous instructions from President are necessary. As can be seen from the report of the Subject Committee on the Kerala Raw Cashewnut (Procurement and Distribution) Bill of 1981, no such sanction was obtained either for the promulgation of the Ordinance or for the introduction of the Bill for the impugned Act. This is clear from the two dissenting notes appended by Sri E. Ahamed, Member, Subject Committee and Mr. T.M. Jacob, Member, Subject Committee on March 25, 1981. It is clearly mentioned in the dissenting note of Sri E. Ahamed referring to Article 304(b), that the proviso to Article 304(b) makes it clear beyond any shadow of doubt that no Bill or amendment for these purposes shall be introduced or moved in the Legislature of a State without previous sanction of the President. It is not seen that the sanction of the President of India is obtained before this Bill is introduced. The Hon"ble Member concluded as follows:

"On a careful consideration of the restrictions contained in the Bill, vis-a-vis the Constitutional provisions and the intention of the framers of our Constitution, Clauses 3 and 5 are most likely to be declared void and ultra vires to the Constitution."

The other member who made dissenting note also stated that legislation can be brought in by the State Legislature to regulate and control trade or commerce only after obtaining the sanction of the President of India. He pointed, out that the Government has not cared to obtain the necessary previous sanction of the President of the Indian Union for issuing the Ordinance It is also interesting to see from paragraphs 4 and 5 of K. Janardhan Pillai and Another Vs. Union of India (UOI) and Others, , that the earlier law, namely, the Kerala Essential Articles Control (Temporary Powers) Bill was reserved by the Governor for the consideration of the President and it received the assent of the President. But such a precaution was not taken when the present enactment was passed.

19. I shall now briefly deal with the provisions of the Act, the validity of which is under challenge. It may be remembered that Act 14 of 1981 never received the assent of the President and the Amending Acts of 1983 and 1988 also did not receive the assent of the President and the Ordinances preceding these Acts were promulgated without the prior instructions of the President. The Bills relating to these Acts were introduced without obtaining the previous sanction of the President under Article 304. As can be seen from the Preamble of the Act, it is pre-dominantly declared that the Act is to provide for the trade in Cashewnuts by the State to the exclusion of all others by the procurement and sale thereof at fair price. Thus the declared objective is to create monopoly of trade for the State to the exclusion of all others. But when we see the provisions of the Act, we find that the provisions of the Act do not create a monopoly of trade in raw cashewnut for the State. Section 3 lays down that no person shall sell any raw cashewnut within the State except to the agent of the Government authorised by them in this behalf by notification in the Gazette or to a sub-agent. It also mentions that no person other than a co-operative society shall be authorised as the agent under Sub-section (1). It also states that no person other than the agent or a sub-agent shall purchase any raw cashewnut within the State. From this section we find that a total embargo is imposed against sale of raw cashewnut to anybody other than an agent or sub-agent. There is nothing to indicate that the agents are appointed on behalf of the State or that they are appointed for the State. The Act only mentions "authorised" by the Government. It also gives power to the authorised agent to appoint co-operative societies as sub-agents. u/s 4 no person other than an agent or a sub-agent shall have in his possession raw cashewnuts in excess of quantity of 50 Kgs. A cultivator is not entitled to be in possession at any time of raw cashewnuts in excess of quantity of 50 Kgs., whatever may be the yield of his crop on each day. The main attack of the petitioners is against this provision. u/s 5 when raw cashewnuts are tendered to the agent or sub agent by or on behalf of a cultivator, the agent or sub agent shall pay the price thereof at the rate notified for the locality by the Government. It should be remembered that for notifying the price, the grower or cultivator has absolutely no say in the matter. No guidelines are fixed for determining the process of fixing the price. It should be remembered under the Kerala Land Reforms Act, an agriculturist as a family unit is entitled to hold 20 acres of land. An acre of cashew garden will have 70 trees as per the scientific method and usually 100 plants. The yield per tree will be about 10 Kgs. Cashew is a seasonal crop for one or one and half months and the peak period is only for 15 days. In the peak period, the yield will be three or four quintals per day. So by virtue of Section 4 and the limits prescribed in it every honest cultivator of cashew crop runs the risk of being prosecuted and punished for his having in his custody at a time more than 50 Kgs. of raw cashew nuts. It should also be remembered that he cannot transport small quantities of 50 Kgs. of raw cashew nuts for sale. A cultivator can only transport his crop after he accumulates the crop to a reasonable extent. Transporting it to the agent or sub agent every 50 Kgs. is not economically viable. Originally u/s 5 an agent or a sub agent shall not

refuse to purchase any raw cashewnut tendered to him by or on behalf of a cultivator But the position was totally altered by the Amendment Act, 1988 by which a proviso is added to the effect that the agent or sub agent may refuse to purchase raw cashewnuts tendered for sale which do not conform to such quality or standard as may be prescribed. It is asserted on behalf of the petitioners that till now no rules have been prescribed regarding the quality or standard for the purpose of rejection or acceptance. Sec. 5 also speaks of price to be notified. The cultivator has no choice. In 1994 the prices are notified. But in 1993 the prices are not notified. According to the argument of the learned Advocate General, the prices are notified after consulting the unions of workers. This makes things still worse. A grower or cultivator is ignored and the factory owner and the trade union workers are given the upper hand. The Act does not contemplate any scientific exercise for notifying the prices, nor does it contemplate any methodology or any committee for doing this work. The trade union workers and the cashew factory owners are/ capable of influencing the authorities and get the prices fixed to their advantage and to the detriment of the cultivator or grower. There are no guidelines for fixing the prices. This is totally arbitrary.

20. The only control which the Government exercises over the agent is that the Agent should furnish returns to the Government or to any officer specified by the Government. It also has got power to give instructions. u/s 8 it has got power to remove the agent. It is interesting to see that the grower is not allowed under the Act to stock the raw cashewnuts and process it himself or by using the labour of his family members. Normally a small cultivator or small grower who will be unemployed during the lean season can get himself employed as also his family members by taking to processing of raw cashewnuts. That is totally denied by virtue of this Act.

21. u/s 10 an agent or a sub agent shall not process or convert or sell except in accordance with the provisos of Section 11. u/s 11 the agent or sub agent shall sell all the stock of raw cashewnuts purchased by him to cashew factories in the State. u/s 13, the price to be paid by occupier of the cashew factory for the raw cashewnuts sold to him is decided by the Government. The processing of raw cashew nuts cannot be done anywhere else except in the cashew factory.

22. Section 15 is a very peculiar provision. No person shall transport raw cashew nuts from one place to another place except in accordance with the permit issued in that behalf by the competent authority or any other officer authorised by the Government in this behalf, provided that nothing contained in this Section shall apply to the movement of raw cashewnuts by a cultivator for sale thereof to the agent or a sub-agent. As can be seen from this Section a grower cannot transport raw cashewnuts from his cashew garden to his house or to any other place for trading without a permit. A peculiar thing is that Form III and Form IV do not apply to a grower or a cultivator. Even a rejected commodity cannot be transported and peculiarly under the notification issued on 3-2-1981 only one officer, namely, the Special Officer, Cashew Industry, Quilon, is notified as the

competent authority to grant permits for transport of raw cashew nuts u/s 15. Examining things in a practical manner, it is impossible for the cashew growers through- out the Kerala to approach the nominated officer and obtain permits for transport u/s 15. It is a most cumbersome and impracticable procedure, and that itself amounts to unreasonable restriction. It is also interesting to see that when a cultivator transports raw cashew nuts for sale, he is still bound by the limits prescribed u/s 4. In a way Section 15 is in conflict with Section 4.

23. There are a few Sections which deal with enforcement of the Act. u/s 19 powers of entry, search and seizure are given to a large number of officers. Any Revenue Officer above the rank of Revenue Inspector, any Officer of the Sales Tax Department above the rank of an Inspector, or any officer of the co-operative Department not below the rank of Junior Co-operative Inspector or any Block Development Officer, or any other officer authorised by the Government or any Police Officer not below the rank of a Sub-Inspector are empowered to enter, search and seize the cashew nuts. They are given the power to do something u/s 19. It is interesting to see that there is not even the normal ingredient of their doing search and seizure "on credible information" or on being satisfied about the violation being committed. Section 19 is an instance of conferring absolute power on the officers mentioned in the Section. The learned Advocate General rightly stated that this Section is unhappily worded and to a large number of people, the power of entry, search and seizure is given. Section 20 deals with confiscation of raw cashew nuts. A reading of Section 20 indicates that even in a bus if more than the prescribed quantity of 50 Kgs. of raw cashewnuts are being transported it is liable for confiscation. Another peculiar feature is that if a person is prosecuted for violation of the Act, if he is acquitted, the confiscated property is to be released. But if he is not prosecuted and simply an order of confiscation is passed by the RDO, he is not entitled to get return of the property under any circumstances, unless in appeal he succeeds. Section 21 deals with issue of show cause notice before confiscation. Section 22 deals with an appeal to the District Judge against the order of confiscation. u/s 23 even when the goods are confiscated he is still liable for prosecution and penalties are provided u/s 25. The punishment is imprisonment for a term which may extend to one year and a fine which may extent to Rs. 1,000/-. For a second offence the punishment is more severe. One peculiar thing is that notwithstanding anything contained in the Cr.P.C. every offence under this Act is made cognisable though applying the provisions of the Cr.P.C. the offences under this Act are not cognisable. Thus the grower is exposed to the greater risk and harassment.

24. It is argued on the basis of the Sections, as they stand in this Act, that it is impossible to carry on the profession of a cashew cultivator or grower and it is impossible for a cultivator to conform to the various injunctions mentioned in this Act. No such restrictions are there regarding any other agricultural commodity, which is grown by the cultivator. A coconut grower can make copra and sell it. A rubber, plantation owner can make rubber sheets and sell it. A paddy cultivator can convert it into deed and sell it. Where all other agriculturists are allowed to

do the processing without any restrictions, to impose restrictions only with regard to raw cashewnuts is an instance of the cashew cultivator being discriminated against. It is also submitted that a cashew grower will normally have more than 50 Kgs. of raw cashewnuts on every day during the season. He cannot be exposed to the risk of prosecution every minute. It is argued that these provisions cannot stand the test of judicial scrutiny and do not satisfy the test of reasonableness. The method of price fixation under the Act is totally arbitrary.

25. Having taken note of the nature of the provisions briefly, it would be just and proper to discuss whether these provisions act as a fetter on the fundamental rights enshrined under Article 19(1)(g) of the Constitution of India, and whether the restrictions imposed under the Act can be said to be reasonable restrictions, saved by Article 19(6).

26. The decision of the Supreme Court in *Dwarka Prasad Laxmi Narain Vs. The State of Uttar Pradesh and Others*, is a case under U. P. Coal Control Order. With a view to ensure equitable distribution of coal various restrictions were imposed. Dealing with such a situation, the Supreme Court observed in paragraph 6 at page 227 as follows:

"....the mischief arises when the power conferred on such officers is an arbitrary power unregulated by any rule or principle and it is left entirely to the discretion of particular persons to do anything they like without any check or control by any higher authority. A law or order which confers arbitrary and uncontrolled power upon the executive in the manner of regulating trade or business in normally available commodities cannot but be held to be unreasonable."

The Court then quoted with approval the decision of the Supreme Court in *Chintaman Rao Vs. The State of Madhya Pradesh*, and observed that the phrase "reasonable restriction" connotes that the limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. It held :

"Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in reasonableness. It is in the light of these principles that we would proceed to examine the provisions of this Control Order, the validity of which has been impugned before us on behalf of the petitioners." Then the Court observed in paragraph 7 as follows:

"...An unrestricted power has been given to the State Controller to make exemptions, and even if he acts arbitrarily or from improper motives, there is no check over it and no way of obtaining redress. Clause 3(2)(b) of the Control Order seems to us therefore prima facie to be unreasonable."

The Judges felt that this particular provision, Clause 3(2)(b) is severable and hence that provision alone is declared as offending Article 19(1)(g) of the Constitution, and it was struck down.

27. The decision of the Supreme Court in *Saghir Ahmad Vs. The State of U.P. and Others*, is a case relating to U.P. Road Transport Act. The Court dealt with the scope of Article 19(1)(g) and 19(6) of the Constitution and observed that it is the duty of the respondent-State who claims that restrictions are reasonable to prove that they are reasonable and that they are saved by Clause (6) of Article 19. The Court observed in paragraph 22 at page 738 as follows :

"In order to judge whether State monopoly is reasonable or not, regard therefore must be had to the facts of each particular case in its own setting of time and circumstances. It is not enough to say that as an efficient transport service is conducive to the interests of the people, a legislation which makes provision for such service must always be held valid irrespective of the fact as to what the effect of such legislation would be and irrespective of the particular condition and circumstances under which the legislation was passed. It is not enough that the restrictions are for the benefit of the public, they must be reasonable as well and the reasonableness could be decided only on a conspectus of all the relevant facts and circumstances."

The Court further observed in paragraph 23 as follows:

"There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in Clause (6) of the Article. If the respondents do not place any materials before the court to establish that the legislation comes within the permissible limits of Clause (6) it is surely not for the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community."

Judged in the light of these observations, in the present case on hand, we do not find any provisions in the Act which are for the benefit of the general public or in public interest. The so-called State monopoly in trade of raw cashewnuts is not at all achieved by the provisions. The restrictions imposed under the Act violated Article 19(1)(g). No material is placed by the State to show that the restrictions are reasonable and that they are not arbitrary and that the restrictions are just and saved by Clause (6) of Article 19 of the Constitution. This decision lends a lot of strength to the arguments of the petitioners' advocates.

28. The decision of the Supreme Court in *LaLa Hari Chand Sarda Vs. Mizo District Council and Another*, is a case dealing with licences under Lushai Hills District (Trading by Non-Tribals) Regulations and the Rules. There a non-tribal had to obtain a licence to carry on trade. A non-tribal was granted licence year after year for a particular number of years, and subsequently they refused to renew

licence. In such a context, the Court observed in paragraph 7 as follows; after dealing with the entire case law touching upon Article 19(1)(g):

"These authorities clearly demonstrate that the fundamental rights of a citizen to carry on trade can be restricted only by making a law imposing the interest of the general public reasonable restrictions on the exercise of such a right, that such restrictions should not be "arbitrary or excessive or beyond what is required in the interest of the general public and that an uncontrolled and uncanalised power conferred on the authority would be an unreasonable restriction on such right."

The court further observed in the same paragraph 7 as follows :

"It is also well established that where a provision restricts anyone of the fundamental rights it is for the State to establish the reasonableness of such restriction and for the Court to decide in the light of the circumstances in each case, the policy and the object of the impugned legislation and the mischief it seeks to prevent."

Then after examining the particular facts of the case, the Court observed at page 833 in paragraph 8 as follows :

"A perusal of the Regulation shows that it nowhere provides any principles or standards on which the Executive Committee has to act in granting or refusing to grant the licence.The power of refusal is thus left entirely unguided and untrammelled. How arbitrary the exercise of such unguided power can be is seen from the fact that the Executive Committee not only refused to renew the appellant's licence, but also directed him to remove his property by the end of July, 1960 and imposed a fine if he failed to do so."

In the present case on hand, there are no guidelines for fixing the price. There are no guidelines for granting the permits. The cultivator's interests are not at all taken into account. It looks as if the Act is brought into existence to benefit the cashew factory owners and the workers in the cashew factories. They are being benefited at the expense of the cultivator. One fails to understand why there should be a middleman of an agent and why a cashew grower is not entitled to sell raw cashewnuts to the factory owners directly.

29. The decision of the A.P. High Court in *Kishore Boiled Rice Mill Vs. State of Andhra Pradesh and Others*, is a decision which deals with a very cumbersome procedure prescribed for granting permits for transportation of paddy and rice. In such a context, conditions Nos. 5 and 7 were held to be violative of Article 19(1) (g) of the Constitution. At page 234 in paragraph 7, the Court observed as follows:

"I must refer also to the fact that condition No. 5 requires that the specified officer should make an entry in the permit, as well as the way-bills, about the time of loading and also, note the hour by which the lorry should reach the check post. These endorsements can be made upon the subsidiary permit suggested by

me. The main complaint of the petitioners and which, in my opinion, is justified -- is the requirement in condition No. 5 that the loading should also take place in the presence of the specified officer and that such officer should make the aforesaid entries only after witnessing the loading. This requirement in all the facts and circumstances of the case is oppressive and unreasonable and is likely to unduly interfere with the fundamental right of the petitioners to carry on trade."

The learned Judge indicated various situations where it would become impossible to have the loading done in the presence of the officer. This decision is aptly applicable in the context of the present writ petitions, especially with regard to the transport of cashew nuts. One fails to understand why the Legislature did not think of exempting the grower with regard to restrictions of transport when for all other commodities the grower is always exempt from taking permits.

30. The decision of the Supreme Court in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, is a decision which dealt with Part XIII of the Constitution and it dealt with Articles 301 304(b) 255 and 265. In paragraph 43, the Court examined the scheme of Part XIII, dealt with the various provisions in that Part and observed as follows :

"At this stage we would content ourselves with the statement that the freedom of trade guaranteed by Article 301 is freedom from all restrictions except those which are provided by the other Articles in Part XIII. What these restrictions denote may raise a larger issue. But in the present case we will confine our decision to that aspect of the matter which arises from the provisions of the Act under scrutiny. It is hardly necessary to emphasis that in dealing with constitutional questions courts should be slow to embark upon an unnecessarily wide or general enquiry and should confine their decision as far as may be reasonably practicable within the narrow limits of the controversy arising between the parties to the particular case."

In the earlier portion of the judgment in paragraph 34, the Court observed about the philosophy of Part XIII as follows :

"The provision contained in Article 301 guaranteeing the freedom of trade, commerce and intercourse is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory character it is not also a mere statement of a directive principle of State policy; it embodies and enshrines a principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country...."

In paragraph 39 it observed as follows :

"... That is why it seems to us that Article 301, read in its proper context and subject to the limitations prescribed by the other relevant Articles in Part XIII, must be regarded as imposing a constitutional limitation on the legislative power

of Parliament and the Legislatures of the States. What entries in the Legislative lists will attract the provisions of Article 301 is another matter; that will depend upon the content of the freedom guaranteed; but wherever it is held that Article 301 applies, the legislative competence of the Legislature in question will have to be judged in the light of the relevant Articles of Part XIII; this position appears to us to be inescapable.

In Paragraph 52 of the Court observed as follows :

"... Our conclusion, therefore, is that when Article 301 provides that trade shall be free throughout the territory of India, it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301 and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII.

Dealing with the scope of Articles 302 and 304 the Court observed in paragraph 53 as follows :

"... where Parliament exercises its power under Article 302 and passes a law imposing restrictions on the freedom of trade in the public interest, whether or not the given law is in the public interest may not be justiciable, and in that sense Parliament is given the sole power to decide what restrictions can be imposed in public interest as authorised by Article 302. On the other hand Article 304(b) requires not only that the law should have received the previous sanction of the President, but that the restrictions imposed by it should also be reasonable. Prima facie the requirement of public interest can be said to be not justiciable and may be deemed to be satisfied by the sanction of the President; but whether or not the restrictions imposed are reasonable would be justifiable and in that sense laws passed by the State Legislatures may on occasions have to face judicial scrutiny."

In paragraph 54 the Supreme Court observed as follows; after referring to the requirements of Article 304(b) :

"It is common ground that before the Bill was introduced or moved in the State Legislature the previous sanction of the President has not been obtained; nor has the said infirmity been cured by recourse to Article 255 of the Constitution. Therefore, we do not see how the validity of the tax can be sustained. In our opinion the High Court was in error in putting an unduly restricted meaning on the relevant words in Article 301..... We are dealing in the present case with an Act passed by the State Legislature which imposes a restriction in the form of taxation on the carriage or movement of goods, and we hold that such a restriction can be imposed by the State Legislature only if the relevant Act is passed in the manner prescribed by Article 304(b)."

In paragraph 80 the Court gave its final conclusion as follows :

"In that view, the Assam Taxation (on Goods carried by Roads or Inland Waters) Act, 1954, must be regarded as infringing the guarantee of freedom of trade and commerce under Article 301, because the Bill moved in the Assembly had not received the assent of the President as required by Article 304(b) proviso, and the Act has not been validated by the assent of the President under Article 255(c)."

If we judge the facts of our case, it is quite clear that the 1981 Act has not been enacted in conformity with Article 304(b), as no previous sanction of the President was obtained. The Act interferes with the freedom of trade and commerce. It offends Article 301.

31. The decision of the Supreme Court in Abdul Hakim Quraishi and Others Vs. The State of Bihar, is a decision in which the Bihar Preservation and Improvement of Animals Act, Act 2 of 1956 and the rules framed under it had to be considered and whether the restrictions imposed under the Act and the Rules would satisfy the test of reasonableness. The Court observed in paragraph 9 that the age limit prescribed for bulls, bullocks and she buffaloes imposes an unreasonable restriction on the fundamental right of the petitioners because scientific opinion of experts is that after the age of 15, bulls, bullocks and buffaloes are no longer useful for breeding, draught and other purposes. The Court also observed that the imposition of higher age limit for slaughtering of the animals cannot be said to be a restriction imposed in the interests of the general public. The Court then observed as follows :

"The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality."

The same, principle would aptly apply to the various restrictions imposed on the grower or cultivator of cashewnuts under the Act.

32. In Syed Ahmed Aga and Others Vs. The State of Mysore and Others, the Supreme Court observed in paragraph 3 as follows :

"..... Restrictions falling under Article 304(b) must not only be reasonable but are expressly required to be in public interest. It is in order to ensure that purposes of Article 304(b) are satisfied that a bill in a State Legislature has to obtain the previous sanction of the President. It is worth remembering that Article 255 of the Constitution provides for a retrospective curing of the defect of

want of previous sanction by the President so that, where this requirement has been overlooked before an enactment, public interest may not suffer by any want of sanction."

In paragraph 6 the Court observed as follows :

".....Article 301 of the Constitution guarantees not merely freedom of trade and commerce in the abstract. In other words, individuals affected by the violation of the guarantees under Articles 301 and 304 could also complain, at the same time, of infringement of their right guaranteed under Article 19(1)(g) of the Constitution provided a breach of the former involves violation of the latter also as it would ordinarily do. Therefore, we overrule the preliminary objection."

This observation aptly applies to the impugned Act, which was passed without obtaining " the previous sanction of the President, and which infringes Article 19(1)(g), and Article 301.

33. The decision of the Supreme Court in *Buxa Dooars Tea Company Ltd. and Others Vs. State of West Bengal and Others*, , deals with a very peculiar situation. The West Bengal Government has sent a Bill to the President with the object of levying a tax on the income from tea. But the President's assent was not granted. Subsequently the Finance Minister, West Bengal, made a statement in the West Bengal Legislature on 27th February stating that he would introduce rural employment cess on dispatch of tea. He referred to a Bill which was sent for the President's assent, and the President not having given his assent to the Bill. In such a background, the West Bengal Rural Employment and Production Act, 1976 was passed for raising additional resources. Under the guise of this Act a rural employment cess was levied. u/s 4(2) the rural employment cess is levied annually in respect of lands, other than a tea estate, at the rate of six paise on each rupee of development value thereof, and in respect of a tea estate at such rate, not exceeding rupees six on each kilogram of tea on the despatches from such tea estate of tea grown therein, as the State Government may by notification in the Official gazette fix in this behalf. This levy was questioned on various grounds. The Court after discussing the entire case law on this subject, observed in paragraph 8 at page 2018 as follows:

"... In other words, if the Legislature of a State enacts a law which imposes such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest and further that the Bill or amendment for the purposes of Clause (b) has been introduced or moved in the Legislature of a State with the previous sanction of the President, such enactment will not offend the Article 301."

Then the Court considered the question whether the levy impedes the free flow of trade and commerce throughout the territory of India, and whether the legislation is valid, and observed in paragraph 9 as follows :

"There can be no doubt that it constitutes a violation of Article 301 unless the

legislation is brought within the scope of Article 304(b)...."

The Court further observed that such a legislation cannot be saved. The Court observed in paragraph 12 as follows :

"Treating it as a levy on despatches of tea it is evident that the levy must be regarded as constituting a direct and immediate restriction on the flow of trade and commerce in tea throughout the territory of India, and the levy can avoid the injunction declared in Article 301 only if it satisfies the provisions of Article 304(b) and the proviso thereto. For bringing the legislation within the saving provisions of Article 304(b) it is necessary that the Bill or amendment should have been introduced or moved in the Legislature of the State with the previous sanction of the President. It is not disputed that the amendments to the West Bengal Act made in 1981 and 1982 did not satisfy that requirement. ..."

In the present case on hand, we find that the Act which has been struck down in *K. Janardhan Pillai and Another Vs. Union of India (UOI) and Others*, is an Act which was passed after obtaining the prior sanction of the President. But when the impugned Act is passed no effort was made to obtain the prior sanction of the President. Obviously, the State Legislature was acting in haste and within 10 days of the judgment of the Supreme Court in *K. Janardhan Pillai and Another Vs. Union of India (UOI) and Others*, it made the Governor to promulgate Ordinance 1 of 1981 and then within three months, in spite of objections of the Subject Committee, got his enactment passed without obtaining the previous sanction of the President under Article 304(b), nor did the Governor reserved the Bill passed by the Legislature for the assent of the President. Subsequently also no effort was made to obtain the assent of the President under Article 255(c).

34. The decision of this Court in *Mohan Industries and Others Vs. Deputy Director of Industries and Commerce and Others*, , is a decision which lays down the principle where there are no guidelines and where there is no appeal provided, the rules violate Article 14. The Court was dealing with the Paraffin Wax (Supply Distribution and Price Fixation) Order, 1972, and Clause 5 in it. During the course of arguments, two points alone were pressed by counsel for the petitioners. Those arguments were : (1) Clause 5 of the Paraffin Control Order is unconstitutional, as it confers an unguided and arbitrary power on the competent authority in the matter of choice of persons and allotment of quotas for purchase of paraffin wax; and, (2) the allotments made are patently arbitrary, in so far as no intelligible or known standards have been adopted in that matter, and so many persons who have not been even purchasing paraffin wax have been now included in the list. In such a context the Court observed in paragraph 7 at page 61 as follows :

"It is well settled that a law which confers an arbitrary or unguided power on the executive or any administrative authority is violative of the fundamental right for equal protection of the laws guaranteed by Article 14 of the Constitution."

In paragraph 8 the Court observed as follows:

"... In other words, the power of the discretion, if it can be so-called, vested in the competent authority is absolute, arbitrary and naked. And such a power has been vested in the above manner in an executive officer in a matter which would affect the fundamental right of a citizen in carrying on his trade or business. No appeal has also been provided from the orders of the competent authority. An order can be justiciable only if it is one which has to be made in accordance with a procedure or any guiding principles laid down by law. There is no scope for any appeal from an order passed in exercise of a power which is absolute. That is the nature of the power conferred by Clause 5 of the Paraffin Control Order. This is clearly a case which offends the guarantee for equal protection of the laws under Article 14 of the Constitution. In the present case on hand, there are absolutely no guidelines prescribed for rejection of the commodity by the agent or sub agent. No guidelines are prescribed for fixation of the price. No safeguards are prescribed against the power of the officers acting under Sections 19 and 20.

35. The decision of the Supreme Court in *State of Rajasthan Vs. Mohan Lal Vyas*, is a case where monopoly contracts were given to certain individuals prior to the Constitution for plying buses in certain routes. After the Constitution, agreements became unenforceable. After the Constitution, he was plying the buses, but he did not pay the amounts payable by him. In such a context, the Supreme Court held that the agreements became unenforceable, and hence the Government cannot recover the amount. It is my humble duty to point out that in that, decision the Court did not go into the question whether the agreement holder is liable to pay damages for use and occupation of the road or for the privilege of his plying the buses on the roads after 26th January, 1950, though he was not the exclusive operator on the road. I do not find any justification for an elaborate discussion of this decision.

36. The decision of the Supreme Court in *Akadasi Padhan Vs. State of Orissa*, is a decision which is relied upon by the learned Advocate General in support of his argument that it is open to the Government to carry on the monopoly trade through agents. A full reading of the judgment clearly indicates that if a law is passed creating a State monopoly, the Court should inquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19(6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19(6). The Court also pointed out that when the State carried on any trade, business or industry, it must be inevitably carry it on either departmentally or through its officers appointed in that behalf. In the very nature of things, the State as such, cannot function without the help of its servants or employees and that inevitably introduces the concept of agency in a narrow and limited sense. Just as the State can appoint a public officer to carry on the trade on its behalf, so can it appoint an agent to carry on the trade on its behalf. Normally and ordinarily, the trade should be carried on departmentally or

with the assistance of public servants appointed in that behalf. But there may be some trades or business in which it would be inexpedient to undertake the work of trade or business departmentally or with the assistance of State servants. In such cases, it would be open to the State to employ the services of agents, provided the agents work on behalf of the State and not for themselves. The Court further pointed out that the agency which can ultimately be allowed under Article 19(6)(ii) is agency in the strict and narrow sense of the term; it includes only agents who can be said to carry on the monopoly at every stage on behalf of the State for its benefit and not for their own benefit at all. In the present case the agents appointed or the sub agents appointed by the agents are doing the business in raw cashewnuts. They are not doing it on behalf of the State and for the benefit of the State. The profit earned by the agents or sub agents does not go to the State. The so-called State monopoly mentioned in the Preamble is a myth. A reading of the Act clearly discloses that the intendment of the Act seems to be to benefit the cashew factory owners, and the agents appointed to purchase the raw cashewnuts. It looks as if it is an Act meant to stifle and harass the cashew cultivator or grower. The learned Advocate General's argument that monopoly can be carried through agents under the impugned Act is not acceptable.

37. The learned Advocate General relied upon certain passages in Bowstead on Agency at page 127 to indicate that an agent can delegate his rights in certain circumstances. The passage reads as follows :

"An agent may not delegate his authority, or appoint a sub-agent to do any act on behalf of his principal, except with the express or implied authority of the principal.

2. The authority of the principal is implied in the following cases :

(a) Where the act done is purely ministerial and does not involve confidence or discretion.

(b) Where the principal knows, at the time of the agent's appointment, that the agent intends to delegate his authority.

(c) Where the authority conferred is of such a nature as to necessitate its execution wholly or in part by means of a deputy or sub-agent.

(d) Where the employment of a sub-agent is justified by the usage of the particular trade or business in which the agent is employed, provided that such usage is not unreasonable, and not inconsistent with the express terms of the agent's authority.

(e) Where in the course of the agent's employment unforeseen circumstances arise which render it necessary for the agent to delegate his authority.

(f) Where, from the conduct of the principal or of the principal and the agent, it may reasonably be presumed to have been intended that the agent should have

the power to delegate his authority."

In the present case on hand, the agent and the sub-agent who purchased the raw cashewnuts are not obliged to pass on their profit to the State. It is no doubt true that the Act itself contemplates agent appointing co-operative societies as sub-agents. The learned Advocate general relied upon the decision of the Supreme Court in *Welcom Hotel and Others Vs. State of Andhra Pradesh and Others*, which is a case dealing with the price fixation for edible j articles sold by hotels. That decision is in no way helpful for resolving the controversy in this particular case. He also relied upon the decision of this Court in *Madhavan K. P. Kunnisseriy v. Asst. Excise Commissioner 1969 KLJ 289*. In that decision, when an argument was raised that doing trade of liquor through agents violates Article 19(6)(ii), the Court held that in order that it may be said that a trade or business is carried on by the State, it is necessary that the trade or business is conducted either by departmental agencies or by agents in the strict sense of that term. The court emphasised the fact that if the agents have beneficial interest in the trade, the trade would not be a trade carried on by the State. The learned single Judge followed the decision of the Supreme Court in *Akadasi Padhan Vs. State of Orissa*, and *Saghir Ahmad Vs. The State of U.P. and Others*, .

38. In view of the principles laid down in the various decisions discussed above, it is quite clear that Sections 3 to 5 impose unreasonable restrictions and they violate Article 19(1)(g). They also violate Article 301 under which freedom of trade throughout India is guaranteed. Sections like 10 and 11 impose unreasonable restrictions and prevent the purchaser of the cashewnuts from processing it himself. Nor can he sell it at a price commanded in the market. The price which he gets is not based upon the laws of economics, namely, supply and demand. He is compelled to sell the cashewnuts at the rates fixed by the Government. In the process, the agents are making a profit of Rs. 3 to 4 per Kg. There is a lot of scientific literature to show that the quality of cashewnuts produced in the Kasaragod and Kannur is the best in the world.

But a remunerative price is not paid to the cashew cultivator. Section 15 which deals with transport of cashewnuts contemplates a cumbersome procedure and the grower obtaining permits. Even if he obtains a permit he cannot transport more than 50 Kgs. at a time. A large number of growers who would be getting about 10 to 15 quintals per day during the peak season run the risk of becoming liable for prosecution for violation of the provisions of the Act. Even the cashewnuts collected by him on each day would be far in excess of the limit prescribed u/s 4. The grower and cultivator cannot be compelled to transport raw cashewnuts everytime he gets a quantity of 50 Kgs. It should also be remembered that some of the cashewnuts will have to be dried properly before they can be sold. Sections 19, 20, 21, 23 and 25 are very oppressive in their effect. Section 29 makes the offences cognisable. To summarise the whole thing, here is an enactment which is meant to harass the grower and the cultivator. It puts unreasonable restrictions on his fundamental right under Article 19(1)(g)

and his right to sell the commodity to whomsoever he likes at a remunerative price.

39. The further fact is that the legislation was introduced without obtaining the previous sanction of the President and the legislation never received the assent of the President. It cannot be saved under Article 304. Any such legislation passed in violation of Article 304(b) and the proviso thereto is incompetent and illegal. It should also be remembered that the legislation cannot be saved under Article 19(6) of the Constitution because the interests of the general public are not served by this enactment. There is absolutely nothing in the Act to indicate that it is an Act brought in, in public interest. The trade is not carried on as a monopoly trade by the State or by a corporation owned or controlled by the State. Neither Article 19(6) nor Article 304(b) can rescue this legislation.

40. Another question that remains to be considered is whether only the offending Sections should be declared as illegal and whether the entire Act should be quashed. On an analysis of the Act, we find that if the offending Sections, namely, Sections 3 to 5, 10, 14, 15 and 19 to 21 and 25 are struck down, nothing else remains to serve the purpose of this enactment. The offending Sections are not severable parts. The entire Act has necessarily to be struck down as violative of the Constitution. It should also be remembered that the State Government itself did not implement this Act during several years, after having passed the Act in 1981. After the 1988 amendment Act, the position became much worse. The agents were given a right to reject the so-called inferior quality of raw cashewnuts, but the grower is not permitted to deal with them, if they are in excess of 50 Kgs. Various organisations, including the Cashew Export Promotion Council, wanted this unjust law to be scrapped. The various seminars have pointed out that the Act did not achieve its purpose and nearly 53% of the cashew nuts are going outside the State. In this background I hold that the entire Act has to be struck down as violative of the constitutional provisions.

41. In the result, all the writ petitions are allowed. The various actions taken against the petitioners on the basis of the provisions of the Act are hereby quashed. The Act is declared as ultra vires the Constitution of India. Each party shall bear its own costs. Advocate fee fixed at Rs. 1,000/-.

42. Before I part with this case, I would like to record my appreciation for the indepth study made by Sri B. Radhakrishnan and Sri Benny Gervasis who have taken immense pains to argue the matter in a very lucid and enlightened analytical manner.